

Blog Entry: Sixth Circuit Holds That Ascertainability Not a Requirement in Rule 23(B)(2) Class Actions

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On October 17, 2016, in a case of first impression, the Sixth Circuit held that ascertainability is not a requirement in Federal Rule of Civil Procedure 23(b)(2) class actions. The Sixth Circuit joined three other Circuits and reasoned that because there is no notice requirement in Rule 23(b)(2) class actions seeking injunctive or declaratory relief, the precise identity of each class member need not be ascertained.

In *Cole v. City of Memphis*, a Memphis police officer was arrested on Beale Street in Memphis, Tennessee. The officer subsequently brought claims individually and on behalf of a class of individuals, alleging that the city's routine "Beale Street Sweeps" were unconstitutional. A jury found that the city's street-sweeping policy was unconstitutional and entered an injunction pursuant to Rule 23(b)(2). On appeal to the Sixth Circuit, the city argued in part that it was error for the district court to enter an injunction pursuant to Rule 23(b)(2), because the precise members of the class were unascertainable.

On appeal, the Sixth Circuit affirmed the district court's entry of an injunction pursuant to Rule 23(b)(2). Acknowledging that it was a case of first impression, the Sixth Circuit first noted that the implicit requirement of ascertainability in Rule 23(b)(3) class actions "aids the inherent efficiencies of the class device by ensuring administrative feasibility[.]" Specifically, Rule 23(b)(3) requires notice to absent class members and to allow those class members a chance to opt-out "and avoid the potential collateral estoppel effects of a final judgment." Because administering a Rule 23(b)(3) class can be "procedurally complicated," requiring ascertainability, the Sixth Circuit stated, helps quell those inefficiencies.

In a Rule 23(b)(2) class action, however, the purpose is to "provide relief through a single injunction or declaratory judgment." In joining the Third, Tenth, and First Circuit, the Sixth Circuit held that because the plaintiffs were seeking a single remedy of an injunction under Rule 23(b)(2) to prohibit the city of Memphis from conducting the Beale Street Sweep, the plaintiffs were not required to establish the ascertainability of the class. The Sixth Circuit additionally relied on the advisory committee notes to Rule 23, which use as an example of Rule 23(b)(2) class actions civil rights cases where class members "are incapable of specific enumeration."

The case is *Cole v. City of Memphis*, No. 15-5725, 2016 WL 6068911 (6th Cir. Oct. 17, 2016).