Legal Backgrounder

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# Could Trio of Ninth Circuit Class Actions Force Supreme Court to Resolve Ascertainability Circuit Split?

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"Ascertainability" in the context of civil litigation involves the identification of individuals who qualify for membership in a putative class action. Although not an explicit requirement under Rule 23, since the US Court of Appeals for the Third Circuit refused to certify a class due to difficulties in objectively and efficiently identifying class members in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), lower federal courts have been sharply divided over the meaning and extent of the ascertainability requirement for certifying a class.[1] The ascertainability issue has taken on particular importance in low-value consumer class actions involving inexpensive retail products, as these cases have become an increasing burden for manufacturers, distributors, and retailers in the current litigation environment—involving a flood of class actions over labeling on consumer products.

Unfortunately, especially for companies that operate nationwide, the US Supreme Court has not yet intervened in this quagmire. After having denied *certiorari* in two cases last term that addressed ascertainability, the next spate of cases from the Ninth Circuit likely will not ripen for consideration by the Supreme Court until the 2017 Term. Thus, uncertainty and forum-shopping by plaintiffs' lawyers exploiting the split among the courts are likely to persist for the foreseeable future.

The Third Circuit, as well as other state and federal courts, have consistently recognized that "an essential prerequisite of a class action ... is that the class must be currently and readily ascertainable based on objective criteria." *Marcus v. BMW of North Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012). "If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Id.* at 593. In *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), and *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013), the Third Circuit provided much-needed guidance regarding the implementation of that ascertainability requirement. The Third Circuit recognized in *Carrera* that "the plaintiff must demonstrate his purported method for ascertaining class members is reliable and administratively feasible, and permits a defendant to challenge the evidence used to prove class membership." 727 F.3d at 308.

[1] Ascertainability has come to be a shorthand way of addressing aspects of other requirements like predominance and superiority in Rule 23(b)(3) cases. Because it is not an express requirement, courts have approached the issue in a variety of ways, leading to inconsistency even within some circuits regarding how the requirement applies. Whether by the name ascertainability or some other description, however, all circuits now apply some version of the doctrine, although none quite so rigorously as the Third Circuit.

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The ascertainability requirement is important for class members as well as for defendants because it establishes which individuals will be bound by the judgment if a class is certified. *Id.* at 307. It is important for the defendants in these cases because they have a due process right to challenge each individual class member's assertion that he or she is a proper member of the class. *Ibid* ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues. A defendant has a similar, if not the same, due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim."). The *Carrera* panel rejected plaintiffs' proposal to use third-party retailer records because "there is no evidence that a single purchaser" could be identified by these records, as well as the proposal to use affidavits of class members because "it does not address a core concern of ascertainability: that a defendant must be able to challenge class membership." *Id.* at 308-09.

In *Hayes*, the panel reversed the certification of a class because the district court there "did not consider whether it would be administratively feasible to ascertain class members." 725 F.3d at 355. The district court did note that the defendant "had no method for determining how many of the 3,500 ... transactions that took place during the class period" met the class definition. *Id.* at 356. For that reason, the panel remanded the action for plaintiff to "offer some reliable and administratively feasible alternative" for determination of class membership. *Ibid.*[2]

In many of these cases, where the product at issue is a low-cost retail item, consumers are unlikely to have receipts to prove their purchase, and this has often been the focus of the court's analysis. The Third Circuit has held that the mere "say so" of the class member is not enough to establish class membership. *Marcus*, 687 F.3d at 594. In contrast, the Sixth Circuit decided that self-identifying affidavits will suffice in many cases for purposes of ascertainability. *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 526 (6th Cir. 2015).

Since *Carrera*, circuit courts have been sharply divided over the implementation of the ascertainability requirement. The Fourth, Ninth, and Eleventh Circuits have followed the approach taken by the Third Circuit in *Carrera*:

**Fourth Circuit**: In *EQT Production Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014), the panel stated that while "[t]he plaintiffs need not be able to identify every class member at the time of certification … [i]f class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Id*. at 358 (quoting *Marcus* 687 F.3d at 593). The panel reversed the grant of certification because, although some putative class members could be identified through defendants' records, others could not. *Id.* at 360.

**Ninth Circuit**: In *Martin v. Pacific Parking Systems Inc.*, 583 Fed. Appx. 803 (9th Cir. 2014), the panel affirmed the denial of class certification because plaintiff "has not demonstrated that it would be administratively feasible to determine which individuals" fall within the class definition. *Id.* at 804. However, the panel did not enunciate a standard for evaluating ascertainability and left its opinion unpublished.

[2] The Third Circuit addressed ascertainability for a fourth time in *Byrd v. Aaron's Inc.*, 784 F.3d 154 (3d Cir. 2015). There, the putative class was only comprised of 895 members, the defendant had some records to identify class members, and other class members could be identified by filling out a simple form. The panel reversed the district court's denial of class certification on ascertainability grounds, holding that the form filled out by putative class members could be verified through already-known address information as well as additional public records, which the panel found was consistent with *Carrera* because "[c]ertainly, *Carrera* does not suggest that *no* level of inquiry as to the identity of class members can ever be undertaken. If that were the case, no Rule 23(b)(3) class could ever be certified." *Id.* at 171 (emphasis in original).

**Eleventh Circuit**: In *Bussey v. Macon County Greyhound Park, Inc*., 562 Fed. Appx. 782 (11th Cir. 2014), the panel recognized that "the objective criteria [for identifying class members] should be administratively feasible" and that "'[a]dministrative feasibility' means 'that identifying class members is a manageable process that does not require much, if any, individual inquiry.'" *Id.* at 787 (quoting NEWBERG ON CLASS ACTIONS § 3.3 p. 164 (5th ed. 2012)). Applying these principles, the panel revised the class definition to exclude class members for whom no identifying records existed. *Id.* at 788. In a subsequent decision in *Karhu v. Vital Pharmaceuticals, Inc.*, 621 Fed. Appx. 945 (11th Cir. 2015), the Eleventh Circuit rejected plaintiffs' proposal that class members could be identified through "self-identification" via affidavit. *Id.* at 949.

The First, Fifth, Sixth, and Seventh Circuits have rejected the approach to the ascertainability requirement taken in *Carrera*:

**First Circuit**: In *In re Nexium Antitrust Litigation*, 777 F.3d 9 (1st Cir. 2015), the panel cited *Carrera*, but only required that "the definition of the class must be 'definite,' that is, the standards must allow the class members to be ascertainable." *Id.* at 19. Although the defendant argued there were problems in identifying certain class members, the panel held that "[t]he class definition here satisfies these standards by being defined in terms of purchasers of Nexium during the class period." *Ibid.*

**Fifth Circuit**: In *Frey v. First National Bank Southwest*, 602 Fed. Appx. 164 (5th Cir. 2015), though not strongly repudiating the *Carrera* approach, the panel ruled that "some inquiries with banks or individual class members can be made" to identify class members but found that such fact investigation was not an impediment to certifying the class. *Id.* at 169.

**Sixth Circuit**: In *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015), the panel stated: "We see no reason to follow *Carrera*, particularly given the strong criticism it has attracted from other courts." *Id.* at 525. The panel affirmed the certification of the class even though identifying class members "would require substantial review, likely of internal [defendant] data" and "such review could be supplemented through the use of receipts, affidavits, and a special master to review individual claims." *Id.* at 526.

**Seventh Circuit**: *In Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), the panel ruled that "[n]othing in Rule 23 mentions or implies this heightened requirement [for ascertainability] under Rule 23(b)(3), which has the effect of skewing the balance that district courts must strike when deciding whether to certify classes." *Id.* at 658. "The heightened ascertainability requirements ... gives one factor in the balance absolute priority, with the effect of barring class actions where class treatment is often most needed: in cases involving relatively low-cost goods or services where consumers are unlikely to have documentary proof of purchase." *Ibid.* The Seventh Circuit merely requires that "classes be defined clearly based on objective criteria," and that the class definition not be too vague, "defined by subjective criteria, such as by a person's state of mind," or "defined in terms of success on the merits—so-called 'fail-safe classes.'" *Id*. at 659-60.

The Supreme Court has repeatedly declined the opportunity to establish a uniform test for ascertainability in the past year. Petitions for certiorari were filed in both *Rikos* and *Mullins*, but in February and March the Court denied review. Nor will the Court necessarily have the opportunity to address ascertainability as part of the planned amendment of Rule 23, as the Judicial Conference's Rule Advisory Committee did not include any discussion of the issue when it issued initial proposed amendments in September 2015.


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The most defendants can hope for in the meantime are opportunities to positively develop the ascertainability standards in the circuit courts. One chance to do so in a critically important circuit—the Ninth Circuit—will arise this September with three food-labeling class-action oral arguments: *Briseno v. ConAgra Foods, Inc.* (No. 15-55727), *Jones v. ConAgra Foods, Inc.* (No. 14-16327),[3] and *Brazil v. Dole Packaged Foods, LLC* (No. 14-17480). These three cases illustrate the uncertainty involved in litigating the ascertainability issue.

In *Briseno* and *Brazil*, the district courts held that plaintiffs had satisfied their burden by offering an objective class definition without any verifiable method for identifying class members. *See Brazil v. Dole Packaged Foods, LLC*, 2014 WL 5794873, *14 (N.D. Cal. Nov. 6, 2014). In *Jones*, the district court found that the class was not ascertainable, observing that "there is no good way to determine who bought the relevant products … The variety of products and of labels, combined with the lack of receipts and the low cost of the purchases, means that consumers are unlikely to accurately self-identify. Plaintiffs have offered no verifiable means of identifying class members." 2014 WL 2702726, at *11 (N.D. Cal. June 13, 2014).

It is difficult to predict which way the Ninth Circuit will come down on ascertainability; however, the Ninth Circuit's prior unpublished decision in *Martin*[4] reflects that the Ninth Circuit could adopt a stricter ascertainability requirement than the "objective definition" test enunciated by two of the district courts below and some of the other circuits. The fact that the products at issue in the pending cases are low-value consumer products purchased at the retail level, where many consumers are unlikely to retain their receipts, ought to be a factor that the court weighs in favor of adopting a stricter ascertainability requirement. A lesser standard would permit individuals to self-identify as class members without any objective or efficient way to verify class membership.

Decisions in these cases will provide the Supreme Court another opportunity to resolve the circuit split, one that will become all-the-more pronounced, however the Ninth Circuit comes down, particularly if they are published opinions. *Briseno*, *Jones*, and *Brazil* will be orally argued on September 12, 2016. Unfortunately, that schedule makes it unlikely that these cases will make their way to the Supreme Court in the forthcoming term. Assuming the Ninth Circuit rules by the end of 2016, and given the likelihood that the losing party on the appeal will seek *en banc* review, any petition for *certiorari* would not be considered until Spring 2017 at the earliest. Ideally, by that time the Court will recognize that it is finally time to resolve the deep schism among the circuit courts on ascertainability. If *certiorari* is granted, the cases likely will be scheduled for argument in the early part of the 2017 Term.

Until then, the division amongst the circuits will remain. And one would expect an increase in the number of class action filings, especially in low-value consumer cases where it is difficult to identify all class members, in the First, Fifth, Sixth, and Seventh Circuits.

[3] Ed. Note: WLF filed an *amicus* brief in support of the Respondents in *Jones*, *available at* http://www.wlf.org/upload/litigation/briefs/WLFamicusConAgra.pdf.

[4] As an unpublished opinion, *Martin* has no precedential effect except in very limited circumstances, under the Ninth Circuit's rules. Federal Rules of Appellate Procedure, Ninth Circuit Rule 36-3, Citation of Unpublished Dispositions or Orders.

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