ARTICLES

The Ascertainability Requirement for Class Actions Now Has Teeth

By Joseph C. Merschman and David R. Roth

A growing number of courts are denying motions for class certification on the ground that the members of the proposed class are not readily ascertainable. While courts have recognized this ascertainability requirement for years, they rarely had invoked it to bar class certification. But a trio of Third Circuit decisions has given the ascertainability requirement new bite. The Third Circuit and a number of lower courts have denied class certification when the plaintiffs could not show that there was an objective and administratively feasible way of identifying the members of the proposed class. This trend could dramatically reshape the class action landscape, particularly in consumer cases, where there often is no record of who bought the product at issue. But not all courts are onboard with the Third Circuit's approach, making it likely that this issue will soon reach another court of appeals and, possibly, the Supreme Court. In the meantime, defendants have a powerful tool at their disposal in the fight against class certification.

Roots of the Ascertainability Requirement

Under Rule 23(a), a putative class action must meet four requirements, which are commonly referred to as numerosity, commonality, typicality, and adequacy of representation. *See* Fed. R. Civ. P. 23(a). A proposed class also must satisfy the terms of Rule 23(b), which vary depending on the type of class the plaintiffs seek to certify. The term "ascertainable" or any variant of it cannot be found in the text of Rule 23. But for years, courts have recognized that "[t]he existence of an ascertainable class of persons to be represented by the proposed class representative is an implied requirement of [Rule] 23." *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (7th Cir. 2007) (citing cases); *see also In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 30 (2d Cir. 2006); *Crosby v. Soc. Sec. Admin. of U.S.*, 796 F.2d 576, 580–81 (1st Cir. 1986); 1 William B. Rubenstein, *Newberg on Class Actions* § 3:2–3:3 (5th ed. 2014).

Courts vary in how they describe the basis of this ascertainability requirement. *See Newberg on Class Actions* § 3:2 (discussing cases). Most courts describe it as an implied requirement of Rule 23 and discuss the various policy reasons behind it. Courts have noted, for example, that a clearly identifiable class is necessary to fashion appropriate notice to class members (S*ee Crosby*, 796 F.2d at 580) and that membership in the class must be readily ascertainable so that a successful defendant can assert a res judicata defense against any future actions brought by members of the class (S*ee Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1089-91 (N.D. Cal. 2011)). Other courts have traced the ascertainability requirement to the very concept of a "class" and reasoned that Rule 23's express requirements, such as numerosity and commonality, can only be analyzed if the class is clearly defined and its membership readily ascertainable. *See Newberg on Class Actions* § 3:2. Finally, a small set of courts have found the ascertainability requirement codified in Rule 23(c)(1)(B)'s provision that courts "define the class and the class claims, issues or defenses." *See id.*

Although many courts have mentioned the ascertainability requirement, until recently few courts had relied on it to deny class certification. When the doctrine did come into play, its primary effect was to prevent the certification of classes defined by subjective criteria such as state of mind (*See, e.g.*, *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679–80 (S.D. Cal. 1999)) (denying certification of a class of those who purchased trading cards from the defendant "for the purpose of" finding a particular card) or classes that were defined too vaguely or had fail-safe characteristics (*See, e.g.*, *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537–39 (6th Cir. 2012)) (vacating certification of a class of all persons who were charged local government taxes "which were either not owed, or were at rates higher than permitted" because membership in the class was defined by the outcome of the case on the merits); *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 495–97 (7th Cir. 2012) (vacating certification of class of all students eligible for special education services "who are, have been or will be" denied certain procedural rights under the IDEA); *Crosby*, 796 F.2d at 580 (vacating certification of class of all present and future claimants for disability benefits "who have not had a hearing held within a reasonable time"). But only in a few cases did courts actually deny class certification because there was no reliable method for determining who was in the proposed class. *See, e.g.*, *Xavier*, 787 F. Supp. 2d at 1089–90 (denying motion for class certification of all those over 50 who had smoked twenty "pack-years" of Marlboro cigarettes because this definition "does not describe a group of people whose membership can be ascertained in a reliable manner"); *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742(DLC), 2010 WL 3119452, at *12–13 (S.D.N.Y. Aug. 3, 2010) (denying on other grounds class certification of individuals who purchased Snapple but noting serious ascertainability issues with determining class membership). In short, ascertainability was not a major obstacle to most class actions.

Third Circuit Bolstered Ascertainability Requirement

The Third Circuit has changed the landscape dramatically with a trio of recent decisions. The court first raised the issue in *Marcus v. BMW of North America, LLC,* 687 F.3d 583 (3d Cir. 2012), where the plaintiff sought to certify a class of current and former owners and lessees of BMW vehicles equipped with Bridgestone run-flat tires that had gone flat and been replaced. The Third Circuit vacated and remanded the district court's grant of class certification, concluding that the class definition was too imprecise, in violation of Rule 23(c)(1)(B). *Id.* at 591-92. But the court did not stop there, noting that even if the district court could fashion a more precise definition of the class, the proposed class raised "serious ascertainability issues." *Id.* at 593. Specifically, BMW of North America did not track which cars had been manufactured with Bridgestone tires, dealerships sometimes changed tires before selling the cars, BMW did not maintain records showing the current owners of BMW vehicles, and, most difficult of all, no records showed which BMW vehicles had run-flat tires replaced because they had gone flat. *Id.* at 593–94. For these reasons, the court instructed the district court to determine whether "there is

a reliable, administratively feasible" means to determine class membership and cautioned "against approving a method that would amount to no more than ascertaining by potential class members' say so" through the filing of affidavits. *Id.* at 594.

Next in line was *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013), where the district court certified a class of consumers who had purchased a service plan on "as-is" goods sold in Sam's Club stores in New Jersey. The plaintiff alleged that Sam's Club erroneously sold these plans to consumers even though these plans were not available for as-is products, meaning that customers purchased a worthless policy. *Id.* at 352–53. Wal-Mart argued that the class was not ascertainable because Sam's Club did not keep records of which goods were sold as-is, and thus, there was no way to identify as-is goods for which Sam's Club sold service plans. *Id.* at 355–56. On appeal, the Third Circuit concluded that the plaintiff had failed to demonstrate a reliable and administratively feasible means to determine who was in the class that did not rely on the say-so of potential class members. *Id.* at 356. But because the trial court had certified the class before the Third Circuit issued *Marcus*, the court vacated and remanded for further consideration in light of that decision.

Finally, in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), the Third Circuit gave its fullest explanation of the ascertainability requirement. The plaintiff brought a putative class action against Bayer, alleging that Bayer had falsely and deceptively marketed a weight-loss supplement, WeightSmart. *Id.* at 304. The district court certified a class of all consumers who had purchased WeightSmart in Florida. *Id.* The Third Circuit reversed, noting that "[a] plaintiff does not satisfy the ascertainability requirement if individualized fact-finding or mini-trials will be required to prove class membership." *Id.* at 307.

The plaintiff argued that he had provided two administratively feasible methods of determining membership. First, he proposed using the records of sales made with the loyalty cards of major retailers, such as CVS, a method the FTC had used in an earlier settlement with CVS regarding misleading advertisements of other supplements. *Id.* at 308. The Third Circuit rejected this approach, finding that the plaintiff had not demonstrated that this method would identify a sufficient number of class members, because many consumers likely did not have loyalty cards. *Id.* at 308–09. Second, the plaintiff proposed using affidavits from class members, which the plaintiff argued were unlikely to be fabricated given the low value of claims and could be verified through the use of several statistical sampling techniques. *Id.* at 309–12. The Third Circuit rejected this approach, too, reaffirming its conclusion that affidavits from putative class members are simply inadequate and finding that the plaintiff's statistical sampling methods were not sufficiently reliable. *Id.*

Throughout its opinion, the court repeatedly emphasized that it is the plaintiff's burden to prove at the class certification stage that a proposed method of ascertaining class members will in fact

be successful. *Id.* at 306, 309, 311. Since Carrera had failed to meet this burden, the court vacated the class certification order. *Id.* at 312. While acknowledging that its interpretation of the ascertainability requirement is "rigorous," the court explained that it is necessary because a clearly defined and ascertainable class (1) ensures that the action proceeds without administrative burdens at odds with the efficiencies expected in a class action, (2) facilitates better notice and opt-out procedures for absent class members, and (3) protects defendants' constitutional rights by allowing them to identify those persons bound by the final judgment and ensures that a class will not be certified in cases when defendants have strong individual defenses against particular class members. *Carrera*, 727 F.3d at 307–08; *see also Marcus*, 687 F.3d at 593.

Courts Outside Third Circuit Split on Stringent New Requirement

Some courts outside the Third Circuit have followed its lead, while others have balked at imposing a stringent ascertainability requirement. After *Marcus*, *Hayes*, and *Carrera*, consumer class actions in the Third Circuit face major obstacles to certification. Indeed, several district courts in the circuit already have denied certification of consumer class actions on the ground that the plaintiffs could not demonstrate a simple and objective method of determining membership in the class. *See, e.g.*, *Haskins v. First Am. Title Ins. Co.*, No. 10-5044 (RMB/JS), 2014 WL 3748565, at *5–7 (D.N.J. July 30, 2014) (denying class certification because the plaintiff had not shown that defendant's database it proposed using to identify class members was sufficiently reliable); *Stewart v. Beam Global Spirits & Wine, Inc.*, No. 11-5149 (NLH/KMW), 2014 WL 2920806, at *6–14 (D.N.J. June 26, 2014) (denying certification of all New Jersey residents who purchased Skinnygirl Margarita because no records of these purchasers existed); *Byrd v. Aaron's, Inc.*, No. 11-101E, 2014 WL 1316055, at *5 (W.D. Penn. Mar. 31, 2014) (denying certification of class alleging that Aaron's franchise stores leased laptop computers without disclosing that Aaron's had installed monitoring software on the laptops, because, although Aaron's records revealed the identity of the lessees, the plaintiff could not demonstrate whose information was monitored since individuals other than the lessee may have been using the computer at the time the software was activated).

Some district courts outside the Third Circuit have also followed its reasoning. *See, e.g.*, *Warnick v. Dish Networks LLC*, No. 12-cv-01952-WYD-MEH, 2014 WL 2922660, at *5–7 (D. Colo. June 27, 2014) (denying class certification because determining membership in the class would require review of the records of millions of phone calls); *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2014 WL 580696, at *4–6 (N.D. Cal. Feb. 13, 2014) (following *Carrera* over other district court decisions in the Ninth Circuit and declining to certify class of all persons who purchased ZonePerfect nutrition bars); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 299 F.R.D. 555, 567–73 (E.D. Tenn. 2014) (denying certification because membership in the class could only be determined through exhaustive review of records to determine who ultimately paid for a particular drug).

But a number of district courts, primarily in the Ninth Circuit, have rejected *Carrera*'s rigorous approach to ascertainability. In the view of one such court, "*Carrera* eviscerates low purchase price consumer class actions" because consumers or manufacturers will rarely have reliable records of all purchasers. *See McCrary v. Elations Co., LLC*, No. EDCV 13-00242 JGB (OPx), 2014 WL 1779243, at *8 (C.D. Cal. Jan. 13, 2014). The court continued: "While this may now be the law in the Third Circuit, it is not currently the law in the Ninth Circuit," where "it is enough that the class definition describes a set of common characteristics sufficient to allow a prospective plaintiff to identify himself or herself as having a right to recover based on the description." *Id.* (internal quotation marks omitted). These courts continue to certify consumer class actions even in the absence of reliable purchase records. *See, e.g.*, *Brazil v. Dole Packaged Foods, LLC*, No. 12-CV-01831-LHK, 2014 WL 2466559, at *4–6 (N.D. Cal. May 30, 2014); *Werdebaugh v. Blue Diamond Growers*, No. 12-CV-2724-LHK, 2014 WL 2191901, at *9–11 (N.D. Cal. May 23, 2014); *Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 456 (S.D. Cal. 2014); Forcellati v. Hyland's, Inc., No. CV 12-1983-GHK (MRWx), 2014 WL 1410264, at *5 (C.D. Cal. Apr. 9, 2014); *McCrary*, 2014 WL 1779243, at *8.

Indeed, even some judges on the Third Circuit have expressed doubts about *Carrera*'s scope. Four judges dissented from the denial of the *Carrera* plaintiff's petition for en banc review, including the author of *Marcus*. *See* Carrera v. Bayer Corp., No., 12-2621, 2014 WL 3887938, at *1–3 (3d Cir. May 2, 2014) (Ambro, *J.*, dissenting) (concluding that *Carrera* went far beyond *Marcus* and arguing that the court should be flexible in its approach to the "judicially created" ascertainability requirement, "especially in instances where the defendant's actions cause the difficulty," because "[w]here, as here, a defendant's lack of records and business practices make it more difficult to ascertain the members of an otherwise objectively verifiable low-value class, the consumers who make up that class should not be made to suffer").

What's Next?

Broadly defined classes with unascertainable members impose enormous pressure on defendants to settle purported class actions, even when the underlying merits are questionable. Defendants face the reality of costly discovery and litigation that can drag on for years. Without some reasonable method of determining class membership (or even estimating the number of class members), it is difficult to see how courts can determine whether a proposed class meets the requirements of Rule 23, such as commonality, typicality, and predominance. But some courts are leery of a rigorous ascertainability requirement, especially given its origin as an implied, rather than express, requirement of Rule 23 and its potential to become a significant obstacle to class certification in a wide range of cases.

We surely have not seen the last word on ascertainability. Given the disagreement between district courts in the Ninth Circuit and those in the Third, Sixth, and Tenth Circuits, it is only a matter of time before another court of appeals—likely the Ninth Circuit—takes up the issue. And

should a circuit split emerge, Supreme Court review seems likely, particularly given the Supreme Court's recent interest in class actions.

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