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The Third Circuit Court of Appeals Erects Significant New Barrier to Plaintiffs Seeking to Certify Consumer Classes

In August 2013, the Third Circuit Court of Appeals issued two opinions reversing district court certification of consumer classes because the plaintiffs in each case had failed to present a viable way of demonstrating that each proposed class member had purchased the product at issue. These two decisions, along with a 2012 Third Circuit decision, present a new barrier for money damage class claims related to a product purchase when no records identifying the purchaser exist. Because many franchise systems involve consumer product sales where no record of the purchaser is kept (i.e., quick service restaurants), these cases are likely to be particularly useful to franchisors defending against consumer class actions.

In *Marcus v. BMW North America, LLC*, 687 F.3d 583 (3d Cir. 2012), plaintiffs sued BMW and Bridgestone for selling allegedly defective run-flat tires and sought to represent a class of all BMW owners and lessees who purchased or leased BMWs with original Bridgestone run-flat tires or who had had flat tires replaced. The Third Circuit explained that no class can be certified unless it is ascertainable, which requires that the class can be defined using objective criteria and that there is a reliable and feasible way of determining who is in the class. The Third Circuit found that the class definition in *Marcus* raised "serious ascertainability" issues because the purchase and lease records did not document the brand of tires on each car,

and not all owners and lessees had their vehicles repaired at a BMW dealership. The Third Circuit also cautioned that, on remand, the district court should not approve any ascertainability method that "would amount to no more than ascertaining by potential class members' say so" because forcing defendants "to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications."

Hayes v. Wal-Mart Stores, Inc., --F.3d --- (3d Cir. Aug. 2, 2013) and *Carrera v. Bayer Corporation*, --- F.3d --- (Aug. 21, 2013) demonstrate that the Third Circuit meant what it said in *Marcus*. The *Hayes* district court certified a class of consumers who had purchased a service plan for an "as is" product from Sam's Clubs that was allegedly not honored. Following *Marcus*, the Third Circuit held that the trial court had not considered whether it was administratively feasible to determine who was in the class and remanded the case for further consideration. The Third Circuit noted that, because Sam's Club did not keep a record of who bought as-is items, its purchase records could not meet plaintiffs' burden of proving ascertainability and that, on remand, "this petition for class certification will founder if the only proof of class membership is the say-so of putative class members or if ascertaining the class requires extensive and individualized fact-finding."

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Similarly, in *Carrera*, the district court certified a class of purchasers alleging that a vitamin manufacturer made improper claims about its vitamins' effects. Because most customers lacked receipts and the defendant did not have a list of purchasers, plaintiffs presented customer affidavits to prove ascertainability. The Third Circuit reversed because the class was not ascertainable. After reaffirming that ascertainability is meant to protect a defendant's due process rights, it concluded that customer affidavits were not enough to establish class membership without some other proof of class membership, such as customer lists or receipts.

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