

## 3rd Circ. Takes Ascertainability More Seriously

Law360, New York (August 21, 2013, 4:41 PM ET) -- On Aug. 21, 2013, the U.S. Court of Appeals for the Third Circuit reversed certification of a class action against Bayer involving Bayer's One-A-Day WeightSmart multivitamin. See *Carrera v. Bayer Corp.*, No. 12-2621 (3d Cir. Aug. 21, 2013). Relying in large measure on another recent ruling in *Marcus v. BMW of North America LLC*, 687 F.3d 583 (3d Cir. 2012), the Third Circuit reversed the lower court's order certifying a Florida class asserting consumer fraud claims against Bayer on the ground that the class was not ascertainable — i.e., membership in the class could not be identified "without extensive and individualized fact-finding or mini-trials." *Carrera*, slip op. at 10.

Two significant takeaways from the ruling bear noting: The appellate court not only determined that the U.S. Supreme Court's "rigorous analysis" requirement applies to ascertainability but also declared that defendants have a fundamental due-process right to challenge individuals' membership in a class.

The plaintiff in *Carrera* brought a putative consumer fraud class action against Bayer on behalf of consumers who purchased Bayer's One-A-Day WeightSmart multivitamin. *Id.* at 3-4. The lawsuit was based on allegations that Bayer falsely advertised the product as enhancing metabolism. *Id.*

Bayer opposed the plaintiff's bid for class certification, arguing that the proposed class was not ascertainable because there was no list of purchasers, and Bayer did not sell WeightSmart directly to consumers. *Id.* at 4. Nonetheless, the district court certified the class, accepting both of the plaintiff's proposals to ascertain class membership: reliance on retailer records of sales and affidavits by class members stating that they purchased the product and specifying the amount paid.

Notably, the district court did so notwithstanding the fact that the named plaintiff himself "failed to remember when he purchased WeightSmart and ... confused it with WeightSmart Advanced and other ... products." *Id.* at 5. Bayer appealed, and the Third Circuit reversed.

In reversing the lower court's ruling, the Third Circuit made clear that the "rigorous analysis" requirement articulated in recent Supreme Court decisions "appl[ies] to the question of ascertainability." *Id.* at 9. After all, the Court of Appeals recognized, "Class ascertainability is 'an essential prerequisite of a class action, at least with respect to actions under Rule 23(b)(3).'" *Id.*

Thus, a plaintiff advancing a class proposal "must show, by a preponderance of the evidence, that the class is 'currently and readily ascertainable based on objective criteria,'" and the trial court must evaluate this showing by employing a "rigorous analysis." *Id.*

Applying this standard, the Court of Appeals held that the certified class was not ascertainable and rejected each of the plaintiff's proposals for determining membership in

the class. First, the appellate court dismissed the plaintiff's proposal to rely on retailer records of online sales and sales using customer membership cards because "there [was] no evidence that a single purchaser of WeightSmart could be identified" using these records. *Id.* At 14.

Second, the Court of Appeals nixed the plaintiff's proposal to rely on affidavits of class members stating that they purchased WeightSmart and specifying the amount paid, reasoning in large part that it denies Bayer of the opportunity to challenge class membership. The Court of Appeals explained that "[t]his is especially true," given that the named plaintiff himself "suggested that individuals will have difficulty recalling their purchases of WeightSmart," which likely took place many years ago. *Id.* at 15.

Beyond confirming that ascertainability is an essential prerequisite to class certification that must be subject to a "rigorous analysis," the Third Circuit went a step further, explaining that defendants have a due-process right to contest an individual's membership in the class. "In this case," the appellate court observed, "the ascertainability question is whether each class member purchased WeightSmart in Florida." *Id.* at 10.

As the court appropriately recognized, "[i]f this were an individual claim, a plaintiff would have to prove at trial he purchased" the product. *Id.* at 10-11. The right to mount such a challenge does not disappear by dint of the class device, the Court of Appeals explained, emphasizing that "a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Id.* at 11.

In short, "[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." *Id.* Because none of the proposals advanced by the plaintiff would allow the defendant to adequately challenge class membership, the Court of Appeals reversed the lower court's certification order.

However, the appellate court did afford the plaintiff another opportunity to submit to the district court reliable proposals that would allow the defendants to adequately challenge class membership.

The Third Circuit's recent ruling joins other recent decisions by federal courts that have recognized the importance of ascertainability when scrutinizing a proposal for class certification.

Indeed, just last year, the Third Circuit issued a similar ruling in *Marcus v. BMW*, in which it vacated an order certifying a class encompassing "any and all current and former owners and lessees of 2006, 2007, 2008, and 2009 BMW vehicles equipped with fun-flat tires manufactured by Bridgestone ... and sold or leased in New Jersey whose Tires have gone flat and been replaced." *Marcus*, 687 F.3d at 590. As the Third Circuit explained in *Marcus*, the certified class was not ascertainable because records from BMW could not be used to determine which vehicles actually fit the definition of the class.

A similar result was reached in *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011), 23(f) pet. denied, where the district court refused to certify a class of California cigarette purchasers who smoked Marlboro cigarettes for at least 20 "pack-years" — i.e., "one pack of Marlboro cigarettes per day for twenty years or the equivalent (e.g., two packs a day for ten years)." *Xavier*, 787 F. Supp. 2d at 1089.

The court reasoned, "There [was] no good way to identify ... individuals" who had smoked 20 pack-years of Marlboro because "[u]nlike in many cases, there [were] no defendant records on point to identify class members." *Id.* As a result, class membership could not be ascertained, derailing the class action.

The Carrera decision, coupled with other recent ascertainability rulings, is critical for manufacturers of consumer products, particularly disposable items (including food) that are not purchased directly from the manufacturer and for which consumers do not tend to keep receipts. In such instances, the defendant would not have records identifying potential class members. Class member affidavits are also not a legitimate substitute for records or receipts unless the defendant is afforded the opportunity to cross-examine each alleged class member.

Going forward, plaintiffs in the Third Circuit and beyond will need to think hard about how they propose to identify class members before bringing a consumer class action.

--By John Beisner, Jessica Miller and Jordan Schwartz, Skadden Arps Slate Meagher & Flom LLP

*John Beisner and Jessica Miller are partners, and Jordan Schwartz is an associate in the firm's Washington, D.C., office.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

---

All Content © 2003-2013, Portfolio Media, Inc.