

# Complex Mass Tort Product Liability Alert

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## Third Circuit Rejects Class Without Objective Means of Identifying Members

On August 21, 2013, the U.S. Court of Appeals for the Third Circuit reversed certification of a class action comprised of Florida purchasers of Bayer's One-A-Day WeightSmart multivitamin. *See Carrera v. Bayer Corp.*, No. 12-2621 (3d Cir. Aug. 21, 2013). Relying on another recent ruling in *Marcus v. BMW of North America, LLC*, 687 F.3d 583 (3d Cir. 2012), the Third Circuit invalidated the lower court's order certifying a Florida class alleging 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 (internal quotation marks and citation omitted). In so doing, the appellate court not only determined that the 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. (Skadden submitted an amicus brief on behalf of the Product Liability Advisory Council in support of Bayer.)

The plaintiff in *Carrera* commenced 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 gravamen of plaintiff's suit is that Bayer falsely advertised the product as enhancing metabolism. *Id.* Bayer challenged 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 plaintiff's proposals to ascertain class membership: (1) reliance on retailer records of sales; and (2) 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.

### Rigorous Analysis Applies to Ascertainability

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

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 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 (emphasis added). **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. As the court

highlighted, “[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.

### **Defendants Have a Due-Process Right to Challenge Class Membership**

Beyond confirming that ascertainability is an essential prerequisite to class certification that must pass the “rigorous analysis” test, the Third Circuit also resolved 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 [that] 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 plaintiff would allow defendant to adequately challenge class membership, the Court of Appeals reversed the lower court’s certification order. However, the appellate court did afford plaintiff another opportunity to submit to the district court reliable proposals that would allow defendants to adequately challenge class membership.

The Third Circuit’s recent ruling is a significant win for manufacturers of consumer products, particularly disposable items (including food) for which consumers do not tend to keep receipts. As the *Carrera* ruling makes clear, ascertainability is a fundamental prerequisite to class certification that is subject to the heightened requirements articulated in recent Supreme Court decisions. Moreover, this prerequisite is inextricably linked to due process, which guarantees a defendant’s right to contest whether an individual is actually part of the putative class. Accordingly, without **reliable** and **objective** methods to determine class membership, a class action cannot satisfy ascertainability.