

# The Implicit Ascertainability Requirement for Class Actions

JOHN H. BEISNER, JESSICA D. MILLER AND NINA R. ROSE, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, WITH PRACTICAL LAW LITIGATION

**An Article addressing the standard used to evaluate whether, at the class action certification stage, members of a proposed class can be easily ascertained using objective criteria.**

In the class action context, ascertainability means that the members of a certified class must be sufficiently definite, that is, that class members can be easily ascertained or determined using objective criteria. Class action defendants have long argued that ascertainability is an implicit prerequisite to class certification that must be established in addition to the statutory requirements of *Federal Rule of Civil Procedure (FRCP) 23*. In recent years, several courts have found that ascertainability is indeed critical to ensure manageability and fairness in class action proceedings. However, courts still debate the showing necessary to satisfy it for certification purposes.

## ASCERTAINABILITY MUST BE ESTABLISHED AT THE CERTIFICATION STAGE

Although ascertainability is not a statutory prerequisite to class certification, several courts have held plaintiffs to a high standard in demonstrating that the proposed class can be readily ascertained before granting class certification. In one of the most noteworthy ascertainability rulings to date, the US Court of Appeals for the Third Circuit recently held that ascertainability is subject to the same standards that govern the class certification statutory prerequisites.

### THE THIRD CIRCUIT'S RIGOROUS APPROACH

In *Carrera v. Bayer Corp.*, the Third Circuit reversed the district court's order certifying a class of purchasers of Bayer's One-A-Day WeightSmart multivitamins who alleged consumer fraud claims (727 F.3d 300 (3d Cir. 2013)). According to the Third Circuit, the class was not viable because "extensive and individualized fact-finding or mini-trials" would be required to determine who purchased the specific

product at issue and therefore the class was not ascertainable (*Carrera*, 727 F.3d at 307). This ruling is particularly significant because it:

- Holds that ascertainability is a real class certification requirement that is subject to the same "rigorous analysis" as the *FRCP 23* statutory prerequisites.
- Establishes that defendants have a fundamental due process right to challenge an individual's membership in a proposed class.

(*Carrera*, 727 F.3d at 306-07.)

The *Carrera* ruling adopts the common sense position that a class may not be certified unless the court is able to determine at the outset, based on objective evidence, who is and who is not part of the class. As the Third Circuit explained, ascertainability mandates a rigorous approach because, at the class certification stage, it:

- Allows potential class members to identify themselves for purposes of opting out of an *FRCP 23(b)(3)* class.
- Ensures that a defendant's rights are protected by the class action mechanism.
- Ensures that the parties can identify class members in a manner consistent with the efficiencies of a class action.

(*Carrera*, 727 F.3d at 307.)

Accordingly, a plaintiff seeking class certification "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" (*Carrera*, 727 F.3d at 306 (citation omitted)).

*Carrera* also embraced the argument that defense counsel has been advancing for several years: class action defendants have a fundamental due process right to challenge an individual's putative membership in a class just as defendants have the right to raise individual challenges and defenses to the underlying claims. This right is not extinguished merely because the plaintiff seeks to proceed on a class basis. After all, "a class action cannot be certified in a way that eviscerates this right or masks individual issues." (*Carrera*, 727 F.3d at 307.)



To satisfy ascertainability as it relates to proof of class membership, the plaintiff must demonstrate that the purported method for ascertaining class members:

- Is reliable.
- Is administratively feasible.
- Permits a defendant to challenge the evidence used to prove class membership.

(*Carrera*, 727 F.3d at 308.)

Notably, the court held that ascertainability could not be satisfied merely by having proposed class members submit affidavits swearing that they purchased the product at issue. That method would force defendants to simply take proposed class members at their word that they are part of a class and it could also harm absent class members by diluting the class with fraudulent or inaccurate claims. (*Carrera*, 727 F.3d at 309-11.) The court did note that in some instances ascertainability may be demonstrated by a defendant's or retailer's records where those records provide enough evidence of class membership. However, in this case, it was impossible to discern from available records who purchased the product. (*Carrera*, 727 F.3d at 308-09.)

While the plaintiff in *Carrera* petitioned for rehearing and Bayer was ordered to respond, the Third Circuit has not yet ruled on the plaintiff's request for review of the decision.

#### OTHER COURTS REQUIRE OBJECTIVE EVIDENCE

*Carrera* is just one of several recent judicial decisions to take the ascertainability requirement seriously when assessing the suitability of a class action proposal. These include:

- **Haskins v. First American Title Insurance Co.** The US District Court for the District of New Jersey refused to certify a class of homeowners alleging they were over-charged for title insurance while refinancing their home mortgages because there was no objective means of ascertaining class membership. The court found that plaintiffs did not have a viable method for determining "exactly how many loan owners have been overcharged for title insurance" and therefore the plaintiffs "failed to meet their burden to demonstrate that they can reliably or efficiently identify class members." (*No. 10-cv-5044*, 2014 WL 294654, at \*13 (D.N.J. Jan. 27, 2014).)
- **Astiana v. Ben & Jerry's Homemade, Inc.** The US District Court for the Northern District of California declined to certify a consumer fraud class defined to include persons who bought Ben & Jerry's ice cream products that were labeled "all natural" but contained alkalized cocoa processed with a synthetic ingredient. The court held that the proposed class did not satisfy the ascertainability requirement because identifying class members would require the court to determine which consumers bought an ice cream containing alkalized cocoa processed with a synthetic ingredient, as opposed to cocoa processed with a natural ingredient, and the plaintiff had not identified any objective way to make that determination. (*No. 10-cv-4387*, 2014 WL 60097, at \*3 (N.D. Cal. Jan. 7, 2014).)

- **Quality Management and Consulting Services, Inc. v. SAR Orland Food Inc.** The US District Court for the Northern District of Illinois denied certification of a proposed class action alleging that consumers were sent unsolicited faxes in violation of the Telephone Consumer Protection Act on ascertainability grounds. The court found that the plaintiff had failed to satisfy the threshold requirement of ascertainability because the proposed class members would have to prove that they received a fax to be entitled to statutory damages and plaintiff did not have objective evidence capable of "reliably demonstrat[ing] the identity of the fax recipients." (*No. 11-cv-06791*, 2013 WL 5835915, at \*4 (N.D. Ill. Oct. 30, 2013).)
- **Xavier v. Philip Morris USA Inc.** The US District Court for the Northern District of California refused to certify a class of California cigarette purchasers who smoked Marlboro cigarettes for at least 20 "pack-years," that is, "one pack of Marlboro cigarettes per day for 20 years or the equivalent (e.g., two packs per day for ten years)." The court found that there was "no good way" to identify individuals who had smoked twenty pack-years of cigarettes because, among other things, there were no defendant records on point to identify class members. Class membership would instead have to essentially be based on each individual's "subjective estimate of his or her long-term smoking habit." As a result, class membership could not be ascertained through any reliable or manageable means, derailing the class action. (*787 F. Supp. 2d 1075*, 1089-91 (N.D. Cal. 2011).)

#### ASCERTAINABILITY NEED NOT BE PROVEN AT THE CERTIFICATION STAGE

However, not all courts have been willing to jump on the ascertainability bandwagon. These cases focus on the difficulty of precisely identifying class members at the certification stage, particularly in consumer class actions.

For example, in *Astiana v. Kashi Co.*, the US District Court for the Southern District of California found that class actions cannot be defeated merely because membership is difficult to ascertain at the class certification stage (*291 F.R.D. 493, 500 (S.D. Cal. 2013)*). Any other rule, the court warned, would signal the death knell of consumer class actions. The district court certified a class of California consumers who had purchased cereal and snack products labeled as all natural or containing nothing artificial, but which allegedly contained artificial or synthetic ingredients. The plaintiffs asserted consumer fraud claims under California law and the court certified the proposed class in part. In so doing, the court found unavailing the defendant's argument that there was "no feasible mechanism for identifying class members" because the defendant did not have "records of consumer purchases, and potential class members will likely lack proof of their purchases." According to the court, "[t]here is no requirement that 'the identity of the class members ... be known at the time of certification'." (*Astiana*, 291 F.R.D. at 500 (citation omitted); see also *Terrill v. Electrolux Home Prods., Inc.*, 295 F.R.D. 671, 684 (S.D. Ga. 2013) (rejecting defendant's ascertainability argument that the "Court would need to undertake the 'painstaking task of inspecting each machine purchased' to determine whether an alleged purchaser falls within the Class definitions").)

## CARRERA MAY HELP DEFENDANTS

Class action defendants should give particular focus to the ascertainability issue in light of this recent case law. If it is followed in other circuits, the Third Circuit's *Carrera* decision will likely make it extremely difficult to bring class actions related to the sale of low-value, disposable consumer items for which consumers do not tend to keep receipts. Ascertainability can extend to other scenarios as well, such as where the class definition turns on the plaintiffs' actions (for example, fulfillment of certain criteria for an application) or exposure to advertisements or other representations that could only be determined in individualized mini-trials. A rigorous ascertainability requirement may prove to be a potent weapon in resisting class treatment in a broad range of consumer cases and will almost certainly help defendants facing potential certification of an obscure and ill-defined class.

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