

## Antitrust Trade and Practice

## Expert Analysis

# Heightened Ascertainability In Class Actions: Clash of Two Circuits

The degree of rigor needed to attain class action certification under Rule 23 of the Federal Rules of Civil Procedure<sup>1</sup> are hotly litigated issues in the federal courts these days. Approval or denial of class certification often can have outcome determinative results. On the heels of the U.S. Supreme Court's decision to grant certiorari in *Bouaphakeo v. Tyson Foods*,<sup>2</sup> about which we have written in a previous column,<sup>3</sup> an outright split among several circuit courts on the ascertainability requirement of Rule 23 may tee up yet another class certification issue for the Supreme Court to resolve. On July 28, 2015, the U.S. Court of Appeals for the Seventh Circuit issued a decision in *Mullins v. Direct Digital*,<sup>4</sup> in which the opinion penned by Judge Hamilton disagreed with the heightened ascertainability standard adopted by the U.S. Court of Appeals for the Third Circuit.<sup>5</sup>

### Heightened Ascertainability

Ascertainability refers to the concept that a class must be clearly and sufficiently defined, and is an implicit requirement recognized by courts for a class to be certified under Rule 23(b)(3). Courts have traditionally utilized the ascertainability requirement to weed out deficient class definitions, such as those (1) suffering from vagueness; (2) derived from subjective criteria; or (3) defined based on individual elements of a claim or success on the merits.<sup>6</sup> Recently, however, the Third Circuit adopted a judicially created "heightened ascertainability" standard that elevated the burden of proof plaintiffs must meet at the class certification stage.

Under this standard, plaintiffs must be able to



By  
**Shepard  
Goldfein**



And  
**James A.  
Keyte**

demonstrate at the outset that class members can be identified based on objective evidence. The Third Circuit initially introduced the concept of heightened ascertainability in its decision in *Marcus v. BMW of North America*<sup>7</sup> but more clearly articulated the standard in *Carrera v. Bayer Corp.*<sup>8</sup>

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In hearing an interlocutory appeal under Rule 23(f) of a district court's decision to grant class certification, the Third Circuit in *Carrera* vacated the district court's class certification order on the ground that the plaintiffs had not met their burden under the heightened ascertainability standard. The plaintiffs in *Carrera* alleged that Bayer had engaged in false and deceptive advertising in violation of state consumer protection laws and moved to certify a class of purchasers of Bayer's One-A-Day WeightSmart supplement under Rule 23(b)(3).

Since it was a consumer class action involving low-priced retail goods, neither Bayer nor the plaintiffs had access to a list of purchasers, and the purchasers were unlikely to maintain receipts or other proofs of purchase. Thus, the plaintiffs faced the conundrum as to how to

identify or "ascertain" members of the class and proposed two methods to accomplish this: (1) through use of retailer records of online sales and those with loyalty rewards cards; and (2) by supplying affidavits of class members attesting to their purchase of the product.<sup>9</sup>

The court rejected both of these methods, holding that a "class must be currently and readily ascertainable based on objective criteria" and that a "plaintiff must demonstrate his purported method for ascertaining class members is reliable and administratively feasible, and permits a defendant to challenge the evidence used to prove class membership." These elements are not satisfied "if individualized fact-finding or mini-trials will be required to prove class membership."<sup>10</sup>

Although the court found that retailer records constitute objective evidence, their use in this instance was insufficient because the plaintiffs did not supply any evidence that such retailer records even existed. The court also found that class member affidavits were also unacceptable because such evidence amounted to nothing more than members' "say-so" and such evidence does not provide defendants an opportunity to challenge class membership.<sup>11</sup>

The Third Circuit in *Carrera* justified the use of the heightened ascertainability standard reasoning that it helped further several desirable policy objectives, including: (1) alleviating serious administrative burdens; (2) protecting absent class members by clearly identifying those bound by the proceeding; (3) protecting class members from fraudulent claims that dilute individual recovery amounts; and (4) ensuring due process by allowing defendants to challenge evidence used to establish class membership.<sup>12</sup>

### Decision in 'Mullins'

The Seventh Circuit's decision in *Mullins* explicitly rejected the heightened ascertain-

SHEPARD GOLDFEIN and JAMES A. KEYTE are partners at Skadden, Arps, Slate, Meagher & Flom. ANISA SOMANI, an associate in the Washington, D.C., office at the firm, assisted in the preparation of this column.

ability standard under the language of Rule 23, noting that the provisions of Rule 23 required a comparative analysis and balancing of its various provisions when assessing whether the class definition was ascertainable. The Seventh Circuit was not shy about expressing its wholehearted disagreement with the Third Circuit, claiming that use of the heightened ascertainability standard “misreads Rule 23” and “does not further any interest of Rule 23 that is not already adequately protected by the Rule’s explicit requirements.”<sup>13</sup> Furthermore, the court raised serious concerns that such a stringent standard (1) “invites...systemic error” by effectively barring class certification in low-value consumer class actions; and (2) given the small recovery of the potential claims, it denies such consumers of any recourse all together.<sup>14</sup>

The facts in *Mullins* were quite similar to those in *Carrera*. The Seventh Circuit reviewed a district court decision granting class certification on an interlocutory appeal under Rule 23(f) after the defendants asked the court to adopt the heightened ascertainability standard utilized by the Third Circuit. *Mullins* also involved state consumer fraud claims regarding whether Direct Digital made false and misleading statements about its Instaflex Joint Support supplement product. And again, there was no record of the retail sales of a low price consumer good and thus plaintiffs proffered self-identifying affidavits from potential class members as a means to ascertain class membership.<sup>15</sup>

The court vigorously defended its reading of Rule 23 by noting how its conclusions better serve the policy objectives the Third Circuit identified as being furthered by the heightened ascertainability requirement. With respect to alleviating administrative burden, the Seventh Circuit found that the superiority requirement of Rule 23(b)(3) is better tailored to achieve efficiency. Certification of a class under Rule 23(b)(3) requires “that a class action [device] is superior to other available methods for fairly and efficiently adjudicating the controversy.”

The court found that the heightened ascertainability standard requires the judge to examine administrative manageability on its own, whereas the superiority requirement calls on judges to look at both sides of the equation—examining administrative efficiency in light of other available options. Rather than bar class certification altogether based on class administrability concerns, the Seventh Circuit suggested that district courts could avail themselves of other resources to address class manageability at later stages

of the proceeding, including the use of tools available to them under Rule 23(c) and (d), such as appointing a special master or having representative trials.<sup>16</sup>

The Seventh Circuit also dismissed the remaining fairness rationales put forward for absent class members, bona fide class members, and defendants. The court found the heightened ascertainability standard essentially demands that class members have actual notice. The court held that such a requirement for actual notice stands in direct contrast to Rule 23(c)(2)(B), which only requires the “best notice that is practicable under the circumstances.”<sup>17</sup> Furthermore, the court noted that given that low-value class action claims are most vulner-

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able under the heightened ascertainability standard, the likelihood of those opting out to pursue individual claims remains minimal, and that the type of notice necessary in these cases should correspond accordingly to the value of the absent class members’ interest.

With respect to protecting bona fide class members, the court acknowledged the concern of fraudulent claims is very real, but in the context of low-value consumer class actions, it deemed such a risk to be minimal. The court pointed out that (1) given that many eligible class members never file a claim for the settlement or judgment award in the first place, fraudulent claims would detract from the unclaimed funds, and not affect the recovery of legitimate class members; and that (2) a diluted recovery would still be better than no recovery at all if the certification is denied.

Lastly, the Seventh Circuit found that the heightened ascertainability standard was not necessary to preserve the due process rights of the defendants. While acknowledging that defendants do have the right to challenge the reliability of the evidence for class membership, the court claimed that such rights are preserved so long as the defendants have the opportunity to do so during the damages phase.<sup>18</sup>

## Implications

Although the Third and Seventh circuits have directly taken on the issue of heightened ascertainability in their opinions, by no means is this issue limited to a mere dispute between the two circuits. The Eleventh Circuit has also weighed in and denied class certification utilizing the heightened ascertainability standard in a non-precedential opinion.<sup>19</sup>

Several district courts also have denied class certification on ascertainability grounds due to lack of objective evidence of class membership.<sup>20</sup> However, the Seventh Circuit’s opinion in *Mullins* may provide a counterweight to these decisions and it will be interesting to follow *Mullins* and see whether a petition for a writ of certiorari is filed.

One thing remains for certain; Until the Supreme Court resolves this split, at least in the short term, and especially given the high stakes associated with class certification, ascertainability will be hotly contested by both parties at the class certification stage.

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1. FED. R. CIV. P. 23.

2. 765 F.3d 791 (8th Cir. 2014).

3. Shepard Goldfein and James A. Keyte, “U.S. Supreme Court to Address Class Certification—Again,” NYLJ (July 14, 2015), <http://www.newyorklawjournal.com/id=1202731984067>.

4. No. 15-1776, 2015 WL 4546159 (7th Cir. July 28, 2015).

5. See *infra* notes 7-12, and accompanying text.

6. *Mullins*, at \*45.

7. 687 F.3d 583 (3d Cir. 2012).

8. 727 F.3d 300 (3d Cir. 2013).

9. *Id.* at 304.

10. *Id.* at 305, 307-08 (citation omitted).

11. *Id.* at 305-06.

12. *Id.* at 305-08.

13. *Mullins*, at \*7.

14. *Id.* at \*7, 9.

15. *Id.* at \*2-4.

16. *Id.* at \*14-18.

17. FED. R. CIV. P. 23(c)(2)(B); *Mullins*, at \*9.

18. *Mullins*, at \*9-16.

19. See *Karhu v. Vital Pharms.*, No. 14-11648, 2015 WL 3560722 (11th Cir. June 9, 2015).

20. See e.g. *Turcios v. Carma Labs.*, 296 F.R.D. 638 (C.D. Cal. 2014); *In re POM Wonderful*, No. ML 10-02199 DDP(RZx), 2014 WL 1225184 (C.D. Cal. Mar. 25, 2014); *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2014 WL 580696 (N.D. Cal. Feb. 13, 2014); *Minkler v. Kramer Labs.*, No. CV 12-9421-JFW (FFMx), 2013 WL 3185552 (C.D. Cal. Mar. 1, 2013); *Xavier v. Philip Morris USA*, 787 F.Supp.2d 1075 (N.D. Cal. 2011); *True v. ConAgra Foods*, No. 07-00770-CV-W-DW, 2011 WL 176037 (W.D. Mo. Jan. 4, 2011); *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742(DLC), 2010 WL 3119452 (S.D.N.Y. Aug. 5, 2010); *Hodes v. Van’s Int’l Foods*, No. CV 09-01530 RGK (FFMx), 2009 WL 2424214 (C.D. Cal. July 23, 2009).