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ASCERTAINABILITY

CERTIFICATION

The circuits are now split on whether Federal Rule of Civil Procedure 23 implicitly requires plaintiffs to prove at the class certification stage an administratively feasible process to identify class members, attorneys Jamie Zysk Isani and Jason B. Sherry say. The authors survey case law, including a recent ruling by the Seventh Circuit in *Mullins v. Direct Digital* that accuses other courts of applying a ''heightened'' ascertainability requirement. They also preview *Jones v. ConAgra Foods*, a case that could further pave the way for Supreme Court action.

Trends in Recent Class Action Ascertainability Decisions

BY JAMIE ZYSK ISANI AND JASON B. SHERRY

Several federal courts have issued significant opinions on the issue of ascertainability as an implied requirement for class certification since Bloomberg BNA published our article, *The Ascendancy of Ascertainability as a Threshold Requirement for Certification*, less than five months ago.[1] The circuits are now split on whether Rule 23 implicitly requires plaintiffs to prove, at the class certification stage of a case, an administratively feasible process to identify class members.

The Eleventh Circuit became the first to weigh in on the issue in *Karhu v. Vital Pharmaceuticals, Inc.*[2] In an unpublished (non-precedential) decision, the court agreed with the Third Circuit's decision in *Carrera v. Bayer Corp.*[3] that Rule 23 ''implicitly'' requires a plaintiff to propose an administratively feasible method by which class members can be identified with evidentiary support. The Eleventh Circuit held that the plaintiff in *Karhu* failed this standard because he had not demonstrated that third-party retail records would actually identify class members.

Just one month after *Karhu* was decided, the Seventh Circuit issued its opinion in *Mullins v. Direct Digital, LLC*.[4] The *Mullins* court sharply critiqued *Carrera*, accusing the Third Circuit of creating a new ''heightened'' ascertainability requirement that has the ''effect of barring class actions where class treatment is often most needed: in cases involving relatively low-cost goods or services.'' The Seventh Circuit held that ''policy'' concerns regarding administrative feasibility are better addressed by the explicit requirements of Rule 23(a) and (b).

[1] Jamie Zysk Isani & Jason B. Sherry, *The Ascendancy of Ascertainability as a Threshold Requirement for Certification*, 16 CLASS 525 (2015).

[2] *Karhu v. Vital Pharm., Inc.*, 2015 BL 181132, No. 14-11648 (11th Cir. June 9, 2015).

[3] *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).

[4] *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015).

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Meanwhile, this issue has been percolating in the district courts, which are increasingly focusing their analysis on a ''fact-intensive'' inquiry. Several district courts have rejected a ''self-identifying'' affidavit submission process when the plaintiff has challenged advertising statements on a large number of products, finding that absent class members cannot be expected to remember purchasing an inexpensive product several years earlier.

Eleventh Circuit Generally Agrees With *Carrera,* But Leaves Open Questions

The plaintiff in *Karhu v. Vital Pharmaceuticals, Inc.* challenged various fat-burning advertisements on the outside packaging of the defendant's dietary supplement. The defendant, which sold its supplement indirectly to consumers through a nationwide network of distributors, argued that certifying a class of purchasers was improper because its records could not be used to identify who purchased the dietary supplement. The district court denied certification of the class of purchasers because it found consumers were unlikely ''to retain receipts or other records'' of a ''relatively small purchase[.]''

On appeal, the Eleventh Circuit began with the premise that a plaintiff seeking certification bears the burden of establishing the requirements of Rule 23, including the ''implicit'' ascertainability requirement. The court cited a number of its own and district court decisions for the principle that ''[i]n order to establish ascertainability, the plaintiff must propose an administratively feasible method by which class members can be identified.'' Using language similar to the Third Circuit's in *Carrera*, the court explained that ''[i]dentifying class members is administratively feasible when it is a manageable process that does not require much, if any, individual inquiry.''

The plaintiff had proposed the court use the defendant's ''sales data'' to identify class members, but because the defendant sold primarily to distributors and retailers, its records could not be used to determine the identities of most class members. In a motion for reconsideration and subsequently on appeal, the plaintiff sought to flesh out his plan for identifying class members by issuing subpoenas to third-party retailers. The Eleventh Circuit essentially held that this was too little, too late. The court held that a plaintiff cannot establish ascertainability ''simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible.''

The court went on to say a plaintiff cannot satisfy the ascertainability requirement ''by proposing that class members self-identify (such as through affidavits) without first establishing that self-identification is administratively feasible and not otherwise problematic.'' Acknowledging that a defendant has a due process right to challenge membership in the class, the court explained that the plaintiff's proposal must be capable of identifying class members in a manner that would not require a series of mini-trials.

Although the court in *Karhu* affirmed the denial of class certification, the court left the door open for plaintiffs in future cases to demonstrate that sales data or self-identification through affidavit submissions can satisfy Rule 23. And, as an unpublished decision, *Karhu* is not binding on the Eleventh Circuit in future cases. Thus, we expect the law of ascertainability will continue to develop on a case-by-case basis in the Eleventh Circuit.

Seventh Circuit Blasts *Carrera*

In *Mullins v. Direct Digital, LLC*, the Seventh Circuit accepted the defendant's Rule 23(f) appeal ''to address whether Rule 23(b)(3) imposes a heightened ascertainability requirement[.]''

The plaintiff in *Mullins* alleged that the defendant had exaggerated the effectiveness of its ''Instaflex Joint Support'' product at relieving joint discomfort. Similar to *Carrera* and *Karhu*, the defendant had opposed class certification on the ground that it had no records to identify purchasers of its product. But in *Mullins*, the district court overruled those objections and certified a consumer class under Rule 23(b)(3).

On appeal, the Seventh Circuit began by explaining its understanding of the ''established'' meaning of ascertainability, which, in its view, focused solely on the class definition. It accepted that Rule 23 included an ''implicit requirement'' to define a class ''clearly'' according to ''objective criteria.'' The court gave three examples of class definitions that have not satisfied this implicit requirement: (1) classes that are too vaguely defined to satisfy the ''clear definition'' component, i.e., because the class definition did not identify a particular group, harmed during a particular timeframe, in a particular location, in a particular way; (2) classes that are defined by subjective criteria, such as a person's state of mind, and thus fail the objectivity requirement; and (3) classes that are defined in terms of success on the merits (often called ''fail-safe classes'').

The Seventh Circuit held that imposing a more ''stringent version of ascertainability does not further any interest of Rule 23 that is not already adequately protected by the rule's explicit requirements,'' and in-

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structed district courts to ''continue to insist that the class definition satisfy the established meaning of ascertainability by defining classes clearly and with objective criteria.'' The court surveyed, and rejected, four ''policy'' concerns that, it thought, had motivated the ''heightened'' ascertainability standard.

1. Administrative Convenience

According to the Seventh Circuit, courts imposing a heightened ascertainability standard believed it ''eliminated serious administrative burdens'' that were incongruous with the efficiencies expected of a class action. The heightened ascertainability standard accomplished this by ensuring that the court will be able to identify class members without ''extensive and individualized fact-finding or mini-trials.''

This concern about ''administrative convenience,'' the *Mullins* court held, was better addressed by Rule 23(b)(3)'s explicit requirements for manageability and superiority. The court reasoned that a district court has discretion under the superiority and manageability prongs of Rule 23(b)(3) to ''press the plaintiff for details about the plaintiff's plan to identify class members'' and refuse certification if the district court's concerns are not adequately addressed. And the district court can ''assess efficiency with an eye toward other available methods'' of adjudication by analyzing the proposed identification method under the superiority prong of Rule 23(b)(3).

2. Unfairness to Absent Class Members

The *Mullins* court rejected the argument that a heightened ascertainability standard was necessary to ensure adequate notice to class members. The court faulted *Carrera* and its progeny for ''com[ing] close to insisting on actual notice'' to class members while overlooking the reality that, absent class certification, putative class members will ''not recover anything at all.''

3. Unfairness to Bona Fide Class Members

The *Mullins* court also rejected the argument that the risk of diluting class members' recovery, particularly when affidavit submissions are allowed, can prevent class certification. ''To deny class certification based on fear of dilution,'' the court wrote, ''would in effect deprive bona fide class members of any recovery as a means to ensure they do not recover too little.'' The court noted that there was no ''empirical evidence'' of claim dilution caused by fraudulent affidavits. In any event, the court refused to hold ''as a matter of law'' that affidavit submissions were insufficient to identify class members. ''We believe a district judge has discretion to allow class members to identify themselves with their own testimony and to establish mechanisms to test those affidavits as needed.''

4. Due Process Rights of the Defendant

The *Mullins* court agreed with *Carrera* and its progeny that a defendant has a due process right to ''challenge the plaintiffs' evidence at any stage of the case, including the claims or damages stage[,]'' and it agreed that a defendant has a due process right to present ''individualized defenses[.]'' But ''[i]t does not follow,'' the court wrote, ''that a defendant has a due process right to a cost-effective procedure for challenging every individual claim to class membership.'' According to the court, ''the due process question is not whether the identity of class members can be ascertained with perfect accuracy at the certification stage but whether the defendant will receive a fair opportunity to present its defenses when putative class members actually come forward.''

Because a defendant's due process right not to pay in excess of liability and present individualized defenses is adequately protected by the ''class device and ordinary civil procedure,'' the court concluded that the due process issue ''does not justify the heightened ascertainability requirement.''

The Sixth Circuit Concurs With *Mullins* in *Rikos v. Procter & Gamble*

Shortly after *Mullins* was issued in July, a split panel of the Sixth Circuit affirmed certification of five single-state classes of purchasers of a probiotic nutritional supplement in *Rikos v. Procter & Gamble Co.*, No. 14-4088, 2015 BL 268080 (6th Cir. Aug. 20, 2015).

The *Rikos* court focused primarily on commonality and typicality issues. In a brief discussion of ascertainability, the Sixth Circuit agreed with the Seventh that ''[t]o allow . . . systemic failure to defeat class certification would undermine the very purpose of class action remedies.'' The court wrote that it saw ''no reason to follow *Carrera*, particularly given the strong criticism it has attracted from other courts.''

The court found that, even if it followed *Carrera*, there were significant factual differences that made the class ''more ascertainable,'' including evidence that more than half of the defendant's sales were online.

The court also noted that many of the sales to consumers could be ''verified'' by third parties because a large portion of consumers learned of the nutritional supplement through their treating physicians.

The Second Circuit Reaffirms Ascertainability as Implied Requirement of Rule 23

In *Brecher v. Republic of Argentina*, the Second Circuit reviewed the district court's certification of a class of holders of beneficial interests in Argentine bonds.[5] The court noted that it had previously recognized an ''implied requirement of ascertainability'' in Rule 23 and wrote to clarify that the touchstone of ascertainability is whether the class is ''sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.''

It held that the class defined by the district court was not ascertainable because the secondary market for bonds is active and it would not be possible to determine whether the beneficial interests of current holders were in the class without holding the kind of individualized mini-hearings that run contrary to the principle of ascertainability. The court did not address *Carrera* or *Mullins* in reaching this conclusion.

Reactions to Recent Appellate Decisions

The Seventh Circuit's decision in *Mullins* is troubling for a number of reasons, although its practical impact remains to be seen.

[5] *Brecher v. Republic of Argentina*, No. 14-4385, 2015 BL 298783 (2d Cir. Sept. 16, 2015).

The Seventh Circuit's approach seems in tension with recent Supreme Court trends in at least two respects. First, the *Mullins* court's focus on the ''need'' for the class action device to vindicate consumer rights in cases involving small-dollar products fails to acknowledge that the class action is the exception to the general rule that litigation is between named parties,[6] and that Rule 23 does not guarantee the effective vindication of rights through the class device in every case.[7] In addition, the Seventh Circuit's approach of certifying a class without requiring evidence to establish class members are identifiable through an administratively feasible process, and its self-admitted decision to allow district courts to ''wait and see how serious the problem may turn out to be after settlement or judgment[,]'' is directly at odds with the Supreme Court's recent emphasis on the plaintiff's burden to prove ''in fact'' compliance with all the elements of Rule 23 in order to certify a class.[8]

Another issue with the Seventh Circuit's effort to shift the consideration of administrative feasibility to the manageability or superiority prongs of the Rule 23 analysis is the fact that courts have long held that courts should not refuse to certify a class ''merely on the basis of manageability concerns.''[9] This presumption has typically applied to manageability concerns that a court might face *after* class members have been identified. It should not be used as a shield to prevent courts from taking a hard look at whether class members can be identified through an administratively feasible process prior to certifying a class.

Finally, in our view, the Seventh Circuit embellished the extent to which previous courts had focused exclusively on the class definition under the ascertainability doctrine. For many years, courts—including the Seventh Circuit—cited the practicality of the process for identifying absent class members as a factor in their class certification decisions.[10] Some of these cases date to the adoption of Rule 23 in 1966.[11] Moreover, we explained in some depth in our previous article that courts need to appreciate the impact of the Class Action Fairness Act of 2005 on the development of the ascertainability doctrine. Pre-CAFA class actions—in federal court, predominantly securities fraud classes—did not typically implicate the ascertainability issues raised by today's small-value consumer protection claims.

District Courts Emphasize Fact-Intensive Inquiry

We noted in our previous article that some district courts had recently focused their ascertainability analysis on the breadth of products or product flavors at issue. In *Bruton v. Gerber Prods. Co.*, for instance, the plaintiff proposed to identify absent class members through self-identifying affidavit submissions. But rather than determine whether affidavits would be permissible in all cases, the district court conducted a fact-intensive inquiry into the products, advertising statements, and proposed class period. The court's principal focus was to determine whether self-identification through affidavit submissions would strain the memories of absent class members to the point that they were unreliable. In *Gerber*, there were several advertising statements that appeared on more than 69 product lines. The court held that, in those circumstances, consumers could not be expected to remember whether they purchased the baby food that fell within the class definition, and not another baby food with a ''similar sounding'' name.

A handful of recent opinions suggest district courts may be trending towards this type of fact-intensive inquiry. In *Ault v. J.M. Smucker*, No. 13 Civ. 3409(PAC), 2015 BL 252949 (S.D.N.Y. Aug. 6, 2015), the plaintiff challenged the ''All Natural'' label that appeared on four of nine brands of Crisco olive and vegetable oils. The plaintiff in the case attempted to draw parallels to *Ebin v. Kangadis Food Inc.*—a similar olive oil case also filed in the S.D.N.Y.—where the court allowed absent class members to ''self-identify'' through affidavits. The *Ault* court distinguished the self-identification process used in *Ebin*, however, because in *Ebin* ''every bottle of olive oil sold during the class period contained the allegedly misleading label[.]'' In *Ault*, the defendant sold different brands of cooking oil and only some bore the challenged ''All Natural'' label during the class period. The court wrote that ''[p]ermitting potential class members to self-identify would require them to specifically recall each variety of Crisco cooking oil they purchased during the class period.''

Another district court reached a similar conclusion in *Kosta v. Del Monte Foods, Inc.*, ___ F.R.D.___, No. 12-CV-1722 YGR, 2015 BL 244856 (N.D. Cal. July 30, 2015). There, the plaintiffs challenged a variety of advertising statements that appeared on Del Monte canned fruit products, such as ''contain antioxidants'' and ''natural source'' of lycopene. The defendant argued that the court should deny class certification because some of the challenged canned fruit products did not have the allegedly misleading labeling and packaging. Roughly 27 of 61 tomato products had the antioxidant claim, 32 of 61 tomato products had a statement about artificial flavoring, and 15 of 25 products had a

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[6] *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013).

[7] *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013) (''Nor does congressional approval of Rule 23 establish an entitlement to class proceedings for the vindication of statutory rights. . . . The Rule imposes stringent requirements for certification that in practice exclude most claims. . . . [W]e have specifically rejected the assertion that one of those requirements (the class-notice requirement) must be dispensed with because the 'prohibitively high cost' of compliance would 'frustrate plaintiff's attempt to vindicate the policies underlying the antitrust' laws.'').

[8] *Dukes*, 131 S. Ct. at 2551.

[9] *Mullins*, 795 F.3d at 663.

[10] *See, e.g.*, *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752-53 (7th Cir. 2011) (''No one knows who bought the kits. No one knows who used them without problems; this would make it difficult if not impossible to determine who would be entitled to a remedy.'')

[11] In 1970, a New York district court wrote that it was ''obvious'' that a class composed of all egg consumers was ''unmistakably beyond the limit of a permissible class action'' since ''[i]t would be next to impossible to identify members of the class and to give them appropriate notice.'' *See United Egg Producers v. Bauer Int'l Corp.*, 312 F. Supp. 319, 321 (S.D.N.Y. 1970). A New Jersey district court held in 1971 that a class of gasoline consumers could not be certified because ''it would be impossible or at the very minimum prohibitively expensive to compile a list of the members of this class.'' *Philadelphia v. Am. Oil Co.*, 53 F.R.D. 45, 74 (D.N.J. 1971).

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''Must Be Refrigerated'' statement. The court agreed that determining membership in the class would require absent class members to pass a ''memory test,'' and denied class certification. The plaintiffs have appealed.

What Is Next?

The appeal in *Jones v. ConAgra Foods, Inc.* remains pending before the Ninth Circuit. As we noted in our previous article, *Jones* has attracted considerable attention because of the large number of consumer class actions filed in recent years against food companies in the Northern District of California. This attention has only increased since the Seventh Circuit's decision in *Mullins*. In *Jones*, the plaintiff challenged the defendant's advertising of PAM cooking spray, Hunt's canned tomatoes, and Swiss Miss hot cocoa over a six-year period. The district court denied class certification because it was ''hard to imagine that [absent class members] would be able to remember which particular [product] they purchased from 2008 to the present[.]''[12]

Jones offers an opportunity for the Ninth Circuit to provide guidance to the district courts in its circuit. The Ninth Circuit may take a case-by-case approach, similar to the Eleventh Circuit in *Karhu*. If, however, the court stakes out a broader position (such as one closer to the Seventh Circuit's in *Mullins*), the Supreme Court might be more likely to take up the issue.

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[12] *Jones v. ConAgra Foods, Inc.*, No. C 12-01633 CRB, 2014 BL 164990, at *10-14 (N.D. Cal. June 13, 2014) (holding the same for purchasers of PAM and Swiss Miss).