Bloomberg BNA

Class Action Litigation Report®

ASCERTAINABILITY

CLASS CERTIFICATION

The Ninth and Eleventh Circuits are poised to address the contours of the ascertainability requirement for certifying class actions. Ascertainability, which requires that class members be readily identifiable, is ''one of the most hotly debated topics in class action litigation today,'' especially in consumer class actions involving false advertising claims, and ''can vary significantly within and across the circuits,'' the authors say.

The Ascendancy of Ascertainability as a Threshold Requirement for Certification

By Jamie Zysk Isani and Jason B. Sherry

The word ''ascertainability'' appears nowhere in Federal Rule of Civil Procedure 23, and yet its meaning is one of the most hotly debated topics in class action litigation today. The standard that it imposes on a plaintiff seeking class certification can vary significantly within and across the circuits. Until recently, few federal courts had explained its requirements in much detail.

In the past decade, however, plaintiffs and defendants have begun devoting extensive discovery and briefing to ascertainability, particularly in consumer class actions involving false advertising claims regarding low-dollar consumer goods. The issue often arises in consumer cases because manufacturers and retailers typically do not maintain records identifying the purchasers of low-dollar consumer products, and consumers do not keep receipts for every can of peas or roll of toilet paper they purchase.

Plaintiffs often attempt to circumvent the lack of existing records by suggesting that class members may identify themselves through affidavits. The Third Circuit has rejected the self-identification approach in a case involving diet supplements, finding that the memories of class members would be insufficiently reliable to satisfy the defendant's due process rights to challenge the proof used to demonstrate class membership.[1]

The Ninth and Eleventh Circuits are poised to address these issues in appeals involving canned tomato products and a diet supplement, respectively.[2] The Ninth Circuit appeal has garnered extensive attention and amicus curiae support on both sides of the issue, in part because of the large number of consumer class actions filed in recent years against food companies in the Northern District of California.[3]

Below, we explore the history of the ascertainability requirement and then discuss how the Ninth and Eleventh Circuits may view the issues before them.

Origins of Ascertainability

Although Rule 23 does not explicitly reference ascertainability, courts long have required that in order to maintain a class action, plaintiffs must demonstrate

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

[2] *Jones v. ConAgra Foods, Inc.*, No. 14-16327 (9th Cir.); *Karhu v. Vital Pharm., Inc. d/b/a VPX Sports*, No. 14-11648 (11th Cir.).

[3] *See* http://www.bna.com/jury-still-out-on-the-food-court/.

 ISSN 1529-0115

that the class sought to be represented is both adequately defined and clearly ascertainable.

The contours of the ascertainability requirement developed from a line of cases that can be traced to a 1970 Fifth Circuit decision, *DeBremaecker v. Short*,[4] and the Seventh Circuit's decision a decade later, *Simer v. Rios*.[5] In *DeBremaecker*, the Fifth Circuit rejected a proposed class of persons who were ''active in the peace movement'' during the Vietnam War and ''fear[ed] harassment and intimidation'' in speaking against the war. Starting from the premise that ''[i]t is elementary that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable,'' the court found the term ''peace movement'' to create patent uncertainty, due to the broad spectrum of positions and activities which could conceivably be lumped under the term.

A decade later, in *Simer*, the Seventh Circuit rejected a class of persons who were ''eligible for CIP assistance but who were denied assistance or who were discouraged from applying because of the existence of the invalid regulation. . . .'' The court joined *DeBremaecker* and a number of lower court decisions in recognizing the difficulty of identifying class members whose membership in the class depends on each individual's state of mind. The court further stressed the burdens that would be imposed on the court and the parties to determine who qualified for the assistance, and then who were discouraged from applying because of the challenged regulation—what it called a ''Sisyphean task.'' Even if the class could be defined by class members' ''conduct,'' rather than their ''state of mind,'' the cost and time that the court and parties would have to expend before the class could be identified would outweigh the efficiency of a class action.

The *Simer* court explained that identification of the class serves two purposes: first, it alerts the court and the parties to the burdens that such a process might entail; and second, ''identifying the class insures that those actually harmed by defendants' wrongful conduct will be the recipients of the relief eventually provided.'' This latter purpose serves both to protect putative class members, who are seeking the relief, and defendants, who benefit from res judicata when a judgment is entered for or against the class.

[4] 433 F.2d 733, 734 (5th Cir. 1970).
[5] 661 F.2d 655, 669-70 (7th Cir. 1981).

Jamie Zysk Isani is a partner, and Jason B. Sherry is an associate, in the Miami office of Hunton & Williams LLP. Isani focuses on complex commercial litigation, including defense of consumer class actions and unfair competition claims in the financial services and retail industries, and is available at jisani@hunton.com. Sherry focuses on class action defense, including the defense of financial institutions and manufacturers and retailers of consumer products against securities fraud, false advertising, and breach of warranty claims, and can be reached at jsherry@hunton.com.

Today, these decisions are best known for founding the rule that ascertainability requires a class that is defined according to ''objective'' criteria and cannot depend on a person's mental state. In addition to requiring objective criteria, though, the courts recognized that class members must be identifiable through administratively feasible means that do not impose heavy burdens on the court and the parties, which would defeat the efficiencies of Rule 23.

In the decades after *DeBremaecker* and *Simer*, courts generally treated ascertainability as a fairly lenient standard. This is largely a function of the type of cases that reached federal courts during that time. For instance, in the staple of the federal class action, the securities class, documents typically were available to identify class members: account statements, registration documents, or broker-dealer statements showed who purchased or sold a security, when, and at what price.[6] Case law developed from securities cases therefore offers only limited insight into the evidentiary threshold required to ascertain a class.

Traditional ''consumer'' cases, on the other hand, rarely reached federal court. Few federal statutes allowed consumers to pursue class action claims. For example, indirect purchasers are barred from asserting antitrust claims against manufacturers,[7] and individual consumers generally lack standing to assert claims for false advertising or consumer deception under the Lanham Act.[8] Diversity jurisdiction did not exist for consumer class actions involving low-dollar products because each named plaintiff's claims had to satisfy the jurisdictional minimum.[9]

This changed dramatically in 2005, though, when Congress passed the Class Action Fairness Act (''CAFA'').

New Cases, New Problems

Ten years ago this past February, Congress passed and the President signed CAFA into law. CAFA effected significant changes to federal courts' diversity jurisdiction, and its influence on the development of the law regarding ascertainability cannot be understated. CAFA was the first federal jurisdictional statute that allowed plaintiffs to satisfy the amount-in-controversy requirement for diversity jurisdiction by aggregating the total value of putative class claims to overcome CAFA's $5 million amount-in-controversy threshold. From a jurisdictional standpoint, Congress swung the doors of federal court open to consumer class actions.

Before CAFA, diversity jurisdiction under 28 U.S.C. § 1332 required that each class member satisfy the amount-in-controversy requirement, which varied from $10,000 to $75,000 between 1966 and 2005. This means that a plaintiff seeking to rely upon state law in federal court, absent an independent basis for federal jurisdiction, had to demonstrate that ***each*** member of the class he or she sought to represent had a claim which mea-

[6] Ascertainability problems do arise in securities class actions, though, such as when the class definition depends on the subjective intent of the purchaser. *See, e.g., In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 44–45 (2d Cir. 2006).
[7] *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).
[8] *See, e.g., Made in the USA Found. v. Phillips Foods, Inc.*, 365 F.3d 278, 279-80 (4th Cir. 2004) (collecting cases).
[9] *See Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301 (1973).

  CLASS ISSN 1529-0115

sured in the tens of thousands of dollars. This requirement effectively excluded many of the consumer false advertising class actions that are filed in federal court today. Under CAFA, however, a plaintiff can advance state law claims in federal court on behalf of a class of consumers, each who claims only a paltry amount, so long as the class collectively seeks in excess of $5 million.[10]

Since CAFA became effective in 2005, federal courts have faced a barrage of consumer class actions, many alleging false advertising claims. Unlike the federal Lanham Act, many state statutes provide individual consumers with standing to sue for false advertising and unfair competition. These cases are particularly attractive to the plaintiffs' bar because many state statutes contain fee-shifting provisions and some provide for statutory damages, which can quickly multiply when liability is adjudicated on behalf of a class under Rule 23. And these cases, which are often fact-intensive, can be difficult to dismiss on the pleadings. If a false advertising case is not dismissed on the pleadings, plaintiffs often seek to challenge a producer's substantiation for an advertising statement, and potentially leverage the concomitant risk that the producer's internal testing and analyses will be released to the consuming public.

It is unsurprising, then, that federal courts have seen such an explosion of these cases, and that class certification plays a pivotal role. Classwide adjudication, however, cannot ''abridge, enlarge or modify any substantive right.''[11] In an individual action, a plaintiff would have to prove at trial that she purchased the product at issue. A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues.

In many small-value consumer class actions, there simply is no existing evidence available to identify absent class members. Traditional brick-and-mortar retailers rarely have records to show who purchased a particular product, the price that was paid, or the date of the purchase. The vast majority of consumers do not retain receipts for everyday products, such as a can of tomato sauce or a bottle of shampoo. Thus, courts today are grappling with questions regarding what level of proof plaintiffs must present, and when it must be presented in the class certification process, to establish that a class is sufficiently ascertainable to satisfy Rule 23.

What Type of Evidence Is Required to Identify Class Members (and When)?

In the four decades since *DeBremaecker* was decided, every federal appellate court to consider the issue has held that a class must be readily ascertainable based on objective criteria.[12] A plaintiff seeking to certify a damages class pursuant to Rule 23(b)(3) also must establish that class members are identifiable through reliable and administratively feasible means.[13] Administrative feasibility means that identifying class members ''is a manageable process that does not require much, if any, individual factual inquiry.''[14]

In the consumer class action context, a plaintiff may be able to define a class objectively—for example, all individuals who purchased product X during time period Y. It is not so simple, however, to demonstrate that the identity of class members is readily ascertainable through verifiable means. If consumers do not retain receipts of their purchases, and manufacturers and retailers do not maintain sales records identifying the purchasers, then what kind of evidence could be used to identify class members?

To date, the Third Circuit is the only federal appellate court to consider the issue in depth in this context. *Carrera v. Bayer Corp.* involved false advertising claims against a manufacturer of a multi-vitamin and dietary supplement that was promoted as having metabolism-enhancing effects.[15] The plaintiffs offered two methods to ascertain the class: (1) by retailer records of online sales and sales made with store loyalty or rewards cards, and (2) by affidavits of class members, attesting they purchased the product and stating the amount they purchased. Bayer challenged the latter method on the ground that memories of putative class members would be unreliable, noting that the plaintiff in his deposition could not remember when he purchased the product and confused it with other products. The plaintiff offered a declaration from a company that verifies and processes class settlement claims, stating that there are ways to verify the affidavits of class members to screen out fraudulent claims.

The district court characterized ascertainability as a ''speculative'' problem of case management and certified the class.[16] On appeal, the Third Circuit rejected that rationale and emphasized that ascertainability ''mandates a rigorous approach at the outset because of the key role it plays as part of a Rule 23(b)(3) class action lawsuit.'' The court identified three primary functions served by ascertainability: (1) it allows potential class members to identify themselves for purposes of opting out of a class; (2) it ensures that a defendant's rights are protected by the class action mechanism; and (3) it ensures that the parties can identify class members in a manner consistent with the efficiencies of a class action. The court emphasized that ascertainability provides due process by requiring that a defendant ''be able to test the reliability of the evidence submitted to prove class membership.''

---

[10] This assumes that the class satisfies the remaining requirements of CAFA. *See* 28 U.S.C. § 1332(d).

[11] *See* 28 U.S.C. § 2072(b).

[12] *DeBremaecker*, 433 F.2d at 734; *Crosby v. Soc. Sec. Admin.*, 796 F.2d 576, 580 (1st Cir. 1986); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 44 (2d Cir. 2006), clarified on other grounds on denial of reh'g, 483 F.3d 70 (2007); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006); *Ihrke v. N. States Power Co.*, 459 F.2d 566, 573 n.3 (8th Cir.), *vacated* as moot, 409 U.S. 815 (1972); *Davoll v. Webb*, 194 F.3d 1116, 1146 (10th Cir. 1999); *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012).

[13] *See Astrazeneca AB v. UFCW (In re Nexium Antitrust Litig.)*, 777 F.3d 9, 19 (1st Cir. 2015); *Marcus*, 687 F.3d at 592-93.

[14] William B. Rubenstein & Alba Conte, Newberg on Class Actions § 3:3 (5th ed. 2011).

[15] *Carrera v. Bayer Corp.*, 727 F.3d 300, 304-05 (3d Cir. 2013).

[16] *Carrera v. Bayer Corp.*, Civ. A. No. 08-4716, 2011 BL 297732, at *4 (D.N.J. Nov. 22, 2011).

The *Carrera* court concluded that, although retailer records might be an acceptable method of proving class membership, the plaintiff had not provided any evidence to show that retail records would allow class members to be identified in that case. The court rejected the plaintiff's proposal to allow putative class members to self-identify through affidavits because the defendant ''must be able to challenge class membership,'' particularly where the plaintiff's own deposition suggested that individuals would have difficulty accurately recalling their purchases. In reaching this conclusion that constitutional due process required allowing the defendant to challenge membership in the class, the court rejected the plaintiff's argument that the ascertainability requirement should be relaxed because Bayer's *total* liability would be determined at trial. It reasoned that the defendant has an interest in ensuring the payment of only legitimate claims in order to prevent a class member from later challenging the judgment on grounds that the named plaintiff had not adequately represented the class.

The court also rejected the settlement administrator's declaration, finding that it did not show that class member affidavits would be reliable or propose a model for screening fraudulent submissions that was specific to the case. Particularly after *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the court explained, plaintiffs must demonstrate a reliable method for determining class members at the class certification stage and not merely assure that they ''intend'' or ''plan'' to meet the requirements of Rule 23.

In the nearly two years since *Carrera* was decided, lower courts outside the Third Circuit have taken varied approaches to the issue. Some have embraced the reasoning of *Carrera* and declined to allow consumer affidavits to identify class members.[17] Others have rejected *Carrera*, fearing that a rule preventing consumers from self-identifying as class members would spell the death of low purchase price consumer class actions.[18] Some Third Circuit judges and leading scholars have echoed these concerns.[19]

A number of courts have taken a middle ground, conducting a case-by-case inquiry into the scope of products and statements and the temporal period at issue to determine whether they would expect affidavits to be reliable in a particular case. For instance, Northern District of California Judge Lucy Koh has certified a class of purchasers of almond milk during a 6-year period,[20] and a class of purchasers of 10 products bearing the same label statement during a 6-year period,[21] yet denied certification for a proposed class of individuals who purchased 69 different types of baby food products during a 6-year period.[22]

Will the Ninth and Eleventh Circuits Follow *Carrera*?

It is against this backdrop that the Ninth and Eleventh Circuits may soon weigh in on the issue of ascertainability in consumer false advertising class actions.

The Ninth Circuit appeal in *Jones v. ConAgra* has garnered substantial attention and a number of amicus curiae briefs on both sides, in part because of the large number of consumer class actions filed in recent years against food companies in the Northern District of California. In *Jones*, the plaintiffs allege deceptive and misleading labels on a variety of canned tomato products that bore different labels over a six-year period.[23] The plaintiffs proposed that class membership could be ascertained through photographic verification and sworn testimony regarding a customer's purchase. The district court rejected that proposal, finding that even assuming all proposed class members would be honest, they could not be expected to remember which particular products they had purchased during a 6-year period and whether those products bore the challenged label statements. Without deciding whether self-identification might be a reliable method of identifying class members in a case involving a single product with a single label, the court held that the variation in the Hunt's products and labels made self-identification unfeasible in *Jones*.[24]

On appeal, the plaintiff in *Jones* has asserted that ascertainability is not required for class certification because it is not mentioned in Rule 23. Although the Ninth Circuit has not explicitly recognized ascertainability as a requirement for class certification in a published deci-

[17] *See, e.g., Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2014 BL 434038 (N.D. Cal. Feb. 13, 2014); *Karhu v. Vital Pharms., Inc.*, Case No. 13-60768-CIV, 2014 BL 57320 (S.D. Fla. Mar. 3, 2014).

[18] *See, e.g., McCrary v. Elations Co.*, No. EDCV 13-00242 JGB, 2014 BL 19957, at *8 (N.D. Cal. Jan. 13, 2014) (''While [*Carrera*] may now be the law in the Third Circuit, it is not currently the law in the Ninth Circuit.''); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 500 (S.D. Cal. 2013); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014).

[19] *See Byrd v. Aaron's Inc.*, No. 14–3050, __ F.3d __, 2015 BL 107876, at *16 (3d Cir. Apr. 16, 2015) (Rendell, J., concurring) (''We have effectively thwarted small-value consumer class actions by defining ascertainability in such a way that consumer classes will necessarily fail to satisfy for lack of adequate substantiation.''); *Carrera v. Bayer Corp.*, No. 12-2621, 2014 BL 404936, at *3 (3d Cir. May 2, 2014) (dissenting from denial of petition for rehearing en banc).

[20] *Weredebaugh v. Blue Diamond Growers*, No. 12-cv-2724, 2014 BL 146743 (N.D. Cal. May 23, 2014).

[21] *Brazil v. Dole Packaged Foods, LLC*, Case No. 12-cv-01831, 2014 BL 384762 (N.D. Cal. May 30, 2014).

[22] *Bruton v. Gerber Prods. Co.*, No. 12-CV-02412-LHK, 2014 WL 2860995, at *9 (N.D. Cal. Nov. 18, 2014).

[23] *Jones v. ConAgra Foods, Inc.*, No. C 12–01633 CRB, 2014 BL 164990 (N.D. Cal. June 13, 2014).

[24] *Jones*, 2014 BL 164990, at *13 (''Although this Court might be persuaded that a class of 'all people who bought Twinkies,' for example, during a certain period, could be ascertained—one would at least have more confidence in class members' ability to accurately self-identify—the variation in the Hunt's products and labels makes self-identification here unfeasible.'').

  CLASS ISSN 1529-0115

sion, all 10 other federal circuits to consider the issue have recognized that ascertainability is implicitly required for class certification.[25]

In addition, a panel of the Ninth Circuit in an unpublished opinion recently affirmed the denial of certification, on ascertainability grounds, of a proposed class of parking purchasers who received receipts containing the expiration dates of their credit cards on ascertainability grounds. The court noted that ''[s]elf-identification may suffice for some settlement-only classes. But those classes need not satisfy Rule 23(b)(3)(D)'s 'manageability' requirement.''[26] If the Ninth Circuit reaches the issue of ascertainability in *Jones*, it is unlikely that the court will become the first federal appellate court to dispense entirely with the ascertainability requirement.

The appeal pending before the Eleventh Circuit in *Karhuv. Vital Pharmaceuticals* involves facts similar to *Carrera*—alleging false advertising by a manufacturer of a dietary supplement.[27] The district court denied certification, finding the plaintiff had not provided any practical means of verifying class membership through existing evidence, as the defendant rarely sells directly to consumers, and declining to allow class members to self-identify through affidavits. The court found that, as in *Carrera*, accepting affidavits without verification would deprive the defendant of its due process rights to challenge the claim of each class members, and allowing the defendant to contest each affidavit would require a series of mini-trials and defeat the purpose of class-action treatment.

Unlike the Ninth Circuit, the Eleventh Circuit has held repeatedly that ascertainability is a threshold requirement implicit in the class certification analysis.[28] In recent unpublished decisions, the Eleventh Circuit has focused on the importance of a clearly defined, ascertainable class, reversing class certification where a defendant gaming facility lacked records to identify patrons' losses at the game level,[29] and affirming the denial of certification of a proposed class of video game purchasers that included all purchasers of the game from any source irrespective of whether they suffered the alleged animation defect at issue.[30]

The plaintiff/appellant in *Karhu* relies heavily on a 2011 decision in which the Eleventh Circuit vacated an order certifying a class of persons who purchased a yogurt product ''to obtain its claimed digestive health benefit,'' finding that the district court improperly included a reliance element in the class definition, but otherwise agreeing with its legal analysis.[31] That decision may be of limited value, though, because neither the Eleventh Circuit nor the district court addressed how yogurt purchasers would be identified, whether through self-identification or otherwise.

The Ninth Circuit traditionally has been more receptive to class actions than the Eleventh, but the decisions in *Jones* and *Karhu* ultimately may be driven by the facts in each case. The defendants in both cases have emphasized the fact-specific nature of the district court's determination that affidavits would be unreliable in the particular case—in *Jones*, due to the wide spectrum of labels and ingredients used by the defendant in its canned tomato products, and in *Karhu*, based on conflicts between the facts alleged by the plaintiff and those shown by documents produced in discovery. Neither defendant has argued that *Carrera* requires *per se* rejection of self-identification of class members in all cases, and both courts could affirm the district court decisions without issuing sweeping rulings.[32]

Conclusion

It remains to be seen whether the Ninth and Eleventh Circuits will take a broad stance on ascertainability or will craft narrow decisions based on the facts before them.

As these cases make clear, though, a defendant facing a consumer class action in any circuit should argue that (1) ascertainability is a demanding standard that cannot be overlooked simply because the word does not appear in the text of Rule 23; (2) defendants' due process rights may not be sacrificed in the class action context for the sake of efficiency, and procedures that may be acceptable in the settlement context often are not appropriate in a contested case; and (3) it is the plaintiff's burden to submit evidence at the time of class certification demonstrating that class members are identifiable through administratively feasible means.

A defendant also may be more likely to defeat class certification by developing an evidentiary record that demonstrates the variety of products, advertising, or labeling at issue, to provide the district court with a factual basis from which to conclude that consumer affidavits would not be reliable in the particular case.

---

[25] *See supra*, note 12.

[26] *Martin v. Pac. Parking Sys. Inc.*, 583 F. App'x 803, 804 n.3 (9th Cir. 2014).

[27] *Karhu v. Vital Pharms., Inc.*, 2014 BL 57320 (S.D. Fla. Mar. 3, 2014).

[28] *See, e.g., Little v. T-Mobile USA Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012) (quoting *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970)).

[29] *Bussey v. Macon Cnty. Greyhound Park, Inc.*, 562 F. App'x 782 (11th Cir. 2014).

[30] *Walewski v. Zenimax Media, Inc.*, 502 F. App'x 857 (11th Cir. 2012).

[31] *Fitzpatrick v. Gen. Mills, Inc.*, 635 F.3d 1279 (11th Cir. 2011).

[32] A panel of the Third Circuit recently attempted to clarify that ''there is no records requirement'' under *Carrera*, which ''stands for the proposition that a party cannot merely provide assurances to the district court that it will later meet Rule 23's requirements.'' *Byrd*, 2015 BL 107876 at *6.