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## Grasping for a Hold on “Ascertainability”: The Implicit Requirement for Class Certification and its Evolving Application

*By Robert W. Sparkes, III*

The concept of “ascertainability” serves as an important arrow in the quiver of a defendant seeking to prevent certification of a putative class action in federal court. Recently, the issue of what a plaintiff must demonstrate to satisfy the strictures of ascertainability has taken on new prominence, particularly in the context of proposed classes under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Most notably, the U.S. Courts of Appeals for the Third and Seventh Circuits have grappled with the issue and come to conflicting conclusions as to how strictly courts should scrutinize proposed class definitions under this rubric. While some courts, including the Third and Eleventh Circuits, appear to apply a “heightened” standard, others, like the Seventh Circuit, have refused to do so. These decisions have left confusion and uncertainty in their wake, such that further resolution of this issue will no doubt require the courts and class action defendants to continue to reach for a firm hold on ascertainability, and may ultimately require Supreme Court intervention.

Federal courts have recognized “ascertainability” as an implicit prerequisite to the certification of a proposed class.<sup>1</sup> In general, the ascertainability requirement mandates that a proposed class be clearly defined and that class members be identifiable through objective criteria.<sup>2</sup> Where the identification of putative class members requires individualized fact finding or mini-trials for each putative class member, class certification is inappropriate and must be denied.<sup>3</sup> As discussed below, the precise application of this general standard is the now the subject of an apparent circuit split worth further development.

### The Third Circuit: Ascertainability Sets Forth a Heavy Evidentiary Burden for Plaintiffs and a Strict Obstacle to Certification of a Class Under Rule 23(b)(3)

In a series of cases stretching back to 2012, the Third Circuit has addressed and provided detailed guidance regarding the scope of the ascertainability inquiry.<sup>4</sup> Specifically, the Third Circuit requires a plaintiff seeking certification of a Rule 23(b)(3) class to demonstrate by a preponderance of the evidence that “(1) the class is ‘defined with reference to objective criteria’; and (2) there is ‘a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.’”<sup>5</sup> An “administratively feasible mechanism” is one that is manageable and “does not require much, if any, individual factual inquiry.”<sup>6</sup>

Under the Third Circuit’s analysis, a plaintiff cannot simply “propose a method of ascertaining a class.”<sup>7</sup> Instead, he or she must provide “evidentiary support that the method [of identifying class members] will be successful.”<sup>8</sup> Additionally, the plaintiff’s proposed method of demonstrating class membership must provide the defendant with the opportunity and ability “to challenge the evidence used to prove class membership.”<sup>9</sup> If a plaintiff cannot overcome this high burden and prove that class members can be identified without the need to resort to

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individualized inquiries and mini-trials, he or she has failed to “affirmatively demonstrate . . . compliance with Rule 23.”<sup>10</sup>

According to the Third Circuit, a rigorous and strict inquiry into the existence of an ascertainable class serves several goals. First, it provides a means to identify putative class members consistent with the efficiencies underlying the class action mechanism and to determine who will be bound by any class judgment.<sup>11</sup> Second, it facilitates the efficient provision of notice to class members consistent with Rule 23(c)(2).<sup>12</sup> Third, it protects a defendant’s due process rights by ensuring the defendant’s ability to challenge the evidence offered to prove class membership in the same manner in which it has a right to contest the elements of each putative class member’s claim.<sup>13</sup> Fourth, it allows putative class members to identify themselves in considering whether to opt out of a Rule 23(b)(3) class and protects against potentially fraudulent or inaccurate claims that unnecessary dilute class member’s recoveries.<sup>14</sup>

The application of this standard is illustrated by the Third Circuit’s 2013 decision in *Carrera v. Bayer Corporation*. In that case, plaintiff attempted to satisfy ascertainability through either the use of affidavits of putative class members attesting to their purchases of certain products or through certain records of third-party retailers who sold the products.<sup>15</sup> As to third-party records, the Third Circuit found that while third-party retailer records *could* be sufficient to ascertain class members in some cases, plaintiff failed to present any actual evidence that a single purchaser of the relevant product could be identified through retailer records.<sup>16</sup> The Court similarly rejected plaintiff’s reliance on putative class member affidavits as a feasible and fair method for ascertaining class membership.<sup>17</sup> As such, the Third Circuit found that plaintiff failed to present an “administratively feasible mechanism” for identifying putative class members and thus failed to satisfy the ascertainability standard.<sup>18</sup>

As illustrated in *Carrera*, the Third Circuit’s iteration of the ascertainability requirement directly calls into questions putative classes for which a plaintiff proposes a “self-identifying” method of identifying class members or for which a plaintiff cannot affirmatively demonstrate, with evidentiary proof, that the defendant’s records alone are sufficient to identify class members.<sup>19</sup> In short, the Third Circuit has erected a substantial evidentiary hurdle to overcome for plaintiffs seeking certification of a Rule 23(b)(3) class.<sup>20</sup>

### The Eleventh Circuit Adopts a Standard In Line with the Third Circuit

In a recent decision, the Eleventh Circuit appears to have adopted a strong ascertainability analysis similar to that espoused by the Third Circuit.<sup>21</sup> In order to establish ascertainability in the Eleventh Circuit, a plaintiff must propose and establish “an administratively feasible method by which class members can be identified.”<sup>22</sup> To satisfy this burden, a plaintiff must do more than simply assert that the defendant’s records permit identification, he or she “must also establish that the records are in fact useful for identification purposes and that identification will be administratively feasible.”<sup>23</sup> And, like the Third Circuit, the Eleventh Circuit recognized the due process concerns with permitting putative class members to self-identify, cautioning plaintiffs that they must satisfy a high burden to “establish how the self-identification method proposed will avoid the potential [due process] problems.”<sup>24</sup>

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### The Seventh Circuit Rejects the Heightened Requirements of the Third Circuit Standard

On July 28, 2015, the Seventh Circuit issued a decision in *Mullins v. Direct Digital, LLC*, in which it addressed the issue of “whether Rule 23(b)(3) imposes a heightened ‘ascertainability’ requirement as the Third Circuit and some district courts have held recently.”<sup>25</sup> In doing so, the Seventh Circuit rejected the Third Circuit’s two prong ascertainability standard in a case that, like *Carrera*, addressed the appropriateness of putative class member’s self-identification through affidavits.<sup>26</sup>

Instead of following the lead of the Third Circuit, the Seventh Circuit reaffirmed its adherence to a self-described “weak version” of ascertainability that requires only that the class membership be defined clearly and by reference to objective criteria.<sup>27</sup> Under this standard, proposed classes will fail to satisfy the ascertainability standard only if they are (1) vague and lack a “clear definition” (that is one that “identif[ies] a particular group, harmed during a particular time frame, in a particular location, in a particular way”); (2) defined by subjective criteria; or (3) defined based on the merits of the claims (also known as a fail-safe class).<sup>28</sup> In *Mullins*, the Seventh Circuit refused to extend its ascertainability precedent any further and declined to adopt a requirement that a plaintiff also demonstrate a reliable and administratively feasible mechanism for identifying class members (the second prong of the Third Circuit analysis above).<sup>29</sup>

While noting that the policy concerns underlying a “heightened” ascertainability inquiry are “substantial and legitimate,” the Seventh Circuit reasoned that those concerns “are better addressed by applying carefully the explicit requirements of Rule 23(a) and especially (b)(3).”<sup>30</sup> In particular, the Seventh Circuit relied on the superiority requirement of Rule 23(b)(3), including the manageability component of superiority, in finding that those policy concerns were adequately protected without interposing a heightened ascertainability standard.<sup>31</sup> Moreover, the Seventh Circuit recognized the importance of a defendant’s due process rights, but limited that right: “[t]he 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.”<sup>32</sup> Thus, the Seventh Circuit noted that courts may rely on self-identifying affidavits from class members as a method for ascertaining class membership, so long as that process is subject to “audits and verification procedures” and the defendant has the opportunity to challenge the merits of each class member’s claim as appropriate.<sup>33</sup>

Ultimately, the Seventh Circuit’s decision in *Mullins* appears driven by its own policy judgment that an overly strict ascertainability requirement would create a “nearly insurmountable hurdle” to class certification, especially in cases “where a class action is the only viable way to pursue valid but small individual claims.”<sup>34</sup>

### Implications and Conclusions

Despite the Seventh Circuit’s criticism, the Third Circuit’s decision rests on the stronger rationale and better balances the purposes and efficiencies underlying the class action device and defendants’ due process rights in the class certification analysis. The Supreme Court has made clear that neither plaintiffs nor courts can use Rule 23 to prevent a defendant from exercising its due process rights to raise all defenses and challenge the

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claims of putative class members, and the Third Circuit’s ascertainability standard safeguards these important due process rights at the outset of the class certification analysis and ensures that a class is not certified in a manner “that eviscerates” such rights or “masks individual issues.”<sup>35</sup>

At a fundamental level, a plaintiff that cannot demonstrate that putative class members are identifiable in an efficient and “administratively feasible” manner, likely has not stated and cannot establish putative class claims that are appropriate for and capable of class-wide resolution. Consider, for example, the question of how such claims can be adjudicated at trial without requiring individualized factual inquiries for each putative class member if those class members are not feasibly ascertainable in the first instance? The Third Circuit’s standard, in other words, simply takes account of the class certification principles inherent in and underlying the express elements of Rule 23(a) and Rule 23(b)(3) at the outset of the certification analysis.

The Seventh Circuit’s express rejection of the Third Circuit’s ascertainability standard creates a circuit split that will necessarily require further resolution as district courts, other circuit courts of appeal, and, possibly the Supreme Court, strive to grasp a clear definition of the scope of the ascertainability inquiry. At their base, the conflicting view points of the Third and Eleventh Circuits and the Seventh Circuit reflect the respective court’s differing policy judgments regarding certification of putative class actions, the application of Rule 23, and the role of an implicit requirement in that analysis. And, these conflicting decisions leave federal court practitioners without clear guidance and class action defendants at the mercy of the vagaries of jurisdiction and a plaintiff’s forum shopping.

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<sup>1</sup> See, e.g., *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592 (3d Cir. 2012); *Mullins v. Direct Digital, LLC*, --- F.3d ---, 2015 WL 4546159, at \*1 (7th Cir. Jul. 28, 2015); *Karhu v. Vital Pharmaceuticals, Inc.*, --- Fed. App'x ---, 2015 WL 3560722, at \*1 (11th Cir. Jun. 9, 2015); *Romberio v. Unumprovident Corp.*, 385 Fed. App'x 423, 431 (6th Cir. 2009); *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 30 (2d Cir. 2006).

<sup>2</sup> See, e.g., Note 1, *supra*.

<sup>3</sup> See, e.g., *Carrera v. Bayer Corp.*, 727 F.3d 300, 303-04 (3d Cir. 2013).

<sup>4</sup> See *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163-65 (3d Cir. 2015) (discussing the evolution of ascertainability in the Third Circuit); *Carrera*, 727 F.3d at 306, 307; *Marcus*, 687 F.3d at 592.

<sup>5</sup> *Byrd*, 784 F.3d at 163 (quoting *Carrera*, 727 F.3d at 305).

<sup>6</sup> *Carrera*, 727 F.3d at 307-08.

<sup>7</sup> *Id.* at 306.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 308.

<sup>10</sup> *Comcast Corp. v. Behrend*, --- U.S. ---, 133 S. Ct. 1426, 1432 (2013).

<sup>11</sup> See *Carrera*, 727 F.3d at 305-06, 307 (ascertainability “eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action by insisting on the easy identification of class members” and “ensur[es] that those persons who will be bound by the final judgment are clearly identifiable” (internal quotations omitted)).

<sup>12</sup> See *id.* at 305-06; see also *Byrd*, 784 F.3d at 165.

<sup>13</sup> See *Carrera*, 727 F.3d at 307-08 (“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.”); see also *Marcus*, 687 F.3d at 594.

<sup>14</sup> See *Carrera*, 727 F.3d at 307, 310 (“It is unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims.”).

<sup>15</sup> See *id.* at 308.

<sup>16</sup> See *id.* at 308-09.

<sup>17</sup> See *id.* at 309-11. In remanding the case to the District Court, the Third Circuit noted that plaintiff should have an opportunity to satisfy the ascertainability requirement, specifically by proposing a “screening model” for evaluating putative class member affidavits. The Court cautioned plaintiff that, in doing so, he must “prove how the model will be reliable and how it would allow [defendant] to challenge the affidavits. Mere assurances that a model can screen out unreliable affidavits will be insufficient.” *Id.* at 311-12.

<sup>18</sup> See *id.* at 308-09.

<sup>19</sup> See *id.* at 308-10 (rejecting proposed identification process utilizing class member affidavits); *Marcus*, 687 F.3d at 592-94 (noting that defendant’s records could not determine potential class membership and cautioning against a method of ascertaining membership “by potential class members’ say so,” which would force defendants “to accept as true absent persons’ declarations that they are members of the class, without further indicia of reliability” and “have serious due process implications”); but see *Byrd*, 784 F.3d at 169 (finding proposed class satisfied the ascertainability requirement where objective records in defendant’s possession would allow parties to identify class members).

<sup>20</sup> Notably, at least one judge on the Third Circuit has recently criticized the Third Circuit’s purported “heightened ascertainability requirement” as inappropriately narrowing the availability of class actions, particularly in small-claim class actions. *Byrd*, 784 F.3d at 172-76 (Rendell, J., Concurring).

<sup>21</sup> *Karhu v. Vital Pharmaceuticals, Inc.*, --- Fed. App'x ---, 2015 WL 3560722, at \*2-3 (11th Cir. June 9, 2015).

<sup>22</sup> *Id.* at \*2 (citing *Carrera*, 727 F.3d at 306-07).

<sup>23</sup> *Id.* at \*3.

<sup>24</sup> *Id.*

<sup>25</sup> *Mullins v. Direct Digital, LLC*, --- F.3d ---, 2015 WL 4546159, at \*1 (7th Cir. Jul. 8, 2015).

<sup>26</sup> *Id.* at \*2, \*7.

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<sup>27</sup> *Id.* at \*3, \*6-7; *see also id.* at \*16 (“District courts should continue to insist that the class definition satisfy the established meaning of ascertainability by defining classes clearly and with objective criteria.”).

<sup>28</sup> *See id.* at \*4-5.

<sup>29</sup> *Id.* at \*6-7 (“[Defendant] urges us to adopt [the Third Circuit] rule and to reverse the certification order here because the only method for identifying class members proposed by [plaintiff] . . . was self-identification by affidavit. We decline to do so.”).

<sup>30</sup> *Id.* at \*2, \*7; *see also id.* at \*16.

<sup>31</sup> *See id.* at \*8-9.

<sup>32</sup> *Id.* at \*13-14 (“A defendant has a due process right to challenge the plaintiffs’ evidence at any stage of the case, including the claims or damages stage. That does not mean a court cannot rely on self-identifying affidavits, subject as needed to audits and verification procedures and challenges, to identify class members.”).

<sup>33</sup> *Id.* at \*13; *see also id.* at \*16.

<sup>34</sup> *Id.* at \*6.

<sup>35</sup> *Carrera*, 727 F.3d at 307.