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IN THIS ISSUE

When opposing a class certification motion, class action defense attorneys often focus their efforts on challenging the predominance, superiority and typicality requirements of Rule 23(b)(3). Following recent decisions in the Third Circuit, the ascertainability prerequisite has emerged as a new battleground. In this article, Ryan Ethridge discusses the contours and use of this new defense tool.

Rule 23's Ascertainability Requirement: A Powerful Defense to Class Certification

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In a pair of recent decisions, the Third Circuit has infused new life into the ascertainability "prerequisite" for class actions under Rule 23(b)(3). These cases build on the United States Supreme Court's recent *Comcast* mandate that trial courts conduct a "rigorous analysis" at class certification by requiring class plaintiffs to "'affirmatively demonstrate [their] compliance'" with Rule 23's requirements "through evidentiary proof."[1] In holding that these requirements apply equally to the ascertainability inquiry, the Third Circuit made clear that plaintiffs must be prepared to prove, at class certification, that the proposed class is readily ascertainable based on objective criteria without the need for individual inquiries to determine whether someone is a member of the class.

Marcus v. BMW – The Ascertainability Element of Rule 23

In 2012, the Third Circuit explained the concept of ascertainability at length for the first time in *Marcus v. BMW of North America*.[2] The *Marcus* plaintiffs alleged that Bridgestone run-flat tires ("RFTs") were defective, and the district court certified a Rule 23(b)(3) class consisting of "any and all current and former owners and lessees of [certain] BMW vehicles equipped with [Bridgestone RFTs] . . . and sold or leased in New Jersey whose tires have gone flat and been replaced."[3]

As a "preliminary matter," the Third Circuit identified ascertainability as "an essential prerequisite" of a Rule 23(b)(3) class action.[4] Under this prerequisite, a proposed class "must be currently and readily ascertainable based on objective criteria," and a class action is "inappropriate" if "class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials.'"[5]

The *Marcus* Court explained the justification for the ascertainability requirement in Rule 23(b)(3) actions, listing three important objectives served thereby: (1) "it eliminates serious administrative burdens . . . by insisting on the easy identification of class members"; (2) "it protects absent class members by facilitating the best notice practicable"; and (3) "it protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable."[6]

The Third Circuit ultimately found that the certified class raised "serious ascertainability issues" because the lease and purchase

[1] *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011)).
[2] 687 F.3d 583 (3d Cir. 2012).
[3] *Id.* at 590 (quotation and alterations omitted).
[4] *Id.* at 592-93.
[5] *Id.*
[6] *Id.* at 593. Significantly, the Supreme Court relied on similar policy justifications in *Dukes* and *Comcast*, stating that a rigorous analysis is required at class certification, in part, because "Rule 23(b)(3), as an 'adventuresome innovation,' is designed for situations 'in which class-action treatment is not as clearly called for.'" *Comcast*, 133 S. Ct. at 1432 (quoting *Dukes*, 131 S. Ct. at 2558). According to the Supreme Court, this "explains Congress's addition of procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (*e.g.,* an opportunity to opt out), and the court's duty to take a 'close look' at whether common questions predominate over individual ones." *Id.* (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997)).

records on which the plaintiffs relied were both over-inclusive and under-inclusive. On remand, the district court was instructed to "resolve the critical issue of whether the defendants' records can ascertain class members and, if not, whether there is a reliable, administratively feasible alternative."[7] The Third Circuit also cautioned "against approving a method that would amount to no more than ascertaining by potential class members' say so. . . . Forcing [defendants] to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications."[8]

Hayes v. Wal-Mart – Establishing Plaintiffs' Ascertainability Burden

In *Hayes v. Wal-Mart Stores, Inc.*,[9] the Third Circuit expanded on *Marcus* and held that class plaintiffs must come forward with a reliable and administratively feasible mechanism to identify class members in order to satisfy their ascertainability burden. The *Hayes* plaintiffs accused Wal-Mart of selling worthless extended warranties for ineligible "as-is" merchandise at its Sam's Club stores, and the district court certified a class of New Jersey consumers who purchased a warranty to cover as-is items. On appeal, the Third Circuit concluded that the class definition ran afoul of *Marcus*, which was decided after the district court certified the class.

The certified class of New Jersey consumers who purchased extended warranties to cover as-is products expressly excluded consumers whose product was covered by a manufacturer's warranty and those who obtained service on their product or were previously reimbursed (i.e., those who were not harmed by the alleged conduct). The first ascertainability problem was that the warranties generally did not cover as-is items, unless the item was covered by a full manufacturer's warranty at the time of purchase. The second problem concerned the way in which the sales of as-is items were recorded in Sam's Club records – with a "price override" notation but no indication of the reason for the override. Thus, the transactional records did not readily identify which sales were for as-is items, and not all products sold as-is were actually excluded under the warranty.

The Third Circuit reversed and emphasized that ascertainability entails "two important elements": (1) "the class must be defined with reference to objective criteria"; and (2) "there must be a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition."[10] "Reliability" requires proof of class membership beyond "the say-so of putative class members,"[11] and "'[a]dministrative feasibility means that identifying class members is a manageable

[7] *Marcus*, 687 F.3d at 594.
[8] *Id.*
[9] 725 F.3d 349 (3d Cir. 2013)
[10] 725 F.3d at 355.
[11] *Id.* at 356.

process that does not require much, if any, individual factual inquiry.'"[12]

The trail court's order was overturned, in large measure, because it did not consider the feasibility requirement.[13] Sam's Club had no method for determining how many of the 3,500 price-override transactions during the class period were for as-is items; and because the plaintiff had not demonstrated an alternative method to determine which purchasers should be in the class, he failed his ascertainability burden. On remand, the Third Circuit directed that the plaintiff must provide this alternative, which would require proof, for each putative class member, that: (1) s/he purchased a warranty for an as-is item; (2) s/he had not received service on the as-is item or a refund for the cost of the warranty; and (3) the item was not covered by a manufacturer's warranty.

The Third Circuit's holding in *Hayes* reaffirms that ascertainability is "'an essential prerequisite'" to class certification, and it specifies that proof thereof is "by a preponderance of the evidence" standard.[14] Perhaps most importantly, the Third Circuit also makes clear that the burden of proving an ascertainable class rests with the plaintiff alone. A plaintiff cannot escape this burden by complaining about the state of the defendant's records – "the nature or thoroughness of a defendant's recordkeeping does not alter the plaintiff's burden to fulfill Rule 23's requirements"[15] – and she cannot simply identify a large group of potential class members and shift this burden to the defendant to specify who should be excluded.[16]

<u>*Carrera v. Bayer Corp.* – Due Process Right to Challenge Class Membership</u>

Carrera v. Bayer Corporation[17] involved claims that Bayer had falsely advertised the metabolism-enhancing effects of its product, One-A-Day WeightSmart. The district court certified a class of Florida consumers under that state's consumer protection law, and the issue on appeal was whether the class members were ascertainable. The difficulty with the class was that class members were unlikely to have documentary proof of purchase, such as receipts, and Bayer had no list of purchasers because it did not sell WeightSmart directly to consumers.

In concluding that the class was not ascertainable, the Third Circuit made two

[12] *Id.*at 355 (quoting William B. Rubenstein, Newberg on Class Actions § 3:3 (5th ed. 2011)).
[13] *Id.* at 355.
[14] *Id.* at 354 (quoting *Marcus*, 687 F.3d at 592).
[15] *Id.* at 356. Indeed, the Third Circuit provided defense practitioners with a written "sound bite" to include in every class certification opposition brief they write: "Rule 23's requirements that the class be administratively feasible to ascertain and sufficiently numerous to warrant class action treatment cannot be relaxed or adjusted on the basis of [the plaintiff's] assertion that [insert name of defendant's] records are of no help to him." *Id.* This likely does not apply in situations where the defendant has a legal obligation "to create and maintain a particular set of records" from which class members could be ascertained. *Id.*
[16] *Id.* at 358 ("[I]t was not defendant's burden to show how many of the 3,500 price override transactions occurred for a reason other than the purchase of an as-is item.").
[17] 727 F.3d 300 (3d Cir. 2013).

significant holdings. First, it made clear that the Supreme Court's "rigorous analysis" requirements "apply to the question of ascertainability": (1) district courts must be "'satisfied, after a rigorous analysis, that the prerequisites' of Rule 23 are met"; (2) this rigorous analysis will frequently "entail some overlap with the merits of the plaintiff's underlying claim"; and (3) factual determinations necessary at class certification "must be made by a preponderance of the evidence."[18] The court also summarized the evidentiary burden and the trial court's responsibility at class certification: "a plaintiff must show, by a preponderance of the evidence, that the class is 'currently and readily ascertainable based on objective criteria,' and a trial court must undertake a rigorous analysis of the evidence to determine if the standard is met."[19]

Second, the Third Circuit held that defendants have a fundamental due-process right to challenge both the makeup of a class and any individual's membership in the class as defined. "A defendant has a similar, if not the same, due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim," and "a class action cannot be certified in a way that eviscerates this right or masks individual issues."[20] As a result, at class certification, 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."[21]

The court then analyzed the two types of evidence relied on by the plaintiff to demonstrate who is a class member. It found that retailer records, which purportedly track customers who make purchases online or using loyalty cards, and affidavits of class members were both insufficient to satisfy the plaintiff's burden.

The court expressly refuted each of the arguments plaintiffs advanced in support of affidavit identification of class membership. First, the argument that the low value of the claims rendered false affidavits unlikely did not override the fact that "a defendant must be able to challenge class membership."[22] Second, the court stated that plaintiffs cannot focus solely on the defendant's interest in challenging class membership because "ascertainability protects absent class members as well as defendants," and it is "unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims."[23] Third, the Court addressed the screening

[18] *Id.* The Court derived these principles from, *inter alia*, *Hydrogen Peroxide*, 552 F.3d at 309; *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982); and *Dukes*, 131 S. Ct. at 2551-52.

[19] *Id.* (quoting *Marcus*, 687 F.3d at 593) (internal citation omitted). The Court also explained why "[a]scertainability mandates a rigorous approach at the outset." *See id.* at 307.

[20] *Id.* at 307 (citing *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231-32 (2d Cir. 2008), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *Dukes*, 131 S. Ct. at 2561)).

[21] *Id.* at 308.

[22] *Id.* at 309.

[23] *Id.* at 310 (citing *Marcus*, 687 F.3d at 593). Under the statute at issue, Bayer's total liability was capped

method proposed by the plaintiff's expert and held that any screening method must be specific to the case, at hand and a plaintiff must demonstrate the reliability of the proposed method – which requires more than mere "assurances [that] it will be effective."[24]

Ascertainability Outside the Third Circuit

Courts in jurisdictions outside the Third Circuit are split on how much is required to satisfy Rule 23's ascertainability requirement. Some have followed the reasoning announced in the recent Third Circuit decisions, demanding a strong showing by plaintiffs that a reliable and administratively feasible method exists for identifying members of the proposed class.[25] Others have declined to go as far as the Third Circuit.[26]

Virtually all recent cases addressing ascertainability have articulated a 2-part test similar to *Marcus*, requiring (1) a class defined with reference to objective criteria, and (2) a reliable and administratively feasible method for identifying class members. Most of the cases that disagree with *Carrera* and *Hayes*, however, pay mere lip service to the administrative feasibility requirement. In *Werdebaugh v. Blue Diamond Growers*, for example, the court recognized that a class is ascertainable only "if it is 'administratively feasible to determine whether a particular individual is a member of the class,'" but it held that this is satisfied as long as "'parameters for membership in the class are set by objective criteria.'"[27] These cases appear to base their analysis primarily on policy grounds. In *McCrary v. Elations Co.*, for example, the court expressly disagreed with the *Carrera* decision because, in its determination, it "eviscerates low purchase price consumer class actions in the Third Circuit."[28]

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at $14 million (the amount of Weight Smart sold in Florida), and the plaintiff argued that Bayer lacked an interest in challenging class membership as a result.

[24] *Id.* at 311.

[25] *See, e.g.*, *In re POM Wonderful Marketing & Sales Pracs. Litig.*, 2014 WL 1225184 (C.D. Cal. Mar. 25, 2014); *Karhu v. Vital Pharmaceutical Inc.*, 2014 WL 815253, at *3 (S.D. Fla. Mar. 3, 2014) (citing *Carrera*); *Sethavanish v. ZonePerfect Nutrition Co.*, 2014 WL 580696, at *4-6 (N.D. Cal. Feb. 13, 2014) (citing *Carrera*); *In re Skelaxin (Metaxalone) Antitrust Litig.*, __ F.R.D. __, 2014 WL 340903, at *11-16 (Jan. 30, 2014) (citing *Carrera* and *Marcus*); *Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097 (N.D. Cal. Jan. 7, 2014) (.

[26] *See, e.g.*, *Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 523 (N.D. Cal. 2012) (rejecting argument that class identification would require "mini-trials" due to lack of receipts, reasoning that this would mean there "would be no such thing as a consumer class action," and noting that there is no requirement that the identity of class members be known at the time of certification); *McCrary v. Elations Co. LLC*, 2014 WL 1779243, at * (C.D. Cal. Jan. 13, 2014); *Astiana v. Kashi Co.*, 291 F.R.D. 493 (S.D. Cal. 2013) (relying on *Ries*). There is actually a split within the Ninth Circuit (and even within individual districts) on this issue. *See generally Sethavanish*, 2014 WL 580696, at *4-6 (discussing this split).

[27] *Werdebaugh v. Blue Diamond Growers*, 2014 WL 2191901, at *9, 11 (N.D. Cal. May 23, 2014) (quoting *Wolph v. Acer Am. Corp.*, 2012 WL 993531, at *1-2 (N.D. Cal. Mar. 23, 2012)); *see also Brazil v. Dole Packaged Foods, LLC*, 2014 WL 2466559 (N.D. Cal. May 30, 2014 ("In this Circuit, it is enough that the class definition describes a set of common characteristics sufficient to allow a prospective plaintiff to identify [herself as a member of the class].").

[28] *McCrary v. Elations Co. LLC*, 2014 WL 1779243, at *8 (C.D. Cal. Jan. 13, 2014); *see also Lanovaz v. Twinings N. Am., Inc*, 2014 WL 1652338 (N.D. Cal. Apr. 24, 2014) (finding a class was ascertainable, despite the absence

In another case, *Ebin v. Kangadis Food, Inc.*, the court certified a class despite the plaintiffs' failure to "point to any records that can objectively determine membership in the proposed class."[29] The court characterized ascertainability as a manageability-only issue, noted the general policy considerations favoring the class action device in low-damage consumer cases, and concluded: "Against this background, the ascertainability difficulties, while formidable, should not be made into a device for defeating the action."[30] Importantly, the court did not address the defendant's due process right to challenge class membership.

Conclusion

At least in the Third Circuit states of Pennsylvania, New Jersey and Delaware, plaintiffs must now come forward at the class certification stage with evidence establishing that class members are readily identifiable without the need for individualized inquiries and without relying on the mere "say-so" of putative class members via affidavits. This showing must be made by a preponderance of the evidence. It is now much more difficult for consumers to maintain class actions for product liability and deceptive advertising claims. This is particularly true for low-cost products where the defendant's records do not identify purchasers, because it is unlikely that consumers will possess receipts or other proof that they purchased the offending product, and plaintiffs cannot simply invite consumers to submit affidavits stating that they purchased the produce at issue.

Defense practitioners should keep an eye on the courts around the country to track whether the Third Circuit's analysis gains traction or becomes an outlier. In the meantime, the Plaintiffs' Bar will likely file their consumer class actions in California and other fora that appear to be more plaintiff-friendly. Even in those venues, however, defendants would be well-served to oppose certification on ascertainability grounds in the hopes that they can convince courts to follow the Third Circuit's lead. Even if those efforts are ultimately unsuccessful, the ascertainability analysis will likely unearth numerous individualized issues relevant to Rule 23(b)(3)'s predominance and superiority inquiries.[31]

of records identifying purchasers, and noting that a contrary holding "would be the death of consumer class actions").

[29] 297 F.R.D. 561, 567 (S.D.N.Y. 2014).

[30] *Id.*

[31] *See, e.g.*, *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 45 (2d Cir. 2006) (pointing out "the need for numerous individualized determinations of class membership in order to provide further support for [the court's] basic conclusion that individual questions will permeate this litigation").

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