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## **IMPUNITY FOR SNAKE OIL MERCHANTS?: THE SEVENTH CIRCUIT UPHOLDS THE CLASS ACTION AS A VEHICLE FOR CONSUMER PROTECTION**

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### INTRODUCTION

Each year Americans spend billions on dietary supplements that promise to do everything from treating colds and enhancing memory to curbing hot flashes.<sup>1</sup> However, in spite of the lofty promises made by the manufacturers of such products, a recent study of herbal supplements by the journal BNC MEDICINE found that most of the products tested were of poor quality and contained considerable ingredient substitution.<sup>2</sup> In November 2015, the Justice Department announced that it was bringing criminal and civil cases against over

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<sup>1</sup> Anahad O’Connor, *Herbal Supplements Are Often Not What They Seem*, N.Y. TIMES, (Nov. 3, 2013), [http://www.nytimes.com/2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html?\\_r=0](http://www.nytimes.com/2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html?_r=0).

<sup>2</sup> Meghan Grguric et al., *DNA Barcoding Detects Contamination and Substitution in North American Herbal Products*, BMC MEDICINE (Oct. 11, 2013), <http://www.biomedcentral.com/1741-7015/11/222/abstract>.

100 makers of dietary supplements<sup>3</sup>. The complaints alleged, *inter alia*, the sale of products that make health or disease treatment claims unsupported by adequate scientific evidence.<sup>4</sup>

What legal remedy does the injured *consumer* of a low cost product like a dietary supplement have? One option is the class action. Guided by Federal Rule of Civil Procedure 23, a class action is a form of representative litigation: one or more named class representatives bring a claim on behalf of many absent class members, and those class members are bound by the outcome of the representatives' litigation.<sup>5</sup> The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individually named parties only.<sup>6</sup> The core policy behind the class action, as stated by the United States Supreme Court, is "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."<sup>7</sup>

Procedurally, after a class claim has been filed, a court must determine by order whether to certify the suit as a class action.<sup>8</sup> Rule 23 provides express requirements for the certification of class actions in federal court.<sup>9</sup> In addition to Rule 23's express requirements, courts have developed additional criteria, known as the "implicit requirements," for a class to be certifiable.<sup>10</sup> One of these judicially created rules is that the proposed class be "ascertainable."<sup>11</sup> To meet the ascertainability requirement, a plaintiff must show that the

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<sup>3</sup> Press Release, U.S. Dep't of Justice, Justice Department and Federal Partners Announce Enforcement Actions of Dietary Supplement Cases (Nov. 17, 2015), <http://www.justice.gov/opa/pr/justice-department-and-federal-partners-announce-enforcement-actions-dietary-supplement-cases>.

<sup>4</sup> *Id.*

<sup>5</sup> WILLIAM RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 1:1 (5th ed. 2015).

<sup>6</sup> Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348 (2011).

<sup>7</sup> Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997)).

<sup>8</sup> FED. R. CIV. P. 23.

<sup>9</sup> Rubenstein, *supra* note 5, at § 3:1.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

proposed class is defined in reference to objective criteria.<sup>12</sup> This view has been adopted in the Seventh Circuit, where courts have held that “a class must be sufficiently definite that its members are ascertainable.”<sup>13</sup> Put another way, a court must be able know or readily ascertain who will be a member of the class.<sup>14</sup>

In recent years, the issue of class ascertainability has split the circuit courts. Some courts have expanded the ascertainability test beyond the definition described above.<sup>15</sup> These courts have held that it is not enough that the proposed class is objectively defined; the plaintiff must also show a “reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.”<sup>16</sup> This requirement, which the Seventh Circuit has labeled “heightened ascertainability,”<sup>17</sup> has been used to defeat class certification in several consumer fraud cases involving low-cost products, including several against makers of dietary supplements.<sup>18</sup>

In *Mullins v. Direct Digital, LLC*, the Seventh Circuit addressed whether Rule 23 imposed a heightened ascertainability requirement in granting class certification.<sup>19</sup> The plaintiff in *Mullins* sought to certify a class of all people who purchased the defendant’s allegedly fraudulently marketed dietary supplement – Instaflex Joint Support.<sup>20</sup> The court held that nothing in Rule 23 mentioned or implied the

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<sup>12</sup> *Id.* at § 3:3.

<sup>13</sup> *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 493 (7th Cir. 2012).

<sup>14</sup> *Id.* at 495.

<sup>15</sup> *Byrd v. Aaron's Inc.*, 784 F.3d 154, 164-65 (3d Cir. 2015); *Carrera v. Bayer Corp.*, 727 F.3d 300, 303-04 (3d Cir. 2013); *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 354-55 (3d Cir. 2013); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593-94 (3d Cir. 2012).

<sup>16</sup> *Hayes*, 725 F.3d at 355.

<sup>17</sup> *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015).

<sup>18</sup> *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 946 (11th Cir. 2015); *Carrera*, 727 F.3d at 303; *In re POM Wonderful LLC*, No. ML 10-02199 DDP RZX, 2014 WL 1225184, at \*6 (C.D. Cal. Mar. 25, 2014).

<sup>19</sup> *Mullins*, 795 F.3d at 657.

<sup>20</sup> *Id.* at 658.

heightened ascertainability requirement.<sup>21</sup> Further, the court ruled that this requirement had the effect of denying class certification in cases involving low-cost goods or services.<sup>22</sup> In such cases, the court explained, a class action is the only viable way to pursue valid but small individual claims.<sup>23</sup>

This article will explore the Seventh Circuit's position on class ascertainability, through an analysis of *Mullins v. Direct Digital, LLC*, and will contrast this approach with the heightened ascertainability requirement adopted by other federal circuit courts of appeal. Specifically, this article argues that the Seventh Circuit was right to reject the heightened ascertainability requirement. Part I provides an outline of the requirements of Rule 23 and examines the traditional standards that courts have used to certify class actions. Part II explores the development of the heightened ascertainability requirement and the policy concerns behind its creation. Part III examines the facts and holding in *Mullins* and details the Seventh Circuit's point-by-point rebuttal to the justifications other federal circuit courts have used for applying heightened ascertainability. Part IV argues that the heightened ascertainability requirement is superfluous, has deleterious effects on class plaintiffs and should be abandoned. Finally, Part V proposes changes to Rule 23 that the Judicial Conference's Committee on Rules of Practice and Procedure could adopt in order to codify the Seventh Circuit's approach to class certification.

## I. RULE 23, TRADITIONAL ASCERTAINABILITY AND SUPREME COURT HOLDINGS ON CLASS CERTIFICATION

Rule 23 took its current form in a 1966 revision to the Federal Rules of Civil Procedure.<sup>24</sup> According to its principal drafter, Benjamin Kaplan, the Rule is intended to “rebuild the law on functional lines responsive to . . . recurrent life patterns which call for

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 668.

<sup>23</sup> *Id.* at 662.

<sup>24</sup> *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 592 (1997).

mass litigation through representative parties.”<sup>25</sup> The Rule has two primary purposes. First, it permits the vindication of the rights of groups of people who individually would not have effective strength to bring their opponents into court.<sup>26</sup> Second, by permitting a representative to sue on behalf of a large group of people, it provides an efficient method of litigation.<sup>27</sup>

In class action suits filed pursuant to Rule 23, a court’s ruling on certification is the threshold question and often the most important decision in the litigation.<sup>28</sup> As the Third Circuit noted, “orders granting class certification may expose defendants to enormous liability while orders denying certification may effectively eviscerate the plaintiffs’ ability to recover.”<sup>29</sup> Rule 23 sets forth the express requirements the plaintiff seeking certification must meet.<sup>30</sup> First, class plaintiffs must show all the prerequisites of Rule 23(a).<sup>31</sup> Then, a court must consider whether the class fits within one of the three categories set forth in Rule 23(b).<sup>32</sup> In addition to Rule 23, plaintiffs must also meet the judicially created ascertainability requirement.<sup>33</sup> Rule 23 does not specify a particular burden of proof, nor has the Supreme Court weighed in on the matter.<sup>34</sup> Currently, some federal circuit courts, including the Seventh Circuit,<sup>35</sup> have moved towards a “preponderance of the evidence” standard, while others have

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<sup>25</sup> Geoffrey C. Shaw, *Class Ascertainability*, 124 Yale L.J. 2354, 2356 (2015) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. Indus. & Com. L. Rev. 497, 497 (1969).

<sup>26</sup> *Amchem*, 521 U.S. at 617.

<sup>27</sup> *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974).

<sup>28</sup> *Deposit Guar. Nat’l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980).

<sup>29</sup> *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 93 F. App’x 345, 350 (3d Cir. 2004).

<sup>30</sup> *Amchem*, 521 U.S. at 614.

<sup>31</sup> FED. R. CIV. P. 23.

<sup>32</sup> *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, PNC Bank NA, 795 F.3d 380, 392 (3d Cir. 2015).

<sup>33</sup> Rubenstein, *supra* note 5, at § 3:1.

<sup>34</sup> *Id.* at § 7:21.

<sup>35</sup> *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012).

articulated a lower standard.<sup>36</sup> The following section describes each of the certification elements in detail.

### A. Rule 23(a)'s Express Requirements

#### 1. Rule 23(a): Required Characteristics of a Class Action

The named class representative must meet each of the below elements in order to certify her class. Rule 23(a) establishes the four necessary components of a class action:

(1) the class is so numerous that joinder of all members is impracticable (numerosity);

(2) there are questions of law or fact common to the class (commonality);

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and

(4) the representative parties will fairly and adequately protect the interests of the class (adequacy).<sup>37</sup>

The first two prerequisites, numerosity and commonality, are aimed at absent class members, while the latter two tests, typicality and adequacy, focus on the desired qualifications of the named class representative.<sup>38</sup>

Rule 23(a)(1), the numerosity requirement, is intended to improve judicial economy and social efficiency.<sup>39</sup> This rule does not articulate a minimum number of members for a class to exist, but instead addresses whether joinder would be impractical.<sup>40</sup> Rule 23(a)(1) solves the problem of courts being overrun by a large number of individuals with similar claims.<sup>41</sup> In addition, it allows people who are

<sup>36</sup> *Id.*

<sup>37</sup> Rubenstein, *supra* note 5, at § 1:2 (citing Fed. R. Civ. P. 23).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at § 3.1.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

unable to fund litigation themselves to join the claim of a class plaintiff.<sup>42</sup>

Rule 23(a)(2)'s commonality requirement is "easily met in most cases."<sup>43</sup> To constitute commonality, the plaintiff must demonstrate that the class members "have suffered the same injury."<sup>44</sup> Put differently, the plaintiff must show there is a single issue of law or fact that is common across all class members.<sup>45</sup> Like the numerosity requirement, commonality serves both efficiency and fairness goals.<sup>46</sup> Adjudicating a question once, rather than repeatedly, is more efficient and avoids the unfairness that could result from inconsistent outcomes.<sup>47</sup> Moreover, if a common issue of law or fact is not shared among class members, there is no basis upon which to bind one party to the outcome of another's litigation.<sup>48</sup>

A plaintiff satisfies the Rule 23(a)(3) typicality requirement if "her claim and those of the class arise from the same event or pattern or practice and are based on the same legal theory."<sup>49</sup> The heart of the typicality requirement is that plaintiff and the class members have an interest in prevailing on similar legal claims.<sup>50</sup> Thus, similar to numerosity and commonality, typicality achieves judicial economy because the named plaintiff, by litigating her own case, simultaneously advances the interests of the absent class members.<sup>51</sup> Class member's claims need not be completely factually similar; however, they must

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<sup>42</sup> *Id.*

<sup>43</sup> *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, No. 09-08030, 2013 WL 499474, at \*8 (E.D. La. Feb. 7, 2013).

<sup>44</sup> *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2551 (2011).

<sup>45</sup> Rubenstein, *supra* note 5, at § 3:18.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Singer v. AT&T Corp.*, 185 F.R.D. 681, 689 (S.D. Fla. 1998).

<sup>50</sup> *Zeffiro v. First Pennsylvania Banking & Trust Co.*, 96 F.R.D. 567, 570 (E.D. Pa. 1983).

<sup>51</sup> JOSEPH M. McLAUGHLIN, *McLAUGHLIN ON CLASS ACTIONS* § 4:16 (12th ed. 2015).

be similar enough so that the interests of the class members will be fairly and adequately protected in their absence.<sup>52</sup>

Lastly, Rule 23(a)(4) establishes the adequacy requirement. This inquiry serves to uncover conflicts of interest between named parties and the class they seek to represent.<sup>53</sup> It ensures that named plaintiffs and their counsel understand that they are acting in a representative capacity on behalf of all class members and will prosecute the action fairly, vigorously, and competently.<sup>54</sup> Distinctions between the named plaintiff and absent class members are permitted; only affirmative antagonism between the named representative and the class will defeat certification under Rule 23(a)(4).<sup>55</sup> This requirement is well illustrated by *Amchem Products, Inc. v. Windsor*.<sup>56</sup> There, the Supreme Court held that a group of plaintiffs who had suffered injuries from exposure to asbestos could not adequately represent a class of persons who had merely been exposed to asbestos and might develop injuries later.<sup>57</sup> The Court found a conflict of interest between the named class representatives and the absent members because the former had an interest maximizing immediate payouts, while the latter had an interest in preserving settlement funds for future claims.<sup>58</sup> Thus, due process and fairness form the core policy behind Rule 23(a)(4); the requirement ensures that the named plaintiff will pursue her interests adequately in order to produce a judgment that will justly bind the absent class members.<sup>59</sup>

Though the above requirements are distinct, they are interrelated and tend to overlap.<sup>60</sup> For example, commonality and typicality each serve as markers for whether the named plaintiff's claim and the absent member's claims are sufficiently intertwined so that the interests of the

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<sup>52</sup> *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 598 (3d Cir. 2009).

<sup>53</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 594 (1997).

<sup>54</sup> McLaughlin, *supra* note 51, at § 4:26.

<sup>55</sup> Rubenstein, *supra* note 5, at § 3:58.

<sup>56</sup> *Amchem*, 521 U.S. at 594.

<sup>57</sup> Rubenstein, *supra* note 5, at § 3:58.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at § 3:50.

<sup>60</sup> McLaughlin, *supra* note 51, at § 4:1.

class members will be fairly protected in their absence.<sup>61</sup> In this manner, commonality and typicality also tend to merge with the adequacy-of-representation requirement.<sup>62</sup> Nevertheless, each of the four requirements retains independent significance and all must be present for a class to be certified.<sup>63</sup>

## 2. Rule 23(b): Types of Class Actions

If the class representative satisfies each of the requirements of Rule 23(a), she then must show that that a class action is maintainable under any one of the three categories set forth in Rule 23(b).<sup>64</sup> The Rule 23(b)(1) class action addresses cases where the defendant is bound to treat class members alike or where class members are making claims against a fund insufficient to satisfy all of the claims.<sup>65</sup> The Rule 23(b)(2) class action is relevant for cases where broad, class-wide injunctive or declaratory relief is necessary.<sup>66</sup> Because issues of class ascertainability overwhelmingly pertain to Rule 23(b)(3) class actions, discussed *infra*, this Comment article provides only the above brief descriptions of the first two types of Rule 23(b) actions. Rule 23(b)(3) states:

A class action may be maintained if Rule 23(a) is satisfied and if . . .

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

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<sup>61</sup> Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 158 (1982).

<sup>62</sup> *Id.*

<sup>63</sup> Rubenstein, *supra* note 5, at § 1:2.

<sup>64</sup> McLaughlin, *supra* note 51, at § 5:1.

<sup>65</sup> *Id.* (quoting Allison v. Citgo Petroleum Corp., 151 F.3d 402, 412 (5th Cir. 1998)).

<sup>66</sup> *Id.*

- (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.<sup>67</sup>

Put simply, a Rule 23(b)(3) class action permits judgments for money that bind all class members, except those who opt out.<sup>68</sup> This is the most common category for small claims class actions, and is commonly referred to as the “money damage” class action.<sup>69</sup> Courts have aggregated money damages suits into Rule 23(b)(3) class actions when many individuals have small damage claims.<sup>70</sup> In these situations, aggregation is efficient because it forces wrongdoers to internalize the cost of their wrongdoing and captures the positive externalities associated with litigation.<sup>71</sup> The Supreme Court articulated this concept by noting, “the aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.”<sup>72</sup>

There are two elements at play in Rule 23(b)(3): *predominance*, (common questions must predominate over any questions affecting only individual members); and *superiority*, (class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy).<sup>73</sup> The predominance requirement, while similar to Rule 23(a), is even more demanding.<sup>74</sup> The Supreme Court has held that it is a court's duty to take a “close look” at whether

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<sup>67</sup> FED. R. CIV. P. 23.

<sup>68</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 592 (1997).

<sup>69</sup> Rubenstein, *supra* note 5, at § 4:1.

<sup>70</sup> *Id.* at § 4:47.

<sup>71</sup> *Id.*

<sup>72</sup> *Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980).

<sup>73</sup> *Amchem*, 521 U.S. at 615 (quoting FED. R. CIV. P. 23) (emphasis added).

<sup>74</sup> *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432, (2013).

common questions among class members predominate over individual ones.<sup>75</sup> Thus, a court may not assume that because common issues may be implicated in the trial of every class member's claim, these issues are significant enough to support certification.<sup>76</sup> At the same time, common issues must only predominate; they do not have to be dispositive of the litigation.<sup>77</sup>

In considering whether a plaintiff meets the superiority requirement, courts consider the factors in Rule 23(b)(3)(A)-(D), listed above.<sup>78</sup> However, these factors are not exhaustive.<sup>79</sup> In essence, superiority analysis is composed of three considerations.<sup>80</sup> First, whether alternative methods of adjudication are available.<sup>81</sup> Second, a comparison of fairness between alternative methods and the class action.<sup>82</sup> And third, a comparison of efficiency of each method of adjudicating the claims.<sup>83</sup> For example, courts have denied certification for lack of superiority in consumer class actions where the defendant instituted a refund program to compensate purchasers of a defective product.<sup>84</sup> In this situation, one court held, "it makes little sense to certify a class where a class mechanism is unnecessary to afford the class members redress."<sup>85</sup>

Lastly, an important distinction between Rule 23(b)(3) actions and Rule 23(b)(1) and (2) actions is the absent class members' opportunity to opt out of the litigation. Rule 23(c)(2)(B) requires a court that has certified a Rule 23(b)(3) class to notify members "that the court will exclude from the class any member who requests exclusion."<sup>86</sup> This

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<sup>75</sup> *Id.* (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997)).

<sup>76</sup> *McLaughlin*, *supra* note 51, at § 5:23.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at § 5:63.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (citing *Turcios v. Carma Labs., Inc.*, 296 F.R.D. 638, 649 (C.D. Cal. 2014)).

<sup>85</sup> *Turcios*, 296 F.R.D. at 649.

<sup>86</sup> FED. R. CIV. P. 23.

rule stipulates that such notice must be “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” The “opt out” requirement, along with the other Rule 23(b)(3) prerequisites, provides an added procedural protection not seen elsewhere in Rule 23. These procedural protections have been cited by the Supreme Court as evidence that Rule 23(b)(3) actions allow for class certification under a much wider set of circumstances than the other types of actions.<sup>87</sup>

### B. Traditional Ascertainability

The ascertainability prerequisite is an “implicit” requirement of Rule 23.<sup>88</sup> Its central inquiry is whether the proposed class can be defined in reference to objective criteria.<sup>89</sup> For example, classes that are defined by subjective criteria, such as by a person's state of mind, fail the ascertainability requirement.<sup>90</sup> Courts generally regard ascertainability as a precursor to Rule 23, and have held that the plaintiff bears the burden of pleading an ascertainable class before the court proceeds to a Rule 23 inquiry.<sup>91</sup> As previously noted, the ascertainability requirement is judicially created and is often legitimized by courts as being inherent to the structure of Rule 23 and, therefore, an “axiomatic” part of class certification.<sup>92</sup>

Courts have employed the traditional ascertainability precondition since the late 1960's, shortly after Rule 23's revision in 1966.<sup>93</sup> For example, in 1970, the Fifth Circuit denied certification of a proposed class of “residents . . . active in the ‘peace movement’ who have been harassed and intimidated” by police.<sup>94</sup> The court held that the

<sup>87</sup> Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362 (2011).

<sup>88</sup> Rubenstein, *supra* note 5, at § 3:3.

<sup>89</sup> *Id.*

<sup>90</sup> Mullins v. Direct Digital, LLC, 795 F.3d 654, 660 (7th Cir. 2015).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* (quoting Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981)).

<sup>93</sup> See Hardy v. U.S. Steel Corp., 289 F. Supp. 200, 202 (N.D. Ala. 1967) (holding a class must be defined adequately at the beginning of the lawsuit).

<sup>94</sup> DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970).

proposed class did not “constitute an adequately defined or clearly ascertainable class contemplated by Rule 23.”<sup>95</sup> While the objective definition requirement is necessary for ascertainability, a court does not have to know the identity of each class member before certification.<sup>96</sup> Evidence that the court will be able to identify class members at some stage of the proceeding is sufficient.<sup>97</sup> One district court noted that a rule requiring knowledge of all class members at the certification stage would be particularly problematic for consumer class actions, where the named plaintiff would have no capability of identifying others who purchased a similar defective or deceptive product.<sup>98</sup> “If class actions could be defeated because membership was difficult to ascertain at the class certification stage, there would be no such thing as a consumer class action.”<sup>99</sup>

There are two primary policy goals that justify traditional ascertainability. First, it protects plaintiffs by enabling notice to be provided and by defining who is entitled to relief.<sup>100</sup> Second, it protects defendants by enabling a final judgment that clearly identifies who is bound by it.<sup>101</sup> Judge Hamilton articulated these justifications in *Mullins*, explaining that vague classes pose a problem because “a court needs to be able to identify who will receive notice, who will share in any recovery, and who will be bound by a judgment.”<sup>102</sup>

## II. THE JUDICIAL DEVELOPMENT OF HEIGHTENED ASCERTAINABILITY

The Third Circuit first articulated the heightened ascertainability requirement in the federal appellate courts in *Marcus v. BMW of North America, LLC*.<sup>103</sup> There, the plaintiff sought to certify a class of current and former owners and lessees of BMW vehicles equipped

<sup>95</sup> *Id.*

<sup>96</sup> Rubenstein, *supra* note 5, at § 3:3.

<sup>97</sup> *Id.*

<sup>98</sup> *Astiana v. Kashi Co.*, 291 F.R.D. 493, 500 (S.D. Cal. 2013).

<sup>99</sup> *Id.*

<sup>100</sup> Rubenstein, *supra* note 5, at § 3:3

<sup>101</sup> *Id.*

<sup>102</sup> *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 660 (7th Cir. 2015).

<sup>103</sup> *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012).

with allegedly defective tires over a four-year period.<sup>104</sup> Defendant BMW kept no records of the vehicles it sold that were outfitted with the tires in question.<sup>105</sup> Thus, potential class members could only identify themselves via affidavits.<sup>106</sup> The court disapproved of this, stating that ascertaining a class by potential class member's "say so" would have serious due process implications.<sup>107</sup> In overturning the district court's certification order, the Third Circuit found that Marcus' class definition raised "serious ascertainability issues" because *Marcus* failed to present a "reliable, administratively feasible" way to identify class members.<sup>108</sup> The court held that if class members are impossible to identify without extensive and individualized fact-finding or "mini-trials," then a class action is inappropriate.<sup>109</sup>

*Marcus* diverged from the established ascertainability test by adding a second prong: in addition to proving that the class can be defined by objective criteria, a plaintiff must also prove that there is an administratively feasible mechanism for identifying class members.<sup>110</sup> The court identified three policy reasons for its new rule.<sup>111</sup> First, it eliminates "serious administrative burdens" by requiring that class members be easily identifiable.<sup>112</sup> Second, it protects absent class members by ensuring the "best notice practicable" under Rule 23(c)(2) in a Rule 23(b)(3) action.<sup>113</sup> Third, it protects defendants by providing clarity as to who will be bound by the litigation.<sup>114</sup>

One year later, the Third Circuit decided *Carrera v. Bayer Corp.*, a case widely cited to support the heightened ascertainability

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<sup>104</sup> *Id.* at 592.

<sup>105</sup> *Id.* at 593-94.

<sup>106</sup> *Id.* at 594.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 593-94.

<sup>109</sup> *Id.* at 593.

<sup>110</sup> Daniel Luks, *Ascertainability in the Third Circuit: Name That Class Member*, 82 Fordham L. Rev. 2359, 2380 (2014).

<sup>111</sup> *Marcus*, 687 F.3d at 593.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

requirement.<sup>115</sup> In *Carrera*, plaintiff alleged that defendant falsely and deceptively advertised its dietary supplement, WeightSmart, by claiming it enhanced metabolism.<sup>116</sup> Carrera's class of "all persons who had purchased WeightSmart in Florida" was certified by the district court.<sup>117</sup> The Third Circuit vacated the certification order, holding that Carrera had failed to provide a reliable, administratively feasible mechanism for identifying the class.<sup>118</sup> Like the plaintiff in *Marcus*, Carrera sought to ascertain his class via affidavits of class members.<sup>119</sup> However, Carrera also proposed to identify class members through retailer sales records.<sup>120</sup> To support this, Carrera presented a declaration from a settlement claims processor, which stated there are ways to verify the types of affidavits at issue and screen out fraudulent claims.<sup>121</sup>

The Third Circuit rejected Carrera's proposed model to identify class members, stating that he had presented no evidence that retailers actually possessed the relevant sales records.<sup>122</sup> The court held that a plaintiff cannot merely propose a method of ascertaining a class without any evidentiary support that the method will be successful.<sup>123</sup> The court articulated three reasons for its holding. First, allowing a plaintiff to ascertain class members by affidavit or via another method not proven to be effective would "eviscerate" a defendant's due process right to raise individual challenges and defenses to claims.<sup>124</sup> The court explained that due process requires that a defendant be able to test the reliability of the evidence submitted to prove class

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<sup>115</sup> *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 948 (11th Cir. 2015); *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015); *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2014 WL 580696, at \*5 (N.D. Cal. Feb. 13, 2014).

<sup>116</sup> *Carrera v. Bayer Corp.*, 727 F.3d 300, 304 (3d Cir. 2013).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 309.

<sup>123</sup> *Id.* at 306.

<sup>124</sup> *Id.* at 307.

membership.<sup>125</sup> Second the court posited that a poorly ascertained class would lead to mini-trials to determine class membership.<sup>126</sup> This would diminish efficiency, a benefit expected in a class action.<sup>127</sup> Third, a poorly ascertained class could lead to the distribution of fraudulent or inaccurate claims.<sup>128</sup> The court averred that it would be unfair to absent class members to have their recovery diluted by such claims.<sup>129</sup> Moreover, it would be unfair to defendants if claim dilution resulted in absent class members bringing new claims.<sup>130</sup> The court hypothesized that this could occur if the absent class members argued that the plaintiff did not adequately represent them because he had proceeded with the litigation with the understanding that the absent class members could get less than full relief.<sup>131</sup>

After *Carrera*, the Eleventh Circuit Court of Appeals and several district courts adopted the Third Circuit's heightened ascertainability approach to their class certification analysis.<sup>132</sup> This has resulted in the denial of certification where the plaintiff has failed to show a reliable, administratively feasible way to identify class members.<sup>133</sup> For example, in *Karhu v. Vital Pharmaceuticals, Inc.*, a case factually similar to *Mullins*, a proposed class of purchasers of the defendant's allegedly deceptively advertised dietary supplement was denied certification.<sup>134</sup> The Eleventh Circuit 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,

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 310.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 948 (11th Cir. 2015); *Warnick v. Dish Network LLC*, 301 F.R.D. 551, 556 (D. Colo. 2014); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 299 F.R.D. 555, 572 (E.D. Tenn. 2014).

<sup>133</sup> *Warnick*, 301 F.R.D. at 557.

<sup>134</sup> *Karhu*, 621 F. App'x at 948.

and that identification will be administratively feasible.<sup>135</sup> As the below discussion will show, heightened ascertainability has been very detrimental to class plaintiffs. However, with its holding in *Mullins*, the Seventh Circuit has provided an important counterweight to this approach.<sup>136</sup>

### III. MULLINS V. DIRECT DIGITAL, LLC

#### A. Background and District Court Decision

On March 8, 2013, Vince Mullins filed a multi-state class action complaint against Direct Digital, LLC (“Direct Digital”), alleging violations of the Illinois Consumer Fraud Act, 815 Ill. Comp. Stat. 502/1, et seq. and similar laws in other states.<sup>137</sup> Mullins claimed that the statements on the label of defendant’s product, Instaflex Joint Support (Instaflex), were false and misleading, and as a result, Mullins and members of his proposed class purchased a product that did not perform as advertised.<sup>138</sup> The statements at issue included claims that Instaflex would “relieve discomfort,” “improve flexibility,” and “increase mobility.”<sup>139</sup> The label also made claims that Instaflex was “scientifically formulated,” and “clinically tested.”<sup>140</sup> To support his assertions that the statements were false and misleading, Mullins cited several studies, including one by the National Institute of Health, which concluded that the Instaflex’s primary active ingredient in Instaflex, glucosamine, does not possess joint health benefits.<sup>141</sup>

Defendant Direct Digital did not contest Mullins’ consumer fraud allegations but instead moved to defeat Mullins’ complaint on class

<sup>135</sup> *Id.*

<sup>136</sup> *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658 (7th Cir. 2015).

<sup>137</sup> Complaint at 1, *Mullins v. Direct Digital, LLC*, 2014 WL 5461903 (N.D. Ill. Sept. 30, 2014) (No. 13 CV 1829).

<sup>138</sup> *Id.* at 3.

<sup>139</sup> *Mullins v. Direct Digital, LLC*, No. 13 CV 1829, 2014 WL 5461903, at \*1 (N.D. Ill. Sept. 30, 2014).

<sup>140</sup> *Id.*

<sup>141</sup> Complaint, *supra* note 135, at 2.

ascertainability grounds.<sup>142</sup> Citing *Carrera*, Direct Digital argued that the court should apply the heightened ascertainability standard to its class certification analysis.<sup>143</sup> Direct Digital averred that neither Mullins nor any proposed class member could prove that they purchased or used Instaflex.<sup>144</sup> Further, Direct Digital contended that the studies Mullins cited to show that Instaflex did not work were “widely circulated and publicized.”<sup>145</sup> Direct Digital posited that, unlike Mullins, consumers who were aware of these studies but nonetheless purchased Instaflex could not be class members because they were not defrauded by Direct Digital’s false claims.<sup>146</sup> Thus, the inquiries into whether Mullins and members of his proposed class had actually used Instaflex and whether they had seen the studies would likely lead to individualized fact finding and mini trials.<sup>147</sup> This would result in Mullins failing the heightened ascertainability test, under which the party seeking certification must show an administratively feasible means of identifying class members.<sup>148</sup>

The District Court rejected Direct Digital’s arguments and granted Mullins’ motion to certify a multi-state class.<sup>149</sup> The court did not address the heightened ascertainability question, instead confining its analysis to whether Mullins’ proposed class met the express requirements of Rule 23. First, the court explained that Rule 23(a)’s requirements of commonality and typicality were satisfied as Mullins’ proposed class was confined to the questions of whether Instaflex provided any health benefits to a person's joints and whether the product labeling deceived the consumer.<sup>150</sup> These questions were

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<sup>142</sup> Def.’s Opp’n Mot. to Pl.’s Renewed Mot. for Class Certification at 1, *Mullins v. Direct Digital, LLC*, 2014 WL 5461903 (N.D. Ill. Sept. 30, 2014) (No. 13 CV 1829).

<sup>143</sup> *Id.* at 5.

<sup>144</sup> *Id.* at 6.

<sup>145</sup> *Id.* at 2.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 5.

<sup>149</sup> *Mullins v. Direct Digital, LLC*, No. 13 CV 1829, 2014 WL 5461903, at \*4 (N.D. Ill. Sept. 30, 2014).

<sup>150</sup> *Id.* at 2.

common to all class members, and Mullins' claims were typical of all class members because he relied on the false advertising before purchasing the product.<sup>151</sup> Because these questions were "objectively contained" to Instaflex purchasers, the court held the class was ascertainable.<sup>152</sup>

Second, the court held that Mullins had satisfied Rule 23(b)(3)'s requirements of predominance and superiority.<sup>153</sup> Predominance was satisfied because the question of Instaflex's efficacy were common to all class members; therefore, proceeding to trial as a class would produce a common answer as to whether the advertisements on Instaflex's label were false. Turning to superiority, the court reasoned that the sheer size of the class would "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."<sup>154</sup> Direct Digital appealed to the Seventh Circuit.

### *B. The Seventh Circuit's Decision*

In a unanimous opinion authored by Judge David Frank Hamilton, sitting on a panel with Judge Michael Stephen Kanne and Judge William Joseph Bauer, the Seventh Circuit declined to follow other circuits in adopting the heightened ascertainability requirement to its class certification analysis.<sup>155</sup> The court explained that, when deciding whether to certify a class, Rule 23 requires a court to balance the likely difficulties in managing a class against whether a class is superior to other available methods for fairly and efficiently adjudicating the controversy.<sup>156</sup> The court stated that the heightened ascertainability requirement upsets this balance by giving class manageability

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 3.

<sup>154</sup> *Id.*

<sup>155</sup> *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 660 (7th Cir. 2015).

<sup>156</sup> *Id.*

concerns absolute priority over superiority considerations.<sup>157</sup> Hence, heightened ascertainability effectively bars any class action concerning goods where consumers are unlikely to have documentary proof of purchase.<sup>158</sup>

## 1. The Established Meaning of Ascertainability in the Seventh Circuit

The court made clear that it had long defined ascertainability as the requirement that a class be clearly defined based on objective criteria.<sup>159</sup> Never, the court noted, had its analysis focused on whether, given an adequate class definition, it would be difficult to identify particular members of the class.<sup>160</sup> In order to provide clarity to the Seventh Circuit's settled ascertainability doctrine, Judge Hamilton listed and described three ways that a plaintiff can "flunk" the requirement.<sup>161</sup>

First, classes that are defined too vaguely fail to satisfy the "clear definition" component. To overcome this requirement, classes must identify a particular group, harmed during a particular time frame, in a particular location, in a particular way.<sup>162</sup> Second, classes cannot be defined using subjective criteria, such as a person's state of mind.<sup>163</sup> As support for this proposition, the court cited *Harris v. General Development Corp.*<sup>164</sup> There, a proposed class of "all black persons who were discouraged or excluded from" applying for sales jobs at defendant's corporation during a defined time period was held to be "too imprecise and speculative" to be certified.<sup>165</sup> Third, so-called "fail safe cases," where class membership depends on the liability of the

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 359.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 660 (citing McLaughlin, *supra* note 51, at § 4:2).

<sup>163</sup> *Harris v. General Dev. Corp.*, 127 F.R.D. 655, 659 (N.D. Ill. 1989).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

defendant, are also not properly defined.<sup>166</sup> Such classes raise basic fairness problems for the defendant: “the defendant is forced to defend against the class, but if a plaintiff loses, she drops out and can subject the defendant to another round of litigation.”<sup>167</sup>

## 2. The Court Addresses the Policy Concerns Behind the Heightened Ascertainability Requirement

Direct Digital’s argument to the Seventh Circuit boiled down to the notion that it would be inefficient, unfair to Direct Digital, and unfair to absent and bona-fide class members should the court allow class members to self-identify by affidavit.<sup>168</sup> Judge Hamilton responded to each of these policy concerns and detailed how they could be addressed under Rule 23’s express requirements and under the Seventh Circuit’s settled understanding of class ascertainability.<sup>169</sup>

First, the court addressed the efficiency concerns articulated in *Carrera*. The court responded to the argument that heightened ascertainability “eliminates serious administrative burdens” by ensuring easy identification of class members.<sup>170</sup> This is accomplished by eliminating “extensive and individualized fact-finding or mini-trials”.<sup>171</sup> The court provided two reasons against applying heightened ascertainability on these grounds: 1) heightened ascertainability is superfluous because Rule 23(b)(3) already addresses case manageability;<sup>172</sup> and 2) the requirement conflicts with the well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns.<sup>173</sup> Judge Hamilton noted that

<sup>166</sup> *Mullins*, 795 F.3d at 660.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 662.

<sup>169</sup> *Id.* at 663-672.

<sup>170</sup> *Id.* at 663 (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012)).

<sup>171</sup> *Id.* (quoting *Carrera v. Bayer Corp.*, 727 F.3d 300, 304 (3d Cir. 2013)).

<sup>172</sup> *Id.* (citing *Luks*, *supra* note 110, at 2395).

<sup>173</sup> *Id.* (citing *Byrd v. Aaron’s Inc.*, 784 F.3d 154, 175 (3d Cir. 2015) (Rendell, J., concurring)).

Rule 23(b)(3)'s superiority requirement is comparative; the rule requires a court to balance possible efficiencies with an eye toward other available methods to resolve the dispute.<sup>174</sup> By imposing heightened ascertainability without considering superiority, a court may deny justice in a case where the requirement is difficult to satisfy but there is no realistic alternative to class treatment.”<sup>175</sup>

In addition, the court pointed out that serious administrative problems related to identifying class members typically arise after settlement or judgment, when much more is known about available records and response rates.<sup>176</sup> The court advised that district judges should wait until this stage of litigation to consider such matters, and if a problem is truly insoluble, the court may decertify the class.<sup>177</sup> Therefore, the court held that, “refusing to certify on manageability grounds alone should be the last resort.”<sup>178</sup>

Second, the court addressed the notice concerns put forth in *Carrera*. Judge Hamilton rebutted the argument that the heightened ascertainability requirement is needed to protect absent class members.<sup>179</sup> In sum, this argument states that if absent members do not receive actual notice of the action because they could not be ascertained, they lose their opt out rights and thus are unfairly bound by the judicial proceeding.<sup>180</sup> Judge Hamilton noted that this premise is erroneous because Rule 23(c)(2)(B) requires the “best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort,” not actual notice.<sup>181</sup> Therefore, Rule 23 recognizes that some members may be impossible to identify.<sup>182</sup> The court also noted the unlikelihood that someone with a claim in a low value consumer case would wish to opt

<sup>174</sup> *Id.* at 664 (quoting FED.R.CIV.P. 23(b)(3)).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 665 (quoting *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013)).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* (quoting *Shaw*, *supra* note 25, at 2367–69).

out and litigate a claim individually.<sup>183</sup> Accordingly, the court ruled, “due process simply does not require the ability to identify all members of the class at the certification stage.”<sup>184</sup>

Third, the court addressed the concern that individuals without valid claims would submit fraudulent affidavits, receive a payment, and as a consequence dilute the share of recovery for true class members.<sup>185</sup> Judge Hamilton held that Direct Digital had presented no evidence for this proposition, and the likelihood of that scenario seemed low, “perhaps to the point of being negligible,” especially when one considers that it is not unusual to have participation rates in class action cases of 10 to 15 percent and in recent cases rates lower than five percent.<sup>186</sup> Moreover, the court noted that if fraudulent or inaccurate claims actually caused dilution, then deserving class members would still receive something.<sup>187</sup> However, if certification were denied in case like *Mullins*, then the class would receive nothing.<sup>188</sup> The court ruled that to accept this argument in a case like this would lead to the absurd result of depriving bona fide class members of any recovery at all as a means to ensure they do not recover too little.<sup>189</sup>

Fourth, the court responded to the argument that the heightened ascertainability requirement is needed to protect a defendant's due process rights.<sup>190</sup> The court summarized this argument with a quote from the Third Circuit: “[F]orcing [the defendant] to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 666.

<sup>186</sup> *Id.* at 667 (quoting Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 119–20 (2007)).

<sup>187</sup> *Id.* at 668.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 669.

implications.”<sup>191</sup> Judge Hamilton agreed that a defendant has a due process right to challenge plaintiffs’ evidence at any stage of the case, to not pay a plaintiff in excess of its liability and to present individualized defenses if those defenses affect its liability.<sup>192</sup> However, this right does not translate into the right to ascertain the identity of class members with perfect accuracy at the certification stage.<sup>193</sup> So long as the defendant is given a fair opportunity to challenge the claim to class membership and to contest the amount owed each claimant *during the claims administration process*, the defendant’s due process rights have been protected.<sup>194</sup>

Lastly, the court discussed one of the core policy reasons for Rule 23 and the class action device: deterring and punishing corporate wrongdoing.<sup>195</sup> The court posited that the heightened ascertainability requirement effectively immunizes defendants from liability because they chose not to maintain records of the relevant transactions.<sup>196</sup> To summarize this point, under heightened ascertainability, if the defendant has kept no records concerning the harmful product and a class member can produce none, class certification is denied and the defendant escapes liability. Judge Hamilton argued that such a regime would immunize significant corporate misconduct; therefore, 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.<sup>197</sup>

#### IV. THE CASE FOR ABANDONING HEIGHTENED ASCERTAINABILITY

In the aftermath of *Carrera*, the Third Circuit decided *Byrd v. Aaron’s, Inc.*, where it attempted to respond to critiques of the

<sup>191</sup> *Id.* (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012)).

<sup>192</sup> *Id.* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2560–61 (2011)).

<sup>193</sup> *Id.* at 670–671.

<sup>194</sup> *Id.* (emphasis added).

<sup>195</sup> *Id.* at 668.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 669.

heightened ascertainability requirement and clarify its application.<sup>198</sup> This section responds to the Third Circuit's attempts to save heightened ascertainability as a mechanism to demonstrate the practical difficulties in applying the requirement, its logical fallacies, and its tendency to promote opaque business practices and poor record keeping as a means to avoid liability. In addition, this section argues that heightened ascertainability should ultimately be abandoned as the policy concerns it purports to address are sufficiently resolved by the Seventh Circuit's approach.

*A. Heightened Ascertainability Imposes a Records Requirement that Creates an Unnecessary Burden on Class Plaintiffs*

*Byrd* involved an invasion of privacy claim against a company that leased laptop computers.<sup>199</sup> The defendant installed spyware on the computers that was capable of collecting screenshots, keystrokes, and webcam images.<sup>200</sup> The Third Circuit certified the class, ruling that it was ascertainable because of the existence of objective records that contained full identity of the customers who leased or purchased the computers.<sup>201</sup> The *Byrd* court declared that heightened ascertainability only requires a plaintiff to show a way that class members *can be* identified; it does not require her to actually identify the class members nor does it impose a records requirement.<sup>202</sup> However, it is difficult to see how a class plaintiff could surmount heightened ascertainability's requirement that class members be identified in an "administratively feasible" manner absent a record that actually identifies every class member. In cases involving low cost products, consumers would need to keep a receipt or a can, bottle, tube, or wrapper of the offending item in order to succeed in bringing a class action.<sup>203</sup>

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<sup>198</sup> *Byrd v. Aaron's Inc.*, 784 F.3d 154, 161 (3d Cir. 2015).

<sup>199</sup> *Id.* at 159.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 169.

<sup>202</sup> *Id.* at 164.

<sup>203</sup> *Id.* at 174-75 (Rendell, J., concurring).

Even in cases where defendants have kept records, heightened ascertainability imposes a substantial burden to certification. Indeed, in two other Third Circuit cases post-*Marcus*, class certification was denied when the defendants kept records of the allegedly fraudulent transactions and plaintiffs presented methods of identifying class members based on those records.<sup>204</sup> In *Hayes v. Wal-Mart Stores, Inc.*, the plaintiff brought consumer fraud claims against Wal-Mart Stores (“Wal-Mart”) for allegedly selling him a service plan on an “as-is” item not covered by the plan.<sup>205</sup> Wal-Mart maintained the sales records at issue, but argued it had no way of determining which transactions were for “as-is” items.<sup>206</sup> The court declared, “the nature or thoroughness of a defendant's recordkeeping does not alter the plaintiff's burden,” and de-certified the class.<sup>207</sup> In doing so, the court cautioned the plaintiff that in order to prevail on remand, he must “offer some reliable and administratively feasible” method for the court to determine whether an “as-is” item was purchased.<sup>208</sup>

As *Hayes* demonstrates, heightened ascertainability's administrative feasibility requirement presents class plaintiffs with a nearly impossible burden. It narrows the availability of class actions in a way that the drafters of Rule 23 could not have intended.<sup>209</sup> It is easy to see how; the requirement bars certification not only in cases where the defendant lacks records, but also in cases where the defendant possesses records but their consultation would not be administratively feasible in the opinion of the court. Comparing *Byrd* and *Hayes* illustrates this point. In *Byrd*, the plaintiff was able to certify his class by pointing to a clean list of names that easily identified class members.<sup>210</sup> In *Hayes*, certification was denied because the names of

<sup>204</sup> *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 353 (3d Cir. 2013); *Haskins v. First Am. Title Ins. Co.*, No. CIV. 10-5044 RMB/JS, 2014 WL 294654, at \*6 (D.N.J. Jan. 27, 2014).

<sup>205</sup> *Hayes*, 725 F.3d at 352.

<sup>206</sup> *Id.* at 355.

<sup>207</sup> *Id.* at 356.

<sup>208</sup> *Id.*

<sup>209</sup> *Byrd v. Aaron's Inc.*, 784 F.3d 154, 172 (3d Cir. 2015) (Rendell, J., concurring).

<sup>210</sup> *Id.* at 169.

class members were mixed with names of other purchasers and separating them was held to be administratively infeasible.<sup>211</sup> As these cases demonstrate, unless ideal records exist, class certification in consumer cases will likely fail under heightened ascertainability.

Further, as the *Mullins* court noted, heightened ascertainability conflicts with the settled proposition that courts should not deny certification merely on the basis of concerns over the manageability of identifying class members.<sup>212</sup> Such concerns are appropriately addressed at the claims administration stage.<sup>213</sup> There, courts can rely on a claim administrator's various auditing processes and other techniques to make empirical assessment of the likelihood of fraud or inaccuracy.<sup>214</sup> Thus, it is inappropriate for a court to erect hypothetical roadblocks to identifying class members when deciding whether to certify a class.<sup>215</sup>

### *B. The Administratively Feasible Requirement is Vague and Inconsistently Applied*

The administratively feasible requirement speaks to a central concern of courts applying heightened ascertainability: the elimination of so-called “mini-trials” to identify class members.<sup>216</sup> Such mini-trials are necessary to protect a defendant's due process rights by enabling him to test the reliability of the evidence submitted to prove class membership.<sup>217</sup> However, mini-trials result in “serious administrative burdens that are incongruous with the efficiencies expected in a class action.”<sup>218</sup> Yet, courts applying heightened ascertainability have failed to define when an inquiry into identifying class members results in a mini-trial or at what point a defendant's due process rights have been

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<sup>211</sup> *Hayes*, 725 F.3d at 356.

<sup>212</sup> *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 663 (7th Cir. 2015).

<sup>213</sup> *Id.* at 667.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012).

<sup>217</sup> *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013).

<sup>218</sup> *Id.*

violated. The *Byrd* court declared, “*Carrera* does not suggest that *no* level of inquiry as to the identity of class members can ever be undertaken . . . [T]he size of a potential class and the need to review individual files to identify its members are not reasons to deny class certification.”<sup>219</sup> Still, the Third Circuit denied certification in *Marcus*, *Hayes*, and *Carrera* for precisely these reasons.<sup>220</sup> Moreover, the Third Circuit has been remarkably inconsistent in its rulings as to whether the consultation of records results in a mini-trial. For example, in *In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation*, the Third Circuit certified a class where member identification required consulting the defendant’s business records and then “follow[ing] a few steps to determine whether the borrower is the real party in interest.”<sup>221</sup> Why such an approach was not sufficient in *Marcus* and *Hayes* is not clear.

Further, in *Byrd*, the court ruled that household members of the computer lessee plaintiffs could be included in the class.<sup>222</sup> This was because household members could be “easily objectively verified through personal and public records. And their usage of the owner/lessee’s computers can also be easily objectively established.”<sup>223</sup> This reasoning is unsound. To see how, consider a scenario where a sibling of a class member in *Byrd* moved into the household from another state. Say this sibling began paying rent and living in the home but did not establish other public records to indicate residency. It is impossible to tell how the court could determine whether the sibling used the class member’s computer without individualized fact finding and a mini-trial. As this hypothetical demonstrates, applying the administratively feasible requirement is problematic and invites inconsistency because it is poorly defined.

<sup>219</sup> *Byrd v. Aaron's Inc.*, 784 F.3d 154, 171 (3d Cir. 2015).

<sup>220</sup> *Carrera*, 727 F.3d at 306; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 356 (2011); *Marcus*, 687 F.3d at 593.

<sup>221</sup> *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, PNC Bank NA, 795 F.3d 380, 397 (3d Cir. 2015).

<sup>222</sup> *Byrd*, 784 F.3d at 169.

<sup>223</sup> *Id.*

What is more, class actions inherently involve administrative burdens, individual inquiry, and some uncertainty.<sup>224</sup> The *Byrd* court noted, “There will always be some level of inquiry required to verify that a person is a member of a class.”<sup>225</sup> Heightened ascertainability imposes an unnecessary burden on plaintiffs because reviewing the files of persons seeking to join a class is an intrinsic part of class action litigation. Denying certification on these grounds is unjustified where the plaintiff has presented an objectively verifiable class.

*C. Heightened Ascertainability Incentivizes Poor Record Keeping and Immunizes Corporate Misconduct*

As the *Mullins* court noted, heightened ascertainability bars low-value consumer class actions where plaintiffs do not have documentary proof of purchases and, sometimes, even when they do.<sup>226</sup> Thus, heightened ascertainability effectively immunizes defendants from liability and encourages poor or no record keeping.<sup>227</sup> An unscrupulous corporation could market and sell a low cost dietary supplement it knows to be ineffective and potentially avoid civil liability in the Third Circuit. To do so, it would simply need to sell such a product to third party distributors and destroy all records of the transactions. The individual purchaser’s monetary claim would be so low that the case would never be brought except as a class action.<sup>228</sup> Under heightened ascertainability, a potential class could never be certified; affidavits are not an acceptable means to identify class members and there would be no records that could possibly provide a plaintiff with an “administratively feasible” way to identify purchasers. In this manner, heightened ascertainability can become a tool for businesses to defraud.

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<sup>224</sup> Shaw, *supra* note 25, at 2397.

<sup>225</sup> *Byrd*, 784 F.3d at 170.

<sup>226</sup> *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 662 (7th Cir. 2015).

<sup>227</sup> *Id.* at 668.

<sup>228</sup> Shaw, *supra* note 25, at 2359.

*D. Rule 23's Express Requirements Sufficiently Address the Policy  
Concerns Motivating Heightened Ascertainability*

This subsection summarizes four core points made in *Mullins* to demonstrate that heightened ascertainability is a superfluous requirement. First, Rule 23(b) (3) already addresses concerns about administrative inconvenience.<sup>229</sup> Rule 23(b)(3)'s superiority clause requires that a class action be superior to other available methods for fairly and efficiently adjudicating the controversy.<sup>230</sup> The likely difficulties in managing a class action are one factor in this determination.<sup>231</sup> Thus, Rule 23(b)(3) requires a court to balance efficiency against other available methods of resolving the dispute.”<sup>232</sup> The heightened ascertainability approach upends this balance.<sup>233</sup> It makes one factor unconditional and overlooks the reality that without certification, class members with valid small claims would receive nothing.<sup>234</sup> Thus, when the *realistic* alternative to a class action is no litigation at all, a court should not deny certification based on efficiency considerations.<sup>235</sup>

Second, the concern that absent class members will not receive notice of the suit and be denied their right to opt out of the litigation is addressed under Rule 23(c)(2)(B). This rule states that a “court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”<sup>236</sup> Thus, actual notice is not required under Rule 23 nor is it required to satisfy constitutional due process.<sup>237</sup> If actual notice is not possible, courts may use alternative

<sup>229</sup> *Mullins*, 795 F.3d at 663.

<sup>230</sup> FED. R. CIV. P. 23.

<sup>231</sup> *Id.*

<sup>232</sup> *Mullins*, 795 F.3d at 658.

<sup>233</sup> *Id.* at 558.

<sup>234</sup> *Id.* at 558, 666 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997)).

<sup>235</sup> See *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

<sup>236</sup> FED. R. CIV. P. 23.

<sup>237</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314–15 (1950).

means such as paid advertising without offending due process.<sup>238</sup> Therefore, as long as notice satisfies the standard of Rule 23(b)(3), there is no due process violation.<sup>239</sup> By insisting on the identification of class members via an administratively feasible process, heightened ascertainability comes close to requiring actual notice.<sup>240</sup> This runs contrary to settled law and Rule 23. Moreover, the argument that lack of notice would result in an absent class member being deprived of her right to opt out of the class action because she desired to litigate a low value claim like the one in *Mullins* is unconvincing. As Judge Posner noted, “only a lunatic or a fanatic sues for \$30.”<sup>241</sup> Thus, the concern that absent class members may not receive notice is not a rational justification for heightened ascertainability.

Third, courts have posited that heightened ascertainability protects absent class members from unfairness where there is a “significant likelihood their recovery will be diluted by fraudulent or inaccurate claims.”<sup>242</sup> The *Mullins* court held that there was no empirical evidence that this risk existed.<sup>243</sup> Moreover, if a class definition is overbroad and there is a risk that a defendant would have to pay illegitimate claims, such a class would likely be blocked by Rule 23(a)’s commonality and typicality requirements.<sup>244</sup> Hence, the claims dilution argument is based on nonexistent dangers that would be addressed by Rule 23’s express requirements, if the dangers actually materialized.

Fourth, heightened ascertainability is offered as a means to protect a defendant’s due process right to challenge the evidence presented to prove class membership.<sup>245</sup> This argument too, is without merit. Using

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<sup>238</sup> *Mullins*, 795 F.3d at 665 (citing *Hughes v. Kore of Indiana Enterprise, Inc.*, 731 F.3d 672, 676–77 (7th Cir.2013)).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 666.

<sup>241</sup> *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

<sup>242</sup> *Stewart v. Beam Glob. Spirits & Wine, Inc.*, No. CIV. 11-5149 NLH/KMW, 2014 WL 2920806, at \*10 (D.N.J. June 27, 2014) (quoting *Carrera v. Bayer Corp.*, 727 F.3d 300, 310 (3d Cir. 2013)).

<sup>243</sup> *Mullins*, 795 F.3d at 667.

<sup>244</sup> *Shaw*, *supra* note 25, at 2402 (2015).

<sup>245</sup> *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013).

the heightened ascertainability requirement to deny class certification is not the only means, or even the best means, to protect a defendant's due process rights.<sup>246</sup> As long as the defendant is given the opportunity to challenge a class member's claim during the damages phase, the defendant's due process rights are protected.<sup>247</sup>

## V. PROPOSED SOLUTIONS

As the above analysis indicates, a return to the text of Rule 23 is likely the simplest solution to resolve the concerns that heightened ascertainability attempts to address. By strictly applying Rule 23, the rights of all parties in a class action will be adequately protected and courts will have no justification for creating new rules. However, courts have long accepted the doctrine of traditional ascertainability.<sup>248</sup> In order to limit the recent expansion of this doctrine,<sup>249</sup> it is necessary to amend Rule 23 to clarify its application and limit its scope.

There are several amendments the Judicial Conference's Committee on Rules of Practice and Procedure could consider to achieve this end. First, the Committee could codify ascertainability as an additional prerequisite to Rule 23(a). For example:

23(a)(5): the class is adequately defined by objectively specifying a particular group that was harmed during a particular time frame, in a particular location, in a particular way.<sup>250</sup>

This proposed prerequisite provides a precise definition of ascertainability and address concerns relating to overbroad or poorly defined classes. Moreover, it speaks to the concern over administrative inefficiency. The efficiency of identifying class members is maximized if the class is objectively defined. Second, a limiting sentence could be

<sup>246</sup> *Mullins*, 795 F.3d at 671.

<sup>247</sup> *Id.* (citing *Lilly v. Jamba Juice Co.*, No. 13-cv-02998-JST, 2014 WL 4652283, at \*6 (N.D. Cal. Sept. 18, 2014)).

<sup>248</sup> Rubenstein, *supra* note 5, at § 3:1.

<sup>249</sup> *Mullins*, 795 F.3d at 657.

<sup>250</sup> McLaughlin, *supra* note 51, at § 4:2.

added to Rule 23(b) to reign in the ascertainability doctrine's scope. For example:

23(b)(3): the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.<sup>251</sup> *When making this determination, a court should not consider the administrative feasibility or efficiency of identifying class members in its analysis* (proposed amendment in italics).

This proposed amendment would bar courts from denying certification due to the defendant's lack of records, the defendant's poor record keeping or hypothetical difficulties in consulting the defendant's records. The above amendments deserve consideration. The current state of the law puts class plaintiffs in some circuits at a significant disadvantage because they are unable to certify a class without documentary evidence that actually identifies every potential class member. This effectively bars consumer class actions and severely limits any class action where the defendant has kept complex records. Such judicially created restrictions on class certification attack the core purposes of Rule 23 and should be abandoned. Only then will all class plaintiffs have the ability to seek relief in the courts and will companies engaged in deceitful practices be held accountable.

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<sup>251</sup> FED. R. CIV. P.23.