

Ascertaining the Importance of Ascertainability in New Jersey State and Federal Courts

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Most New Jersey litigators and first-year law students are generally familiar with the four threshold requirements for class action certification under Federal Rule of Civil Procedure 23: numerosity, commonality, typicality, and adequacy (or adequate representation). Most are also familiar with the relatively recent development of the requirement that a class be ascertainable. Ascertainability generally requires that members of a proposed class be readily identifiable through objective criteria, and that administratively feasible method exists for identifying class members and determining class membership. Courts and scholars have both praised and criticized the ascertainability doctrine, resulting in contrasting opinions and approaches even here in New Jersey. Indeed, the requirement of ascertainability in New Jersey state and federal courts differs significantly, and lawyers must be aware of these differences when litigating class action claims.

Most of the legal community acknowledges that there are benefits for requiring classes to be defined in a precise way that allows members of the class to be readily identifiable. Notably, ascertainability protects absent class members by requiring that the parties identify who must receive notice of class certification, protects defendants by determining who will be bound by the judgment so subsequent litigation is avoided, ensures there is a way to identify class members that may be entitled to compensation or other relief, and eliminates administrative burdens required to identify class members that are inconsistent with class actions.

On the other hand, commentators assert that the benefits of imposing ascertainability as an additional requirement for certification must be measured against the consequences to the parties, intended or otherwise. For example, it has been argued that requiring classes to be readily identifiable through objective criteria and utilizing administratively feasible methods could deter plaintiffs from pursuing small-value consumer class

actions due to the perceived difficulties of obtaining specific evidence of individual class membership.

This article will briefly discuss the evolution of ascertainability as a requirement for class certification in the Third Circuit and contrast it with the New Jersey Appellate Division's apparent rejection of any ascertainability requirement with respect to 'low-value consumer class actions.' The article concludes by addressing the implications of these cases for plaintiffs and defendants in class action cases in New Jersey. Understanding these contrasting approaches is important for litigators involved in defending class actions.

Both the Third Circuit and the District of New Jersey have been particularly active in considering and analyzing the ascertainability doctrine. In *Marcus v. BMW of North America, LLC*,¹ the Third Circuit first discussed the ascertainability requirement for class certification at length and expressed a preference for the doctrine, explaining that a class must be "currently and readily ascertainable based on objective criteria." Although the Third Circuit did not hold that the proposed class in *Marcus* failed due to its inability to meet the ascertainability requirement, it explained that on remand, if the plaintiff desired to re-certify the class, the district court would have to resolve the issue of whether the class could be ascertainable either from the defendant's records or through some other feasible alternative.²

The ruling in *Marcus* paved the way for the more recent Third Circuit case interpreting the ascertainability requirement, *Carrera v. Bayer Corp.*³ In *Carrera*, the sole issue before the court was whether the purported class members were ascertainable. There, the plaintiff filed a class action alleging that Bayer falsely and deceptively advertised one of its weight-loss pills (WeightSmart) by claiming the pills had metabolism-enhancing effects, even though the product failed to produce the advertised and desired results.⁴ The plaintiff moved to certify a Federal Rule 23(b)(3) class of "all persons who purchased WeightSmart in Florida."⁵ In its challenge

to certification, Bayer argued that the class was not readily ascertainable because there was no documentation to prove class membership, as Bayer only sold the product to retailers like CVS, who did not keep records of who purchased the pills. Additionally, purchasers who were issued receipts were unlikely to keep them, and in certain circumstances the receipts would not even affirmatively identify the purchasers.⁶ The district court rejected these arguments and certified the class.⁷

On appeal, the Third Circuit adhered to its decision in *Marcus*, explaining that “[c]lass ascertainability is ‘an essential prerequisite of a class action, at least with respect to actions under Rule 23(b)(3).’”⁸ The court noted that to satisfy this ascertainability requirement “the 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.”⁹ The plaintiff argued that the class could be ascertained either by: 1) using records from retailers who purportedly track customers through online purchases or loyalty cards, or 2) through affidavits from class members attesting to their purchases of WeightSmart.¹⁰ The *Carrera* court rejected both of these approaches.

In short, the Third Circuit in *Carrera* found there was no evidence that a single purchaser could be identified through online sales or a loyalty program, and there was no evidence that retailers had records for the relevant period.¹¹ Additionally, it concluded the affidavit method failed because there was a strong likelihood purchasers would have difficulty accurately recalling their purchases of WeightSmart, which would inhibit the defendant’s ability to challenge class membership. The court also rejected ascertainability-by-affidavit based on the potential for individuals to fraudulently join the class, which would result in a dilution of recovery for *true* class members.¹² Accordingly, the Third Circuit concluded the class failed the ascertainability test because determining who was a member of the class would require “mini trials,” and decertified the class.¹³

A recent Appellate Division opinion shows how the playing field in New Jersey state court is much different. In *Daniels v. Hollister Co.*,¹⁴ the Appellate Division appeared to reject ascertainability as a requirement for class certification under New Jersey law, at least with respect to “low value consumer class actions.” In that case, the plaintiff filed a class action lawsuit against defendant Hollister Company, based on a promotion

whereby customers purchasing at least \$75 worth of merchandise were given a \$25 gift card.¹⁵ The plaintiff alleged that although the gift cards did not contain an expiration date, the defendant voided all outstanding cards on Jan. 30, 2010.¹⁶ The plaintiff claimed his gift card, which expressly stated it had no expiration date, was dishonored when he presented it at one of the defendant’s stores in New Jersey.¹⁷ The defendant acknowledged that some cards expressly stated that they had no expiration date, but pointed to store signs and emails to customers who joined its mailing list, which informed customers the cards would expire on Jan. 30, 2010.

The defendant appealed the grant of class certification and argued that the proposed class failed to meet the ascertainability requirement, which was implicitly adopted by the New Jersey Supreme Court and expressly adopted by the Third Circuit.¹⁸ Specifically, the defendant relied on a footnote in the Supreme Court’s opinion in *Iliadis v. Wal-Mart Stores, Inc.*,¹⁹ in support of its argument that New Jersey had adopted the ascertainability doctrine, which noted that:

[e]ven before one reaches the four prerequisites for a class action, there must be an adequately defined class...the proposed class must be sufficiently identifiable without being overly broad. The proposed class may not be amorphous, vague, or indeterminate and it must be administratively feasible to determine whether a given individual is a member of the class.

The defendant further argued that the plaintiff’s proposed class was not readily ascertainable because the defendant would not be able to “test class membership,” absent class members would have no opportunity to opt out, and the preclusive effect of a judgment would be unknowable and unenforceable.²⁰

The Appellate Division rejected these arguments and concluded that “our courts have never viewed Rule 4:32-1 as requiring that a class be ‘ascertainable’ as a condition for certification.”²¹ The court found that the *Iliadis* footnote “simply emphasized the need for a clear *definition* of the contours of the class,” and said nothing regarding whether class members must be ascertainable for certification.²²

Thus, according to this panel of the Appellate Division, there was no ascertainability requirement under New Jersey law. Furthermore, the court refused

the defendant's alternate request that it affirmatively hold that an ascertainability requirement is implicitly contained in Rule 4:32-1. The court explained that in its opinion, ascertainability in the federal courts remains uncertain, and cited to courts that adopted and rejected ascertainability as a requirement for class certification. The Appellate Division further indicated that the federal doctrine "imposes far too heavy a burden on class certification where the purported injuries to the class members are so minimal as to preclude the likelihood they would be individually asserted."²³

Thus, the *Daniels* court held that it "declined to water down—if not eliminate—the availability of the class-action device to low-value consumers by appending an onerous requirement that serves no equitable purpose and cannot be located in Rule 4:32-1."²⁴ Notably, while the Third Circuit in *Carrera* was wary of affidavits, the New Jersey court seemed to accept the submission of affidavits as a means to identify individual class members.

As demonstrated by these cases, the requirements for class certification differs significantly between New Jersey state and federal courts. It remains to be seen whether the New Jersey Supreme Court will weigh in on the issue of

ascertainability and adopt the doctrine as a requirement for class certification, as the Third Circuit has. It likewise remains to be seen whether the Third Circuit will decide to depart from its previous rulings and limit the ascertainability requirement. Nevertheless, as it stands today, a plaintiff in a 'low-value consumer class action' case in New Jersey state court may not need to establish that the class is 'readily ascertainable' based on objective criteria in order to obtain certification. Thus, plaintiffs will continue to look to file class action cases in state court to receive the benefit of the *Daniels* holding.

In the Third Circuit and the District of New Jersey, however, a plaintiff pursuing a class action must demonstrate that the class is readily ascertainable through objective criteria before the court will grant certification. Accordingly, defendants should look for all possible ways to remove a class action to federal court where ascertainability is required so they can realistically determine who will and will not be bound by any judgment or settlement. ■

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Endnotes

1. 687 F.3d 583, 593 (3d Cir. 2012).
2. *Id.* at 594.
3. 727 F.3d 300 (3d Cir. 2013).
4. *Id.* at 304.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 306.
9. *Id.* at 308.
10. *Id.*
11. *Id.*
12. *Id.* at 309-10.
13. *Id.* at 305, 310.
14. 440 N.J. Super. 359 (2015).
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 364.
19. 191 N.J. 88 (2007).
20. *Id.* at 364-65.
21. *Id.* at 365.
22. *Id.* at 365 (emphasis added).
23. *Id.* at 368.
24. *Id.* at 370.