

2014

Ascertainability in the Third Circuit: Name That Class Member

Daniel Luks

Fordham University School of Law

Recommended Citation

Daniel Luks, *Ascertainability in the Third Circuit: Name That Class Member*, 82 Fordham L. Rev. 2359 (2014).

Available at: <http://ir.lawnet.fordham.edu/flr/vol82/iss5/14>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

ASCERTAINABILITY IN THE THIRD CIRCUIT: NAME THAT CLASS MEMBER

Daniel Luks*

The 1966 amendment of Rule 23 provided plaintiffs with an extremely powerful procedural device. Since then, much controversy has surrounded Rule 23. Judges have often shown hostility towards certification of frivolous class actions that result in large fees for attorneys but little recovery for class members. The Third Circuit has recently used the requirement that a class be ascertainable to create an extremely high bar for certification of small-claims consumer class actions. Such class actions in the Third Circuit are essentially fruitless unless a plaintiff can individually identify all potential class members prior to class certification. The Third Circuit is the first circuit court to use ascertainability to create a bar to class certification. Class certifications will vary widely depending on whether or not the circuit in which the class action is brought has adopted the Third Circuit's interpretation of ascertainability.

TABLE OF CONTENTS

INTRODUCTION.....	2360
I. GENERAL BACKGROUND OF CLASS ACTIONS.....	2361
A. <i>The Purpose of Class Actions</i>	2362
1. The Negative-Value Conception.....	2363
2. The Regulatory Conception: Private Attorneys General Model	2364
B. <i>The Explicit Requirements of Rule 23</i>	2365
C. <i>The Ascertainability Requirement</i>	2369
1. The Origins of Ascertainability.....	2369
2. Tests For Ascertainability	2372
3. Subjective Classes.....	2373
II. THE UNACKNOWLEDGED SPLIT REGARDING ASCERTAINABILITY...	2374
A. <i>The Traditional Ascertainability Approach: Ascertainability Applied As a Definitional Requirement Demanding a Precisely Defined Class Based on Objective Terms</i>	2375
B. <i>The Third Circuit's Heightened Approach to Ascertainability</i>	2379

* J.D. Candidate, 2015, Fordham University School of Law; B.A., 2011, University of Michigan. I would like to thank Professor Marc Arkin for her guidance and invaluable assistance in writing this Note.

III. THE POLICY ARGUMENTS SUPPORTING THE TWO DIFFERENT APPLICATIONS OF ASCERTAINABILITY	2388
A. <i>The Policy Reasons for the Traditional Approach to Ascertainability</i>	2388
B. <i>The Policy Arguments Supporting the Third Circuit Approach</i>	2390
IV. COURTS SHOULD APPLY ASCERTAINABILITY SO AS NOT TO DESTROY CONSUMER CLASS ACTIONS.....	2393
CONCLUSION.....	2396

INTRODUCTION

Kashi Brand, a producer of a variety of health foods, claimed to use only natural, simple ingredients in many of its products.¹ When purchasers of Kashi products discovered that it used a wide array of artificial ingredients, they filed a class action complaint.² The complaint alleged that Kashi engaged in deceptive advertising by saying that its products contained no artificial ingredients.³

After determining that all of the requirements of Federal Rule of Civil Procedure 23 were met, a judge in the Southern District of California certified a class of all California consumers who had purchased a Kashi product with a label claiming “Nothing Artificial” on or after August 24, 2007.⁴ Kashi had argued that the class could not be certified because no records existed that allowed for easy identification of class members.⁵ The court rejected this argument, noting, “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.’”⁶

Had *Astiana v. Kashi Co.* been brought in the Third Circuit, the consumer class would almost certainly have *not* been certified under that circuit’s recent ascertainability doctrine jurisprudence.⁷ Traditionally, ascertainability requires that a class be identifiable and “susceptible of precise definition.”⁸ Under this standard, the *Kashi* class above satisfies ascertainability.⁹ Although the requirement does not receive much discussion, a recent string of Third Circuit cases has emphasized the importance of ascertainability in small-claims consumer class actions.¹⁰ These cases make clear that to bring a damages class action in the Third

1. *See Astiana v. Kashi Co.*, 291 F.R.D. 493 (S.D. Cal. 2013).

2. *See id.* at 499.

3. *See id.*

4. *Id.* at 510.

5. *See id.* at 500.

6. *Id.* (quoting *Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 523, 536 (N.D. Cal. 2012)).

7. *See, e.g., Carrera v. Bayer Corp.*, 727 F.3d 300, 303 (3d Cir. 2013).

8. Jason Steed, *On “Ascertainability” As a Bar to Class Certification*, 23 APP. ADVOC. 626, 627 (2011).

9. *See Astiana*, 291 F.R.D. at 500–01.

10. *See Carrera*, 727 F.3d 300; *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583 (3d Cir. 2012).

Circuit, a plaintiff must prove by a preponderance of the evidence the existence of an administratively feasible mechanism that allows the court to identify all potential class members.¹¹ Several scholars have recently argued that the Third Circuit's approach to ascertainability presents a drastic shift in the application of the doctrine and creates a nearly impossible bar for the certification of many small-claims consumer class actions.¹² This new approach to ascertainability provides defendants a powerful tool to defeat class certification in most small-claims consumer class actions.¹³

This Note explains the previously unacknowledged ascertainability split in detail. Then, this Note argues that the Third Circuit's approach is not correct, because ascertainability developed as a doctrine to ensure that a class be defined with precision. Ascertainability demands a class definition, which allows the court to identify class members based on objective criteria. The doctrine ensures the effectiveness of claim preclusion as to class adjudication and that damages go to individuals actually harmed by the defendant. However, it should not require that all class members be identified prior to certification.

Part I of this Note briefly explains class action certification requirements and identifies theories explaining the purposes of class actions. Part II introduces the split regarding ascertainability and discusses the background of the doctrine. Part III describes the arguments for and against the Third Circuit's novel approach. Finally, Part IV argues that ascertainability should ensure the successful application of claim preclusion to any final class judgment.

I. GENERAL BACKGROUND OF CLASS ACTIONS

Before addressing the unacknowledged split regarding ascertainability, a brief overview of the class action device is necessary. Part I.A describes underlying motives of the class action device. Part I.B sets forth the requirements for class certification. Lastly, Part I.C addresses the development of ascertainability as well as the traditional understanding of what is needed to satisfy the doctrine.

11. See *Carrera*, 727 F.3d at 307–08.

12. Brief for Professors of Civil Procedure and Complex Litigation et al. As Amici Curiae Supporting Respondent at 3, *Carrera*, 727 F.3d 300 (No. 12-2621), 2013 WL 4437225 [hereinafter Law Professors' Brief].

13. See Nicole Skolout, *Carrera v. Bayer Corporation: Third Circuit Vacates Class Certification Order on Ascertainability Grounds in Consumer False Advertising Case*, MONDAQ (Aug. 29, 2013), <http://www.mondaq.com/unitedstates/x/260302/Class+Actions/Carrera+v+Bayer+Corporation+Third+Circuit+Vacates+Class+Certification+Order+On+Ascertainability+Grounds+In+Consumer+False+Advertising+Case>.

A. *The Purpose of Class Actions*

American courts first used the representative suit device to ensure that large groups of individuals with a common interest would not be prevented from enforcing their rights.¹⁴ The modern Federal Rule of Civil Procedure 23, which contains the requirements for class actions, was established in 1966 by amendment to the Federal Rules of Civil Procedure.¹⁵ The 1966 revision of Rule 23 was intended to offer clarity to the class action device and establish various procedural requirements for certification of a class action.¹⁶ Class action litigation is an exception to the traditional rule of individual adjudication and therefore has additional procedural and constitutional requirements.¹⁷

Representative litigation is also an exception to the long held maxim that one is not bound by a judgment in litigation to which he is not a party.¹⁸ A similarly situated group, properly represented in a “class” or “representative” proceeding, may be bound by a judgment even if not made party to the suit.¹⁹ Rule 23 allows large groups of individuals to come together and adjudicate many individual claims at once.²⁰

While class actions are a procedural device, experts have noted that class treatment necessarily eases plaintiffs’ costs in bringing many types of claims.²¹ For example, small-value claims, which are commonly consumer claims, do not individually provide the necessary financial incentives for an individual to bring a claim.²² Class action adjudication provides plaintiffs with the incentives to prosecute claims that previously would not have been pursued.²³ By making litigation easier for one party, class actions affect the substantive balance between the two parties.²⁴ Because Rule 23 is a procedural rule that affects parties’ substantive rights, it has proven quite controversial.²⁵ Two traditional policy reasons that have been put forth to

14. 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1751 (3d ed. 2005 & Supp. 2013).

15. FED. R. CIV. P. 23 advisory committee’s note.

16. *Id.*

17. *See id.*; *see also* *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

18. *Hansberry*, 311 U.S. at 41. “It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.” *Id.* at 40 (citing *Pennoyer v. Neff*, 95 U.S. 714 (1877)).

19. *Id.*

20. *See* FED. R. CIV. P. 23.

21. *See* Symposium, *Some Reflections on the “Abusiveness” of Class Actions*, 58 F.R.D. 299, 299–300 (1973) (featuring the Honorable Jack Weinstein and Professors Arthur Miller and Geoffrey Hazard and discussing the effects of the modern amendments to Rule 23).

22. *See* Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 305 (2010).

23. *See id.*; Symposium, *supra* note 21, at 300.

24. Symposium, *supra* note 21, at 300.

25. *See id.* at 301; Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664, 670 (1979).

lend legitimacy to class treatment of individual claims are (1) the negative-value conception and (2) the regulatory conception.²⁶

1. The Negative-Value Conception

Benjamin Kaplan, a primary drafter of modern Rule 23, believed Rule 23 would allow for vindication of rights that would otherwise not be adjudicated.²⁷ Rule 23 “provide[d] means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.”²⁸ Kaplan believed that when the stakes for each individual class member are large and each individual can enforce his rights himself, class treatment is unnecessary.²⁹ According to Kaplan, class treatment overcomes a lack of incentive to pursue small claims.³⁰

The U.S. Supreme Court identified this compensatory function of class actions in *Eisen v. Carlisle & Jacquelin*.³¹ The Court noted that the lone petitioner’s individual stake in the litigation was only worth \$70;³² therefore, “[n]o competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner’s suit proceed as a class action or not at all.”³³ For example, notice in *Eisen* was prohibitively expensive.³⁴ The Court, however, while recognizing the importance of Rule 23 in litigating negative-value claims, did not allow the plaintiffs to pass that cost on to the defendants.³⁵ While Rule 23 allows plaintiffs to enforce a substantive right that otherwise would have gone uncompensated, plaintiffs must still bear the financial burden needed to satisfy Rule 23’s requirements.³⁶

In *Amchem Products, Inc. v. Windsor*,³⁷ the Supreme Court reiterated this view of class actions as a device for overcoming problems presented by small recoveries.³⁸ Class actions aggregate many small claims “‘into something worth someone’s (usually an attorney’s) labor.’”³⁹ This aspect of Rule 23, identified by the Supreme Court, is precisely what Benjamin

26. Gilles, *supra* note 22, at 305 (identifying the negative-value conception of class actions); David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 592–99 (2013) (identifying the regulatory conception of class actions).

27. See Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

28. *Id.*

29. See Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5, 13–14 (1991).

30. See *id.* at 13.

31. 417 U.S. 156 (1974).

32. *Id.* at 161.

33. *Id.*

34. See *id.* at 178.

35. See *id.* at 178–79.

36. See *id.*

37. 521 U.S. 591 (1997).

38. See *id.* at 617.

39. *Id.* (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

Kaplan had in mind when drafting Rule 23.⁴⁰ Aggregation allows for compensation where none would have otherwise been practical.⁴¹

2. The Regulatory Conception: Private Attorneys General Model

Groups such as consumer advocates, civil rights practitioners, and plaintiffs' lawyers have identified the use of Rule 23 as a regulatory device.⁴² "The regulatory conception treats Rule 23 as 'an evolutionary response to the existence of injuries unremedied by the regulatory action of government.'"⁴³ The conception of Rule 23 as a regulatory device stemmed from the understanding that class actions could serve as an important substitute to public regulation.⁴⁴

If regulation is the primary goal of a class action, individual remediation is not essential to support the policy behind Rule 23.⁴⁵ Although compensating class members helps deter defendants' general unlawful conduct, the deterrence itself is the primary purpose, not the class compensation.⁴⁶ The defendant's general unlawful conduct is most important, and courts should attempt class certification to accomplish this goal.⁴⁷

Legal theorists claim that because of both budgetary issues and concerns about capture,⁴⁸ regulatory agencies are incapable of adequately enforcing substantive law.⁴⁹ Therefore, privately initiated litigation is necessary to protect certain substantive rights.⁵⁰ Although private litigation is an important tool to implement many substantive rights, individual claimants often do not have the incentives or resources to prosecute claims that otherwise would go unlitigated.⁵¹ "[W]here harms are small and dispersed, the defendants can avoid liability because no individual has sufficient incentive to sue."⁵² Rule 23 therefore responds to this issue and ensures that more substantive law is enforced through private litigation.⁵³

Private litigation through Rule 23 pushes enforcement of substantive law to a more optimal point that regulatory agencies alone would not be able to

40. Kaplan, *supra* note 27, at 497.

41. 1 WILLIAM B. RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 1:7 (5th ed. 2011).

42. Gilles, *supra* note 22, at 309; Alexandra D. Lahav, *Two Views of the Class Action*, 79 *FORDHAM L. REV.* 1939, 1951–53 (2011); Marcus, *supra* note 26, at 590.

43. Marcus, *supra* note 26, at 592–93 (quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980)).

44. *See id.*

45. *See id.* at 593.

46. *See* 1 RUBENSTEIN ET AL., *supra* note 41, § 1:8.

47. *See id.*

48. Regulatory capture occurs when "interest groups and political decisionmakers enter into jointly maximizing relationships." William W. Bratton & Joseph A. McCahery, *Regulatory Competition, Regulatory Capture, and Corporate Self-Regulation*, 73 *N.C. L. REV.* 1861, 1885 (1995).

49. *See* Marcus, *supra* note 26, at 593.

50. *See id.*

51. *See id.*

52. 1 RUBENSTEIN ET AL., *supra* note 41, § 1:8.

53. *See* Marcus, *supra* note 26, at 593.

achieve.⁵⁴ Aggregation of claims now allows “an independent, well-financed cadre of private attorneys general to compensate for the inadequacies of government regulators and individual litigants.”⁵⁵ These private attorneys general can utilize Rule 23 to deter defendants from engaging in wrongdoing otherwise left unaddressed.⁵⁶ Congress often legislates with private attorneys general in mind by enacting damage and fee provisions that enable private enforcement actions.⁵⁷ For such legislation to succeed in regulating private conduct, the class action device must be available.⁵⁸

Turning to the legitimacy of Rule 23, supporters of the regulatory model would argue that the enforcement of substantive law provides the necessary legitimacy to maintain class actions.⁵⁹ Scholars have noted that private suits aid public enforcement of laws and that the class action device is an important factor in this enforcement.⁶⁰ This view is supported by the Supreme Court, which specifically identified classwide suits as a response to “injuries unremedied by the regulatory action of government.”⁶¹ Class actions also enhance judicial efficiency—specifically in cases where plaintiffs have large enough claims that they would individually pursue those claims.⁶² While efficiency in small-claims classes may be more suspect, these classes generate efficient enforcement of substantive rights.⁶³ More efficient enforcement of legal norms, along with future deterrence, are two important “positive externalities” that contribute to the efficiency of the small-claims consumer class action.⁶⁴

B. *The Explicit Requirements of Rule 23*

Rule 23, while designed to promote judicial economy, contains a number of explicit requirements that must be satisfied in order to maintain a class action.⁶⁵ These requirements are in place to ensure that the rights of absent class members are adequately protected, as the representative nature of class actions necessarily limits the ordinary individual autonomy characteristic of the adversary model.⁶⁶ The procedural requirements that must be satisfied prior to class certification also determine whether maintenance of a class action is economically and administratively feasible, coherent, and constitutionally permissible.⁶⁷ Failure to satisfy any of Rule

54. *See id.*

55. *Id.*

56. *See, e.g., deHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1231 (10th Cir. 1970).

57. *See* 1 RUBENSTEIN ET AL., *supra* note 41, § 1:8.

58. *See id.*

59. *See id.*

60. *See id.*

61. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

62. 1 RUBENSTEIN ET AL., *supra* note 41, § 1:9.

63. *See id.*

64. *See id.*

65. *See id.*; 7A WRIGHT ET AL., *supra* note 14, § 1753.

66. *See* 1 RUBENSTEIN ET AL., *supra* note 41, § 1:3.

67. *See id.*

23's requirements will result in a denial of class certification.⁶⁸ For a class action to be certified, all requirements of Rule 23(a) must first be satisfied.⁶⁹ A class action must then fit into one of three categories outlined in Rule 23(b).⁷⁰

The first requirement, Rule 23(a)(1), known as numerosity, focuses on the number of potential class members.⁷¹ Numerosity requires that a class may be certified only if it is so numerous that joinder is impracticable.⁷² Numerosity serves three important purposes: (1) it reveals the legal system's preference for individual litigation; (2) it works to ensure that Rule 23 is in fact an efficient way to litigate; and (3) it allows courts to consider factors, other than the pure number of litigants, that may indicate that joinder, a class action alternative, is impractical.⁷³

Ultimately, the Rule 23(a)(1) numerosity requirement directs a court to determine whether joinder is a better procedural device than a class action.⁷⁴ The lack of a strict threshold to meet numerosity reinforces the idea that courts must engage with the facts thoroughly to determine if joinder is impractical.⁷⁵ Class actions often involve a wide range of plaintiffs, but the key underlying factor that must be satisfied is that joinder is never practical.

Rule 23(a)(2) requires that common questions of law or fact exist in order to certify a class.⁷⁶ Often referred to as commonality, 23(a)(2) is satisfied if a single issue of law or fact exists for all class members.⁷⁷ The common question need not be both one of law and fact, but may be a common question of either law or of fact.⁷⁸ Because of the representative nature of class actions, commonality ensures that the advantages of representative litigation are actually obtained.⁷⁹ If a common question does not exist, then there is no basis to bind one litigant to the outcome of another.⁸⁰

The commonality requirements had long been settled until *Wal-Mart Stores, Inc. v. Dukes*.⁸¹ In *Wal-Mart*, the Supreme Court stated, "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,' That common contention, moreover,

68. See FED. R. CIV. P. 23.

69. See *id.* R. 23(a).

70. See *id.* R. 23(b).

71. See *id.* R. 23(a)(1).

72. *Id.*

73. See 1 RUBENSTEIN ET AL., *supra* note 41, § 3:11. An example of the third rationale for numerosity would be a situation where the court is not flooded with individual litigants, but joinder may be impractical because of the small value of claims.

74. See *id.* § 3:11.

75. See *id.* § 3:12.

76. *Id.*

77. See *id.* § 3:18.

78. *Id.* § 3:21.

79. *Id.* § 3:18.

80. *Id.*

81. 131 S. Ct. 2541, 2550–57 (2011).

must be of such a nature that it is capable of classwide resolution.”⁸² The Court emphasized the importance of the commonality question and pointed towards a renewed focus on this prong of class certification.⁸³

The latter two requirements of Rule 23(a), typicality and adequacy, guarantee that the class representative has the proper qualifications to represent the class.⁸⁴ Rule 23(a)(3) requires that the claims or defenses of the representative party be typical of the class.⁸⁵ This requirement ensures that the representative is in fact a member of the class.⁸⁶ Rule 23(a)(3) also presumes that a representative whose claim is typical of the class will pursue not only his best interests but those of the class as well.⁸⁷

Finally, Rule 23(a)(4) requires that the representative parties fairly and adequately protect the interests of the class.⁸⁸ Adequacy focuses the court’s attention on the attributes of the individual seeking to represent a class.⁸⁹ Because a class action binds absent class members, a certain level of legitimacy is required to validate the binding effect of class adjudication.⁹⁰ The Due Process Clause and class action procedure both require that absent class members’ interests be adequately protected.⁹¹ Rule 23(a)(4) helps stymie fears about binding absent parties by requiring that a class representative pursue the interests of the class sufficiently such that any judgment can fairly bind absent class members.⁹² Failure to satisfy Rule 23(a)(4) can reopen a class judgment to future judicial scrutiny.⁹³ Because class representatives are often given financial incentives, adequacy helps guarantee that class representatives have the best interests of the class in mind.⁹⁴

If Rule 23(a) is satisfied, a class action must then fit into one of three class action types set forth by Rule 23(b).⁹⁵ Rule 23(b)(1) and 23(b)(2) are mandatory classes that do not allow opt outs and generally do not seek money damages.⁹⁶ This Note focuses on Rule 23(b)(3) class actions—damages suits—because that is where ascertainability issues generally arise.

Monetary damages may be sought as a remedy by Rule 23(b)(3) classes, distinguishing them from Rule 23(b)(1) and 23(b)(2) classes.⁹⁷ Because

82. *Id.* at 2551.

83. *Id.* at 2552.

84. *Id.* at 2553.

85. *See* FED. R. CIV. P. 23(a)(3).

86. 1 RUBENSTEIN ET AL., *supra* note 41, § 3:28.

87. *Id.*

88. FED. R. CIV. P. 23(a)(4).

89. 1 RUBENSTEIN ET AL., *supra* note 41, § 3:50.

90. *See* *Hansberry v. Lee*, 311 U.S. 32, 43 (1940).

91. *Id.* at 42–43.

92. 1 RUBENSTEIN ET AL., *supra* note 41, § 3:50.

93. *See, e.g., Hansberry*, 311 U.S. 32 (stating that a prior class action did not adequately represent the current parties and could not bind those parties to the prior judgment). *Hansberry* did not apply the requirements of Rule 23.

94. *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009).

95. FED. R. CIV. P. 23(b).

96. *Id.* R. 23(b)(1)–(2).

97. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011).

Rule 23(b)(3) classes seek monetary damages, the procedural requirements reflect potential individualized determinations.⁹⁸ The justification for this class is the predominance of a common question of law or fact and a determination that the class action is the superior method to fairly and efficiently adjudicate the controversy.⁹⁹ Not only must a common question of law or fact exist, thus satisfying Rule 23(a)(1), but a common question of law or fact must also predominate over all other issues.¹⁰⁰ Rule 23(b)(3) lists a number of factors that are intended to guide the court in its determination of whether a class action is superior and whether a common question predominates.¹⁰¹ Aside from requiring predominance and superiority, Rule 23(b)(3) classes differ in a number of other crucial aspects.¹⁰²

Unlike Rule 23(b)(1) and 23(b)(2) class actions, class members of a Rule 23(b)(3) class action may choose to opt out of the class.¹⁰³ 23(b)(3) class members must be provided with an opportunity to opt out of the class to satisfy constitutional due process concerns.¹⁰⁴ Courts must also direct notice of the class action to all members who may be identified through reasonable efforts.¹⁰⁵ While this does not mean that each individual class member must receive notice, each class member who may be identified through reasonable efforts must in fact receive notice.¹⁰⁶ If identification of all putative class members at the time of certification proves impractical, courts often direct notice through publication or similar means that will alert the general public, and therefore presumably potential class members, to the existence of a class action.¹⁰⁷

Once a class action is properly certified, any judgment is binding on all class members in subsequent litigation under the doctrines of issue and claim preclusion.¹⁰⁸ Claim preclusion applies if: (1) the second claim is the same claim as the class action claim; (2) the second claim is between the

98. *Id.*

99. FED R. CIV. P. 23(b)(3); 1 RUBENSTEIN ET AL., *supra* note 41, § 1:3; 7A WRIGHT ET AL., *supra* note 14, § 1777.

100. FED R. CIV. P. 23(b)(3).

101. *Id.* The matters pertinent to these findings include:

- (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.

Id. R. 23(b)(3)(A)–(D).

102. *See infra* notes 103–07 and accompanying text.

103. *See* FED R. CIV. P. 23(c); 7A WRIGHT ET AL., *supra* note 14, § 1777.

104. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

105. FED R. CIV. P. 23(c)(2)(B).

106. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997).

107. Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 786 (7th Cir. 2004); *see also* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 309–10 (1950).

108. Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874 (1984).

same parties; and (3) the previous judgment was valid, final, and on the merits.¹⁰⁹

C. The Ascertainability Requirement

Part I.C discusses the origins of the ascertainability requirement and common tests to determine if a class is ascertainable, and then introduces the concept of subjective classes.

1. The Origins of Ascertainability

Ascertainability has traditionally been defined as the existence of a class whose members can be identified by reference to objective criteria in the class definition.¹¹⁰

Because ascertainability is an implicit element of Rule 23, courts have found authority to require it in a number of sources.¹¹¹ Ascertainability has no universally agreed upon textual source.¹¹² Courts therefore often make a policy argument for ascertainability's necessity.¹¹³ Those opposed to imposing additional hurdles to class certification argue that Rule 23 itself contains all of the necessary procedural protections to satisfy all "essential issues of class action law."¹¹⁴ Some courts discuss ascertainability generally, but fail to mention any specific statutory language from which such a requirement may be implied.¹¹⁵ While not deriving ascertainability from specific statutory language, these courts tend to focus on the policy reasons for implying a requirement of ascertainability in a class

109. RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1982).

110. See *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 496 (7th Cir. 2012); Steed, *supra* note 8, at 627.

111. 1 RUBENSTEIN ET AL., *supra* note 41, § 3:2.

112. See *id.*

113. *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 n.3 (5th Cir. 2007); *Singer v. AT & T Corp.*, 185 F.R.D. 681, 685 (S.D. Fla. 1998).

114. *Blain v. Smithkline Beecham Corp.*, 240 F.R.D. 179, 184 (E.D. Pa. 2007) ("Because the same considerations in evaluating the sufficiency of the class definition are implicated in the commonality, typicality and adequacy of representation analyses, and courts are charged with analyzing all of the Rule 23(a) factors anyway, the sufficiency of the class definition can be assessed in the context of the Rule 23(a) analysis without engaging in a redundant exercise.").

115. See generally *Cunningham Charter Corp. v. Learjet, Inc.*, 258 F.R.D. 320, 325 (S.D. Ill. 2009) (addressing how a proper class definition aids the court, but not where the requirement of a proper class definition comes from); *Bakalar v. Vavra*, 237 F.R.D. 59, 64–66 (S.D.N.Y. 2006) (providing significant discussion about ensuring that class members be ascertainable, but not providing any indication from where such a requirement is derived); 1 RUBENSTEIN ET AL., *supra* note 41, § 3:2.

definition.¹¹⁶ Courts that do provide a textual source for ascertainability have identified three sources for the requirement.¹¹⁷

The first policy argument is that Rule 23 does not adequately vindicate the purposes of class adjudication.¹¹⁸ In *John v. National Security Fire and Casualty Co.*, the Fifth Circuit noted that while “the text of Rule 23(a) is silent on the matter, a class must not only exist, the class must be susceptible of precise definition.”¹¹⁹ Ascertainability therefore demands a certain level of precision from a class definition¹²⁰ that will allow a court to determine whether or not class treatment is proper.¹²¹ Neither Rule 23(a) nor Rule 23(c) actually addresses how a class is properly defined.¹²² By demanding an additional requirement of ascertainability, class definitions allow courts to identify both the class and potential class members based on objective criteria.¹²³ Courts that accept this purpose for ascertainability will then likely apply the doctrine to all types of Rule 23(b) classes.¹²⁴

The second policy argument supporting ascertainability results from a common issue facing class certification: proposed classes are often indefinite.¹²⁵ Focusing on ascertainability at an early stage allows courts to directly confront problems facing class certification rather than attempting to solve the issues using the traditional Rule 23(a) analysis.¹²⁶ This conception of ascertainability forces courts to apply the doctrine to all types of Rule 23(b) classes, but courts need only raise the issue if the class definition appears to be inadequate.¹²⁷

The final policy argument for developing the implicit requirement is concern for the due process rights of absent litigants.¹²⁸ Ascertainability deserves special discussion, because without any treatment of it, it “would be unconstitutional to bind absent litigants to the results of aggregate proceedings.”¹²⁹ The class definition is critically important, because it identifies those who deserve notice, are entitled to relief, and are bound by a final judgment.¹³⁰ Professor Martin Redish identified additional due

116. See *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593–94 (3d Cir. 2012); 1 RUBENSTEIN ET AL., *supra* note 41, § 3:2 (naming policy reasons including “the administrative burden and inefficiency that would result from an imprecise class definition, the need to ensure that only plaintiffs who have been injured receive recovery, and the fact that a precise class definition facilitates the ‘best notice that is practicable under the circumstances’” (quoting *Cunningham Charter Corp.*, 258 F.R.D. at 325)).

117. 1 RUBENSTEIN ET AL., *supra* note 41, § 3:2.

118. See *Grimes v. Rave Motion Pictures Birmingham, LLC*, 264 F.R.D. 659, 664 (N.D. Ala. 2010); RUBENSTEIN ET AL., *supra* note 41, § 3:1.

119. *John v. Nat’l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 n.3 (5th Cir. 2007).

120. See *Steed*, *supra* note 8, at 629.

121. *Cunningham*, 258 F.R.D. at 325.

122. See FED. R. CIV. P. 23(a)–(c).

123. *Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417 (N.D. Ill. 2012).

124. See 1 RUBENSTEIN ET AL., *supra* note 41, § 3:1.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Singer v. AT & T Corp.*, 185 F.R.D. 681, 685 (S.D. Fla. 1998).

process concerns in relation to a litigant's individual autonomy to advance her claim in the manner she deems most appropriate.¹³¹ If ascertainability ensures that courts direct proper notice, then putative class members should retain more individual autonomy.¹³² Notice in a Rule 23(b)(3) class action allows class members to opt out if they do not believe that class adjudication is the most effective or appropriate means of vindicating their rights.¹³³ Ascertainability therefore provides additional legitimacy to the class action device.¹³⁴

Turning to the statutory basis for ascertainability, some courts "imply that the term 'class' in Rule 23(a) means a definite or ascertainable class."¹³⁵ These courts reason that absent a definite class, the Rule 23(a) prerequisites to certification cannot be applied.¹³⁶ Courts cannot apply the four requirements of Rule 23(a) without identifying the members of a class.¹³⁷

Finally, some remaining courts find support for ascertainability in Rule 23(c).¹³⁸ Rule 23(c)(1)(B) specifies what must be included in a certification order, but some courts have read this rule to also include the requirement that a class be ascertainable.¹³⁹ Specifically, Rule 23(c)(1)(B) instructs a court to define the class.¹⁴⁰ As ascertainability directly relates to class definitions, Rule 23(c)(1)(B) seems to, at least indirectly, provide some support for ascertainability.¹⁴¹ In addition to Rule 23(c)(1)(B), some courts look to Rule 23(c)(2) to provide implicit support for ascertainability.¹⁴² Rule 23(c)(2)(B) specifies that in a Rule 23(b)(3) class, "the 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."¹⁴³ If ascertainability demands that a class definition allow a court to identify potential class members, a court

131. MARTIN H. REDISH, *WHOLESALE JUSTICE* 136 (2009).

132. *See* Gibbs Props. Corp. v. CIGNA Corp., 196 F.R.D. 430, 442 (M.D. Fla. 2000); *Singer*, 185 F.R.D. at 685; *see also* FED. JUD. CTR., *MANUAL FOR COMPLEX LITIGATION* § 21.222 (4th ed. 2004).

133. REDISH, *supra* note 131, at 169–70.

134. *See* 1 RUBENSTEIN ET AL., *supra* note 41, § 3:1.

135. *Id.* § 3:2.

136. *See* DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970).

137. 1 RUBENSTEIN ET AL., *supra* note 41, § 3:2.

138. *Id.* Rule 23(c)(1)(B) states, "An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)." FED. R. CIV. P. 23(c)(1)(B).

139. *Standford v. Foamex LP*, 263 F.R.D. 156, 174–75 (E.D. Pa. 2009); *Riedel v. XTO Energy, Inc.* 257 F.R.D. 494, 506 (E.D. Ark. 2009); 1 RUBENSTEIN ET AL., *supra* note 41, § 3:2.

140. FED. R. CIV. P. 23(c)(1)(B).

141. *See* Benito v. Indymac Mortg. Servs., No. 2:09–CV–001218–PMP–PAL, 2010 WL 2089297, at *2 (D. Nev. May 21, 2010) (stating that Rule 23(c)(1)(B) requires an order certifying a class to define the class). Class definition is therefore an important consideration at the certification stage.

142. *Cunningham Charter Corp. v. Learjet, Inc.*, 258 F.R.D. 320, 325 (S.D. Ill. 2009).

143. FED. R. CIV. P. 23(c)(2)(B).

may then properly direct notice.¹⁴⁴ Establishing a class definition that is sufficiently definite is most important in a Rule 23(b)(3) class action, because notice is required in a Rule 23(b)(3) class.¹⁴⁵ Finding support for ascertainability in Rule 23(c)(2) demands that courts address the doctrine only in a Rule 23(b)(3) class.¹⁴⁶ Rule 23 does not require that a court direct notice for a Rule 23(b)(1) or 23(b)(2) class.¹⁴⁷ As a result, a precise class definition to determine who must receive notice is not much of a concern in class actions other than in a Rule 23(b)(3) class.¹⁴⁸

2. Tests For Ascertainability

Although ascertainability is an essential prerequisite for the maintenance of a class action, no bright-line rules exist to examine whether a class is sufficiently ascertainable.¹⁴⁹ This determination is a fact-dependent inquiry based on the unique circumstances of each case.¹⁵⁰ Absent a clear definition of ascertainability, courts focus on a number of criteria when addressing the doctrine.¹⁵¹

Courts have developed three linguistic formulations commonly used to test for ascertainability.¹⁵² The first test asks if the class definition is “precise, objective, and presently ascertainable.”¹⁵³ The second test requires that “the class sought to be represented . . . be adequately defined and clearly ascertainable.”¹⁵⁴ The final test focuses on the presence of “objective criteria” in the class definition.¹⁵⁵

Although each test emphasizes various requirements that a class definition must fulfill, courts tend to focus on the ability to identify a class by objective criteria, because it allows courts to determine whether a class is identifiable based on a clearly defined set of characteristics.¹⁵⁶ In applying this test, courts will typically find that “an identifiable class exists

144. *See Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417 (N.D. Ill. 2012).

145. *In re Fosamax Prods. Liab. Litig.*, 248 F.R.D. 389, 396 (S.D.N.Y. 2008) (“Identifying class members is especially important in Rule 23(b)(3) actions, in order to give them the notice required by Rule 23(c)(4) so that they may decide whether to exercise their right to opt out of the class.”).

146. *See Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972).

147. FED. R. CIV. P. 23(c).

148. *See Yaffe*, 454 F.2d at 1366.

149. 7A WRIGHT ET AL., *supra* note 14, § 1760A.

150. *Id.*

151. *Cervantes v. Sugar Creek Packing Co.*, 210 F.R.D. 611, 620 (S.D. Ohio 2002) (identifying a number of key elements to defining a class).

152. 1 RUBENSTEIN ET AL., *supra* note 41, § 3:3.

153. FED. JUD. CTR., *supra* note 132, § 21.222; 1 RUBENSTEIN ET AL., *supra* note 41, § 3:3.

154. *Duchardt v. Midland Nat'l Life Ins. Co.*, 265 F.R.D. 436, 443 (S.D. Iowa 2009); *Kelecseny v. Chevron, U.S.A., Inc.*, 262 F.R.D. 660, 668 (S.D. Fla. 2009); *Harrell v. CheckAGAIN, LLC*, 248 F.R.D. 199, 204 (S.D. Miss. 2006).

155. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012); *Fograzzo v. Lehman Bros., Inc.* 263 F.R.D. 90, 97 (S.D.N.Y. 2009).

156. *See Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417 (N.D. Ill. 2012); 1 RUBENSTEIN ET AL., *supra* note 41, § 3:3.

if its members can be ascertained by reference to objective criteria.”¹⁵⁷ For example, requiring objective criteria in a class definition allows courts to dispose of class actions based on the mental state of putative class members.¹⁵⁸ A number of courts in the 1970s developed ascertainability in response to class definitions that required a court to delve into an individual’s mental state to determine whether he was a potential class member.¹⁵⁹

3. Subjective Classes

Courts have been guided by a number of seminal class action cases that provide analysis of what constitutes an ascertainable class.¹⁶⁰ As early as 1970, the Fifth Circuit in *DeBremaecker v. Short*, addressed the ascertainability of a class of “residents of this State active in the ‘peace movement’ who have been harassed and intimidated as well as those who fear harassment and intimidation in exercising their *First Amendment* right of free expression in the form of passing out leaflets in furtherance of their cause.”¹⁶¹ The court noted that an essential element to maintaining a class action is that the class be “adequately defined and clearly ascertainable.”¹⁶² This requirement was not met because the term “peace movement” was not adequately defined.¹⁶³ “Peace movement” could mean any number of things, thereby precluding the court from identifying the “movement’s” members.¹⁶⁴ Thus, the court could not determine class membership.¹⁶⁵

While the class definition in *DeBremaecker* failed because it did not adequately define “peace movement,” the definition also failed because it included “those who fear harassment.”¹⁶⁶ The court found that the chilling effect the class representative complained of could not possibly reach all Texas residents wishing to voice their opinion on the Vietnam War.¹⁶⁷ A class definition based on such an effect will typically fail to meet the requirement that a class be ascertainable, because a court cannot determine members who have been chilled absent individualized findings of fact.¹⁶⁸ The Fifth Circuit’s rationale for denying class certification in

157. *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 209 F.R.D. 323, 337 (S.D.N.Y. 2002) (citing *Zapka v. Coca-Cola Co.*, No. 99 CV 8238, 2000 WL 1644539, at *2 (N.D. Ill. Oct. 27, 2000)).

158. 1 RUBENSTEIN ET AL., *supra* note 41, § 3:3.

159. *See Steed, supra* note 8, at 627.

160. *See Simer v. Rios*, 661 F.2d 655, 669–71 (7th Cir. 1981); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970).

161. *DeBremaecker*, 433 F.2d at 734 (emphasis added).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Cf. id.*

166. *Id.*

167. *Id.*

168. 7A WRIGHT ET AL., *supra* note 14, § 1760 (citing *Simer v. Rios*, 661 F.2d 655 (7th Cir. 1981)).

Debremaecker was an influential decision that provided guidance to other circuits in relation to “mental state” classes.¹⁶⁹

In *Simer v. Rios*,¹⁷⁰ the Seventh Circuit confronted a similar issue of “chilling.” The putative plaintiffs were individuals who qualified for, but did not receive, cash assistance for fuel and utilities from the Emergency Energy Conservation Program.¹⁷¹ The complaint defined the class as “those individuals eligible for [public] assistance but who were denied assistance or who were discouraged from applying because of the existence of the invalid regulation promulgated by [the Community Services Administration, a government agency].”¹⁷² To certify a class based on this definition, the court would first have to identify those individuals who were eligible for assistance.¹⁷³ The court would then have to engage in the “Sisyphean task of identifying those individuals” who not only qualified for assistance, but who also knew of the existence of the regulation “and were discouraged from applying for assistance because of the shut-off notice requirement.”¹⁷⁴ Any attempt to identify those individuals who were “chilled” would burden the court in terms of both time and money.¹⁷⁵

The court then noted that identification of class members helps courts determine whether the class action device is the proper way to try the case and ensures that only those harmed by the defendant’s conduct will be the recipients of any eventual relief.¹⁷⁶ In *Simer*, the court could not determine based on objective criteria whether or not someone harmed by the Community Service Administration’s actions should be a member of the class.¹⁷⁷ The only way to determine the members of the plaintiff’s class would have been to engage in individualized findings of fact.¹⁷⁸ Determining which potential class members were in fact discouraged from applying for assistance is an individualized determination that, while not an absolute bar to class certification, presented an “arduous task for the parties as well as the district court.”¹⁷⁹

II. THE UNACKNOWLEDGED SPLIT REGARDING ASCERTAINABILITY

This Part first explains how courts typically apply the ascertainability requirement. It then discusses the Third Circuit’s new approach.

169. *See, e.g., Simer*, 661 F.2d at 669.

170. *Id.* The district court failed to identify which subsection of Rule 23(b) the case fell under, but “its reference to the concept of manageability implies a determination that this was a 23(b)(3) class action.” *Id.* at 668 n.24.

171. *Id.* at 657–58.

172. *Id.* at 669.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 670.

177. *Id.* at 671 (noting that the district court properly denied class certification in light of the difficulties of identifying individuals who both knew of the regulation and were discouraged from applying for assistance).

178. *Id.* at 673.

179. *Id.*

Although most circuits have acknowledged the need for ascertainability, few circuit court decisions have addressed the issue directly.¹⁸⁰ Nevertheless, the requirement that a class be ascertainable has long been understood by a number of courts as an implicit prerequisite to class certification.¹⁸¹ Although ascertainability is necessarily a prerequisite to class certification, the exact application of ascertainability is an essential question of an increasingly important requirement.¹⁸²

A. *The Traditional Ascertainability Approach: Ascertainability Applied As a Definitional Requirement Demanding a Precisely Defined Class Based on Objective Terms*

Because few circuits have addressed ascertainability directly, little discussion of the issue exists at the circuit level.¹⁸³ As an implied requirement of class certification, however, the issue of ascertainability is often raised in district court decisions regarding class certification.¹⁸⁴ Ascertainability ordinarily requires that a court be able to identify individual class members without individualized trials.¹⁸⁵ If a class member can be identified solely by reference to objective criteria in the class definition, the class will typically be ascertainable.¹⁸⁶ Though ascertainability receives only modest discussion at the circuit court level, the Seventh Circuit recently addressed the requirement.¹⁸⁷

180. Steed, *supra* note 8, at 626 n.2.

181. See *Carrera v. Bayer Corp.*, 727 F.3d 300, 305 (3d Cir. 2013); *Simer*, 661 F.2d at 669–71; *DeBreaeacker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970).

182. Steed, *supra* note 8, at 626.

183. *Id.* at 626 n.2.

184. See, e.g., *Fograzzo v. Lehman Bros., Inc.*, 263 F.R.D. 90, 97 (S.D.N.Y. 2009); *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 593–94 (C.D. Cal. 2008). Because of the high stakes in a class action, parties also tend to settle once a class is certified. See George L. Priet, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521 (1997). A dearth of circuit court opinions regarding class certification orders has likely led to minimal discussion of ascertainability at the circuit level.

185. See *infra* notes 188–234 and accompanying text.

186. See *infra* notes 188–234 and accompanying text.

187. *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006) (stating that plaintiffs must show that the class is “identifiable”). More recently, the Seventh Circuit addressed ascertainability in *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 493–97 (7th Cir. 2012). In *Jamie S.*, the plaintiffs sought certification of a Rule 23(b)(2) class of learning disabled students, who alleged that the Milwaukee Public School District failed to properly implement the Individuals with Disabilities Education Act. *Id.* at 484–85. Class certification was overturned on appeal, because in addition to failing commonality and the requirement that injunctive relief be applicable on a classwide basis, the class definition was indefinite. *Id.* at 493. The class definition included a sizable number of students “who may have been eligible for special education but were *not identified* and *remained unidentified* The problem with a class of potentially eligible but unidentified students is not that their rights might not have been violated but that the relevant criteria for class membership are unknown.” *Id.* at 495. This class definition did not meet the definiteness requirement for class certification, because the court could not readily identify a member of the class. *Id.* Identifying students with learning disabilities is a highly individualized task that cannot simply be accomplished by reference to some objective criteria. *Id.* at 496. Students with unidentified learning disabilities, who according to the class definition were part of the class, could not simply be identified by reference to criteria in the class definition. *Id.*

In *Oshana v. Coca-Cola Co.*, the plaintiff attempted to certify a Rule 23(b)(3) consumer class action, claiming that Coca-Cola engaged in deceptive advertising.¹⁸⁸ According to the plaintiff, Coca-Cola led consumers to believe that bottled and fountain Diet Coke contained the same artificial sweetener.¹⁸⁹ Membership in the plaintiff's proposed class only required the purchase of a Diet Coke.¹⁹⁰ The Seventh Circuit affirmed the district court's decision denying certification because the class definition "was not sufficiently definite."¹⁹¹ A damages claim under the Illinois statute at issue required that the plaintiff was in fact deceived and damaged in some way by the deception.¹⁹² But membership in Oshana's proposed class did not necessarily require that the plaintiff be deceived.¹⁹³ As the Seventh Circuit pointed out, "Some people may have bought fountain Diet Coke because it contained saccharin, and some people may have bought fountain Diet Coke even though it had saccharin."¹⁹⁴ The court further noted, "Countless members of Oshana's putative class could not show any damage, let alone damage proximately caused by Coke's alleged deception."¹⁹⁵ Thus, the class definition would necessarily contain some individuals who knew fountain Diet Coke contained saccharin and bought it anyway.¹⁹⁶

While the court emphasized that this class definition was not sufficiently definite, and therefore failed to satisfy ascertainability, its discussion of ascertainability was significantly enmeshed with typicality.¹⁹⁷ Inclusion in the class was independent of potentially having suffered any harm as required by the Illinois statute.¹⁹⁸ The proposed class was not identifiable, because the class consisted of both harmed and unharmed individuals.¹⁹⁹ Although the class definition itself was based on objective terms, the terms did not identify a sufficiently definite class of individuals who may have been harmed under the Illinois consumer fraud claim.²⁰⁰ The class definition could not allow a court to identify individuals who were harmed by Coca-Cola's actions.²⁰¹ The Seventh Circuit's decision in *Oshana* provided important precedent for district courts in applying the ascertainability doctrine.²⁰²

188. *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 509–10 (7th Cir. 2006).

189. *Id.* at 509.

190. *Id.* at 514.

191. *Id.* at 513.

192. *Id.* at 513–14.

193. *Id.* at 514.

194. *Id.*

195. *Id.* (emphasis omitted).

196. *Id.*

197. Steed, *supra* note 8, at 628.

198. *See Oshana*, 472 F.3d at 513–14.

199. *See id.* at 514.

200. *See id.* at 513–14.

201. *See id.*

202. *See Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417 (N.D. Ill. 2012).

In *Boundas v. Abercrombie & Fitch Stores, Inc.*, a court in the Northern District of Illinois certified a Rule 23(b)(3) damages class, rejecting the defendant's argument that the class was not ascertainable.²⁰³ The underlying facts involved a promotion giving a \$25 gift card to any Abercrombie consumer who purchased at least \$100 worth of merchandise.²⁰⁴ The promotional gift cards stated that they were redeemable at any Abercrombie store and did not have an expiration date.²⁰⁵ Abercrombie failed to maintain any records that would have allowed the store to determine who received a gift card.²⁰⁶ When the class representative attempted to redeem her gift card, she was told that the card expired and had been voided.²⁰⁷ The plaintiff then sued Abercrombie and sought certification of a class of:

All people who received Abercrombie & Fitch Stores, Inc. promotional gift cards in hard copy stating "no expiration date" issued as part of a 2009 winter holiday in-store promotion and voided by Abercrombie & Fitch Stores, Inc. on or after January 30, 2010 despite having credit remaining on the gift cards.²⁰⁸

Although the class definition was based on objective criteria, Abercrombie argued that the class was not ascertainable because with the exception of a small number of individuals, class members could not be identified.²⁰⁹

Abercrombie's argument failed because the district court determined that individual class members' identities did not need to be identified prior to certification.²¹⁰ The court found that ascertainability was not intended to prevent certification because of a lack of records; rather, ascertainability ensures that the class definition is sufficiently definite such that a court can determine who should be in the class.²¹¹ Ascertainability demands that an identifiable class exist, such that its members can be identified by reference to objective criteria.²¹² As the court held, the class in *Boundas* "consist[ed] primarily of individuals holding an Abercrombie promotional gift card

203. *See id.* at 417–18.

204. *Id.* at 411.

205. *Id.*

206. *Id.* at 417.

207. *Id.* at 411.

208. *Id.* The class definition was ultimately amended, and the certified class definition was:

Persons who possess Abercrombie & Fitch Stores, Inc. promotional gift cards in hard copy stating "No expiration date" that were issued as part of a 2009 winter holiday in-store promotion and that were voided by Abercrombie on or after January 30, 2010, *and* persons who discarded such cards because they were told that the cards expired or had been voided, but *not* persons who received a refund of the expired balance on their cards, *not* persons who lost their cards, *not* persons who discarded their cards for reasons other than having been told that the cards expired or had been voided, and *not* persons who gave their cards to somebody else.

Id. at 418–19.

209. *Id.* at 417.

210. *Id.*

211. *Id.*

212. *Id.*

whose value was voided on or around January 30, 2010. That criterion is as objective as they come.”²¹³ The class also consisted of those who threw away their cards.²¹⁴ While this criterion is not as objective as those who retained their gift cards, these class members were required to submit an affidavit to be evaluated during a claims administration process if the plaintiffs were to prevail at trial.²¹⁵

Finally, the court addressed how ascertainability impacts class notice.²¹⁶ Abercrombie claimed that without identification of individual absent class members, “notice by mail [could not] be effectuated.”²¹⁷ Although Abercrombie was correct in determining that notice by mail would be nearly impossible, the Seventh Circuit’s doctrine does not require that notice by mail be practical as a prerequisite to class certification.²¹⁸ Notice by publication would have been a sufficient substitute for notice by mail in light of the circumstances.²¹⁹ The facts of *Boundas* are quite similar to other consumer class actions that have been dismissed on the basis of a lack of records identifying potential class members.²²⁰

*Astiana v. Kashi Co.*²²¹ is a consumer class action that presented the court with similar questions regarding class member identification.²²² In *Astiana*, the representative plaintiffs brought a consumer class action against Kashi Brands for allegedly deceptive advertising.²²³ The Southern District of California certified a Rule 23(b)(3) class consisting of: “All California residents who purchased Kashi Company’s food products on or after August 24, 2007 in the State of California that were labeled ‘Nothing Artificial.’”²²⁴ Kashi sold foods labeled as “all natural” or “nothing artificial,” but the plaintiffs claimed that foods with this label actually contained many artificial ingredients.²²⁵

Attempting to defeat certification, Kashi argued that the class could not be certified because of the administrative difficulties involved in identifying class members.²²⁶ Kashi claimed that because potential class members likely do not have records or evidence of their purchases, “the Court will have no feasible mechanism for identifying class members and will have to pursue proof individual to each class member.”²²⁷

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 418.

217. *Id.*

218. *Id.* (citing *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 786 (7th Cir. 2004)).

219. *Id.*

220. *See, e.g., Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742(DLC), 2010 WL 3119452, at *12–13 (S.D.N.Y. Aug. 5, 2010).

221. 291 F.R.D. 493 (S.D. Cal. 2013).

222. *Id.* at 500.

223. *Id.*

224. *Id.* at 510.

225. *Id.* at 498.

226. *Id.* at 500.

227. *Id.*

The court disagreed with Kashi that the potential administrative burden of identifying class members resulted in a failure to satisfy ascertainability.²²⁸ The class definition at issue was in fact “adequately defined and clearly ascertainable,”²²⁹ nor did it present any administrative burdens that would prevent certification.²³⁰ The proposed class definition properly identified purchasers of the defendant’s products that contained the alleged misrepresentation.²³¹ Notably, the court stated that because the alleged misrepresentation was on the package of the products, there is no concern that the class could include individuals not exposed to the misrepresentation.²³² According to the district court, allowing class actions to be defeated at such an early stage due to difficulties in ascertaining membership would essentially prohibit any consumer class actions.²³³ As the court found, the definition need only be sufficiently definite to identify putative class members, and challenges entailed in administration of this class are not so burdensome to defeat class certification.²³⁴

B. The Third Circuit’s Heightened Approach to Ascertainability

The Third Circuit diverges from the other circuit courts.²³⁵ Whereas other courts hold a class ascertainable when class members are identifiable

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id. Compare* *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513–14 (7th Cir. 2006), with *Astiana*, 291 F.R.D. 493. In *Oshana*, the alleged misrepresentation was not included on any package, so some people who bought the product may very likely not have been misled. See *Oshana*, 472 F.3d at 514. In *Astiana*, however, the package itself featured deceptive advertising. *Astiana*, 291 F.R.D. at 500. In *Oshana*, some people may have bought fountain soda, because it in fact contained the artificial sweetener, and therefore those individuals were not deceived. *Oshana*, 472 F.3d at 514.

233. See *Astiana*, 291 F.R.D. at 500.

234. *Id.*

235. While the Third Circuit is the first circuit court to accept this approach to ascertainability, other district courts have used ascertainability to deny certification in small-claims consumer class actions. In *Weiner v. Snapple Beverage Corp.*, No. 07 CIV. 8742(DLC), 2010 WL 3119452 (S.D.N.Y. Aug. 5, 2010), the plaintiffs alleged that Snapple violated consumer protection laws by labeling certain products as “all natural” even though the products contained high fructose corn syrup. *Id.* at *1. The class definition included all persons who within the state of New York purchased a Snapple beverage labeled “all natural” between 2001 and 2009. *Id.* at *2. The court denied certification, because predominance was not satisfied, but the court also noted that the class definition would likely fail ascertainability. *Id.* at *5–6, *12–13. To be ascertainable, the court must be able to identify class members based on objective criteria that are administratively feasible. *Id.* at *12. The plaintiffs argued that the court could require class members to submit a receipt, bottle label, or sign a declaration confirming the purchase of a Snapple labeled “all natural.” *Id.* at *13. As to the first two suggestions, the plaintiffs showed no evidence that consumers retained a label or receipt. *Id.* Declarations would not adequately identify class members, because putative class members “[were] unlikely to remember accurately every Snapple purchase during the class period . . .” *Id.* Soliciting declarations would invite putative class members to speculate about their Snapple purchases. *Id.* In a case involving a similar set of facts, plaintiffs alleged that Chipotle engaged in deceptive advertising by claiming that they only served “naturally raised” meats. *Hernandez v. Chipotle Mexican Grill, Inc.*, No. CV 12-

based on objective criteria in the class definition, the Third Circuit further requires that plaintiffs prove that an administratively feasible mechanism for identifying class members exists.²³⁶ This rule was created through three recent cases.

The first of the three was *Marcus v. BMW of North America, LLC*.²³⁷ In *Marcus*, the named plaintiff sought to certify a Rule 23(b)(3) class “on behalf of all purchasers and lessees of certain model-year BMWs equipped with Bridgestone [run-flat tires (RFTs)] sold or leased in New Jersey with tires that ‘have gone flat and been replaced.’”²³⁸ Marcus brought this class action as a result of what he believed to be defective RFTs that came equipped on his BMW 3 Series convertible.²³⁹ Marcus brought his claim against BMW of North America, Bridgestone Tire, and a number of Bridgestone subsidiaries.²⁴⁰ The initial complaint asserted claims of consumer fraud, breach of warranty, and breach of contract claims.²⁴¹ During his three-year lease, Marcus suffered four flat tires, costing between \$350 and \$390 to replace each tire.²⁴²

Marcus initially attempted to certify both a nationwide class of 3 Series owners and lessees and a New Jersey subclass against BMW and Bridgestone.²⁴³ The district court denied certification of a nationwide class, but granted certification with respect to the New Jersey subclass.²⁴⁴ Before the Third Circuit considered whether the certified class satisfied the requirements of Rule 23(a) and (b), the court addressed ascertainability: “(1) whether the District Court clearly defined the parameters of the class and the claims to be given class treatment, as required by Rule 23(c)(1)(B);

5543 DSF(JCx), 2013 WL 6332002 (C.D. Cal. Dec. 2, 2013). The judge denied class certification, because the proposed class action failed Rule 23(b)(3). *Id.* at *1. Identifying that common issues did not predominate over individual ones, the judge also alluded to a failure to satisfy ascertainability. *See id.* Chipotle’s misconduct took place only at certain locations within a specific time frame. *Id.* Plaintiffs would have to know with specificity exactly where, when, and what meats they purchased to be included in the class definition. *Id.* “In other cases, the class will be all purchasers of a particular product within some reasonably large time period, so the details of the purchase are not significant.” *Id.* Credit card records could potentially identify Chipotle transactions but would not identify the specific type of meat purchased. *Id.* Thus, credit card records would only lead to more individualized inquiries to determine exactly what type of meat was being served at the specific location on the date of the transaction. *See id.* Although these two cases denied class certification in part because of ascertainability, these cases are distinguishable from the recent Third Circuit cases. In both of these cases, plaintiffs would be unable to identify themselves as class members. Because of the type of claim, plaintiffs could not simply say that they purchased a specific product and are therefore included in the class definition. *Hernandez* specifically illustrates this point. While putative class members may have been able to say that they ate at Chipotle on a specific date, this determination would not necessarily result in inclusion in the class.

236. *See infra* notes 286–88 and accompanying text.

237. 687 F.3d 583 (3d Cir. 2012).

238. *Id.* at 588.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 590.

244. *Id.*

and (2) whether the class must be (and, if so, is in fact) objectively ascertainable.”²⁴⁵

On appeal, the *Marcus* court began its discussion of ascertainability by noting that “[m]any courts and commentators have recognized that an essential prerequisite of a class action, at least with respect to actions under Rule 23(b)(3), is that the class must be currently and readily ascertainable based on objective criteria.”²⁴⁶ The Third Circuit therefore appears to be in line with a majority of courts, emphasizing objective criteria in the class definition as the essential element in determining the ascertainability of a potential class.²⁴⁷ Although the court claimed that a “class must be currently and readily ascertainable based on objective criteria,”²⁴⁸ it also held that “[i]f class members are impossible to identify without extensive and individualized fact-finding or ‘mini-trials,’ then a class action is inappropriate.”²⁴⁹ Individualized factfinding or mini-trials would challenge the efficiency realized through class actions.²⁵⁰

Rather than solely relying on textual support for ascertainability, the Third Circuit identified a number of policy and textual sources for requiring the doctrine.²⁵¹ First, requiring that all potential class members are ascertainable eliminates any serious administrative burdens that may result from an indefinite class and ensures that the efficiency benefits of a class action are realized.²⁵² Second, ascertainability “protects absent class members by facilitating the ‘best notice practicable’ under Rule 23(c)(2) in a Rule 23(b)(3) action.”²⁵³ Finally, ascertainability serves to protect defendants and ensure that all class members bound by any final judgment are clearly identifiable.²⁵⁴ By precisely identifying what ascertainability meant and required, the court provided a framework for applying the doctrine to class certification decisions.²⁵⁵

Turning to the specific issues of ascertainability at hand, the court took note of a number of problems in objectively identifying class members.²⁵⁶

245. *Id.* at 591. Because the court discusses ascertainability and Rule 23(c)(1)(B) separately, the court does not seem to find its justification for applying ascertainability in Rule 23(c)(1)(B) as a number of courts do.

246. *Id.* at 592–93 (citing *John v. Nat. Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007)).

247. *See id.* As noted earlier, whether or not a class definition is based on objective terms is the question most courts focus on when considering the issue of ascertainability. *See* 1 RUBENSTEIN ET AL., *supra* note 41, § 3:1.

248. *Marcus*, 687 F.3d at 593.

249. *Id.*

250. *See id.*

251. *See id.*

252. *Id.* (citing *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 446 (E.D. Pa. 2000)). Eliminating serious administrative burdens seems like a policy goal of Rule 23(c)(1)(B)’s requirement that the class definition be precise. Given that the court discusses this requirement separately, this policy benefit seems to fit more appropriately elsewhere.

253. *Id.* (citing FED. JUD. CTR., *supra* note 132, § 21.222).

254. *Id.* (citing *Xavier v. Philip Morris USA, Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011)).

255. *See id.* at 593–94.

256. *Id.*

“BMW claims that it ‘may be able to identify current and former original owners and lessees of BMW vehicles factory-equipped with Bridgestone RFTs which were initially purchased or leased from New Jersey dealership.’”²⁵⁷ While BMW may have been able to identify lessees of BMW’s factory equipped with Bridgestone RFTs, BMW counsel suggested that BMW would not know exactly which vehicles fit the class definition, because they did not maintain a parts manifest and would be unable to identify which vehicles that satisfied the class definition actually had Bridgestone RFTs.²⁵⁸ Additionally, some cars that arrived at a dealership with Bridgestone RFTs may have left with different tires.²⁵⁹ BMW argued that even if it could identify all cars with the proper tires, its “records would not indicate whether all potential class members’ Bridgestone RFTs ‘have gone flat and been replaced,’ as the class definition requires, because the class is not limited to those persons who took their vehicles to BMW dealers to have their tires replaced.”²⁶⁰ The court’s decision to reverse the class certification order, while focusing generally on ascertainability, was specifically concerned with the ability of defendant’s records to ascertain potential class members.²⁶¹

The court noted that if Marcus attempted to certify a class on remand, the district court would need 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.”²⁶² Any method involving self-identification of class members would likely fail the court’s requirement that class members be objectively ascertainable.²⁶³ Focusing on ascertainability, the court in *Marcus* seemed to not only address whether class members were objectively ascertainable, but whether potential class members were identifiable based on the defendant’s records.²⁶⁴ Extensive discussion of ascertainability in *Marcus* provided the Third Circuit with important precedent regarding how ascertainability must be applied in future Rule 23(b)(3) classes.²⁶⁵

Approximately one year later, the Third Circuit revisited the ascertainability question with respect to a Rule 23(b)(3) class action.²⁶⁶ In *Hayes v. Wal-Mart Stores, Inc.*, the Third Circuit vacated the district court’s certification order and remanded in light of the *Marcus* decision.²⁶⁷ At

257. *Id.* at 593.

258. *Id.* (citing Transcript of Oral Argument at 16, *Marcus*, 687 F.3d 583 (Nos. 11-1192, 11-1193)).

259. *Id.* at 593. BMW claimed that some dealers would change the tires on a car at the customers’ request. *Id.*

260. *Id.*

261. *See id.* at 592–94.

262. *Id.* at 594.

263. *Id.* A claims process utilizing sworn affidavits would likely fail, as this would “amount to no more than ascertaining by potential class members’ say so.” *Id.*

264. *See id.* at 592–94.

265. *See, e.g.,* *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013); *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 351–52 (3d Cir. 2013).

266. *Hayes*, 725 F.3d 349.

267. *Id.* at 352.

issue in *Hayes* was the sale of extended warranties on “as-is” sale items.²⁶⁸ Sam’s Club contracted with National Electronics Warranty Corporation (NEW) to provide extended warranties called “service plans” for a variety of items sold in Sam’s Club stores.²⁶⁹ Although Sam’s Club indiscriminately sold the warranties, the service plans stated that NEW “will not cover ‘products sold ‘as-is’ including but not limited to floor models (unless covered by a full manufacturer’s warranty on your date of purchase) and demonstration models.’”²⁷⁰ Sam’s Club employees sold warranties on goods expressly excluded from coverage by the terms of the service plan.²⁷¹

When a customer wished to purchase an as-is item, a cashier would scan the item.²⁷² After the cashier scanned the item, the original price appeared, at which point a cashier performed a “price override” and manually entered the sale price.²⁷³ Although Sam’s Club software recorded price overrides, the software did not record a reason for the override itself.²⁷⁴ Further, the court highlighted that price overrides may occur for reasons other than the sale of as-is items.²⁷⁵ Each individual Sam’s Club kept a handwritten log of all items offered “as-is,” but the log did not record any actual transactions involving sales of those items.²⁷⁶

After the plaintiff learned that the service plan sold to him by a Sam’s Club employee was not valid on as-is items, he filed suit in the District of New Jersey.²⁷⁷ The district court then certified a class of “[a]ll consumers who, from January 26, 2004 to the present, purchased from Sam’s Clubs in the State of New Jersey, a Sam’s Club Service Plan to cover as-is products.”²⁷⁸ The district court found that this class definition satisfied all of the prerequisites for certification of a Rule 23(b)(3) class.²⁷⁹ Of note, the trial court “found the class was ascertainable because members could be determined with reference to objective criteria.”²⁸⁰

Although ascertainability was only one basis for overruling the class certification order, the Third Circuit once again devoted extensive discussion to what ascertainability demands.²⁸¹ On appeal, Wal-Mart claimed that the trial court did not consider how the class might practically

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.* at 353.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* at 354–56. Once again providing extensive discussion on the issue of ascertainability, the court referenced the *Marcus* decision and the Third Circuit’s extensive discussion of ascertainability, in that order, overruling class certification. *Id.* at 355.

be ascertained.²⁸² Wal-Mart argued that individual mini-trials would be required to determine who was actually a member of the class.²⁸³

Addressing the purpose for the ascertainability requirement, the Third Circuit found that ascertainability “focuses on whether individuals fitting the class definition may be identified without resort to mini-trials.”²⁸⁴ Referencing the *Marcus* decision, the court identified two important elements of ascertainability that the *Marcus* court highlighted.²⁸⁵ “*Marcus* made clear that ascertainability entails two important elements. First, the class must be defined with reference to objective criteria. Second, there must be a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.”²⁸⁶ Although most courts recognize that a class must be defined with reference to objective criteria, the need for an “administratively feasible mechanism” to determine if class members fall within the definition is not a typical requirement of ascertainability.²⁸⁷ According to the Third Circuit, an administratively feasible mechanism can best be described as allowing a potential class member to prove his membership through some form of proof of purchase or other evidence, and then permitting a defendant to challenge such evidence.²⁸⁸

As an essential prerequisite to class certification, the plaintiff is required to show by a preponderance of the evidence that individual mini-trials are unnecessary to ascertain identities of class members.²⁸⁹ Ascertainability, like the other requirements for class certification, is an evidentiary standard that the plaintiff must satisfy prior to a grant of class certification.²⁹⁰ To satisfy this standard, a plaintiff would likely have to show that a class definition is based on objective terms, and present the court with a plan detailing an administratively feasible mechanism which would allow the court to determine if putative class members actually fall within the class.²⁹¹ The ascertainability of a potential class cannot just be pled, but must in fact be proven by the plaintiff.²⁹²

Because the trial court did not have the benefit of the *Marcus* decision, the court failed to consider whether an administratively feasible mechanism

282. *Id.* at 354. Specifically, Wal-Mart raised “whether it is administratively feasible to ascertain the class.” *Id.*

283. *Id.*

284. *Id.* (citing *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012)).

285. *Id.*

286. *Id.* at 355 (citing *Marcus*, 687 F.3d at 593–94).

287. *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 496 (7th Cir. 2012) (noting that identification of unidentified children with learning disabilities cannot simply be accomplished by reference to some set of objective criteria); *Fograzzo v. Lehman Bros., Inc.* 263 F.R.D. 90, 97 (S.D.N.Y. 2009) (“An identifiable class exists if its members can be ascertained by reference to objective criteria.” (quoting *In re Fosamax Prods. Liab. Litig.*, 248 F.R.D. 389, 395 (S.D.N.Y. 2008))).

288. *See Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013).

289. *See Hayes*, 725 F.3d at 354–55.

290. *See id.*

291. *See id.* at 355.

292. *Id.* at 354–55.

existed to determine who exactly should be in the class.²⁹³ Although the plaintiff failed to identify any such mechanism, the trial court found that the plaintiff should not be barred from bringing a class action solely because the defendant lacked certain records.²⁹⁴ But the extent to which a defendant maintains its records has no impact on the plaintiff's burden to fulfill all necessary requirements of Rule 23.²⁹⁵ Rule 23's implied requirement of ascertainability could not be relaxed solely because Wal-Mart's records may have been inadequate.²⁹⁶ To be successful on remand, the Third Circuit stated that the plaintiff would need to "show by a preponderance of the evidence that there is a reliable and administratively feasible method for ascertaining the class."²⁹⁷

After *Hayes*, the Third Circuit again addressed the implication of ascertainability on a Rule 23(b)(3) class certification in *Carrera v. Bayer Corp.*²⁹⁸ In that case, the named plaintiff brought a Rule 23(b)(3) consumer class action against Bayer Corp. over allegedly deceptive advertising of its "One-A-Day WeightSmart" supplement.²⁹⁹ The supplement was sold in retail stores until January 2007, although Bayer never sold the product directly to consumers.³⁰⁰

In the District of New Jersey,³⁰¹ Carrera "moved to certify a Rule 23(b)(3) class of Florida consumers under the Florida Deceptive and Unfair Trade Practices Act."³⁰² The class was certified "as all persons who purchased WeightSmart in Florida."³⁰³ Bayer challenged the certification order, claiming that class members were not ascertainable because of the absence of retailer records indicating who ultimately purchased WeightSmart.³⁰⁴ The court noted that class members were unlikely to have retained documentary evidence of their purchases, and Bayer did not have a list of purchasers, as it did not sell the product directly to consumers.³⁰⁵ The trial court considered Bayer's objections to class certification based on a failure to satisfy ascertainability but "characterized the issue of ascertainability as one of manageability, stating 'speculative problems with

293. *Id.* at 355. The trial court, in discussing numerosity, noted "that Sam's Club had no method for determining how many of the 3,500 price-override transactions that took place during the class period were for as-is items." *Id.*

294. *Id.*

295. *Id.* at 356.

296. *Id.*

297. *See id.*

298. 727 F.3d 300 (3d Cir. 2013). The appellee has since filed a motion for a rehearing en banc. Appellee's Petition for Rehearing and Rehearing En Banc, *Carrera*, 727 F.3d 300 (No. 12-2621).

299. *Carrera*, 727 F.3d at 304.

300. *Id.*

301. The plaintiff brought suit in New Jersey court rather than Florida because Bayer is headquartered in New Jersey. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 305.

305. *See id.* at 304-05.

case management' are insufficient to prevent class certification."³⁰⁶ Bayer then appealed the certification order, challenging the ascertainability of the class.³⁰⁷

Recognizing potential issues in ascertaining the class, Carrera attempted to devise two administratively feasible mechanisms to determine who was in the class.³⁰⁸ The first method was to utilize retailer records of online purchases and sales made with store loyalty or rewards cards.³⁰⁹ The second proposed method to ascertain the class was for potential class members to submit affidavits declaring that they purchased WeightSmart and the amount they purchased.³¹⁰ Carrera argued that affidavits would satisfy ascertainability, because

[f]irst, due to the low value of the claims, class members will be unlikely to submit fraudulent affidavits. Second, because Bayer's total liability will not depend on the reliability of the affidavits, the ascertainability requirement should be relaxed. Finally, a screening method such as the one described in the Prutsman Declaration will ensure any unreliable affidavits are identified and disregarded.³¹¹

The plaintiff's first argument for using affidavits failed, because the value of the claims had no bearing on the purpose for requiring that a class be ascertainable.³¹² The court noted that a "core concern" for requiring that a class be objectively ascertainable is to allow a defendant to challenge class membership.³¹³ Just because claims are low value—minimizing concern that individuals will submit fraudulent claims—this does not affect a defendant's ability to challenge class membership.³¹⁴

The second argument supporting the use of affidavits to prove the class was in fact ascertainable failed because, according to the court, the plaintiff once again did not properly understand the interests which ascertainability is intended to protect.³¹⁵ In arguing the merits of an affidavit system, the plaintiff noted that liability does not depend on the number of affidavits submitted.³¹⁶ Unlike *Marcus*, where the number of affidavits submitted affected the defendant's overall liability, liability here would be determined at trial, and the number of affidavits submitted would therefore only impact an individual class member's recovery.³¹⁷ The court observed, however,

306. *Id.* (citing *Carrera v. Bayer Corp.*, Civ. A. No. 08-4716, 2011 WL 5878376, at *4 (D.N.J. Nov. 22, 2011)).

307. *Id.* at 304.

308. *Id.* at 308.

309. *Id.*

310. *Id.*

311. *Id.* at 309. The plaintiff's third argument supporting ascertainability was denied by the court because the Prutsman Declaration did not show how the affidavits would be reliable. *Id.* at 310–12. The court was not satisfied that the screening method would satisfy the ascertainability requirement. *Id.* at 311–12.

312. *Id.*

313. *Id.* at 309.

314. *Id.*

315. *See id.* at 309–10.

316. *Id.* at 310.

317. *Id.*

that this method for ascertaining the class would dilute true class members' recovery if damages were paid to fraudulent claims, and therefore would fail to adequately protect the interests of absent class members.³¹⁸ Failing to adequately protect absent class members' interests could allow class members to argue that the named plaintiff did not adequately represent them, leaving Bayer open to future suits.³¹⁹ Because ascertainability ensures that a feasible method of identifying class members exists, fraudulent claims will not be filed and class recovery will not be diluted by such claims.³²⁰ In the Third Circuit's view, this interpretation of ascertainability ultimately works to protect absent class members' interests.³²¹

The Third Circuit once again identified that when addressing whether a class is ascertainable, "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."³²² Carrera could not simply plead that an administratively feasible mechanism for identifying class members existed; rather, he had to show that such a method existed.³²³

The ascertainability question in *Carrera* was whether each class member actually purchased WeightSmart in Florida.³²⁴ Although class actions aggregate many individual claims, a defendant still has a due process right to challenge each claim, and class certification does not preclude this right.³²⁵ Due process rights are not limited to challenging the claim itself, but extend to the proof used to demonstrate class membership.³²⁶ Therefore, ascertainability protects a defendant's due process rights by "requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership."³²⁷

The court found that for Carrera to satisfy the requirement that the class be ascertainable, he had to demonstrate an administratively feasible and reliable method for ascertaining class members, which would also permit a defendant to challenge the evidence utilized to prove such membership.³²⁸ Carrera failed to establish facts proving that the conditions needed to satisfy ascertainability were met, and the Third Circuit therefore overruled the district court and denied class certification.³²⁹

318. *Id.*

319. *Id.* "When class members are not adequately represented by the named plaintiff, they are not bound by the judgment." *Id.* (citing *Hansberry v. Lee*, 311 U.S. 32, 42 (1940)).

320. *Id.*

321. *See id.*

322. *Id.* at 306 (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012)).

323. *See id.* at 307.

324. *Id.* at 304–05.

325. *Id.* at 307.

326. *Id.* (citing *Marcus*, 687 F.3d at 594).

327. *Id.*

328. *See id.* at 307–08.

329. *Id.* at 304.

III. THE POLICY ARGUMENTS SUPPORTING THE TWO DIFFERENT APPLICATIONS OF ASCERTAINABILITY

This Part examines the policy arguments for the two distinct approaches to ascertainability. Part III.A discusses various policy reasons for applying the traditional approach to ascertainability. Part III.B identifies and examines arguments supporting the Third Circuit's approach.

A. *The Policy Reasons for the Traditional Approach to Ascertainability*

In light of a traditionally liberal interpretation of Rule 23, individual class members need not be identifiable at the class certification stage.³³⁰ Federal Rule of Civil Procedure 1 states that the Rules of Civil Procedure "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."³³¹ In *Eisen v. Carlisle & Jacquelin*,³³² the Second Circuit held that Rule 23 should be given a liberal rather than restrictive interpretation.³³³ Ascertainability, in the traditional sense, demands that a class definition be precise and based on objective terms.³³⁴ Prior to class certification, only "membership of the class must be ascertainable."³³⁵

Courts that discuss ascertainability ordinarily invoke the doctrine when evaluating a class definition.³³⁶ Ascertainability is an important implied requirement of class certification because it guarantees that an identifiable class in fact exists.³³⁷ If an identifiable class does not exist, then there is no entity that can satisfy the requirements of Rule 23.³³⁸ Because Rule 23 applies to absent parties, an ascertainable class is one that exists and can fulfill Rule 23's requirements.³³⁹ The existence of a class is a question of fact to be determined based on the circumstances.³⁴⁰ A precise definition based on objective terms allows a judge to make such a determination regarding the existence of a class.³⁴¹ The traditional definition of ascertainability successfully identifies whether or not a class in fact exists.³⁴²

330. 7A WRIGHT ET AL., *supra* note 14, § 1760; *see also* FED. JUD. CTR., *supra* note 132, § 21.222, at 270 ("Although the identity of individual class members need not be ascertained before class certification, the membership of the class must be ascertainable.").

331. FED. R. CIV. P. 1.

332. 391 F.2d 555 (2d Cir. 1968), *aff'd*, 417 U.S. 156 (1974); 7A WRIGHT ET AL., *supra* note 14, § 1754.

333. *Eisen*, 391 F.2d at 563.

334. Steed, *supra* note 8, at 627.

335. FED. JUD. CTR., *supra* note 132, § 21.222.

336. *See* Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981); DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970).

337. *See* Steed, *supra* note 8, at 627.

338. *Id.*

339. *See generally id.*

340. 7A WRIGHT ET AL., *supra* note 14, § 1760.

341. *Cf.* FED. JUD. CTR., *supra* note 132, § 21.222.

342. DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970).

Applying the conventional definition of ascertainability allows courts to identify class members, because objective terms in the class definition either include or exclude someone as a class member.³⁴³ Absent such a class definition, a court would have to undergo individualized findings of fact to establish who could be a class member—therefore undoing the efficiency that class actions are intended to create.³⁴⁴ An important aspect of ascertainability is that any class definition also be administratively feasible.³⁴⁵ Any class definition must be “sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.”³⁴⁶ Emphasizing that class definitions be based on objective terms satisfies this requirement, because courts can determine membership without delving into the merits of the claims themselves.³⁴⁷ Courts need only look at the class definition and a putative class member’s conduct or actions to determine whether he fits within the class definition.³⁴⁸

Rule 23 is a complex rule of procedure that contains a variety of requirements relating to various stages of the class action process.³⁴⁹ Rule 23(b)(3) importantly specifies determinations that a court must make in concluding whether class treatment is appropriate.³⁵⁰ If common issues of law or fact do not predominate over individual ones, or if a class action is not superior to other available methods for fairly adjudicating the controversy, a court may not certify a Rule 23(b)(3) class.³⁵¹ While concerns about the ability to identify absent class members may be raised when addressing a class definition, demanding that a class be ascertainable is sufficiently distinct from “the notion that individual class members must be identifiable at the class certification stage.”³⁵² Once a class is identified, a court can decide whether or not a class action is an efficient means of adjudication.³⁵³ Manageability is explicitly listed as a factor courts should consider when determining if a class action is superior to other methods of

343. *Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417–18 (N.D. Ill. 2012).

344. 1 JOSEPH M. MCLAUGHLIN, *MCLAUGHLIN ON CLASS ACTIONS* § 4:2 (10th ed. 2013).

345. *Kirkman v. N.C. R.R. Co.*, 220 F.R.D. 49, 53 (M.D.N.C. 2004).

346. 7A WRIGHT ET AL., *supra* note 14, § 1760A.

347. *See* *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 594 (C.D. Cal. 2008); 1 MCLAUGHLIN, *supra* note 344, § 4:2. Alternatively, courts can look at the administratively feasible aspect of ascertainability from the prospective of class members. Under this framework, courts will typically find a class ascertainable “when the class definition contained a particular make, model, and production period for the vehicle that was the subject of the litigation.” 1 RUBENSTEIN ET AL., *supra* note 41, § 3:3. Class members should be able to identify themselves as having a right to recovery based on the class description. *Id.*

348. *Cf. Cervantes v. Sugar Creek Packing Co.*, 210 F.R.D. 611, 620 (S.D. Ohio 2002).

349. *See* FED. R. CIV. P. 23.

350. *Id.* R. 23(b)(3).

351. *Id.* The Federal Rules of Civil Procedure list a number of factors that inform courts as to the question of whether or not a class action is superior to other methods. Specifically, one factor that courts should consider is the difficulties in managing a class action. *Id.* R. 23(b)(3)(D).

352. *Cf. Law Professors’ Brief*, *supra* note 12, at 3.

353. *See Simer v. Rios*, 661 F.2d 655, 670 (7th Cir. 1981).

adjudication.³⁵⁴ If a court finds that absent class members cannot readily be identified, a court can deny class certification on manageability grounds.³⁵⁵

*B. The Policy Arguments Supporting the
Third Circuit Approach*

In *Carrera v. Bayer Corp.*,³⁵⁶ the Third Circuit identified three distinct policy reasons for applying a more rigorous application of ascertainability prior to class certification.³⁵⁷ First, “ascertainability and a clear class definition allow potential class members to identify themselves for purposes of opting out of a class.”³⁵⁸ Unlike Rule 23(b)(1) and 23(b)(2) class actions, Rule 23(b)(3) class members have an absolute right to opt out.³⁵⁹ Failure to exercise an opt-out right will bind a putative Rule 23(b)(3) class member to any future judgment.³⁶⁰ The right to opt out is an essential characteristic of a Rule 23(b)(3) class action because it allows individuals to pursue their own claims if they desire to do so.³⁶¹ Opt-out rights balance the benefits gained through class action litigation along with the right to individually litigate a claim.³⁶² The ability to opt out satisfies constitutional concerns about representative litigation.³⁶³

Because Rule 23(b)(3) classes primarily seek monetary damages, opt-out rights allow those individuals with stronger claims to opt out and litigate—or not litigate—on their own.³⁶⁴ As compared to a class seeking injunctive relief, class members’ interests in a damages class are less likely to be aligned.³⁶⁵ Exclusion rights are essential for putative damage class members who desire to individually litigate their claims.³⁶⁶

While Rule 23 does not directly protect class members’ opt-out rights, it does so indirectly through the notice provision.³⁶⁷ Notice, which must be

354. FED. R. CIV. P. 23(b)(3)(D).

355. *Ballard v. Branch Banking & Trust Co.*, 284 F.R.D. 9, 13–15 (D.D.C. 2012) (stating that where the court could not practically identify class members, proper notice could not be directed and the court therefore denied class certification on manageability grounds).

356. 727 F.3d 300 (3d Cir. 2013).

357. *See id.* at 307.

358. *Id.*

359. FED. R. CIV. P. 23(b)(3); *see also* 3 RUBENSTEIN ET AL., *supra* note 41, § 9:40.

360. *See* FED. R. CIV. P. 23.

361. *See generally* 3 RUBENSTEIN ET AL., *supra* note 41, § 9:38.

362. *In re* Teletronics Pacing Sys., Inc., 221 F.3d 870, 881 (6th Cir. 2000).

363. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

364. *In re* “Agent Orange” Prod. Liab. Litig. MDL No. 381, 818 F.2d 145, 165–66 (2d Cir. 1987).

365. *See* 3 RUBENSTEIN ET AL., *supra* note 41, § 9:40. In a Rule 23(b)(2) class, injunctive or declaratory relief must be appropriate respecting the class as a whole. Therefore, for a Rule 23(b)(2) class to be properly certified, all class members’ interests must align.

366. *See Shutts*, 472 U.S. at 812.

367. FED. R. CIV. P. 23(c)(2)(B); 3 RUBENSTEIN ET AL., *supra* note 41, § 9:41.

For any class certified under Rule 23(b)(3), the 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. The notice must clearly and concisely state in plain, easily understood language . . . that the court will exclude from the class any member who requests exclusion
FED. R. CIV. P. 23(c)(2)(B).

provided in a Rule 23(b)(3) class action, must inform class members of their right to opt out of the class action.³⁶⁸ Absent class members may not be afforded their right to opt out if notice is not received.³⁶⁹ Ultimately, the Third Circuit's approach to ascertainability would ensure that all putative class members have an opportunity to opt out of class treatment.³⁷⁰ Demanding that the plaintiff submit an administratively feasible method to determine the identity of each class member would allow potential class members to receive notice, thus guaranteeing that opt out rights can be exercised if desired.³⁷¹ Because class actions are an exception to the traditional rule that nonparties are not bound by the judgment, opt-out rights are an essential protection of due process.³⁷² If the Third Circuit's interpretation of ascertainability better directs notice, due process concerns of class adjudication should be minimized.³⁷³

Focusing on absent class members, the Third Circuit's definition of ascertainability importantly protects any absent plaintiff's right to fully recover damages that may be awarded.³⁷⁴ Because this view of ascertainability demands that all potential class members be identifiable by an administratively feasible method, only individuals who are truly class members will ultimately be able to recover any damages.³⁷⁵ Absent class members need not fear that their recovery will be diminished by fraudulent claims.³⁷⁶ Class actions create due process concerns regarding class members' rights, but Rule 23 also may deprive a defendant of his due process rights.³⁷⁷

The second policy reason for a more exacting application of the ascertainability doctrine is that it protects a defendant's due process rights once a class action is certified.³⁷⁸ A defendant's due process right to challenge the proof used to establish class membership is not diminished solely because litigation proceeds as a class action.³⁷⁹ The Third Circuit's ascertainability test supports due process because it allows a defendant to reliably examine evidence used to prove class membership.³⁸⁰ Affidavits alone are not sufficient to prove class membership, because a defendant would be required to accept as true affidavits of absent class members.³⁸¹ A defendant would not be afforded an opportunity to individually challenge all claims of absent class members if affidavits are an acceptable alternative

368. FED. R. CIV. P. 23(c)(2)(B)(v).

369. *See, e.g.,* *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013).

370. *Id.*

371. *See id.*

372. *See* *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

373. *See, e.g.,* *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012).

374. *Carrera*, 727 F.3d at 310.

375. *Id.*

376. *Id.*

377. *Id.* at 307.

378. *Id.*

379. *Id.* (citing *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012)).

380. *Id.*

381. *Marcus*, 687 F.3d at 594. While this is true, this seems to ignore that a successful claims process can occur which would be able to eliminate fraudulent claims.

to proving class membership.³⁸² Ascertainability identifies all true class members, prevents fraudulent claims, and ensures that class members are adequately represented.³⁸³ If a defendant is ultimately forced to pay out fraudulent claims, absent class members could argue that they were not adequately represented and therefore not bound by the judgment.³⁸⁴

Scholars often justify representative litigation because of the efficiency associated with litigating many individual claims at once.³⁸⁵ Yet if class actions require an administratively burdensome process to determine who should be in the class, much of the desired efficiency will be lost.³⁸⁶ The Third Circuit claims that its theory of ascertainability demands efficiency, and thus addresses one of the important policy goals of a class action.³⁸⁷ Because the Third Circuit requires a plaintiff to “demonstrate his purported method for ascertaining class members is reliable and administratively feasible,”³⁸⁸ a burdensome administrative process is no longer necessary to determine class membership.³⁸⁹ Courts will easily be able to determine those truly entitled to class membership while conserving precious judicial resources.³⁹⁰

Lastly, while plaintiffs and society generally may benefit from the pursuit of small-value claims, lawyers have benefited enormously from this representative litigation.³⁹¹ The aggregation of many small claims into a single suit often results in large settlements, from which attorneys are paid a rewarding fee for their work.³⁹² For example, between 2005 and 2007, there have been roughly 100 securities class action settlements in federal court each year.³⁹³ The settlements have involved between \$7 billion and \$17 billion per year, of which a mean and median of 20 to 30 percent can be attributed to attorney’s fees.³⁹⁴ Judges may fear that plaintiffs’ attorneys conjure up class actions as a means of seeking compensation.³⁹⁵ The plain text of Rule 23(b)(3) is also quite advantageous to plaintiffs and significantly eases plaintiffs’ ability to bring suit.³⁹⁶ Interpreting Rule 23(b)(3) class actions as an attorney-driven piece of litigation tends to cast

382. *See id.*

383. *Carrera*, 727 F.3d at 305–06.

384. *Id.* at 310 (citing *Hansberry v. Lee*, 311 U.S. 32, 42 (1940)). In *Hansberry*, the Supreme Court held that to satisfy due process, absent class members’ interests must be adequately represented to be bound by the judgment. *Hansberry*, 311 U.S. at 42.

385. *See* 1 MCLAUGHLIN, *supra* note 344, § 4:2; 7A WRIGHT ET AL., *supra* note 14, § 1751.

386. *See generally Carrera*, 727 F.3d at 307.

387. *Id.*

388. *Id.* at 308.

389. *Cf. id.* at 307–08.

390. *Cf. id.*

391. *Cf.* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL STUD. 811, 814–15 (2010).

392. *Id.*

393. *Id.*

394. *Id.*

395. *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 238–39 (9th Cir. 1974) (Duniway, J., concurring).

396. *See supra* notes 23–26 and accompanying text.

doubt on the appropriateness of class actions.³⁹⁷ In the same manner that it would limit overinclusive classes, the Third Circuit's heightened approach to ascertainability could curb this attorney-driven litigation.

IV. COURTS SHOULD APPLY ASCERTAINABILITY SO AS NOT TO DESTROY CONSUMER CLASS ACTIONS

Ascertainability, as traditionally applied, ensures that class damages can be distributed to those actually harmed³⁹⁸ and that class members are precluded from relitigating a valid final judgment.³⁹⁹ Relying on objective terms in the class definition to identify putative class members should guarantee that these two purposes of ascertainability are realized. The modern amendments to Rule 23 provided plaintiffs with a procedurally efficient and cost-effective means of adjudicating many claims.⁴⁰⁰ Rule 23(b)(3) drastically changed the landscape of representative litigation and created a strong bias in favor of plaintiffs.⁴⁰¹

Ascertainability as applied by the Third Circuit presents a potent tool for defendants to defeat many if not all small-claims consumer class actions.⁴⁰² Any proposed class action where potential class members do not have individual records proving membership in the class and defendants also have not maintained records indicating class membership will fail ascertainability according to the Third Circuit.⁴⁰³ Many negative-value suits fall into this category, because few consumers keep receipts of boxes of cereal they consumed or weight loss supplements they purchased. The Third Circuit's understanding of ascertainability, while attempting to prevent many frivolous class actions, goes too far in establishing a bar to class certification. The ascertainability doctrine as described in *Carrera* prohibits a type of representative litigation that, for over forty years, has become an accepted—albeit controversial—piece of the American legal system.⁴⁰⁴

While class actions such as the one presented to the court in *Carrera* expend significant judicial resources and result in little recovery for class members, the novel approach to ascertainability tips the balance too far in favor of defendants. In light of its limited resources, the federal judiciary rightly emphasizes conservation of judicial resources. While this should and likely will remain a main concern of the judiciary, courts should also be concerned with administering justice efficiently.⁴⁰⁵ Ascertainability, if used

397. See *Kline*, 508 F.2d at 236 (Duniway, J., concurring).

398. *Simer v. Rios*, 661 F.2d 655, 670 (7th Cir. 1981).

399. *McBean v. City of N.Y.*, 260 F.R.D. 120, 132–33 (S.D.N.Y. 2009).

400. See *supra* notes 27–40 and accompanying text.

401. See *supra* notes 27–40 and accompanying text.

402. See Law Professors' Brief, *supra* note 12, at 10.

403. See *supra* notes 312–23 and accompanying text.

404. See *supra* notes 29–66 and accompanying text.

405. See *Simer v. Rios*, 661 F.2d 655, 688 (7th Cir. 1981) (Swygert, J., dissenting) (“The majority characterizes as ‘Sisyphean’ the job of identifying those qualified persons who were discouraged from applying for assistance. Although I agree with the majority that such a

to both ensure future claim preclusion and guarantee that those harmed by a defendant's conduct receive any damages, allows for both justice and efficient uses of the court system.

If courts are unable to determine the members of class litigation, then it will also be nearly impossible to determine who is bound by the preclusive effect of any judgment.⁴⁰⁶ Ascertainability should serve primarily as a requirement to ensure the workability of claim preclusion. Because class actions bind any member of the class to any final and valid judgment, class members who have not opted out are precluded from relitigating the identical claim.⁴⁰⁷ If later courts cannot determine precisely who is bound by an earlier judgment, then claim preclusion does not adequately prevent absent class members from attempting to relitigate a claim.⁴⁰⁸ Soon after a motion for class certification, courts must use ascertainability as a test to determine the feasibility of claim preclusion in relation to the class definition.

Using ascertainability simply as an early measure of the effectiveness of claim preclusion is a lower bar to meet than that set by the Third Circuit. Plaintiffs should only need to show that a court can determine based on objective criteria who is a member of the class, and that any class members will be claim precluded from bringing the same claim in a future case. An inability to show that a future court will be able to identify someone as a class member should result in a failure to satisfy ascertainability.⁴⁰⁹ A class definition based on objective terms under most circumstances then satisfies this requirement. Consider *Boundas*—if a future court can see that a plaintiff had received a gift card to Abercrombie & Fitch between certain dates, then that court can easily identify this individual as a class member of a prior class and therefore bound by the judgment.⁴¹⁰ But when a class definition, such as the one in *Simer v. Rios* that included members “discouraged” from applying for assistance, does not allow a court to easily recognize who is bound by the class judgment, then ascertainability as it relates to claim preclusion fails.⁴¹¹ The class definition in *Simer* would not have allowed later courts to determine who was bound by a class judgment, and, therefore, who would have been claim precluded.⁴¹² Thus, if a court is unable to determine who would be claim precluded as a result of class adjudication, then judicial economy is not properly served and the class should not be certified.

For a class definition to satisfy ascertainability, a court must look at two factors: (1) Is the class definition based on objective terms that will easily allow a court to identify someone as a class member? And (2) does the

procedure would be a burden on the court, I believe that in certain cases considerations of justice require courts to undertake those tasks; I would find this to be such a case.”)

406. See *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012).

407. See *supra* notes 108–09 and accompanying text.

408. See *Marcus*, 687 F.3d at 593.

409. See *supra* notes 160–80 and accompanying text.

410. See *supra* notes 211–16 and accompanying text.

411. See *supra* notes 176–79 and accompanying text.

412. See *supra* notes 171–80 and accompanying text.

class definition adequately ensure that all class members will be precluded from bringing the identical claim in a later proceeding? If both questions are answered in the affirmative, then ascertainability has been satisfied. A failure to fulfill either requirement would mean that a class is not ascertainable and therefore the class definition must fail. Further, if a class definition passes both prongs, the court will likely be able to identify those individuals actually harmed by the defendant's conduct. In most cases, the emphasis should be on the first question, because the use of objective terms in the class definition is a necessary predicate to ensure the ability to identify class members bound by the judgment.

Because members of any properly certified Rule 23 class are bound by a judgment, ascertainability then should apply to all variations of Rule 23 class actions. While some courts emphasize ascertainability only in relation to Rule 23(b)(3), if ascertainability is meant to ensure judicial efficiency, then it necessarily should apply to all classes. Applying ascertainability to all Rule 23 classes is in line with Rule 23's overall goal of promoting efficient adjudication of claims.⁴¹³

The Third Circuit's concern with efficiency and frivolous class actions was likely motivation for applying ascertainability in such a way as to safeguard against those concerns.⁴¹⁴ But utilizing ascertainability to require that a court be able to identify all class members renders the manageability consideration of superiority as surplusage. If a court finds that a class action is not efficient because class members cannot be identified through the use of records or a claims process, then it can deny class certification based on manageability concerns.⁴¹⁵ "[W]hether the court is likely to face difficulties managing a class action bears on whether the proposed class satisfies the predominance and superiority requirements."⁴¹⁶ Transforming ascertainability into a requirement demanding that a class action be administratively feasible diminishes the superiority inquiry. While ascertainability is intertwined with manageability, the two are distinct concepts in relation to class certification.⁴¹⁷ Ascertainability turns on the definition of the proposed class, whereas manageability assesses the practical problems that may render a class action inappropriate.⁴¹⁸

413. See *supra* note 20 and accompanying text.

414. Cf. Gilles, *supra* note 22, at 307 (describing generally judicial hostility to small-claims class actions, and courts' application of ascertainability regarding such classes).

415. Cf. *id.* at 310–11.

416. Seijas v. Republic of Arg., 606 F.3d 53, 58 (2d Cir. 2010).

417. See Law Professors' Brief, *supra* note 12, at 3. In *Weiner v. Snapple Beverage Corp.*, 07 CIV. 8742 DLC, 2010 WL 3119452, at *12 (S.D.N.Y. Aug. 5, 2010), the court addressed manageability as a separate requirement from ascertainability. The court pointed out that while ascertainability and manageability are related, the two are also distinct concepts. *Id.* The size of the potential class itself in *Weiner* would likely have resulted in a failure to satisfy manageability.

418. *Weiner*, 2010 WL 3119452, at *12.

CONCLUSION

Ascertainability developed as a doctrine to ensure that courts can determine who is bound by a class judgment.⁴¹⁹ Maintaining it as such focuses courts' attention to the definition of a class and ensures that plaintiffs attempt only to certify classes with a precise definition. While individual identification is an appropriate concern of courts, ascertainability defines the contours of who is bound by a class judgment and therefore a member of the class.

Recent developments in the Third Circuit have called into question the viability of Rule 23 in small-claims consumer class actions.⁴²⁰ The Third Circuit has established that ascertainability requires plaintiffs to identify an administratively feasible mechanism that allows the court to identify all putative class members.⁴²¹ In most, if not all, small-claims consumer class actions, this requirement would be extremely difficult to satisfy.⁴²²

While the Third Circuit is not the first court to deny class certification based on ascertainability, the need to identify each individual plaintiff is a novel approach.⁴²³ Traditionally, ascertainability has demanded that plaintiffs present the court with a precise class definition.⁴²⁴ Based on the class definition, courts must be able to readily identify absent class members.⁴²⁵ This means that a court must be able to identify whether someone could be a class member based on objective criteria.⁴²⁶ An inability to identify potential class members based on the class definition must result in a failure to satisfy ascertainability.⁴²⁷ The traditional application of ascertainability weeds out imprecise class definitions that do not allow for proper representative litigation to occur.

Although the Third Circuit's understanding of ascertainability will likely prevent many frivolous class action lawsuits, this interpretation does not properly apply the requirement. Ascertainability developed in response to class definitions that prohibited a court from identifying class members absent individualized findings of fact.⁴²⁸ Such class definitions would prevent proper distribution of damages and determinations by future courts about who is bound by a valid judgment.⁴²⁹ In this regard, the doctrine promoted the efficient use of Rule 23.

Because class certification often results in settlement, little discussion of ascertainability exists at the circuit level.⁴³⁰ The growing use of ascertainability to deny class certification is an important topic that

419. *See supra* notes 160–79 and accompanying text.

420. *See supra* notes 237–329 and accompanying text.

421. *See supra* notes 237–329 and accompanying text.

422. *See supra* notes 296–329 and accompanying text.

423. *See supra* notes 183–235 and accompanying text.

424. *See supra* notes 183–235 and accompanying text.

425. *See supra* notes 183–235 and accompanying text.

426. *See supra* notes 183–235 and accompanying text.

427. *See supra* notes 183–235 and accompanying text.

428. *See supra* notes 160–79 and accompanying text.

429. *See supra* notes 160–79 and accompanying text.

430. *See supra* notes 183–85 and accompanying text.

demands more attention from circuit courts. The Third Circuit decisions are important examples of the questions that remain regarding the exact application of ascertainability. Different understandings of the requirement will result in class certification in some circuits but not others. The potential bar to certification that the Third Circuit's interpretation of ascertainability has created should push more circuits to further flesh out the requirement. Any failure to do so may lead to a significant increase in the denial of class certification based on ascertainability.