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ASCERTAINABILITY**CERTIFICATION**

Given that the U.S. Supreme Court has declined to clarify the ascertainability requirement in class certification, litigants face considerable uncertainty and unpredictability in assessing the likelihood of certification, attorneys Edward Soto and Erica W. Rutner say. The authors discuss the evolution of the ascertainability requirement and the various ways it has been interpreted by circuit courts, and offers advice for class action practitioners.

**Circuit Split on Ascertainability Leads to Inconsistency
And Uncertainty in the Certification of Class Actions**

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Independent from the explicit elements of Federal Rule of Civil Procedure 23 is an additional requirement to obtaining class certification: ascertainability.

Traditionally, ascertainability simply required that class members can be identified by reference to objective criteria in the class definition.

While Rule 23 does not expressly mention ascertainability, courts have imposed an ascertainability requirement in evaluating whether a class can be certified, describing it as an “implicit” requirement for class certification.¹

In the past, however, ascertainability was often overlooked by courts and practitioners as a requirement that could be easily met. Indeed, until recently, it remained unclear whether the failure to satisfy ascertainability could even be an independent bar to class certification. But the last decade has seen a growing attention to ascertainability in the class action jurisprudence, with many courts embracing an increasingly-stringent application of the doctrine. However, the treatment of this concept has differed widely among the circuits, with some circuit courts vehemently resisting any expansion of the doctrine. As some commentators have

¹ See, e.g., *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (“We have repeatedly recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be ‘readily identifiable,’ . . . Our sister circuits have described this rule as an ‘ascertainability’ requirement.”).

described it, ascertainability is “one of the most contentious issues in class action litigation these days.”² Given that the Supreme Court has denied certiorari on this issue on two separate occasions, litigants in many jurisdictions continue to face considerable uncertainty and unpredictability in assessing the likelihood of class certification. This article describes the evolution of the ascertainability requirement and the various ways in which it is currently interpreted by circuit courts, and suggests relevant discovery strategies for practitioners involved in putative class action suits.

I. Origins of Ascertainability Requirement

The evolution – and disagreement – over ascertainability stems largely from the fact that it is not formally mentioned in Rule 23 and has no universally agreed upon source. Rather, courts find authority for the requirement in a variety of different sources and based on a variety of different reasons. Many courts focus on policy reasons as a basis for imposing a requirement of ascertainability. The most often cited policy reasons revolve around the need to identify the persons who are (a) entitled to notice, (b) entitled to relief, and (c) bound by a final judgment.³ More recently, courts have also focused on the notion that 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.”⁴

Some courts have pointed to Rule 23 of the Federal Rules as a basis for requiring ascertainability. For instance, one of the oldest justifications for the ascertainability requirement is that the term “class” in Rule 23(a) means a definite or ascertainable class because, without such a class, courts cannot apply the explicit class certification elements of Rule 23(a) in the first instance.⁵ Other courts find support for ascertainability in Rule 23(c)(1)(B), which provides that a court must define the class in its certification order.⁶ Finally, some courts have looked to the notice requirements of Rule 23(c)(2), reasoning that ascertainability allows the court to identify the potential class members to whom notice should be directed.⁷

Clearly, there are many potential sources for imputing the requirement of ascertainability. As discussed below, this has significantly contributed to the inconsistent and varying application of the doctrine in courts around the country.

² Archis A. Parasharami & Hannah Chanoine, U.S. Chamber of Commerce Files Amicus Brief on Ascertainability in Key Ninth Circuit Case, Class Def. Blog (Feb. 3, 2015), <http://www.classdefenseblog.com/2015/02/03/u-s-chamber-of-commerce-files-amicus-brief-on-ascertainability-in-key-ninth-circuit-case>.

³ See, e.g., *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. July 28, 2015) (identifying four policy reasons given by courts for ascertainability requirement as: (1) administrative convenience, (2) unfairness to absent class members, (3) unfairness to bona fide class members, and (4) due process interests of the defendant); see also *Singer v. AT&T Corp.*, 185 F.R.D. 681, 685 (S.D. Fla. 1998).

⁴ See *Carrera v. Bayer Corp.*, 277 F.3d 300, 307 (3d Cir. 2013).

⁵ See *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981).

⁶ See *Stanford v. Foamex L.P.*, 263 F.R.D. 156, 174 (E.D. Pa. 2009).

⁷ See *In re Fosamax Prods. Liab. Litig.*, 248 F.R.D. 389, 396 (S.D.N.Y. 2008).

II. Various Applications of Ascertainability Requirement

Because courts cannot even agree on the origins of the ascertainability requirement, there is no bright-line rule to examine whether a class is sufficiently ascertainable.

Rather, courts diverge on what the requirement means and how it should be applied, with increasing disparity on the issue in the last few years.

A. Lack of ‘Objective Criteria’ to Define Class

The most traditional application of the ascertainability requirement focuses on whether the class definition contains “objective criteria” to identify who is in the class. This allows courts to determine the identity of the class based on a clearly defined set of characteristics. Thus, if the court must examine subjective criteria to identify class members, such as a putative class member’s state of mind, the class generally will not be ascertainable. A seminal case on this issue is *DeBremaecker v. Short*, wherein the Fifth Circuit upheld the denial of a class which was defined to include residents active in the “peace movement” as well as those who feared harassment and intimidation in exercising their First Amendment right when passing out leaflets.⁸ The first part of the class definition was not “clearly ascertainable” because of the “patent uncertainty of the meaning of ‘peace movement.’”⁹ The second part of the class definition was also problematic because the court could not conclude with certainty that the activity complained of had a “chilling effect” on all state residents.¹⁰

The Second Circuit and Seventh Circuit have reached similar results, holding that a class cannot be certified where “membership in the class depends on each individual’s state of mind.”¹¹ This criterion has also been applied in connection with a class definition that depended upon each class member’s “subjective estimate of his or her long-term smoking habit.”¹² As the court in *Xavier* aptly explained, “[i]f a class definition includes a requirement that cannot be proven directly, and that depends instead upon each putative class member’s feelings and beliefs, then there is no reliable way to ascertainable class membership.”¹³

B. Class Definition Imprecise, Inadequate

Courts have also required that the class be precisely and adequately defined in order to satisfy ascertainability. This requirement has received increased attention in the last decade and is most often applied in finding that a class definition is either overbroad or creates a “failsafe class.”

⁸ 433 F.2d 733, 734 (5th Cir. 1970).

⁹ *Id.*

¹⁰ *Id.* at 734.

¹¹ *Simer*, 661 F.2d at 669 (denying certification of class defined to include individuals who were discouraged from applying for public assistance); see also *In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 44-45 (2d Cir. 2006) (holding that class was “not identifiable” where determining membership “would require inquiry into the subjective intent of the [class member]”).

¹² *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011).

¹³ 787 F. Supp. 2d at 1089.

1. Class Definition Overbroad

Several circuit courts interpret ascertainability to mean that a class definition cannot be overbroad by virtue of including too many individuals who have no legitimate claim. For instance, in *Oshana v. Coca-Cola Co.*, the plaintiffs alleged that Coca-Cola deceived consumers into believing that bottled and fountain Diet Coke contained the same sweetener and sought certification of a class defined to include any consumer who purchased a fountain Diet Coke.¹⁴ The Seventh Circuit affirmed the district court's decision that the class definition "was not sufficiently definite," reasoning that the "class could include millions who were not deceived and thus have no grievance."¹⁵ As the Seventh Circuit later articulated in *Messner v. Northshore Univ. Health-System*, "[i]f [] a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification."¹⁶ Similar findings have also been made by the Sixth Circuit and Eleventh Circuit.¹⁷

However, not all circuits agree with the principle that an overbroad class definition fails to satisfy ascertainability. In *In re Deepwater Horizon*, the Fifth Circuit specifically rejected this argument, reasoning that "the possibility that some claimants may fail to prevail on their individual claims will not defeat class membership on the basis of the ascertainability requirement."¹⁸ And other circuits have qualified the principle, noting that a class may be certified even if it includes "a *de minimis* number of potentially uninjured parties."¹⁹ The First Circuit reasoned that "excluding all uninjured class members at the certification stage is almost impossible in many cases, given the inappropriateness of certifying what is known as a fail-safe class – a class defined in terms of the legal injury."²⁰

2. Class Definition Creates 'Failsafe' Class

Another way in which defendants can defeat certification based on lack of ascertainability is based on the prohibition against fail-safe classes. A fail-safe class is a class that is defined "so that whether a person qualifies as a member depends on whether the person has a valid claim."²¹ Numerous circuits, including the First, Sixth, Seventh and Ninth Circuit, have all held that "[s]uch a class definition is improper because a class member either wins or, by virtue of losing, is defined

out of the class and is therefore not bound by the judgment."²² Again, however, not all circuits follow this principle. In *In re Rodriguez*, the Fifth Circuit held that it has rejected a rule against fail-safe classes and therefore it will not reject a class definition that creates a fail-safe class.²³

C. More Rigorous Application of Ascertainability Requirement: Identifying Class Membership Feasibly

1. Evolution of Third Circuit Approach Towards Ascertainability

Beyond the applications discussed above, a far more rigorous construction of the ascertainability requirement has developed in just the last few years. As first discussed by the Third Circuit and now embraced by other courts around the country, the ascertainability requirement is now being read to also require an "administratively feasible mechanism for determining whether putative class members fall within the class definition."²⁴ The issue raised by this requirement is not that the class definition is built on inherently subjective factors, but that the proposed means of determining membership involves subjective and unreliable evidence. As each of the courts adopting this requirement have emphasized, "if class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate."²⁵

This approach first developed in *Marcus*, where the Third Circuit concluded that the proposed class, which was defined to include owners of BMW vehicles whose run-flat tires had gone flat, "raise[d] serious ascertainability issues" because the defendants did not have records that would demonstrate whether a putative class member's tires had gone flat and the plaintiffs had not proposed "a reliable, administratively feasible alternative" to identify such members.²⁶ In reaching its decision, the court emphasized that it could not approve "a method that would amount to no more than ascertaining by potential class members' say so," because "forcing defendants to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications."²⁷

This reasoning continued in *Hayes v. Wal-Mart Stores, Inc.*, where the Third Circuit again emphasized the need for a "reliable and administratively feasible mechanism" for determining class membership.²⁸ Ex-

¹⁴ 472 F.3d 506, 509 (7th Cir. 2006).

¹⁵ *Id.* at 513-514.

¹⁶ 669 F.3d 802, 824 (7th Cir. 2012).

¹⁷ See *Walewski v. Zenimax Media, Inc.*, 502 Fed. App'x 857, 861 (11th Cir. 2012) (affirming decision that class definition was overbroad because it included all persons who had purchased any version of an allegedly defective video game, "whether or not they ever were injured by (or experienced) the alleged animation defect"); *Romberio v. UnumProvident Corp.*, 385 Fed. App'x 423 (6th Cir. 2009) (overturning certification of a class that included members whose long-term disability benefits were denied on the basis that the class definition was "unsatisfactory" because it included "many individuals whose claims were properly denied for medical reasons") (emphasis in original)

¹⁸ 785 F.3d 1003, 1018 (5th Cir. 2015).

¹⁹ *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015).

²⁰ *Id.* at 22.

²¹ *Messner*, 669 F.3d at 825.

²² *Id.*; *In re Nexium Antitrust Litig.*, 777 F.3d at 26; *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537 (6th Cir. 2012); *Kamar v. Radio Shack Corp.*, 375 Fed. App'x 734, 736 (9th Cir. 2010).

²³ 695 F.3d 360, 370 (5th Cir. 2012).

²⁴ *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013).

²⁵ *E.g.*, *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012).

²⁶ 687 F. 3d at 593-594.

²⁷ *Id.* at 594. As other courts have further explained in discussing this due process concern, allowing class members to self-identify without affording defendants the opportunity to challenge class membership impinges on a defendant's due process right to "present every available defense." *Mullins*, 2015 WL 4546159, at *13.

²⁸ 725 F.3d at 355.

plaining that this requirement is distinct from – and in addition to – the requirement that the class be defined with reference to objective criteria, the *Hayes* court found that the class definition was not ascertainable because the defendant did not have records that could sufficiently identify class members and the only proof of class membership was the “say-so of putative class members.”²⁹ In so holding, the Third Circuit made clear that it does not believe “the nature or thoroughness of a defendant’s recordkeeping [] alter[s] the plaintiff’s burden to fulfil Rule 23’s requirement,” particularly where there was no statutory or regulatory authority obligating the defendant to create and maintain a particular set of records.³⁰

Finally, in *Carrera v. Bayer Corp.*, the Third Circuit cemented this principle, decertifying a class defined to include consumers who purchased Bayer’s over-the-counter weight loss pill on the basis that identifying class members was not “administratively feasible.”³¹ The court emphasized that a defendant in a class action case has “a due process right to raise individual challenges and defenses to claims,” which includes the right to challenge the proof used to demonstrate class membership, and that a plaintiff does not satisfy ascertainability if individualized fact-finding or mini-trials will be required to prove class membership.³² The court then found that there was no way for the defendant to challenge the evidence used to prove class membership in a manageable way because consumers were unlikely to have documentary proof of purchase, the defendant had no records of purchasers, and the model affidavits offered by the plaintiff were a deficient method of ascertainability.³³ Although the court did not hold that consumer affidavits were *per se* insufficient, it stated that it “doubt[ed] whether [an amended model] could satisfy the ascertainability requirement.”³⁴ Notably, although the *Carrera* court did not provide any explanation as to the type of model that could satisfy ascertainability, the Third Circuit in *Byrd v. Aaron’s Inc.*, later allowed a form of self-identification as to individuals in the class who were “household members,” based on the fact that such affidavits could be objectively verified by public records.³⁵

Eleventh Circuit jurisprudence has evolved in a manner similar to that of the Third Circuit. In *Bussey v. Macon County Greyhound Park, Inc.*, the Eleventh Circuit first emphasized that a class definition must contain “objective criteria” that allow for class members to be identified in an “administratively feasible way.”³⁶ Based on this requirement, the Eleventh Circuit held that the class definition certified by the district court must be revised because, although the defendant had records as to certain of the members in the class, the class also included individuals about whom the plaintiff had “not provided any indication that they have, or even that they can obtain, data.”³⁷ Following this, the Eleventh Circuit in *Karhu v. Vital Pharmaceutical, Inc.*,

just recently affirmed the denial of class certification on the basis that the proposed classes were not ascertainable, reasoning that the plaintiff had not established that the defendant’s records were useful for identification purposes and that the plaintiff’s proposed self-identification method was deficient.³⁸ Like the Third Circuit, the Eleventh Circuit highlighted the potential due process implications of self-identification and explained that a plaintiff proposing self-identification must establish how the methods proposed would avoid these problems.³⁹ Notably, the court did not give any indication of how a plaintiff could establish the validity of self-identification.

Although the Third and Eleventh Circuits have spoken most directly on this issue, other circuit courts recently have taken a related approach to ascertainability. In *EQT Products Co. v. Adair*, the Fourth Circuit held the class at issue, which included owners of a gas estate, was not sufficiently ascertainable because complications in resolving ownership of a gas estate “pose a significant administrative barrier to ascertaining the ownership classes.”⁴⁰ And – despite widespread discontent for this approach by California district courts – the Ninth Circuit in *Martin v. Pacific Parking Systems*, affirmed the denial of a proposed class that was defined to include all individuals who were provided a parking receipt on which the expiration date of their personal credit or debit card was printed.⁴¹ The Ninth Circuit reasoned that it was not administratively feasible to determine which individuals used personal, and not business, credit cards to purchase parking, nor was it feasible to determine whether individuals received parking receipts with expiration dates on them.⁴² The court noted that the plaintiff had not proposed a plan to make these determinations “beyond suggesting that individuals self-identify themselves as members of the class” and that this was not sufficient for the district court to “manageably determin[e] which individuals are members.”⁴³ Notably, this decision is unpublished and therefore has no precedential value under Ninth Circuit rules.⁴⁴

2. Rejections and Qualifications of Third Circuit Approach

At least four circuits have taken a decidedly less stringent approach than that espoused by the Third Circuit. Most notably are the recent decisions of the Seventh Circuit in *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015) and the Sixth Circuit in *Rikos v. P&G*, 799 F.3d 497 (6th Cir. 2015).

In *Mullins*, the Seventh Circuit unequivocally rejected *Carrera* and declined to require an administratively feasible method for identifying class members as part of the ascertainability inquiry.⁴⁵ In so holding, the Seventh Circuit emphasized this stringent version of ascertainability “effectively bars low-value consumer class actions” and “immunizes defendants from liability because they chose not to maintain records of the

²⁹ *Id.* at 356.

³⁰ *Hayes*, 725 F.3d at 356.

³¹ 727 F.3d at 307-308.

³² *Id.*

³³ *Id.* at 308-309.

³⁴ *Id.* at 311.

³⁵ 784 F.3d 154 (3d Cir. 2015).

³⁶ 562 Fed. App’x 782, 788 (11th Cir. 2014).

³⁷ *Id.* (emphasis in original).

³⁸ 621 Fed. App’x 945 (11th Cir. 2015).

³⁹ *Id.* at 948-949.

⁴⁰ 764 F.3d 347, 358 (4th Cir. 2014).

⁴¹ 583 Fed. App’x 803 (9th Cir. 2014).

⁴² *Id.* at 804.

⁴³ *Id.*

⁴⁴ See U.S. Ct. App. Ninth Circuit Rule 36-3.

⁴⁵ 795 F.3d at 662.

relevant transaction.”⁴⁶ The court ultimately concluded that certification should not be denied merely because the proposed method for identifying class members relies on affidavits, and that the district court can usually tailor fair verification procedures to the particular case so that, at some stage in the proceedings, a defendant is given the opportunity to challenge each class member’s claim.⁴⁷ The court did make clear, however, that problems of administrative inconvenience should not be ignored entirely, but should instead be addressed under the superiority requirement of Rule 23(b)(3), which is better suited for the issue because it requires courts to recognize “both the costs and benefits of the class device.”⁴⁸

Similarly, in *Rikos*, the Sixth Circuit held “we see no reason to follow *Carrera*, particularly given the strong criticism it has attached from other courts.”⁴⁹ The court concluded that a class of probiotic supplement purchasers was ascertainable as it was defined by objective criteria – anyone who had purchased the supplement.⁵⁰ The court further concluded that class membership “can be determined with reasonable – but not perfect accuracy,” which could be accomplished through “substantial review [] of internal P&G data,” as well as “through the use of receipts, affidavits, and a special master to review individual claims.”⁵¹ Notably, while taking a less stringent approach as the Third Circuit, the Sixth Circuit does not appear to have gone as far as the Seventh Circuit in *Mullins*. In particular, despite the Sixth Circuit’s rejection of *Carrera*, it appears that plaintiffs must nevertheless be capable of determining class membership with at least “reasonable” accuracy. Moreover, prior to *Rikos*, the Sixth Circuit had held that ascertainability requires that a class “be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class.”⁵² Thus, plaintiffs still face at least some requirement regarding the ability to identify class members at the outset in order to obtain class certification.

Critically, as discussed in more detail below, the defendants in both *Rikos* and *Mullins* sought writs of certiorari from the Supreme Court regarding the ascertainability issue, arguing that the inconsistent treatment of the issue amongst appellate courts warranted Supreme Court review. However, as some of the first certiorari petitions heard following the passing of Justice Scalia, both writs were denied by the Supreme Court.⁵³

The other circuits that have addressed the issue have not rejected *Carrera* outright, maintaining the technical requirement of an administratively feasible method for class identification. Yet, they have applied this requirement in more qualified ways, permitting either affidavits or some other form of individualized inquiry to ascertain class membership. For instance, in *In re Nexium Antitrust Litigation*, the First Circuit agreed that a

mechanism for distinguishing the injured from uninjured class members must be “administratively feasible,” but held that testimony by the consumer, “in the form of an affidavit or declaration would be sufficient” for establishing injury.⁵⁴ Although the plaintiffs had not even proposed such a mechanism for identification, the court appeared to place the burden on the defendant to affirmatively disprove the reliability of self-identification, emphasizing that “plaintiffs’ expert made no concession that such a mechanism could not be developed, nor did defendant’s expert say that it could not be developed.”⁵⁵ The court did not explain, however, how the defendant or its expert could have disproved the reliability of self-identification.

In *Frey v. First National Bank Southwest*, the Fifth Circuit upheld the finding that a putative class satisfied the ascertainability requirement despite the fact that the class definition required the court to conduct individualized inquiries to determine whether accounts were established primarily for personal or commercial purposes.⁵⁶ The Fifth Circuit reasoned these inquiries would “be largely administrative” and therefore would not defeat ascertainability.⁵⁷

Beyond these appellate court decisions, district courts likewise have battled over ascertainability issues in circuits where the appellate court has not yet definitively spoken. For instance, even after the unpublished Ninth Circuit decision in *Martin*, several California district courts expressed their vehement opposition to *Carrera*, holding that it “is not currently the law in the Ninth Circuit” and that “[a]dopting the *Carrera* approach would have significant negative ramifications for the ability to obtain redress for consumer injuries [because] few people retain receipts for low-priced goods.”⁵⁸ Other California district courts, however, have taken the exact opposite approach in analyzing the issue of ascertainability.⁵⁹ The Ninth Circuit is currently considering the issue in *Jones v. ConAgra Foods, Inc.*, No. 14-16327 (9th Cir. Filed July 15, 2014), so clarity in this Circuit should be forthcoming.

Similarly, some federal judges in New York have directly rejected the Third Circuit approach, whereas others have embraced it. In *Ebin v. Kangadis Food, Inc.*, the court acknowledged that the defendant did not have any records to determine class membership, consumers were unlikely to keep receipts documenting their purchase of the product at issue, and the only process described for identifying class members was through a signed declaration that the class member purchased the product in the class period.⁶⁰ Nevertheless, the court held that denying a class on this basis “would render class actions against producers almost impossible to

⁴⁶ *Id.* at 662, 668.

⁴⁷ *Id.* at 668-669.

⁴⁸ *Id.* at 663 (emphasis in original).

⁴⁹ 799 F.3d at 525.

⁵⁰ *Id.* at 526.

⁵¹ *Id.*

⁵² *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537-38 (6th Cir. 2012).

⁵³ See *Direct Digital, LLC v. Mullins*, U.S., No. 15-549, cert. denied (Feb. 29, 2016); *P&G Co. v. Rikos*, 2016 BL 94358 (U.S. Mar. 28, 2016).

⁵⁴ 777 F.3d at 19-20.

⁵⁵ *Id.* at 20.

⁵⁶ 602 Fed. App’x 164, 168 (5th Cir. 2015).

⁵⁷ *Id.* at 169.

⁵⁸ *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 2014 BL 259776 (N.D. Cal. Sep. 18, 2014); see also *Forcellati v. Hyland’s, Inc.*, 2014 BL 98578 (C.D. Cal. Apr. 9, 2014) (“Given that facilitating small claims is ‘[t]he policy at the very core of the class action mechanism,’ . . . we decline to follow *Carrera*.”).

⁵⁹ See *Perrine v. Segal of Am., Inc.*, 2015 BL 140969 (N.D. Cal. May 12, 2015) (holding that the class was not ascertainable because the only way to identify class members was through affidavits and, under the alleged facts, “those affidavits would be highly unreliable”).

⁶⁰ 297 F.R.D. 561, 567 (S.D.N.Y. 2014).

bring,” and therefore, “the ascertainability difficulties, while formidable, should not be made into a device for defeating the class action.”⁶¹ However, in *Brown v. Sega Amusements, U.S.A., Inc.*, the court reached the exact opposite conclusion.⁶²

III. Where Will Ascertainability Go From Here

Given the unsettled state of the law, depending on the jurisdiction and court in which an action is brought, the issue of ascertainability may be fatal to a class action, or it may have no impact at all. Indeed, the current patchwork of approaches on the issue could very well lead to inconsistent results in similar class actions filed in multiple district courts, and may encourage forum shopping by the plaintiffs’ bar. Moreover, given that a number of circuit courts have not yet addressed the issue – two of which have clear splits amongst their district courts – it is difficult for parties to predict how the requirement will be interpreted by a particular court. Even in some circuits that have addressed the issue there remains uncertainty, and thus how a district court might choose to interpret and apply the words of the appellate court in a particular context is unclear. As the defendant in *Mullins* aptly pointed out to the Supreme Court, there is “mass confusion in the class action bar concerning the proper standard.”⁶³ This ambiguity is further compounded by the fact that the Advisory Com-

mittee’s Rule 23 Subcommittee recently omitted ascertainability from its draft concept amendments for the class action reforms, as well as the fact that the Supreme Court denied certiorari in the two cases that could have led to a uniform approach on the issue. Regardless of the reasons why both the Supreme Court and the Rule 23 Subcommittee chose not to address the issue, the result is the same: continued uncertainty regarding the meaning and treatment of the ascertainability requirement. And that means considerable uncertainty for parties seeking to evaluate the likelihood of class certification, particularly in small-dollar consumer product cases.

Given the current state of flux surrounding the ascertainability requirement, parties involved in a putative class action should be keenly aware of the developing jurisprudence. They should also plan to pursue discovery that can support ascertainability arguments under any of the existing interpretations, in anticipation of the many different approaches a court might take towards the issue. In particular, discovery should be obtained with respect to what records do – and do not – exist regarding the identity of class members. And when dealing with product liability cases, such discovery should be sought at all levels of the distribution chain. Evidence demonstrating whether (and the extent to which) distributors maintain sales records may prove to be highly relevant. Moreover, discovery bearing on the verifiability of consumer affidavits should also be obtained, something which may be highly relevant to the question of ascertainability even under the current interpretations espoused by the Sixth and Seventh Circuits. Given that uniform clarity from the Supreme Court is not expected in the near future, parties should acknowledge the uncertainty they face and act accordingly.

⁶¹ *Id.*

⁶² 2015 BL 61999 (S.D.N.Y. Mar. 9, 2015) (denying class certification in part because there was no “objective means to determine whether a particular individual is a class member” and rejecting self-identification as an administratively feasible method to determine class membership).

⁶³ Brief for Petitioner, *Direct Digital, LLC v. Mullins* (No. 15-549) (Oct. 26, 2015), 2015 U.S. Briefs 549, at *3.