

CLASS ACTION

ALERT

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2013THE ENHANCED SCRUTINY OF CLASS DEFINITIONS
UNDER THE ASCERTAINABILITY REQUIREMENT:
AN ADDITIONAL HURDLE FOR PLAINTIFFS OR
AN INCREASED BURDEN FOR DEFENDANTS?*By Ira Neil Richards and Theresa E. Loscalzo*

When a plaintiff seeks certification of a class, the issue of whether the class is “ascertainable” has become an increasingly significant battleground issue in class certification proceedings. While not explicitly set out in Rule 23 of the Federal Rules of Civil Procedure, ascertainability is now widely recognized as an implied prerequisite for class certification. Ascertainability refers to the requirement that the class definition be sufficiently definite so that it is administratively feasible to determine whether a particular person is a member of the proposed class by reference to objective and definite criteria. Recent appellate authority suggest that both plaintiffs and defendants must consider issues relating to the feasibility of identifying class members when addressing a motion for class certification.

The ascertainability requirement serves several important objectives. First, it eliminates serious administrative burdens that are not consistent with the efficiencies expected in a class action. Second, it protects absent class members by ensuring the best notice possible, consistent with both requirements of due process and Rule 23. Third, it protects defendants by ensuring that the defendant can clearly identify the class members bound by any final judgment. Similarly, a class definition tied to objective and definite criteria ensures it will be feasible for both a defendant and potential class members to identify who may ultimately be entitled to damages or other relief. Defining class membership by reference solely to objective factors also avoids fail-safe classes, in which a class is defined in terms of the merits of a plaintiff’s claims.

In a recent decision, the Court of Appeals for the Third Circuit again emphasized that the plaintiff must show by a preponderance of the evidence that there is a reliable and administratively feasible method of ascertaining the class:

This petition for class certification will founder if the only proof of class membership is the say-so of

putative class members or if ascertaining the class requires extensive and individualized fact-finding.

Hayes v. Wal-Mart Stores, Inc., No. 12-2522, slip op. at 13 (3d Cir. Aug. 2 2013). In *Hayes*, the plaintiff purchased two “as-is” products and was offered and Hayes agreed to purchase a Sam’s Club service plan for each product. Sam’s Club had contracted with a vendor to offer an extended warranty product service plan on merchandise it sold. It routinely offered the service plan on “as-is” products. “As-is” products are certain clearance items that may have been returns, display items, damaged items, or items Sam’s Club wanted to clear out from inventory. The extended warranty product Sam’s Club was selling, however, did not cover most products sold “as-is” including but not limited to floor models and demonstration models. But it did cover “as-is” products that were covered by a full manufacturer’s warranty, and products that were being sold “as-is” simply to clear out inventory. Alleging that Sam’s Club was selling warranties to “as-is” purchasers who could not benefit from the warranties, Hayes sued under the New Jersey Consumer Fraud Act, and asserted as well breach of contract and unjust enrichment claims.

In opposing class certification, Sam’s Club argued that the proposed class was not ascertainable because there was no feasible way to identify class members from available records. Sam’s Club kept an inventory of products placed for sale “as-is.” But Sam’s Club did not keep records of which “as-is” sales involved the concomitant sale of a service plan. Instead, Sam’s Club kept records of all price overrides, and all “as-is” products were rung up with a price override, but so were many other products for various other reasons.

The district court certified the following Rule 23(b)(3) class:

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All consumers who Purchased from Sam’s Clubs in the State of New Jersey, a Sam’s Club Service Plan to cover as-is products. Excluded from the Class are consumers whose as-is product was covered by a full manufacturer’s warranty, was a last-one item, consumers who obtained service on their product, and consumers who have previously been reimbursed for the cost of the Service Plan.

Slip op. at 4-5. The district court found the defined class was ascertainable because the definition specified “a particular group that was harmed during a particular time frame, in a particular location, in a particular way” and used objective criteria. *Id.* at 8-9. The district court further found that Sam’s Club had records of 3,500 member transactions during the class period that included both a price override — potentially but not definitely signaling that the purchase may have been an “as-is” product — and a Service Plan. The district court noted however that Sam’s Club had no method for determining how many of the 3,500 price override transactions were actually for “as-is” items, but did not see that as a barrier to class certification, reasoning that the plaintiff should not be hindered from bringing a class action because the defendant lacked records. *Id.* at 11-12.

The Third Circuit granted interlocutory appeal, vacated the certification order and remanded in light of its decision in *Marcus v. BMW of North America, LLC*, 687 F.3d 583 (3d Cir. 2012). In *Marcus*, a putative class action alleging that run-flat tires manufactured by Bridgestone and included as original equipment on certain BMW vehicles were purportedly defective. The district court certified a class, and the Third Circuit vacated and remanded, finding a number of defects in the class certification decision. The Third Circuit in *Marcus* addressed ascertainability and expressly adopted a requirement that the members of a proposed class must be readily ascertainable by objective criteria:

[The district court] must resolve the critical issue of whether the defendants’ records can ascertain class members and, if not, whether there is a reliable, administratively feasible alternative. We caution, however, against approving a method that would amount to no more than ascertaining by potential class’ members say so. For example, simply having potential class members submit affidavits that their Bridgestone RFTs have gone flat and been replaced may not be “proper or just.” BMW and Bridgestone will be able to cross-examine [the

named plaintiff] at trial about whether and why his tires “have gone flat and been replaced.” Forcing BMW and Bridgestone 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.

Id. at 594.

In reaching its decision to vacate in *Hayes*, the Third Circuit reviewed its decision in *Marcus*, and explicitly noted that the nature or thoroughness of a defendant’s record-keeping does not alter the plaintiff’s burden to fulfill Rule 23 requirements: “Rule 23’s requirements that the class be administratively feasible to ascertain and sufficiently numerous to warrant class action treatment cannot be relaxed or adjusted on the basis of Hayes’ assertion that Wal-Mart’s records are of no help to him.” Slip op. at 12.

As a result of the heightened focus on the feasibility of identifying class members, and the role that a defendant’s records may play in establishing ascertainability, courts are becoming less sympathetic to claims by defendants that different sets of records might need to be examined to ascertain whether potential class members meet a number of different objective criteria, even where the case involves a potentially large class with millions of records. *See e.g., Young v. Nationwide Mutual Ins. Co.*, 693 F.3d 532 (6th Cir. 2012) (rejecting defendants’ arguments that the large number of defendants’ records that would have to be examined to determine class membership made ascertaining class membership administratively infeasible and citing with approval cases where courts found that the size of the potential class and the need to review defendant’s records, even where the review required substantial efforts, were not reasons to deny certification).

In situations where the defendant’s records are inadequate for the purpose of objectively identifying class members, plaintiffs seeking to represent a class will have to successfully devise an administratively feasible means of objectively identifying class members. For example, the plaintiffs might be able to meet their burden where they are able to compile objective data from third parties and match it up with defendant’s records to identify potential class members. In securities class actions, for instance, records in the hands of third party brokerage firms and transfer agents routinely are used to compile a list of potential class members.

At first blush, the increased focus on ascertainability —

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and the reluctance of courts to relax the requirement where the defendant does not have adequate records to ascertain who appropriately is within the scope of the class definition — appears to be a victory for the defense bar and to create an additional hurdle for plaintiffs. But as a practical matter, it likely will impose a significant business and cost burden on defendants as well. Typically, in class action cases, the plaintiff serves discovery early in the case asking for identification of every class member. In response, the defense typically objects, claiming that the discovery request is premature, and says it will answer the discovery after class certification. But now, where there is any dispute with regard to whether the defendant's records are sufficient to identify class members, the plaintiff's lawyer cannot wait until after class certification to seek discovery from the defendant about its record-keeping. Consequently, discovery involving potentially massive numbers of documents and databases which once was routinely postponed until post-certification now will need to be addressed — and the plaintiff's counsel will insist that it be addressed — before the certification hearing.

Because more recent cases have focused both on whether a proposed class definition is based on objective criteria *and* whether records exist to feasibly identify who matches those criteria, parties have to take both of those ascertainability elements into consideration when addressing a motion for class certification. Each side will need to consider what additional discovery is necessary, including discovery concerning a defendant's record keeping and the availability of third party information sources. A plaintiff will need to be prepared to adjust a proposed class definition in order to conform it to the available information. A defendant faced with a motion for class certification will likewise want to consider how its own records or use of outside

data sources tie into the class definition that a plaintiff is proposing. As both sides examine the available information, class definitions may narrow, which will also narrow issues in dispute, potentially, at least in some cases, reducing the cost of litigation for both sides. ♦

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