GET PREPARED FOR CLASS: THE CASE FOR REQUIRING REASONABLE ASCERTAINABILITY FOR CLASS ACTION CERTIFICATION IN THE NINTH CIRCUIT

INTRODUCTION

Recent Circuit Court decisions have judges, attorneys, consumers, and law students alike scrambling for the right answers. The subject of debate is ascertainability as a prerequisite for class certification. The class action vehicle is an efficient way to sue or hold organizations accountable for alleged wrongdoing that also provides for justice and fairness.[1] This vehicle can be used to sue an organization by a group of unidentified people who may or may not have been affected by the organization's actions. These claimants might in fact be unknown, but the organization knows there is possibly a sufficient number of them to warrant class action treatment.[2] Interestingly enough, the claimants may not even know who they are, because the attorneys bringing forth the lawsuit may have not yet identified who is included in this group.[3]

Organizations should certainly be held accountable for actual wrongdoing. Injured people with legitimate claims should also be given a remedy. Suppose these people meet the requirements to satisfy a class action lawsuit and bring forth their claim. These claimants bear the risk of their recovery becoming diluted because of others who are not actually injured

1. *See* Montgomery Ward & Co., Inc. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948).

2. FED. R. CIV. P. 23 (requiring a class to be "so numerous that joinder of all members would be impracticable" as one of its prerequisites for class action certification).

3. Lawyers bringing a class action lawsuit often have not yet identified the actual members of the class because class members could be "impossible to identify." Marcus v. BMW of N. Am., LLC, 687 F.3d 583 (3d Cir. 2012). When Rule 23(a) is satisfied, a class action must fit into one of three Rule 23(b) categories, one of which is the Rule 23(b)(3) Damages class, which, unlike the other two categories, requires notice to absent class members to allow them an opportunity to opt out. FED. R. CIV. P. 23.

jumping on the bandwagon.[4] Having no objective proof of injury, others may fraudulently submit an affidavit stating they have been injured and join the class. Additionally, claimants who would have sued individually but did not receive notice, and would have opted out if they did, are barred from bringing forth their claim separately. This is a very real issue that is the subject of heated debate.

Rule 23 of the Federal Rules of Civil Procedure governs class actions.[5] The rule has four stated prerequisites for class certification.[6] The class must be "so numerous that joinder of all members is impracticable;" there must be "questions of law or fact common to the class;" the claims or defenses of the representative parties must be "typical of the claims or defenses of the class;" and the representative parties must "fairly and adequately protect the interests of the class."[7] Though absent from Rule 23's text, several United States Circuits have held that a class must also be "ascertainable."[8]

Because ascertainability is absent from Rule 23's text, courts that require this prerequisite have had to define what ascertainability means.[9] Within the last decade, courts have adopted competing definitions. The "Heightened Ascertainability" approach, articulated by the Third Circuit, holds that ascertainability has two basic elements.[10] The class must be defined with reference to objective criteria, and there must be an administratively feasible mechanism to determine whether putative class members fall within the class definition.[11] To shed some light on what this means, the court in *Marcus v. BMW of North America, LLC* held that a class action is inappropriate if class members are "impossible to identify without individualized fact-finding or mini-trials."[12] This included the use of affidavits to identify, or *ascertain*

4. Class members with legitimate claims receive diluted recovery when class members join who would otherwise not have a valid claim on their own. Carrera v. Bayer Corp., 727 F.3d 300, 310 (3d Cir. 2013).

5. FED. R. CIV. P. 23.

6. The rule explicitly states the prerequisites are required "for one or more members of a class to sue or be sued as representative parties on behalf of all members." *Id.*

7. In short, these requirements can be summed up to Numerosity, Commonality, Typicality, and Adequacy of Representation. *Id.*

8. Rhys J. Williams, *Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.: The Eighth Circuit Joins the Ascertainability Standard Conversation*, 50 CREIGHTON L. REV. 155, 155 (2016).

9. *See* FED. R. CIV. P. 23(c)(1)(B) (requiring a class definition but excluding the word "ascertainability").

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

11. *Id.*

12. 687 F.3d 583, 593 (3d Cir. 2012).

class members.[13] The First, Second, Fourth,[14] and Eleventh Circuits have generally followed the Third Circuit's Heightened Ascertainability approach.[15]

The Seventh Circuit rejected this "heightened" standard of ascertainability, and instead applies a weaker version. The "Weak Ascertainability" approach merely requires that a class be defined clearly and based on objective criteria.[16] The Seventh Circuit also does not see a reason why affidavits should not be used to identify or ascertain class members.[17] The Sixth and Eighth Circuits joined the Seventh Circuit with the more reasonable Weak Ascertainability approach.[18]

The Ninth Circuit created its own approach: "No Ascertainability." Though the Ninth Circuit also held the Heightened Ascertainability approach's second element is unnecessary, it entirely refused to recognize ascertainability as an implied requirement for class certification in its *Briseno v. ConAgra Foods* decision.[19] The *Briseno* court did, however, agree with the Seventh Circuit's *Mullins* decision that affidavits are a proper means to identify or ascertain class members.[20]

The Courts' disagreement about the definition and application of ascertainability has caused a profound split among the circuits.[21] The United States Supreme Court has not yet opined on this heated debate regarding which is the appropriate standard. The Supreme Court has so far denied two petitions for certiorari in 2016 that question this issue.[22]

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13. *Id.* at 594.

14. The Fourth Circuit has not conformed to this "heightened standard," but has followed the Third's Circuit's precedent by holding that "a class cannot be certified unless a court can readily identify the class members in reference to objective criteria," Robert W. Sparkes, III, *Revisiting Ascertainability: The Ninth Circuit Court of Appeals Weights in on "Ascertainability" for Class Certification*, K&L GATES n.10 (Jan. 19, 2017), http://www.klgates.com/revisiting-ascertainability-the-ninth-circuit-court-of-appeals-weighs-in-on-ascertainability-for-class-certification-01-19-2017/#_edn25; EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014).

15. *See In re* Nexium Antitrust Litig., 777 F.3d 9 (1st Cir. 2015); Brecher v. Republic of Arg., 806 F.3d 22 (2d Cir. 2015); *Adair*, 764 F.3d at 358; Karhu v. Vital Pharm., Inc., 621 F. App'x 945 (11th Cir. 2015).

16. Mullins v. Direct Dig., LLC, 795 F.3d 654, 659 (7th Cir. 2015); Sparkes, *supra* note 14.

17. *Mullins*, 795 F.3d at 672.

18. *See* Rikos v. Procter & Gamble Co., 799 F.3d 497 (6th Cir. 2015); Sandusky Wellness Center, LLC v. Medtox Scientific, Inc., 821 F.3d 992 (8th Cir. 2016).

19. 844 F.3d 1121, 1125 n.4 (9th Cir. 2017).

20. *Id.* at 1132.

21. Williams, *supra* note 8, at 155.

22. Jordan Elias, *The Ascertainability Landscape and the Modern Affidavit*, 84 TENN. L. REV. 1, 2 (2016) (referring to Direct Dig., LLC v. Mullins and Proctor & Gamble Co. v. Rikos).

This Note argues that even in the era of textualism, the No Ascertainability approach to class certification is not true to class action policy and does not provide for fairness and justice. Ascertaining class members should be a prerequisite to class certification. Ascertainability ensures defendants' due process rights are protected because it allows defendants to "test the reliability of evidence submitted to prove class membership."[23] Because using affidavits to ascertain absent class members is unreliable to determine who belongs in the class, this Note's proposed ascertainability standard ensures a more reliable method is used.[24] Ascertainability additionally ensures potential claimants receive adequate notice to allow them to opt in to the class[25] or opt out if they believe class adjudication is not the proper means to vindicate their rights.[26] The result also protects legitimate claimants from diluted recovery by fraudulent or non-meritorious claims.[27]

Proponents of the No Ascertainability approach will object to erecting yet another barrier to class certification. They will argue that class certification is already a difficult enough task and interpretation of the current requirements already serve to protect the goals of ascertainability. Additionally, if ascertainability is required, why is it not already expressly stated in Rule 23? Why impose an additional barrier for claimants with legitimate claims who are entitled to recover for their injuries? These proponents will assert that Rule 23 neither provides nor implies such a prerequisite.

This Note begins with a background about the class action form and the purpose and requirements of class action lawsuits, focusing primarily on Rule 23(b)(3) classes. Part I of this Note discusses the three competing approaches to the ascertainability requirement. Part II explains the issues with the No Ascertainability approach, focusing on the use of affidavits as evidence of class membership. Part III argues that the Ninth Circuit should adopt a simple, objective form of the ascertainability doctrine, but reject using affidavits to identify or ascertain absent class members. Finally, this Note concludes that the ascertainability requirement is fair and appropriate because it provides for efficient litigation that is consistent with the requirements of due process for defendants and plaintiffs alike.

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23. Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013); Daniel Luks, *Ascertainability in the Third Circuit: Name That Class Member*, 82 FORDHAM L. REV. 2359, 2387 (2014).

24. *Carrera*, 727 F.3d at 311.

25. *Id.* at 307.

26. Luks, *supra* note 23, at 2371.

27. *Carrera*, 727 F.3d at 311.

BACKGROUND: THE CLASS ACTION FORM

A class action lawsuit is about fairness, justice, and efficiency.[28] A class action operates with a named class representative litigating the case on behalf of the absent class members, which are "a defined group of similarly situated persons."[29] Absent class members have no significant role in the litigation, but the class judgment also binds them if they were adequately represented by the class representative.[30] Class actions permit individuals with smaller claims to litigate collectively and pursue claims they may not be able to afford to litigate themselves.[31] Consolidating tens or possibly millions of claims into a single suit efficiently "conserve[s] judicial resources and promote[s] consistency."[32]

Certifying a potential class is a defining point in class action litigation for both plaintiffs and defendants alike.[33] For plaintiffs, failure to certify a class could put an end to the lawsuit.[34] On the other hand, successful certification may create unwanted pressure for defendants to settle even non-meritorious claims.[35] Defendants would be motivated to settle because litigation could be more costly, and settlement could thwart the risk of liability causing severe reputational damage.[36] In determining whether to certify a class, even the Ninth Circuit agrees that the court must conduct a "rigorous analysis" to determine whether Rule 23 is satisfied.[37] A party seeking certification must meet all four express prerequisites[38] under Rule 23(a) and fit into a 23(b) category.[39]

Plaintiffs seeking money damages regularly fit into a Rule 23(b)(3) class.[40] A Rule 23(b)(3) class has additional requirements that only pertain

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28. *See* Dale v. Daimler Chrysler Corp., 204 S.W.3d 151, 183 (Mo. Ct. App. 2006).

29. Erin L. Geller, Note, *The Fail-safe Class as an Independent Bar to Class Certification*, 81 FORDHAM L. REV. 2769, 2772 (2013).

30. *Id.*

31. *Id.*

32. *Id.* at 2773.

33. Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 167 (3d. Cir. 2001).

34. *Id.* at 162 (The court calls denial of certification the "death knell" of the litigation on the part of the plaintiffs).

35. *Id.*

36. *See* Geller, *supra* note 29, at 2773.

37. Briseno v. ConAgra Foods, Inc. 844 F.3d 1121, 1126 (9th Cir. 2017).

38. *See supra* note 7 and accompanying text (summing up Rule 23(a)'s prerequisites to Numerosity, Commonality, Typicality, and Adequacy of Representation).

39. *See* FED. R. CIV. P. 23(a)-(b).

40. Elias, *supra* note 22, at 10.

to this type of class action.[41] The court must find that "questions of law or fact common to class members *predominate* over any questions affecting only individual members," and that "a class action is *superior* to other available methods for fair and efficient adjudication."[42] Satisfying predominance and superiority depends on factors including class members' interest in individually controlling the litigation, the extent and nature of litigation concerning the controversy already begun, the desirability or undesirability of concentrating the litigation in the particular forum, and likely management difficulties.[43]

Given the prerequisites to certify a 23(b)(3) class, Rule 23 presumes the class is identifiable, or in our terms, ascertainable.[44] Even before this heated debate, a Kansas District Court held in 1995 that without a "cognizable" (also interchangeable with ascertainable) class, determining whether a putative class satisfies Rule 23(a) and (b) requirements is unnecessary.[45] Prior to the three main approaches discussed later in Part I of this Note, it appears courts recognized ascertainability as a threshold test to class certification.[46] Basically, the class members must be identifiable, or in other words, *ascertainable*, to then satisfy the requirements under Rule 23.[47] Years later, federal courts continue to grapple in defining this ascertainability doctrine,[48] resulting in the three main approaches discussed in Part I.

Because class certification is such a defining point for both plaintiffs and defendants, the means utilized to prove ascertainability are also crucial. The use of affidavits has also been the subject of heated debate, as plaintiffs have attempted to use affidavits as evidence of membership in a purported class.[49] Relying on affidavits to prove membership brings its own set of concerns for

41. *See* FED. R. CIV. P. 23(b)(3); Elias, *supra* note 22, at 10.

42. These additional requirements can be summed up to "Predominance" and "Superiority." FED. R. CIV. P. 23.

43. FED. R. CIV. P. 23(b)(3)(A)-(D).

44. Jason Steed, *On "Ascertainability" as a Bar to Class Certification*, 23 APP. ADVOC. 626, 627 (2011).

45. Davoll v. Webb, 160 F.R.D. 142, 146 (D. Colo. 1995).

46. *Id.*

47. Steed, *supra* note 44, at 627.

48. Elias, *supra* note 22, at 2.

49. *See* Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013); Marcus v. BMW of N. Am., LLC, 687 F.3d 583 (3d Cir. 2012); Rikos v. Procter & Gamble Co., 799 F.3d 497 (6th Cir. 2015); Mullins v. Direct Dig., LLC, 795 F.3d 654 (7th Cir. 2015); Briseno v. ConAgra Foods, Inc. 844 F.3d 1121 (9th Cir. 2017); Karhu v. Vital Pharm., Inc., 621 F. App'x 945 (11th Cir. 2015).

both plaintiffs and defendants, such as undermining defendants' ability to challenge class membership[50] and diluting plaintiffs' recovery.[51]

I. PREPARING FOR CLASS: THREE COMPETING APPROACHES TO THE ASCERTAINABILITY REQUIREMENT

There is yet to be a consensus among the Circuit Courts on what a putative class must show to prove its class members are ascertainable or identifiable for purposes of class certification. The Heightened Ascertainability approach has so far been the clearest, providing a two-part test to answer this question, discussed in Section A.[52] Section B illustrates the Weak Ascertainability approach's rejection of this two-part test, advocating for a weaker version of ascertainability requirements.[53] Finally, Section C shows how the No Ascertainability approach expressly or at least implicitly rejects both approaches.[54]

A. Overachieving with a "Heightened Ascertainability" Standard

The Heightened Ascertainability approach currently reviews ascertainability questions by applying a two-part test: (1) the class must be defined by objective criteria, and (2) there must be a reliable and administratively feasible method of determining whether class members fit the proposed definition.[55] The Third Circuit defined this standard in its "trilogy" of decisions in 2012 and 2013.[56]

The Third Circuit first hinted at requiring administrative feasibility in 2012 with *Marcus v. BMW of North America, LLC*.[57] In *Marcus*, the plaintiff class brought products liability and fraud claims against BMW and

50. *Carrera*, 727 F.3d at 309.

51. *Id.*

52. Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 355 (3d Cir. 2013). The First, Second, Fourth, and Eleventh Circuits currently hold the same requirements. *See infra* note 66 and accompanying text.

53. *Mullins*, 795 F.3d at 659. The Sixth and Eighth Circuits currently hold the same requirements. *See infra* note 84 and accompanying text.

54. Briseno v. ConAgra Foods, Inc. 844 F.3d 1121, 1125 n.4 (9th Cir. 2017).

55. Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015); Williams, *supra* note 8, at 155 (citing Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015).

56. Elias, *supra* note 22, at 19-20 (referring to Marcus v. BMW of N. Am., Hayes v. Wal-Mart Stores, and Carrera v. Bayer Corporation).

57. 687 F.3d 583 (3d Cir. 2012).

Bridgestone.[58] The proposed class was defined as New Jersey residents who currently or formerly owned or leased 2006 to 2009 BMWs with Bridgestone run-flat tires that have went flat and were replaced.[59] BMW expressed trouble with identifying who fit the class definition because Bridgestone run-flat tires were made in Germany by another company, BMW did not have a parts manifest, dealers might change the tires per customer request, and BMW would have no record of claimants whose tires went flat if they were replaced in places other than a BMW facility.[60] The court held the proposed class was unascertainable, and stated that if Marcus attempts to certify a class on remand, the District Court must resolve whether the defendants' records can ascertain class members, and if not, "whether there is a reliable, *administratively feasible* alternative."[61]

Just under a year later in 2013, the Third Circuit decided *Hayes v. Wal-Mart Stores*.[62] In *Hayes*, the plaintiff class asserted claims for violation of the New Jersey Consumer Fraud Act, breach of contract, and unjust enrichment against Wal-Mart for its sales of extended warranty plans through Sam's Club stores.[63] The proposed class was defined as all consumers who purchased a Sam's Club Service Plan to cover as-is products from Sam's Clubs in New Jersey.[64] Citing *Marcus*, the court expressly held that a plaintiff must show by a preponderance of the evidence that there is a "reliable and administratively feasible" method for ascertaining the class.[65] The court found the class unascertainable after finding Wal-Mart lacked records necessary to identify class members.[66]

Within weeks, the Third Circuit decided *Carrera v. Bayer Corporation* and solidified its heightened standard.[67] In *Carrera*, the plaintiff class

58. *Id.* at 590.

59. *Id.*

60. *Id.* at 593-94 (3d Cir. 2012). The court further stated if a defendant corporation cannot apply the class criteria to its internal databases to discern who the individual class members are, the definition is not administratively feasible and therefore not ascertainable. Williams, *supra* note 8, at 168.

61. *Marcus*, 687 F.3d at 594.

62. 725 F.3d 349 (3d Cir. 2013).

63. *Id.* at 351.

64. *Id.* at 353.

65. *Id.* at 356.

66. *Id.* Sam's Club offered certain "as-is" items for a discount, but cashiers needed to manually perform a price override. Sam's Club software recorded the price override, but not the reason for it. Overrides could be performed for several other reasons, and there was no method to determine how many of the price overrides were for as-is items to ascertain the class members. *Id.* at 352, 355.

67. 727 F.3d 300 (3d Cir. 2013).

asserted a false and deceptive advertising claim against Bayer for its "One-A-Day WeightSmart" diet supplement.[68] The proposed class was defined as all persons who purchased WeightSmart in Florida.[69] Class members were unlikely to have documentary proof of purchase, and Bayer had no list of purchasers because it sold WeightSmart to retail stores, not directly to consumers.[70] To ascertain the class, Carrera proposed retailer records of online sales, sales made with store or loyalty cards, and class member affidavits attesting they purchased WeightSmart, specifying the amount they purchased.[71] The court found no evidence that a single purchaser could be identified using retailer records of online sales or store or loyalty cards, or even that retailers have records for the relevant period.[72] In finding the class unascertainable, the court held that class member affidavits do not address a core concern of ascertainability: defendants' right to challenge class membership.[73]

When the Third Circuit paved the way for a clear and definitive Heightened Ascertainability requirement, some other circuits took the same or very similar approach. The First, Second, Fourth, and Eleventh Circuits currently agree with the Heightened Ascertainability approach's additional "administratively feasible" prong and have used it to assess whether a proposed class is ascertainable.[74] Others, however, have criticized this prong as "skewing the balance district courts must strike when deciding whether to

68. *Id.* at 304.

69. *Id.*

70. *Id.*

71. *Id.* To support his argument for using affidavits, Carrera produced a declaration of James Prutsman, who worked for a company that verified and processed class settlement claims. Prutsman declared there were ways to verify the types of affidavits at issue and screen out fraudulent claims. Screening methods included running programmatic audits to identify duplicate claims, and fraud prevention techniques that would ward off fraudulent claimants, but the court found this unpersuasive and doubted whether it would make the affidavits reliable. *Id.* at 304, 311.

72. *Id.* at 309. The court did state that depending on the facts of a case, retailer records may be a "perfectly acceptable" method of proving class membership, but that such was not the case with Carrera. *Id.* at 308-09.

73. *Id.* at 309. One of the reasons the court pointed to defendants' rights to challenge class membership was Carrera's inability to remember when he purchased WeightSmart and confusing it with other products at his deposition testimony. *Id.* at 309 n.5.

74. *See In re* Nexium Antitrust Litig., 777 F.3d 9 (1st Cir. 2015); Brecher v. Republic of Arg., 806 F.3d 22 (2d Cir. 2015); EQT Prod. Co. v. Adair, 764 F.3d 347 (4th Cir. 2014); Karhu v. Vital Pharm., Inc., 621 F. App'x 945 (11th Cir. 2015).

certify classes."[75] The Seventh Circuit first held this Weak Ascertainability approach with its decision in *Mullins v. Direct Digital, LLC*.[76]

B. Balancing with a "Weak Ascertainability" Version

In criticizing the Heightened Ascertainability approach, the Seventh Circuit contended that the Third Circuit and others who followed this approach moved beyond examining the adequacy of the class definition to examining the potential difficulty of identifying particular class members.[77] In relevant part, the Weak Ascertainability approach does not advocate getting rid of the ascertainability requirement altogether.[78] The Seventh Circuit reviewed ascertainability issues with its own "well-settled" version, requiring a class be defined clearly and membership be defined by objective criteria.[79]

The Seventh Circuit illustrated its concerns with the Heightened Ascertainability approach in its *Mullins v. Direct Digital, LLC* decision.[80] In *Mullins*, the plaintiff class asserted a fraudulent representation claim against Direct Digital for misrepresenting that its product, Instaflex Joint Support, relieves joint discomfort.[81] The proposed class was defined as consumers who purchased Instaflex within the applicable statute of limitations for personal use until the date notice is disseminated.[82] The district court certified the class under 23(b)(3), and the Seventh Circuit used Direct Digital's appeal primarily to address the "developing law" of ascertainability.[83] Finding the defined class ascertainable, the court explained that the definition was not vague and identified a group of individuals harmed in a particular way during a specific period of time.[84] The court also found the class definition was based on objective criteria, focusing

75. Mullins v. Direct Dig., LLC, 795 F.3d 654, 658 (7th Cir. 2015).

76. *Mullins*, 795 F.3d 654.

77. *Id.* at 657.

78. *Id.*

79. *Id.* The Seventh Circuit says that nothing in Rule 23 mentions or implies the *heightened* requirement in Rule 23(b)(3). *Id.* at 658.

80. *Mullins*, 795 F.3d 654.

81. *Id.* at 658.

82. *Id.*

83. *Id.*

84. The court parenthetically tied the definition as "purchasers of Instaflex defrauded by labels and marketing" (for the relevant time period). *Id.* at 660.

on the act of purchasing and Direct Digital's labeling and advertising the product.[85]

In its analysis, the court confirmed that Rule 23 states a class must be defined[86] and asserted that with experience, courts have required classes to be defined "clearly and based on objective criteria."[87] The court further stated that when courts wrote of this "implicit requirement of 'ascertainability,'" they focused on adequacy of the class definition itself.[88] Illustrating its direct adversity with Heightened Ascertainability, the court rejected Direct Digital's argument that the only way Mullins proposed to ascertain class members was through self-identification by affidavits.[89] Citing its own prior decisions that held class definitions must be definite enough that the class can be ascertained, the Seventh Circuit preserved its Weak Ascertainability approach.[90]

The Seventh Circuit is not alone. The Sixth and Eighth Circuits have joined the Weak Ascertainability approach and rejected Heightened Ascertainability.[91] The Sixth Circuit in 2015 held five single-state classes were ascertainable by analyzing whether the proposed class was defined by objective criteria, further stating the sub-classes could be determined with reasonable, but not perfect accuracy, including affidavits.[92] In 2016, the Eighth Circuit chimed in with *Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.*, holding that it adheres to a rigorous analysis of Rule 23 requirements, which includes that a class must be adequately defined and clearly ascertainable, but not to an administratively feasible standard.[93]

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85. *Id.* at 661.

86. FED. R. CIV. P. 23(c)(1)(B); *Mullins*, 795 F.3d at 659.

87. *Mullins*, 795 F.3d at 659.

88. *Id.*

89. *Id.* at 662. Affidavits are discussed in more detail in Part II, Section B.

90. *Id.* at 659.

91. *See* Rikos v. Procter & Gamble Co., 799 F.3d 497 (6th Cir. 2015); Sandusky Wellness Center, LLC v. Medtox Scientific, Inc., 821 F.3d 992 (8th Cir. 2016).

92. *Rikos*, 799 F.3d at 526-27 (holding the defendant could verify customers that purchased their product by requesting a signed statement from that customer's physician).

93. 821 F.3d at 996.

C. Dropping Ascertainability Altogether – The "No Ascertainability" Approach

The Ninth Circuit took the Weak Ascertainability approach even further, joining the class ascertainability discussion in its 2017 decision,[94] and setting the stage for a third approach. To make matters interesting, the Ninth Circuit refrained entirely from using the word "ascertainability" in its *Briseno v. ConAgra Foods, Inc.* opinion, because "courts ascribe widely varied meanings to that term."[95] Only mentioning the word in its footnotes, the court stated that it was addressing the types of "alleged definitional deficiencies other courts refer to as "'ascertainability' issues" by analyzing Rule 23's express requirements.[96] The court went further, attacking the reasoning in using Heightened Ascertainability, and held that Rule 23 neither provides nor implies an "administratively feasible" way to identify class members as a prerequisite to class certification.[97]

In *Briseno*, consumers in eleven states who purchased Wesson-brand cooking oils labeled "100% Natural" argued the label was false or misleading because Wesson oils are made from bioengineered ingredients.[98] The proposed class was defined as "all persons who reside [in those states] who purchased Wesson oils within the applicable statute of limitations."[99] Relying on the Heightened Ascertainability approach, ConAgra argued the class cannot be certified because it must also demonstrate an administratively feasible way to determine who is in the class.[100] The court was quick to state that it has never required such a demonstration and refuses to do so now.[101] This decision raises significantly important issues, discussed in detail in Part II.

II. PROBLEMS WITH THE "NO ASCERTAINABILITY" APPROACH

The Ninth Circuit has taken the most lenient approach for ascertainability thus far. Though its *Briseno* decision generally agrees with the Weak Ascertainability approach, it plunges deeper and does not require

94. Briseno v. ConAgra Foods, Inc. 844 F.3d 1121 (9th Cir. 2017).
95. *Id.* at 1124 n.3.
96. *Id.* at 1124 n.4.
97. *Id.* at 1133.
98. *Id.* at 1123.
99. *Id.* at 1124.
100. *Id.*
101. *Id.* at 1125.

ascertainability at all.[102] This decision does not necessarily mean any poorly defined or completely unascertainable classes can be certified,[103] but the No Ascertainability approach does raise some concerns. First, it is unfair to defendants and poses due process problems. Second, it is impractical insofar as affidavits do the job of fact-finding and are used as evidence of class membership. Third, it is unfair to absent members of the plaintiff class because it impacts notice and plaintiff recovery.

A. Defendants' Due Process Rights

Ascertainability has important functions for defendants. Just as a defendant always has the due process right to challenge the elements of the plaintiff's claim, a defendant also has the same right to challenge the plaintiff's evidence that is used to meet the requirements for class membership.[104] Ascertainability protects a defendant's due process rights because it requires a defendant to be able to test the reliability of evidence submitted to prove class membership.[105] This is appropriate because in an individual claim, a plaintiff would have to prove at trial that they purchased the product in question that resulted in their injury.[106] A class action may not be certified in a way that "eviscerates" a defendant's rights to raise challenges and defenses to claims.[107]

Ascertainability is also needed to properly enforce the preclusive effect of final judgment.[108] It protects defendants by clearly identifying the individuals that are bound by the final judgment.[109] In the event they lose, defendants also have an interest in only paying for legitimate claims.[110] As discussed in Section C, fraudulent claims may dilute true class members' relief.[111] These class members may argue the named plaintiff did not

102. *Id.* at 1121; Sparkes, *supra* note 14.

103. Sparkes, *supra* note 14.

104. Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013) (citing Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012), finding that due process concerns were implicated when BMW and Bridgestone were forced to accept absent class members' declarations that they were class members as true without any indication of reliability).

105. *Id.* at 307, 309.

106. *Id.* at 307.

107. *Id.*

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

109. Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 354-55 (3d Cir. 2013).

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

111. *Id.*

adequately represent them and since they were inadequately represented, they are not bound by the judgment.[112] In such cases, defendants are exposed to never-ending litigation.

Relating to the final judgment problem is the concept of fail-safe classes. The No Ascertainability approach does not address the fact that certifying a fail-safe class violates res judicata, or claim preclusion.[113] "A fail-safe class is created when the class is defined by the defendant's liability or the plaintiff's central legal issue."[114] This is the case when the class definition uses statutory language, fixes the case's verdict, or refers to a legal right or entitlement.[115] The result is either the plaintiffs win, or if they lose, they are not bound by the judgment because they are no longer part of the class.[116] Because this is evidently unfair, even the Weak Ascertainability approach opposes the certification of fail-safe classes.[117]

In its 2011 decision, the Sixth Circuit found that a class definition that included those "entitled to relief" creates an impermissible fail-safe class.[118] It reasoned that the definition shields putative class members from an adverse judgment because either the class members win, or "by virtue of losing," are not bound by the judgment.[119] Though the Seventh Circuit held the proposed class in its 2012 decision should be certified, it cited *Randleman* and recognized that fail-safe classes are improper.[120] The court also differentiated fail-safe classes from *overbroad* classes, in which the latter is a class defined broadly to include a "great number of members" who for some reason could not have been harmed by a defendant's conduct.[121]

An "overbroad" class may be found unascertainable if a substantial number of class members would be unable to sue individually.[122] This is a common problem when the proposed class is defined as "all users of a

112. *Id.*

113. Geller, *supra* note 29, at 2802.

114. Geller, *supra* note 29, at 2782.

115. Geller, *supra* note 29, at 2782-83.

116. Members of a fail-safe class are determined not to be part of the class if the defendant prevails because the class is defined in a way that makes membership contingent on the validity of plaintiffs' claims. Randleman v. Fid. Nat'l Title. Ins. Co., 646 F.3d 347, 352 (6th Cir. 2011).

117. *See id.* In addition to the Sixth and Seventh Circuits, the First Circuit also expressly states its opposition to fail-safe classes. *See In re* Nexium Anitrust Litig., 777 F.3d 9, 22 (1st Cir. 2015).

118. *Randleman*, 646 F.3d at 352.

119. *Id.*

120. Messner v. Northshore Univ. Healthsystem, 669 F.3d 802, 825 (7th Cir. 2012). While finding fail-safe classes are improper, the Seventh Circuit noted that this problem should be dealt with by amending the class definition. *Id.*

121. *Id.* at 824.

122. *See* Geller, *supra* note 29, at 2779-80.

[certain] product or service," without regard as to whether the users suffered an injury or not.[123] To illustrate, in 2006, the Seventh Circuit refused to certify a class defined as "all individuals in Illinois who had purchased fountain Diet Coke from March 12, 1999, onward" that alleged Coca-Cola tricked consumers into believing it did not contain artificial ingredients.[124] The court reasoned that the class could include millions of consumers that might not have been tricked because some Coca-Cola advertisements include disclaimers.[125] This concept of overbreadth is distinguished from fail-safe classes because fail-safe class definitions base membership depending "on whether the person had a valid claim."[126]

B. Affidavits as Evidence of Class Membership

Circuits are also split on the issue of using self-identification with affidavits as a means of proving ascertainability.[127] The Heightened Ascertainability approach disallows affidavits to be used for self-identification, but the Weak Ascertainability approach allows this method.[128]

In *Marcus*, the Third Circuit made a point to caution against approving a method of certification that amounts to no more than potential members' "say so."[129] It reasoned that forcing a defendant to accept as true absent class members' declarations "that they are members of the class, without further indicia of reliability, would have serious due process implications."[130] Relying on *Marcus*, the *Carrera* court also refused to accept affidavits as a method to prove ascertainability, and pointed to a core deficiency in their

123. Geller, *supra* note 29, at 2779.

124. Oshana v. Coca-Cola Co., 472 F.3d 506, 510, 513, 515 (7th Cir. 2006); Geller, *supra* note 29, at 2779-80.

125. *Oshana*, 472 F.3d at 513-14; Geller, *supra* note 29, at 2780.

126. Messner v. Northshore Univ. Healthsystem, 669 F.3d 802, 825 (7th Cir. 2012).

127. *Compare* Carrera v. Bayer Corp., 727 F.3d 300, 309 (3d Cir. 2013) (rejecting the use of affidavits for self-identification), Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 594 (3d Cir. 2012) *and* Karhu v. Vital Pharm. Inc., 621 F. App'x 945, 948-49 (11th Cir. 2015) (finding that something more than affidavits are needed to prove ascertainability), *with* Mullins v. Direct Dig., LLC, 795 F.3d 654, 662 (7th Cir. 2015) (accepting the use of affidavits to show self-identification), Briseno v. ConAgra Foods, Inc. 844 F.3d 1121, 1132 (9th Cir. 2017) (approving of the use of affidavits to show self-identification), *and* Rikos v. Procter & Gamble Co., 799 F.3d 497, 527-28 (6th Cir. 2015) (finding the use of affidavits proper to show ascertainability).

128. *See Briseno*, 844 F.3d at 1132; *Mullins*, 795 F.3d at 662; *Rikos*, 799 F.3d at 527-28.

129. *Marcus*, 687 F.3d at 594.

130. *Id.*

use, that defendants must be able to challenge class membership.[131] Even if class members *think* they belong in the class, it is quite possible they will have difficulty in accurately recalling the relevant events that would allow them to be a true member.[132]

A California Federal District Court illustrated the possibility of potential class members' inaccurate beliefs in a 2011 decision where it declined class certification against a cigarette manufacturer.[133] The court labeled allowing class members to submit affidavits attesting their belief that they smoked 146,000 Marlboro cigarettes "unreliable."[134] The court reasoned that "[s]wearing 'I smoked 146,000 Marlboro cigarettes' is categorically different from swearing 'I have been to Paris, France' . . . or 'I was within ten miles of the toxic explosion on the day it happened.'"[135] In this context, it is relatively easy to see how an inaccurate memory could cause a potential member to fraudulently join a class, even if they do so unintentionally.

In *Mullins*, the defendant argued that the proposed class was unascertainable because its only method of identification was through affidavits,[136] and should thus be decertified, but the Seventh Circuit declined to do so.[137] The court reasoned that in most cases, the expected recovery is so minimal that the court doubts whether people would be willing to sign affidavits under penalty of perjury.[138] Though the court agreed a defendant has a due process right not to pay in excess of its liability and raise defenses that affect its liability, it held that that does not mean it cannot rely on self-identifying affidavits.[139] The court seemingly concluded that opposing the use of affidavits allows the defendant a "cost-effective" procedure to challenging class membership.[140]

The Ninth Circuit cited the *Mullins* decision and its position on defendants opposing affidavits was that there is no due process right to a cost-effective procedure of challenging every individual claim to class

131. *Carrera*, 727 F.3d at 309; *see supra* notes 97-100 and accompanying text.

132. *Carrera*, 727 F.3d at 309.

133. Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1089-91 (N.D. Cal. 2011).

134. *Id.* at 1090.

135. *Id.*

136. The defendant cited precedent from the Third Circuit. Mullins v. Direct Dig., LLC, 795 F.3d 654, 661 (7th Cir. 2015).

137. *Id.* at 662.

138. *Id.* at 667.

139. *Id.* at 669.

140. *Id.*

membership.[141] The court stated that it is unclear why the issue of self-serving affidavits must be resolved at the class certification stage.[142] The court continued to point out that unreliable affidavits will not affect a defendant's liability in every case.[143] The Ninth Circuit argued that a defendant generally knows how many units of a product it has sold, and the aggregate amount of liability is determinable even if class members' identity is not.[144] Thus, the defendant's total liability would be unaffected by unreliable, self-identifying affidavits.[145]

But self-identifying affidavits pose a real danger to defendants. Even if a defendant believes it committed no wrongdoing or would prevail on the merits of the case, a successful class certification might disfavor taking the case to trial.[146] The cost of litigating the case may be too high and not economically worth the time and money.[147] The defendant may also worry about a damaged reputation if the litigation is publicized. Often times, the defendant will choose to settle the case, whether the class action was meritorious or not.[148]

Additionally, class members may in fact lie and fraudulently join a class action even with a lack of pecuniary gain.[149] The *Xavier* decision shows that where the plaintiff class was also suing for medical monitoring, long term smokers of other cigarette brands and smokers who have smoked less than 146,000 cigarettes may desire medical monitoring and fraudulently join the class.[150] A successful class certification could easily incentivize an uninjured claimant to join the class and seek recovery.[151] A potential class member may also unintentionally join a class fraudulently, simply by remembering the events relevant to joining a class incorrectly.[152]

Though these Circuit Court decisions all discuss the theory of using affidavits to show the class is ascertainable, none of them detail how this

141. Briseno v. ConAgra Foods, Inc. 844 F.3d 1121, 1132 (9th Cir. 2017) (citing *Mullins*, 795 F.3d at 669).

142. *Id.* at 1132.

143. *Id.*

144. *Id.*

145. *Id.*

146. *See supra* note 29 and accompanying text.

147. *See supra* note 29 and accompanying text.

148. *See supra* note 29 and accompanying text.

149. Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1090 (N.D. Cal. 2011).

150. *Id.*

151. *Id.*

152. *See, e.g.*, *supra* note 125 and accompanying text.

would work in the real world.[153] Important issues, such as the standard of a proper affidavit, are unanswered. Is it just a simple signed declaration, or is it more complex? Is it supposed to be notarized or not? Is it the click of a button online, stating, "Yes, I belong in this class," or is there some sort of screening involved? Is it possible that this affidavit is simply just a claims form, which would not be proper indicia of identification? These questions remain unanswered.

C. *Notice and Diluted Recovery*

Ascertainability protects both class members and defendants.[154] No Ascertainability is also unfair to class members in a class action. Aside from concerns of untrustworthiness, procedurally, a class certified under 23(b)(3) is the only type of class action where notice to absent class members is mandatory.[155] The court must direct class members with the "best notice practicable under the circumstances," including individual notice to all members who can be identified through "reasonable effort."[156] The notice must clearly and concisely state that class members have an opportunity to opt out, or be excluded from class representation.[157] Those who choose not to opt out are bound by the class judgment, and are thus unable to assert their claims individually.[158] Though Rule 23 only requires the best notice practicable under the circumstances, including members who can be identified through reasonable effort,[159] providing notice without identifying class members often results in absent members never being reached.

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153. *See* Briseno v. ConAgra Foods, Inc. 844 F.3d 1121, 1132 (9th Cir. 2017) (accepting the use of affidavits as an effective means to meet ascertainability requirement without offering a way to weed out fraudulent members); Mullins v. Direct Dig., LLC, 795 F.3d 654, 662 (7th Cir. 2015) (approving of the use of affidavits to show ascertainability but failing to acknowledge a procedure within such use that would be effective against fraud); Carrera v. Bayer Corp., 727 F.3d 300, 310-12 (3d Cir. 2013) (rejecting plaintiff's expert's proposed screening procedure for use of affidavits in self-identification process but failing to suggest an acceptable alternative); Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 594 (3d Cir. 2012) (refusing to accept affidavits as self-identification but failing to suggest a reasonable alternative for meritorious class actions); *Xavier*, 787 F. Supp. 2d at 1075, 1090 (finding the use of affidavits to prove ascertainability improper and unjust but failing to discuss any reasonable alternative).

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

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

156. *Id.*

157. *Id.*

158. *See* FED. R. CIV. P. 23(c)(3); *see also* FED. R. CIV. P. 23 advisory committee's note to 1966 amendment.

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

Another important consideration is the dilution of recovery. It is unfair to absent class members to have their recovery diluted by fraudulent or inaccurate claims.[160] Ascertainability fixes this problem because by identifying who belongs in the class, we can also discern who does not, and thus weed out any free-riders. Additionally, if class members' recovery is in fact diluted, they might argue the named plaintiff inadequately represented them by proceeding with the knowledge that absent class members may receive less than full relief.[161] Rule 23(a) expressly requires that the named plaintiff "fairly and adequately protect the interests of the class."[162] If the named plaintiff does not do so, class members are not bound by the judgment as a result.[163]

Ascertainability through the use of affidavits contributes to diluted recovery as well. By allowing fraudulent claimants to self-identify themselves as legitimate class members, they are able to partake in the recovery. The end result is the same: legitimate claimants receive less than what they are entitled to because of loopholes others can take advantage of.

III. WHAT SHOULD THE STANDARD FOR ASCERTAINABILITY BE?

The No Ascertainability approach is a concern for both plaintiffs and defendants. The Ninth Circuit's *Briseno* decision went so far as to refuse to use the word "ascertainability" in determining whether a plaintiff must have an administratively feasible method to identify class members.[164] In fact, the Ninth Circuit cited Seventh Circuit decisions (which do recognize ascertainability) to come to its conclusion that ascertainability is unnecessary.[165] In its reasoning, the Ninth Circuit made no mention about how fail-safe classes might affect this decision.[166]

Every Circuit other than the Ninth generally requires a basic form of ascertainability.[167] These Circuits consider the importance of a class being defined based on objective criteria as essential to class certification.[168] But the question still remains: what must a putative class show to prove its class

160. Carrera v. Bayer Corp., 727 F.3d 300, 310 (3d Cir. 2013).
161. *Id.* at 310.
162. FED. R. CIV. P. 23(a)(4).
163. *Carrera*, 727 F.3d at 310.
164. Briseno v. ConAgra Foods, Inc. 844 F.3d 1121, 1124 n.3 (9th Cir. 2017).
165. *Id.* at 1127.
166. Geller, *supra* note 29, at 2797-99.
167. Steed, *supra* note 44, at 627-28.
168. *Id.*

members are ascertainable or identifiable for purposes of class certification? Section C proposes that a simple, objective form of the ascertainability doctrine that rejects the use of affidavits to ascertain class members does the trick. The preceding sections discuss competing approaches, including the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017[169] and possible solutions offered by the Seventh Circuit.[170]

A. House of Representatives Bill 985

On February 9, 2017, H.R. 985 was introduced into the House of Representatives.[171] This bill, sponsored by Representative Bob Goodlatte, would turn the Heightened Ascertainability approach into law.[172] Section 1718(a) of the bill pertains to the distribution of benefits to class members.[173] The bill sets the standard that a federal court *shall not* certify a class seeking monetary relief unless the class (1) is defined with reference to objective criteria; and (2) affirmatively demonstrates that there is a reliable and *administratively feasible* mechanism to: (a) determine whether class members fall in the class definition; and (b) distribute monetary relief secured for the class.[174]

On March 9, 2017, the bill passed by a recorded vote of 220-201.[175] On March 13, 2017, the Senate received the bill.[176] The Senate has currently read it twice and referred to the Committee on the Judiciary.[177] A national Third Circuit approach to class ascertainability has attracted strong criticism.[178] This is mostly due to the fact that class actions are supposed to

169. H.R. 985, 115th Cong. § 1718(a) (2017).

170. *See* Mullins v. Direct Dig., LLC, 795 F.3d 654 (7th Cir. 2015).

171. *H.R.985 Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/985/actions; H.R. 985, 115th Cong. § 1718(a) (2017); Recent Case, *Civil Procedure Class Actions Ninth Circuit Holds Rule 23 Does Not Require Proof of Administrative Feasibility*, 130 HARV. L. REV. 2227, 2234 n.69 (2017).

172. *See* H.R. 985; Recent Case, *supra* note 171, at 2234 n.69;.

173. H.R. 985.

174. *Id.*

175. *H.R.985 Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/985/actions.

176. *Id.*

177. *Id.*

178. *See* Recent Case, *supra* note 171, at 2227-30.

help enforce consumer protection laws.[179] This is a concern because if the bill is adopted, an administratively feasible requirement would disqualify many class actions and thus make protecting consumers much more difficult.[180] Time will tell the outcome of the bill, but in the meantime, the Seventh Circuit's decision has important points that are noteworthy.

B. Seventh Circuit's Solutions

The Seventh Circuit, calling ascertainability "well-settled," acknowledged that the requirement is susceptible to misinterpretation, which is most likely why the Third Circuit has decided to take such a rigorous approach.[181] In its *Mullins* decision, the court attempted to clear confusion by describing three common situations where a proposed class fails ascertainability.[182]

Classes that are defined too vaguely easily fail the clear definition component. For example, in *Young v. Nationwide Mutual Insurance Company*, a Sixth Circuit decision, the court held that there can be no class action if the proposed class is "amorphous or imprecise."[183] A vague class definition fails because "a court needs to be able to identify who will receive notice, who will share in any recovery, and who will be bound by a judgment."[184] The court's solution to the vagueness problem is through the use of a class definition that identifies a particular group that is harmed during a particular time frame, in a particular location, and in a particular way.[185]

Classes that are defined by subjective criteria also fail the objectivity requirement.[186] For example, in *Simer v. Rios*, a Seventh Circuit decision, the court held that a class of people who "felt discouraged" from applying for government assistance failed the objectivity requirement for ascertainability.[187] It is relatively easy for a person to join such a class

179. *Id.* at 2234.

180. *Id.*

181. Mullins v. Direct Dig., LLC, 795 F.3d 654, 659 (7th Cir. 2015).

182. *Id.* at 659-60.

183. 693 F.3d 532, 538 (6th Cir. 2012).

184. *Mullins*, 795 F.3d at 660.

185. The court uses a sufficient Michigan District Court example that specified a group of agricultural laborers during a specific time frame and a specific location who were harmed in a specific way. *Id.* (citing Rodriguez v. Berrybrook Farms, Inc., F. Supp. 1009, 1012 (W.D. Mich. 1987).

186. *Id.*

187. Simer v. Rios, 661 F.2d 655, 683 (7th Cir. 1981).

because a subjective feeling of discouragement is not held to a reasonable standard.[188] The court's solution to this subjectivity problem is defining the class in terms of conduct instead of a state of mind. This solution can simply be achieved by including the defendant's actions in the class definition.

Finally, classes defined in terms of success on the merits are also improperly defined and thus unascertainable.[189] The major problem, as discussed in Part II Section A, is that defining a class that is based on succeeding on the merits allows either plaintiffs to win, or plaintiffs to not be bound by the judgment if they lose.[190] This poses major due process concerns for defendants, who have two choices: settlement or defense, and in the event the defendant wins, the plaintiff can subject the defendant to more litigation.[191] The solution to this fail-safe problem is simple, define the class in a way where membership does not depend on defendants' liability.[192]

The Seventh Circuit recognizes that notice, recovery, and final judgment are all important aspects to a class action. It offers a solution by arguing that these considerations are satisfied with a clear class definition that is based on objective criteria.[193] The No Ascertainability approach calls for a reconsideration of its views on ascertainability.

C. *A Simple and Objective Ascertainability Approach*

Adopting an objective approach that requires a clear class definition based on objective criteria benefits both plaintiffs and defendants. Plaintiffs are able to certify a class without the burden of showing an "administratively feasible mechanism" to prove that they belong in the class.[194] Defendants have a better opportunity to challenge evidence of class membership when the class is defined based on objective criteria.[195] It is evident that such a standard provides for fairness to both parties and levels the playing field.

Although it is unlikely that *each individual* class member will receive notice, this standard is better suited to provide the "best notice practicable under the circumstances," as required by Rule 23(c).[196] With more potential class members receiving notice, more are able to make a well-founded

188. *Mullins*, 795 F.3d at 660.
189. *Id.*; *see supra* notes 113-121 and accompanying text.
190. *Mullins*, 795 F.3d at 660.
191. *Id.*
192. *Id.*
193. *Id.* at 671-72.
194. *Id.* at 662.
195. *Id.* at 671-72.
196. *See Recent Case*, *supra* note 171, at 2229.

decision to join the class, abstain, or opt out and assert their claim individually. By reaching more potential class members, this basic form of ascertainability aids in the primary goal of class actions: to vindicate peoples' rights.[197]

This objective standard also curtails the dilution of recovery problems for legitimate claimants from fraudulent or non-meritorious claims. It presents an additional bar for claimants to show they belong in the class, and by doing so, weeds out fraudulent claimants.[198] This is imperative because fraudulent claims are less likely to flow through with an additional hurdle. Ascertainability also bars the problem of fail-safe classes by requiring a class definition that is unrelated to defendants' liability.

The use of affidavits to prove ascertainability should also be barred. As previously discussed in Part II Section B, there is no proper standard for the use of an affidavit. Affidavits easily allow claimants to lie and join a class with minimal effort. A court would correctly never allow a drunk driver who caused an accident to use an affidavit stating: "I swear I was not drunk and did not cause an accident" as evidence in trial. It follows that a court should not allow an affidavit swearing a person belongs in a class, as defendants need to have the ability for cross examination, instead of taking the person's statement as an undisputed fact.

The Ninth Circuit argued that it was unclear why the issue of using affidavits as proof of class membership must be resolved at the certification stage.[199] This is because the class certification stage is a crucial point in the class action process.[200] It is a fair statement that people believe "where there is smoke, there is fire," and a jury would quite possibly presume a defendant in a class action did something wrong if the class has been certified. Some may argue that people would not commit perjury for minimal monetary relief, but the relief is not always minimal,[201] and it is still unclear if this is a sworn statement, notarized, or just a simple click.

This standard still addresses the Ninth Circuit's concern that the very purpose of Rule 23(b)(3) is to vindicate the rights of people who would individually be without effective strength to bring defendants to court at all.[202] A standard based on objectivity and reasonableness, without

197. Briseno v. ConAgra Foods, Inc. 844 F.3d 1121, 1129 (9th Cir. 2017).
198. Carrera v. Bayer Corp., 727 F.3d 300, 310 (3d Cir. 2013).
199. *Briseno*, 844 F.3d at 1132.
200. *See supra* notes 33-36 and accompanying text.
201. *See supra* note 149 and accompanying text.
202. *Briseno*, 844 F.3d at 1129.

affidavits, appropriately delivers justice to people the Ninth Circuit is concerned about.[203] By using an objective standard, courts are better able to provide the best notice practicable under the circumstances, and plaintiffs' interests are furthered if they wish to opt out and sue independently. Identifying members this way also assists in ensuring the Numerosity requirement is satisfied. In turn, free-riders who are not entitled to recovery are distinguished from legitimate claimants, and thus do not join the class, resulting in non-diluted recovery for class members.

The ascertainability requirement plays a vital function in deterring fail-safe classes.[204] Since the Ninth Circuit has made its position unclear, adopting this requirement will preclude the No Ascertainability approach from certifying fail-safe classes. By requiring class members to be defined based on objective criteria, a court will throw out any class definition that violates a final judgment.[205] This will also play a part in providing absent class members with notice and opportunity to opt out. This is because since fail-safe classes are defined by defendants' liability, it is unlikely to identify class members and give them notice without a final judgment.

CONCLUSION

Ascertainability continues to be a topic of heated debate among federal courts, Congress, attorneys, and even law students alike. With the House of Representatives bill advocating for a standard identical to the Heightened Ascertainability approach, the debate will only continue.[206] One thing, however, is for certain. The No Ascertainability approach should be reconsidered. The Ninth Circuit should adopt a reasonable standard of ascertainability, but reject class members' "say so," as this is a fair and appropriate requirement for class certification. This standard is grounded on objectivity, and thus ensures fairness to both plaintiffs and defendants.

Gevork Gazaryan[*]

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203. *See supra* notes 153-64 and accompanying text.

204. *See supra* notes 113-126.

205. *See supra* notes 106-112.

206. H.R. 985, 115th Cong. § 1718(a) (2017).

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