ADMINISTRATIVE FEASIBILITY REDUX: A REEXAMINATION OF THE HEIGHTENED ASCERTAINABILITY REQUIREMENT FOR CLASS CERTIFICATION

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Under Rule 23(a) of the Federal Rules of Civil Procedure, a class action must meet four requirements before it can be certified: numerosity, commonality, typicality, and adequacy of representation. But courts infer an antecedent requirement to these four—that of ascertainability, the idea that the court must be able to define the class as an entity that exists prior to allowing it to litigate on behalf of absent parties. While the idea behind this requirement is uncontroversial (surely, a court should ensure that a class exists prior to certifying one), the Third Circuit has staked out an unusually stringent, atextual position, requiring that a putative class present an "administratively feasible" method for identifying its members prior to certification. That requirement, nowhere present in the text or purpose of Rule 23, presents a near-insurmountable barrier to small-dollar consumer class actions, thus undermining the intent of Rule 23 to ensure that such claims can be pursued. Despite predictions that the Third Circuit would back down from its position, and despite at least five circuits' explicit rejection of the heightened ascertainability requirement, the Supreme Court has yet to weigh in on this glaring rift in class action jurisprudence. After the Eleventh Circuit's 2021 rejection of the heightened requirement, the time is ripe to once again ask whether this outlier position is defensible.

By examining dozens of cases that apply the ascertainability standard, both within and without circuits that endorse the heightened requirement, this Note affirms that ascertainability in its current form is a scattershot cudgel that undermines small-dollar consumer class actions. Across several factors newly identified by this Note that figure prominently in ascertainability analyses, the requirement adds nothing but inconsistency to the class certification analysis. This Note endorses the position that, absent Supreme Court intervention, an amendment to Rule 23 clarifying that the class must merely be defined objectively would both rectify the circuit split and restore the Rule 23 inquiry to its textual and policy roots: to ensure that small-dollar claims, too little in value to pursue independently but no less meritorious, can be maintained.

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Introduction

On August 24, 2020, the United States District Court for the Western District of Pennsylvania denied class certification in *Adams Pointe I, L.P. v. Tru-Flex Metal Hose Corp.*[1] The case involved a "flexible, stainless-steel pipe encased in an insulative outer yellow jacket" called Pro-Flex CSST, manufactured by Tru-Flex.[2] Pro-Flex was utilized in natural gas delivery and marketed through retail stores to "do-it yourself" customers and untrained workers, but the product allegedly had critical

[1] Adams Pointe I, L.P. v. Tru-Flex Metal Hose Corp., No. 16-CV-00750, 2020 WL 4937455, at *1 (W.D. Pa. Aug. 24, 2020), *aff'd on other grounds*, No. 20-3528, 2021 WL 3612155 (3d Cir. Aug. 16, 2021).

[2] Adams Pointe I, L.P. v. Tru-Flex Metal Hose Corp., No. 16-CV-00750, 2020 WL 4199557, at *1 (W.D. Pa. July 17, 2020) [hereinafter *Adams Pointe* Recommendation].

flaws that led to fires in residential homes—and, allegedly, Tru-Flex knew about these defects yet continued to manufacture Pro-Flex.[3] Plaintiffs, property owners whose houses were damaged in fires caused by Pro-Flex defects, sought to certify a class of "[a]ny and all persons and/or entities who own real property in the United States in which yellow-jacket Pro-Flex CSST manufactured, designed, marketed, or distributed by the named Defendants was installed."[4] In her recommendation against class certification, Judge Eddy found that the proposed class did not meet the Third Circuit's heightened test for ascertainability.[5] She worried about "the complete lack of evidence put forth by Plaintiffs demonstrating how any class member . . . can be ascertained through reliable and administratively feasible methods,"[6] observing that Plaintiffs' proposed methods for identifying class members would involve examining sales records that did not exist,[7] customer data that does not show where Pro-Flex was actually installed,[8] or submission of affidavits with no proposed accuracy-screening system.[9] In August 2021, in a non-precedential opinion that did not address Judge Eddy's findings on ascertainability, the Third Circuit affirmed.[10]

The judicially-created requirement of ascertainability in class certification is "[o]ne of the most hotly contested issues in class action practice today."[11] Traditionally, class actions must meet the four prerequisites listed in Rule 23(a) of the Federal Rules of Civil Procedure in

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3 *Id.* at *1–2.

4 *Id.* at *3.

5 *Id.* at *7–8.

6 *Id.* (noting that the Third Circuit had previously found consumer affidavits to be "an unreliable method of ascertainability" and concluding that "[p]laintiffs cannot show ascertainability through this method alone").

7 *Id.* at *7 ("Plaintiffs' assertion that Defendants maintain customer data is not a reliable method for identifying property owners, because the customer data that Defendants maintain does not include property owners. Rather, the sale of Pro-Flex CSST is not a direct retailer-consumer relationship.").

8 *Id.* at *8 ("Plaintiffs have offered no evidence that any of the retailers or installers maintain records illustrating that they installed Pro-Flex CSST in a certain property.").

9 *Id.* ("Presumably, requiring homeowners to look for the presence of Pro-Flex® CSST in their property would also require homeowners to submit an affidavit or other document affirming its presence in their property. Plaintiffs have identified no way to screen out possible false or erroneous statements.").

10 Adams Pointe I, L.P. v. Tru-Flex Metal Hose Corp., No. 20-3582, 2021 WL 3612155, at *3 (3d Cir. Aug. 16, 2021) (concluding that Plaintiffs' class claims fail because they do not satisfy the commonality requirement or the requirement that common questions of law and fact predominate over questions pertaining only to individual class members).

11 Rhonda Wasserman, *Ascertainability: Prose, Policy, and Process*, 50 Conn. L. Rev. 695, 697–99 (2018) (describing a split among circuits regarding the ascertainability requirement, and noting the Third Circuit's strong commitment to an additional requirement that plaintiffs show "'an administratively feasible' method of determining whether putative class members are part of the class").

order to be certified: the class must be "so numerous that joinder of all members is impracticable" (numerosity), "questions of law or fact" must be "common to the class" (commonality), "the claims or defenses of the representative parties" must be "typical of the claims or defenses of the class" (typicality), and "the representative parties" must be able to "fairly and adequately protect the interests of the class" (adequacy of representation).[12] When a class seeks certification as a damages class, the most common type of class for small-dollar consumer class actions,[13] the class must further meet the requirements of Rule 23(b)(3)—that "questions of law or fact common to class members predominate over any questions affecting only individual members" (predominance) and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" (superiority).[14] On the face of Rule 23's text, there is no further requirement that class members must be "ascertainable" or that an administratively feasible method for ascertaining the class members must be proposed at the certification stage, but courts regard ascertainability as an implicit requirement and treat it as an inquiry preliminary to the Rule 23(a) analysis.[15]

All circuits agree that putative classes must be ascertainable in some fashion. While the textual hook of the requirement comes from the rule's stricture that there must, indeed, be "a class," Rule 23 itself is silent as to what, precisely, "a class" is.[16] Ascertainability traditionally purports to answer this question by requiring class action plaintiffs to provide a basis on which the court can determine whether an individual is a member of the class.[17] And on this question, the circuits are split: some hold that classes must meet a heightened standard of being "administratively feasible,"[18] while others hold that the putative class

12 Fed. R. Civ. P. 23(a).

13 *Cf.* 2 William B. Rubenstein, Newberg & Rubenstein on Class Actions § 4:1 (6th ed. 2023) ("[Rule 23(b)(3)] is the most common category for money damage cases, especially small claims class actions . . . .").

14 Fed. R. Civ. P. 23(b)(3).

15 *See, e.g.*, *Adams Pointe* Recommendation, *supra* note 2, at *6–8 (addressing ascertainability before turning to the Rule 23(a) requirements).

16 *See* Fed. R. Civ. P. 23.

17 7A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1760 (4th ed. 2023) (stating that a class description must be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member," and that "class membership must be able to be determined based on objective criteria").

18 *See, e.g.*, Byrd v. Aaron's, Inc., 784 F.3d 154, 163 (3d Cir. 2015); *accord In re* Nexium Antitrust Litig., 777 F.3d 9, 19 (1st Cir. 2015) (adopting the Third Circuit's administrative feasibility test).

must merely "be defined clearly and based on objective criteria."[19] The former requirement, which takes greater liberties in interpreting the text of Rule 23, strays from the purpose of Rule 23.[20]

Adams Pointe is just one example of the implications of a heightened ascertainability requirement: in effect, it constructs near-impenetrable barriers to consumer class actions, in areas ranging from false advertising to pharmaceutical antitrust, mass tort, and more.[21] However, in her recommendation in *Adams Pointe*, Judge Eddy gave a roadmap for consumer plaintiffs to avoid defeat at the hands of this stringent requirement: make sure that certain records do, in fact, exist, point to verifiably available information, and outline a procedure to screen for accuracy.[22] If meeting the requirement is so simple, why do plaintiffs repeatedly fail to pass the test?

With the Eleventh Circuit's recent flip against the heightened standard[23] and continued reticence from the Supreme Court to resolve the split,[24] the ascertainability debate is certain to reignite. This Note conducts a novel analysis of dozens of recent class action certification decisions which discuss the ascertainability requirement to confirm that the heightened ascertainability requirement is a scattershot cudgel which does little work to separate the proverbial wheat from the chaff of consumer class actions. Discarded classes are linked by the common thread that, on certification, they merely did not point to evidence that

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19 *See, e.g.*, Mullins v. Direct Digit., LLC, 795 F.3d 654, 659 (7th Cir. 2015), *cert. denied*, 577 U.S. 1138 (2016); *accord In re* Petrobras Sec. Litig., 862 F.3d 250, 265 (2d Cir. 2017) (rejecting the heightened standard and adopting the objective definition test from *Mullins* and other cases); Briseño v. ConAgra Foods, Inc., 844 F.3d 1121, 1127 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 313 (2017) (same); Rikos v. Procter & Gamble Co., 799 F.3d 497, 525 (6th Cir. 2015), *cert. denied*, 577 U.S. 1241 (2016) (same).

20 *See infra* note 271 and accompanying text.

21 *See, e.g.*, Wasser v. All Mkt., Inc., 329 F.R.D. 464 (S.D. Fla. 2018) (denying certification in consumer products action against a manufacturer of coconut water for the allegedly misleading phrase "born in brazil" (lowercase in original)); *In re* Thalomid and Revlimid Antitrust Litig., No. 14-6997, 2018 WL 6573118 (D.N.J. Oct. 30, 2018) (denying certification in pharmaceutical antitrust action against manufacturers of generic drugs because complicated purchasing arrangements defeated ascertainability); *In re* Paulsboro Derailment Cases, No. 13-784, 2014 WL 4162790, at *4, *6–7 (D.N.J. Aug. 14, 2020) (denying certification as to class of businesses located within area affected by chemical pollution resulting from train derailment because individualized fact-finding required defeated ascertainability).

22 *Adams Pointe* Recommendation, *supra* note 2, at *7–8 (W.D. Pa. July 17, 2020) (differentiating between an imposition of a records requirement and the requirement that "Plaintiffs show any evidentiary support that any third-party retailers or installers keep end consumer records for properties where they sold or installed Pro-Flex CSST").

23 Cherry v. Dometic Corp., 986 F.3d 1296, 1301–02 (11th Cir. 2021) (noting that previous Eleventh Circuit unpublished decisions that applied the Third Circuit's heightened standard were not binding as precedent, and concluding that "[p]roof of administrative feasibility cannot be a precondition for certification").

24 *See infra* Section I.D.

would prove ultimate administrability of their classes. Therefore, this Note seeks to confirm that the heightened ascertainability requirement should be discarded as a progenitor of unpredictable and inconsistent results—both within circuits and between circuits—and propose some solutions to this open rift in class action law.

Part I outlines the rough contours of the circuit split on the heightened ascertainability requirement along with academic criticisms and some theories as to why the Supreme Court has declined to weigh in. Part II examines four axes, or factors, that purportedly help courts further the values of due process, protection of plaintiffs' rights, and efficiency of the class action device—both in circuits where administrative feasibility is adopted and circuits where it is not. Analysis along these axes demonstrates how administrative feasibility leads to both inconsistency between circuits and consistent destruction of consumer class actions within circuits. Part III concludes the Note by focusing on two cases where certification was initially denied on ascertainability grounds and later granted after plaintiffs cured defects, and uses these case studies to endorse a solution to the ascertainability quagmire: the adoption of an objective test for ascertaining a class and deferral of a more specific inquiry from pre-certification to post-certification.

I
The Heightened Ascertainability Requirement

The proposition that Rule 23 contains an implicit ascertainability requirement is relatively uncontroversial.[25] However, the passage of the Class Action Fairness Act in 2005 and the accompanying sharp uptick in small-claims consumer class actions in the federal courts have given rise to varied interpretations of the ascertainability requirement.[26] The advent of the heightened requirement marked a sea change in what was previously a relatively low hurdle to class certification.[27] The Third Circuit articulated this new form of the ascertainability requirement in

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25 *See* 1 William B. Rubenstein, Newberg & Rubenstein on Class Actions § 3:1 (6th ed. 2023); 7A Wright & Miller, *supra* note 17 § 1760 (4th ed. 2023); *see also* Geoffrey C. Shaw, *Class Ascertainability*, 124 Yale L.J. 2354, 2357 n.14 (2015) (collecting cases).

26 Tom Murphy, *Implied Class Warfare: Why Rule 23 Needs an Explicit Ascertainability Requirement in the Wake of* Byrd v. Aaron's Inc., 57 B.C. L. Rev. E-Supplement 34, 39–40 (2016) (noting that prior to 2005 the typical class actions reaching federal courts were securities disputes "in which each class member was easily ascertained from financial records"); *see also* The Class Action Fairness Act: Law and Strategy 142, 223 (Gregory C. Cook ed., 2013) (noting the "landmark shift in diversity law" affected by CAFA and the consequent increase in "opportunit[ies] to remove class actions to federal court").

27 *See* N. Chethana Perera, *Back to School: A Lesson on the Dual Standards for Class Ascertainability*, 14 U. St. Thomas L.J. 249, 258–59 (2018) (recognizing a "larger trend of increasing the burden on plaintiffs bringing class action suits").

a trio of cases in the mid-2010s,[28] and the Seventh Circuit responded in 2015.[29] The Eleventh Circuit was the most recent Court of Appeals to opine on the subject, after having followed the heightened standard for nearly a decade.[30] This Part will chronicle these developments, summarize salient scholarly criticisms that have arisen in the intervening years, and explore why the Supreme Court has declined to weigh in.

A. Marcus *to* Byrd*: The Third Circuit's Thrust*

The Third Circuit was the first circuit court to deny class certification based solely on an unascertainable class and has consequently become a locus for the ascertainability requirement.[31] The court's first statement on the subject came in 2012 in *Marcus v. BMW of North America*, where the purchaser of a BMW convertible sought to certify a class of all purchasers and lessees of BMWs equipped with "run-flat tires" that "have gone flat and been replaced."[32] The lead plaintiff, Jeffrey Marcus, alleged that the tires were susceptible to flats, failed at higher rates than radial or other run-flat tires, could only be replaced rather than repaired, and were "exorbitantly priced."[33] Marcus obtained certification of a 23(b)(3) opt-out class, but the Third Circuit reversed. Judge Ambro wrote that "[i]f class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate."[34] He went on to reason that the

[28] Marcus v. BMW of N. Am., LLC., 687 F.3d 583, 594 (3d Cir. 2012) (identifying as a "critical issue . . . whether the defendants' records can ascertain class members and, if not, whether there is a reliable, administratively feasible, alternative"); Carrera v. Bayer Corp., 727 F.3d 300, 307–08 (3d Cir. 2013) ("The method of determining whether someone is in the class must be 'administratively feasible.'" (quoting *Marcus*, 687 F.3d at 594)); Byrd v. Aaron's, Inc., 784 F.3d 154, 163 (3d Cir. 2015) (identifying the "administratively feasible" requirement as the second element of the "two-fold" "ascertainability inquiry"). Ascertainability is not a requirement for (b)(2) classes. As the Third Circuit has explained, "[b]ecause the focus in a (b)(2) class is more heavily placed on the nature of the remedy sought, and because a remedy obtained by one member will naturally affect the others, the identities of individual class members are less critical in a (b)(2) action than in a (b)(3) action." Shelton v. Bledsoe, 775 F.3d 554, 561 (3d Cir. 2015); *accord* Cole v. City of Memphis, 839 F.3d 530, 542 (6th Cir. 2016) ("[A]scertainability is inappropriate in the (b)(2) context.").

[29] Mullins v. Direct Digit., LLC, 795 F.3d 654, 659, 661–62 (7th Cir. 2015) ("The Third Circuit's approach in *Carrera*, which is at this point the high-water mark of its developing ascertainability doctrine, goes much further than the established meaning of ascertainability and in our view misreads Rule 23.").

[30] Cherry v. Dometic Corp., 986 F.3d 1296, 1301–02 (11th Cir. 2021) (concluding that plaintiffs "cannot" be required to prove administrative feasibility as a "precondition for certification").

[31] Stephanie Haas, *Class Is in Session: The Third Circuit Heightens Ascertainability with Rigor in* Carrera v. Bayer Corp., 59 Vill. L. Rev. 793, 812 (2014).

[32] 687 F.3d at 588.

[33] *Id.*

[34] *Id.* at 593.

ascertainability requirement "eliminates 'serious administrative burdens that are incongruous with the efficiencies expected in a class action' by insisting on the easy identification of class members"; "protects absent class members by facilitating the best notice practicable"; and "protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable."[35] The Court further cautioned against simply deferring to submitted affidavits, "a method that would amount to no more than ascertaining by potential class members' say so."[36]

The following year brought *Carrera v. Bayer Corp.*, where a class of Florida consumers sought certification of a 23(b)(3) class in the District of New Jersey for false and deceptive advertising under the New Jersey Consumer Fraud Act.[37] Lead plaintiff Gabriel Carrera alleged that Bayer falsely advertised the effects of its supplement, One-A-Day WeightSmart.[38] On appeal, Bayer responded that there was "no evidence that any retailer records show[ed] who purchased WeightSmart" and that "the use of unverifiable affidavits . . . fail[ed] to comply with Rule 23 and violate[d] [defendant's] rights under the due process clause."[39] Citing the recent decision in *Marcus*, the Court agreed, vacated the class certification order, and remanded.[40] Judge Scirica elaborated on *Marcus* and clarified the administrative feasibility requirement:

> The method of determining whether someone is in the class must be administratively feasible. A plaintiff does not satisfy the ascertainability requirement if individualized fact-finding or mini-trials will be required to prove class membership. Administrative feasibility means that identifying class members is a manageable process that does not require much, if any, individual factual inquiry.[41]

Critically, the court in *Carrera* clarified that ascertainability does not actually require production of corporate records or other evidence that can prove administrative feasibility. Rather, "ascertainability only requires the plaintiff to show that class members *can be identified*."[42]

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35 *Id.* (quoting Sanneman v. Chrysler Corp., 191 F.R.D. 441, 446 (E.D. Pa. 2000)).
36 *Id.* at 594.
37 727 F.3d 300, 304 (3d Cir. 2013).
38 *Id.*
39 *Id.* at 305.
40 *Id.* at 307–12 ("[T]here is the possibility that Carrera's proposed method for ascertaining the class via affidavits will dilute the recovery of true class members.").
41 *Id.* at 307–08 (internal citations and quotations omitted).
42 *Id.* at 308 n.2 (emphasis added).

Finally, the Third Circuit synthesized its ascertainability standard in *Byrd v. Aaron's, Inc.*[43] There, plaintiffs sued under the Electronic Communications Privacy Act of 1986, alleging violations of their privacy after an agent of Aaron's presented screenshot images from a leased laptop taken without their permission by pre-installed software.[44] Plaintiffs Crystal and Brian Byrd sought to certify two classes of individuals who purchased or leased computers from Aaron's, Inc. or a franchisee and "on whose computers DesignerWare's Detective Mode was installed and activated without such person's consent on or after January 1, 2007."[45] The district court denied certification, and the Third Circuit vacated and remanded, holding that the district court abused its discretion in "confus[ing] ascertainability with other relevant inquiries under Rule 23."[46] The Court went on to articulate a unified standard for heightened ascertainability: "The ascertainability inquiry is two-fold, requiring a plaintiff to show that (1) the class is 'defined with reference to objective criteria'; and (2) that there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'"[47] Under this standard, Byrd's class was ascertainable, since "Aaron's own records reveal the computers upon which Detective Mode was activated, as well as the full identity of the customer who leased or purchased each of those computers."[48]

The *Byrd* decision drew a concurrence from Judge Rendell—a preview of the forthcoming backlash against the Third Circuit's new "administratively feasible" standard. She argued that the "heightened ascertainability requirement defies clarification" and "narrows the availability of class actions in a way that the drafters of Rule 23 could not have intended."[49] In her estimation, the heightened inquiry required under the clarified standard put "the class action cart before the horse" and required the court to perform a trial function at the class certification stage.[50] The Supreme Court held in *Wal-Mart Stores, Inc. v. Dukes* that the class certification process traditionally requires the court to

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[43] 784 F.3d 154 (3d Cir. 2015).

[44] *Id.* at 159–60.

[45] *Id.* at 160.

[46] *Id.* at 161.

[47] *Id.* at 163 (citing *Carrera*, 727 F.3d at 305–06).

[48] *Id.* at 169 (quoting *Byrd*, 2014 WL 1316055, at *5).

[49] *Id.* at 172 (Rendell, J., concurring in the judgment) ("[T]he lengths to which the majority goes in its attempt to clarify what our requirement of ascertainability means . . . indicate that the time has come to do away with this newly created aspect of Rule 23 in the Third Circuit.").

[50] *Id.* at 173–74 (Rendell, J., concurring in the judgment) ("It is the trial judge's province to determine what proof may be required at the claims submission and claims administration stage.").

"probe behind the pleadings before coming to rest on the certification question,"[51] but Judge Rendell argued that requiring such a high evidentiary burden as the administrative feasibility requirement imposed at the certification stage foreclosed the trial judge's ability to craft a suitable claims administration mechanism later on in the class action life cycle.[52] Judge Rendell pointed, in particular, to the potential for a receipt or documentation requirement to "defeat[] what is at the 'core' of what the class action was designed to accomplish."[53] Subsequent developments would largely vindicate her concerns.

B. Mullins *and* Cherry*: The Seventh and Eleventh Circuits' Parry*

Months after *Byrd*, the Seventh Circuit wholeheartedly rejected the heightened ascertainability standard. In *Mullins v. Direct Digital, LLC*, the lead plaintiff brought a series of state law consumer fraud claims, alleging that Direct Digital's Instaflex Joint Support product was "nothing more than a sugar pill" and there was no scientific support for the company's claims that the pill could relieve joint pain and discomfort.[54] The district court certified a 23(b)(3) class, and the Seventh Circuit took a 23(f) interlocutory appeal to consider Direct Digital's argument that the district court abused its discretion in failing to address ascertainability.[55] Judge Hamilton soundly rejected the heightened test, writing that the second prong of the *Byrd* test "erect[s] a nearly insurmountable hurdle at the class certification stage in situations where a class action is the only viable way to pursue valid but small individual claims."[56] He addressed common defenses of the heightened standard in turn: "[a]dministrative [c]onvenience" is best addressed by Rule 23(b)(3)'s "superior[ity]" requirement and consideration of "the likely difficulties in managing a class action" under Rule 23(b)(3)(D);[57] "[u]nfairness to [a]bsent [c]lass [m]embers" adopts the false premise that Rule 23 insists on actual notice to all class members in all cases;[58] "[u]nfairness

51 564 U.S. 338, 350 (2011) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982)).

52 *Byrd*, 784 F.3d at 174 (Rendell, J., concurring in the judgment) ("[W]e foreclose this process at the outset of the case by requiring that plaintiffs conjure up all the ways that they might find the evidence sufficient to approve someone as a class member.").

53 *Id.* at 177.

54 795 F.3d 654, 658 (7th Cir. 2015), *cert. denied*, 577 U.S. 1138 (2016).

55 *Id.* at 658.

56 *Id.* at 662.

57 *Id.* at 663 (quoting Fed. R. Civ. P. 23(b)(3), 23(b)(3)(D)).

58 *Id.* at 665 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985)); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314–15 (1950) ("While actual individual notice may be the ideal, due process does not always require it."). *Shutts* and *Mullane*, respectively, established the baseline minimum for a class certification decision to meet the requirements of the Due Process Clause, *Shutts*, 472 U.S. at 812, and held that due process

to [b]ona [f]ide [c]lass [m]embers" because of the risk that "individuals without a valid claim will submit erroneous or fraudulent claims and dilute the share of recovery for true class members" is an insignificant concern in comparison to the possibility of "immunizing corporate misconduct";[59] and the "[d]ue [p]rocess [i]nterest of the [d]efendant" is properly addressed by the district courts' ability "to develop effective auditing and screening methods tailored to the individual case."[60] On top of this policy analysis, Judge Hamilton pointed out the simple fact that "[n]othing in Rule 23 mentions or implies" a heightened ascertainability requirement.[61] Direct Digital's petition for a writ of certiorari was denied by the Supreme Court in 2016 over several amici arguing in favor of review.[62]

Outside the Third Circuit, the Eleventh had been the friendliest circuit to the heightened standard after the Seventh Circuit rejected it in *Mullins*. Until recently, and absent more concrete guidance from the Court of Appeals, most district courts in the Eleventh Circuit followed *Karhu v. Vital Pharmaceuticals, Inc.*[63] In that case, the district court denied certification of a class of purchasers of Vital Pharmaceutical's VPX Meltdown Fat Incinerator dietary supplement because the class was not ascertainable.[64] The Eleventh Circuit affirmed, holding that a plaintiff must establish that identification of class members will be "administratively feasible and not otherwise problematic."[65] The court pointed to another case where plaintiff's counsel successfully obtained certification for a class of consumers by proposing subpoenas to third-party retailers for their customer lists and noted that a similar suggestion in

requires "notice reasonably calculated" and "an opportunity to present . . . objections" before an administrative process can affect individual litigants' rights, *Mullane*, 339 U.S. at 314.

[59] *Mullins*, 795 F.3d at 666, 669.

[60] *Id.* at 669.

[61] *Id.* at 672.

[62] Direct Digit., LLC v. Mullins, 577 U.S. 1138 (2016) (mem.); *see also, e.g.*, Brief for the Chamber of Com. of the U.S. as Amicus Curiae in Supporting Petitioner at 4, *Mullins*, 577 U.S. 1138 (2016) (No. 15-549), 2015 WL 7625702 (arguing that Supreme Court review of the issue is "urgently needed"); Brief for Atlantic Legal Found. as Amicus Curiae Supporting Petitioner at 5, *Mullins*, 577 U.S. 1138 (2016) (No. 15-549), 2015 WL 7758584 (urging the Court to grant certiorari); Brief for DRI—The Voice of the Def. Bar as Amicus Curiae Supporting Petitioner at 4, *Mullins*, 577 U.S. 1138 (2016) (No. 15-549), 2015 WL 7758583 (same); Brief for the Prod. Liab. Advisory Council, Inc. as Amicus Curiae Supporting Petitioner at 5, *Mullins*, 577 U.S. 1138 (2016) (No. 15-549), 2015 WL 7625701 (same).

[63] *See* 621 F. App'x 945, 946 (11th Cir. 2015) (presenting legal framework for heightened ascertainability requirement). Another unpublished opinion, *Bussey v. Macon County Greyhound Park, Inc.*, also acknowledged a heightened ascertainability requirement in the Eleventh Circuit, but *Karhu* is much more widely cited. *See* Bussey v. Macon Cnty. Greyhound Park, Inc., 562 F. App'x 782, 787 (11th Cir. 2014).

[64] *Karhu*, 621 F. App'x at 946.

[65] *Id.* at 948.

plaintiff's class certification papers might have worked here.[66] Though *Karhu* was a non-precedential opinion, it was enormously influential; numerous consumer class action opinions in the district courts of the Eleventh Circuit cited it to support application of the heightened ascertainability standard.[67]

However, in *Cherry v. Dometic Corp.*, the Eleventh Circuit clarified that heightened ascertainability was, in fact, not welcome in the circuit.[68] Eighteen owners of Dometic refrigerators sought certification of a class of refrigerator purchasers.[69] Dometic's gas-absorption refrigerators, usually used in recreational vehicles, had a known risk of leakage connected with a heightened risk of fire that led to a limited recall.[70] The plaintiffs argued that the defect was more widespread, affecting "almost every refrigerator that Dometic sold between 1997 and 2016."[71] The putative class representatives sued under the Magnuson-Moss Warranty Act and an assortment of state laws, proposing a 23(b)(3) class "of all persons who purchased in selected states certain models of Dometic refrigerators that were built since 1997."[72] In an opinion by Judge Pryor, the court soundly and explicitly repudiated *Karhu* and rejected a heightened test for ascertainability: "We hold that administrative feasibility is not a requirement for certification under Rule 23. In doing so, we limit ascertainability to its traditional scope: a proposed class is ascertainable if it is adequately defined such that its membership is capable of determination."[73] The Court found that circuit precedent only required a court to determine that a proposed class is "'adequately defined and clearly ascertainable' before it may consider whether the requirements of Rule 23(a) are satisfied."[74] Further, Judge Pryor held that the administrative feasibility requirement bears no textual relationship to either a district court's ability to consider the explicitly enumerated prerequisites of Rule 23(a) or the additional requirements for

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66 *Id.* at 950 (citing *In re* Scotts EZ Seed Litig., 304 F.R.D. 397, 407–08 (S.D.N.Y. 2015)).

67 *See, e.g.*, Randolph v. J.M. Smucker Co., 303 F.R.D. 679, 689–90, 689 n.7 (S.D. Fla. 2014) (applying *Karhu* to hold that a consumer class action against manufacturers of cooking oils was not ascertainable because consumers were unlikely to remember which variety of oil they purchased); Wasser v. All Mkt., Inc., 329 F.R.D. 464, 473 (S.D. Fla. 2018) (applying *Karhu* and noting that third-party records have not been shown to be useful for identification purposes).

68 986 F.3d 1296, 1304 (11th Cir. 2021).

69 *Id.* at 1300.

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* at 1304.

74 *Id.* at 1302 (quoting Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012)).

certifying a Rule 23(b)(3) class.[75] To the extent that administrative feasibility has a place in the class certification decision, it belongs in Rule 23(b)(3)(D)'s manageability requirement.[76] Judge Pryor concluded by noting the comparative evaluation necessary in making class certification decisions because of Rule 23(b)(3)'s superiority requirement and that "[a]dministrative feasibility alone will rarely, if ever, be dispositive, but its significance will depend on the facts of each case."[77]

Cherry left the First and Third Circuits as the sole administrative feasibility circuits.[78] The Second, Sixth, Seventh, Ninth, and Eleventh Circuits have adopted *Mullins* and rejected administrative feasibility.[79] The Fifth Circuit has noted in a non-precedential opinion that it has not adopted the Third Circuit's standard, but it has not outright rejected it.[80] The Fourth, Eighth, Tenth, D.C., and Federal Circuits have not spoken on the heightened ascertainability standard.[81]

C. *Academic Criticisms: Wrecking Ball to Consumers, Contrary to Text, and Inconsistent with Purpose*

Academic criticisms of heightened ascertainability abound. Chief among them are that the requirement disproportionately disadvantages low-value consumer cases, that the requirement is inconsistent with the text of Rule 23, and that it renders other parts of Rule 23 superfluous by attempting to address "class malfunctions."[82]

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75 *Id.* at 1303 ("[N]either foreknowledge of a method of identification nor confirmation of its manageability says anything about the qualifications of the putative class representatives, the practicability of joinder of all members, or the existence of common questions of law or fact . . . . Nor does a requirement of administrative feasibility follow from Rule 23(b).").

76 *Id.* at 1304 (citing Mullins v. Direct Digit., LLC, 795 F.3d 654, 664 (7th Cir. 2015)).

77 *Id.* at 1305 (citing Klay v. Humana, Inc., 382 F.3d 1241, 1272–73 (11th Cir. 2004)).

78 *See In re* Nexium Antitrust Litig., 777 F.3d 9, 19–20 (1st Cir. 2015) (applying the administrative feasibility requirement).

79 *See* cases cited *supra* note 19.

80 Seeligson v. Devon Energy Prod. Co., 753 F. App'x 225, 230 (5th Cir. 2018) (noting that the Fifth Circuit "has not adopted th[e] heightened standard"); *see also* Union Asset Mgmt. Holding A.G. v. Dell, Inc., 669 F.3d 632, 639 (5th Cir. 2012) (noting merely that "in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable" (quoting DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970))).

81 Emmy L. Levens & Brent W. Johnson, *When Courts Part Ways: Circuit Splits and Disharmony Impacting Antitrust Class Actions*, 34 Antitrust 41, 43 (2019) (charting out the circuit split on administrative feasibility).

82 *See* Shaw, *supra* note 25, at 2364 ("Courts and commentators have argued that the dangers of subjective and vague classes and classes with problematic scope . . . warrant an ascertainability requirement. But these class malfunctions are not best understood as failures of ascertainability, and Rule 23 already supplies the resources we need to prevent them.").

Disproportionate disadvantage against small-claims consumer class actions is the dominant criticism of administrative feasibility.[83] The observation that the heightened ascertainability standard effectively guts consumer class actions "has taken on the air of conventional wisdom,"[84] despite the fact that the class action device was created in substantial part to ensure that small-dollar claimants who otherwise would not seek compensation for their injuries have a mechanism by which to obtain relief.[85] Courts applying the administrative feasibility requirement frequently note that small-dollar consumers rarely keep receipts from their purchases.[86] The use of affidavits as a method to protect bona fide class members has received similarly negative reception.[87] Courts often cite concerns about getting damages into the hands of consumers,[88] but as Professor Myriam Gilles pointed out even before the *Marcus* decision, "[p]roof-of-purchase requirements may do a good job of keeping damages from the uninjured, but courts' extravagant concern with compensating the uninjured does an equally effective job of keeping damages from the truly injured."[89] Further, by making small-dollar classes nearly impossible to maintain, the requirement undermines the deterrence function of the class-action mechanism; under heightened ascertainability, defendants repeatedly and successfully argue against certification and escape "the potentially unfavorable effects of a large settlement or trial on the merits."[90]

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83 These criticisms have been echoed vociferously elsewhere in the judiciary, aside from in *Mullins* and *Cherry*. *See, e.g.*, Ebin v. Kangadis Food Inc., 297 F.R.D. 561, 567 (S.D.N.Y. 2014) ("[T]he class action . . . is designed for cases . . . where a large number of consumers have been defrauded but no one consumer has suffered an injury sufficiently large as to justify bringing an individual lawsuit. Against this background, the ascertainability difficulties . . . should not be made into a device for defeating the action.").

84 Jordan Elias, *The Ascertainability Landscape and the Modern Affidavit*, 84 Tenn. L. Rev. 1, 42 (2017).

85 *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. Ind. & Com. L. Rev. 497, 497 (1969)) ("[T]he Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'"); *see also* Shaw, *supra* note 25, at 2390 (emphasizing the decision of the framers of Rule 23 to unite claims of "absent, unknown parties" to allow vindication of smaller claims).

86 *See infra* Section II.C.

87 *See, e.g.*, *supra* notes 36–39 and accompanying text.

88 *See, e.g.*, *In re* Fresh Del Monte Pineapples Antitrust Litig., No. 1:04-md-1628 (RMB), 2008 U.S. Dist. LEXIS 18388, at *29 (S.D.N.Y. Feb. 20, 2008) (citation omitted) ("[E]ven the named Plaintiffs appear unable to estimate the number (or brand) of past pineapple purchases they made with any degree of certainty.").

89 Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DePaul L. Rev. 305, 316 (2010).

90 Haas, *supra* note 31, at 816; *see also* Stephen P. DeNittis & Joseph A. Osefchen, *A Plaintiff's Perspective of the New Ascertainability Requirement in Federal Class Actions*, 293 N.J. Lawyer 17, 26 (2015) (arguing that the heightened ascertainability standard "creates a

Opponents of administrative feasibility also often point to the standard's inconsistency with the text of Rule 23. Geoffrey Shaw argues forcefully that Rule 23(c)(2)(B)'s notice provision "specifically envisions that some class members might *not* be able to be identified through reasonable effort."[91] He points to the drafters' debate over whether the court should require "the best notice practicable"[92] or a more stringent notice standard,[93] and he analogizes the drafters' choice of "best notice practicable" to the balance struck by the Supreme Court in *Mullane v. Central Hanover Bank & Trust*.[94] In Shaw's estimation, a requirement that it be administratively feasible to ascertain each and every class member is inconsistent with this approach adopted by the drafters.[95] Moreover, Rule 23 specifically envisioned a mechanism distinct from Rule 19 joinder, where all known parties are joined as co-plaintiffs to the action.[96] The drafters incorporated "procedural safeguards" into Rule 23 with an eye towards "includ[ing] and aggregat[ing] the claims of parties who were left behind in other procedural schemes."[97] A heightened ascertainability requirement, in contrast, "pushes *out* of court the very classes that Rule 23 was designed to bring *in* to court and as a result makes the rule less 'effective.'"[98]

A final, prominent criticism of the administrative feasibility requirement is that it renders Rule 23(b)'s manageability and superiority requirements redundant. Rule 23(b)(3)(D) requires the district court to analyze "the likely difficulties in managing a class action" when making a certification decision.[99] This requirement already prompts the court to analyze whether or not the court must expend substantial resources to determine class membership and gives courts discretion as to whether those difficulties outweigh the potential expedience of the class action device; a judicially-created requirement adds little to the certification

road map for how to avoid any serious consequences for misconduct directed at a large group of people").

91 Shaw, *supra* note 25, at 2367.

92 *Id.* (quoting Fed. R. Civ. P. 23(c)(2)(B)).

93 *Id.* at 2367–68 (citing Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 394–96 (1967)).

94 *Id.* at 2368; *see also* 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

95 Shaw, *supra* note 25, at 2367.

96 Fed. R. Civ. P. 19.

97 Shaw, *supra* note 25, at 2390.

98 *Id.* at 2392.

99 Fed. R. Civ. P. 23(b)(3)(D).

analysis.[100] Further, the administrative feasibility requirement guts the comparative analysis required by Rule 23(b)(3)'s superiority standard.[101] The superiority requirement demands that the court compare the costs and benefits of other methods for managing the action and ensure that the class action device is the best method available.[102] Heightened ascertainability short-circuits superiority by "isolat[ing] the court's administrative convenience analysis to the current class action only."[103] It forces courts to consider whether class certification is proper for *this particular class* and robs the certifying court of the broader perspective gained under the superiority prong.[104]

D. Silence from the Top: Where is SCOTUS?

While the administrative feasibility circuit split was identified in 2016 as a potential bellwether of the Roberts Court's treatment of class actions,[105] the Supreme Court has, seven years later, declined to weigh in.[106] In addition to denying certiorari in *Mullins*, the Supreme Court denied certiorari in the Sixth and Ninth Circuits' recent cases approving the *Mullins* standard.[107] The clear divide among the circuits and strident academic criticism begs the question of why the Court has declined to weigh in. The certiorari fight in *Briseño v. ConAgra Foods, Inc.*,[108] where the Ninth Circuit rejected the administrative feasibility requirement

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100 *See* J.D. Moore, Comment, *The Heightened Standard of Ascertainability: An Unnecessary Hurdle to Class Action Certification*, 122 Penn St. L. Rev. 247, 261 (2017) ("If a court faces substantial difficulties in managing a class's definition or verifying class claims, then the court can rely on Rule 23's manageability clause to deny certification. . . . [C]ourts do not need a judicially-created administratively feasible requirement . . . .").

101 *Id.* at 262.

102 *See* Brent W. Johnson & Emmy L. Levens, *Heightened Ascertainability Requirement Disregards Rule 23's Plain Language*, 30 Antitrust 68, 70–71 (2016).

103 Moore, *supra* note 100, at 262.

104 *Id.*

105 *See* Allyson Ho & Scott Schutte, *The Court After Scalia: Uncertain First Principles for Class Actions*, SCOTUSBlog (Sept. 7, 2016, 2:06 PM), https://www.scotusblog.com/2016/09/the-court-after-scalia-uncertain-first-principles-for-class-actions [https://perma.cc/JR32-6T9L] (identifying the ascertainability requirement as a "potential test on the horizon" for the Roberts Court).

106 *See supra* note 62 and accompanying text.

107 Conagra Brands, Inc. v. Briseño, 138 S. Ct. 313 (2017) (mem.); Procter & Gamble Co. v. Rikos, 577 U.S. 1241 (2016) (mem.); *see also* Stephanie Starek, Note, *Navigating the Ascertainability Spectrum: Analyzing the Policy Rationales Behind the Various Ascertainability Standards as Applied to Small-Value Consumer Class Actions*, 68 Case W. Rsrv. L. Rev. 213, 237–38 (2017) (describing the likelihood, as of 2017, of Supreme Court review).

108 844 F.3d 1121, 1127 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 313 (2017).

and elected to follow the Seventh Circuit's approach in *Mullins*,[109] is illustrative.

After losing before the Ninth Circuit, Conagra petitioned for certiorari, framing the question presented squarely around the administrative feasibility requirement.[110] Conagra argued that the divide between pro-administrative feasibility and anti-administrative feasibility jurisdictions had created an "intolerable" situation where class certification "turns on venue in many, many cases."[111] It asserted that the divide led to unpredictably different results in nearly identical cases,[112] and that this case presented an "excellent vehicle" for resolving the split in favor of the Third Circuit's requirement.[113] In advocating for that result, Conagra posited that *Wal-Mart* and *Amchem Prods., Inc. v. Windsor*, where the Court held that settlement may play a limited role in determining the propriety of class certification,[114] militated in favor of a requirement that plaintiffs identify an administratively feasible mechanism for identifying members of the class.[115] "Without such a mechanism," according to Conagra, "courts cannot meaningfully evaluate whether the proposed class satisfies Rule 23's other requirements" or "meaningfully protect absent plaintiffs, class defendants, or their own dockets against the risks inherent in such cases."[116] Conagra went on to dismiss the Ninth Circuit's reasoning that "if plaintiffs must put forward a method of identifying absent class members, no class will be certified, and no one will bring these low-value claims."[117]

In response, Briseño argued that the circuit split on administrative feasibility was nonexistent or irrelevant.[118] According to Briseño, "the case law is settling on the context-specific approach from the Seventh Circuit's *Mullins* decision, and recent ascertainability decisions have not yet integrated the [Supreme] Court's holding in *Tyson*."[119] In *Tyson Foods, Inc. v. Bouaphakeo*, the Court held that a requirement for individual proof at the threshold liability stage is a matter determined by

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109 Mullins v. Direct Digit., LLC, 795 F.3d 654, 659 (7th Cir. 2015), *cert. denied*, 577 U.S. 1138 (2016) (mem.).

110 Petition for a Writ of Certiorari at i, Conagra Brands, Inc. v. Briseño, 138 S. Ct. 313 (2017) (No. 16-1221), 2017 WL 1353282, at *i [hereinafter *Briseño* Petition].

111 *Id.* at 1–2.

112 *Id.* at 20–23.

113 *Id.* at 23–28.

114 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997).

115 *Briseño* Petition, *supra* note 110, at 28–29.

116 *Id.*

117 *Id.* at 35.

118 Brief in Opposition at 17–29, Conagra Brands, Inc. v. Briseño, 138 S. Ct. 313 (2017) (No. 16-1221), 2017 WL 2628551, at *17 [hereinafter *Briseño* Opposition].

119 *Id.* at 20.

underlying substantive law rather than a prerequisite to class certification under Rule 23.[120] Briseño asserted that, while *Tyson* did not make an explicit statement on the percolating ascertainability divide, the case at hand was indistinguishable—there, as here, the question of "[h]ow a claims process will function, and the level of proof required from claimants, are simply not relevant to establishing the scope of the defendant's alleged wrongdoing"[121]—and precluded the kind of individualized inquiry Conagra argued Rule 23 demands.[122] Briseño predicted the Third Circuit would "embrace[] the Seventh Circuit's approach" and that the Court should "let the issue percolate before intervening."[123] Finally, Briseño argued that Conagra's rights were not infringed upon by the Ninth Circuit's approach: the class definition ensured that no further claims would be brought against Conagra for the conduct in question, a plan of notice distribution was not required at the certification phase, and Conagra was "protected from liability stemming from uncontested claims."[124]

Briseño's arguments were successful; the Court denied certiorari in the case, and the Ninth Circuit ruling remained in place.[125] The arguments and responses above evince two explanations for why the Court has declined to weigh in on heightened ascertainability. The first explanation is that, as Briseño argued, the implications of *Tyson* have not yet been fully realized in the Courts of Appeals. Indeed, while the Third Circuit did address ascertainability in one of the opinions cited by Briseño in its opposition brief, *City Select Auto Sales Inc. v. BMW Bank of North America Inc.*, that case did not disturb the fundamental contours of the doctrine, but rather clarified that the Third Circuit's "ascertainability precedents do not categorically preclude affidavits from potential class members, in combination with [other data], from satisfying the ascertainability standard."[126] Judge Scirica's opinion did not cite *Tyson Foods*, but that opinion's logic rang true in *City Select*'s clarification

120 577 U.S. 442, 460 (2016).
121 *Briseño* Opposition, *supra* note 118, at 16.
122 *Id.* at 19.
123 *Id.* at 20.
124 *Id.* at 29–32.
125 Conagra Brands, Inc. v. Briseño, 138 S. Ct. 313 (2017).
126 867 F.3d 434, 440 (3d Cir. 2017). The *Briseño* respondents also cited another upcoming Third Circuit case as one where "ascertainability will . . . be an issue at argument . . . ." *Briseño* Opposition, *supra* note 118, at 24 (citing Gonzalez v. Corning, 317 F.R.D. 443 (W.D. Pa. 2016)). The Third Circuit's opinion in that appeal did not discuss ascertainability. *See* Gonzalez v. Corning, 885 F.3d 186 (3d Cir. 2018). *Gonzalez* did, however, discuss *Tyson*. *Id.* at 198–99.

that affidavits combined with a customer database could meet the ascertainability requirement.[127]

Another explanation for why the Court has declined to take up the ascertainability mantle lies in a parallel fight over Article III standing in the Supreme Court's jurisprudence and its impact on the class action as a litigation device. In *TransUnion LLC v. Ramirez*, the Court clarified that under Article III, "[o]nly those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court."[128] *TransUnion* decertified a class of 6,332 class members whose credit reports were misleading but not disseminated to third parties because they merely alleged "future harm."[129] Given the plaintiffs' burden to demonstrate standing,[130] *TransUnion* may have the effect of shifting the certification fight to more front-end inquiries, thus subsuming "heightened ascertainability" or "administrative feasibility" into the broader development of standing law. Given *TransUnion*'s recent vintage, and the two new additions to the Supreme Court since the decision, it is too early to determine conclusively that this subsumption has taken place, but it may offer some insight as to why the Court has yet to weigh in.

Regardless, Briseño's prediction that the Third Circuit would reverse course on heightened ascertainability has not materialized. In fact, that court has doubled down,[131] and the Third Circuit's unique requirement is still being applied with regularity and vigor in the district courts within its borders.[132] Five years after certiorari was denied

[127] *See City Select*, 867 F.3d at 441–42. To the credit of the respondents in *Briseño*, the decision in *City Select* drew a concurrence from Judge Fuentes arguing that "the added ascertainability requirement is not necessary to serve" the values of (1) "absent plaintiffs' opt-out rights and interest in not having future claims diluted," (2) "a defendant's due process rights," or (3) "the efficiency of the class action mechanism." *Id.* at 444 (Fuentes, J., concurring).

[128] 141 S. Ct. 2190, 2205 (2021).

[129] *Id.* at 2211.

[130] *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing the[] elements [of standing].").

[131] *See* Kelly v. RealPage Inc., 47 F.4th 202 (3d Cir. 2022) (vacating district court opinion for failing to properly consider heightened ascertainability). While the proposed method for identifying members of the class in *Kelly* was found to be administratively feasible, the Court still analyzed the issue under the test articulated in *Marcus*, *Hayes*, *Carrera*, and *Byrd*. *Id.* at 223–24.

[132] *See, e.g.*, Espinal v. Bob's Discount Furniture, LLC, No. 17-2854, 2021 WL 5002650 (D.N.J. Oct. 28, 2021) (denying a class certification motion on primarily administrative feasibility grounds); Butela v. Midland Credit Mgmt. Inc., 341 F.R.D. 581 (W.D. Pa. 2022) (granting a class certification motion despite arguments that the putative class was not administratively feasible); *In re* Valsartan, Losartan, and Irbesartan Prods. Liab. Litig., No. 19-2875, 2023 WL 1818922 (D.N.J. Feb. 8, 2023) (incorporating *Kelly*'s slight refinements on the heightened ascertainability inquiry and both granting and denying several classes within this

in *Briseño*, two years after *TransUnion*, and despite consistent scholarly criticism and disagreement from its sister circuits, this requirement remains a mainstay of Third Circuit law.

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The administrative feasibility test has few friends outside of Philadelphia, and academic criticism cuts against its application. The current state of the doctrine, and the Supreme Court's reticence on the subject, begs the question of whether administrative feasibility matters at all in the class certification analysis. The next Part will attempt to address this question.

II
Wheat from the Chaff: The Four Axes of Ascertainability

In order to evaluate whether the heightened ascertainability requirement actually does any work in the class action analysis, this Part will identify four common axes, or factors, upon which ascertainability decisions often turn: whether the purchases made were for "big ticket" or "small ticket" items, how plaintiffs propose to ascertain the class, whether defendants have kept records of the sale of the goods in question, and whether plaintiffs propose that class members self-identify via affidavit or otherwise. By comparing cases centered on each of these factors in both heightened and non-heightened ascertainability jurisdictions, this Part will show how the administrative feasibility standard appears only to add inconsistency to the analysis of whether or not a class can be ascertained—and, in the rare areas where the requirement produces consistent results, it operates to the detriment of consumer class actions.

Supposedly, the administrative feasibility requirement protects "(1) absent plaintiffs' opt-out rights and interest in not having future claims diluted, (2) a defendant's due process rights, and (3) the efficiency of the class action mechanism."[133] But as the analysis below demonstrates, those values are difficult to discern through the wash of cross-cutting conclusions. If the heightened inquiry only serves to make small-dollar consumer class actions more difficult to bring, are opt-out

multi-district litigation); Lutz Surgical Partners PLLC v. Aetna, Inc., No. 15-2595-BRM-TJB, 2023 WL 2153806 (D.N.J. Feb. 21, 2023) (holding that the class was ascertainable but denying class certification on other grounds).

133 City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc., 867 F.3d 434, 444 (3d Cir. 2017) (Fuentes, J., concurring) (citing Carrera v. Bayer Corp., 727 F.3d 300, 310 (3d Cir. 2013); Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593–94 (3d Cir. 2012)).

rights and interests in future claim dilution not overprotected? If due process requires that nearly all such class actions are impermissible, doesn't administrative feasibility overprotect defendants' rights and entirely subjugate plaintiffs' rights to pursue their chosen action?[134] And does "efficiency" require that small-dollar class actions *never* survive a certification motion? None of these values appear to be served by a requirement that does no work in the certification analysis other than to indiscriminately bar the very type of action that Rule 23 was written to enable. Therefore, as this Part aims to demonstrate, the heightened ascertainability requirement does not even further the values it purports to serve.

The conclusions in this Part come from a novel analysis of nearly three-dozen cases, all of which turn on administrative feasibility in substantial part—even in those cases that originate in non-heightened circuits. While many cases involve courts' consideration of a constellation of the factors identified below, they have been categorized to illustrate the inconsistencies across the ascertainability jurisprudence.

A. Big Ticket/Small Ticket

The "big ticket/small ticket" distinction cuts to the "very core" of the 23(b)(3) class and the class action more generally: to "overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."[135] However, in administrative feasibility jurisdictions, courts leverage the size and magnitude of the purchase in question to justify denying certification. Plaintiffs with similar allegations in non-administrative feasibility jurisdictions face a mixed reception: In some cases, the "small ticket" nature of the item defeats ascertainability, while in others, ascertainability is met. These comparisons reveal that the "big ticket/small ticket" distinction likely does not go very far in furthering the supposed values of the heightened standard.

1. Inconsistency Between Pro- and Anti-Administrative Feasibility Jurisdictions

For instance, class certification was denied in both *Algarin v. Maybelline* and *Dapeer v. Neutrogena*, two cases where consumers sought certification of classes based on false-labelling claims regarding

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[134] *Cf.* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807–08 (1985) (holding that a plaintiff's legal claim is a constitutionally protected property interest even when bundled within a class action).

[135] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

personal cosmetic products.[136] *Algarin* and *Dapeer* present prime examples of how unpredictable an administrative feasibility requirement can be for small-claims consumer classes. In *Algarin*, brought in the pre-*Briseño* Ninth Circuit where several district courts embraced administrative feasibility, one of the named plaintiffs paid $10 for Maybelline's SuperStay Lipcolor on the promise of 24 hour coverage.[137] She sued, claiming that the labels were "deceptive, false, and/or misleading," and sought to certify a class of "[a]ll California consumers who purchased SuperStay 24HR Lipcolor and/or SuperStay 24HR Makeup for personal use until the date notice [was] disseminated."[138] The class was found to be unascertainable because Maybelline did not retain records to support any identifying method and, given that "self-identification alone ha[d] [only] been deemed sufficient" in "situations where consumers [were] likely to retain receipts, where the relevant purchase was a memorable 'big ticket' item; or where defendant would have access to a master list of consumers or retailers," it was unlikely that self-identification alone could help the court ascertain the class.[139] In *Dapeer*, brought in the pre-*Cherry* Eleventh Circuit where the courts followed *Karhu*'s embrace of administrative feasibility,[140] the plaintiff brought unfair trade practices claims against Neutrogena for misleading advertising of its 70 SPF sunscreen.[141] He sought to certify a class of "all individuals" in the relevant state jurisdictions "who . . . purchased Beach Defense 70 . . . ."[142] In his deposition testimony, the named plaintiff could not remember where or when he purchased the product, how much he paid for it, or any details about what other sunscreen he purchased since.[143] Judge Torres noted it was "troubling" that "the representative plaintiff who was offended enough to bring suit [could not] remember these important details," found that the class was not ascertainable, and recommended denying certification.[144]

At the time *Algarin* was decided, the Ninth Circuit had not clearly staked out a position on the administrative feasibility debate, and

136 Algarin v. Maybelline, LLC, 300 F.R.D. 444, 450 (S.D. Cal. 2014); Dapeer v. Neutrogena Corp., No. 14-22113-Civ, 2015 WL 10521637, at *1 (S.D. Fla. Dec. 1, 2015).

137 *Algarin*, 300 F.R.D. at 450.

138 *Id.* at 451–52 (first alteration in original).

139 *Id.* at 456 (citing Red v. Kraft Foods, Inc., No. CV 10-1028, 2012 WL 8019257 (C.D. Cal. Apr. 12, 2012)).

140 *See supra* notes 63–73 and accompanying text.

141 Dapeer v. Neutrogena Corp., No. 14-22113-Civ, 2015 WL 10521637, at *2 (S.D. Fla. Dec. 1, 2015).

142 *Id.* at *2.

143 *Id.* at *10.

144 *Id.* at *10, *13.

several district courts indeed embraced administrative feasibility.[145] At the time *Dapeer* was decided, *Karhu* was followed in the Eleventh Circuit.[146] However, in *Dapeer*, failure to demonstrate ascertainability was deemed to "present[] a fatal obstacle to Plaintiff's class certification . . . ."[147] In *Algarin*, where no circuit precedent controlled the administrative feasibility standard, "a lack of ascertainability alone" did not "defeat class certification" and "the Court continue[d] to analyze whether the requirements of Rule 23(a) and 23(b) [were] met."[148] In these two cases, similar facts (surrounding "small ticket" purchases) led to two findings of no ascertainability. In one, this was enough to defeat the class. In the other, the class was still defeated, but on other grounds.

Another pair of cases in pro- and anti-administrative feasibility jurisdictions likewise demonstrates the scattershot nature of the requirement's application. Here, like in *Dapeer* and *Algarin*, small ticket items were at issue. In both cases, members of the proposed classes were unlikely to have retained their proofs of purchase, but despite arising from two different circuits (one where administrative feasibility is endorsed and one where it is not), the small nature of the purchase did not defeat certification. In one case, absent proof of purchase for the small ticket item alone was not enough to defeat ascertainability, while in the other, lack of proof of purchase was specifically rejected as irrelevant to the inquiry. Plaintiffs in *Randolph v. J.M. Smucker Co.*, brought in the *Karhu*-era, pro-administrative feasibility Eleventh Circuit,[149] sued Smucker over the inclusion of harsh chemicals in its supposedly "All Natural" Crisco oil.[150] They sought to certify a class of "[a]ll persons in Florida who, from May 2009 to the present, purchased Crisco Pure Vegetable Oil, Crisco Pure Canola Oil, Crisco Pure Corn Oil, and Crisco Natural Blend Oil . . . ."[151] The Court found that while "putative class members are highly unlikely to retain proof of purchase for such a low price consumer item," this was "insufficient to defeat certification."[152] However, many variations of the challenged products were sold during the time period in question, and the court found that the consumers would not "retain significant memory" about the item in question.[153]

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145 *See* Algarin v. Maybelline, LLC, 300 F.R.D. 444, 454 (S.D. Cal. 2014) (collecting cases).

146 *Karhu* was a nonprecedential opinion but treated as the controlling law of the Eleventh Circuit prior to *Cherry*. *See supra* notes 67–74 and accompanying text.

147 *Dapeer*, 2015 WL 10521637, at *11.

148 *Algarin*, 300 F.R.D. at 456.

149 *See supra* notes 63–74 and accompanying text.

150 303 F.R.D. 679, 682–83 (S.D. Fla. 2014).

151 *Id.* at 683.

152 *Id.* at 689.

153 *Id.*

The court concluded that "Plaintiff ha[d] failed to submit sufficient evidence that an . . . administratively feasible method for determining class membership exist[ed]" and denied certification.[154] In a different case, *In re Scotts EZ Seed Litigation*, brought in the anti-administrative feasibility Second Circuit,[155] the court certified a class of plaintiffs who claimed that a grass fertilizer was advertised with the false claim that the fertilizer would grow grass "50% Thicker With Half the Water."[156] Plaintiffs sought certification of a class of "[a]ll persons who purchased EZ Seed in the state[s] of [California or New York] containing the label statement."[157] The court held that the retention of proof of purchase was irrelevant to the ascertainability inquiry and, in fact, "would render class actions against producers almost impossible to bring."[158] The former case was brought in the pre-*Cherry* Eleventh Circuit and argued under the *Karhu* standard,[159] while the latter was brought in the Second Circuit—an explicitly anti-administrative feasibility jurisdiction.[160] Yet, in both, the lack of receipts for a small ticket item was not alone a bar to certification.

2. *Big Ticket Items: Clearly Ascertainable*

The "big ticket" end of the spectrum also does few favors for the administrative feasibility requirement's vitality. In at least one case where a big ticket item was at issue, the class was found to be administratively feasible but was still denied certification. The lead plaintiffs in *Pagliaroni v. Mastic Home Exteriors, Inc.*, brought in the pro-administrative feasibility First Circuit,[161] sought to certify a class of individuals who purchased exterior home decks made of Oasis, a synthetic wood material shown to exhibit cracking.[162] The proposed class cleared the ascertainability bar easily, since a synthetic deck is a "significant and

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[154] *Id.* at 690. The court concluded that a lack of ascertainability was sufficient to defeat class certification but proceeded to analyze the 23(a) prerequisites "for the purposes of thoroughness." *Id.* at 692 (citing Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012)).

[155] *See In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 45 (2d Cir. 2006) (impliedly rejecting a heightened ascertainability requirement as already encompassed by the prohibition against "individualized determinations"); *see also In re* Petrobras Sec., 862 F.3d 250, 265 (2d Cir. 2017) (explicitly rejecting heightened ascertainability and adopting the *Mullins* standard).

[156] 304 F.R.D. 397, 404 (S.D.N.Y. 2015).

[157] *Id.*

[158] *Id.* at 407 (quoting Ebin v. Kangadis Food Inc., 297 F.R.D. 561, 567 (S.D.N.Y. 2014)).

[159] *See* Karhu v. Vital Pharms., Inc., 621 F. App'x 945, 946 (11th Cir. 2015).

[160] *See In re Scotts EZ Seed*, 304 F.R.D. at 407 (citing *In re Initial Pub. Offerings*, 471 F.3d at 30); *see also In re Petrobras*, 862 F.3d at 265.

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

[162] No. 12-10164-DJC, 2015 WL 5568624, at *3, *8 (D. Mass. Sept. 22, 2015).

lasting addition to a property."[163] The *Pagliaroni* court went so far as to say that the administrative feasibility standard is "inapposite" because even where potential class members did not purchase their deck directly from Mastic, "[t]he proposed class is determinable by a single objective criterion: whether a person owns a property where Oasis is or was installed, as verifiable by laser-etching on the Oasis boards."[164] But ascertainability is only a threshold issue, and Pagliaroni's class was doomed by commonality and typicality: questions of individualized proof under various state laws undermined commonality, and the breadth of the proposed class coupled with the distinct nature of the injury suffered by each class member (coupled with the lack of any injury suffered by others) defeated typicality.[165] So, here, in an administrative feasibility jurisdiction,[166] a class was administratively feasible but still could not clear the certification hurdle.

As these cases demonstrate, on the "big ticket/small ticket" axis, administrative feasibility adds little to the certification analysis. In jurisdictions where administrative feasibility is adopted, the requirement has both defeated and failed to independently defeat class certification where consumers are not likely to have recalled details about their purchases.[167] In jurisdictions where administrative feasibility is and is not adopted, the lack of receipts retained for a small ticket purchase alone does not defeat certification.[168] And, in at least one case where administrative feasibility was a requirement, a class related to a "big ticket" item was not even subjected to the test.[169] On this factor, the heightened requirement does not further the purported ascertainability values. We must look elsewhere to find where the requirement might lend consistency to the class certification analysis.

B. Proposed Method of Ascertainment

How, precisely, the class will be ascertained is one of the key questions in the ascertainability inquiry in both pro-administrative feasibility and anti-administrative feasibility jurisdictions. In pro-administrative

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163 *Id.* at *10.

164 *Id.*

165 *Id.* at *10–14.

166 *See Nexium*, 777 F.3d at 19.

167 *Compare* Dapeer v. Neutrogena Corp., No. 14-22113-Civ, 2015 WL 10521637, at *11 (S.D. Fla. 2015) (defeating class certification), *with* Algarin v. Maybelline, LLC, 300 F.R.D. 444, 456 (S.D. Cal. 2014) (failing to independently defeat class certification).

168 *Compare* Randolph v. J.M. Smucker Co., 303 F.R.D. 679, 682–83 (S.D. Fla. 2014), *with In re* Scotts EZ Seed Litig., 304 F.R.D. 397, 407 (S.D.N.Y. 2015) (finding ascertainability without receipt).

169 *Pagliaroni*, 2015 WL 5568624, at *10.

feasibility jurisdictions, courts often require evidence in the record of a specific plan to obtain class member information in order to satisfy the "administratively feasible mechanism" prong of the heightened ascertainability inquiry.[170] In *Adams Pointe*, for instance, plaintiffs did not present an administratively feasible plan for obtaining information that might allow the court to ascertain a class.[171] In anti-administrative feasibility jurisdictions, courts merely require some "objective criteria" which can be used to ascertain the class.[172] Yet, in analyzing the "proposed method" factor, courts are inconsistent in their approaches in both pro- and anti-administrative feasibility jurisdictions. The cases decided along this axis illustrate that here, too, the lack of predictability undermines the values ascertainability purports to promote.

To start with an internally contradictory case from the world of mass tort, the individual plaintiffs in *In re Paulsboro Derailment Cases* easily cleared the heightened ascertainability bar in the District of New Jersey—a district within the administrative feasibility heartland, the Third Circuit.[173] However, the business plaintiff class was not certified because a specific method for ascertainment was not presented to the court despite such methods being self-evident. Both sub-classes of plaintiffs suffered economic loss as a result of the derailment of a freight train in November 2012.[174] The train was carrying vinyl chloride when it failed to heed a signal indicating that a swing bridge over Mantua Creek was open, leading to four tank cars falling into the creek where they released their payload and contaminated the surrounding air and water with chemicals.[175] Local residents and business owners were required to evacuate the area while local authorities cleaned up the spill, and the entire populations of Paulsboro and West Deptford were ordered to shelter in place for several days.[176] Plaintiffs sued under broad theories of gross negligence and sought certification of several subclasses: one made up of, essentially, all individuals who resided in the evacuation zone who had unreimbursed medical expenses, and another made up of two further subclasses of individuals and businesses who suffered income loss as a result of the evacuation.[177] The court had

170 Carrera v. Bayer Corp., 727 F.3d 300, 306 (3d Cir. 2013).
171 *Adams Pointe* Recommendation, *supra* note 2, at *8.
172 Mullins v. Direct Digit., LLC, 795 F.3d 654, 659 (7th Cir. 2015), *cert. denied*, 577 U.S. 1138 (2016).
173 Civ. Nos. 13-784, 12-7586, 12-7648, 13-410, 13-721, 13-761, 2014 WL 4162790, at *6 (D.N.J. Aug. 20, 2014).
174 *Id.* at *1.
175 *Id.*
176 *Id.*
177 *Id.* at *4.

no trouble finding that the individual residents constituted an ascertainable subclass; property records would be sufficient to determine the identity of the individuals who lived in identifiable properties.[178] But the court stopped short of certifying the class of businesses, reasoning that this subclass was not ascertainable because while "the businesses on the preliminary list . . . appear to have physical operations in the evacuation or shelter zones, it is not obvious that all of them lost income."[179] While the court could only make a certification decision based on the record as presented, the distinction between residents and businesses in *In re Paulsboro Derailment* evinces an evidentiary deficiency rather than any actual difficulty in determining class membership—surely, it was self-evident that business class members could have produced income statements, business records, and a variety of other material to prove that they lost income during the mitigation period.

A series of false advertising cases where the proposed method of ascertainment was a primary issue further evinces the conclusion that heightened ascertainability undermines the consistency and efficiency values it purports to serve. In *Weidenhamer v. Expedia, Inc.*, the Western District of Washington, in the period prior to the Ninth Circuit's rejection of heightened ascertainability in *Briseño*,[180] denied certification of a class of plaintiffs who purchased airfare via Expedia's website or mobile application and were charged a higher baggage fee than disclosed by Expedia at the time of purchase.[181] Plaintiffs proposed that class members be ascertained, in part, by mining Expedia's sale records and identifying "hot spots" where the problematic displays might have appeared.[182] The court colorfully dismissed this approach as "nothing more than throwing the proverbial spaghetti at the wall to see what sticks."[183] Meanwhile, in the Southern District of Florida, during the period when the Eleventh Circuit embraced administrative feasibility,[184] the court similarly denied class certification in *Mirabella v. Vital Pharmaceuticals, Inc.*, where plaintiffs brought unfair trade practices claims against manufacturers of an energy drink.[185] There, the plaintiffs proposed the use of a third-party class action administrator to forensically identify purchasers of energy drinks, but the court found

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178 *Id.* at *6.
179 *Id.* at *7.
180 *See* Briseño v. ConAgra Foods, Inc., 844 F.3d 1121 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 313 (2017).
181 No. C14-1239, 2015 WL 7157282, at *3, *6 (W.D. Wash. Nov. 13, 2015).
182 *Id.* at *6.
183 *Id.*
184 *See supra* notes 63–74 and accompanying text.
185 No. 12-62086-CIV, 2015 WL 1812806, at *1 (S.D. Fla. Feb. 27, 2015).

this insufficient to meet administrative feasibility, holding that the required self-declarations would suffer inevitably from a "subjective memory problem."[186] By contrast, another three classes were *approved* in anti-administrative feasibility jurisdictions: plaintiffs in a consumer fraud action alleging violations of the Telephone Consumer Protection Act obtained class certification despite no demonstration of a method to connect telephone numbers from outgoing call logs to individual telephone providers;[187] plaintiffs alleging false and deceptive business practices by a distributor of baby formula obtained certification of several subclasses of purchasers despite the need to use self-identifying affidavits;[188] and in the long-running antitrust litigation over Mylan's EpiPen monopoly, plaintiffs obtained certification of a state antitrust class and a nationwide RICO damages class on the proposition that third-party payors could attest to whether individual class members were reimbursed for the price of an EpiPen.[189] The proposed methods of ascertainment in these five cases run the gamut between relatively speculative to sophisticated and technical. But whether administrative feasibility applies in the given jurisdiction or not, it does no work to predict whether or not the class will be found to be ascertainable.

Even within the Third Circuit itself, cases that turn on the recordkeeping factor come out inconsistently under the administrative feasibility inquiry. A pair of pharmaceutical cases, where opaque purchasing arrangements seem to produce several ascertainability problems, illustrates this point. First, the plaintiff class in *In re Suboxone* was determined to be ascertainable with evidence of a clear plan to obtain patient information.[190] Plaintiffs, direct purchasers of the drug Suboxone, brought suit under a novel "product hop" theory of antitrust liability, alleging that the manufacturer made slight modifications to its product in order to "stymie[] generic competition and preserv[e] monopoly profits."[191] The court found the class to be ascertainable since the plaintiffs identified how subpoenas during fact discovery would

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[186] *Id.* at *4.

[187] Toney v. Quality Res., Inc., 323 F.R.D. 567, 582 (N.D. Ill. 2018) (citing Mullins v. Direct Digit., LLC, 795 F.3d 654, 657–58 (7th Cir. 2015)).

[188] Hasemann v. Gerber Prods. Co., 331 F.R.D. 239, 271 (E.D.N.Y. 2019) (citing *In re* Scotts EZ Seed Litig., 304 F.R.D. 397, 539 (S.D.N.Y. 2015)).

[189] *In re* EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig., No. 17-md-2785, 2020 WL 1180550, at *12 (D. Kan. Mar. 10, 2020) (citing *In re* Syngenta AG MIR 162 Corn Litig., No. 14-md-2591, 2016 WL 5371856, at *2–3 (D. Kan. Sept. 26, 2016) (adopting the Seventh Circuit's reasoning in *Mullins* and predicting that, when asked to examine the heightened ascertainability issue, the Tenth Circuit would adopt *Mullins*)).

[190] *In re* Suboxone (Buprenorphine Hydrochloride and Nalaxone) Antitrust Litig., 421 F. Supp. 3d 12, 72 (E.D. Pa. 2019).

[191] *Id.* at 26.

yield the information needed to identify specific class members.[192] By contrast, in *In re Thalomid*, a court in the same circuit denied class certification after undertaking a closer inquiry, pointing to "incomplete records" that would make it impossible to determine, without extensive, individualized fact-finding, who the class members were.[193] Meanwhile, in the Fourth Circuit, where there has been no clear statement on the heightened ascertainability requirement, a court subjected a similar class of pharmaceutical plaintiffs to the administrative feasibility test.[194] In a suit against alleged perpetrators of an unlawful reverse payment settlement agreement, plaintiffs sought to prove ascertainability through rigorous analysis by a third-party expert. Here, applying the Third Circuit's test, the court blessed that method and found that "the named plaintiffs offer an administratively feasible method for identifying class members in reference to objective criteria."[195]

Several cases presented here identify similar methods of ascertainment, yet the result is nearly impossible to predict. Examining the "proposed method" factor further supports a characterization of the administrative feasibility requirement as one that more properly belongs in a post-certification evidentiary inquiry than as a precertification requirement; it clearly does little work at the certification stage, and certainly does no work to predict outcomes or offer any protection of plaintiffs' rights.

C. Recordkeeping

Another common metric in ascertainability cases is whether the defendant has records that can be relied upon for an administratively feasible method of certifying the class. Even under the heightened test, courts can look to defendant's records to prove administrative

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192 *Id.* at 73.

193 *In re* Thalomid and Revlimid Antitrust Litig., No. 14-6997, 2018 WL 6573118, at *22 (D.N.J. Oct. 30, 2018). Judge Arleo noted that in a renewed motion for class certification, plaintiffs "must demonstrate that excluding flat co-pay consumers will not require extensive individualized inquiry and mini-trials." *Id.* Plaintiffs ultimately cured these defects and obtained certification of a settlement class. *In re* Thalomid and Revlimid Antitrust Litig., No. 14-6997, 2020 WL 4197092 (D.N.J. May 26, 2020).

194 *In re* Zetia (Ezetimibe) Antitrust Litig., No. 2:18-md-2836, 2020 WL 5778756, at *12 (E.D. Va. Aug. 14, 2020). The court in *In re Zetia* points to *Marcus* and other Third Circuit cases in articulating its standard of review for ascertainability. *See id.* at *8 (citing Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012); Krakauer v. Dish Network, L.L.C., 925 F.3d 643, 658 (4th Cir. 2019) (holding that the named plaintiff must "define a class in such a way as to ensure that there will be some administratively feasible [way] for the court to determine whether a particular individual is a member at some point")).

195 *In re Zetia*, 2020 WL 5778756, at *14.

feasibility.[196] In *Hayes v. Wal-Mart Stores, Inc.*, the Third Circuit clarified the heightened standard with respect to recordkeeping and held that while defendants' records could be used to meet the administrative feasibility prong, plaintiffs were still required to demonstrate that the records would actually be useful in ascertaining the class.[197] Courts that adopt the lower ascertainability standard ostensibly impose lower requirements on the use of defendants' records,[198] but in both pro- and anti-administrative feasibility jurisdictions, consumer products classes with recordkeeping issues are usually not certified.[199] In cases that turn on this factor, whether or not the heightened requirement applies makes no difference as to whether the class will be certified. This is the one factor that produces consistent outcomes: where recordkeeping is an issue, the consumer class certification is nearly always defeated. And, as in the one case that proceeded to trial where corporate antitrust plaintiffs presented a recordkeeping method that met the heightened ascertainability requirement, the focus on this requirement in ascertainability analysis only serves to *undermine*, rather than promote, plaintiffs' due process rights.

1. Consistent Destruction in Pro-Administrative Feasibility Jurisdictions

Pro-administrative feasibility jurisdictions nearly always find that failure to demonstrate usability of proposed records is fatal to certification. For instance, the case that led to the Eleventh Circuit's recent rejection of the heightened standard was initially denied certification because of a recordkeeping issue.[200] The court in *Papasan v. Dometic* applied the *Karhu* standard to find the lack of evidence from Dometic that the manufacturer kept records about who purchased the refrigerators fatal to the ascertainability of the class.[201] The same court declined

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[196] *See* Carrera v. Bayer Corp., 727 F.3d 300, 308–09 (3d Cir. 2013).

[197] 725 F.3d 349, 356 (3d Cir. 2013).

[198] *See* Kyle Harris Timmons, Comment, *The End of Low-Value Consumer Class Action Lawsuits?: The Federal Circuit Split on the Ascertainability Requirement for Class Certification*, 68 Mercer L. Rev. 1107, 1133–34 (2017) ("[T]he courts adhering to the lower standard have focused on the need to not incentivize poor recordkeeping by corporate defendants."); *see, e.g.*, Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 539–40 (6th Cir. 2012).

[199] Many of these cases that involve "small-ticket" items might justifiably be categorized in Section II.A. I discuss them separately here because the courts in these cases focused primarily on whether consumers might or might not be likely to retain records of their purchases of these items, rather than how big or small of a purchase is involved.

[200] Papasan v. Dometic Corp., 16-22482-CIV, 2019 WL 3317750, at *5–6 (S.D. Fla. Jul. 24, 2019), *rev'd sub nom* Cherry v. Dometic Corp., 986 F.3d 1126 (11th Cir. 2021).

[201] *Id.* at *5.

to certify in *Wasser v. All Market, Inc*.[202] There, plaintiffs claimed that VitaCoco's "born in Brazil" tagline was deceiving and asserted unjust enrichment claims against VitaCoco's manufacturer, All Market.[203] Their six proposed classes were found to be unascertainable under the *Karhu* test because "the level of individual inquiry necessary to attempt to validate a self-identified claimant is especially high in this case."[204] *Wasser* seemed to indicate that a detailed plan to utilize records was a demerit rather than a virtue under a heightened ascertainability test: the plaintiffs' test called for subjecting third-party records to several layers of review and ensuring that each individual record meets at least six objective criteria, a process which the plaintiffs proposed to be overseen by a special master or magistrate judge.[205] The court described the threshold necessary to identify class members under plaintiffs' proposed test as "especially high," but did not address how the plaintiffs might clear the bar.[206]

2. *Consistent Destruction in Anti-Administrative Feasibility Jurisdictions*

Classes whose certification motions turned primarily on record-keeping fared no better in jurisdictions that reject administrative feasibility. Plaintiffs in *Astiana v. Ben & Jerry's* sued the ice cream manufacturer in the Northern District of California over the "all natural" label on certain ice cream flavors, alleging that the label constitutes false advertising because the product contained cocoa that was alkalized with a synthetic agent.[207] In the pre-*Briseño* Ninth Circuit,[208] the *Astiana* court denied certification because plaintiffs had not shown which ice cream flavors contained the synthetically alkalized cocoa, the manufacturers had no records of which products contained the substance, and there was no evidence that Ben & Jerry's maintained records of who purchased which flavors of ice cream.[209] In the Southern District of New York, after the Second Circuit made clear that it rejected heightened ascertainability,[210] antitrust plaintiffs sued distributors of digital music, alleging various

202 329 F.R.D. 464, 475 (S.D. Fla. 2018).
203 *Id.* at 467.
204 *Id.* at 474.
205 *Id.* at 475.
206 *Id.* at 474.
207 Astiana v. Ben & Jerry's Homemade, Inc., No. C 10-4387, 2014 WL 60097, at *1 (N.D. Cal. Jan. 7, 2014).
208 Briseño v. ConAgra Foods, Inc., 844 F.3d 1121 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 313 (2017).
209 *Astiana*, 2014 WL 60097, at *3.
210 *See In re* Petrobras Sec. Litig., 862 F.3d 250, 265 (2d Cir. 2017).

violations of the Sherman Act and state laws.[211] The court denied certification, in part, because only six of the twenty proposed class representatives were actually able to provide proofs of purchase of digital music during a substantial portion of the class period.[212] In *Bruton v. Gerber Products Co.*, the Northern District of California initially denied certification because purchasers of baby food were unlikely to have kept evidence that they purchased the challenged product during the time period in question.[213] The court found that there were simply too many varieties of the product for plaintiffs to have any reliable, administratively feasible method of ascertaining who purchased which product.[214] The Ninth Circuit reversed, though, noting that it had decided *Briseño v. ConAgra Foods, Inc.* since the district court ruled on the class certification motion.[215] *Briseño* adopted the *Mullins* test and rejected heightened ascertainability, thus abrogating the district court's ascertainability analysis.[216] On remand, Judge Koh once again denied certification, finding that Bruton lacked standing to pursue injunctive relief under Rule 23(b)(2) and that the proposed damages theory does not meet Rule 23(b)(3)'s predominance requirement.[217] So, in a single case, which was subjected to class certification analyses both with and without a heightened ascertainability standard, certification was denied.

One case from a pro-administrative feasibility jurisdiction merits closer examination as the only case identified where a class was certified and the case did not settle. *In re Processed Egg Products Antitrust Litigation* illustrates how the requirement's inconsistent application in particular fails to further the efficiency of the class action system. This case was tried over roughly twelve weeks in 2018 and 2019 before Judge Pratter in the Eastern District of Pennsylvania (located within the Third Circuit).[218] Direct purchasers of eggs from the nation's major egg producers accused the producers of "conspiring to control and

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211 *In re* Digital Music Antitrust Litig., 321 F.R.D. 64, 72–73 (S.D.N.Y. 2017).

212 *Id.* at 89.

213 No. 12-CV-02412, 2014 WL 2860995, at *9 (N.D. Cal. June 23, 2014), *rev'd*, 703 F. App'x 468 (9th Cir. 2017).

214 *See id.* ("The number of products at issue in this case, the varieties included and not included in the class definition, . . . and the fact that the same products were sold with and without the challenged label statements simultaneously make Plaintiff's proposed class identification method administratively unfeasible.").

215 Bruton v. Gerber Prods. Co., 703 F. App'x 468, 470 (9th Cir. 2017); Briseño v. ConAgra Foods, Inc., 844 F.3d 1121 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 313 (2017).

216 *Bruton*, 703 F. App'x at 470.

217 Bruton v. Gerber Prods. Co., No. 12-CV-02412, 2018 WL 1009257 (N.D. Cal. Feb. 13, 2018).

218 *See* Minute Entry for Proceedings Held Before Hon. Gene E.K. Pratter, Jury Trial Day 27, *In re* Processed Egg Prods. Antitrust Litig., No. 08-md-02002 (E.D. Pa. June 15, 2018), ECF No. 1762; Minute Entry for Proceedings Held Before Hon. Gene E.K. Pratter, Jury Trial

limit the supply of eggs and thereby increase the price of eggs."[219] On class certification, plaintiffs proposed that the class be ascertained using defendants' transaction data and class members' purchase records.[220] Defendants did not contest ascertainability.[221] Ultimately, the Court declined to certify the class of egg products producers but did certify the class of shell egg producers.[222] Notably, this class was not a consumer class action: rather, it was an antitrust action brought by several large distributors of consumer products suing over alleged price-fixing by several of the nation's leading egg producers.[223] The administrative feasibility requirement was not contested at the class certification stage, and the case was tried to a verdict—a significant expenditure of judicial resources that the administrative feasibility requirement did no work to prevent.

This research did not identify any consumer products actions that moved past summary judgment, let alone to twelve total weeks of trial. The certification in *Processed Egg*, where defendants did not even contest ascertainability, contrasted both with the protracted trial proceedings that the case ultimately spawned as well as the comparative destruction wrought by recordkeeping findings elsewhere in the administrative feasibility jurisprudence, further begs the question of where recordkeeping cuts in the ascertainability analysis. The case law supports the conclusion that courts subject proposed uses of defendant records for small-claims consumers to a higher bar in the ascertainability analysis than they do for large, corporate plaintiffs—a further tick against the administrative feasibility requirement doing any work to protect plaintiffs' rights or further any of the other ascertainability values.

D. Self-Identification

The final axis of ascertainability is the ability for plaintiffs to rely on class member self-identification. Often presented as a "last alternative" for ascertainability, courts frequently express skepticism of plaintiffs' ability to reliably self-identify by affidavits or otherwise, claiming that allowing reliance on "class members' say so" amounts to a violation of defendants' due process rights to respond to allegations against them.[224] Critics reply that disclaiming this reliance on self-identification

Day 26, *In re* Processed Egg Prods. Antitrust Litig., No. 08-md-02002 (E.D. Pa. Dec. 16, 2019), ECF No. 2088.

219 *In re* Processed Egg Prods. Antitrust Litig., 312 F.R.D. 171, 176 (E.D. Pa. 2015).

220 *Id.* at 181.

221 *Id.*

222 *Id.* at 204.

223 *Id.* at 176–77.

224 Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 594 (3d Cir. 2012).

"disregard[s] the representative nature of the class action mechanism and the procedural protections already afforded."[225] While in the cases discussed in Sections II.A and II.C, courts assessed the nature of the item itself and the likelihood of retaining a purchase record, courts here pass judgment on whether a variety of self-identification schemes have probative value. As with the other factors, they rarely come to consistent conclusions.

A pair of cases involving cooking oil highlights how sometimes courts bless the use of self-identification in demonstrating administrative feasibility, while in other cases they do not, with little predictability. The Southern District of New York rejected certification in *Ault v. J.M. Smucker Co.* prior to the Second Circuit's explicit rejection of heightened ascertainability.[226] In this consumer products action nearly identical to the *Randolph* case,[227] plaintiffs alleged that the "All Natural" label on certain Crisco products was deceptive because GMO crops were used in the production of certain oils and because the chemical processes to which the oils are subjected before distribution render them "chemically altered," "highly processed," and therefore not "natural."[228] Plaintiffs proposed that the class be ascertained via self-identification but did "not explain, however, how such self-identification would be performed or authenticated."[229] The court distinguished another recent case, *Ebin v. Kangaris*, in which a class of olive oil purchasers was certified, in part, because plaintiffs were only required to remember whether they purchased a specific variety of olive oil within a specific period.[230] Instead, the court opted for the Southern District of Florida's *Randolph* standard, holding that the need to "specifically recall each variety of Crisco cooking oil they purchased during the class period" rendered the class unascertainable.[231] Unascertainability is not fatal in the Second Circuit, but the court here went on to hold that the proposed class did not meet the predominance requirement.[232] The oil cases illustrate not just the internal divisions caused by ascertainability at the intra-circuit level but also the arbitrariness with which the standard has been

225 Elias, *supra* note 84, at 42.

226 310 F.R.D. 59 (S.D.N.Y. 2015); *see In re* Petrobras Secs. Litig., 862 F.3d 250, 265 (2d Cir. 2017) (noting that heightened ascertainability is "neither compelled by precedent nor consistent with Rule 23").

227 *See supra* notes 146–50 and accompanying text.

228 *Ault*, 310 F.R.D. at 62–63.

229 *Id.* at 65.

230 297 F.R.D. 561, 567 (S.D.N.Y. 2014).

231 *Ault*, 310 F.R.D. at 66.

232 *Id.* at 66–68 (reasoning that because plaintiff failed to demonstrate how she would determine whether class members were injured by the defendant's conduct, damages cannot be adequately calculated on a class-wide basis).

applied: In one case, plaintiffs could be relied upon to recall when they purchased specific products, while in another, the need to recall which of four varieties of a product was purchased during a particular time was not an administratively feasible method to ascertain the class.

In non-heightened jurisdictions, by contrast, courts have no issue ascertaining classes where self-identification is the main method of ascertainability. Another misleading labeling case in the Central District of California was not certified, but the court found the class to be ascertainable on the basis of a proposed scheme requiring class members to attest to three objective factors relating to the purchase of the product at issue, one of which required providing a doctor's note.[233] From the same district came *Campbell v. Best Buy Stores, L.P.*, where Best Buy computer technicians claimed wage and hour violations under several California labor relations laws.[234] The class was initially certified, but Best Buy moved to decertify after conducting nine class member depositions, in part pointing to the Third Circuit's decisions in *Marcus* and *Carrera* to argue that "a class that includes only Techs who drove Best Buy vehicles home and were not compensated for their commute time cannot be ascertained."[235] The court here observed that the Ninth Circuit had not yet addressed the administrative feasibility requirement,[236] but found sufficient the ability to cross-check route sheets with time sheets to determine when technicians drove home and were not paid for their time.[237] And, in another California labor case, the Eastern District found ascertainable a class of agricultural workers alleging wage and hour violations.[238] Similarly to *Campbell*, the plaintiffs in *Arredondo* proposed identification of class members via time sheets and cross-references.[239] However, in *Arredondo*, the court added an additional policy justification to their ascertainability analysis. The court quoted the Sixth Circuit's decision in *Young* recognizing that "[i]t is often the case that class action litigation grows out of systemic failures of administration, policy management, or records management . . . . To allow that same

233 Otto v. Abbott Lab'ys, Inc., No. 12-cv-01411, 2015 WL 9698992, at *3–4 (C.D. Cal. Sept. 29, 2015) (noting that requiring putative class members to show that they purchased the product at issue, their age at the time of purchase, and their vitamin D levels at the time of purchase, which can be evidenced via a doctor's note, are objective factors that lend to making the class ascertainable).

234 No. LA CV12-07794, 2014 WL 12778925, at *1 (C.D. Cal. Aug. 15, 2014).

235 *Id.* at *3, *5–6.

236 The Ninth Circuit later adopted the *Mullins* standard and rejected the Third Circuit's test in *Briseño v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1127 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 313 (2017).

237 *Campbell*, 2014 WL 12778925, at *7.

238 Arredondo v. Delano Farms Co., 301 F.R.D. 493, 498, 547 (E.D. Cal. 2014).

239 *Id.* at 543–45.

systemic failure to defeat class certification would undermine the very purpose of class action remedies."[240]

Self-identification thus poses fewer problems for consumer classes than the preceding axes, which begs the question why courts consider it part of the ascertainability requirement at all. Further, if the *Young* policy justification is sufficient to sustain ascertainability in wage and hour suits, why not extend it to consumer products actions? This question captures the enduring mystery of the ascertainability requirement—a labyrinth of cross-cutting standards all inexorably constructed to defeat the consumer action. The examination of cases from a myriad of jurisdictions in this Part demonstrates that, regardless of the factors that courts deem dispositive in the ascertainability analysis, barriers are erected that are permeable for several non-consumer classes but nearly impenetrable for most consumer classes. Each factor demonstrates how administrative feasibility is deployed inconsistently, does not advance the values that justify its existence, and, perhaps, belongs elsewhere in the class certification inquiry. The next Part will address this possibility.

III
Deescalating the Heightened Standard

The inconsistent nature of the heightened standard's application calls to mind the Supreme Court's caution against "free-ranging merits inquiries at the certification stage."[241] While the certification analysis may "entail some overlap with the merits of the plaintiff's underlying claim,"[242] a requirement that plaintiffs demonstrate how specific class members will be identified bleeds past the merits and is closer to a question of who will be compensated for the injury in question. In ascertainability cases, courts give defendants another opportunity to contest individual claims of class members, frequently citing the inability of the named plaintiff to recall facts or produce information about the purchased product as a reason to find that the class is not ascertainable.[243] However, allowing such a contestation at the certification stage "convert[s] Rule 23 into just another joinder device for aggregating and

240 *Id.* at 545 (quoting Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 540 (6th Cir. 2012)).

241 Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013).

242 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011).

243 *Compare* Pagliaroni v. Mastic Home Exteriors, No. 12-10164, 2015 WL 5568624, at *10 (D. Mass. Sept. 22, 2015) (finding ascertainable a class of deck purchasers given the "big ticket" nature of the purchase), *with* Dapeer v. Neutrogena Corp., No. 14-22113-Civ, 2015 WL 10521637, at *10, *13 (S.D. Fla. Dec. 1, 2015) (declining to find ascertainable a class of consumers where the named plaintiff could not recall the date or specifics of their purchase), *and* Ault v. J.M. Smucker Co., 310 F.R.D. 59, 66 (S.D.N.Y. 2015) (declining to find ascertainable a class of consumers where individuals must remember purchases from six-years prior).

adjudicating claims, a device no more efficient than procedures under Rules 19, 20, and 42."[244] Therefore, the way forward on ascertainability must strike a balance between the due process rights of defendants to respond to class allegations while also marking a defined path for plaintiffs to follow in pursuing class certification.

This Part argues that, since Supreme Court intervention is unlikely, an amendment to Rule 23 adopting the Seventh Circuit's objective test for ascertainability, as presented in *Mullins v. Direct Digital* and endorsed in the Second, Sixth, Ninth, and Eleventh Circuits, is the best way forward on ascertainability. First, this Part will present two cases where courts "flipped" and certified classes after initially denying certification because of ascertainability concerns to demonstrate that a clearer definition of where ascertainability fits in the class litigation process would better serve the concerns that ascertainability purports to protect. Next, this Part will endorse the position that, given the Supreme Court's unwillingness to adopt the *Mullins* test, an amendment to the Federal Rules clarifying that heightened ascertainability is not required in the pre-certification Rule 23 analysis would appropriately address the concerns that the Third Circuit's outlier view presents.

A. Lessons from the Flipped Cases

In two cases, one in a pro-administrative feasibility jurisdiction and one in an anti-administrative feasibility jurisdiction, courts which initially denied certification later certified classes where plaintiffs rectified ascertainability problems. These cases demonstrate that clearer, unified prerequisites embodied in an amendment to Rule 23 would satisfy defendants' due process rights while lowering the bar to certification for consumer classes.

The first, *Vista Healthplan v. Cephalon*, decided within the Third Circuit, was the end payor class plaintiffs' suit in the consolidated antitrust action known as the *In re Modafinil Litigation*.[245] Plaintiffs sued Cephalon and four generic pharmaceutical companies over an alleged reverse-payment settlement in violation of the Hatch-Waxman Act.[246] The court found that the class was not ascertainable on two grounds. First, the plaintiffs only produced one consumer's prescription purchase history which could be used to identify only that individual plaintiff.[247] While plaintiffs' counsel assured the court that additional records were readily available, the court stressed that *Carrera* required plaintiffs to "present a

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244 Elias, *supra* note 84, at 44.

245 Vista Healthplan, Inc. v. Cephalon, Inc. (*Vista Healthplan I*), No. 06-CV-1833, 2015 WL 3623005, at *1 (E.D. Pa. June 10, 2015).

246 *Id.*

247 *Id.* at *10.

methodology to identify class members, and prove by a preponderance of the evidence that such methodology will be effective and will not require individualized mini-trials."[248] Second, the court found that plaintiffs' proposed method for ascertaining members of the class was not administratively feasible, since no reliable method to *exclude* class members was presented.[249] The court distinguished the front-end ascertainability analysis with back-end fund administration; in the former, the inquiry is whether "[p]laintiffs can reliably identify class members at the outset," while in the latter, the administrator merely "verif[ies] that any particular consumer or [third-party payor] is indeed one of the previously-identified members of the class."[250] Five years later, parties moved for certification of a settlement class.[251] This time, plaintiffs redefined the class to exclude specific categories of people and submitted a Consumer Claim form that required potential claimants to swear under penalty of perjury that they did not belong to one of the excluded categories.[252] Plaintiffs also put a robust notice program into effect which successfully identified 40,000 eligible claimants—all before a class was actually certified.[253]

The second, *B & R Supermarket v. MasterCard*, decided within the anti-administrative feasibility Second Circuit,[254] was an antitrust action by supermarkets against the four major credit card companies.[255] They alleged that defendants coordinated the rollout of new EMV chip technology by arbitrarily establishing a date by which, if merchants did not install the new system, the merchants themselves would be liable for fraudulent charges rather than banks.[256] The plaintiffs sought to certify a 23(b)(3) class of "[m]erchants who ha[d] been unlawfully subjected to the Liability Shift for the assessment of MasterCard, Visa, Discover, and/or American Express payment card chargebacks, from October 2015 until the anticompetitive conduct cease[d]."[257] The liability theory turned on an assumption that, without the arbitrary October 1, 2015 deadline, defendants would have set their own deadlines for the liability

248 *Id.* (citing *Carrera*, 727 F.3d at 306).

249 *Id.* at *11–12.

250 *Id.* at *13.

251 Vista Healthplan, Inc. v. Cephalon, Inc. (*Vista Healthplan II*), No. 06-CV-1833, 2020 WL 1922902, at *1 (E.D. Pa. Apr. 21, 2020).

252 *Id.* at *14.

253 *Id.*

254 *See In re* Petrobras Secs. Litig., 862 F.3d 250, 265 (2d Cir. 2017) (joining a number of circuits in declining to adopt a heightened ascertainability theory that factors in administrative feasibility).

255 B & R Supermarket, Inc. v. MasterCard Int'l, Inc. (*B & R Supermarket I*), No. 17-CV-02738, 2018 WL 1335355, at *1 (E.D.N.Y. Mar. 14, 2018).

256 *Id.*

257 *Id.* at *3.

shift based on competitive forces.[258] However, since plaintiffs did not substantiate any of the potential end dates for their proposed class, the class could not be ascertained, and the court denied certification without prejudice.[259] In their renewed motion for certification, plaintiffs picked September 30, 2017 as the revised end-date for the class.[260] The court approved this revised end date as objectively defined, consistent with plaintiffs' theory of liability, and sufficiently substantiated.[261] Therefore, the class was ascertainable, and the court certified the class.[262]

In both of these cases, courts initially dismissed the class as unascertainable but explicitly recognized evidence that might be admitted to satisfy the requirement.[263] On recertification, both courts "flipped," finding that a simple introduction of more concrete evidence satisfied both heightened and non-heightened ascertainability requirements.[264] The initial decisions to deny certification led to protracted litigation for both parties—five years' worth in *Vista Healthplan* and two years in *B & R Supermarkets*—and precipitated results only marginally different from what might have been achieved if the classes were certified at the outset. These two results suggest that ascertainability, as applied in both pro- and anti-administrative feasibility jurisdictions, is an evidentiary standard that could be imposed during discovery at the merits stage. Requiring plaintiffs to present fully-formed evidence that they can reliably identify class members at the outset of the class certification process deprives

258 *Id.* at *13.

259 *Id.* at *13–14.

260 B & R Supermarket, Inc. v. MasterCard Int'l, Inc. (*B & R Supermarket II*), No. 17-CV-02738, 2021 WL 234550, at *15 (E.D.N.Y. Jan. 19, 2021).

261 A significant portion of the evidence to support the substantiation was produced under protective order and thus redacted from the court's Order. *See, e.g.*, *id.* American Express also argued that the class was not ascertainable as to them specifically because Plaintiffs presented no administratively feasible method to determine which class members have claims against them. *Id.* at *18. The court found the class to be ascertainable with respect to American Express because the plaintiffs relied on joint and several liability and because the Second Circuit has rejected the heightened ascertainability framework under which American Express argued against ascertainability. *Id.* at *19.

262 *Id.* at *17, *36.

263 Vista Healthplan, Inc. v. Cephalon, Inc. (*Vista Healthplan I*), No. 06-CV-1833, 2015 WL 3623005, at *10 (E.D. Pa. June 10, 2015) (noting that plaintiffs need to present a methodology to identify class members); B & R Supermarket, Inc. v. MasterCard Int'l, Inc. (*B & R Supermarket I*), 2018 WL 1335355, at *13 (reasoning that plaintiffs can satisfy the ascertainability requirement if they choose just one class period and sufficiently substantiate it).

264 Vista Healthplan, Inc. v. Cephalon, Inc. (*Vista Healthplan II*), No. 06-CV-1833, 2020 WL 1922902, at *14 (E.D. Pa. Apr. 21, 2020) (finding that the revised class definitions and development of a notice program appropriately addressed previous ascertainability concerns); B & R Supermarket, Inc. v. MasterCard Int'l, Inc. (*B & R Supermarket II*), 2021 WL 234550, at *15 (finding that the class is ascertainable because the class must be defined using objective criteria, which is done by narrowing the class period).

them of the opportunity to even state their claims in court.[265] Further, the plaintiffs in *Vista Healthplan* and *B & R Supermarkets* were both corporations rather than consumers. The disaggregated nature of consumers with small-dollar claims means that a requirement to meet a high evidentiary burden at the certification stage denies consumers the opportunity to obtain compensation, enforce the law, and create meaningful guides for future behavior.[266] This disincentivization is plainly contrary to the stated goals of Rule 23.[267] Instead, courts should certify classes according to the textual requirements of Rule 23 and examine ascertainability with the benefit of full discovery and merits proceedings.

B. *Shifting the Inquiry: Ascertaining a Post-Certification Burden*

Given the atextual nature of the heightened ascertainability requirement and the danger that the requirement poses to small-dollar consumer class actions where it does apply, Rule 23 should be amended to include an explicit ascertainability requirement, and that amendment should be modeled on the Seventh Circuit's objective definition test as articulated in *Mullins*.[268] This suggestion is not novel; Tom Murphy proposed such an explicit requirement in a 2016 piece responding to the Third Circuit's *Byrd* decision.[269] But as the analysis above demonstrates, seven years later, Murphy's suggestion is still apt: the Third Circuit has not backed down from the heightened requirement, and the requirement still adds no weight to the class certification analysis. The heightened requirement purports to serve values like due process, fairness, and efficiency, but as evidenced above, these values are lost in the inconsistency that ascertainability and varying interpretations thereof bring to the class action analysis. Adopting the *Mullins* test would make clear that *all* classes, not just the classes with resources to repeat the certification process, need not provide an administratively feasible method for ascertaining the members of the class until the case has proceeded past certification and to the merits.

As Murphy observed in 2016, the Seventh Circuit's test "does not allow a defendant the opportunity to block class certification simply by conducting its business in a way that makes it impossible to easily identify its consumers."[270] Allowing such effects is directly contrary to the text and purpose of Rule 23, which was written "to overcome the problem that

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265 Shaw, *supra* note 25, at 2395.

266 *Id.*

267 Starek, *supra* note 107, at 233.

268 Mullins v. Direct Digit., LLC, 795 F.3d 654, 672 (7th Cir. 2015) ("District courts should . . . insist that the class definition satisfy the established meaning of ascertainability by defining classes clearly and with objective criteria.").

269 *See* Murphy, *supra* note 26, at 48–51.

270 *Id.* at 50.

small recoveries do not provide the incentive for any individual to bring solo action prosecuting his or her rights."[271] Right now, the scattershot application of the ascertainability requirement in general serves to insulate businesses from liability to small-dollar claimants—and in particular, the heightened requirement guarantees this insulation. Adopting an objective definition test would allow such claimants to merely state a plausible way of ascertaining the class at the outset and identify specific claimants later on in the process. Recall the *Adams Pointe* case, where the district court denied certification of a class of property owners with a particular kind of gas hose installed in their houses that caused fires.[272] There, Judge Eddy expressed serious concern that there was no way to find out who actually had Pro-Flex installed in their houses.[273] Thus, heightened ascertainability allows the manufacturers and distributors of the problematic product to evade liability by their own failure to track each individual product. But under an objective definition test, there is an obvious response to Judge Eddy's concerns: a constellation of property records, affidavits, verification by actually going to the houses, and more could easily identify who is in the class, and Rule 23 does not require that these determinations be made before the class is certified. Compare that result with, for instance, *Pagliaroni v. Mastic Home Exteriors, Inc.*, where a court in a pro-administrative feasibility jurisdiction held the ascertainability inquiry "inapposite" where a "lasting addition" to a home like an exterior deck could easily be used to identify class members.[274] The fact that two products, similar in many ways, produce such inconsistent results under the heightened inquiry underscores the need for a clarification that a specific method of ascertainment need not be identified until after certification. Certainly, such results do not further due process, protect claimants or defendants, or promote efficiency of the class action device.

An amendment to Rule 23 on ascertainability would fix these inconsistencies, and an amendment that adopts the objective definition test would best serve the interests that the class action device was meant to protect. Such an amendment would clarify that, to the extent the class action inquiry requires that specific claimants be identified in the process of litigating the action, such identification should occur post-certification, during discovery, instead of at a stage before the suit even gets off the ground.

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[271] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997)); *see* Murphy, *supra* note 25, at 50 n.101 (collecting cases).

[272] Adams Pointe I, L.P. v. Tru-Flex Metal Hose Corp., No. 16-750, 2020 WL 4937455, at *1 (W.D. Pa. Aug. 24, 2020), *aff'd on other grounds*, No. 20-3528, 2021 WL 3612155 (3d Cir. Aug. 16, 2021); *see supra* notes 1–10 and accompanying text.

[273] *Adams Pointe* Recommendation, *supra* note 2, at *8.

[274] No. 12-10164, 2015 WL 5568624, at *10 (D. Mass. Sept. 22, 2015).

Conclusion

The heightened ascertainability requirement has a devastating effect on the ability of small-claims consumers to pursue class actions. Scholars agree, and the case law supports, the contention that a wide-ranging adoption of the Third Circuit's "heightened" standard threatens to "sound[] a death knell" for "class actions arising from small retail purchases."[275] The case law also makes clear that an administrative feasibility standard does little but add inconsistency to the class certification analysis.[276] And, when well-funded plaintiffs are given the opportunity to file renewed motions for certification, they need only add nominal evidence to the record to clear the ascertainability bar.[277] Small-claims consumers, though, do not have this opportunity, as the class action device only incentivizes them to overcome their collective action problems if plaintiffs' lawyers can guarantee settlement (and subsequent payout).[278] The heightened ascertainability requirement, and the inconsistent application even outside of jurisdictions where the heightened requirement is applied, does not further the values that the requirement purports to serve: absent plaintiffs' opt-out rights and interests against future claim dilution, defendants' due process rights, and efficiency of the class action mechanism.[279]

As the split stands now, two circuits still adhere to the heightened standard,[280] and the Supreme Court has declined to weigh in.[281] In the meantime, as evidence mounts regarding the heightened requirement's actual negative externalities for the very classes that Rule 23 was written to protect, the First and Third Circuits are distinct outliers on this issue. The future of the consumer class action depends on a resolution that properly accounts for the unique pressures created by these classes, the intent of the drafters of Rule 23, and the fundamental promise of a day in court for the "smaller guy."[282]

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275 Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 Emory L.J. 1531, 1556 (2016); *see generally supra* Section I.C.

276 *See supra* Part II.

277 *See supra* Section III.A.

278 *See* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 77–78 (2007) ("[I]n the event that the class action is dismissed or the defendant prevails at trial, the class counsel working on a contingent fee basis earns nothing and is out the entire investment in the litigation . . . . Settlement is therefore a much more attractive alternative for class counsel . . . .").

279 City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc., 867 F.3d 434, 444 (3d Cir. 2017) (Fuentes, J., concurring) (citing Carrera v. Bayer Corp, 727 F.3d 300, 310 (3d Cir. 2013); Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593–94 (3d Cir. 2012)).

280 *See supra* Sections I.A, I.B.

281 *See supra* Section I.D.

282 Marvin E. Frankel, *Amended Rule 23 from a Judge's Point of View*, 32 Antitrust L.J. 295, 299 (1966).