



## SEVENTH CIRCUIT'S ASCERTAINABILITY DECISION DEPRIVES CLASS-ACTION PLAINTIFFS AND DEFENDANTS OF DUE-PROCESS PROTECTIONS

by Stephanie Stroup and Jeffrey Brian Margulies

The ruling issued by the U.S. Court of Appeals for the Third Circuit in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), generated considerable attention over its refusal to certify a consumer class action where plaintiffs proposed to determine class membership with class-member affidavits alone. Some district courts have refused to follow *Carrera* out of concern that its reasoning undermines the putative benefit that the class-action device provides in cases involving low-cost consumer goods. Recently, the Seventh Circuit weighed in on the side of courts rejecting *Carrera*, officially creating a circuit split on the subject and increasing the odds that the U.S. Supreme Court will weigh in on this issue in the near future. See *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015). Regrettably, the *Mullins* court misses the point.

In *Mullins*, the plaintiff filed a class action on behalf of purchasers of Instaflex Joint Support, which he alleged was falsely represented to “relieve discomfort,” “improve flexibility,” “increase mobility,” and “support cartilage repair,” as well as being “scientifically formulated” and “clinically tested for maximum effectiveness,” because the primary active ingredient, glucosamine sulfate, is nothing more than a sugar pill. *Id.* at 658. Affirming the lower court’s order certifying the class, the Seventh Circuit declined to apply a “heightened” ascertainability requirement, which requires plaintiffs to prove a “reliable and administratively feasible” way to identify class members. *Id.* at 657. Judge Hamilton, writing for the court, instead opted for the “weak” version of ascertainability, merely requiring that a class be defined clearly with “objective criteria.” *Id.*

Justifying its refusal to apply what it deemed an impermissibly stringent standard for ascertainability, the court identified—and then shot down—the following major policy concerns prompting application of a heightened ascertainability requirement: 1) administrative convenience; 2) unfairness to absent class members; 3) unfairness to bona fide class members; and 4) due-process interests of defendants. While the court’s discussion of each of these policy concerns was certainly thorough, its legal analysis was outcome driven, with the court giving short shrift to the significant concerns that drove the Third Circuit to reach the opposite result.

### Administrative Convenience

The court first tackled the claim that applying stringent ascertainability measures “eliminates serious administrative burdens ... by insisting on the easy identification of class members.” *Id.* at 663, citing *Marcus v. BMW of North America, LLC*, 687 F.3d 583 at 593 (3rd Cir. 2012). Judge Hamilton held that the ascertainability requirement was not designed to address the issue of “administrative convenience” of

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contacting class members, which is better addressed by the Rule 23(b)(3) requirement mandating that a class action be “superior to other available methods for fairly and efficiently adjudicating the controversy.” Because Rule 23(b)(3)(D) addresses the “likely difficulties in managing a class action,” the court noted that tackling administrative concerns on ascertainability “renders the manageability criterion of the superiority requirement superfluous.” *Id.* at 663.

The argument conflates the issue of superiority (addressed after the class has already been deemed ascertainable) with the issue of class member identification meant to be addressed at the ascertainability stage. The Eleventh Circuit squarely identified this problem in the unpublished decision of *Karhu v. Vital Pharmaceuticals, Inc.*, No. 14-11648, 2015 WL 3560722 (11th Cir. June 9, 2015), which the Seventh Circuit did not substantively address.

In *Karhu*, the plaintiff contended that construing ascertainability to require an administratively feasible way of identifying class members was at odds with the Eleventh Circuit’s previous ruling in *Klay v. Humana*, 382 F.3d 1241 (11th Cir. 2004). The *Klay* court held that even though individualized issues of reliance, causation, and damages would have to be resolved as to particular class members, they implicated manageability concerns under a superiority analysis—issues that “will rarely, if ever, be in [themselves] sufficient to prevent certification of a class.” *Id.* at 1272. The Seventh Circuit employed similar reasoning in its holding in *Mullins*. 795 F.3d at 663-664.

However, the *Karhu* opinion highlighted the fact that the ability to identify class members in an administratively feasible way is much different than what is implicated in a superiority-manageability analysis:

*Klay* addressed manageability concerns that a court might face after class members have already been identified—for example, concerns about whether particular class members are entitled to relief in light of individualized reliance, causation, and damages issues. ... Ascertainability, by contrast, addresses whether class members can be identified at all. ... Put differently, the manageability concern at the heart of the ascertainability requirement is prior to, hence more fundamental than, the manageability concern addressed in *Klay*.

*Id.* at \*4. Thus, what *Karhu* noted, and *Mullins* overlooked, is that the ability to identify class members is much different from the manageability of the class (*i.e.*, damages, etc.) once the individuals can be identified. For example, if the court cannot ascertain who is in the class, then how can it determine whether the named plaintiffs are typical of the class?

Manageability is but one factor to be considered in the broader analysis of whether or not a class action is *superior*. Manageability determines “the potential difficulties in notifying class members of the suit, calculation of individual damages, and distribution of damages.” *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1304 (9th Cir. 1990). The fact that the feasibility of contacting members of the class may be one consideration in the broad, catchall of manageability does not mean, however, that a more focused consideration of identification under ascertainability renders manageability “superfluous.”

### Unfairness to Absent Class Members

The court next rejected the justification that heightened ascertainability is needed to protect unidentified class members who will be unable to opt out of the class if they cannot determine if they are actually a part of the class. The court stated that such reasoning presumed that all class members must receive notice of a claim in order for the class to be viable. It then disregarded this concern, stating that while

Rule 23(c)(2)(B) requires that “best notice” possible under the circumstances be given, that is not perfect notice—and the rule recognizes the impossibility of providing notice to all potential class members.

The court’s presumption that the heightened ascertainability requirement is premised upon actual notice to all class members is troubling. Similar to the manageability discussion above, Rule 23(c)(2)(B) requirements for notice occur after the class has already been determined and identified. *Marcus and Carrera* were not addressing whether a class member would personally be contacted as part of the notice process, but whether these members could determine their class membership at all. The purpose of requiring an administratively feasible method of identifying class members at the ascertainability stage goes to the definition of the class itself; *i.e.*, can an individual conclude one is a member of the class by looking at the definition?

What the Seventh Circuit overlooked is that if a class member cannot be feasibly identified from the definition, a person could actually receive and review the class notice (via publication, etc.) and still not be able to determine if one is a class member because, for example, one would not know if one had purchased the offending product. *See, e.g., Hernandez v. Chipotle Mexican Grill*, 2013 WL 6332002, at \*1–2 (C.D. Cal. Dec. 2, 2013) (refusing to accept class member affidavits because consumers themselves were unlikely to remember if they had purchased the offending product); *Astiana v. Ben & Jerry’s Homemade*, 2014 WL 60097, at \*3 (N.D. Cal. Jan. 7, 2014) (same).

### **Unfairness to Bona Fide Class Members**

The court next rejected concerns expressed over the dilution of bona fide claims. Fraudulent claims are likely to occur, defendants and some courts have posited, when class membership is predicated solely on the say-so of class members. Such fraud, in turn, reduces actual class members’ recovery. The Seventh Circuit dismisses this concern based on its conclusion that the risk of this happening seems low, the historical rate of claimants on class actions is typically a fraction of the actual class membership, and claims administration procedures have ways of detecting fraudulent submissions. The court’s dismissal of this concern is generally without support, and the reality is that dilution does occur. The settlement of a case brought against the makers of Red Bull Energy Drink provides an instructive example.

On September 3, 2014, the Southern District of New York preliminarily approved a settlement in the class-action lawsuit *Careathers v. Red Bull GMBH, et al.*, Case No. 13 CIV 369 (S.D.N.Y.). Plaintiff alleged that the advertising phrase “Red Bull Gives You Wings” falsely suggested the product improves consumer’s physiological and mental performance beyond simple caffeine. The parties settled under the terms that each consumer who purchased Red Bull products between January 1, 2002 and October 3, 2014 would receive a \$10 check or a voucher for \$15 worth of Red Bull products. Red Bull’s maximum payout amount was \$13 million in either cash or vouchers, regardless of the number of class members; the more claims filed, the less money received. To administer the settlement, a website was established allowing class members to submit their claims through simple affidavit. Within hours, the website crashed due to the number of claimants and, ultimately, class members received only 42 percent of the settlement to which they were entitled. *See* Dkt. No. 101 (“Final Judgment and Order of Dismissal with Prejudice”).

The Seventh Circuit failed to consider the effect of such “capped” settlements, which are becoming increasingly popular, because they offer defendants predictability in the amounts they will have to pay as opposed to having to wait and see how many claims are made. Fraudulent claims can, and do, negatively impact the recovery amounts of consumers in such classes.

## Due-Process Interests of the Defendant

Finally, the court rejected the argument that defendants' due-process rights are violated when they lack the ability to test the reliability of evidence submitted to prove class membership. The court agreed that defendants have a due-process right to challenge the affidavits, but asserted that this right does not extend to a "cost effective" method of challenging the affidavits, essentially saying defendants are free to go to the expense of challenging each individual affidavit if they so choose. *Mullins*, at 669-670.

The court's dismissive approach is troubling. In a non-class setting, a plaintiff would have to prove that he or she purchased a product and was harmed by it. Here, the court allows a consumer to prevail by a hearsay affidavit, and shifts the burden to a defendant, forcing it to shoulder extensive financial burden in order to prove its way out of liability rather than putting the onus on the class member, where it would be in an individual lawsuit.

In a climate offering heavy fee incentives for plaintiffs' attorneys to file these lawsuits, the prospect that defendants will bear the burden of disproving out-of-court affidavits for unseen class members only further sweetens the deal for entrepreneurial class counsel. The Seventh Circuit asserted that only a "lunatic or a fanatic" would file an individual consumer claim, *id.* at 665, but is the same not true for the defendant who wishes to conduct mini-investigations to assess the veracity of hundreds (or thousands) of individual affidavits? Are courts right to insist on such expense and effort just so that defendants may preserve their due-process protections?

It also cannot be overlooked that, even for those defendants that have the resources, interest, and tenacity to address each affidavit separately, the undeniable result would be the individual mini-trials that all class actions seek to avoid. The court fails to take a realistic look at what an individualized assessment of affidavits would look like—*i.e.*, discovery requests, potential interviews/depositions, motions made to the court about lack of evidence and the need for court rulings on the evidence for each claimant.

Besides which, the defendants' due-process interests extend to more than just current affidavits. A settling defendant needs finality and that only comes with certainty regarding whom a judgment will bind. Certifying unascertainable classes will facilitate future collateral attacks and satellite litigation—ultimately deterring defendants from settling.

## Conclusion

To date, the *Mullins* decision is one of the more thorough criticisms of the "heightened" ascertainability approach advanced by the Third Circuit. The Seventh Circuit took great pains to address and criticize each of the policy concerns that *Marcus*, *Carrera*, and their progeny have espoused. It remains to be seen where this decision will go, and whether the Supreme Court will accept the defendant's pending petition for writ of certiorari. Nevertheless, the decision intensifies the strong divide in U.S. courts regarding how many teeth to give the ascertainability requirement. Until the Supreme Court rules on this issue, one can expect a fair amount of forum shopping, and a likely uptick in consumer class actions being filed in Seventh Circuit courts by plaintiffs' attorneys looking to tip the scales in their favor.