ASCERTAINABILITY BECOMING HIGHER HURDLE IN CONSUMER CLASS ACTION CERTIFICATION

by Jeffrey B. Margulies and Stephanie A. Stroup

The U.S. Court of Appeals for the Third Circuit recently raised the bar for certifying class actions in which class members cannot be readily identified except via self-identification. *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), relied on due process considerations in refusing to certify a consumer class action because the defendant had no meaningful opportunity to challenge individual class members' claims. Several recent decisions following *Carrera* suggest that it is not an isolated decision (assuming the pending rehearing petition in *Carrera* is denied), and that plaintiffs will need to do more than propose self-certification in cases brought over relatively inexpensive consumer products.

"Ascertainability" of a proposed class is an implied prerequisite under Federal Rule of Civil Procedure 23. *See Diacakis v. Comcast Corp.*, 2013 WL 1878921, at *4 (N.D. Cal. May 3, 2013). It has two requirements: 1) the class must be adequately defined; and 2) class members must be ascertainable by reference to objective criteria. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 299 (N.D. Cal. 2010).

In *Carrera*, the plaintiff sought to certify a class of consumers who purchased an allegedly falsely advertised product. *Id*. at 304. Plaintiff claimed that class member-purchasers could be ascertained through value cards from retailers and/or affidavits from class members attesting to their purchase of the product. *Id*. at 308. The court deemed these methods inadequate because: 1) there was no evidence that all class members used loyalty cards; and 2) the affidavits, without accompanying receipts, were inherently unreliable and susceptible to fraudulent claims. *Id*. at 308-309. Vacating the certification order, the Third Circuit held that a "defendant has a similar, if not the same, due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim," and "[a]scertainability provides due process by requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership." *Id*. at 307. Although the plaintiff argued that Bayer's liability for damages would be fixed by its sales, the court disagreed, explaining, "Bayer too has an interest in ensuring it pays only legitimate claims." *Id*. at 310.

Since *Carrera*, other courts are adopting this more demanding view of ascertainability too. For example, in *Hernandez v. Chipotle Mexican Grill*, 2013 WL 6332002 (C.D. Cal. Dec. 2, 2013), the plaintiff alleged that, despite advertising its use of all "naturally raised" meats, the defendant at times served "conventionally raised" meats. The court denied class certification based on the substantial obstacles plaintiffs faced in identifying consumers, noting that "the Court is confident very few people will be able to provide that information. People will either (1) lie, (2) attempt to fill out the claim form as best they can but be unable to do so accurately, or, most likely, (3) not bother." *Id*. at *2.

In *Sethavanish v. ZonePerfect Nutrition Company*, 2014 WL 580696 (N.D. Cal. Feb. 13, 2014), the court refused to certify a class in a case alleging that the defendant misrepresented its products as "All-Natural," where defendant did not keep records identifying consumers that purchased the bars and it was infeasible

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to identify class members. Although acknowledging that its decision could "restrict the types of consumer classes that can be certified," the court found that to be an insufficient basis for granting certification, because its ruling did not "bar certification in consumer class actions altogether." *Id*. at *5.

Haskins v. First American Title Ins. Co., 2014 WL 294654 (D.N.J. Jan. 27, 2014), applied *Carrera* to alleged misrepresentations resulting in overcharges for title insurance used in home purchases. *Id*. at *2. The court found that the plaintiff's detailed attempts to define the class by creating an accurate master database failed, ultimately being "fatal" to class certification. *Id*. at *13. The court was especially critical of an expert's statement that his analysis was designed to capture "potential, not actual overcharges," stating that the point of the court's analysis was to "identify ***actual*** class members." *Id*. at *12 (emphasis in original).

And, most recently in *In re POM Wonderful LLC*, 2014 WL 1225184 (C.D. Cal., Mar. 24, 2014), a court decertified a class of juice product purchasers based, in part, on ascertainability concerns because the proposed class included ten to fifteen million purchasers who purchased inexpensive products for a variety of reasons. *Id*. at *6. The court noted that "[n]o bottle, label, or package included any of the alleged misrepresentations," and very few consumers were likely to have retained receipts for purchase, putting the case "toward the unascertainable end of the spectrum." *Id*.

However, other district courts have refused to follow *Carrera's* view of ascertainability, as evident from the conflicting Northern District and Central District of California cases cited above. For example, in *McCrary v. The Elations Co.*, 2014 U.S. Dist. LEXIS 8443 (C.D. Cal. Jan. 13, 2014), the court certified a class because "the class definition clearly define[d] the characteristics of a class member by providing a description of the allegedly offending product and the eligible dates of purchase." *Id*. at *24. The court was directly critical of *Carrera*:

> *Carrera* eviscerates low purchase price consumer class actions in the Third Circuit….While this may now be the law in the Third Circuit, it is not currently the law in the Ninth Circuit. In this Circuit, it is enough that the class definition describes a set of common characteristics sufficient to allow a prospective plaintiff to identify himself or herself as having a right to recover based on the description.

Id. at *24-25. In another very recent opinion, the court in *Forcellati v. Hyland's, Inc.*, 2014 WL 1410264 (C.D. Cal., Apr. 4, 2014), found that a class of purchasers of homeopathic children's cold and flu remedies was ascertainable because defendants had no due process interest in how damages were distributed when total damages was based on the total amount of sales (and would not change based on the identity of class members), class members would be bound by a final judgment, and determining class membership was not overly burdensome and did not render class action an inferior method of adjudicating the controversy. The *Forcellati* decision shared the concern that *Carrera* "eviscerates" class actions over low-priced consumer products. *Id*. at *5.

While the *Carrera* opinion seems to be gaining traction—even in class-action-happy California—how far the newfound emphasis on ascertainability will go in class actions over relatively small-ticket items remains to be seen and there are still glaring splits of authority that need to be ironed out in the circuit courts of appeals. Ascertainability does, however, raise a significant question regarding the fundamental nature of class actions. In an individual lawsuit, a defendant has the right to challenge a claim that a plaintiff purchased a product. Why, then, would a defendant in a class action be prevented from challenging the identical claim simply because it is being sued by a hundred or more plaintiffs? *Carrera* suggests that the analysis must be the same; but according to *McCrary* and the plaintiffs' bar, a different answer must be reached, solely because concluding otherwise might be the undoing of low-price consumer class actions. The next big battle line in class actions has been drawn, and it is likely that the U.S. Supreme Court will need to have the final word on this simmering clash between Rule 23 and the Due Process Clause.