No. 12-2621

IN THE

United States Court of Appeals for the Third Circuit

GABRIEL JOSEPH CARRERA,
on behalf of himself and all others similarly situated,
Plaintiff-Appellee,

v.

BAYER CORPORATION AND BAYER HEALTHCARE, LLC,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of New Jersey

APPELLEE'S PETITION FOR REHEARING AND REHEARING EN BANC

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September 27, 2013

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STATEMENT REQUIRED BY LOCAL RULE 35.1

I express a belief, based on a reasoned and studied professional judgment, that this appeal presents the following questions of exceptional importance:

1. Does Rule 23's implicit requirement of ascertainability demand that a class-action plaintiff prove, as a prerequisite to class certification, that he will be able to identify each class member in the claims process—with evidence well beyond the traditional use of affidavits—even when the value of the claim is small, the existence of a well-defined class is undisputed, and the defendant's liability is based on its own sales records and thus will be the same regardless of how many class members are ultimately identified?

2. Does the defendant have a constitutional due-process right to insist that the plaintiff prove, as a prerequisite to class certification, that he will be able to identify each class member in the claims process—even when the defendant's liability will be the same regardless of how many class members are ultimately identified?

/s/ James E. Cecchi
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INTRODUCTION

The panel's decision in this case deals a body blow to consumer class actions. In the half-century since the creation of the modern class action, the panel's decision is the first by any federal circuit to hold that class certification may be defeated on the basis of "ascertainability" even when the existence of a well-defined class is not in doubt and the full extent of potential liability is known. In reaching that result, the panel minted a new constitutional due-process right of the defendant to insist that every class member prove—under an evidentiary standard that forecloses even the traditional use of affidavits—that they purchased the defendant's product.

If allowed to stand, the panel's decision will effectively wipe out most class actions involving small-dollar consumer products—cases for which class treatment has always been recognized as most essential. The panel's opinion leaves this Court's class-action jurisprudence at odds with that of every other circuit, adopts a troubling new interpretation of the Due Process Clause that cannot be reconciled with Supreme Court precedent, and undermines the goals of Rule 23 in the name of a judge-made doctrine (ascertainability) that is supposed to further those very goals.

As it did just a few years ago, this Court should grant rehearing en banc "to explain why the addition of this new requirement into the Rule 23 certification process is unwarranted." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 285-86 (3d Cir. 2011) (en banc). Indeed, the issues here are of far greater importance than in *Sullivan* because they bear on the extent to which class actions will continue to exist in the

Third Circuit. At the very least, this Court should clarify that neither the Due Process Clause nor ascertainability precludes certification where a well-defined class exists and the defendant's liability is based only on its own records. Those key considerations make the panel's decision fundamentally different from this Court's recent ascertainability rulings in *Marcus v. BMW of North America, LLC,* 687 F.3d 583 (3d Cir. 2012), and *Hayes v. Wal-Mart Stores, Inc.,* 725 F.3d 349 (3d Cir. 2013)—and from the law of all other circuits. Rehearing is needed here to bring this Court's law back into line with that of other circuits and to ensure that ascertainability does not thwart both the operation of Rule 23 and the private enforcement of consumer-protection laws.

STATEMENT

This is a case against Bayer for deceptively advertising One-A-Day WeightSmart vitamins. The district court certified a class of all people who purchased WeightSmart in Florida. A panel of this Court decertified the class. The panel held that the district court's certification order violated Bayer's "due process right to challenge the proof used to demonstrate class membership"—a combination of retailer records and consumer affidavits—even though "Bayer's total liability [would] be determined at trial, and [would] not increase or decrease based on the affidavits submitted." Panel Op. 11 & 15.[1]

[1] Damages would be determined based on the total number of WeightSmart purchases in Florida, which Bayer's own sales records show. "As a result, affidavits attesting to class membership will only be used to determine to whom to pay the refund, and in what amount." Panel Op. 16. Any unclaimed money would not go back

The panel acknowledged that this fact—that the defendant's liability will be unaffected either way—distinguishes the case from this Court's recent decision in *Marcus*, where "each claim submitted would have increased the amount of money the defendants would have had to pay." *Id.* at 16. The panel determined that Bayer nevertheless has a constitutionally protected "interest in ensuring it pays only legitimate claims" because the following chain of events could take place:

(1) the class prevails at trial by proving deceptive advertising;
(2) the vast majority of true class members learn of the case and file a claim;
(3) a large number of people file "fraudulent or inaccurate claims";
(4) many of those claims go undetected, thus "dilut[ing] the recovery of true class members";
(5) that dilution proves "material[]";
(6) class members then "argue [that] the named plaintiff did not adequately represent them because he proceeded with the understanding that absent members may get less than full relief";
(7) that argument succeeds (an issue on which the panel offered "no opinion");
(8) some class members, no longer bound by the judgment, "then bring a new action against Bayer"; and, finally,
(9) the court "appl[ies] the principles of issue preclusion to prevent Bayer from re-litigating" its liability.

Id. at 17-18 & n.7. The panel pointed to no example in history in which anything like this has ever happened. Yet it concluded that "Bayer has a substantial interest in ensuring that this does not happen"—a property interest protected by the Due

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to Bayer, but to Florida's unclaimed property fund. *See Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1217-18 (S.D. Fla. 2006).

Process Clause of the Fourteenth Amendment—and that this interest demands that Bayer be able to challenge class membership for every class member. *Id.* at 18. The ascertainability requirement, the panel explained, "provides due process by requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership." *Id.* at 11. The panel concluded that all the methods the plaintiff proposed by which the court or a claims administrator could determine who is a class member—sworn affidavits by class members, the well-established screening procedures of claims administrators, and retailer records of online sales and reward programs—are inadequate in light of Bayer's due-process rights. *Id.* at 14-20.

ARGUMENT

I. The Panel's Decision Erects An Unprecedented Hurdle That, If Left Standing, Will Effectively Wipe Out Class Actions Involving Small-Dollar Consumer Products.

The panel's decision in this case is a "game-changing decision" that imposes an "unheard-of" barrier to class certification in a wide range of cases. Ryan, *3rd Circ. Adopts Unheard-Of Consumer Class Action Hurdle*, Law360, Sept. 18, 2013 (attached). The decision decertifies a class based on three facts—none of which is unique to this case: (1) "class members are unlikely to have documentary proof of purchase" because the case involves an inexpensive consumable product, (2) the defendant "has no list of purchasers" because it does not sell the product "directly to consumers," and (3) retailers do not collect identifying information from every consumer who purchases the product. Panel Op. 4. From those facts, the decision holds that the case

cannot proceed as a class action because the plaintiff has not shown—at the threshold—that each class member could be identified using a particular method that the district court can "see . . . in action," *id.* at 19, even though "the determination of class membership" here "does not involve complex or complicated factual issues."[2]

That holding is unprecedented. As commentators of all stripes immediately recognized, the panel's decision erects "a much higher hurdle" than any previous decision in any circuit.[3] No case "has gone as far." Ryan, *Unheard-Of Hurdle*. The decision effectively requires a "complete record of who purchased [a] product" to bring a class action based on that product.[4] If the decision is left undisturbed, plaintiffs "likely will be required to demonstrate that sales record data actually exists and identifies the specific purchasers of the product." Hogan, *New Third Circuit decision*. That is an impossible task for a product purchased at a grocery store, pharmacy, or discount retailer such as Wal-Mart or Target—where neither the manufacturer nor retailer keeps comprehensive "lists of individuals who purchased those products" and "consumers generally do not save receipts or packaging." Skolout, *Carrera*. This unprecedented requirement dooms "most small-claims consumer class actions. Who, after all, has proof that they purchased peanut butter, pineapples, or aspirin?"[5] And

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[2] Skolout, *Carrera v. Bayer Corporation*, Aug. 26, 2013, http://bit.ly/1dp4vtE.

[3] Hogan, *New Third Circuit decision toughens standard for class certification when information about individual consumers is lacking*, Sept. 20, 2013, http://bit.ly/1aWrHhY.

[4] Greenberg, *Class Ascertainability—The Third Circuit Approaches the Precipice*, Aug. 22, 2013, http://bit.ly/14w6hGW.

[5] Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DePaul L. Rev. 305, 312 (2010).

"permitting defendants to evade class actions based on their own insufficient records would give companies an incentive to engage in shoddy record-keeping or even to destroy their files."[6] (This concern is not limited to consumer cases. Imagine, for example, how an unscrupulous employer of migrant workers might respond.)

The decision's upshot is clear: It "come[s] perilously close to abrogating class certification in cases involving mass-marketed consumer products" like foods, beverages, dietary supplements, drugs, and other household items. Greenberg, *Class Ascertainability*. Setting the plaintiff up for a fool's errand, the panel remanded so he could try again, but the "opening left" "is so small as to be nonexistent." Ryan, *Unheard-Of Hurdle*. Rule 23's drafters intended it to allow "groups of people who individually" could not "bring their opponents into court at all" to band together to vindicate their rights. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). By eliminating the class-action device in the small-dollar cases where it is most essential, the panel's decision greatly impairs the ability of consumers to vindicate their rights.

II. The Panel's Ascertainability Holding Puts This Court At Odds With Other Circuits, Fails To Serve The Purposes Of Ascertainability Identified In *Marcus*, And Undermines Rule 23.

En banc rehearing is warranted for a second, related reason: The panel's decision is the first from a federal circuit to hold that ascertainability—a judge-made doctrine that this circuit had not even "explain[ed] . . . at length" until last year, Panel Op. 6—requires plaintiffs to prove that they will be able to identify every member of

[6] Seltz & Elias, *The Limited Scope of the Ascertainability Requirement*, American Bar Association, Mar. 18, 2013, http://bit.ly/1eFc8PK.

their proposed class in a claims process. That requirement is not just novel—it is at odds with the law of other circuits, leading civil-procedure treatises, and Rule 23 itself. By making class certification most difficult in the cases where it is most needed, the panel's holding undermines the objectives of ascertainability identified by this Court in *Marcus*: The class here clearly defines who would be bound, and the method for identifying class members (retailer records and affidavits) would be administratively feasible and would allow for adequate notice to absent class members.

A. The panel's ascertainability analysis cannot be squared with the prevailing law of other circuits and a half-century of class-action jurisprudence.

Ascertainability has historically rested on common sense: Rule 23 presumes the existence of "a definite or ascertainable class." 1 Rubenstein, *Newberg on Class Actions* § 3:2 (5th ed. 2013). "[A] class must exist," and it must "be susceptible of precise definition.'" 5 *Moore's Federal Practice* § 23.21[1] (3d ed. 1997). The requirement has always "focus[ed] on the question of whether *the class* can be ascertained by objective criteria" as opposed to "subjective standards (*e.g.*, a plaintiff's state of mind) or terms that depend on resolution of the merits (*e.g.*, persons who were discriminated against)." Rubenstein, § 3:3; *Manual for Complex Litigation* § 21.222 (4th ed. 2004). For example, the Fifth Circuit refused to certify a "class made up of 'residents of this State active in the 'peace movement'" because of the "uncertainty of the meaning of 'peace movement.'" *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970). Other circuits' approaches have been similar. *See, e.g.*, *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981);

Ihrke v. N. States Power Co., 459 F.2d 566, 573 & n.3 (8th Cir. 1972), *vacated as moot*, 409 U.S. 815 (1972).[7]

The panel, however, held that the class here is insufficiently ascertainable because the plaintiff cannot prove that he could identify *every class member*—not because the class definition is subjective or unclear. But courts have long "held that the class does not have to be so ascertainable that every potential member can be identified at the commencement of the action." 7A Wright & Miller, *Federal Practice & Procedure* § 1760 (3d ed. 2005); *see* Rubenstein § 3:3; *Manual for Complex Litig.* § 21.222. "To place such a burden on plaintiffs would seem harsh and unnecessary" and make many class actions "very difficult, if not impossible." Wright & Miller § 1760. Hence, "[i]f the general outlines of the membership of the class are determinable at the outset of the litigation, a class will be deemed to exist." *Id.* (footnote omitted).

In holding otherwise, the panel's decision is at odds with the prevailing law of the other circuits. It cannot be squared, for example, with *Fitzpatrick v. General Mills, Inc.*, 635 F.3d 1279 (11th Cir. 2011). As here, that case involved Florida-law claims alleging deceptive advertising of an over-the-counter product (yogurt touted for its digestive health benefits). As here, the defendant argued that the class should be decertified because "individualized fact-finding" was required "to ascertain the members of the class." *Id.* at 1282. The Eleventh Circuit disagreed, finding the district

[7] In 2011, one commentator surveyed the cases and found that "there is no circuit-court opinion squarely holding that lack of ascertainability provides an independent basis for denying class certification." Steed, *On "Ascertainability" as a Bar to Class Certification*, 23 App. Advoc. 626, 627 (2011).

court's order "scholarly," "sound," and "well within the parameters of Rule 23's requirements." *Id.* at 1282-83. The only flaw it saw, easily fixable on remand, was that the class definition's wording included a subjective component (whether consumers bought yogurt "to obtain its claimed digestive health benefit") that is impermissible under the traditional understanding of ascertainability. *Id.* The Eleventh Circuit approved of the class if "defined as 'all persons who purchased [the product] in the State of Florida.'" *Id.* at 1283 & n.1. The panel's decision here—to decertify a class of all persons who purchased WeightSmart in Florida—directly conflicts with *Fitzpatrick*: If this case were brought in the Eleventh Circuit (or if that case were brought in the Third Circuit), the outcomes would be radically different.

More generally, the panel's decision conflicts with decisions upholding classes of purchasers of over-the-counter products—classes that could never exist under the decision. *See, e.g.*, *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 28 (D.C. Cir. 2000) (vitamins); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24 (1st Cir. 2009) (drugs); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 336 (3d Cir. 2010) (pet food); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 170 (3d Cir. 2013) (baby products); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716 (6th Cir. 2013) (diapers); *State of Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1210 (9th Cir. 1984) (dairy products); *Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 431 (11th Cir. 2012) (baby formula).

The panel's decision is also in substantial tension with this Court's en banc decision in *Sullivan v. DB Investments Inc.*, 667 F.3d 273. There, a broad majority of the

full Court rejected the view that, "when deciding whether to certify a class, a district court must ensure that each class member possesses a viable claim or 'some colorable legal claim.'" *Id.* at 285. The panel's rule here is more extreme than the rule rejected by *Sullivan*: It says that a district court cannot certify a class unless the plaintiff can show that each class member will be able to prove to a certainty that he or she is entitled to damages. *Sullivan* explained that the focus at certification is not an "inquiry into the existence or validity of each class member's claim" but rather "whether the defendant's conduct was common as to all of the class members" *Id.* at 299. Here, as in *Sullivan*, there is no doubt that the complaint alleges conduct (deceptive marketing) that is common to the class. The only question is whether individual class members' "potential inability" to prove that they purchased the product "should have precluded the District Court from certifying" the class. *Id.* at 300 n.23. *Sullivan* says it should not.

Finally, the panel's approach is impossible to harmonize with precedent allowing "[a] class action limited to determining liability on a class-wide basis, with separate hearings to determine . . . the damages of individual class members"—a procedure "permitted by Rule 23(c)(4)." *Butler v. Sears, Roebuck & Co.*, --- F.3d ---, 2013 WL 4478200, at *4 (7th Cir. Aug. 22, 2013); *accord Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (collecting cases). As Judge Posner recently remarked, "[i]t would drive a stake through the heart of the class action device" to deny class treatment where, as here, "the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in

individual hearings, in settlement negotiations, or by creation of subclasses." *Butler*, 2013 WL 4478200, at *5. The alternative is unacceptable: "[D]efendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits." *Id.*

B. The panel's decision undermines Rule 23 and fails to serve the purposes of the ascertainability requirement.

The panel's decision frustrates the "core" purpose of Rule 23—solving "the problem that small recoveries do not provide the incentive for any individual to bring a solo action," *Amchem*, 521 U.S. at 617—by rendering the Rule effectively inapplicable in the quintessential small-recovery case: one involving an inexpensive consumable product. The decision achieves this result by purporting to apply *Marcus*, in which this Court first "explained the concept of ascertainability." Panel Op. 6. But ascertainability aims to *further* the operation of Rule 23, not defeat it.

Marcus identified three "important objectives" of ascertainability: (1) "it eliminates serious administrative burdens . . . by insisting on the easy identification of class members"; (2) "it protects absent class members by facilitating the 'best notice practicable' . . . in a Rule 23(b)(3) action"; and (3) "it protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable." 687 F.3d at 593. The panel's opinion serves none of these purposes.

Class membership here is based on an objective definition with clear contours: whether someone purchased WeightSmart in Florida. And the plaintiff has provided a method to identify people who meet this definition based on (a) affidavits or proofs

of purchase from potential class members that would then be subject to (b) an expert model designed to screen out fraudulent, inaccurate, or duplicative claims, and (c) data obtained from retailers like CVS, which track online purchases and those made using a rewards card. That method is administratively feasible, and it promotes Rule 23's efficiency goals without altering the defendant's substantive liability—a critical fact that distinguishes this case from *Marcus* and *Hayes*.[8]

Nor does the plaintiff's method violate the rights of absent class members. To the contrary, it ensures that they will receive adequate notice and provides an efficient, effective way for them to obtain relief.[9] True, the method here does not guarantee that *every* class member can be identified with perfect accuracy. But Rule 23 does not require a roll call (nor, for that matter, does due process). The Rule itself contemplates that classes will contain members who are not easily identifiable: It requires that absent class members in a case like this receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," and published notice to those who cannot be. Fed. R. Civ. P. 23(c)(2)(B); *see Hughes v. Kore of Ind. Enter., Inc.*, --- F.3d ---, 2013 WL

[8] The use of affidavits is well established: "A simple statement or affidavit may be sufficient where claims are small or are not amenable to ready verification." 3 Conte & Newberg § 10:12. Where "the burden of an affidavit procedure is likely to be minimal," courts allow people "to establish class membership by affidavit or claim form." *Harris v. comScore, Inc.*, 2013 WL 1339262, at *8 (N.D. Ill. 2013); *see Boundas v. Abercrombie & Fitch Stores*, 280 F.R.D. 408, 417 (N.D. Ill. 2012) ("[A]nybody claiming class membership on that basis will be required to submit an appropriate affidavit.").

[9] This does not come at the expense of their recoveries: There is simply no realistic chance that hundreds of thousands of Floridians will go through the trouble of lying on their claim forms, finding a notary, and submitting their claims—all for $9.

4805600, at *4 (7th Cir. Sept. 10, 2013). These requirements would make no sense if a class could consist only of members who are identifiable.

III. The Panel's Recognition Of A New Due Process Clause Right—In The Absence Of A Protected Property Interest Or The Requisite Balancing of Interests—Cannot Be Reconciled With Supreme Court Precedent.

Although framed in terms of Rule 23 and its implicit ascertainability requirement, the panel's decision rests, at bottom, on its novel interpretation of the Due Process Clause. The decision establishes a new "due process right to challenge the proof used to demonstrate class membership"—even when the defendant's liability will not be affected—and says that ascertainability protects this right "by requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership." Panel Op. 11.

Procedural due process, however, is not a freestanding right. It attaches "only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). The panel's opinion concludes that Bayer has a "substantial interest in ensuring" that "only legitimate claims" are paid out as part of the claims process because otherwise there would be "a significant likelihood" that true class members' recoveries would "be diluted by fraudulent or inaccurate claims," which could mean that class members are not bound by the judgment. Panel Op. 17-18. But it is "exceedingly rare for courts to permit after-the-fact challenges by class members." Frankel, *2nd Circuit: Class Members Deserve Notice,* Reuters, Aug. 25, 2012. "[T]here have

been only eight or nine such 'collateral attacks' in the history of the federal judiciary." *Id.* And the likelihood here is particularly slight: It would require virtually everyone who bought WeightSmart in Florida to file a claim, setting off a chain of events (listed on page 3) so unlikely that the panel does not cite any evidence that anything like it has ever occurred.[10] As the Supreme Court has made clear, such speculation is not enough to create a constitutionally protected property interest under the Due Process Clause: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577; *see also Hilao v. Estate of Marcos*, 103 F.3d 767, 786 (9th Cir. 1996) (class-action defendant asserted due-process "interest in not paying damages for any invalid claims," but its "interest [was] *only* in the total amount of damages for which it will be liable" (emphasis added)).

Nor can a due-process right be grounded in Bayer's supposed interest in the distribution of damages. As the panel acknowledged, "Bayer's total liability will be determined at trial, and will not increase or decrease based on the affidavits submitted." Panel Op. 15. "[O]nce damages are established, the defendant has no legitimate interest in how those damages are distributed." DeJarlais, *The Consumer Trust*

[10] Some of the panel's speculation is particularly far-fetched. For example, the panel surmises that there would be so many claims (both valid and invalid) that the total amount would greatly exceed Bayer's liability and thus "materially reduce true class members' relief." Panel Op. 17. But "in small-claims consumer class actions, less than twenty percent" of class members file a claim. Gilles, 59 DePaul L. Rev. at 315.

Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions, 38 Hastings L.J. 729, 766 (1987). Bayer therefore is not "prejudiced . . . by an inability to defend against consumers who are unable to prove their purchases" and is not "constitutionally entitled to compel a parade of individual plaintiffs to establish damages." *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 289 (S.D.N.Y. 1971). This fact—that any "affidavits attesting to class membership [would] only be used to determine *to whom* to pay the refund, and in what amount," Panel Op. 16 (emphasis added)—distinguishes this case from *Marcus*, where "each claim submitted would have increased the amount of money the defendants would have had to pay." *Id.* Under those circumstances, "having potential class members submit affidavits," as Judge Ambro's opinion for the Court observed, might very well have "serious due process implications." *Marcus*, 687 F.3d at 594. Not so here.

Finally, even if the panel were somehow correct that Bayer has a property interest, the panel never balanced the competing interests in efficiency and accuracy, as required by *Mathews v. Eldridge*, 424 U.S. 319 (1976). Indeed, the panel did not even consider *Mathews* balancing; it simply held that Bayer's right to insist on perfect accuracy trumps all other countervailing concerns—including "'the just, speedy, and inexpensive determination of every action.'" *Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 123 (3d Cir. 2009) (quoting Fed. R. Civ. P. 1).

CONCLUSION

The petition for rehearing and rehearing en banc should be granted.

Respectfully submitted,

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September 27, 2013

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2013, I electronically filed the foregoing petition with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: September 27, 2013

/s/ James E. Cecchi
James E. Cecchi

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 12-2621

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GABRIEL JOSEPH CARRERA,
on behalf of himself and all others similarly situated

v.

BAYER CORPORATION;
BAYER HEALTHCARE, LLC.,
Appellants

*(Amended Pursuant to the Clerk's Order of July 5, 2012)

_____

On Appeal from the District Court
for the District of New Jersey
D.C. Civil No. 2-08-cv-04716
(Honorable Jose L. Linares)

_____

Argued April 16, 2013

Before: SCIRICA, SMITH and CHAGARES, *Circuit Judges*

(Filed: August 21, 2013)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge.*

> In this Fed. R. Civ. P. 23(f) appeal, Bayer Corporation and Bayer Healthcare contest the certification of a class of consumers who purchased Bayer's One-A-Day WeightSmart diet supplement in Florida. The sole issue on appeal is whether the class members are ascertainable. While this interlocutory appeal was pending, we decided *Marcus v. BMW of North America, LLC*, in which we held "[i]f class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." 687 F.3d 583, 593 (3d Cir. 2012). We explained that if class members cannot be ascertained from a defendant's records, there must be "a reliable, administratively feasible alternative," but we cautioned "against approving a method that would amount to no more than ascertaining by potential class members' say so." *Id.* at 594. In light of *Marcus*, we will vacate the class certification order and remand.

I.

Gabriel Carrera brings this class action against Bayer Corporation and Bayer Healthcare, LLC ("Bayer"), claiming that Bayer falsely and deceptively advertised its product One-A-Day WeightSmart. WeightSmart was promoted as a multivitamin and dietary supplement that had metabolism-

enhancing effects. The recommended daily dose was one tablet and prices ranged from about $8.99 for fifty tablets to about $16.99 for one hundred tablets. Bayer sold WeightSmart in retail stores, such as CVS, until January 2007. Bayer did not sell it directly to consumers. Carrera alleges Bayer falsely claimed that WeightSmart enhanced metabolism by its inclusion of epigallocatechin gallate, a green tea extract.

Carrera initially sought to certify a nationwide class under Fed. R. Civ. P. 23(b)(3) bringing a claim under the New Jersey Consumer Fraud Act, as Bayer's headquarters is in New Jersey. The court denied certification, concluding that New Jersey law did not apply to out-of-state customers. This order is not before us on appeal.

Carrera then moved to certify a Rule 23(b)(3) class of Florida consumers under the Florida Deceptive and Unfair Trade Practices Act. One of Bayer's challenges to certification, and the issue on this appeal, is whether the class members are ascertainable. In this case, there is no dispute that class members are unlikely to have documentary proof of purchase, such as packaging or receipts. And Bayer has no list of purchasers because, as noted, it did not sell WeightSmart directly to consumers.

Carrera advanced two ways to ascertain the class: first, by retailer records of online sales and sales made with store loyalty or rewards cards; second, by affidavits of class members, attesting they purchased WeightSmart and stating the amount they purchased. Bayer challenged this latter method on the ground that memories of putative class members will be unreliable. Bayer argued that, in Carrera's

own deposition testimony, he failed to remember when he purchased WeightSmart and that he confused it with WeightSmart Advanced and other generic or similar products (none of which are part of this litigation). In response, Carrera produced a declaration of James Prutsman, who works for a company that verifies and processes class settlement claims, in which Prutsman stated there are ways to verify the types of affidavits at issue here and screen out fraudulent claims.

The court certified the class, defined as all persons who purchased WeightSmart in Florida.[1] It characterized the issue of ascertainability as one of manageability, stating "'speculative problems with case management'" are insufficient to prevent class certification. *Carrera v. Bayer Corp.*, Civ. A. No. 08-4716, 2011 WL 5878376, at *4 (D.N.J. Nov. 22, 2011) (quoting *Klay v. Humana, Inc.*, 382 F.3d 1241, 1272-73 (11th Cir. 2004)). The court concluded Carrera had satisfied his burden, noting "that the claims involved will be relatively small and Plaintiff points to methods to verify claims." *Id.* Bayer appealed. It contends Carrera has failed to demonstrate the class is ascertainable because there is no evidence that any retailer records show who purchased WeightSmart. Bayer also argues that the use of unverifiable affidavits to ascertain class members fails to comply with Rule 23 and violates its rights under the due process clause.

II.

The District Court had jurisdiction under 28 U.S.C. §

[1] The class definition does not include a class period. Bayer sold WeightSmart from December 2003 through January 2007.

1332(d). We have jurisdiction under 28 U.S.C. § 1292(e) and Fed. R. Civ. P. 23(f). "We review a class certification order for abuse of discretion, which occurs if the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 312 (3d Cir. 2008) (quotation omitted). "Whether an incorrect legal standard has been used is an issue of law to be reviewed *de novo*." *Id.* (quotation omitted).

III.

In *Marcus*, we explained the concept of ascertainability at length for the first time. 687 F.3d at 592-95. The claim in *Marcus* was that Bridgestone run-flat tires ("RFTs") were defective because they were highly susceptible to flats; could only be replaced, not repaired; and were highly priced. *Id.* at 588. The district court certified a Rule 23(b)(3) class consisting of "any and all current and former owners and lessees of 2006, 2007, 2008, and 2009 BMW vehicles equipped with run-flat tires manufactured by Bridgestone . . . and sold or leased in New Jersey whose Tires have gone flat and been replaced." *Id.* at 590 (quotation and alterations omitted). The defendants appealed, and we vacated the order certifying the class.

Before turning to the explicit requirements of Rule 23 in *Marcus*, we addressed two "preliminary matters": first, whether the class was clearly defined, and second, "whether the class must be (and, if so, is in fact) objectively ascertainable." *Id.* at 591. We concluded the class was not clearly defined. At the least, the definition of the class was broader than intended and did not define the claims, issues, or

defenses to be treated on a class-wide basis. *Id.* at 592. Accordingly, we remanded the case for clarification of the class definition.

We then addressed ascertainability. We began by stating, "[m]any courts and commentators have recognized that an essential prerequisite of a class action, at least with respect to actions under Rule 23(b)(3), is that the class must be currently and readily ascertainable based on objective criteria." *Id.* at 592-93 (citing cases). "If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Id.* at 593. We noted, "[s]ome courts have held that where nothing in company databases shows or could show whether individuals should be included in the proposed class, the class definition fails." *Id.* (citing cases).

We then explained the

> ascertainability requirement serves several important objectives. First, it eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action by insisting on the easy identification of class members. Second, it protects absent class members by facilitating the best notice practicable under Rule 23(c)(2) in a Rule 23(b)(3) action. Third, it protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable.

Id. (citations and quotations omitted).

We set forth why the "proposed class action raise[d] serious ascertainability issues." *Id.* Defendant BMW explained that it could not determine by its records which vehicles fit the definition of the class because it did not keep records of which cars got fitted with Bridgestone RFTs, because some customers may have changed tires (of which BWM had no record), and because BMW would not have known which customers experienced flat tires. *Id.* at 593-94. We stated that if plaintiff were to attempt to re-certify a class on remand, the court "must resolve the critical issue of whether the defendants' records can ascertain class members and, if not, whether there is a reliable, administratively feasible alternative." *Id.* at 594. We cautioned "against approving a method that would amount to no more than ascertaining by potential class members' say so. For example, simply having potential class members submit affidavits that their Bridgestone RFTs have gone flat and been replaced may not be proper or just." *Id.* (quotation omitted). "Forcing BMW and Bridgestone to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications." *Id.*

IV.

A.

"A party seeking class certification must affirmatively demonstrate his compliance with" Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). "Class certification is proper only 'if the trial court is satisfied, after a rigorous analysis, that the prerequisites' of Rule 23 are met." *Hydrogen Peroxide*, 552 F.3d at 309 (quoting *Gen. Tel.*

Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982)). "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. '[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Dukes*, 131 S. Ct. at 2551-52 (alteration in original) (quoting *Falcon*, 457 U.S. at 160). "Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence." *Hydrogen Peroxide*, 552 F.3d at 320.

These same standards apply to the question of ascertainability. Class ascertainability is "an essential prerequisite of a class action, at least with respect to actions under Rule 23(b)(3)." *Marcus*, 687 F.3d at 592-93. "[T]here is 'no reason to doubt'" that the "rigorous analysis" requirement "'applies with equal force to all Rule 23 requirements.'" *Hydrogen Peroxide*, 552 F.3d at 309 n.5 (quoting *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 33 n.3 (2d Cir. 2006)). Accordingly, a plaintiff must show, by a preponderance of the evidence, that the class is "currently and readily ascertainable based on objective criteria," *Marcus*, 687 F.3d at 593, and a trial court must undertake a rigorous analysis of the evidence to determine if the standard is met.

"A party's assurance to the court that it intends or plans to meet the requirements [of Rule 23] is insufficient." *Hydrogen Peroxide*, 552 F.3d at 318. A plaintiff may not merely propose a method of ascertaining a class without any evidentiary support that the method will be successful. "'A critical need'" of the trial court at certification "'is to determine how the case will be tried,'" *id.* at 319 (quoting Fed. R. Civ. P. 23 advisory committee's note, 2003

Amendments), including how the class is to be ascertained.

B.

Ascertainability mandates a rigorous approach at the outset because of the key roles it plays as part of a Rule 23(b)(3) class action lawsuit. First, at the commencement of a class action, ascertainability and a clear class definition allow potential class members to identify themselves for purposes of opting out of a class. Second, it ensures that a defendant's rights are protected by the class action mechanism. Third, it ensures that the parties can identify class members in a manner consistent with the efficiencies of a class action.

"'[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.'" *Falcon*, 457 U.S. at 155 (second alteration in original) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979)). If a class cannot be ascertained in an economical and "administratively feasible" manner, *Marcus*, 687 F.3d at 594, significant benefits of a class action are lost. *See id.* at 593 (explaining ascertainability "eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action" (quotation omitted)). Accordingly, a trial court should ensure that class members can be identified "without extensive and individualized fact-finding or 'mini-trials,'" *id.*, a determination which must be made at the class certification stage.

In this case, the ascertainability question is whether each class member purchased WeightSmart in Florida. If this were an individual claim, a plaintiff would have to prove at

trial he purchased WeightSmart. A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues. *See McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231-32 (2d Cir. 2008) (rejecting a "fluid recovery" method of determining individual damages, in which aggregate damages would be based on estimates of the number of defrauded class members and their average loss), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *see also Dukes*, 131 S. Ct. at 2561 (rejecting a method of class certification in which a sample set of class members would be used to extrapolate average damages). 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. *See Marcus*, 687 F.3d at 594 ("Forcing BMW and Bridgestone to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications."). Ascertainability provides due process by requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership.

The method of determining whether someone is in the class must be "administratively feasible." *Id.* A plaintiff does not satisfy the ascertainability requirement if individualized fact-finding or mini-trials will be required to prove class membership. *Id.* at 593. "Administrative feasibility means that identifying class members is a manageable process that does not require much, if any, individual factual inquiry." William B. Rubenstein & Alba Conte, *Newberg on Class Actions* § 3:3 (5th ed. 2011); *see also Bakalar v. Vavra*, 237

F.R.D. 59, 64 (S.D.N.Y. 2006) ("Class membership must be readily identifiable such that a court can determine who is in the class and bound by its ruling without engaging in numerous fact-intensive inquiries.").

The type of challenge to the reliability of evidence that is required will vary based on the nature of the evidence. For example, if Carrera produces retailer records that purport to list purchasers of WeightSmart, Bayer can challenge the reliability of those records, perhaps by deposing a corporate record-keeper.[2] In sum, to satisfy ascertainability as it relates to proof of class membership, the plaintiff must demonstrate his purported method for ascertaining class members is reliable and administratively feasible, and permits a defendant to challenge the evidence used to prove class membership.

V.

Carrera contends the class is ascertainable. He points to two types of evidence that can be used to determine who is a class member. First, he argues the class can use records from retailers, which purportedly track customers who make purchases online or who use loyalty cards. Second, he proposes using affidavits of class members attesting to their purchases of WeightSmart. We conclude that, based on the evidence produced below, neither method satisfies Carrera's burden to show the class is ascertainable.

[2] Although some evidence used to satisfy ascertainability, such as corporate records, will actually identify class members at the certification stage, ascertainability only requires the plaintiff to show that class members can be identified.

A.

Carrera argues he will be able to show class membership using retailer's records of sales made with loyalty cards, e.g., CVS ExtraCare cards,[3] and records of online sales. Carrera points to a Federal Trade Commission (FTC) settlement with CVS regarding the sale of a supplement that was falsely advertised as boosting immune systems. The supplement was sold only at CVS. The FTC stated in its press release regarding the settlement that "[p]urchasers will be identified through the CVS ExtraCare card program and sales on cvs.com." A1089.

Bayer contends there is no evidence that any other retailer of WeightSmart has membership cards, that the FTC case is inapposite as it was a stipulated settlement in a non-Rule 23 context,[4] in which some of the money paid might go to class members but did not have to, and that it is speculative whether CVS or any other retailer's records will reveal customers who purchased WeightSmart.

The evidence put forth by Carrera is insufficient to show that retailer records in this case can be used to identify

[3] ExtraCare cards are membership cards that offer customers discounts. A1091.

[4] Settlement classes raise different certification issues than litigation classes. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Accordingly, we question whether the FTC's proposals for identifying purchasers, made as part of a settlement (and a non-class action settlement at that), bear any relevance to the issue of ascertainability in this case.

class members. Depending on the facts of a case, retailer records may be a perfectly acceptable method of proving class membership. But there is no evidence that a single purchaser of WeightSmart could be identified using records of customer membership cards or records of online sales. There is no evidence that retailers even have records for the relevant period. The FTC's press release does not support a finding that these records can determine class membership on the facts of this case. Moreover, we have no evidence the FTC's method was successful.

B.

Carrera also contends the class is ascertainable using affidavits of class members. He advances three arguments. First, due to the low value of the claims, class members will be unlikely to submit fraudulent affidavits. Second, because Bayer's total liability will not depend on the reliability of the affidavits, the ascertainability requirement should be relaxed. Finally, a screening method such as the one described in the Prutsman Declaration will ensure any unreliable affidavits are identified and disregarded.

1.

Because the claims are of low value, Carrera argues it is less likely someone would fabricate a claim. He concedes it is unlikely customers would have retained a receipt, but asserts this is irrelevant to possible falsification. He contrasts the claims at issue here to those in *Marcus*, which involved more money and more complicated issues of fact as to whether an individual was a class member.

This argument fails because it does not address a core concern of ascertainability: that a defendant must be able to challenge class membership. This is especially true where the named plaintiff's deposition testimony suggested that individuals will have difficulty accurately recalling their purchases of WeightSmart.[5] *Cf. In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 618-19 (W.D. Wa. 2003) (concluding affidavits could not be used to ascertain a class because the named plaintiffs had difficulty remembering the products they bought that contained PPA).

2.

Carrera also argues ascertainability is less important in this case because Bayer's total liability will be determined at trial, and will not increase or decrease based on the affidavits submitted. As noted, this is an action under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), Fla. Stat. § 501.201 *et seq*. "[A] consumer claim for damages under FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006). There is no requirement of actual reliance on the deceptive act. *See Fitzpatrick v. Gen. Mills, Inc.*, 635 F.3d 1279, 1282-83 (11th Cir. 2011) (citing *Davis v. Powertel, Inc.*, 776 So. 2d 971, 973 (Fla. Dist. Ct. App. 2000)). "[T]he question is not whether the plaintiff actually relied on the alleged deceptive trade practice, but whether the practice was

[5] As mentioned, in his deposition testimony, Carrera was unable to remember when he purchased WeightSmart and confused WeightSmart with other products that are not part of this litigation.

likely to deceive a consumer acting reasonably in the same circumstances." *Davis*, 776 So. 2d at 974.

Contending liability under the FDUTPA is not based on individual issues, Carrera argues that he can prove at trial that Bayer owes a refund for every purchase of WeightSmart.[6] Since Bayer's records show it sold approximately $14 million worth of WeightSmart in Florida, Carrera asserts Bayer's liability will be determined at trial to be $14 million—no more, no less. As a result, affidavits attesting to class membership will only be used to determine to whom to pay the refund, and in what amount.

Under no circumstances, Carrera assures us, will Bayer pay any amount other than $14 million, even if a significant number of inaccurate claims are submitted and paid out. For example, if claims are made for more than $14 million, and inaccurate or false claims cannot be screened out, claimants will simply receive less than they are entitled to. And if too few claims are made, Carrera asserts the excess funds will not be returned to Bayer but will go to an unclaimed property fund. Carrera contrasts this situation with *Marcus*. In *Marcus*, there was no evidence of the total number of RFTs allegedly purchased in violation of the consumer protection laws. Accordingly, each claim submitted would have increased the amount of money the defendants would have had to pay. As a

[6] Bayer argues that if it is liable, its liability will be limited to refunding the premium consumers paid for WeightSmart based on its metabolism-enhancing claims. For purposes of this appeal, it makes no difference whether customers would be entitled to a full refund or merely a refund of this premium.

result, the defendants had a more substantial interest in screening out false claims. Because Bayer's total liability cannot be so affected by unreliable affidavits, Carrera argues Bayer lacks an interest in challenging class membership.

Under Carrera's view, if fraudulent or inaccurate claims are paid out, the only harm is to other class members. But ascertainability protects absent class members as well as defendants, *Marcus*, 687 F.3d at 593, so Carrera's focus on Bayer alone is misplaced. It is unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims. In this case, as we discuss, there is the possibility that Carrera's proposed method for ascertaining the class via affidavits will dilute the recovery of true class members.

Bayer too has an interest in ensuring it pays only legitimate claims. If fraudulent or inaccurate claims materially reduce true class members' relief, these class members could argue the named plaintiff did not adequately represent them because he proceeded with the understanding that absent members may get less than full relief.[7] When class members are not adequately represented by the named plaintiff, they are not bound by the judgment. *See Hansberry v. Lee*, 311 U.S. 32, 42 (1940) (explaining that due process requires the interests of absent class members to be adequately represented for them to be bound by the judgment). They could then bring a new action against Bayer and, perhaps, apply the principles of issue preclusion to

[7] We express no opinion on whether absent class members would be successful in arguing they were not adequately represented on this ground.

prevent Bayer from re-litigating whether it is liable under the FDUTPA. Bayer has a substantial interest in ensuring this does not happen. Accordingly, we reject Carrera's argument that the level of proof for ascertainability should be relaxed because Bayer's ultimate liability will not be based on the affidavits.

3.

Finally, Carrera argues that a screening method such as the one described in the Prutsman Declaration will ensure that Bayer pays claims based only on reliable affidavits. In his declaration, James Prutsman states that he works at Rust Consulting, Inc., a firm that has administered class settlements for nearly 25 years. A992. He explains that Rust "employs numerous methods to detect claims that are submitted fraudulently." A995. "For example, the firm runs programmatic audits to identify duplicate claims, outliers, and other situations. In addition, Rust has successfully utilized fraud prevention techniques where by [sic] the claim form offers claim options that do not reflect valid product descriptions, prices paid, geographic locations or combinations of such factors." *Id.* "By providing claims options such as a very high pill count or significantly higher purchase price in this case, fraudulent claim filers would naturally be inclined to select options that they believe would increase their claim value. As such, techniques such as these can be used to effectively [eliminate] fraudulent claims." *Id.*

Bayer maintains the Prutsman Declaration is insufficient to satisfy the reliability standard because it only addresses methods for allocating payment to a settlement class. This fact is important, according to Bayer, because

there are different standards for approving a settlement class than for certifying a litigation class, and because Prutsman does not opine that his method would satisfy the standard for class certification. Bayer also argues that just because some defendants have agreed to use such techniques in administering a class settlement, it does not mean that it is sufficiently reliable.

The Prutsman Declaration does not show the affidavits will be reliable.[8] Nor does it propose a model for screening claims that is specific to this case. And even if Prutsman produced a model that is specific to this case, we doubt whether it could satisfy the ascertainability requirement. At this stage in the litigation, the district court will not actually see the model in action. Rather, it will just be told how the model will operate with the plaintiff's assurances it will be effective. Such assurances that a party "intends or plans to meet the requirements" are insufficient to satisfy Rule 23. *Hydrogen Peroxide*, 552 F.3d at 318; *see also Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1434 (2013) (rejecting contention that Rule 23 is satisfied by an assurance that the plaintiffs can produce a damages model capable of measuring damages caused by a specific theory of antitrust impact). Carrera has suggested no way to determine the reliability of such a model. For example, even if a model screens out a

[8] Based on this conclusion, we do not need to reach Bayer's argument that the District Court erred by considering the Prutsman Declaration, which was produced with Carrera's reply brief in support of its motion for class certification. Accordingly, we will deny Bayer's motion to supplement the appellate record, which relates solely to this issue.

significant number of claims, say 25%, there is probably no way to know if the true number of fraudulent or inaccurate claims was actually 5% or 50%.[9]

As *Marcus* was decided after the trial court certified the class, Carrera should have another opportunity to satisfy the ascertainability requirement. Accordingly, we will afford Carrera the opportunity to submit a screening model specific to this case and prove how the model will be reliable and how it would allow Bayer to challenge the affidavits. Mere assurances that a model can screen out unreliable affidavits will be insufficient.[10]

VI.

For the foregoing reasons, we will vacate the District Court's order certifying the class action and remand for further proceedings consistent with this opinion. Because *Marcus* was decided after the court's certification of the class, Carrera should be allowed to conduct further, limited

[9] Carrera's ability to meet the ascertainability requirement using a screening model is further in doubt due to his inability to clearly remember his purchases of WeightSmart, although the District Court did not determine whether his testimony was reliable. It would appear that the less reliable a class member's memory is, the more reliable any screening method would have to be.

[10] Bayer also argues that because the statute of limitations will bar some claims, the class cannot be ascertained. Because the class is defined as all purchasers of WeightSmart in Florida, whether an individual's claim is barred by the statute of limitations is not an aspect of ascertainability in this case.

discovery on the issue of ascertainability and afforded another opportunity to satisfy the ascertainability requirement.

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3rd Circ. Adopts Unheard-Of Consumer Class Action Hurdle

By **Greg Ryan**

Law360, New York (September 18, 2013, 9:14 PM ET) -- The Third Circuit recently sank a false advertising lawsuit against Bayer Corp. by holding that, without receipts or sales records, there may be no reliable way to identify class members, a game-changing decision that makes it significantly tougher for consumers to target food and other low-cost products in a class action.

In a precedential Aug. 21 opinion, a three-judge panel reversed a New Jersey federal judge's certification of a class of Florida consumers who claim Bayer falsely advertised the metabolism-boosting benefits of its One-A-Day WeightSmart vitamin. It would be too difficult to determine whether a consumer actually belongs to the class, the appeals court said, pointing to a concept known as ascertainability.

The panel rejected plaintiff Gabriel Carrera's contention that class membership could be determined based on retailer records for customer-loyalty card and online purchases, since there was no proof they had such records, or based on affidavits from consumers swearing they bought the vitamins, since there was no proof they are reliable.

The decision is not the first in the Third Circuit or elsewhere to apply ascertainability in a manner that benefits defendants, but none has gone as far in suggesting that, without a receipt or record of purchase from a retailer, plaintiffs bringing a consumer product class action may not be able to secure certification, according to attorneys.

"What it really nails down is if a defendant doesn't have records regarding who's in the class, then a class might not be possible," McGuireWoods LLP counsel Andrew Trask said.

Such a reading hampers lawsuits targeting the types of inexpensive products that most retailers would not bother tracking and most consumers would not bother to keep a receipt for, including the common grocery items at the heart of ever-popular food labeling litigation, attorneys said.

"Ultimately, in a case where a defendant does not have and is under no obligation to retain sales records, it's going to be an uphill battle for these very broad false advertising types of claims," Shook Hardy & Bacon LLP partner Sean Wajert said.

The ruling builds on the Third Circuit's ruling in Marcus v. BMW of North America LLC in August 2012, the first time the appeals court examined ascertainability at length. The appeals court held in that case that a tire defect class action should not be certified because the plaintiff had not adequately shown how to determine which consumers had experienced flat tires and had the products replaced.

"This case really implements [Marcus] in a concrete way that would be applicable to a whole host of products," Wajert said.

In reversing the certification of the Carrera class, the Third Circuit held there is no proof that retailers have online sales or loyalty-card records proving a consumer purchased the vitamins.

The judges turned aside arguments put forward by Carrera related to the viability of affidavits. It would not matter if the low value of the claims made fabricated affidavits unlikely, since Bayer still must have a way to challenge class membership, according to the panel.

In addition, it would not matter if Bayer's total liability remains the same regardless of the number of claims, since the ascertainability principle protects class members from fabricated claims, just as it protects defendants, it said.

Carrera cannot simply propose a screening model to ferret out fabricated affidavits without proving that it will be reliable and specific to the case, the panel said. However, it held that Carrera could overcome the ascertainability hurdle if he devises a reliable, case-specific screening model that allows Bayer to challenge affidavits, according to the panel.

In reality, the opening left by such a model is so small as to be nonexistent, attorneys said.

"If you read the opinion in its entirety, it certainly seems to indicate that nothing short of a receipt will be a reliable method. I don't see much of a door being left open in light of the other language in the opinion," Seeger Weiss LLP partner Jonathan Shub said.

"As plaintiffs counsel, we think the court has just misconstrued Rule 23. There's no requirement that you have written proof you're in the class," Shub said. "It has far-reaching implications for consumer cases."

Defense attorneys maintained that it was not fair to rely on consumers' word that they bought a product in a class setting when such a statement would be subject to much higher scrutiny in an individual action.

"You don't give up your right to due process as a defendant just because the plaintiffs bring a class action," Wajert said.

Circuit Judges Michael Chagares, D. Brooks Smith and Anthony Scirica sat on the panel for the Third Circuit.

Carrera is represented by Caroline Bartlett, James Cecchi and Lindsey Taylor of Carella Byrne Cecchi Olstein Brody & Agnello PC and Joe Whatley of Whatley Drake & Kallas LLC.

Bayer is represented by Matthew Ford, Christopher Landgraf and Rebecca Weinstein Bacon of Bartlit Beck Herman Palenchar & Scott LLP.

The case is Carrera v. Bayer Corp. et al., case number 12-2621, in the U.S. Court of Appeals for the Third Circuit.

--Editing by Katherine Rautenberg and Philip Shea.