

## NEWS & INSIGHTS

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### IS THE CLASS ASCERTAINABLE?

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In addition to Rule 23's express requirements for class certification, courts routinely recognize the implicit requirement of class ascertainability. A class is considered ascertainable when it is objectively defined. In addition to this baseline requirement, however, some courts also require a showing that identifying the class members would be administratively feasible.

The Third Circuit first adopted this heightened standard in *Carrera v. Bayer Corporation*. *Carrera* spurred a circuit split. Four circuits have adopted the heightened standard, requiring both an objective definition and administrative feasibility. See *Carrera v. Bayer Corp.*, 727 F.3d 300, 307-08 (3d Cir. 2013); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015); *Karhu v. Vital Pharms, Inc.*, 621 Fed. Appx. 945, 947 (11th Cir. 2015); *EQT Production Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014).

Other circuits have rejected the heightened requirement. See *In re Petrobas Sec.*, 862 F.3d 250, 265 (2d Cir. 2017) (finding that adding separate requirement for class ascertainability would "upset the careful balance of competing interests codified in the explicit requirements for Rule 23"); *Rikos v. Proctor & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015); *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 657 (7th Cir. 2015); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1127 (9th Cir. 2017); *Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.*, 821 F.3d 992, 996 (8th Cir. 2016).

The heightened requirement imposed in some circuits leads to the question of what will suffice as proof of an ascertainable class, especially in low-cost product consumer class actions. For example, in *Carrera*, the court rejected the use of affidavits to prove membership in a class because they could be falsified. *Carrera*, 727 F.3d at 308. Other courts have found such methods acceptable. See *Mullins*, 795 F.3d at 673 ("Courts should not decline certification merely because the plaintiff's proposed method for identifying class members relies on affidavits.").

Despite this split in the circuits, the Supreme Court thus far has denied certiorari in cases raising the question.