Volume 59 | Issue 5 Article 2

11-1-2014

Class is in Session: The Third Circuit Heightens Ascertainability with Rigor in Carrera v. Bayer Corp.

Stephanie Haas

CLASS IS IN SESSION: THE THIRD CIRCUIT HEIGHTENS ASCERTAINABILITY WITH RIGOR IN *CARRERA v. BAYER CORP.*

STEPHANIE HAAS*

"If *Carrera* is any indication of things to come, the viability of consumer class actions is in question."[1]

I. INTRODUCTION

At any given time, millions of Americans are trying to lose weight.[2] Many, like Gabriel Carrera, seek help from over-the-counter products, such as diet pills.[3] The diet industry is a massive financial market, and pharmaceutical companies are constantly striving to seize a slice of the pie.[4] In 2002, Bayer Corporation (Bayer) began distributing One-A-Day WeightSmart (WeightSmart), a product marketed as a vitamin to boost metabolism and help support weight loss.[5] However, the benefits of

* J.D. Candidate, 2015, Villanova University School of Law. This Casebrief is dedicated to the memory of my grandmother, Barbara Eisenhofer, who taught me I could achieve anything with hard work and perseverance. I would like to thank my family and friends, especially Edward and Wendi Haas for their unwavering encouragement throughout my academic career, Jay Eisenhofer for inspiring my legal education, and Mike Cottone for his constant support. Lastly, I would like to thank the editors of the *Villanova Law Review* for their helpful guidance during the writing and editing process.

1. Erin Rhinehart, *Third Circuit Gives Ascertainability Argument Teeth*, FARUKI IRELAND & COX P.L.L. (Aug. 22, 2013, 3:50 PM), http://businesslitigationinfo.com/business–litigation/archives/1450/ (describing *Carrera* as "momentous victory" for class action defendants).

2. *See* Nanci Hellmich, *Americans Fighting Fat, but Odds Stacked Against Them*, USA TODAY (Nov. 5, 2012, 8:29 PM), http://www.usatoday.com/story/news/nation/2012/11/05/americans-obesity-rate/1684507/ (reporting 55% percent of Americans state they are trying to lose weight).

3. *See* Carrera v. Bayer Corp., 727 F.3d 300, 304 (3d Cir. 2013) (summarizing factual background); JAIME GAHCHE ET AL., DIETARY SUPPLEMENT USE AMONG U.S. ADULTS HAS INCREASED SINCE NHANES III (1988–1994), CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR HEALTH STATISTICS 5 (2011), *available at* http://www.cdc.gov/nchs/data/databriefs/db61.pdf (finding over 40% of adults took dietary supplements during 1988–1994 and over 50% during 2003–2006).

4. *See* Sarah Boseley, *A Safe, Effective Diet Pill—The Elusive Holy Grail*, THE GUARDIAN (Jan. 14, 2014, 2:17 PM), http://www.theguardian.com/lifeandstyle/2014/jan/14/safe-effective-diet-pill-elusive-holy-grail (stating successful diet pill could earn pharmaceutical company billions); Jessica Rao, *It's the Year of the Value Diet*, CNBC (June 18, 2010, 3:13 PM), http://www.cnbc.com/id/37492840 (chronicling growth of pharmaceutical diet pill industry to $59.7 billion).

5. *See* Press Release, Fed. Trade Comm'n, Federal Trade Commission Reaches New Years Resolutions with Four Major Weight-Control Pill Marketers (Jan. 4, 2007) [hereinafter FTC Press Release], *available at* http://www.ftc.gov/news-

WeightSmart were ultimately deemed unsupported by scientific evidence, and, in 2007, the Federal Trade Commission filed suit against Bayer for deceptive trade practices.[6] After Bayer paid a $3.2 million civil penalty to settle allegations of deceptive advertising, Carrera considered his own options.[7] Carrera wanted his money back.[8]

As a solo plaintiff, Carrera would have had to expend a considerable amount of time and expense to litigate his case against Bayer.[9] To overcome this obstacle, the Federal Rules of Civil Procedure provide the class action mechanism, by which plaintiffs with similar grievances may join together in prosecution of their claims.[10] Carrera believed other consumers who had purchased WeightSmart with the same false hope should share in his recovery and, accordingly, sought class certification, a necessary prerequisite to bring a class action.[11]

Because so few class actions go to trial, the "real battle" in class action litigation takes place during the certification stage.[12] Plaintiffs view the denial of class certification as the "death knell" for their claims because of the impracticability of individual suits.[13] Alternatively, courts and com-

events/press-releases/2007/01/federal-trade-commission-reaches-new-years-resolutions-four-major (detailing Bayer's unsubstantiated marketing claims).

6. *See id.* (noting imposition of civil penalty for deceptive advertising).

7. *See* Carrera v. Bayer Corp., No. 08-4716 (JLL), 2011 WL 5878376, at *6 (D.N.J. Nov. 22, 2011) (stating Carrera's suit was based on same conduct giving rise to successful FTC prosecution), *rev'd*, 727 F.3d 300 (3d Cir. 2013).

8. *See Carrera*, 727 F.3d at 304 (providing WeightSmart was sold for $8.99).

9. *See generally* Samuel Issacharoff, *Assembling Class Actions*, 90 WASH. U. L. REV. 699, 710 (2013) (describing individual plaintiffs as "incapacitated" to litigate small claims); Stacey M. Lantagne, *A Matter of National Importance: The Persistent Inefficiency of Deceptive Advertising Class Actions*, 8 J. BUS. & TECH. L. 117, 123 (2013) (explaining class actions "promote the litigation of injustices that might not be worthwhile otherwise").

10. *See generally* FED. R. CIV. P. 23 (providing procedure and requirements for class actions).

11. *See Carrera*, 727 F.3d at 304 (describing Carrera's initial intention to bring nationwide class action representing all WeightSmart purchasers).

12. *See* Andrew J. Trask, Wal-Mart v. Dukes*: Class Actions and Legal Strategy*, 2011 CATO SUP. CT. REV. 319, 322 (2011) (describing class action litigation as high-stakes game encouraging plaintiffs to use creative strategies to obtain certification); *see also* Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 325 (2011) (describing class certification as "preeminently important"). The Rule 23 drafters recognized the crucial nature of class certification in amending Rule 23 to allow interlocutory appeal of certification decisions. *See* FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment (expressing concern about deferring certification appeal until plaintiffs have proceeded through expensive trial and encouraging defendants to settle rather than risk "potentially ruinous liability" after court grants certification).

13. *See Death Knell and Injunction Exceptions*, 92 HARV. L. REV. 232, 233 (1978) (explaining death knell doctrine allowed interlocutory appeal of class certification denial where solo plaintiffs "may find it economically imprudent to pursue [their] lawsuit to a final judgment and then seek appellate review of an adverse class determination" (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469–70 (1978))

mentators have recognized that approving class certification may coerce defendants to settle.[14] Considering these conflicting consequences of class certification, courts undertook the task of determining the appropriate scrutiny with which to interpret class certification requirements.[15] In doing so, courts have set the stage for heightened certification requirements that risk precluding plaintiffs like Carrera from employing the class action mechanism.[16]

This Casebrief discusses the declining practicability of consumer class actions in light of the Third Circuit's recent interpretation of the ascertainability requirement in *Carrera v. Bayer Corp.*[17] Part II outlines the policies underpinning the advent of the class action mechanism.[18] Further, Part II summarizes the legal standards courts apply to determine whether to certify a class.[19] Finally, Part II traces the development of a discrete and implicit certification requirement—ascertainability.[20] Part III examines the Third Circuit's opinion in *Carrera* and analyzes the

(internal quotation marks omitted)). *See generally* Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 92 (1975) (chronicling circuit court treatment of death knell doctrine). Although the Supreme Court rejected the death knell doctrine as an improper ground for appellate jurisdiction, Rule 23(f) now provides for immediate interlocutory appeal of certification decisions. *See Coopers & Lybrand*, 437 U.S. at 476 (explaining death knell doctrine conflicts with exclusive statutory grant of appellate jurisdiction over final orders); *see also* FED. R. CIV. P. 23(f) (authorizing interlocutory appeal for orders granting or denying certification).

14. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (emphasizing need to balance coercive pressure on defendants to settle with benefits of class actions); Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1429–30 (2003) (recognizing "excessive pressure" after class certification "resulting in decisions to settle made under duress"). *But see In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 145 (2d Cir. 2001) (acknowledging plaintiffs' increased settlement leverage after certification is "fact of life" for defendants that cannot preclude "otherwise proper certification").

15. *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 736–37 (2013) (chronicling inconsistent court decisions granting or denying class certification).

16. *See* Arthur R. Miller, *Simplified Pleadings, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 314–15 & n.107 (2013) (stating courts have heightened class certification requirements with effect of establishing "stop signs" for plaintiffs' cases). *See generally* Klonoff, *supra* note 15, at 729–30 (summarizing "several disturbing trends" that "curtail . . . the ability of plaintiffs to obtain class treatment," including heightened proof necessary to establish certification requirements).

17. 727 F.3d 300 (3d Cir. 2013). For an analysis of *Carrera*'s effect on consumer class actions, see *infra* notes 125–63 and accompanying text.

18. For a discussion of the policies and procedures governing the class action mechanism, see *infra* notes 24–43 and accompanying text.

19. For a discussion of how courts determine whether plaintiffs have satisfied class action requirements, see *infra* notes 44–70 and accompanying text.

20. For a discussion of the development of the ascertainability requirement, see *infra* notes 71–86 and accompanying text.

court's reasoning.[21] Part IV discusses *Carrera*'s implications for practitioners seeking or challenging class certification.[22] Part V concludes by assessing *Carrera*'s overall impact on consumer class actions within the Third Circuit.[23]

II. PREPARING FOR CLASS: THE MOTION FOR CLASS CERTIFICATION

Rule 23 of the Federal Rules of Civil Procedure governs the process for class actions and sets forth the requirements for class certification.[24] The class action mechanism was primarily established to allow plaintiffs to aggregate their claims and seek mass justice in cases where their individual claims would be too small to litigate independently.[25] Class actions have served the vital roles of deterring mass misconduct, compensating wronged parties no matter how small their claim may be, and promoting efficient resolution of similar claims.[26] Further, the Supreme Court articulated the crucial role of class actions: "The policy at the very core of the class action mechanism is 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."[27] To ensure appropriate use of the class action mechanism, the explicit Rule 23 requirements limit the applicabil-

21. For an examination of the Third Circuit's holding and reasoning in *Carrera*, see *infra* notes 87–124 and accompanying text.

22. For a discussion of *Carrera*'s impact on Third Circuit practitioners, see *infra* notes 125–56 and accompanying text.

23. For a discussion of the diminished viability of consumer class actions following *Carrera*, see *infra* notes 157–63 and accompanying text.

24. *See* FED. R. CIV. P. 23 (detailing requirements for class certification and other procedures including appeals, settlement, appointing counsel, and conducting the action). For a discussion of the class certification requirements, see *infra* notes 33–43 and accompanying text.

25. *See* Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 305 (2010) ("[S]mall claims of a dispersed group of consumers injured by a broad range of marketplace abuses were undoubtedly in the minds of the drafters . . . ."); Klonoff, *supra* note 15, at 731 (asserting class action mechanism was "once considered a 'revolutionary' vehicle for achieving mass justice" (citing Owen W. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 25 (1996))); Miller, *supra* note 16, at 315 (arguing 1966 revision to Rule 23 was intended to increase value of class action as procedural device, particularly in context of low-value financial claims such as civil rights and consumer actions).

26. *See* Klonoff, *supra* note 15, at 735 (identifying compensation, deterrence, and efficiency as main functions of class action device); Miller, *supra* note 16, at 316 (explaining class actions overcome inefficiencies small-claims plaintiffs often encounter when seeking recovery through governmental and administrative agencies).

27. 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)) (internal quotation marks omitted) (explaining class actions solve problem "by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor").

ity of class actions to cases that further the mechanism's policy goals.[28] Yet, courts have also developed an implicit Rule 23 requirement that threatens to undermine these goals.[29]

A. *The ABCs of Class Certification Under Rule 23*

Because class certification is typically the defining moment of class actions, Rule 23 sets forth certification requirements intended to filter out improper uses of the class action device.[30] These requirements include numerosity, commonality, typicality, adequacy, adherence to another prerequisite depending on the type of relief sought, and an adequate class definition.[31] In determining whether the proposed class meets these requirements, courts have applied varying degrees of scrutiny.[32]

1. *The Six Classroom Rules*

Lead plaintiffs must affirmatively establish that the proposed class complies with the requirements of Rule 23 to obtain certification.[33] The proposed class must meet four threshold requirements.[34] First, the class must be "so numerous that joinder of all members is impracticable" (numerosity).[35] Second, there must be "questions of law or fact common to the class" (commonality).[36] Third, "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class" (typicality).[37] Fourth, the named parties must "fairly and adequately protect the interests of the class" (adequacy).[38]

In addition to these threshold requirements, the proposed class must satisfy one of three additional prerequisites.[39] First, the plaintiffs may show that actions by individual class members could result in inconsistent

28. For a discussion of the Rule 23 requirements and corresponding court interpretations, see *infra* notes 30–70 and accompanying text.

29. For a discussion of the development of the implicit ascertainability requirement, see *infra* notes 71–86 and accompanying text.

30. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) ("The Rule's four [certification] requirements . . . effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982)) (internal quotation marks omitted)).

31. For a discussion of the explicit requirements established by Rule 23, see *infra* notes 33–43 and accompanying text.

32. For an examination of courts' inconsistent analyses of Rule 23 requirements, see *infra* notes 44–70 and accompanying text.

33. *See Dukes*, 131 S. Ct. at 2550–51 (explaining affirmative showing means plaintiffs must have sufficient factual support to establish each Rule 23 requirement).

34. *See* FED. R. CIV. P. 23(a) (establishing prerequisites to class certification).

35. FED. R. CIV. P. 23(a)(1) (establishing numerosity requirement).

36. FED. R. CIV. P. 23(a)(2) (establishing commonality requirement).

37. FED. R. CIV. P. 23(a)(3) (establishing typicality requirement).

38. FED. R. CIV. P. 23(a)(4) (establishing adequacy requirement).

39. *See* FED. R. CIV. P. 23(b) (categorizing class actions based on type of relief sought and effect of action on similar actions).

holdings "that would establish incompatible standards of conduct" for the defendant or adjudications relating to "individual class members . . . would be dispositive of the interests" of other class members.[40] Second, the plaintiffs may establish that injunctive relief is an appropriate remedy for the entire class based on the defendant's alleged conduct.[41] The third prerequisite governs classes seeking monetary relief and imposes two additional requirements on the proposed class—plaintiffs must show that "questions of law or fact common to class members predominate over any questions affecting only individual members" (predominance) and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" (superiority).[42] Finally, class certification requires a proper class definition that "define[s] the class and the class claims, issues, or defenses."[43]

---

40. FED. R. CIV. P. 23(b)(1)(A)–(B) (authorizing class certification if trying similar cases individually could lead to inconsistent holdings affecting plaintiffs and defendants); *see also* Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1108 nn.50–51 (2013) (explaining Rule 23(b)(1)(B) is more lenient than other Rule 23(b) categories).

41. *See* FED. R. CIV. P. 23(b)(2) (governing class actions involving injunctive relief). Plaintiffs often argue for certification as a "hybrid" class under Rule 23(b)(2) and 23(b)(3), because the (b)(3) requirements are more difficult to satisfy. *See, e.g.*, Cooper v. S. Co., 390 F.3d 695, 703 (11th Cir. 2004) (explaining plaintiff's attempt to obtain certification under Rule 23(b)(2) by omitting that damages diminished adequacy of plaintiff's representation of class); *see also* Trask, *supra* note 12, at 326 (providing hybrid classes as example of creative certification strategy employed to avoid challenges of meeting Rule 23(b)(3) requirements). Rule 23(b)(2), however, was not intended as a workaround for classes properly categorized under Rule 23(b)(3); rather, the drafters of Rule 23(b)(2) intended to create an easier path to injunctive relief for civil rights plaintiffs. *See* FED. R. CIV. P. 23(b)(2) advisory committee's note to 1966 amendment (stating civil rights actions "where a party is charged with discriminating unlawfully against a class" illustrate purpose of Rule 23(b)(2)); Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 603 (2012) (explaining intent of Rule 23(b)(2) to mitigate difficulties individual civil rights plaintiffs encountered before being able to aggregate claims (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954), which was tried with individual plaintiff rather than class of affected plaintiffs)). Although plaintiffs may still attempt to obtain class certification using both Rule 23(b)(2) and (b)(3) under certain circumstances, plaintiffs seeking individualized monetary damages are now foreclosed from invoking Rule 23(b)(2). *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2560 (2011) (holding claims for monetary relief that are not incidental to injunctive relief may not be certified under Rule 23(b)(2)).

42. *See* FED. R. CIV. P. 23(b)(3) (listing four factors relevant to predominance and superiority requirements). Most class actions are brought under this subsection. *See* Klonoff, *supra* note 15, at 792 (discussing heightened scrutiny of Rule 23(b)(3) requirements).

43. *See* FED. R. CIV. P. 23(c)(1)(B) (providing requirements for certification order). The class definition requirement, not initially included in Rule 23, was added in 2003. *See* Klonoff, *supra* note 15, at 761 (discussing evolution of class definition requirement, beginning as case law requirement on which few cases turned).

2. *Checking Your Homework: Compliance with Rule 23*

Despite, or perhaps because of, plaintiffs' frequent reliance on the class action mechanism across a broad spectrum of cases, courts have gradually heightened the scrutiny with which they assess Rule 23 compliance, thereby creating barriers to class certification.[44] The level of scrutiny courts apply depends on whether district courts should consider the merits during the class certification stage.[45] After the Supreme Court failed to define the proper scope of merits inquiries at the certification stage, circuit courts shaped certification jurisprudence in accordance with their own policy objectives.[46] The Supreme Court eventually clarified the appropriate level of scrutiny, which both endorsed and heightened the scrutiny lower courts had applied.[47]

a. The Supreme Court Delivers Dueling Standards

The Supreme Court articulated conflicting views on the appropriate level of scrutiny to assess Rule 23 compliance.[48] The Supreme Court's reasoning in *Eisen v. Carlisle & Jacqueline*[49] first shaped the requisite certification analysis.[50] In rejecting the district court's consideration of the merits to determine whether the plaintiff was likely to prevail, the Court

44. *See* Klonoff, *supra* note 15, at 737 (acknowledging numerous multi-billion dollar settlements in 1980s and 1990s led to heightening certification requirements); Miller, *supra* note 16, at 316–17 (discussing use of Rule 23 in "ever-widening range of substantive contexts"—such as antitrust, securities litigation, civil rights, and consumer actions—as precursor to courts' eventual tightening of certification requirements to contain use of class action).

45. *See* John M. Husband & Bradford J. Williams, Wal-Mart v. Dukes *Redux: The Future of the Sprawling Class Action*, 40 COLO. LAW. 53, 54–55 (Sept. 2011) (distinguishing between pleading ability to satisfy certification requirements and actually resolving merits disputes stemming from certification requirements); J. Britton Whitbeck, *Identity Crisis: Class Certification, Aggregate Proof, and How Rule 23 May be Self-Defeating the Policy for Which it Was Established*, 32 PACE L. REV. 488, 490–91 (2012) (explaining courts struggled to determine whether Rule 23 requirements were met, "especially given that some factors included a preliminary review of evidence").

46. For an examination of the Supreme Court's initially inconsistent holdings, see *infra* notes 48–54 and accompanying text. For a discussion of the circuit courts' inconsistent approaches to determining Rule 23 compliance, see *infra* notes 55–62 and accompanying text.

47. For a discussion of the Supreme Court's decision resolving the inconsistencies plaguing the lower courts, see *infra* notes 63–70 and accompanying text.

48. *See* Klonoff, *supra* note 15, at 748 (describing two opinions on class certification "point[ing] in . . . different direction[s]"); Husband & Williams, *supra* note 45, at 54 (explaining Supreme Court jurisprudence had been "torn between" opposing standards prior to 2011).

49. 417 U.S. 156 (1974).

50. *See id.* at 177 (interpreting history of Rule 23); *see also* Steig D. Olson, *"Chipping Away": The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935, 943–44 (2009) (suggesting *Eisen* disconnected all merits inquiries from certification decision despite narrow facts of case). *But see* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552 n.6 (dedicating footnote to dismissing prior misunderstanding of *Eisen* as prohibition on all merits

explained "nothing in either the language or history of Rule 23" authorized preliminary merits inquiries "to determine whether it may be maintained as a class action."[51] Eight years later, without addressing *Eisen*, the Supreme Court subsequently announced a conflicting and more demanding approach to assess compliance with Rule 23 in *General Telephone Co. of Southwest v. Falcon*.[52] The Court stated the certification process "generally involves considerations that are enmeshed in the [plaintiff's] factual and legal issues . . . ."[53] Thus, the Court reversed class certification, holding that trial courts must conduct a rigorous analysis and "probe behind the pleadings" to ensure plaintiffs comply with Rule 23 before certifying a class.[54]

b. Circuit Courts Reconcile *Eisen* and *Falcon*

Lower courts have struggled to reconcile the contradiction between *Falcon*'s rigorous analysis and *Eisen*'s instructions to ignore the merits during class certification.[55] Most courts initially relied on *Eisen* to support the premise that merits inquiries were prohibited during class certification and dodged the rigorous analysis standard.[56] Circuits generally applied a

inquiries). For a pre-*Dukes* discussion of *Eisen*, see Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 HOFSTRA L. REV. 51 (2004).

51. *See Eisen*, 417 U.S. at 177 (holding Rule 23 does not permit courts to consider whether plaintiff is likely to prevail on merits in order to shift class notice costs to defendant).

52. 457 U.S. 147 (1982).

53. *Id.* at 160 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978)) (internal quotation marks omitted) (noting wide gap between individual's discriminatory claim and actually proving entire class was affected by same injury).

54. *See id.* at 160–61 (signaling shift to more exacting scrutiny of Rule 23 requirements after expressing concern defendants will be unable to defend against suit without sufficient factual information).

55. *See* Klonoff, *supra* note 15, at 748–49 (describing evolving circuit court approaches to *Eisen/Falcon* conflict); Marcus, *supra* note 12, at 326 (describing federal judges' reluctance to consider merits based on *Eisen* despite importance of class certification); Miller, *supra* note 16, at 314 & n.107 (discussing diverging viewpoints regarding consideration of merits during class certification stage and arguing "judicial scrutiny of class certification requests has expanded dramatically"); Whitbeck, *supra* note 45, at 493 (summarizing varying circuit court interpretations of *Eisen* and *Falcon*).

56. *See, e.g.*, Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291 (2d Cir. 1999) ("[A] motion for class certification is not an occasion for examination of the merits of the case."), *overruled by In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006); *see also* Marcus, *supra* note 12, at 350 (explaining *Eisen* was regularly cited to support position against considering merits to decide class certification). A minority of circuit courts, however, raised concerns with *Eisen* and integrated language from *Falcon* to heighten class certification scrutiny. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996) (stating "[a] district court certainly may look past the pleadings to determine whether the requirements of [R]ule 23 have been met" and reversing certification based on lower court's misinterpretation of *Eisen*); *see also* Whitbeck, *supra* note 45, at 493, 505–06 (explaining minority holdings created circuit court split and placed "much greater hurdle" on plaintiffs during class certification stage).

lenient standard that only required plaintiffs to sufficiently show the certification requirements were met, which can be attributed to the policy concerns courts expressed during that time.[57] For example, the Third Circuit reasoned the "interests of justice" mandate that uncertain cases be decided in favor of certification.[58]

The Seventh Circuit brought an end to this plaintiff-friendly standard by attributing a refusal to consider the merits when deciding certification to a misreading of *Eisen*.[59] Thereafter, most courts, including the Third Circuit, fully embraced *Falcon*'s rigorous analysis standard and relied on both policy concerns and amendments to Rule 23 to justify this interpretive shift.[60] Although the Third Circuit previously weighed policy con-

57. *See Caridad*, 191 F.3d at 292 (explaining "class certification would not be warranted absent some showing" that plaintiff met Rule 23 requirements); Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986) (expressing need to "rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters"); Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975) (stating extensive evidentiary showing not required during certification stage, requiring instead only "sufficient" showing); Kahan v. Rosenstiel, 424 F.2d 161, 168 (3d Cir. 1970) (finding alleged facts in plaintiff's complaint sufficient to illustrate compliance with Rule 23).

58. *See Kahan*, 424 F.2d at 169 (explaining effectiveness of securities laws hinges upon use of class action device). Despite the Third Circuit's prior friendliness toward certifying doubtful classes in the context of securities laws, the national tide in this area has shifted against plaintiffs. *See* RENZO COMOLLI & SVETLANA STARYKH, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2013 FULL-YEAR REVIEW, NERA ECON. CONSULTING 19 (2014), *available at* http://www.nera.com/67_8394.htm (explaining recent Supreme Court decisions are likely to decrease certification in securities class actions). The Third Circuit has similarly upheld class certification despite noting serious concerns with the class's ability to satisfy Rule 23 in an asbestos case. *See In re* Sch. Asbestos Litig., 789 F.2d 996, 1011 (3d Cir. 1986) (certifying class after recognizing "manageability is a serious concern" and "likelihood that" commonality requirement will not be met).

59. *See* Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 677 (7th Cir. 2001) (finding plaintiff's allegations should not be accepted as true during certification stage); *see also In re Initial Pub. Offerings*, 471 F.3d at 34 (explaining *Eisen*'s statement cautioning against merits inquiries "has sometimes been taken out of context and applied in cases where a merits inquiry either concerns a Rule 23 requirement or overlaps with such a requirement").

60. *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 321 (3d Cir. 2008) (analyzing policy concerns underlying class actions); *In re Initial Pub. Offerings*, 471 F.3d at 39–40 (discussing significance of amendments to Rule 23 and explaining lower court's "some showing" standard did not comply with rigorous analysis requirement); Whitbeck, *supra* note 45, at 493–94 (collecting cases accepting *Falcon*'s rigorous analysis). The Third Circuit in *In re Hydrogen Peroxide* highlighted two Rule 23 amendments justifying its transition to a more stringent certification standard. *See In re Hydrogen Peroxide*, 552 F.3d at 318 ("Support for our analysis is drawn from amendments to Rule 23 that took effect in 2003.").

First, the 2003 amendment changed the suggested timing for class certification; instead of recommending the certification decision be made "as soon as practicable after commencement of an action," the amended rule states the decision should be made "at an early practicable time after a person sues or is sued as a class representative." *See* FED. R. CIV. P. 23(c)(1)(A) advisory committee's note (explaining proper certification decision requires discovery and time); *In re Hydrogen Peroxide*, 552 F.3d at 318 (citing Weiss v. Regal Collections, 385 F.3d 337, 347 (3d

cerns in favor of certification, the court changed its focus to protecting defendants from the coercive effect of certification.[61] Thus, most courts abandoned the plaintiff-friendly standard in favor of a stringent, rigorous analysis, awaiting Supreme Court review to resolve these inconsistencies.[62]

c. The Supreme Court Speaks Again

The Supreme Court revisited the scrutiny issue in *Wal-Mart Stores, Inc. v. Dukes*[63] and approved probing merits inquiries that significantly burden plaintiffs seeking class certification.[64] Resolving the circuit courts' fluctuating jurisprudence, the Court dismissed *Eisen*'s prohibition on merits inquiries as the "purest dictum."[65] After adopting *Falcon*'s rigorous analysis as the proper standard to determine certification, the Court clarified that

Cir. 2004)) (stating amended language "reflects the need for a thorough evaluation of the Rule 23 factors").

Second, the 2003 amendments removed the language allowing courts to certify classes on a conditional basis. *See* FED. R. CIV. P. 23(c)(1)(C) advisory committee's note ("A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met."); *In re Hydrogen Peroxide*, 552 F.3d at 321 (explaining Rule 23 can no longer be understood to encourage certification in doubtful cases, in contrast to Third Circuit's previous holdings). Thus, the Third Circuit concluded that these changes require a more careful consideration of the evidence before deciding certification. *See id.* at 320 ("[A] district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the [certification] requirements.").

61. *See In re Hydrogen Peroxide*, 552 F.3d at 310 (recognizing "unwarranted settlement pressure" as factor to consider when deciding certification (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 168 n.8 (3d Cir. 2001))).

62. *See* Whitbeck, *supra* note 45, at 499–500 (explaining inconsistencies regarding requisite level of proof remained even after most circuits followed *Szabo*).

63. 131 S. Ct. 2541 (2011).

64. *See* Husband & Williams, *supra* note 45, at 54–55 (arguing *Dukes* "completes an evolution toward a more searching class certification inquiry"); Trask, *supra* note 12, at 348 (asserting *Dukes* Court's language forces, as opposed to permits, district courts to conduct probing rigorous analyses); Suzette Malveaux et al., *A Death Blow to Class Action?*, N.Y. TIMES (June 21, 2011, 12:21 PM), http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action/money-matters (presenting various practitioners' and scholars' reactions to *Dukes*, with most expressing concern that claimant animus encouraged stricter holding than necessary).

65. *See Dukes*, 131 S. Ct. at 2552 n.6 (explaining statement from *Eisen* "is sometimes mistakenly cited to the contrary"); *see also* Miller, *supra* note 50, at 65 (positing that before *Dukes*, preliminary merits inquiries to determine class certification were not necessarily inconsistent with *Eisen*). Before the Supreme Court decided *Dukes*, scholars questioned whether *Eisen*'s narrow issue could give rise to a broad prohibition on merits inquiries in deciding the certification question. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1252, 1276 (2002) (asserting merits should be considered during class certification decision because "liberal" *Eisen* standard risks "erroneous certification grants that cannot be corrected"); Bartlett H. McGuire, *The Death Knell for* Eisen: *Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366, 375, 377–78, 380–81 (1996) (arguing *Eisen* dictum precluding merits inquiries was misinterpretation of Rule 23 and chronicling courts' eventual disregard of *Eisen*).

plaintiffs must show "there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."[66]

Equipped with these standards, the Court heightened the proof necessary to establish commonality, crafting a new analysis that could preclude certification.[67] Lower courts continued the trend toward evaluating evidence at the certification stage with magnified scrutiny.[68] Like commonality, numerosity "rarely posed a roadblock to class certification;" however, courts have relied on *Dukes* to justify increasing the evidence necessary to satisfy this requirement as well.[69] Taken together, these changes indicate that plaintiffs face greater hurdles in certifying their proposed classes, which is partially inconsistent with the impetus to the class action device—providing small-claims plaintiffs with an efficient avenue for recovery.[70]

---

66. *See Dukes*, 131 S. Ct. at 2551 ("Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982))).

67. *See id.* at 2550–51 (stating "[t]he crux of this case is commonality" before asserting "[t]hat language is easy to misread, since [a]ny competently crafted class complaint literally raises common questions" (third alteration in original) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131–32 (2009)) (internal quotation marks omitted)). *See generally* A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 450 (2013) (chronicling antecedents and evolution of Rule 23 commonality requirement; arguing "the *Dukes* majority attempts to resurrect concepts that . . . have been long abandoned"). Before *Dukes*, commonality was considered an easily met requirement. *See* Klonoff, *supra* note 15, at 773 (explaining commonality "was rarely an impediment to class certification" before *Dukes*); Spencer, *supra* note 67, at 443–45, 463 (describing commonality as "easy to satisfy" with "minimal" necessary showing of evidence prior to *Dukes* and suggesting "[n]othing in the language or history of Rule 23(a)(2) supports the *Dukes* majority's interpretation").

68. *See, e.g.*, Kottaras v. Whole Foods Mkt., Inc., 281 F.R.D. 16, 22 (D.D.C. 2012) (explaining D.C. Circuit's previously "low hurdle" required to show compliance with Rule 23 was no longer an accepted method following *Dukes*); *see also* M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832, 838 (5th Cir. 2012) (vacating class certification order after finding district court failed to conduct rigorous analysis of commonality required by *Dukes*).

69. *See* Klonoff, *supra* note 15, at 768–69 (chronicling harsher treatment of numerosity requirement in wake of *Dukes* decision and noting defendants previously stipulated to this requirement); *see, e.g.*, Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 588, 595–96 (3d Cir. 2012) (finding plaintiffs did not satisfy numerosity despite showing half million customers purchased allegedly defective product because number of these customers within geographically defined class was "mere speculation").

70. *See* Recent Case, *Civil Procedure—Class Actions—Fifth Circuit Holds That District Court Failed to Conduct Rigorous Class Certification Analysis in Light of* Wal-Mart Stores, Inc. v. Dukes.—M.D. *ex rel.* Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012)*, 126 HARV. L. REV. 1130, 1134 (2013) [hereinafter *Rigorous Class Certification*] ("[T]he Court rendered it more expensive and difficult for a class to be certified, decreasing the viability of the class action as a vehicle for structural change."); *see also* Klonoff, *supra* note 15, at 745–46 (concluding areas in which federal courts have applied rigorous analysis make it more difficult for plaintiffs to bring viable class actions); Miller, *supra* note 16, at 321–22 (concluding development of strin-

B. *The New Kid in Class: The Implicit Ascertainability Requirement*

Independent from the development of the rigorous analysis standard, courts and commentators established another barrier to class certification—the doctrine of ascertainability.[71] Rule 23 makes no mention of ascertainability, yet courts have described the requirement as "[going] to the heart of the question of class certification . . . ."[72] Nonetheless, the requirement is seldom discussed by scholars and often overlooked by practitioners.[73]

1. *Pop Quiz: Defining Ascertainability*

Because ascertainability is not a statutory requirement, courts have not consistently defined the concept.[74] Commentators list three key factors to establish an ascertainable class: (1) including members who can be identified using objective criteria; (2) capturing all members necessary to resolve the action in a single proceeding; and (3) describing the main claims and defenses that apply to the class.[75] Furnished only with this mal-

gent certification requirements "undermin[es] the utility of one of today's most basic and important joinder mechanisms . . . for handling relatively modest claims").

71. *See, e.g.*, Alliance to End Repression v. Rochford, 565 F.2d 975, 977 (7th Cir. 1977) (recognizing lack of explicit language in Rule 23 regarding ascertainability but explaining "many courts have held that there is a 'definiteness' requirement implied in Rule 23(a)"); *see also* Jason Steed, *On "Ascertainability" as a Bar to Class Certification*, 23 APP. ADVOC. 626, 626 (2011) (explaining most courts have acknowledged implicit ascertainability requirement).

72. *See* Sevidal v. Target Corp., 117 Cal. Rptr. 3d 66, 77 (Ct. App. 2010) (quoting Global Minerals & Metals Corp. v. Superior Court, 7 Cal. Rptr. 3d 28, 47 (Ct. App. 2003)) (internal quotation marks omitted) (explaining ascertainability requires precise and objective class definition); JOHN H. BEISNER, JESSICA D. MILLER & JORDAN M. SCHWARTZ, CLASS ACTION LITIGATION—ASCERTAINABILITY: READING BETWEEN THE LINES OF RULE 23 6 (2011), *available at* http://www.skadden.com/sites/default/files/publications/Publications2371_0.pdf (highlighting importance of ascertainability in recent cases). For a discussion of courts' attempts to define ascertainability, see *infra* notes 74–78 and accompanying text.

73. *See* Gilles, *supra* note 25, at 329 (describing article as "first scholarly effort to examine the ascertainability doctrine"); Steed, *supra* note 71, at 626 (stating many litigators do not know courts have acknowledged ascertainability requirement). For a discussion of ascertainability's development as a requirement distinct from Rule 23 requirements, see *infra* notes 79–86 and accompanying text.

74. *See* FED. R. CIV. P. 23(c)(1)(B) (requiring class definition but making no mention of ascertainability). *Compare* Wachtel *ex rel.* Jesse v. Guardian Life Ins. Co. of Am., 453 F.3d 179, 187 (3d Cir. 2006) (requiring class definition be readily discernible in absence of clear statutory guidelines), *and* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.21[1] (3d ed. 1997) (alluding to ascertainability requirement by stating "class must be susceptible of precise definition"), *with* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.222 (2004) [hereinafter COMPLEX LITIGATION] (listing specific factors required to establish ascertainable class).

75. *See, e.g.*, COMPLEX LITIGATION, *supra* note 74, § 21.222 (warning of common pitfalls in defining ascertainable class, including defining class using subjective standards such as state of mind or legal conclusions).

leable definition, courts rarely focused their class certification inquiries on ascertainability and never denied certification based solely on an unascertainable class.[76] Rather, courts regularly helped plaintiffs revise their class definitions to satisfy the ascertainability requirement.[77] Thus, ascertainability continued to develop in uncertain terms and was typically referenced within other explicit Rule 23 requirements.[78]

2. *Ascertainability to the Front of the Class*

While a majority of circuit courts have now acknowledged the ascertainability requirement in some context, courts did not initially identify ascertainability as a separate certification requirement.[79] The Seventh Circuit first noted the importance of identifying class members, reasoning that courts must be able to both identify the scope of the class to determine whether a class action was the appropriate adjudicative device and ensure only the individuals actually harmed by the defendant's conduct received compensation.[80] Citing the Seventh Circuit's first concern, some courts evaluated ascertainability within Rule 23's explicit manageability requirement and explained the difficulty of identifying class members indicated the class action was unmanageable.[81] Based on the Seventh

76. *See* Klonoff, *supra* note 15, at 762 (acknowledging "few cases turned on the adequacy of the class definition" until 2000); Steed, *supra* note 71, at 628 (collecting cases recognizing ascertainability, but stating no case has denied certification based solely on unascertainability); 7A CHARLES ALAN WRIGHT ET AL., FED. PRACTICE AND PROCEDURE § 1760 (3d ed. 2011) ("If the general outlines of the membership of the class are determinable at the outset of the litigation, a class will be deemed to exist." (footnote omitted)).

77. *See, e.g.*, Messner v. Northshore Univ. Healthsystem, 669 F.3d 802, 825 (7th Cir. 2012) (asserting problems with class definition "can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis" (citing Campbell v. First Am. Title Ins. Co., 269 F.R.D. 68, 73–74 (D. Me. 2010) (aiding plaintiff in adjusting class definition rather than denying certification))).

78. *See* Gilles, *supra* note 25, at 310–11 (presenting various contexts in which ascertainability issues previously arose); Steed, *supra* note 71, at 627–28 (assessing whether ascertainability is another hurdle to certification based on variety of definitions and policies courts have addressed when determining ascertainability).

79. *See, e.g.*, Simer v. Rios, 661 F.2d 655, 670 (7th Cir. 1981) (couching discussion of ascertainability in terms of identification); *see also* Gilles, *supra* note 25, at 310–11 (introducing early approaches to ascertainability); Steed, *supra* note 71, at 627 (discussing early cases that analyzed then-unnamed ascertainability requirement).

80. *See Simer*, 661 F.2d at 670 (describing policies furthered by class member identification without articulating ascertainability requirement); *see also* DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970) (noting difficulties identifying class members).

81. *See, e.g.*, *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 214 F.R.D. 614, 616 (W.D. Wash. 2003) (explaining manageability "encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit" (quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 164 (1974)) (internal quotation marks omitted)); *see also* FED. R. CIV. P. 23(b)(3)(D) (asking courts to consider "likely difficulties in managing a class action" before

Circuit's second concern, other courts encompassed ascertainability within their discussion of predominance and superiority, focusing on the reduced utility of class actions where class members could not be easily identified.[82]

Despite this inconsistent precedent, courts eventually labeled their discussion of class member identification in terms of ascertainability.[83] Even after courts articulated a discrete ascertainability requirement, it remained unclear whether a lack of ascertainability was sufficient to deny class certification if the class satisfied all other certification requirements.[84] Although courts initially deemed an ascertainable class definition an easily met requirement, courts soon began evaluating ascertainability through a more exacting lens.[85] It was not until the Third Circuit denied class certification based solely on the ascertainability requirement that its potential ramifications for consumer class actions became clear.[86]

III. THE THIRD CIRCUIT'S LESSON IN *CARRERA V. BAYER CORP.*

In *Carrera*, the Third Circuit became the first circuit court to determine ascertainability using the rigorous analysis standard and deny class certification based solely on the plaintiff's failure to identify an ascertaina-

certifying a class); Carrera v. Bayer Corp., No. 08-4716 (JLL), 2011 WL 5878376, at *3 (D.N.J. Nov. 22, 2011) (couching ascertainability issues in terms of difficulties managing class action).

82. *See, e.g.*, Oshana v. Coca-Cola Co., 472 F.3d 506, 513 (7th Cir. 2006) (raising concerns that unidentifiable class undermines superiority of class action device); *see also* FED. R. CIV. P. 23(b)(3) (requiring courts find common issues of law and fact predominate over individual claims and class action is superior to other methods of adjudication).

83. *See In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 30, 44–45 (2d Cir. 2006) (noting that identifying class members would be significant undertaking and describing ascertainability as issue distinct from predominance); Holmes v. Pension Plan of Bethlehem Steel Corp., 213 F.3d 124, 136 (3d Cir. 2000) (identifying ascertainability as requirement separate from Rule 23).

84. *See, e.g.*, *In re Initial Pub. Offerings*, 471 F.3d at 45 (explaining problems ascertaining proposed class but denying certification on other grounds without deciding whether ascertainability provides independent basis for denying certification); *In re* PolyMedica Corp. Sec. Litig., 432 F.3d 1, 19 n.22 (1st Cir. 2005) (acknowledging ascertainability problems but denying certification on other grounds).

85. *See* Gilles, *supra* note 25, at 307–08 (suggesting "new barriers have arisen across a variety of contexts where formerly class certification had seemed automatic" (quoting John C. Coffee Jr. & Stefan Paulovic, *Class Certification: Developments over the Last Five Years 2002-2007*, 8 CLASS ACTION LITIG. REP. (BNA) S-787, at S-787 (Oct. 26, 2007)) (internal quotation marks omitted)); Steed, *supra* note 71, at 629–30 (highlighting types of class definitions courts have been reluctant to find satisfactory); BEISNER, MILLER & SCHWARTZ, *supra* note 72, at 6 (explaining increasing number of cases turning on ascertainability).

86. For an examination of the Third Circuit's reasoning in heightening the ascertainability requirement, see *infra* notes 101–24 and accompanying text.

ble class.[87] Although the district court accepted Carrera's proposed methods for ascertaining class members without addressing their likelihood of success, the Third Circuit found the methods lacking.[88] In so doing, the court demonstrated a marked shift against small-claims consumer class actions.[89]

A. *History Class: Factual and Procedural Background*

Gabriel Carrera suffered from diabetes and obesity and purchased Bayer's WeightSmart multivitamin in an attempt to lose weight.[90] Among its many promised health benefits, the WeightSmart packaging and advertisements promised to enhance users' metabolism with a green tea extract and boost weight loss.[91] After finding the company's claims were based on unsubstantiated scientific evidence, the Federal Trade Commission forced Bayer to cease its false advertising, thereby causing Bayer to terminate WeightSmart production.[92] Thereafter, Carrera filed suit against Bayer under Florida's Deceptive and Unfair Trade Practices Act to recover the small sum he expended on WeightSmart.[93] Carrera sought to include all customers who purchased WeightSmart in the state of Florida within the class definition.[94]

The district court began its analysis with the predominance requirement.[95] To challenge predominance, Bayer focused on the difficulties of

87. *Compare* Steed, *supra* note 71, at 628 (collecting cases acknowledging ascertainability requirement but noting no circuit court has used ascertainability as "independent basis for denying class certification"), *with* Carrera v. Bayer Corp., 727 F.3d 300, 312 (3d Cir. 2013) (denying certification when all other certification requirements were satisfied).

88. For a discussion of the district court's reasoning and holding in *Carrera*, see *infra* notes 90–100 and accompanying text. For an analysis of the Third Circuit's reasoning on appeal, see *infra* notes 101–24 and accompanying text.

89. For an examination of the policy concerns the Third Circuit expressed in *Carrera*, see *infra* notes 105–08 and accompanying text.

90. *See Carrera v. Bayer Corp.*, No. 08-4716 (JLL), 2011 WL 5878376, at *1, *8 (D.N.J. Nov. 22, 2011) (describing Carrera's health problems and motivations for purchasing WeightSmart).

91. *See id.* at *1 (detailing WeightSmart's promises).

92. *See id.* (noting Bayer stopped selling WeightSmart in January 2007); FTC Press Release, *supra* note 5, at 4–5 (summarizing Bayer's unsubstantiated claims which resulted in $3.2 million civil penalty from FTC and ban on product as advertised).

93. *See Carrera*, 2011 WL 5878376, at *1 ("Plaintiff characterizes this as a 'consumer protection case [arising] from the uniform deceptive marketing of WeightSmart . . . .'" (first alteration in original)); *see also* Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. § 501.201–501.213 (2013) [hereinafter FDUTPA] (making "deceptive, or unfair acts or practices in the conduct of any trade or commerce" unlawful "[t]o protect the consuming public").

94. *See Carrera*, 2011 WL 5878376, at *1 (explaining Carrera's motion for class certification based on nationwide class of consumers had been previously rejected).

95. *See id.* at *2 (restating legal standards to assess Rule 23 requirements and noting court began analysis with predominance and superiority because those re-

managing a class action that arose from an unascertainable class.[96] Specifically, Bayer asserted Carrera would be unable to identify class members due to a lack of physical evidence of their WeightSmart purchase in the form of product packaging or receipts.[97]

Although Carrera conceded identifying class members "[would] not be easy," the district court found the ascertainability hurdles were not insurmountable.[98] Thus, the district court concluded that Carrera satisfied the predominance requirement despite probable manageability complications with ascertainability.[99] Following its predominance analysis, the district court found Carrera's claim met the numerosity, commonality, typicality, and adequacy requirements and accordingly certified the proposed class.[100]

B. *The Third Circuit Takes Roll and Attempts to Ascertain*

On appeal to the Third Circuit, Bayer challenged only the class's ascertainability.[101] The court first addressed its recent holding in *Marcus v.*

quirements are more difficult to meet than numerosity, commonality, typicality, and adequacy (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008))).

96. *See id.* at *3 (citing FED. R. CIV. P. 23(b)(3)) (synopsizing defendant's arguments against ascertainability).

97. *See id.* ("In light of the fact that Bayer stopped selling WeightSmart in January of 2007, a potential class-member would have had to keep such a proof of purchase for many years."). The defendant argued "purchasers often forget details of minor purchases, such as vitamins." *Id.* (discussing defendant's argument).

98. *See id.* at *4 (presenting plaintiff's proposed method to ascertain class members using records from store loyalty cards and online purchases). The district court relied on an Eleventh Circuit case for the proposition that the manageability of a proposed class "will rarely, if ever, be in itself sufficient to prevent certification of a class." *See id.* (quoting Klay v. Humana, Inc., 382 F.3d 1241, 1272–73 (11th Cir. 2004)) (internal quotation marks omitted). In *Klay*, the Eleventh Circuit emphasized that "[c]ourts are generally reluctant to deny class certification based on speculative problems with case management." *Klay*, 382 F.3d at 1272–73 (quoting *In re* Managed Care Litig., 209 F.R.D. 678, 692 (S.D. Fla. 2002)) (internal quotation marks omitted) (discussing typical treatment of speculative problems).

99. *See Carrera*, 2011 WL 5878376, at *4 (finding plaintiff met predominance requirement and dismissing defendant's argument that damages would depend on each individual purchaser's reasons for buying WeightSmart).

100. *See id.* at *7–9 (evaluating each of Rule 23(a)'s requirements). Although Carrera did not provide an exact number of class members, Bayer did not challenge numerosity. *See id.* at *7 (finding numerosity satisfied). Further, Carrera's claim satisfied commonality because the central legal and factual issue would revolve around Bayer's alleged deceptive practices. *See id.* (rejecting Bayer's argument that purchasers' differing motives for using WeightSmart undermined commonality). The court also rejected Bayer's argument that Carrera's health issues diminished typicality because not all class members would suffer from the same issues. *See id.* at *8 ("[A]ny single plaintiff's health issues, lifestyle or weight loss, is irrelevant."). Finally, the parties did not dispute the adequacy requirement. *See id.* at *9 (granting class certification).

101. *See* Carrera v. Bayer Corp., 727 F.3d 300, 303 (3d Cir. 2013) ("The sole issue on appeal is whether the class members are ascertainable.").

BMW of North America, LLC,[102] which was decided after the district court's opinion in *Carrera* but before Bayer's appeal reached the Third Circuit.[103] In *Marcus*, the court identified ascertainability as a separate, preliminary matter that must be resolved before considering the Rule 23(a) certification requirements.[104]

Although the ascertainability requirement does not appear in Rule 23, the court emphasized three vital objectives that the requirement serves.[105] First, the court reasoned ascertainability "eliminates serious administrative burdens . . . by insisting on the easy identification of class members."[106] Second, the court explained ascertainability "protects absent class members by facilitating the best notice practicable" to allow members to opt-out of a class.[107] Third, the court emphasized ascertainability protects defendants' due process rights to challenge individual class membership.[108]

---

102. 687 F.3d 583 (3d Cir. 2012).

103. *See id.* at 583 (stating opinion was filed August 7, 2012); *see also Carrera*, 727 F.3d at 300 (stating case was argued on April 16, 2013); *Carrera*, 2011 WL 5878376, at *1 (stating district court opinion was filed November 22, 2011).

104. *See Marcus*, 687 F.3d at 591 (recognizing "preliminary matters" should be considered before turning to explicit requirements of Rule 23).

105. *See id.* at 591–92 (surveying important role of ascertainability in furthering policy goals of class actions generally).

106. *Carrera*, 727 F.3d at 305 (quoting *Marcus*, 687 F.3d at 593) (internal quotation marks omitted) (explaining justifications underpinning ascertainability); *see also* Brief Amicus Curiae of Public Citizen, Inc. in Support of Petition for Rehearing or Rehearing En Banc at 11–12, Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013) (No. 12-2621) [hereinafter Brief of Public Citizen, Inc.] (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.66 (2004) (stating "increasing one claimant's benefits will reduce another's recovery" and small claims may require "claim forms by oath or affirmation")), *available at* http://www.citizen.org/documents/Carrera-v-Bayer-Amicus-Brief-in-Support-of-Petition-for-Rehearing.pdf (arguing concern for efficiently identifying class members is unwarranted without evidence that fraudulent claims harm deserving class members).

107. *See Carrera*, 727 F.3d at 305–06 (quoting *Marcus*, 687 F.3d at 593) (internal quotation marks omitted) (summarizing development of ascertainability requirement); *see also* Brief of Public Citizen, Inc., *supra* note 106, at 5 (suggesting opt-out rights are "fully honored when notice is 'reasonably calculated' to reach the defined class" and best notice requirement costs would outweigh plaintiff's recovery (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985))).

108. *See Carrera*, 727 F.3d at 306 (quoting *Marcus*, 687 F.3d at 593) (concluding discussion of policies underpinning ascertainability requirement); *see also* Brief of Public Citizen, Inc., *supra* note 106, at 10 (urging court not to prioritize defendants' due process rights over plaintiff's right to recovery). Specifically, Public Citizen's brief stressed that a heightened ascertainability requirement during the class certification stage "would derail legitimate cases before the court has any idea whether fraud or inaccuracy is likely to be a problem." *See id.* *But see* Brief of the Product Liability Advisory Council as Amicus Curiae in Support of Defendants-Appellants and Reversal of the District Court's Ruling at 6–7, Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013) (No. 12-2621), 2012 WL 3144216 [hereinafter Brief of Product Liability Advisory Council] (theorizing that allowing potential class members to prove membership based "on their own say-so" violates defendants' due process rights because it provides insufficient evidence for individualized challenges).

After repeating the district court's summary of the applicable legal standards used to assess compliance with Rule 23, the court in *Carrera* concluded the same standards apply to the question of ascertainability.[109] Therefore, the court synthesized its newly declared standard for ascertainability: "a plaintiff must show, by a preponderance of the evidence, that the class is 'currently and readily ascertainable based on objective criteria,' and a trial court must undertake a rigorous analysis of the evidence to determine if the standard is met."[110] The court then posed the ascertainability question as whether the proposed class members purchased WeightSmart in Florida.[111]

Beginning its assessment of whether Carrera could answer this question, the court further explained that the proposed method for satisfying the ascertainability requirement must be "reliable and administratively feasible."[112] In recounting the facts, the court highlighted that class members "are unlikely to have documentary proof of purchase, such as packaging or receipts" and that Bayer "has no list of purchasers" because it sold WeightSmart through third parties.[113] To overcome these shortcomings, Carrera offered two potential ascertainability methods: retailer records and purchaser affidavits.[114]

1. *Retailer Records*

Carrera asserted he could ascertain class members using retailer records of purchases made online or with loyalty cards.[115] While recognizing that retailer records "may be a perfectly acceptable method of proving" ascertainability under certain circumstances, the court found the method inadequate for Carrera's case.[116] Notably, the court emphasized Carrera's failure to offer evidence that these records would, in fact, iden-

109. *See Carrera*, 727 F.3d at 306 (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011); Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982)) (reciting *Falcon* and *Dukes* standards, which require rigorous analysis of Rule 23 requirements and permit inquiries into merits to ensure each requirement is met). For a summary of the development of the legal standards used to assess Rule 23, see *supra* notes 30–70 and accompanying text.

110. *See Carrera*, 727 F.3d at 306 (citation omitted) (quoting *Marcus*, 687 F.3d at 593) ("A plaintiff may not merely propose a method of ascertaining a class without any evidentiary support that the method will be successful.").

111. *See id.* at 307 (explaining due process requires each plaintiff to prove purchase so defendant can challenge reliability of individual evidence offered).

112. *See id.* at 308 (concluding discussion of ascertainability legal standards).

113. *See id.* at 304 (summarizing factual and procedural background of case).

114. *See id.* at 308 (introducing Carrera's proposed methods to prove class is ascertainable).

115. *See id.* (supplying CVS ExtraCare card as example of retailer loyalty card that tracks customers' purchases).

116. *See id.* at 308–09 (agreeing with Bayer's contention that evidence failed to demonstrate retailers selling WeightSmart offered loyalty cards). Before the Third Circuit first applied the rigorous analysis standard to class certification, the court would have likely accepted Carrera's proposed method without considering Bayer's counterargument. *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d

tify any class members.[117] Additionally, the court questioned whether retailers retained records covering the period while WeightSmart was on the market.[118]

2. *Affidavits*

The court similarly found purchaser affidavits were a deficient method of ascertainability despite Carrera's three contentions that the method was reliable and feasible.[119] First, the court summarily dismissed Carrera's argument that the low potential recovery amount would disincentivize fraudulent claims, explaining the issue is not the likelihood of fraudulent claims but rather the defendant's ability to challenge class membership using the evidence produced.[120] Second, the court rejected Carrera's assertion that the number of class members was irrelevant to Bayer's total liability, reasoning that a class composed of fraudulent purchasers would dilute true class members' recovery, even if Bayer's total liability would remain the same.[121]

Finally, Carrera supported his third argument with a consulting firm's declaration ("Prutsman Declaration") that assured the firm's capacity to weed out unmeritorious affidavits.[122] Because the Prutsman Declaration lacked a screening method specific to Carrera's case, the court reduced the Declaration to an assurance only that Carrera intended to satisfy ascertainability rather than an assurance that Carrera in fact satisfied the requirement.[123] Although the court remanded the case specifically to give Carrera the opportunity to amend the affidavit screening method, the

305, 321 (3d Cir. 2008) (applying rigorous analysis standard and recognizing importance of all evidence in determining whether to certify proposed class).

117. *See Carrera*, 727 F.3d at 308–09 (stating courts must determine whether retailer records can sufficiently establish ascertainability on case-by-case basis). The court reasoned that Carrera failed to offer any evidence demonstrating that "a single purchaser of WeightSmart could be identified using records of customer membership cards or records of online sales." *See id.* at 309.

118. *See id.* at 308 (implying stores may no longer have records for product removed from market four years prior to suit).

119. *See id.* at 309 (introducing Carrera's three arguments in favor of using affidavits).

120. *See id.* (dismissing first argument as oblivious to "core concern of ascertainability: that a defendant must be able to challenge class membership").

121. *See id.* at 310 (dismissing Carrera's second argument, stating ascertainability protects other class members as well as defendants). Specifically, Carrera sought to diminish the importance of the number of individual class members by arguing Bayer's liability would be based on its total WeightSmart sales in Florida, irrespective of the number of class members. *See id.* at 309–10 (explaining Carrera's contention that Bayer's $14 million worth of WeightSmart sales marked its maximum liability regardless of class size).

122. *See id.* at 311 (reciting Prutsman's assurances "to identify duplicate claims, outliers, and other situations," and to "[use] fraud prevention techniques" and filters).

123. *See id.* (concluding Prutsman Declaration failed to show affidavits will be reliable).

court expressed "doubt whether [an amended method] could satisfy the ascertainability requirement."[124]

IV. THE WRITING ON THE CHALKBOARD: ASCERTAINABILITY MATTERS

As the first circuit court to deny class certification based solely on an unascertainable class and assess the ascertainability requirement using the rigorous analysis standard, the Third Circuit has considerably narrowed the availability of the class action mechanism to small-claims plaintiffs.[125] As a result, practitioners representing class plaintiffs will face a significant hurdle when seeking certification.[126] Alternatively, practitioners defending against class actions now have a new strategy to challenge certification.[127]

A. *Plaintiffs' Attorneys Stay After School to Satisfy Ascertainability*

Following *Carrera*, class plaintiffs face a notable disadvantage when establishing ascertainability within the Third Circuit.[128] Practitioners can no longer put forth methods of ascertaining a class without demonstrating these methods will actually be effective in identifying class members.[129] Thus, policy arguments against the court's analysis in *Carrera* may be more effective in redirecting the Third Circuit's ascertainability analysis.[130]

1. *The Third Circuit as Ascertainability Hall Monitor*

Although the Third Circuit announced a seemingly bright-line rule to determine whether class members are ascertainable, the *Carrera* court left unanswered the question of what evidence will sufficiently prove ascertainability.[131] Because rigorous analyses encourage probing merits in-

124. *See id.* at 311–12 (vacating certification order and remanding to district court to permit modification of Prutsman Declaration).

125. *See* Gilles, *supra* note 25, at 329–30 (asserting "many (or even most) small-claims consumer cases are now uncertifiable as class actions" under heightened ascertainability requirement); Klonoff, *supra* note 15, at 828, 830–31 (commenting on recent holdings that interfere with use of class action device as "powerful remedy for achieving mass justice").

126. For a discussion of how practitioners can respond to the Third Circuit's holding, see *infra* notes 128–50 and accompanying text.

127. For a discussion of how defendants to consumer class actions can take advantage of the Third Circuit's holding, see *infra* notes 151–56 and accompanying text.

128. *See* Gilles, *supra* note 25, at 305–07 (summarizing heightened ascertainability requirement's negative implications for small-claims plaintiffs seeking certification).

129. For an analysis of the practical implications of the ascertainability methods rejected in *Carrera*, see *infra* notes 131–38 and accompanying text.

130. For a discussion of potential policy arguments against the Third Circuit's reasoning in *Carrera*, see *infra* notes 139–50 and accompanying text.

131. *See* Carrera v. Bayer Corp., 727 F.3d 300, 308 (3d Cir. 2013) (requiring ascertainability method be "reliable and administratively feasible" to "permit[ ] a defendant to challenge the evidence used to prove class membership"). Although

quiries, the Third Circuit will now require plaintiffs to engage in extensive fact-finding before deeming a class ascertainable.[132] Consequently, practitioners should conduct more discovery before moving for class certification rather than delaying discovery until the class has been certified.[133] Unfortunately, Third Circuit practitioners lack the guidance necessary to focus their discovery inquiries and will likely face additional expenses before the court decides the motion that could sound the death knell for their case.[134]

Absent physical proof of purchase, such as receipts or packaging, it is unclear whether consumers will ever be able to satisfy the ascertainability requirement.[135] Although the court did not specify under what circumstances, if any, plaintiffs could rely on affidavits, practitioners cannot rely solely on affidavits because the court has twice dismissed them as nothing

---

the court acknowledged Carrera's proposed methods of ascertainability may be sufficient under different circumstances, the court did not articulate standards to determine those circumstances. *See id.* at 308–09 (rejecting use of retailer records in present case without discussing circumstances under which retailer records could be used).

132. *See, e.g.*, *id.* at 309, 311 (remarking that both of Carrera's proposed methods of proving ascertainability lacked sufficient detail to show class members could, in fact, be identified using those methods); *see also* Miller, *supra* note 16, at 314–15 (indicating heightened certification requirements force plaintiffs to establish aspects of case pretrial).

133. *See* Klonoff, *supra* note 15, at 755–56 (stating heightened ascertainability standard requires "significant (or even complete) merits discovery" prior to class certification motion); *Rigorous Class Certification*, *supra* note 70, at 1135 (asserting plaintiffs must conduct more discovery to provide necessary factual material for court to decide ascertainability issue, after adoption of heightened standard); Trask, *supra* note 12, at 352 (suggesting "more demanding requests for discovery from plaintiffs" will result from rigorous analyses).

134. *See* Klonoff, *supra* note 15, at 755 (noting recent heightened standards impose higher financial burdens on plaintiffs at certification stage); *Rigorous Class Certification*, *supra* note 70, at 1135 (positing that necessity of increased discovery will result in more expensive litigation). As practitioners accept many consumer class actions only on a contingent fee basis, the increased expense associated with collecting sufficient evidence to establish ascertainability may have the larger impact of discouraging contingent fee arrangements or small-stakes consumer actions altogether. *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2073 (2010) (emphasizing practitioners accepting small-stakes consumer class actions help to further deterrence function of class actions while risking little or no compensation); *Rigorous Class Certification*, *supra* note 70, at 1136 (arguing increased costs resulting from heightened certification scrutiny will deter litigation, particularly in context of disadvantaged plaintiffs).

135. *See Carrera*, 727 F.3d at 304 (stressing "class members are unlikely to have documentary proof of purchase"); Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593–94 (3d Cir. 2012) (expressing doubt as to whether class members were ascertainable based on defendant's inability to identify customers affected by allegedly defective product); Clavell v. Midland Funding LLC, No. 10-3593, 2011 WL 2462046, at *4 (E.D. Pa. June 21, 2011) (holding ascertainability fails automatically when nothing in defendant company's databases can identify appropriate class members); *see also* Gilles, *supra* note 25, at 312 ("This proof requirement presents daunting problems in most small-claims consumer class actions. Who, after all, has proof that they purchased peanut butter, pineapples, or aspirin?").

more than "potential class members' say so."[136] Relying on defendants' records has proven an equally uncertain ascertainability method, as courts have been reluctant to accept this method when file-by-file review is necessary, regardless of whether the plaintiff offers evidence that the record can identify class members.[137] With these significant evidentiary limitations, practitioners in the Third Circuit face an uphill battle to establish an ascertainable class.[138]

2. *Policy Arguments as a Practitioner's Hall Pass*

The Third Circuit's unwillingness to find an ascertainable class despite a variety of proposed methods may best be explained by a marked shift in policy.[139] In line with the larger trend toward heightening certification requirements, scholars argue that courts devised the ascertainability requirement based on animus toward consumer class actions.[140] Accordingly, policy arguments undermining the Third Circuit's justifications supporting a rigorous analysis of ascertainability may be more effective than attempting to formulate a viable ascertainability method.[141]

136. *See, e.g.*, *Carrera*, 727 F.3d at 306 (rejecting affidavits as too unreliable to accurately identify class members); *Marcus*, 687 F.3d at 594 ("[S]imply having potential class members submit affidavits . . . may not be 'proper or just.'" (quoting Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1089–90 (N.D. Cal. 2011))); *see also* Brief of Product Liability Advisory Council, *supra* note 108, at 2 (describing affidavits as "self-serving statements whose veracity [a defendant] would have no ability to challenge").

137. *See* Haskins v. First Am. Title Ins. Co., No. 10-5044 (RMB/JS), 2014 WL 294654, at *9 (D.N.J. Jan. 27, 2014) (comparing compiled list of potential class members with necessity of file-by-file review to determine potential class members); *see also Marcus*, 687 F.3d at 593 (explaining review of defendant's records would be too cumbersome to satisfy ascertainability requirement).

138. *See* Gilles, *supra* note 25, at 329–30 (concluding heightened ascertainability requirements render consumer classes automatically unascertainable); *see also* Steed, *supra* note 71, at 630–31 (stating uncertainty surrounding ascertainability requirement requires resolution from circuit courts or Supreme Court).

139. *See* Miller, *supra* note 16, at 358 (stating pretrial obstacles to class certification allow defendants to avoid trial on the merits); Olson, *supra* note 50, at 967 (theorizing recent trend toward rigorous merits inquiries can only be explained by desire to protect corporate defendants from potentially coercive pressure to settle after courts certify classes).

140. *See, e.g.*, Gilles, *supra* note 25, at 307 (positing ascertainability is "foremost" among judicially crafted means to decertify consumer classes); Mac R. McCoy & D. Matthew Allen, *Taming the Kraken: The Supreme Court Weighs in on Class Actions in 2011*, 2012-Jan. BUS. L. TODAY 1, 3 (2012) (acknowledging view that developments heightening certification scrutiny "may eventually lead to the demise or significant curtailment of . . . consumer class actions"); Steed, *supra* note 71, at 630 (recognizing courts can use ascertainability to "raise the bar" of certification); *see also* Klonoff, *supra* note 15, at 729 (arguing "courts have cut back sharply on plaintiffs' ability to bring class action lawsuits").

141. *See Carrera*, 727 F.3d at 311 (expressing doubt that Carrera could use any method to satisfy ascertainability requirement); Gilles, *supra* note 25, at 330 (concluding "ascertainability doctrine either rises or falls on policy grounds"). In fact, policy arguments successfully persuaded the United States District Court for the

First, Third Circuit practitioners should harness the direct conflict between the defendant-centered policies underpinning ascertainability and the plaintiff-centered policies underlying class actions.[142] A heightened ascertainability standard is irreconcilable with both the class action's core policy of incentivizing small-claims plaintiffs to seek justice as well as the compensation and deterrence functions of the class action mechanism.[143] Rather than promoting recovery of small claims using the class action mechanism, the Third Circuit's ascertainability standard precludes this compensation by eliminating available methods of ascertainability.[144] Similarly, the Third Circuit has reduced the class action's utility in deter-

Southern District of New York to avoid the same outcome as *Carrera*. *See* Ebin v. Kangadis Food Inc., No. 13-2311 (JSR), 2014 WL 737960, at *5 (S.D.N.Y. Feb. 25, 2014) (agreeing with plaintiff's assessment of ascertainability standard as "not demanding" and "designed only to prevent the certification of a class whose membership is truly indeterminable" (quoting Gortat v. Capala Bros., Inc., No. 07-CV-3629 (ILG), 2010 WL 1423018, at *2 (E.D.N.Y. Apr. 9, 2010)) (internal quotation marks omitted)). Despite recognizing "formidable" difficulties with satisfying ascertainability based on the likelihood that consumers discarded the product at issue and any proof of purchase, the court accepted the proposed ascertainability methods of providing a receipt or affidavit. *See id.* at *4 (finding "possibility that class members will have discarded the product [does not] render the class unascertainable"). Thus, the *Ebin* court granted certification and explained the ascertainability requirement "should not be made into a device for defeating the action." *See id.* at *5. In so holding, the court emphasized that a contrary interpretation of ascertainability "would render class actions against producers almost impossible to bring." *See id.* Moreover, a strict ascertainability standard conflicts with the class action device's "very core" purpose—to address "cases like this 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." *See id.*

142. *Compare* Gilles, *supra* note 25, at 307 (explaining development of class action mechanism to protect consumers), *with Third Circuit Rejects Class Without Objective Means of Identifying Members*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP 2 (Aug. 21, 2013), https://www.skadden.com/sites/default/files/publications/Third_Circuit_Reject_%20Class_Without_Objective_Means_of_Identifying_Members.pdf [hereinafter *Third Circuit Rejects Class*] (classifying *Carrera* as "significant win" for defendants).

143. *Compare* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (identifying core policy underpinning class action mechanism), *with Carrera*, 727 F.3d at 311–12 (rejecting all proposed ascertainability methods and implying significant difficulty ascertaining consumer class without physical evidence). *See also* Gilles, *supra* note 25, at 330 (arguing heightened ascertainability requirement is inconsistent with "traditional goals of class actions—deterrence and compensation"); Klonoff, *supra* note 15, at 735 ("[T]he emergence of myriad cases that cut back the ability to pursue classwide relief represents a troublesome trend that undermines the compensation, deterrence, and efficiency functions of the class action device.").

144. *See* Gilles, *supra* note 25, at 315 (urging courts to consider, regardless of other concerns, that heightened ascertainability requirement will preclude certification and injured consumers will not receive any compensation). Moreover, the *Carrera* court forfeited compensating allegedly injured plaintiffs in favor of preventing uninjured plaintiffs from sharing in the recovery. *See Carrera*, 727 F.3d at 310 ("It is unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims."); Gilles, *supra* note 25, at 314–15 (arguing compensation of uninjured parties does not affect compensa-

ring misconduct, because defendants now have another means to challenge certification, thereby escaping the potentially unfavorable effects of a large settlement or trial on the merits.[145]

Moreover, the lack of reasoning supporting the Third Circuit's decision to apply the same rigorous analysis standard to both explicit and implicit Rule 23 requirements warrants scrutiny.[146] The explicit requirements sufficiently balance the interests of plaintiffs and defendants in class actions.[147] These requirements were developed to prevent misuse of the class action mechanism while also ensuring plaintiffs without an alternative adjudicative remedy—due to their small claims—can have their day in court.[148] Thus, the harsh rigorous analysis standard that courts apply to the explicit Rule 23 requirements renders a rigorous analysis of the implicit ascertainability requirement duplicative.[149] Therefore, practitioners have strong policy arguments in their arsenal to undercut the Third

---

tion of injured class members and should have no bearing on certification decision).

145. *See* Gilles, *supra* note 25, at 330 (noting heightened ascertainability conflicts with deterrence function); Thomas Kayes, *An Ounce of Prevention: Early Motions Attacking Class Certification*, 80 DEF. COUNS. J. 164, 174 (2013) (recommending defense counsel move to dismiss class actions based on ascertainability problems); Olson, *supra* note 50, at 967 (explaining rigorous analysis conflicts with deterrence function because resolving merits disputes at certification stage "will only provide a reason to conclude that certification is not appropriate"); *see also* Miller, *supra* note 16, at 322, 358 (arguing increased risk of noncertification "leaves public policies underenforced and large numbers of citizens uncompensated" by allowing defendants to avoid trials on merits or settle for smaller sums).

146. *See Carrera*, 727 F.3d at 306 (concluding without analysis "same standards apply to the question of ascertainability" as to explicit Rule 23 requirements). Further, the court cited its own precedent for the proposition that "[t]here is no reason to doubt that the rigorous analysis requirement applies with equal force to all Rule 23 requirements," without considering that ascertainability does not appear in Rule 23. *See id.* (quoting *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 309 n.5 (3d Cir. 2008)) (internal quotation marks omitted).

147. *See generally* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 826 (1997) (describing Rule 23(a) requirements as "primary filter for class actions").

148. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (explaining Rule 23(a) requirements "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims" (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982)) (internal quotation marks omitted)); Klonoff, *supra* note 15, at 736, 741 (explaining Rule 23 as "'bold and well-intentioned attempt to encourage more frequent use of class actions,'" while interlocutory appeal of certification decisions "has served primarily as a device to protect defendants" and was promulgated over strong opposition from plaintiffs' attorneys (quoting Charles Alan Wright, *Class Actions*, 47 F.R.D. 169, 170 (1970))).

149. *See* Gilles, *supra* note 25, at 317 (questioning purpose served by heightened ascertainability requirement); Klonoff, *supra* note 15, at 746–47 (presenting areas of certification analyses in which courts have applied heightened scrutiny without evaluating effect of *Carrera*).

Circuit's decision to rigorously analyze the implicit ascertainability requirement.[150]

B. *Defense Attorneys Dismiss Class Early*

While plaintiffs' attorneys face an additional obstacle to class certification following *Carrera*, defense counsel can now confidently pursue another strategy to challenge certification.[151] Defense attorneys seeking to challenge ascertainability should aim to identify an overbroad class definition, which will result from a definition including all users of an allegedly defective product.[152] Further, a class definition encompassing legal conclusions defeats ascertainability by deferring the certification decision until after the court has decided the merits of the case.[153] Finally, as Bayer's counsel did in *Carrera*, defense attorneys can dispute class definitions that would require intensive fact-finding as unascertainable.[154] In addition to these three areas, the Third Circuit has broadly recognized defendants' due process rights in the context of class actions.[155] Consequently, defendants can rely on due process rights to exploit any potential weakness

150. For a discussion of effective policy arguments against the Third Circuit's methodology in *Carrera*, see *supra* notes 139–49 and accompanying text. Policy arguments have successfully persuaded the Third Circuit in the past to grant certification despite potential difficulties satisfying Rule 23. *See supra* notes 57–58, 61 and accompanying text.

151. *See* Klonoff, *supra* note 15, at 762–63 (chronicling defense attorneys' successful challenges to ascertainability); Kayes, *supra* note 145, at 174, 177 (instructing defense counsel to challenge ascertainability as standard practice); BEISNER, MILLER & SCHWARTZ, *supra* note 72, at 6 (recognizing courts' recent willingness to deny class certification based on ascertainability).

152. *See, e.g.*, Sevidal v. Target Corp., 117 Cal. Rptr. 3d 66, 79 (Ct. App. 2010) (finding consumer class unascertainable based on overbreadth because most proposed class members did not see deceptively advertised claim); *see also* Steed, *supra* note 71, at 630 (stating classes including members without standing are overbroad); BEISNER, MILLER & SCHWARTZ, *supra* note 72, at 2 (describing overbreadth principle and urging attorneys to challenge such class definitions).

153. *See, e.g.*, Kirts v. Green Bullion Fin. Servs., LLC, No. 10-20312-CIV, 2010 WL 3184382, at *2 (S.D. Fla. Aug. 3, 2010) (rejecting class definition that included language "[a]ll individuals . . . were damaged because [defendant] broke its promised and advertised procedures" as legally conclusive); *see also* BEISNER, MILLER & SCHWARTZ, *supra* note 72, at 5 (detailing court hostility toward definitions including legal conclusions).

154. *See* Carrera v. Bayer Corp., 727 F.3d 300, 304 (3d Cir. 2013) (citing Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 588, 593 (3d Cir. 2012)) (finding class certification inappropriate where individualized fact-finding would be required to identify members); Steed, *supra* note 71, at 630 (discussing cases finding classes unascertainable due to subjective criteria); BEISNER, MILLER & SCHWARTZ, *supra* note 72, at 3 (identifying classes that would be "administratively burdensome" to define as potential target area for defense attorneys).

155. *See Carrera*, 727 F.3d at 307 (recognizing defendants' due process rights to individually challenge class membership based on evidence from plaintiffs).

in the class definition that would preclude them from challenging an individual's class membership.[156]

V. CONCLUSION

Since the inception of ascertainability as a discrete class certification requirement, courts and practitioners have not viewed the requirement as a game changer for class action litigation.[157] *Carrera* altered the class action landscape by assessing ascertainability using the rigorous analysis standard and denying certification based solely on an unascertainable class.[158] Defense attorneys have already heralded *Carrera* as a success, and practitioners within the Third Circuit can rely on the court's reasoning as reflective of a desire to protect defendants' due process rights or as another means to challenge certification.[159] On the other hand, the court has deprived consumer classes of their most feasible ascertainability methods.[160] As a result, the court's holding narrows the class action mechanism's availability to consumer classes and conflicts with the mechanism's purpose of incentivizing small-claims plaintiffs to seek justice.[161] Thus, practitioners should challenge the conflict between heightened ascertainability require-

156. *See Third Circuit Rejects Class*, *supra* note 142, at 2 (praising Third Circuit for "appropriately recogniz[ing]" defendants' due process rights in class actions, which "guarantees a defendant's right to contest whether an individual is actually part of the putative class").

157. *See* Steed, *supra* note 71, at 628 (asserting no circuit has deemed ascertainability "independent basis for denying class certification"). For an examination of the development of the ascertainability requirement, see *supra* notes 79–86 and accompanying text.

158. *See* Gilles, *supra* note 25, at 331 (concluding use of "ascertainability filter at the class certification stage is a recipe for making bad law"). For a discussion of the Third Circuit's reasoning in assessing ascertainability with the rigorous analysis standard, see *supra* notes 101–24 and accompanying text.

159. *See* Richard A. Ripley & Scott Ewing, *Third Circuit Raises the Bar on the Ascertainability Requirement in Class Litigation*, HAYNES & BOONE, LLP (Sept. 25, 2013), https://www.haynesboone.com/third-circuit-raises-bar-on-ascertainability/ (explaining *Carrera* decision "could have a profound and sweeping effect on smaller, relatively lower value claims, including many consumer claims"); Kevin Ranlett & Melissa Francis, *Third Circuit Rulings Give Teeth to Ascertainability Requirement for Class Certification*, MAYER BROWN CLASS DEF. BLOG (Sept. 23, 2013), http://www.classdefenseblog.com/2013/09/23/third-circuit-rulings-give-teeth-to-ascertainability-requirement-for-class-certification/ (recognizing *Carrera* "provide[s] defendants with added ammunition for challenging ascertainability"); *Third Circuit Rejects Class*, *supra* note 142 (summarizing ruling as "significant win for manufacturers of consumer products, particularly disposable items (including food) for which consumers do not tend to keep receipts").

160. *See* Gilles, *supra* note 25, at 312–13 (contemplating difficulty establishing ascertainability based on proof of purchase without relying on affidavits). For an analysis of the Third Circuit's rejection of Carrera's proposed ascertainability methods, see *supra* notes 115–24 and accompanying text.

161. *See* Ripley & Ewing, *supra* note 159 (explaining *Carrera* "highlights the growing trend of narrowing the availability of the class mechanism").

ments and the class action's core policy.[162] Until then, the Third Circuit has effectively sounded the death knell for consumer class actions by defining ascertainability in a way consumer classes will automatically fail to satisfy.[163]

---

162. For an analysis of the viable policy arguments against the Third Circuit's holding, see *supra* notes 139–50 and accompanying text.

163. *See* Gilles, *supra* note 25, at 316–17 (arguing heightened ascertainability requirement undermines compensation and deterrence class action functions, "creating a test that small-claim consumer class actions—almost by definition—cannot meet").