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Navigating the Ascertainability Spectrum: Analyzing the Policy Rationales Behind the Various Ascertainability Standards as Applied Standards as Applied to Small-Value Consumer Class Actions

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Navigating the Ascertainability Spectrum: Analyzing the Policy Rationales Behind the Various Ascertainability Standards as Applied to Small-Value Consumer Class Actions

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INTRODUCTION

Think back to the last time you went to the grocery store. You might have purchased items such as ConAgra 100% natural cooking oil, Bayer aspirin, or a probiotic. Did you keep your receipt? It turns out that the 100% natural cooking oil you purchased was anything but 100% natural. But because you did not keep your receipt, you have no recourse against the company.[1] You cannot join a class action and vindicate your rights because of a judge-made doctrine—ascertainability. The corporation's conduct will go unpunished, and it will continue to mislead unwary consumers.[2]

Ascertainability has become one of the most hotly contested issues in class action litigation.[3] Recently, a growing number of class certification decisions are turning on an "implied" requirement of Federal Rule of Civil Procedure 23—that a proposed class must be ascertainable.[4] A court can determine whether a proposed class is ascertainable without discovery, and many courts are willing to dispose

1. Unless you can afford your own attorney. Most Americans, however, cannot spare the time or money it costs to litigate a case over a $6.98 bottle of cooking oil. "Most individuals are too preoccupied with daily life and too uninformed about the law to pay attention to whether they are being overcharged or otherwise inappropriately treated by those with whom they do business." Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 68 (2000).

2. *See* Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013) *reh'g denied*, No. 2-08-CV-04716, 2014 WL 3887938, at *2 (3d Cir. May 2, 2014) ("The [heightened ascertainability decision] gives fear that some wrongs will go unrighted because the wrongdoers successfully gamed the system.") (Ambro, J., dissenting).

3. Archis A. Parasharami & Hannah Chanoine, *U.S. Chamber of Commerce Files Amicus Brief on Ascertainability in Key Ninth Circuit Case*, Mayer Brown: Class Defense Blog (Feb. 3, 2015), https://www.classdefenseblog.com/2015/02/u-s-chamber-of-commerce-files-amicus-brief-on-ascertainability-in-key-ninth-circuit-case/ [https://perma.cc/3WKF-KSGH].

4. John H. Beisner et al., *Ascertainability: Reading Between the Lines of Rule 23*, 12 Class Action Litig. Rep. 253, 253 (2011).

of class actions at the pleading stage.[5] This ascertainability doctrine poses dire consequences to small-value consumer class actions.

Circa 1970, courts began finding it "elementary that in order to maintain a class action, the class sought to be represented must be . . . clearly ascertainable."[6] But courts were not applying the ascertainability standard as a separate prerequisite to class certification as they are today.[7] It is likely that courts did not find it necessary, especially given the types of class actions in federal court. At that time, a class action typically involved securities claims, where courts could easily identify class members from financial records.[8] Consumer class actions were almost never brought in federal court, so courts avoided answering the tough ascertainability questions.[9]

But Congress opened the doors to the federal courts for consumer class actions with the Class Action Fairness Act in 2005.[10] The Act allows a class action to proceed under diversity jurisdiction so long as the class altogether seeks at least $5 million.[11] Once Congress created a new way to establish jurisdiction in federal courts, plaintiffs brought

5. *Id.*

6. DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970). About ten years later, the Seventh Circuit adopted the ascertainability requirement. *See* Simer v. Rios, 661 F.2d 655, 669–70 (7th Cir. 1981) (denying class certification due to the fact that the court would expend large amounts of time and money identifying the members of the class). *See also* Jamie Zysk Isani & Jason B. Sherry, *The Ascendancy of Ascertainability as a Threshold Requirement for Certification*, 16 CLASS ACTION LITIG. REP. 525, 526 (2015) ("Today, [*DeBremaecker* and *Simer*] are best known for founding the rule that ascertainability requires a class that is defined according to 'objective' criteria . . . .").

7. Lindsay Breedlove, *Rule 23's Implicit Ascertainability Requirement: A Brewing Class Action Controversy*, WOMAN ADVOC. COMMITTEE (A.B.A., Chi., Ill.), Spring 2016, at 9–10. *See also* Tom Murphy, Comment, *Implied Class Warfare: Why Rule 23 Needs an Explicit Ascertainability Requirement in the Wake of* Byrd v. Aaron's Inc., 57 B.C. L. REV. ELECTRONIC SUPPLEMENT 34, 39 (2016), http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3488&context=bclr [https://perma.cc/2AN2-K3K3] (noting that ascertainability was not controversial at first).

8. Murphy, *supra* note 7, at 39 n.26.

9. *Id.* at 39 n.27 (noting that consumer class actions seldom met the requirements for diversity jurisdiction because each class member needed to satisfy the amount in controversy requirement); s*ee also id.* ("Subject matter jurisdiction in federal court was typically unattainable for consumer class actions because consumers did not have standing to sue under the federal laws meant to protect consumers from corporate misconduct, like false advertising.").

10. Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, 1711–1715 (2012).

11. 28 U.S.C. § 1332(d) (2012).

class actions, and the federal courts could no longer hide from addressing the ascertainability requirement.

This Note explores the controversy over the heightened ascertainability requirement and its effect on small-value consumer class actions. Part I explains the class-action requirements under Rule 23 and ascertainability's textual origins. Part II explores ascertainability's different forms and explains the policy arguments supporting each version. Part II also argues that the policy rationales supporting the heightened ascertainability standard do not pass muster. The heightened requirement should be abandoned in favor of a weaker standard. Part III explores the possibility that class plaintiffs will likely face the heightened standard with increasing frequency and proposes ways that class plaintiffs can combat the heightened standard.

I. Rule 23's Requirements and Ascertainability's Origins

Before delving into the ascertainability debate, one should understand Rule 23's requirements for class actions in federal court and where the ascertainability doctrine originated. Because class actions are meant to be an exception to the normal rule that requires litigating claims individually,[12] plaintiffs cannot file class actions as they would an ordinary lawsuit. Typically, an individual plaintiff initiates a lawsuit by simply filing a complaint with the court. Class actions are more complicated. A district court must certify the class before the litigation can proceed.[13] During this certification process, the district court thoroughly examines the plaintiffs' class-action proposal. The judge must ensure the class meets several certification requirements before allowing the class to move forward.

Those certification requirements are explicitly laid out in Rule 23. To be certified, the class must satisfy four prerequisites—numerosity,[14] commonality,[15] typicality,[16] and adequacy[17]—and then fit into one of

12. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348 (2011).

13. Fed. R. Civ. P. 23(c)(1)(A).

14. "[T]he class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

15. "[T]here are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2).

16. "[T]he claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3).

17. "[T]he representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4).

three categories.[18] Relevant here, classes fall under the third category, 23(b)(3), when "questions of law or fact common to class members predominate over any questions affecting only individual members" and when "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[19] Once the judge believes these requirements are met and certifies the class, the certification order must include a class definition.[20]

Defining a class is not an easy task. The class definition must be "concrete, objective, and closely tailored to the facts giving rise to the claims."[21] This definition allows potential class members to receive notice of the proceeding and understand their right to opt out of the class. The class definition dictates who benefits from a verdict or settlement if a class prevails, and explains which members are precluded from filing another suit alleging the same injury.[22]

As if all these requirements were not enough, courts recently began imposing an additional prerequisite to class certification—ascertainability.[23] "Ascertainability" is not mentioned in Rule 23; instead, the doctrine is judicially crafted.[24] No one can agree upon one particular textual source, but courts point to a few places in Rule 23 that could lend support to the ascertainability doctrine. [25]

First, Rule 23(a) refers to a "class" upon which the prerequisites are imposed. Some courts infer that this "class" requires a definite or ascertainable class.[26] These courts argue that they cannot apply the Rule 23(a) prerequisites without first knowing who belongs to the class.[27] Second, Rule 23(c)(1)(B) requires that a certification order

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18. Fed. R. Civ. P. 23(b).

19. Fed. R. Civ. P. 23(b)(3).

20. "An order that certifies a class action must define the class . . . ." Fed. R. Civ. P. 23(c)(1)(B).

21. Jordan Elias, *The Ascertainability Landscape and the Modern Affidavit*, 84 Tenn. L. Rev. 1, 7–8 (2016).

22. *Id.* at 8.

23. *See* 1 William B. Rubenstein et al., Newberg on Class Actions § 3:1, at 151 (5th ed. 2011) [hereinafter Newberg] (referring to ascertainability as an "implicit requirement" of Rule 23).

24. Myriam Gilles et al., Panel, *The Current State of the Consumer Class Action*, 11 N.Y.U. J.L. & Bus. 647, 651 (2015).

25. Daniel Luks, Note, *Ascertainability in the Third Circuit: Name that Class Member*, 82 Fordham L. Rev. 2359, 2369 (2014) (citing Newberg, *supra* note 23, § 3:2, at 155–56).

26. Newberg, *supra* note 23, § 3:2, at 155.

27. *See id.* at 158 ("[C]ourts state that they must be able to know who belongs to a class before they can determine the numerosity of the class, the commonality

"define the class and the class claims, issues, or defenses," and "appoint class counsel."[28] A small number of courts believe this rule requires that the class be ascertainable.[29] These courts argue that the required class definition must be specific enough to identify the class members. Third, courts that advocate for a stricter version of ascertainability believe that the doctrine could be implied from the manageability inquiry under 23(b)(3) and 23(b)(3)(D).[30] Rule 23(b)(3) requires that "a class action is superior to other" dispute-resolution methods and Rule 23(b)(3)(D) goes further to require a district court to consider "the likely difficulties in managing a class action."[31] These courts believe that if it is not administratively feasible to ascertain the class members, then the class action may not be superior to other available dispute-resolution methods.[32]

II. The Three-Way Split on Ascertainability

Over roughly the past decade, almost every circuit has weighed in on the ascertainability debate.[33] Once the dust settled, three approaches

of the claims of the class members, or any of the other class certification prerequisites."); *see, e.g.*, Byrd v. Aaron's Inc., 784 F.3d 154, 162 (3d Cir. 2015) ("Ascertainability . . . allows a trial court [to] effectively . . . evaluate the explicit requirements of Rule 23. . . . [T]he independent ascertainability inquiry ensures that a proposed class will function as a class."); *In re* Teflon Products Liability Litig., 254 F.R.D. 354, 361 n.11 (S.D. Iowa 2008) ("[T]he court simply finds an evaluation of the class definition to be the logical first step in the analysis.").

28. Fed. R. Civ. P. 23(c)(1)(B).

29. This rule provides: "An order that certifies a class action must define the class and the class claims, issues, or defenses. . . ." Fed. R. Civ. P. 23(c)(1)(B). *See also* Newberg, *supra* note 23, § 3:2, at 158–59 ("[S]ome district courts now specifically cite Rule 23(c)(1)(B) as authority for the implied definiteness requirement.").

30. For a discussion of the heightened ascertainability standard, see *infra* Part II. *See also* Fed. R. Civ. P. 23(b)(3) ("A class action may be maintained if . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."); Fed. R. Civ. P. 23(b)(3)(D) ("The matters pertinent to these findings include . . . the likely difficulties in managing a class action.").

31. Fed. R. Civ. P. 23(b)(3); Fed. R. Civ. P. 23(b)(3)(D).

32. 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 4:2 (13th ed. 2017).

33. *See, e.g.*, *In re* Nexium Antitrust Litig., 777 F.3d 9, 19 (1st Cir. 2015); Brecher v. Republic of Arg., 806 F.3d 22, 24–25 (2d Cir. 2015); Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015); EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014); Frey v. First Nat'l Bank Sw., 602 F. App'x 164, 168 (5th Cir. 2015); Rikos v. Proctor & Gamble Co., 799 F.3d 497, 525 (6th Cir. 2015); Mullins v. Direct Dig., LLC, 795 F.3d 654, 657–58 (7th Cir. 2015); Sandusky

to ascertainability emerged. Those approaches are most easily understood when placed on a spectrum based on how difficult it is to satisfy each standard.

On one end, the Third Circuit created a heightened standard that requires the plaintiff to make two showings: first, the class must be "defined with reference to objective criteria," and second, there must be a "reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition."[34] On the other end, the Eighth Circuit believes that the extra ascertainability standard is unnecessary as long as the district court rigorously applies Rule 23's requirements.[35] Somewhere in the middle lie the Sixth, Seventh, and Ninth Circuits. These courts acknowledge that there is a preliminary ascertainability requirement, but they only require that the class members be identified with reference to objective criteria.[36]

Because Rule 23 does not contain an explicit ascertainability requirement, courts ultimately make a policy judgment when choosing which standard to adopt. They weigh the policies behind the rule and decide which policies are more important. Courts that adopt the heightened ascertainability standard strongly believe that unascertainable classes violate the defendant's due process rights. Courts that adopt the weaker ascertainability standard value consumer class actions and fear that the heightened standard renders them null.

This Part explores the policy rationales behind the different ascertainability requirements. Although heightened ascertainability proponents cite numerous policy reasons supporting the standard, ultimately, they do not pass muster. Many of the policy arguments are easily refuted, and the threat to consumer class actions is too great to justify the heightened standard.

A. *The Policies Behind the Third Circuit's Heightened Ascertainability Standard*

The Third Circuit's standard lies on one end of the ascertainability spectrum. Most courts find a class ascertainable when the court can use objective criteria to identify class members. But the Third Circuit created an additional requirement: the plaintiffs must prove that there

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Wellness Ctr., LLC v. Medtox Sci., Inc., 821 F.3d 992, 996–98 (8th Cir. 2016); Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1133 (9th Cir. 2017); Bussey v. Macon Cty. Greyhound Park, Inc., 562 F. App'x 782, 787–88 (11th Cir. 2014).

34. *Byrd*, 784 F.3d at 163 (quoting Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 355 (3d Cir. 2013)).

35. *See Sandusky Wellness Ctr.*, 821 F.3d at 996.

36. *See Rikos*, 799 F.3d at 525; *Mullins*, 795 F.3d at 672; *Briseno*, 844 F.3d at 1133.

is an administratively feasible mechanism for identifying class members.[37] When developing this standard, the court weighed numerous policy considerations but ultimately focused on the administrative difficulties of managing an unascertainable class and the risk of violating the defendant's due process rights.

1. Unascertainable Classes Violate the Rules Enabling Act

The Rules Enabling Act ensures that the rules of civil procedure will not "abridge, enlarge or modify any substantive right."[38] Heightened ascertainability proponents argue that unascertainable classes violate the Rules Enabling Act because members who would otherwise be unable to make valid claims individually are allowed to bring their claims as a class. If a person unable to make a claim individually can somehow state a claim as a class member, then Rule 23 would be enlarging that individual's substantive right contrary to the Rules Enabling Act.

Further, a plaintiff's ability to hold a defendant liable cannot depend on whether he brings a case as a class or individually.[39] After all, "[w]ho could dispute that if a named plaintiff brought an individual lawsuit against a company about a particular product, he would have to prove at trial that he purchased the challenged product and was injured as a result?"[40] These heightened ascertainability proponents argue that without a reliable and administratively feasible method to identify class members, defendants have no way of challenging class

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37. In *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583 (3d Cir. 2012), the Third Circuit "transformed [ascertainability] into a sweeping new independent requirement for class certification under Rule 23(b)(3) actions—a requirement mentioned nowhere in Rule 23." Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 Emory L.J. 1569, 1605 (2016). *See also Byrd*, 784 F.3d at 163 (articulating the Third Circuit's two-pronged ascertainability standard).

38. 28 U.S.C. § 2072 (2012).

39. *See, e.g.*, Phillip Morris USA, Inc. v. Scott, 131 S. Ct. 1, 4 (2010) (implying that due process is violated if "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action."); Carrera v. Bayer Corp., 727 F.3d 300, 307 (2013) (noting that "[i]f this were an individual claim, a plaintiff would have to prove at trial he purchased WeightSmart" and that a "defendant in a class action" has the same "due process right to raise individual challenges and defenses to claims . . . .").

40. *State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 20 (2015) [hereinafter *Hearing*] (statement of Andrew J. Pincus, Partner, Mayer Brown LLP).

membership, "short of extensive individual fact-finding and an unmanageable series of mini-trials."[41] Therefore, class members without valid claims will go unnoticed and remain within the class.

But these advocates take for granted the defendant's ability to "oppose the class representatives' showings at every stage" of the litigation.[42] A district court could certify a class action and allow the parties to conduct discovery. The additional discovery could allow class members to more thoroughly identify themselves than they would be able to at the certification stage. Moreover, commentators point out that "the [Supreme] Court has never found a Rule invalid for impermissibly affecting a substantive right"[43] and that there is "no real consensus" about "how the Act should be interpreted."[44] Therefore, instead of rejecting the class action at the certification stage, the court should let the class proceed to discovery. Then, if class members are still unidentifiable, the defendant can file a motion to dismiss.

2. Unascertainable Classes Threaten the Defendant's Due Process Rights

Due process allows defendants to challenge the plaintiff's evidentiary showing by cross-examination and to resolve factual disputes in front of a court or a jury. Heightened ascertainability proponents argue that defendants cannot exercise those due process rights on unascertainable classes. [45] Small-value consumer class-action plaintiffs typically rely solely on affidavits because most consumers do not keep their receipts. A defendant cannot realistically cross-examine every class member, especially when class membership can be in the millions. Without another feasible way to challenge class membership, the

41. Brief for the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Defendant-Appellee at 6*,* Jones v. ConAgra Foods, Inc.*,* No. 3:12-CV–01633-CRB, 2014 WL 2702726 (N.D. Cal. June 13, 2014), *appeal docketed,* No. 14-16327 (9th Cir. July 15, 2014) [hereinafter Chamber of Commerce Brief]. *See, e.g.*, Oscar v. BMW of N. Am., LLC, 274 F.R.D. 498, 513 (S.D.N.Y. 2011) ("[D]etermining whether each tire failed as a result of the allegedly concealed defect or as a result of unrelated issues . . . will devolve into numerous mini-trials.").

42. Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1131 (9th Cir. 2017).

43. Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 Notre Dame L. Rev. 47, 48 (1998).

44. Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 Minn. L. Rev. 26, 27 (2008).

45. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 340 (2011)("Because Rule 23 cannot be interpreted to abridge, enlarge, or modify any substantive right, . . . a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims.") (internal quotations omitted).

defendant's due process rights are violated.[46] Courts that adopt the heightened standard require class members to prove their membership by verifying their affidavits, ensuring that there are no fraudulent claims.[47] The Third Circuit explained that the plaintiff should present a model of how to reliably screen affidavits for honesty and accuracy.[48]

The Seventh and Ninth Circuits reject this argument. In *Mullins v. Direct Digital, LLC*,[49] the Seventh Circuit claimed that the heightened ascertainability requirement renders "affidavits from putative class members . . . insufficient as a matter of law."[50] In *Briseno v. ConAgra Foods, Inc.*,[51] the Ninth Circuit questioned how an affidavit that would be sufficient to force liability at other stages in the proceeding would then be insufficient at the certification stage.[52] For example, if undisputed, a self-serving affidavit could support a defendant's motion for summary judgment.[53] In fact, there is only one type of case where the testimony of one witness is legally insufficient to prove a fact.[54] Therefore, this rule should be extended to small-value consumer class actions.

46. Gilles, *supra* note 24, at 652 ("[T]he problem with . . . oath[s or affidavits] is that a defendant has the right—according to courts that adopt ascertainability analysis— . . . to cross examine every single claimant on the oath, on the injury, [or] on the purchase."); *see also* Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 594 (3d Cir. 2012) ("Forcing [the defendants] to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications.").

47. Sarah R. Cansler, *An "Insurmountable Hurdle" to Class Action Certification? The Heightened Ascertainability Requirement's Effect on Small Consumer Claims*, 94 N.C. L. Rev. 1382, 1397 (2016).

48. Carrera v. Bayer Corp., 727 F.3d 300, 311–12 (3d Cir. 2013).

49. 795 F.3d 654 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016).

50. *Id.* at 661.

51. 844 F.3d 1121 (9th Cir. 2017).

52. *Id.* at 1132 ("Given that a consumer's affidavit could force a liability determination at trial without offending the Due Process Clause, we see no reason to refuse class certification simply because that same consumer will present her affidavit in a claims administration process after a liability determination has already been made.").

53. Fed. R. Civ. P. 56(c)(1)(A) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including . . . affidavits . . . .").

54. *See* U.S. Const., art. III, § 3 ("No [p]erson shall be convicted of Treason unless on the [t]estimony of two [w]itnesses to the same overt [a]ct, or on [c]onfession in open [c]ourt.").

3. Each Fraudulent Class Member Affects the Defendant's Total Liability Because a Court Should Not Aggregate Damages

Unascertainable class members make it difficult for a court to determine a defendant's liability to the class members. Heightened ascertainability proponents argue that each individual class member affects the defendant's total liability because a class defendant is only liable to those class members who can prove their claim by "actual damages."[55] A court cannot make these liability determinations without first identifying those class members.[56]

Heightened ascertainability proponents reject class plaintiffs' argument that the defendant's total liability can be calculated in the aggregate based on total sales or revenue with unclaimed funds distributed by *cy pres*.[57] Proponents point out that this approach is used in settlement cases and has repeatedly been rejected in litigated class actions.[58]

But the Ninth Circuit argues the opposite—the defendant's total liability is independent of whether any individual class member suffered

55. Brief of Appellants Bayer Corporation and Bayer Healthcare, LLC in Opposition to Appellee's Petition for Rehearing and Rehearing En Banc at 18–27, Carrera v. Bayer Corp., No. 12-2621, 2014 WL 3887938 (3d Cir. Dec. 30, 2013) [hereinafter Bayer's Brief Against Rehearing]. The Chamber of Commerce recently made a similar argument. *See* Chamber of Commerce Brief, *supra* note 41, at 14–15 (arguing that a fluid recovery method violates the defendant's due process rights); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973) (stating that even if Rule 23 could be read as to permit fluid recovery, "the courts would have to reject it as an unconstitutional violation of the requirement of due process of law").

56. *See* Rollins, Inc. v. Butland, 951 So. 2d 860, 873 (Fla. Dist. Ct. App. 2d 2006) ("The members of the putative class who experienced no actual loss have no claim for damages under FDUTPA.")

57. Chamber of Commerce Brief, *supra* note 41, at 14. *Cy Pres* is used "to distribute unclaimed portions of a class-action judgment or settlement funds to a charity that will advance the interests of the class." *Cy Pres*, Black's Law Dictionary (10th ed. 2014). Black's Dictionary points out that "[m]ore recently, courts have used *cy pres* to distribute class-action-settlement funds not amenable to individual claims or to a meaningful pro rata distribution to a nonprofit charitable organization whose work indirectly benefits the class members and advances the public interest." *Id.*

58. McLaughlin, *supra* note 32, § 8:16 ("Though aggregate classwide damages are not *per se* unlawful, courts have repeatedly rejected the use of fluid recovery or its equivalent as a substitute for individualized proof when the class pursues claims that seek redress for individualized injuries."); *see also* 32 Am. Jur. 2d *Federal Courts* § 1886 (2007) ("[C]ourts have rejected the 'fluid class' recovery concept as a method of reducing the manageability problems involved in a class action.").

damages.[59] In most cases, a defendant "will generally know how many units of a product it sold in the geographic area in question."[60] The court explained that "if the defendant is ultimately found to have charged . . . 10 cents more per unit than it could have without the challenged sales practice, the aggregate amount of liability will be determinable even if the identity of all class members is not."[61] The opinion even points out that the Third Circuit recognized this in *Carrera v. Bayer Corp.*[62]

The Ninth Circuit's argument is also followed by a regarded treatise on the subject. *Newberg on Class Action* states that "courts have generally rejected the argument that a plaintiff's ability to demonstrate only aggregate damages violates a defendant's due process and/or jury rights to confront and contest each individual's right to damages."[63] Courts have repeatedly stated that "[t]he use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself."[64] If plaintiffs provide the court with a common methodology for calculating individual damages, "even leaving such calculations for a succeeding proceeding[,] proof of aggregate damages may suffice."[65]

Plus, the defendant does not have a property interest in whether any particular individual is a class member.[66] Procedural due process

59. Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1132 (9th Cir. 2017) (noting that the defendant's liability could be determined in the aggregate). *See also* Brief of Public Justice, P.C. as Amicus Curiae in Support of Plaintiff-Appellee Carrera's Petition for Rehearing and Rehearing En Banc at 3–5, Carrera v. Bayer Corp., No. 12-2621, 2014 WL 3887938 (3d Cir. Oct. 4, 2013) [hereinafter Public Justice Brief] (arguing that the defendant's total liability can be determined in the aggregate).

60. *Briseno*, 844 F.3d at 1132.

61. *Id.*

62. *Id.* (citing Carrera v. Bayer Corp., 727 F.3d 300, 310 (3d Cir. 2013)).

63. NEWBERG, *supra* note 23, § 12:2, at 95–96.

64. In re Pharm. Indus. Average Wholesale Price Litig., 582 F.3d 156, 197 (1st Cir. 2009). *See* NEWBERG, *supra* note 23, § 12:2, at 96 n.10 (collecting cases).

65. NEWBERG, *supra* note 23, § 12:2, at 96–97.

66. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569 (1972) (explaining that procedural due process protections apply only to the deprivation of a party's constitutionally-protected interest in liberty or property). After certifying a damages class under Rule 23(b)(3), "courts determine extent of defendant's monetary liability *to the class*." Unopposed Motion of Professors of Civil Procedure and Complex Litigation for Leave to file Amici Curiae Brief in Support of Petition for Rehearing En Banc at 5–6, Carrera v. Bayer Corp., No. 12-2621, 2014 WL 3887938 (3d Cir. Oct. 4, 2013) [hereinafter Law Professors' Brief]. Once the court establishes aggregate damages, "the defendant has no interest in the addition or subtraction of members from the class roster." *Id.* at 6.

requirements apply only when an individual is deprived of an interest included within the Constitution's protection of liberty or property.[67] "Once it is determined that due process applies, the question remains what process is due."[68] In class actions seeking compensatory damages, the defendant may have a property interest in "pay[ing] damages reflective of [its] actual liability"—but no more.[69]

If a court can determine a defendant's liability only by adding together the individual damages each class member suffered, then the defendant's property interest is implicated by whether each person is actually a class member. But if a court can determine a defendant's liability without tallying each individual class member's damages, the defendant's due process rights are not violated as long as the defendant can present defenses to the plaintiff's proof and methodology by which its total liability is determined.[70]

4. Courts Cannot Direct the Required Notices to an Unascertainable Class

Rule 23 requires that class members receive notice of the litigation so that they can opt out of the class.[71] If class members do not receive this required notice, then they can argue that they are not bound by the class judgment.[72] Heightened ascertainability proponents argue that the court cannot direct the "best notice" to class members who cannot be identified.

In addition, recent empirical evidence suggests that when a court cannot identify the class members—and as a result, most members did

67. *See Bd. of Regents*, 408 U.S. at 569.

68. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); *see also* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985).

69. McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 231 (2d Cir. 2008).

70. When it is undisputed that the class damages can be accurately calculated from sales figures, then "the defendants are [not] constitutionally entitled to compel a parade of individual plaintiffs to establish damages." *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278, 289 (S.D.N.Y. 1971).

71. *See* FED. R. CIV. P. 23(c)(2)(B) ("For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."); *see also* Byrd v. Aaron's Inc., 784 F.3d 154, 165 (3d Cir. 2015) ("The separate ascertainability requirement ensures that class members can be identified after certification . . . and therefore better prepares a district court to direct . . . the best notice that is practicable under the circumstances.") (internal quotations omitted).

72. *See* MCLAUGHLIN, *supra* note 32, § 4:2 (noting that "[i]t would be unconstitutional to bind class members to an adverse judgment if they could not determine from the notice whether they were in the class and thus had no meaningful ability to opt out").

not receive direct notice—the class action is not beneficial. Proponents point to a study performed by a senior consultant who oversees and implements legal notice campaigns.[73] The consultant found that based on "hundreds of class settlements, . . . consumer class action settlements with little or no direct mail notice will almost always have a claims rate of less than one percent."[74] This means that "approximately *99.98%* of class members receive *no benefit at all*."[75]

The Ninth Circuit counters this argument by pointing out that Rule 23 does not require actual notice to all class members in all cases.[76] Rule 23 only requires that the court direct "the best notice that is practicable *under the circumstances*"[77] and recognizes that "it might be *impossible* to identify some class members for purposes of actual notice."[78] Moreover, alternative notice methods have been settled law for more than sixty years.[79] So long as the notice is reasonably calculated, publication notice would be acceptable for unidentifiable class members.[80]

5. Fraudulent Claims Could Reduce Bona Fide Class Members' Relief

Heightened ascertainability proponents fear that individuals will falsify their affidavits, which dilutes bona fide class members' recovery.[81] This concern may seem valid in theory, but "in practice, the risk

73. *See* Declaration of Deborah McComb Re Settlement Claims ¶ 1, Poertner v. Gillette Co., No. 6:12-CV-00803-GAP-DAB, 2014 WL 11210747 (M.D. Fla. Apr. 22, 2014) [hereinafter Declaration].

74. *Id.* ¶ 5.

75. Chamber of Commerce Brief, *supra* note 41, at 33.

76. *See* Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1128 (9th Cir. 2017) ("[N]either Rule 23 nor the Due Process Clause requires actual notice to each individual class member.").

77. Fed. R. Civ. P. 23(c)(2)(B) (emphasis added).

78. *Briseno*, 844 F.3d at 1129 (quoting Mullins v. Direct Dig., LLC, 795 F.3d 654, 665 (7th Cir. 2015)).

79. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) ("[N]otice [must be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

80. *See* Manual for Complex Litigation (Fourth) § 21.311 (2004) (detailing forms of notice, other than first-class mail, that courts regularly approve when "individual names or addresses cannot be obtained through reasonable efforts" and citing representative cases).

81. *See* Carrera v. Bayer Corp., 727 F.3d 300, 310 (3d Cir. 2013) ("It is unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims."). But Professor Gilles observes that "in practice only a tiny, tiny fraction of eligible claimants ever put in for recovery, so denying class certification because that tiny fraction . . . [is going to dilute claims] just doesn't seem to really make much sense." Gilles et al., *supra* note 24,

of dilution . . . seems low, perhaps to the point of being negligible."[82] According to Public Citizen, Inc., a non-profit consumer advocacy group, there have been only ten successful collateral attacks since Rule 23 was created.[83] Out of those ten, only two involved collateral attacks against Rule 23(b)(3) class actions, which is important because the ascertainability requirement usually only applies to Rule 23(b)(3) cases.[84] Public Citizen points out that *none* of these successful collateral attacks involved an issue with ascertaining class members or an assertion that some class members' interests were "diluted by fraudulent or inaccurate claims."[85] Therefore, this concern is misplaced.

Without the heightened ascertainability requirement, there would be no meaningful way to tell which claims were fraudulent. But even if the concern was more serious, it could be addressed more effectively. If fraudulent claims materially reduce bona fide class members' relief, these individuals may argue that the named plaintiff did not adequately represent their interests.[86] Class members who are not adequately

at 653. She continues by stating that class certification in cases like *Bayer* is the only way individuals receive compensation because "who, after all, is going to file a claim for fourteen dollars? I think in effect we're just depriving potential claimants of all recovery, which again just doesn't make much sense." *Id.*

82. *Briseno*, 844 F.3d at 1130 (quoting *Mullins*, 795 F.3d at 667). *See also* Brief Amicus Curiae of Public Citizen, Inc. in Support of Petition for Rehearing or Rehearing En Banc at 11, Carrera v. Bayer Corp., No. 12-2621, 2014 WL 2887938 (3d Cir. Oct. 2, 2013), [hereinafter Public Citizen Brief] ("The notion that non-class-members will submit fraudulent or otherwise faulty affidavits, under penalty of perjury, . . . in the hope of collecting $8.99, . . . or even $84.95 . . . is, . . . far-fetched.").

83. Public Citizen Brief, *supra* note 82, at 8 n.6 (citing Hansberry v. Lee, 311 U.S. 32 (1940); Hecht v. United Collection Bureau, Inc., 691 F.3d 218 (2d Cir. 2012); Beer v. United States, 671 F.3d 1299 (Fed. Cir. 2012); Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001), *aff'd by an equally divided court*, 539 U.S. 111 (2003); Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992); Twigg v. Sears, Roebuck & Co., 153 F.3d 1222, 1223-24 (11th Cir. 1998); Johnson v. Gen. Motors Corp., 598 F.2d 432 (5th Cir. 1979); Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978); Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973); Pate v. United States, 328 F. Supp. 2d 62 (D.D.C. 2004); *Cf. In re* Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760 (3d Cir. 1989) (reversing anti-suit injunction against collateral attack on class judgment but not ruling on the propriety of the attack)).

84. *Stephenson*, 273 F.3d at 252, *vacated and remanded in part, and aff'd by an equally divided court in part*, 539 U.S. 111, 112 (2003); *Twigg*, 153 F.3d at 1223–24 (11th Cir. 1998); Public Citizen Brief, *supra* note 82, at 8; Newberg, *supra* note 23, § 3:7, at 172 ("[I]t is not clear that the implied requirement of definiteness should apply to Rule 23(b)(2) class actions at all.").

85. Public Citizen Brief, *supra* note 82, at 8–9 (internal quotations omitted).

86. *Carrera*, 727 F.3d at 310.

represented are not bound by the judgment.[87] Those individuals could then bring another action against the defendant and possibly apply issue preclusion to prevent the defendant from relitigating its liability.[88]

6. Unascertainable Classes Compensate Uninjured Class Members

Ascertainability proponents fear that unascertainable classes will compensate individuals who did not suffer an injury. As previously mentioned, if a defendant is unable to specifically identify class members, then the defendant cannot challenge that person's claim. This runs the risk that uninjured individuals will share in any recovery.

Commentators challenge this logic as ignoring reality in two ways. First, only a tiny fraction of eligible claimants ever make submissions to class administrators in consumer cases.[89] As the Ninth Circuit pointed out, "consistently low participation rates in consumer class actions make it very unlikely that non-deserving claimants would diminish the recovery of participating, bona fide class members."[90] Second, denying class certification effectively denies the only meaningful possibility for compensation at all. Without class certification, "deserving class members will receive nothing, for they would not have brought suit individually in the first place."[91] Moreover, this issue can be resolved through Rule 23(b)(3)'s predominance inquiry, not a separate ascertainability requirement.[92]

7. Attorneys Receive All the Benefit from Consumer Class Actions

Courts and advocates alike assert that consumer class actions bring no real benefit to class members, but instead provide a windfall for attorneys. They claim that "[t]he only winner . . . is not the class

87. *See Hansberry*, 311 U.S. at 42 (explaining that due process requires the interests of absent class members to be adequately represented for them to be bound by the judgment).

88. *Carrera*, 727 F.3d at 310. *See also* Luks, *supra* note 25, at 2394 (explaining that "[a]scertainability should serve primarily as a requirement to ensure the workability of claim preclusion"); McLaughlin, *supra* note 32, § 4:2 ("[An amorphous class definition] call[s] into question the extent to which the court's rulings and a jury's determination will be binding on the parties.").

89. *See* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 120 (2007) (citing instances of "shockingly low participation rates").

90. Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1130 (9th Cir. 2017).

91. *Id.* (internal quotations omitted).

92. *See, e.g.*, Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1136–39 (9th Cir. 2016) (addressing the defendant's claim that the class definition was overbroad, and thus arguably contained some members who were not injured, as a Rule 23(b)(3) predominance issue).

members—who stand to recover little, if they can be identified at all—but class *counsel*—who has now been handed extraordinary leverage to negotiate a settlement and its fee."[93]

While this may be a legitimate concern, the solution is not a heightened ascertainability standard that does not give legitimate consumer classes a fighting chance. Instead, courts and opposing counsel should rely on sanctions. Under Rule 11, attorneys certify that any court filing is made for a proper purpose, is not meant to harass, and is not frivolous.[94] If either the court or opposing counsel believes the plaintiff's attorney violated Rule 23, the court or opposing counsel could file a motion for sanctions.[95] Even the threat of sanctions could be enough to deter plaintiffs' attorneys' misconduct.[96] A separate preliminary certification requirement is unnecessary.

8. Unascertainable Classes Cause an Administrative Headache

Without an administratively feasible mechanism for the court to determine if an individual is a class member, heightened ascertainability proponents argue that the court must conduct mini-trials for each person's claim.[97] This process is time-consuming and expensive. The drafters intended Rule 23 to create judicial efficiency, and an ill-defined class can waste judicial resources.[98] Courts point out that consumer

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93. Petition for Writ of Certiorari at 3, Direct Dig., LLC, v. Mullins, 136 S. Ct. 1161 (2016) (No. 15-549). *See also* Luks, *supra* note 25, at 2359 ("Judges have often shown hostility towards certification of frivolous class actions that result in large fees for attorneys but little recovery for class members.").

94. *See* FED. R. CIV. P. 11(b) ("By presenting to the court a pleading, written motion, or other paper . . . an attorney . . . certifies that to the best of the person's knowledge . . . it is not being presented for any improper purpose, such as to harass . . . [and that] the claims, defenses, and other legal contentions are warranted by existing law . . . .").

95. *See* FED. R. CIV. P. 11(c)(2) (describing how opposing counsel could file a motion for sanctions); FED. R. CIV. P. 11(c)(3) ("On its own, the court may order an attorney . . . to show cause why conduct specifically described in the order has not violated Rule 11(b)."); FED. R. CIV. P. 11(c)(1) ("If . . . the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney . . . that violated the rule or is responsible for the violation.").

96. *See* Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 985 (1992) (finding that if all aspects of Rule 11-related behavior are considered "a remarkable eighty-two percent of the respondents report having been affected by the Rule").

97. MCLAUGHLIN, *supra* note 32, § 4:2.

98. *Id.*; *see also* Cansler, *supra* note 47, at 1394 ("[I]f putative class members cannot provide objective proof of their claims, a class action becomes unwieldly, . . . [and] the heightened ascertainability requirement avoids lengthy and costly litigation that undermines Rule 23(b)(3)'s efficiency requirement.").

class members are unlikely to retain receipts, which could present "daunting administrative challenges," rendering the class action unfeasible.[99]

But both the Ninth and Seventh Circuits disagree. The Ninth Circuit points out that defendants do not have a "due process right to a *cost-effective* procedure for challenging every individual claim to class membership."[100] The explicit efficiency requirements and the manageability factor under Rule 23(b)(3) sufficiently ensure that a class action is superior.[101] The administrative feasibility requirement "conflicts with the well-settled presumption that courts should not refuse to certify a class merely on manageability concerns."[102] Also, a court can utilize many procedural tools to manage administrative burdens. For example, Rule 23(c) allows a district court to divide classes into subclasses or certify a class as to only particular issues.[103] The Seventh Circuit reasoned that the administrative feasibility requirement forced judges to view administrative concerns "in a vacuum," causing them to deny class certification without considering the reality that a class action may be the only way for small consumer claims to be effectively litigated.[104]

B. The Policies Behind the Seventh and Ninth Circuits' Weaker Ascertainability Standard

The Seventh and Ninth Circuit's standards lie somewhere in the middle of the ascertainability spectrum. The Seventh Circuit explicitly rejected any extra certification hurdles and announced that a class is ascertainable if its members can be identified using objective criteria.[105] More recently, the Ninth Circuit also rejected the Third Circuit's stricter approach and joined ranks with the Seventh Circuit.[106] When

99. *In re* POM Wonderful LLC, No. ML 10-02199 DDP (RZx), 2014 WL 1225184, at *6 (C.D. Cal. Mar. 25, 2014).

100. Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1132 (9th Cir. 2017) (internal quotations omitted).

101. *Id.* at 1127–28.

102. *Id.* at 1128 (citing Mullins v. Direct Dig., LLC, 795 F.3d 654, 663 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016)).

103. *See* Fed. R. Civ. P. 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues."); Fed. R. Civ. P. 23(c)(5) ("When appropriate, a class may be divided into subclasses that are each treated as a class . . . .").

104. *Mullins*, 795 F.3d at 663.

105. *Id.* at 657.

106. *See Briseno*, 844 F.3d at 1133. Some commentators predicted this outcome based on the Ninth Circuit's reputation as the "food court." Archis A. Parasharami & Daniel Jones, *Ninth Circuit Rejects Meaningful Ascertainability Requirement for Class Certification, Cementing Deep Circuit Split*, Mayer Brown: Class

choosing this standard, the court weighed several competing policies but ultimately focused on the heightened ascertainability standard's effects on small-value consumer class actions. The Seventh Circuit sharply criticized the Third Circuit's approach as a "doctrinal drift."[107] The court believed that the Third Circuit's concerns must be balanced against the risk of failing to certify classes in small-value consumer cases, where "'only a lunatic or a fanatic' would litigate the claim individually."[108]

1. A Textual Analysis of Rule 23 Suggests that the Drafters Did Not Intend for Courts to Apply a Separate Ascertainability Standard

The Ninth Circuit first analyzed the text and determined that requiring proof of administrative feasibility before class certification is incompatible with Rule 23.[109] The court closely examined the certification prerequisites listed in Rule 23(a) and found that the Rule's language suggests that the drafters intended the list to be exhaustive.[110] The court then argued that the required superiority inquiry already mandates that courts consider the same manageability concerns that drive the heightened ascertainability requirement.[111] The text supports the conclusion that courts should not impose an additional requirement in Rule 23.

Defense Blog (Jan. 6, 2017), https://www.classdefenseblog.com/2017/01/ninth-circuit-rejects-meaningful-ascertainability-requirement-class-certification-cementing-deep-circuit-split/ [https://perma.cc/CMK3-BZ3Y].

107. *Mullins*, 795 F.3d at 659.

108. *Id.* at 665 (quoting Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004)).

109. *See Briseno*, 844 F.3d at 1125 (finding the omission of "administrative feasibility" from the Rule 23(a) prerequisite inquiries meaningful after examining the Rule using "[t]raditional canons of statutory construction"); Michael Scott Leonard, *9th Circuit Widens Circuit Split, Declining to Adopt Rule on 'Administrative Feasibility'*, Westlaw J. Class Action, Jan. 18, 2017, at *1 (discussing the deepening split among federal appeals courts requiring class-action plaintiffs to propose an "administratively feasible" way to identify potential class members).

110. *See Briseno*, 844 F.3d at 1125 (explaining that Rule 23(a) constitutes an exhaustive list).

111. *See id.* at 1126 ("Imposing a separate administrative feasibility requirement would render th[e] manageability criterion largely superfluous, a result that contravenes the familiar precept that a rule should be interpreted to [give] effect to every clause." (internal quotation omitted)).

2. The Heightened Ascertainability Requirement Frustrates Rule 23's Purpose

The Seventh Circuit admits that administrative feasibility "sounds sensible at first glance."[112] "Who could reasonably argue that a plaintiff should be allowed to certify a class whose members are impossible to identify?"[113] But—practically speaking—"some courts have used this requirement to erect a nearly insurmountable hurdle at the class certification stage in situations where a class action is the only viable way to pursue valid but small individual claims."[114] The administrative feasibility requirement makes ascertainability a "gatekeeper" to class certification, which is unacceptable given that ascertainability is a judge-made rule.[115]

The heightened standard's practical consequences are inconsistent with the policies driving Rule 23(b)(3). Rule 23(b)(3) asks courts to compare the costs and benefits of class litigation, including "other methods" that could resolve the controversy.[116] But the extra administrative feasibility requirement instead invites courts to consider administrative burdens in a vacuum.[117] The heightened standard removes an important variable from the equation: the court's choice to apply the heightened standard is outcome-determinative for most small-value consumer class actions.[118] The benefits of class actions in the consumer context could outweigh the administrative burdens involved.[119] But the heightened requirement removes this important piece from the conversation.

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112. Mullins v. Direct Dig., LLC, 795 F.3d 654, 662 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016).

113. *Id.*

114. *Id.*

115. The heightened standard practically precludes a court from considering any of Rule 23(a)'s factors until the plaintiff can establish the class members' identity. *Id.*; Michael R. Carroll & Burt M. Rublin, *7th Circuit Rejects "Heightened" Ascertainability Requirement for Class Actions*, Ballard Spahr, LLP (July 30, 2015), http://www.ballardspahr.com/alertspublications/legalalerts/2015-07-30-7th-circuit-rejects-heightened-ascertainability-requirement-for-class-actions.aspx [https://perma.cc/6J3S-YY25].

116. *Briseno*, 844 F.3d at 1128.

117. *Id.*

118. *Id.*; *see also* Law Professors' Brief, *supra* note 66, at 10 (arguing that the practical consequence of the heightened ascertainability requirement is that "no case involving a low-cost consumer good purchased via a retailer may proceed as a class action").

119. *See* Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("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

3. Corporate Malfeasance Will Go Unpunished Under the Heightened Ascertainability Standard

Beyond providing consumers a way to band together to pursue small-value claims, the drafters intended Rule 23(b) to serve "a deterrent function in the marketplace."[120] The heightened ascertainability requirement is troubling because "it takes class actions off the table as a tool to deter corporate malfeasance."[121]

Some argue that there are other ways to deter corporate wrongdoing. For example, the Food and Drug Administration ensures that food labels are accurate. Therefore, the FDA should be trusted with maintaining the balance between corporations and consumers.[122] But this would defeat the purpose of class actions. The drafters created Rule 23 partially as a response to government inaction.[123] Private class actions under Rule 23 achieves more substantive change than regulatory agencies alone can achieve.[124] Aggregating claims allows "an independent, well-financed cadre of private attorneys general to compensate for the inadequacies of government regulators and individual litigants."[125]

Moreover, when companies expose a mass of consumers to the same deceptive practice, a class is often the only effective way to stop and redress the corporate wrongdoing. As the Supreme Court found, "small recoveries do not provide incentive for any individual to bring a solo

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action prosecuting his or her rights."(quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))). Arthur Miller, one of the country's most recognized experts on procedure, warns that the heightened ascertainability requirement "threatens to render the class action procedure unavailable in the very small-value consumer cases that necessitated Rule 23 in the first instance." Law Professors' Brief, *supra* note 66, at 3.

120. *See, e.g.*, Hughes v. Kore of Ind. Enter., Inc., 731 F.3d 672, 677 (7th Cir. 2013) ("[W]hen what is small is not the aggregate but the individual claim[,] . . . that's the type of case in which class action treatment is most needful . . . A class action, like litigation in general, has a deterrent as well as a compensatory objective.").

121. Law Professors' Brief, *supra* note 66, at 10. "[N]o matter how clear the evidence of wrongdoing and how definite the aggregate liability, plaintiffs have no redress in the typical consumer case involving small retail transactions." *Id.* at 11.

122. *See* Chamber of Commerce Brief, *supra* note 41, at 35.

123. *See* Luks, *supra* note 25, at 2364 (explaining that the drafters crafted Rule 23 as an "evolutionary response" to injuries unremedied by government regulation) (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980)).

124. *Id.* at 2364–65 ("Private litigation through Rule 23 pushes enforcement of substantive law to a more optimal point that regulatory agencies alone would not be able to achieve.").

125. David Marcus, *The History of the Modern Class Action, Part I:* Sturm Und Drang*, 1953–1980*, 90 Wash. U. L. Rev. 587, 593 (2013).

action prosecuting his or her rights."[126] Class actions are meant to overcome this problem by "aggregating the relatively paltry potential recoveries into something worth someone's, usually an attorney's, labor."[127]

C. The Eighth Circuit's Standard: Rigorously Applying Rule 23's Prerequisites Renders a Separate Ascertainability Requirement Unnecessary

The Eighth Circuit's standard sits opposite the Third Circuit's standard on the ascertainability spectrum. The Eighth Circuit recently decided that a rigorous Rule 23 analysis sufficiently covers the concerns behind ascertainably, and the court does not apply ascertainability as a separate, preliminary requirement.

In *Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.*,[128] the court discussed ascertainability, noting that the Eighth Circuit has not articulated a specific standard yet.[129] The court decidedly rejected both the "heightened" and the "weak" versions of ascertainability and opted for a middle ground: "this court adheres to a rigorous analysis of the Rule 23 requirements, which includes that a class must be adequately defined and clearly ascertainable."[130]

One commentator felt the Eighth Circuit wrongly abandoned the separate ascertainability requirement.[131] Requiring that classes at least be defined with reference to objective criteria would deter district courts from improperly expanding the ascertainability analysis.[132] According to this commentator, the Eighth Circuit should have adopted at least the weak ascertainability standard, which would prevent district courts from potentially expanding the standard to include an administrative feasibility standard.[133] Some of those concerns appear misguided. Based

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126. 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)).

127. Public Citizen Brief, *supra* note 82, at 4 (quoting *Amchem Prods.*, 521 U.S. at 617).

128. 821 F.3d 992 (8th Cir. 2016).

129. *Id.* at 996.

130. *Id.* (internal quotations omitted); *see also* McKeage v. TMBC, LLC, 847 F.3d 992, 998 (8th Cir. 2017) ("[A]scertainability is an implicit requirement that our court enforces through a rigorous analysis of the Rule 23 requirements." (quoting *Sandusky Wellness Center*, 821 F.3d at 996)).

131. Rhys J. Williams, Note, Sandusky Wellness Center, LLC v. Medtox Scientific, Inc*: The Eighth Circuit Joins the Ascertainability Standard Conversation*, 50 Creighton L. Rev. 155, 170 (2016).

132. *Id.*

133. *Id.* at 177.

on the cases decided so far, the district courts seem to be having little trouble applying the Eighth Circuit's standard.[134]

Another commentator suggests that sticking with Rule 23's text can mitigate some concerns behind ascertainability.[135] For example, rigorously applying the manageability and superiority requirements from Rule 23 can address concerns behind the strict ascertainability standard. Strict ascertainability proponents argue that unascertainable classes are too difficult to manage without individualized inquiries. If a court finds class members too difficult to identify, then the court can deny class certification on "manageability" grounds because Rule 23 allows a court to consider the class' manageability at the time of certification.[136] Courts must ask whether the *actual* "challenges entailed in the administration of [the] class are . . . so burdensome as to defeat certification."[137] When performing this analysis, courts must remember that Rule 23's drafters understood that "class actions inherently involve administrative burdens, individual inquiry, and some uncertainty."[138] Courts should be skeptical of "dismal specters paraded before them by defendants with regard to the action's manageability" and instead proceed "in accord with the Rule's purposes."[139]

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134. *See* Lafollette v. Liberty Mut. Fire Ins. Co., No. 2:14-CV-04147-NKL, 2016 WL 4083478, at *5 (W.D. Mo. Aug. 1, 2016) ("[The *Sandusky* court] did not apply any heightened ascertainability standard . . . [a]ccordingly, this Court will not use the administrative feasibility test in connection with consideration of ascertainability."); Labrier v. State Farm Fire & Cas. Co., 315 F.R.D. 503, 512 (W.D. Mo. July 25, 2016) (declining to use the administrative feasibility standard because "[t]he *Sandusky* court . . . did not apply any heightened ascertainability standard"); Mojica v. Securus Techs., Inc., No. 5:14-CV-5258, 2017 WL 470910, at *4 (W.D. Ark. Feb. 3, 2017) ("[T]his does not mean administrative burdens are irrelevant to a class certification inquiry; it just means inquiry into administrative burdens should be shaped and guided by the Rule 23(b)(3) factors that properly implicate them, rather than being elevated to a separate, preliminary requirement for a heightened showing that has no basis in the text of Rule 23."); *In re* Global Tel*Link Corp. ICS Litig., No. 5:14-CV-5275, 2017 WL 471571, at *3 (W.D. Ark. Feb. 3, 2017) (same); *In re* Wholesale Grocery Prods. Antitrust Litig., No. 09-MD-2090 ADM/TNL, 2016 WL 4697338, at *5 (D. Minn. Sept. 9, 2016) (mentioning that the class members need to "be identified in an administratively feasible manner," but ultimately not using that test and instead deciding that the class members can be identified using objective criteria).

135. Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 Yale L.J. 2354, 2396, 2403 (2015).

136. *See* Fed. R. Civ. P. 23(b)(3)(D).

137. Ries v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 535 (N.D. Cal. 2012).

138. Shaw, *supra* note 135, at 2397.

139. Tom Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. Indus. & Com. L. Rev. 501, 510 (1969).

These individualized inquiries might make a court concerned about whether a class action is truly "superior" to another form of dispute resolution.[140] The superiority analysis would force courts to wrestle with what other possible resolution methods might be available. "If 'the *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits'—as Judge Posner suggested was often the case—then a class action with some administrative burden may still be 'superior' to nothing at all."[141]

Lastly, if a court must perform extensive individual inquiries, then perhaps the class issues do not predominate over individual issues.[142] The main question for courts should be whether "the realities of litigation . . . suggest that the class procedure is not 'superior' to more commonplace devices" and whether "individual questions of liability and defense will overwhelm the common questions."[143]

Even though a fixed ascertainability rule may make class action litigation more stable and predictable, it comes with a price: "forestalling precisely the kind of litigation the Rule was written to enable—the kind that protects 'the small guy' where other procedural mechanisms cannot."[144]

III. Ascertainability in the Future

Based on the current legal landscape, it appears that ascertainability will remain an issue for consumer class actions. Even though—as discussed in Part II—the weaker standard is superior, there exists the possibility that the heightened standard will be triumphant. If the heightened standard wins the day, there are ways class plaintiffs can make do.

140. *See* FED. R. CIV. P. 23(b)(3) ("A class action may be maintained if Rule 23(a) is satisfied and if . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.").

141. Shaw, *supra* note 135, at 2397 (citing Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004)).

142. *See* FED. R. CIV. P. 23(b)(3).

143. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 393 (1967).

144. Shaw, *supra* note 135, at 2398.

A. The Supreme Court May Eventually Grant Certiorari to End the Circuit Split.

Commentators note that Supreme Court class-action cases seem favorable to the heightened standard.[145] The Court appears to put significant weight on certain policies supporting the heightened requirement. For example, the Court emphasized that a district court should certify a class action only after a "rigorous analysis" that ensures all Rule 23 prerequisites are satisfied.[146] The Court also pointed out that Rule 23 class actions must "achieve economies of time, effort, and expense."[147]

But, oddly enough, the Supreme Court has declined to review some of these high-profile ascertainability cases.[148] The Supreme Court denied review in *Mullins*, even though Direct Digital had a strong argument for certiorari based on the circuit split.[149] One scholar speculates that the Justices need a break on the topic, given how much attention the Supreme Court has provided to class actions recently.[150] Or possibly the Supreme Court is becoming numb to certain arguments. The Court may have once found the threat of "blackmail pressure to settle" persuasive, but now the "mantra has lost its punch."[151]

145. *See* Cansler, *supra* note 47, at 1384 (noting that before *Mullins*, the Supreme Court's recent class action cases suggest the Court would support the heightened standard).

146. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1429 (2013).

147. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997); *see also* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) ("[Class action] claims must depend upon a common contention . . . capable of classwide resolution"); Max Helveston, *Promoting Justice Through Public Interest Advocacy in Class Actions*, 60 Buff. L. Rev. 749, 751 (2012) ("[In *Wal-Mart*], the Court subjected the proposed class to an increased level of scrutiny and appears to have raised the bar for all future groups seeking class certification.").

148. *See, e.g.*, Mullins v. Direct Dig., Inc., 795 F.3d 654 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016); Rikos v. Procter & Gamble Co., 799 F.3d 497 (6th Cir. 2015), *cert denied*, 136 S. Ct. 1493 (2016); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), *cert denied*, 2017 WL 1365592 (2017).

149. Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. Rev. 971, 979–80 (2017); *see also Mullins*, 795 F.3d at 662, *cert. denied*, 136 S. Ct. 1161 (2016) (mem).

150. *See* Klonoff, *supra* note 149, at 12–13 ("[The Justices are] not especially eager to add class action cases to the docket.").

151. *Id.* Although the Supreme Court has not explicitly disparaged the "blackmail settlement" rationale, other courts have done so recently. *See, e.g.*, *In re* Oppenheimer Rochester Funds Grp. Sec. Litig., 318 F.R.D. 435, 440 (D. Colo. 2015) (characterizing the argument about "unfair" pressure to settle for reasons wholly unrelated to the merits as "transparent hyperbole"); Ebin v. Kangadis Food Inc., 297 F.R.D. 561, 572 (S.D.N.Y. 2014) (noting that the alleged pressure

Some commentators speculate that the decision not to accept certiorari on these high-profile cases may have been influenced more by the Court's internal politics after Justice Scalia's death than the merits of the case.[152] Without Justice Scalia, the Supreme Court's conservative wing was without a clear path to five votes.[153] But Justice Gorsuch's confirmation may change that. Commentators speculate that Justice Gorsuch is pro-business, but it is too early to tell whether "he will prod his fellow justices to revive Justice Antonin Scalia's years-long campaign to reign in class actions."[154] Gorsuch participated in only a few class-action cases while on the United States Court of Appeals Tenth Circuit, where he generally—but not always—ruled for the defense.[155]

B. Congress May Codify the Heightened Standard

The House of Representatives passed a bill that would codify the heightened ascertainability standard.[156] The bill's proponents make the same arguments addressed in this Note.[157] They argue that the bill

to settle "is common to virtually all class actions, so that if it were a sufficient argument to defeat certification, virtually no class actions would ever be certified").

152. Justice Scalia authored many of the Supreme Court's recent landmark class action cases. Amanda Bronstad, *To Defense Bar's Dismay, SCOTUS Rejects Review of Class Action*, Nat'l L.J. (Mar. 2, 2016), http://www.nationallawjournal.com/id=1202751230219 [https://perma.cc/QDT2-CYCW].

153. *Id.*

154. Alison Frankel, *SCOTUS Case Will Test Justice Gorsuch's Appetite for Class Action Limits*, Reuters (May 8, 2017), http://www.reuters.com/article/otc-gorsuch-idUSKBN18424X [https://perma.cc/XFU5-E99A].

155. Amy Howe, *A Closer Look at Judge Neil Gorsuch and Class Actions*, SCOTUSBlog (Mar. 8, 2017, 2:07 PM), http://www.scotusblog.com/2017/03/closer-look-judge-neil-gorsuch-class-actions/ [https://perma.cc/M87T-U9S5].

156. *See* Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. § 1718(a) (2017); s*ee also* Fairness in Class Action Litigation Act of 2017, H.R. Rep. No. 115-25, at 4 (2017) [hereinafter Fairness in Class Action Litigation] (discussing the purported rationales for the Act—namely, to protect consumers from unscrupulous lawyers and to prevent abusive litigation practices). Some commentators call this "[a] chilling little bill" that "could have the effect of ending the class action as an American institution." Chris Sagers & Joshua P. Davis, *Proposed Law Could Be a New Attack on Civil Rights*, N.Y. Times (Mar. 13, 2017), https://www.nytimes.com/2017/03/13/business/dealbook/class-action-proposed-law.html?_r=0 [https://perma.cc/9376-KN9Y].

157. *See, e.g.*, Sabrina Eaton, *House Votes to Restrict Class Action Lawsuits Over Consumer Group Objections*, Cleveland.com (Mar. 9, 2017, 10:09 PM), http://www.cleveland.com/metro/index.ssf/2017/03/house_restricts_class_action_1.html [https://perma.cc/6H3W-7DZZ] (quoting a Virginia representative

addresses "the small individual recoveries [that] class action lawsuits sometimes generate" and "the large lawyers' fees and anecdotes that make lawsuits seem ridiculous."[158]

The bill would have very real consequences: "[m]ost claims will be much harder to bring on a class basis."[159] For example, an antitrust class action challenging price-fixing by foreign manufacturers for goods sold to United States customers may never come to fruition because it would be impossible to show that every purchaser paid inflated prices.[160] Without a class action, individuals would have no practical way to seek recovery "and foreign corporations would be free to prey on American consumers."[161]

Some United States Representatives expressed that this bill "represents the latest attempt to tilt the civil justice playing field in favor of corporate defendants and to deny consumers and members of the public access to justice."[162] The Representatives express many concerns about the bill, including that "the bill is a solution in search of a problem" because it is based on the false premise that "[f]ederal courts are routinely failing to comply with the rigorous requirements for certifying class actions specified in Federal Rule of Civil Procedure 23."[163] The Representatives feel that the bill "undermines the core purpose of class actions," which includes "provid[ing] access to courts for parties that, individually, would not have the incentive or resources to pursue otherwise meritorious claims."[164] Lastly, the Representatives believe that the bill substantially and needlessly "increase[s] resource burdens on the Federal courts, significantly reduce[s] judicial discretion in many respects, and unnecessarily circumvent[s] the . . . Rules Enabling Act process for amending Federal civil procedure rules."[165]

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stating that "lawyers are often the only winners from 'frivolous class action lawsuits' that rip off businesses and consumers").

158. Sagers & Davis, *supra* note 156 ("That is all quite misleading and it is a shame.").

159. *Id.*; *see also* Lydia Wheeler, *House Passes Bill to Curb Class-Action Lawsuits*, Hill (Mar. 9, 2017, 7:22 PM), http://thehill.com/blogs/floor-action/house/323313-house-passes-bill-to-curb-class-action-lawsuits [https://perma.cc/X26E-KFNQ] (interviewing Maryland Representative Jamie Raskin who states that the bill "doesn't formally abolish the class-action mechanism . . . It's not the guillotine, but it's a straight jacket.").

160. Sagers & Davis, *supra* note 156.

161. *Id.*

162. Fairness in Class Action Litigation Act, *supra* note 156, at 45.

163. *Id.*

164. *Id.* at 45–46.

165. *Id.* at 46.

C. How Class Plaintiffs Can Combat the Heightened Standard

Because the heightened standard could be adopted by the Supreme Court or codified by Congress, class-action plaintiffs need ways to withstand the heightened standard. One possible solution to the administrative feasibility problem is electronic receipts.[166] Even without electronic receipts, district courts should actively utilize their right to modify class definitions and help viable small-value consumer class actions move past the certification stage and on to discovery.

1. Modern Technology Can Help Ascertain Class Members

A growing number of businesses utilize electronic receipts.[167] In 2012, a third of retailers offered digital receipts, and half of them did so at all of their stores.[168] As this trend continues to grow, and more consumers grow accustomed to electronic receipts, class plaintiffs may be able to rely on these electronic receipts to prove their class membership. Potential class members can simply scan their email for their grocery store receipt and then submit proof that they are class members.

Not only can technology help consumers prove their class membership, it can also help courts send adequate notice to class members. Heightened ascertainability proponents worry that class members are not receiving adequate notice. But pending revisions to Rule 23 contemplate a new spin on notice: social media.[169] The rampant

166. There are important privacy concerns regarding electronic receipts that are beyond the scope of this Note. For a discussion of the privacy concerns behind digital receipts, see, for example, Herb Weisbaum, *Paper or Email? Pros and Cons of Digital Receipts*, CNBC (Jan. 23, 2014, 2:52 PM), http://www.cnbc.com/2014/01/23/paper-or-email-pros-and-cons-of-digital-receipts.html [https://perma.cc/663L-VC2M].

167. *See* Wendy Koch, *Retailers Find Profits with Paperless Receipts*, USA TODAY (Nov. 3, 2012, 11:46 AM), http://www.usatoday.com/story/news/nation/2012/11/03/retailers-e-mail-digital-paperless-receipts/1675069/ [https://perma.cc/C5P2-WF9Q] ("[M]ore stores and banks are offering to e-mail shoppers their receipts rather than giving them a printed copy."); *see also* Stephanie Clifford, *Shopper Receipts Join Paperless Age*, N.Y. TIMES (Aug. 7, 2011), http://www.nytimes.com/2011/08/08/technology/digital-receipts-at-stores-gain-in-popularity.html [https://perma.cc/2P7N-Z3N5] ("Major retailers, including Whole Foods Market, Nordstrom, Gap Inc., . . . Anthropologie, Patagonia, Sears and Kmart, have begun offering electronic versions of receipts . . . .").

168. *See* Koch, *supra* note 167 (relying on a survey by the marketing firm Epsilon).

169. *See* COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 442 (June 12–13 2017), http://www.uscourts.gov/sites/default/files/2017-06-standing-agenda_book_0.pdf [https://perma.cc/V7LT-4JZF] (authorizing notice by "electronic means").

growth of social media outlets potentially allows the court to reach class members through websites like Facebook or Twitter.

2. District Courts Should Take a Larger Role in Aiding Classes

Class plaintiffs may try relying on the district courts to show mercy on viable small-value consumer claims. District courts are not bound by the class definition that the parties propose in the complaint.[170] They have "considerable flexibility" to modify the proposed class definition if it is too broad, narrow, or imprecise.[171] "In fact, the court has a duty to ensure that the class is properly constituted."[172] With all the scholarship surrounding the ascertainability issue and its effects on consumer class actions, district courts should take a bigger role in shaping allegedly unascertainable class definitions to meet the standard so the class can pass the certification stage. With more discovery, class members may be able to produce better evidence demonstrating their membership in the class, and the class action can move forward.

Conclusion

The policies behind the heightened ascertainability standard are not strong enough to support the requirement's practical consequences: low-value consumer class actions cannot be sustained in federal court. If class plaintiffs find themselves facing the heightened ascertainability requirement, the trend toward electronic receipts could help individuals demonstrate their class membership. Regardless, district courts should help consumer class actions re-define their class definitions to make it past the certification stage and to give those class actions a fighting chance.

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170. McLaughlin, *supra* note 32, § 4:2; *see also* James Wm. Moore et al., Moore's Federal Practice and Procedure § 23:21 (3d ed. 2016) ("The court may, in its discretion, grant certification but modify the definition of the proposed class to provide the necessary precision to correct other deficiencies.").

171. McLaughlin, *supra* note 32, § 4:2.

172. Moore et al., *supra* note 170, § 23:21.

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