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Ascertainability of Members in Class Actions: The Implicit Requirement

Ahmed Metwally

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Title: Ascertainability of Members in Class Actions: The Implicit Requirement

Topic: The Implicit Requirement of Ascertainability in Rule 23(b)(3)

I. Introduction

Rule 23 is a mechanism that allows "one or more members of a class [to] sue or be sued as representative parties on behalf of all members."[1] The class action mechanism under Rule 23 is designed to allow for more efficient means of litigation in cases involving members who are similarly situated with identical claims of action against the same defendant(s). In order to ensure the prime efficiency that the rule is designed to accomplish a party seeking class certification must satisfy many requirements including but not limited to the Rule 23(a) prerequisites.[2]

Beyond the prerequisites set forth in Rule 23(a), in order for a class to be certified under Rule 23(b)(3), common questions must "predominate over any questions affecting only individual members" and the use of a class action must be "superior to other available methods for the fair and efficient adjudication of the controversy."[3] A circuit split exists regarding whether Rule 23(b)(3) includes an implied requirement of heightened ascertainability in order for a class to be certified. The First, Second, Third, Fourth, Fifth and Eleventh Circuits are in favor of an implied heightened ascertainability requirement in order for a class to be certified.[4] The

[1] Fed. R. Civ. P. 23(a).
[2] *Id.*
[3] Amchem Prods. v. Windsor, 521 U.S. 591, 615 (1997).
[4] Leyse v. Lifetime Entm't Servs., LLC., No. 16-1133-cv, 679 Fed. Appx. 44, 2017 U.S. App. LEXIS 2607, 2017 WL 659894 (2d Cir. Feb. 15, 2017); Byrd v. Aaron's Inc., 784 F.3d 154 (3d Cir. 2015); Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349 (3d Cir. 2013); City Select Auto Sales, Inc. v. BMW Bank of N. Am., Inc., 867 F.3d 434 (3d Cir. 2017); Karhu v. Vital Pharm., Inc., 621 F. App'x 945 (11th Cir. 2015); Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012); John v. Nat'l Sec. Fire & Cas. Co., 501 F.3d 443 (5th Cir. 2007); In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24, (2d Cir. 2006).

Seventh, Eighth and Ninth Circuits have opined that there is no implicit requirement, and that heightened ascertainability is not necessary for a class to be certified.[5] Although the Supreme Court of the United States has yet to address this particular issue, prior cases have established precedent that is consistent with favoring a higher ascertainability requirement which indicates that once the Supreme Court finally addresses the issue it will likely side with the reasoning established by the Third Circuit.[6]

This Note addresses the issue of whether or not Rule 23(b)(3) should be interpreted to include an implicit requirement of heightened ascertainability when determining whether a class should be certified. This Note advocates for an interpretation of Rule 23(b)(3) which includes an implicit ascestainability requirement resulting in a heightened ascertainability standard**.**

II. Circuits in Favor of an Implied Heightened Ascertainability Requirement

In *Byrd v. Aaron's Inc.*, the Third Circuit reviewed a case where Appellant sought class certification for 895 customers who rented or purchased laptops from the company Aspen Way.[7] The 895 customers all had a spyware program called DesignerWare's Detective Mode installed on their laptops which Appellant alleges Appellee used to invade the privacy of the laptop users in violation of the Electronic Communication Privacy Act of 1986 (ECPA).[8]

Appellant provided two alternative propositions for class definitions:

> Class I — All persons who leased and/or purchased one or more computers from Aaron's, Inc., and their household members, on

[5] Briseno v. ConAgra Foods, Inc., 844 F.3d 1121 (9th Cir. 2017); Mullins v Direct Dig., 795 F.3d 654, (7th Cir. 2015), cert. denied, 136 S. Ct. 1161 (2016); Sandusky Wellness Ctr., LLC, v. Medtox Sci., Inc., 821 F.3d 992 (Eighth Cir. 2016); Rikos v. Proctor & Gamble Co., 799 F.3d 497 (6th Cir. 2015).
[6] Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013); Wal-Mart Stores, Inc. v. Dukes, 564 U.S 338, 350 (2011) ("[Class action] claims must depend upon a common contention . . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution . . . ."); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997).
[7] 784 F.3d 154, 159 (3d Cir. 2015).
[8] *Id.*

> whose computers DesignerWare's Detective Mode was installed and activated without such person's consent on or after January 1, 2007.[9]
>
> Class II — All persons who leased and/or purchased one or more computers from Aaron's, Inc. or an Aaron's, Inc. franchisee, and their household members, on whose computers DesignerWare's Detective Mode was installed and activated without such person's consent on or after January 1, 2007.[10]

The Magistrate Judge found that the proposed classes were unascertainable and underinclusive because the proposed classes failed to encompass all of the individuals whose information was "surreptitiously gathered by Aaron's and its franchisees."[11] The magistrate also found the proposed classes to be overinclusive since not all of the computers with the spyware installed were used to collect customers' sensitive information.[12]

The Magistrate Judge also took issue with the phrase "household members" in the class definition since (1) the phrase was not specifically defined and (2) even if the members could be "gleaned" through public records this method was inadequate for the purposes of accurately ascertaining the necessary information to certify the class.[13] The district court chose to adopt all of the Magistrate Judge's findings.[14] The Third Circuit addressed whether the District Court "erred in determining that the Byrds' proposed classes were not ascertainable."[15] The outcome of this case is essentially determined by whether or not the court finds an implied ascertainability requirement in Rule 23(b)(3).[16] The court began its reasoning by making a general statement that the basis for the ascertainability requirement "is grounded in the nature of the class action

[9] *Id.* at 160.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] 784 F.3d 154 at 160–61.
[14] *Byrd*, 784 F.3d at 159.
[15] *Id.* at 161.
[16] *Id.*

device itself."[17] The court cited to Supreme Court precedent which explained that the general understanding of class actions is that it deviates from standard litigation procedures for the purpose of achieving a more efficient judicial economy.[18]

Furthermore, since the class seeking to be certified bears the burden of demonstrating by a preponderance of the evidence that it has satisfied the requirements of Rule 23, it is incumbent upon the court to engage in "rigorous analysis" and to "probe behind the pleadings when necessary" to discern whether these requirements have in fact been satisfied.[19] This "rigorous analysis" encompassed the implied ascertainability requirement at issue in this case.[20] In order to determine whether the party seeking certification satisfied the ascertainability requirement the court provided a two-step framework. The party must show that (1) the class is defined with reference to objective criteria, and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.[21]

The court emphasizes the fact that this framework does not require all members to be identified at the time of certification.[22] The party seeking certification need only supply a means so that all members *can* be identified throughout the course of discovery without having to engage in what the court refers to as "mini-trials."[23] The term mini-trials is not meant to encompass any and all individual fact-finding; it is in reference to the ascertainment of individual class members that require extensive fact-finding.[24] The court overturned the district court's decision after reasoning that first, the underinclusive requirement was not meant to be a factor in

[17] *Id.* at 162.
[18] *Id.* (citing Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013)).
[19] *Id.* at 163.
[20] Byrd, 784 F.3d at 163.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012).

the analysis of whether class members can be ascertained.[25] Second, certification should not be barred as a result of a class definition being overinclusive.[26] Finally, the District Court misapplied legal principles from Third Circuit precedent in *Carerra* when the court found the phrase "household members" was unascertainable.[27]

In *Leyse v. Lifetime Entm't Servs., LLC.*, Plaintiff-Appellant Mark Leyse brought a claim against Lifetime Entertainment Services, LLC (Lifetime) for violation of the Telephone Consumer Protection Act (TCPA).[28] The Second Circuit reviewed the district court's decision de novo.[29] Lifetime disseminated a recorded message via telephone to inform viewers that the show Project Runway would be broadcasted on a different channel.[30] Lifetime provided a third party with zip codes of areas where viewers of the show were most prominent, at which point another party supplied a list of numbers to be contacted.[31] The source of the list is unknown, and no copies of the list exists.[32] Leyse received the message while he was living with Genevieve Dutriaux whom the number was registered to.[33] However, Leyse listened to the voicemail message and he testifies that he was often responsible for payment of the telephone bills.[34]

The Second Circuit addressed whether certification should be granted when there is no known list of class members who received the recorded messages.[35] The Second Circuit applied precedent finding an implicit ascertainability requirement in Rule 23(b)(3) stating that "[a] class

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[25] Byrd, 784 F.3d at 163.
[26] *Id.*
[27] *Id.* at 165.
[28] No. 16-1133-cv, 679 Fed. Appx. 44, 2017 U.S. App. LEXIS 2607, 2017 WL 659894 (2d Cir. Feb. 15, 2017).
[29] *Id.* at *46.
[30] *See* Leyse v. Lifetime Entm't Servs., 2015 U.S. Dist. LEXIS 139100 (S.D.N.Y., Sept. 22, 2015).
[31] *Id.* at *4.
[32] *Id.*
[33] *Id.* at *5.
[34] *Id.*
[35] *Leyse*, 679 Fed. Appx. 44, at *248.

is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case."[36]

Leyse proposed identification through individual affidavits along with records of telephone bills in the targeted area at the time the message was disseminated.[37] The Second Circuit found no abuse of discretion in the district court's ruling that this method was insufficient in providing a readily ascertainable method for identifying class members since (1) no list of the numbers existed; (2) no list was likely to emerge; and (3) it would be unreasonable to expect members of the class to recall a phone call they received six years ago or still be in possession of documentation of that phone call. Furthermore, allowing certification would result in "mini-hearings on the merits of each case."[38] The Second Circuit relied on relevant precedent from *Birchmeier v. Caribbean Cruise Line, Inc.*, which provided relevant precedent.[39] There, Plaintiff already possessed a list of telephone numbers associated with the defendant in proposing to use affidavits and phone records to document each individual call received and the telephone number of each caller.[40]

III. Circuits in Favor of No Ascertainability Requirement

In *Briseno v. ConAgra Foods, Inc*., Defendant-Appellant ConAgra Foods, Inc. (ConAgra) argued for reversal of class certification as a result of Plaintiff-Appellee Robert Brisenio's inability to demonstrate an administratively feasible method of ascertaining class members.[41] The proposed class was comprised of customers residing throughout eleven states who purchased

[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] Birchmeier v. Caribbean Cruise Line, Inc., 302 F.R.D. 240 (N.D. 111. 2014),
[40] *Leyse*, 679 Fed. Appx. 44, at *248. (citing Birchmeier v. Caribbean Cruise Line, Inc., 302 F.R.D. 240 (N.D. 111. 2014)).
[41] 844 F.3d 1121, 1125 (9th Cir. 2017).

Wesson-brand cooking oils which were labeled "100% Natural" within the relevant period.[42] Plaintiffs are purchasers of Wesson-brand oil products labeled "100% Natural" when in fact the oils were comprised of bioengineered ingredients (genetically modified organisms).[43] The proposed class definition was as follows:

> All persons who reside in the States of California, Colorado, Florida, Illinois, Indiana, Nebraska, New York, Ohio, Oregon, South Dakota, or Texas who have purchased Wesson Oils within the applicable statute of limitations periods established by the laws of their state of residence (the 'Class Period') through the final disposition of this and any and all related actions.[44]

The court addressed "whether, to obtain class certification under Federal Rule of Civil Procedure 23, class representatives must demonstrate that there is an 'administratively feasible' means of identifying absent class members."[45]

The District Court granted class certification after finding that the proposed class was defined by objective criteria—whether the class members purchased the oil.[46] The Ninth Circuit cites Supreme Court case *Beech Aircraft Corp. v. Rainey* to support its conclusion that interpretation of federal rules should begin with the language of the rule itself.[47] The court opined that the prerequisites of certifying a class are explicitly stated in Rule 23(a), and since there is no mention in that provision of an independent ascertainability requirement in the

[42] *Id.* at 1123.
[43] *Id.*
[44] *Id.* at 1124.
[45] *Id.* at 1123.
[46] *Id.* at 1124.
[47] 844 F.3d 1121 at 1125 (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988)).

language an implicit requirement should not be read into the provision. The list of provided prerequisites should be treated as exhaustive.[48]

The Court challenged Third Circuit precedent (although not explicitly stated the court is likely referring to *Byrd* since this was the most recent Third Circuit decision at the time, and the only Third Circuit case the court has mentioned thus far) which advocated for an administrative feasibility requirement in part for the purpose of mitigating administrative burdens.[49] The court mentioned providing notice to absent class members as one of these administrative burdens.[50] Additionally, the court contended that an administrative feasibility requirement for class certification would effectively bar plaintiffs who are similarly situated as those in this case from bringing suit since they would have no real alternative to bring their claims.[51]

The court also challenged the Third Circuit's basis of protecting the rights of class members.[52] The court stated, "[w]ith respect to absent class members, the Third Circuit has expressed concern about whether courts would be able to ensure individual notice without a method for reliably identifying class members."[53] The court dismissed this concern because it found no requirement in Rule 23 nor the Due Process Clause indicating that each individual member was entitled to notice.[54] It found only that "[c]ourts adjudicating such actions must provide notice that a class has been certified and an opportunity for absent class members to withdraw from the class."[55]

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[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* at 1128.
[52] *Id.* at 1129.
[53] *Id.* (citing Byrd, 784 F.3d at 165).
[54] *Id.*
[55] *Id.* at 1127.

The Ninth Circuit also challenged the Third Circuit's concerns of fraudulent claims being brought due to the absence of a feasible method of ascertaining class members.[56] The court insisted that although valid in theory, the chances of this being a commonly recurring issue is unlikely, and even in circumstances where this concern comes to fruition courts "'can rely, as they have for decades, on claim administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques tailored by the parties and the court' to avoid or minimize fraudulent claims."[57]

Finally, the court challenges Third Circuit precedent from *Carrera* and *Marcus v. BMW* which purportedly states that the administrative feasibility requirement is necessary to protect the due process of defendants.[58] In *Mullins v Direct Dig.*, Plaintiff-Appellee, Vince Mullins sued Defendant-Appellant Direct Digital, LLC for "fraudulently representing that its product, Instaflex Joint Support, relieves joint discomfort."[59] Mullins contends that Direct Digital, LLC made false statements regarding the uses and benefits of the drug including claims that the product was clinically proven to have the advertised benefits when in fact the primary ingredient of the supplement was glucosamine sulfate which is no more than a sugar pill which has never been clinically proven to have any of the purported benefits.[60] Mullins filed suit alleging violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*, and similar consumer protection laws in nine other states.[61]

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[56] *Id.* at 1130; *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013); *Marcus v. BME of N. Am., LLC*, 687 F.3d 583, 593-94 (3d Cir. 2012).
[57] *Id.* at 1130 (*quoting* Mullins v Direct Dig., 795 F.3d 654, (7th Cir. 2015), cert. denied, 136 S. Ct. 1161 (2016)).
[58] *Id.*
[59] *Mullins*, 795 F.3d 654 at 658.
[60] *Id.*
[61] *Id.*

The proposed class definition which the district court certified. under Rule 23(b)(3) was "Consumers who purchased Instaflex within the applicable statute of limitations of the respective Class States for personal use until the date notice is disseminated."[62] The Seventh Circuit addressed "whether Rule 23(b)(3) imposes a heightened 'ascertainability' requirement as the Third Circuit and some district courts have held recently."[63] The court states that the Seventh Circuit has long recognized the existence of an implicit requirement under Rule 23 that a class is to be clearly defined and that membership be defined by objective criteria.[64] This implicit requirement is not the same as the implied ascertainability requirement which the court is careful to clarify.[65]

The court correctly chose to view the basis for a heightened ascertainability requirement in light of the prerequisites listed in Rule 23(a) along with the additional requirements of (b)(3).[66] The court insisted that since 23(b)(3) instructs courts to consider "the likely difficulties in managing a class action" while balancing the countervailing interests in its attempt to decide whether a class action is a preferable alternative to justly and efficiently address the dispute, there is no need to incorporate into the rule an implied ascertainability requirement.[67] The court found that reading an implied ascertainability requirement into the rule would "upset this balance" effectively distributing absolute priority to one factor.[68] The court cited precedent from the First and Fifth Circuits finding that the implicit ascertainability requirement referenced in these circuits have always referred to the adequacy of the proposed class definition rather than

[62] *Id.*
[63] *Id.* at 657.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* at 658.

the difficulty of identifying class members.[69] For ascertainability purposes, the Ninth Circuit employed what it refers to as a "weak version of ascertainability."[70]

It is important to note here that despite its finding of an implied ascertainability requirement, the Ninth Circuit is categorized with its sister circuits which do not find an implicit requirement.[71] This is due to the fact that its application of the "weak ascertainability requirement" bears a much closer resemblance to the circuits who do not find an implicit requirement than those that do. The court stated that this requirement is easily susceptible to alternative interpretation.[72] The proper interpretation of the precedent which directs courts to require that a class be "defined by clear and objective criteria" in order to satisfy the Rule 23 requirement for a class to be defined.[73]

The court then elected to focus on the three most common problems that have resulted in denial of certification historically.[74] The three problems the court pointed to were vagueness in the proposed class definition, class definitions relying on subjective criteria (such as the mental state of class members), and finally classes defined in terms of success on the merits of the claim—otherwise known as "fail-safe classes."[75] Since the class definition complies with the ascertainability standard adopted by the Seventh Circuit and avoids the three major problems previously mentioned the District Court correctly granted class certification.[76]

In *Sandusky Wellness Ctr.*, MedTox, a toxicology lab, used a directory from a health insurance company to create a contact list comprised of 4,210 fax numbers to disseminate a one-

[69] *Id.* at 659–60.
[70] *Id.* at 659.
[71] *Compare Byrd*, 784 F.3d 154.
[72] *Id.*
[73] *Id.*
[74] *Id.* at 659–60.
[75] *Id.* at 660.
[76] *Id.* at 674.

page fax informing pediatricians, health departments, family practitioners, and child-focus organizations about its lead-testing capabilities.[77] Out of the 4,210 contacts the fax was sent to 3,256 of them which included Plaintiff-Appellant Sandusky Wellness Center, LLC (Sandusky).[78]

Sandusky alleged a violation of the Telephone Consumer Protection Act (TCPA) and sought certification under the following class definition: "[a]ll persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages regarding lead testing services by or on behalf of Medtox, and (3) which did not display a proper opt out notice."[79] The district court denied class certification after holding the class was "not ascertainable, because it does not objectively establish who is included in the class," and the court would need to conduct individual inquiries to determine who the injured class members are.[80] The Eighth Circuit reviewed the case for abuse of discretion.[81] The TCPA prohibits the "use [of] any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement…"[82] The Act provides for a right of action to the recipient of the fax—not the owner.[83]

The issue here is whether a class can be ascertained through the list of fax numbers used in disseminating unsolicited faxes when the subscriber is not ipso facto the recipient who has a claim of right.[84] The Eighth Circuit chose not to recognize an implicit ascertainability requirement and focuses its attention instead on whether or not the class is clearly defined.[85] The court finds that "fax logs showing the numbers that received each fax are objective criteria that

[77] Sandusky Wellness Ctr., LLC, v. Medtox Sci., Inc., 821 F.3d 992, 994 (8th Cir. 2016).
[78] *Id.*
[79] *Id.*
[80] *Id.* at 995.
[81] *Id.*
[82] 47 U.S.C. § 227(b)(1)(C).
[83] § 227(b)(3).
[84] 821 F.3d 992 at 995.
[85] *Id.* at 996.

make the recipient clearly ascertainable."[86] As a result, the court ruled that the proposed class is "clearly ascertainable."[87]

IV. Interpretation of Rule 23(b)(3)

In interpreting a rule or statute, it is appropriate to consider the text, structure, purpose, and history of the rule.[88] When taking all of the appropriate considerations into account Rule 23 clearly provides for an implied administratively feasible means of ascertaining the members of a class.

a. Purpose and Structure

"Class actions have two primary purposes: (1) to accomplish judicial economy by avoiding multiple suits, and (2) to protect rights of persons who might not be able to present claims on individual basis."[89] The inability for a party requesting class certification to provide an "administratively feasible method of ascertaining class members" defeats both underlying purposes of the class action mechanism: (1) the purpose of accomplishing judicial economy by avoiding multiple suits since courts would have to resort to "mini trials" in order to adequately determine which member should in fact be members of the class; and (2) the purpose of protecting the rights of the individual class members since Rule 23(c)(3) requires only that the court provide "the best notice that practicable under the circumstances."[90] Thus, members who cannot be feasibly ascertained may not ever be notified that they are in fact members of class action suit resulting in their being bound by a verdict in a case in which their participation was completely unbeknownst to them.

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[86] *Id.* at 997.
[87] *Id.* at 998.
[88] General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581, 600, 157 L. Ed. 2d 1094, 124 S. Ct. 1236 (2004).
[89] In re Live Concert Antitrust Litigation, 247 F.R.D. 98 (C.D. Cal. 2007).
[90] *See*, *e.g.*, Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983).

A key principle of American jurisprudence and a right derived from the due process clause is that everyone is entitled to their day in court.[91] More importantly, in light of the recurring theme that has been stringently stressed by the Third Circuit with support from Supreme Court opinions as well as Rule 23 itself, manageability of class action cases is pertinent to ensure the proper use of the class action mechanism.[92] The indifference displayed by certain circuits with regard to the importance of ascertaining class members in the context class certification is bound to result in serious manageability issues.[93]

b. Text

The text of Rule 23(b)(3) states that in order for a class to be certified under this provision

> the court [must find] 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. The matters pertinent to these findings include:
>
> **(A)** the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> **(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
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> **(D)** the likely difficulties in managing a class action.[94]

[91] Celebrity Club, Inc. v. Utah Liquor Control Comm'n, 657 P.2d 1293, 1296 (Utah 1982) (holding that due process clause dictates that claimants have day in court).
[92] Carrera v. Bayer Corp., 727 F.3d at 305; In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig., PNC Bank NA, 795 F.3d 380, 392 (3d Cir. 2015); Fed. R. Civ. P. 23(b)(3
[93] Briseno v. ConAgra Foods, Inc., 844 F.3d 1121 (9th Cir. 2017); Mullins v Direct Dig., 795 F.3d 654, (7th Cir. 2015), cert. denied, 136 S. Ct. 1161 (2016); Sandusky Wellness Ctr., LLC, v. Medtox Sci., Inc., 821 F.3d 992 (Eighth Cir. 2016); Rikos v. Proctor & Gamble Co., 799 F.3d 497 (6th Cir. 2015).
[94] Fed. R. Civ. P. 23(b)(3).

Since Supreme Court precedent indicates that these four factors are "nonexhaustive," referring back to the text which immediately precedes the factors is a naturally expedient approach to determining what other factors are to be considered.[95] In analyzing the preceding text, it is here that purpose, structure, text and history combine to reach a culmination that indicates the existence of an implied ascertainability requirement.[96]

The Supreme Court in *Amchem* finds that "[i]n adding 'predominance' and 'superiority' to the qualification-for-certification list, the Advisory Committee sought to cover cases in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."[97] In an effort to account for the competing tugs of individual autonomy on the one hand, and systemic efficiency on the other, the Reporter for the 1966 amendments cautioned: "The new provision invites a close look at the case before it is accepted as a class action . . . ."[98] This essentially directs courts to be more critical when reviewing petitions for classes seeking certification under Rule 23(b)(3).

The Use of Affidavits for Ascertainability Purposes

This section of the Note introduces affidavits to the ascertainability discussion. Circuits which have chosen to implement an implied ascertainability requirement tend to be much more critical of affidavits than those which have not adopted the requirement.[99] However, even some

[95] *Amchem Prods.*, 521 U.S. 591 at 615.
[96] Fed. R. Civ. P. 23(b)(3).
[97] *Amchem Prods.*, 521 U.S. 591 at 615.
[98] Kaplan, Continuing Work 390.

[99] *See* Mullins v Direct Dig., 795 F.3d 654, (7th Cir. 2015), cert. denied, 136 S. Ct. 1161 (2016); *See also* Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013).

courts that refuse to recognize the requirement do not permit the use of affidavits as a sole means of ascertainment.[100]

Plaintiffs who seek class certification but lack the requisite documents or factual support to ascertain class members will occasionally attempt to compensate for their lack of evidence by providing sworn affidavits signed by each individual class member.[101] This can present multiple issues: (1) the potential class members seeking certification may be inclined to be dishonest in their sworn affidavits; (2) the facts contained in the affidavit often occur years prior to the suit being brought so the memory of the potential class member poses a considerable risk of being inaccurate; (3) and lastly the use of affidavits creates a strong potential for mini-trials to arise within the larger trial.[102]

Courts implementing a higher ascertainability requirement have found that the use of affidavits as a sole source of providing an administratively feasible method of ascertainability is insufficient for this purpose.[103] Notwithstanding, affidavits are still permitted by these circuits for ascertainment purposes if supplemented with records or other reliable and administratively feasible means.[104]

Despite the Eighth Circuit's blatant skepticism regarding the incorporation of an implied ascertainability standard in Rule 23(b)(3), the court agreed with the Third Circuit's reluctance to allow members to be ascertained solely through the use of affidavits.[105] The court expresses the very concerns pertaining to administrative burdens that inspired the two-fold framework

[100] Sandusky Wellness Ctr., 821 F.3d 992 at *4.
[101] *See* Byrd v. Aaron's Inc., 784 F.3d 154 (3d Cir. 2015).
[102] *Id.*
[103] *Id.* at 171.
[104] *City Select Auto Sales, Inc.*, 867 F.3d 434 (3d Cir. 2017) (holding that when supplemented by the Credismarts database which limits potential claimants the use of affidavits may be considered as an administratively feasible method of ascertainment).
[105] Sandusky Wellness Ctr., 821 F.3d 992 at *4.

developed by the Third Circuit while refusing to acknowledge that this concern is appropriately articulated as part of ascertainability, superiority, or predominance.[106]

Requiring parties to accept sworn affidavits from their adversaries as a sole means of ascertaining class members is not only unfair to the opposing parties who may have reason to doubt the legitimacy of said affidavits, but also neglects to conform to the widely accepted requirements laid out by Rule 23 to show that a preponderance of evidence standard can reasonably be found by a court. Furthermore, such a finding would leave the door wide open for fraudulent or erroneous claims[107] which would undermine the court's ability to adequately manage a class action trial.

V. Interpretation of Rule 23(b)(3)

In interpreting a rule or statute, it is appropriate to consider the text, structure, purpose, and history of the rule.[108] When taking all of the appropriate considerations into account Rule 23 clearly provides for an implied administratively feasible means of ascertaining the members of a class.

a. Purpose and Structure

"Class actions have two primary purposes: (1) to accomplish judicial economy by avoiding multiple suits, and (2) to protect rights of persons who might not be able to present claims on individual basis."[109] In order to determine whether the use of Rule 23 class actions is appropriate in any particular case it is necessary to balance the two primary purposes against one

[106] *Id*.
[107] *See* Carrera, 727 F.3d at 310.
[108] General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581, 600, 157 L. Ed. 2d 1094, 124 S. Ct. 1236 (2004).
[109] *See*, *e.g.*, *Crown*, 462 U.S. 345.

another. If the protection of the rights of persons comes at the cost of the judicial economy or vice versa then the use of Rule 23 to create a class action should not be permitted.

The inability for a party requesting class certification to provide an "administratively feasible method of ascertaining class members" defeats both the purpose of accomplishing judicial economy by avoiding multiple suits since courts would have to resort to "mini trials" in order to adequately determine which member should in fact be members of the class as well as the purpose of protecting the rights of the individual class members since Rule 23(c)(3) requires only that the court provide "the best notice that practicable under the circumstances."[110] Thus, members who cannot be feasibly ascertained may not ever be notified that they are in fact members of class action suit resulting in their being bound by a verdict in a case in which their participation was completely unbeknownst to them. A key principle of our judicial system is that everyone is entitled to their day in court, but if members of a class who have a legitimate claim have no knowledge or control of the proceeding they are involved in that right to a day in court becomes substantially frustrated.

b. Text

Rule 23(b)(3) states that in order for a class to be certified under this provision

> the court [must find] 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. The matters pertinent to these findings include:
>
> **(A)** the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> **(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members;

[110] *See* In re Modafinil Antirtrust Litig., 837 F. 3d 238 (3d Cir. 2016).

> **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> **(D)** the likely difficulties in managing a class action.[111]

Since Supreme Court precedent indicates that these four factors are "nonexhaustive", referring back to the text which immediately precedes the factors is a perfectly appropriate approach to determining what other factors are to be considered. In utilizing this preceding text, it is here that purpose, structure, text and history combine to reach a culmination that indicates the existence of an implied ascertainability requirement. The Supreme Court in *Amchem* finds that "[i]n adding 'predominance' and 'superiority' to the qualification-for-certification list, the Advisory Committee sought to cover cases in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."[112] Sensitive to the competing tugs of individual autonomy for those who might prefer to go at it alone or in a smaller unit, on the one hand, and systemic efficiency on the other, the Reporter for the 1966 amendments cautioned: "[t]he new provision invites a close look at the case before it is accepted as a class action . . ."[113]

c. The Ninth Circuit

Reconciling the Issues

As part of its reasoning as to why Rule 23(b) does not contain an implicit ascertainability requirement the Ninth Circuit cited to *Beach Aircraft Corp.* to support its conclusion that

[111] FED. R. CIV. P. 23(b)(3).
[112] *Amchem Prods. v. Windsor*, 521 U.S. 591 at 708.
[113] Kaplan, Continuing Work 390.

interpretation of federal rules should begin with the language of the rule itself.[114] Although the court is correct to inspect the language of the rule as its first step, its application in doing so is fundamentally flawed. In *Mickey v. Lanier Collection Agency & Service, Inc.* the Supreme Court was "hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law."[115] Since the Federal Rules of Civil Procedure are proscribed by the Supreme Court, it is perfectly reasonable to apply the same rules of interpretation to the Federal Rules of Civil Procedure.

The Ninth Circuit criticized the Third Circuit's finding of an implied ascertainability requirement through reasoning that the prerequisites of certifying a class are explicitly stated in Rule 23(a), and since there is no mention in that provision of an independent ascertainability requirement in the language it should not be read into the provision.[116] The list of provided prerequisites should be treated as exhaustive according to the Ninth Circuit.[117] Before delving into the real substantive issue underlying this faulty reasoning, it is prudent to mention that prerequisites are just that—*prerequisites*. By definition, prerequisites are meant to be satisfied before proceeding to the additional requirements necessary for class certification. Thus, it seems only natural that additional requirements should follow.

On a more substantive note, the Ninth Circuit makes the lethal mistake of assuming that the Third Circuit intended there to be a heightened requirement for all three of the avenues available under Rule 23(b), but this in fact is not the case at all. On the contrary, the Third Circuit applies this additional requirement for parties seeking certification only with respect to the 23(b)(3) avenue. It seems noteworthy to mention here that if Rule 23(b)(3) were to be

[114] *Briseno*, 844 F.3d 1121, at 1125 (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988)).
[115] 486 U.S. 825, 837, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988).
[116] *Briseno v. Conagra Foods Inc.*, 844 F.3d at 1125.
[117] *Id.*

interpreted in the manner proposed by the Ninth Circuit—without an implied ascertainability requirement—this provision which is already the most commonly utilized avenue to request class certification would be made even more lax resulting in a substantial frustration of the purpose of the provision which according to the Supreme Court is to "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."[118]

The court proceeds by criticizing the Third Circuit for its concern with regard to providing individual notice to class members, and states that "neither Rule 23 nor the Due Process Clause requires actual notice to each individual class member."[119] However, the Third Circuit never actually required notice to be provided to each individual class member. In fact, the court in *Byrd* cites to Supreme Court precedent stating "[t]he question is not whether every class member will receive actual individual notice, but whether class members can be notified of their opt-out rights consistent with due process."[120] Thus, the Ninth and Third Circuits are in fact aligned in finding that no per se individual notice is required in class action cases. However, this instinct by the Third Circuit to protect the rights of class members is also supported by precedent from *Walmart Stores Inc.* where the Supreme Court finds that "[c]ourts adjudicating [class] actions must provide notice that a class has been certified and an opportunity for absent class members to withdraw from the class."[121] The Third Circuit's concern for providing notice mainly stems from the recurring theme of ensuring adequate manageability in class actions without curtailing the class members' due process rights. The Third Circuit's two-fold ascertainability requirement reinforces this theme since proper ascertainment at the outset will

[118] Amchem Prods. v. Windsor, 521 U.S. 591, 615, 117 S. Ct. 2231, 2246, 138 L.Ed.2d 689, 708 (1997).
[119] *Briseno*, 844 F.3d 1121, at 1129.
[120] 784 F.3d 154 at 175 (citing Dusenbery v. United States, 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002)).
[121] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011); accord FED. R. CIV. P. 23(c)(2)(B).

minimize the risk of due process violations and ease the manageability of the case for trial courts.[122]

d. The Seventh Circuit

In *Mullins v Direct Dig.*, the Seventh Circuit acknowledges the existence of an implied ascertainability requirement, but does not adopt the same framework as the Third Circuit.[123] The Seventh Circuit instead implements a "weak ascertainability requirement" which bears a much closer resemblance to the circuits who do not find an implicit requirement than those that do.[124] The court states that this requirement is easily susceptible to misinterpretation—and for good reason.[125] The court purports to find an "implied ascertainability requirement" that "a class be defined clearly and based on objective criteria."[126] Notice that this language bears a very close resemblance to step one of the Third Circuit's two-fold framework which requires a class to be "defined with reference to objective criteria."[127] This language is the *only* similarity between the two circuits since the Seventh Circuit declines to adopt the second prong of the two-step framework.[128]

Aside from the absence of a second prong, the Seventh Circuit's reasoning as to the purpose of mandating objective criteria[129] is completely contrary to the Third Circuit's reasoning.[130] The stated basis of the Seventh Circuit's implied ascertainability requirement is mislabeled altogether since the court states that the purpose of the rule is not actually for

[122] *See Byrd*, 784 F.3d 154.
[123] 795 F.3d 654 at 658.
[124] *Id.*
[125] *Id.*
[126] *Id.* at 659.
[127] *Byrd*, 784 F.3d at 163.
[128] 795 F.3d 654 at 659.
[129] *Id.*
[130] *Byrd*, 784 F.3d at 163.

purposes of ascertaining class members, but rather for purposes of defining the class.[131] This interpretation is precisely what the Third Circuit cautioned against when the court in *Byrd* writes "[t]his preliminary analysis dovetails with, but is separate from, Rule 23(c)(1)(B)'s requirement that the class-certification order include '(1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis.'"[132] By grounding the basis for its implied requirement in class definition, the Seventh Circuit is essentially doing nothing more than restating Rule 23(c)(1)(B)'s text with the mere addition of objective criteria.

Rule 23(b)(3) instructs courts to consider "the likely difficulties in managing a class action" while balancing the countervailing interests in its attempt to decide whether a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy."[133] The court finds that reading an implied ascertainability requirement into the rule as the Third Circuit proposes would "upset this balance" effectively according absolute priority to one factor.[134] Although it is true that the Third Circuit's approach prioritizes ascertainability, a close inspection of the two-step ascertainability framework furnished by the Third Circuit which requires that a proposed class (1) be defined by with reference to objective criteria; and (2) include a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition actually serves to promote both of these interests.[135]

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[131] Mullins,795 F.3d 654 at 659.
[132] *Byrd*, 784 F.3d at 163 (quoting Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am., 453 F.3d 179, 187-88 (3d Cir. 2006)).
[133] Fed. R. Civ. P. 23(b).
[134] 795 F.3d 654 at 659.
[135] Byrd, 784 F.3d at 163.

The second prong requires a Rule 23(b)(3) request to include "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition."[136] This second prong is equally as important as the first for the very same purposes as those that justify the first (which will be discussed in the upcoming section in the context of affidavits) , but this prong actually serves one additional purpose. While the objective criteria requirement is derived from the need to protect the sanctity and reliability of the means being used to certify a class, the second prong ensures that the objective criteria is sufficient for its purpose—the ascertaining of participating class members.[137] However, the Third Circuit is careful to clarify that actual ascertainment of class members is not needed for certification.[138] Rather, only a *reliable and administratively feasible method* of ascertainment is needed for certification in order to ensure that the trial can in fact be properly managed.[139] The Seventh Circuit is correct in finding that this too would effectively terminate the balancing test under the Third Circuit's framework—as it should.[140] Nonetheless, these two requirements do not "upset the balance" as the Seventh Circuit purports.[141] On the contrary, the framework employs what can be described as preliminary requirements that are indispensable in order for a trial court to adequately manage a class action at all. Otherwise stated, no matter what factors are weighed on the other side of the balancing scale, absent a class defined with reference to objective criteria and an administratively feasible method of ascertaining class members the balancing *must* result in a denial of the certification when FRCP 23(b)(3) is the provision under which certification is being sought.

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[136] *Id.*
[137] *Id.* at 165.
[138] *Id.*
[139] *Id.*
[140] 795 F.3d 654 at 658.
[141] *Id.*

e. The Eighth Circuit

In *Sandusky Wellness Ctr., LLC,* the Eighth Circuit chooses not to recognize an implicit ascertainability requirement and aligns itself with sister circuits that have elected to apply only the requirements found in the "plain language" of the text.[142] The court purports to employ a "rigorous analysis of the Rule 23 requirements"[143] in reaching its holding. The court holds that "fax logs showing the numbers that received each fax are objective criteria that make the recipient clearly ascertainable."[144]

This holding is perplexing since the court chooses to require that the ascertainability of the class members be demonstrated through "objective criteria." This "objective criteria" language is not found anywhere in Rule 23. Yet despite claiming to implement a "rigorous analysis of the Rule 23 requirements"[145] the Eighth Circuit essentially adopts the first requirement found in the Third Circuit's two-fold implicit requirement. The court neglects to provide any reasoning as to why this requirement is included in its holding despite its absence in the rule. Furthermore, not only does the court fail to acknowledge the fact that this "objective criteria" requirement accounts for half of the two-fold framework furnished by the Third Circuit, but it also fails to explain why the first requirement is the only one it chooses to adopt.

VI. Proposal

If the Supreme addresses this issue in the future, which seems inevitable given the growing rift between multiple circuits on the issue, the court will likely favor the approach taken by the First, Second, Third, Fourth, Fifth and Eleventh Circuits which have adopted the implied

[142] Sandusky, 821 F.3d 992 at 996.
[143] *Id.*
[144] *Id.*
[145] *Id.*

two-step ascertainability requirement.[146] The two requirements call for a party seeking certification to show (1) that the class is defined with reference to objective criteria, and (2) that there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.[147]

The Supreme Court has clarified that the class action mechanism is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'"[148] The Supreme Court has also repeatedly emphasized the need to for a party seeking class certification to affirmatively demonstrate its compliance with Rule 23.[149] To ensure compliance the Supreme Court has held that it "may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,' and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[150] Furthermore, the Supreme Court has clarified that parties seeking certification under Rule 23(b)(3) in particular must satisfy an even heavier burden due to this exception's "adventuresome" nature.[151]

> The same analytical principles [as Rule 23(a)] govern Rule 23(b). If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a). Rule 23(b)(3), as an adventuresome innovation, is designed for situations in which

[146] Leyse v. Lifetime Entm't Servs., LLC., No. 16-1133-cv, 679 Fed. Appx. 44, 2017 U.S. App. LEXIS 2607, 2017 WL 659894 (2d Cir. Feb. 15, 2017); Byrd v. Aaron's Inc., 784 F.3d 154 (3d Cir. 2015); Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349 (3d Cir. 2013); City Select Auto Sales, Inc. v. BMW Bank of N. Am., Inc., 867 F.3d 434 (3d Cir. 2017); Karhu v. Vital Pharm., Inc., 621 F. App'x 945 (11th Cir. 2015); Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012); John v. Nat'l Sec. Fire & Cas. Co., 501 F.3d 443 (5th Cir. 2007); In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24, (2d Cir. 2006).
[147] 784 F.3d 154 at 160-61.
[148] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (quoting Califano v. Yamasaki, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)).
[149] Comcast Corp. v. Behrend, 133 S. Ct. 1426 at 1432; Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011).
[150] *Id.* (*quoting* Wal-Mart Stores, 564 U.S. 338 at 350-51).
[151] *Id.*

> class-action treatment is not as clearly called for. That explains Congress's addition of procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (*e.g.*, an opportunity to opt out), and the court's duty to take a close look at whether common questions predominate over individual ones.[152]

The implied ascertainbaility requirement is consistent with the burden of demonstrating by a preponderance of evidence that it has satisfied all of the requirements of Rule 23. Furthermore, it is consistent with purpose of the class action mechanism—achieving a more efficient judicial economy—as identified by the Supreme Court.[153] Some of the circuits have misinterpreted and misapplied the two-fold requirement. The two-fold framework does *not* necessitate identification of all members at the time of certification.[154] The party seeking certification need only supply a means so that all members *can* be identified throughout the course of discovery without having to engage in what the court refers to as "mini-trials."[155] "Mini-trials" would substantially frustrate the purpose that Rule 23 sets out to accomplish—judicial economy. Additionally, the two-fold requirement does *not* entail an overinclusive/underinclusive evaluation of the members seeking certification as such an evaluation would have little to no relevance with regard to the judicial economy of the case, nor does it serve to help ascertain members of the class. The party seeking certification need only supply a means so that all members *can* be identified throughout the course of discovery without having to engage in what the court refers to as "mini-trials."[156]

VII. Affidavits

[152] *Id.*
[153] 133 S. Ct. 1426 at 1432.
[154] 784 F.3d 154 at 160-61.
[155] *Id.* At 163.
[156] *Id.*

Class action suits are generally filed years after the occurrence of the incidents which give rise to the claim. The reliability of a witness's memory years after the event can rarely be considered reliable. [157] The only remedy to measure the reliability of an alleged class member's memory would require an individual evaluation of each member which is precisely the type of "mini-trials" that concerns the Third Circuit due to its ipso facto frustration of a class action's purpose of achieving judicial economy.

The Sixth Circuit's support of this rule can be inferred from its decision not to overturn a lower court's decision which was based on a finding that the affidavits submitted by plaintiffs was insufficient for the purpose of identifying class members. The Sixth Circuit opined that "the district court's recognition of the difficulty in identifying class members without fax logs and with sole reliance on individual affidavits was equally sufficient to preclude certification, regardless of whether this concern is properly articulated as part of ascertainability, Rule 23(b)(3) predominance, or Rule 23(b)(3) superiority."[158] The court's emphasis on the absence of any fax logs or any corroborating evidence whatsoever indicates that the affidavits would likely be deemed sufficient had there been fax logs or some other corroboration complimenting the statements within the affidavits.

The courts that have adopted an implicit ascertainability requirement all require the same type of corroboration as does the Sixth Circuit if affidavits are to be accepted as a means of ascertaining class members.[159] The circuit courts that refuse to recognize the implicit requirement appear to be completely unconcerned with the need for corroboration since said circuits do not recognize the need to ensure that the class is being defined through the use of

[157] *See* Sandusky Wellness Ctr., Ltd. Liab. Co. v. ASD Specialty Healthcare, Inc., 863 F.3d 460 (6th Cir. 2017).
[158] *Id.* At 466.
[159] *Id.*; *Briseno*, 844 F.3d 1121; *Mullins*, 795 F.3d 654.

objective criteria.[160] Nor do the circuits need to confirm that the mechanism of determining the class members is reliable. Although affidavits are generally accepted without corroboration in suits filed individually, allowing individuals to join class actions in the same manner is an impermissible extension of this practice since it is likely to result in an accumulation of mini-trials to confirm the legitimacy of the affidavits.

However, requiring corroboration along with affidavits poses its own danger of leaving many aggrieved plaintiffs without a means of pursuing their claims—particularly in cases where the cost of the suit would exceed the cost of damages owed. If this caveat were to remain unresolved, this would allow free rein for the corporate world to wreak havoc free of consequence so long as the damage to each individual is minimal and unlikely to be documented in any way. Additionally, given the tendency of large corporations to cut corners when convenient there is little doubt that they would pounce at the opportunity to increase their revenue at such minimal risk despite the moral obligations due to their clientele. Finally, even if the companies' actions were truly unintentional and the wrongdoing was brought to their attention chances are slim that any reparations would be voluntarily distributed to the harmed individuals.

The solution to this dilemma was presented by Judge Beverly B. Martin in an Eleventh Circuit concurrence.[161] Judge Martin identified two major factors that courts had weighed in determining previous cases where class certification was sought, but no documentation or corroborating evidence could be presented to supplement plaintiffs' affidavits.[162] The factors are

[160] *E.g.* Karhu v. Vital Pharm., Inc., 621 F. App'x 945 (11th Cir. 2015).
[161] *See Id.* at 953 (Martin, J., concurring).
[162] *Id.*

1) the value of each class member's claim, and 2) the likelihood that potential class members could accurately identify themselves.[163]

This solution is especially appropriate since it not only substantially minimizes the risk of foul play on both the consumers' and the sellers' ends, but also satisfies the two-step implicit ascertainability requirement that is so vital to maintaining the purpose of the class action mechanism. Assessing whether class members as a whole would likely have an accurate recollection of the circumstances which gave rise to the claim eliminates the question of reliability. For example, a group of plaintiffs who purchased a bottle of oil two years ago with no proof of purchase is highly unlikely to have remembered precisely what brand and specific type of oil was purchased at the time the group is signing the affidavit. On the other hand, if a group of musicians purchased a guitar several months ago, chances are much higher that given their inferred background knowledge of musical instruments and the relatively short lapse in time since the purchase that this group's recollection of the incident in question remains accurate. Thus, the reliability issue in the second prong of the two-step ascertainability test is resolved.

Additionally, prior to certification a court must also be convinced that the value of each claim is not one which would incentivize an objectively reasonable person to perjure herself. This factor satisfies the objective criteria requirement in the first prong of the ascertainability test since the penalty for perjury (in the vast majority of cases) will serve as a strong deterrent for anyone who may have considered risking the possibility of being penalized when the stakes are larger. Furthermore, granting class certification to cases that involve less valuable claims will disincentivize any companies which might have otherwise sought to take advantage of this loophole.

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[163] *Id.*

Thus, affidavits should always be permitted as a means of ascertaining class members when complemented with corroborating evidence. In the occasion that no such evidence can be presented at the certification stage, affidavits may still be allowed, but only if the court determines that 1) the value of each class member's claim is low enough to remove the incentive for a reasonable person to risk the penalty of perjury; and 2) the class members are likely capable of accurately identifying themselves.

VIII. Conclusion

The two-fold framework established by the Third Circuit is supported by inferences which can be made from Supreme Court precedent as well as Rule 23 itself. A class which does not satisfy these two requirements would create a very real risk of mini-trials for individual class members within the course of adjudicating the substantive trial itself. A court that is forced to engage in these mini-trials will frustrate the purpose of the class action mechanism.[164]

Additionally, the use of affidavits in the context of the two-fold ascertainability requirement should be scrutinized by courts. Affidavits should not be allowed to serve as the sole criteria for ascertaining an entire class unless the court finds that two factors outlined by Judge Martin in *Karhu*[165] weigh in favor of the party seeking certification. This rule functions to preserve the purposes of the class action mechanism while extending as much leeway as reasonably plausible to plaintiffs who would otherwise be unable to bring their claims.

Certification of a class is an extremely significant milestone in cases—especially those with numerous class members. Once the class is certified, the opposing party generally has two options: (1) begin what will likely be a long and burdensome discovery process which will result

[164] *See* Comcast Corp. v. Behrend, 569 U.S. 27 (2013).

[165] 621 App'x 945 at 953 (Martin, J., concurring).

in the expending large sums of money; or (2) settle. The possibility that some defendants will choose to simply settle a case to avoid a prolonged and costly discovery and trial process *even in circumstances where the defendant may not be legally liable for the claim brought by the certified class* poses a legitimate substantial danger to the American Justice System. It would effectively create a plaintiff's market out of our judicial system in the context of class actions.

In light of this danger, a two-step implied ascertainability requirement which eliminates this threat by requiring the use of objective criteria when defining a class and an administratively feasible means of ascertaining class members seems perfectly appropriate—particularly when those requirements are supported by inferences made from Supreme Court precedents that may not have explicitly addressed the issue, but have clearly provided guidance on it in the context of similar issues. The implied ascertainbaility requirement is consistent with the burden of demonstrating by a preponderance of evidence that it has satisfied all of the requirements of Rule 23(b)(3) as well as being consistent with the purpose of the class action mechanism generally. Furthermore, it is consistent with purpose of the class action mechanism—achieving a more efficient judicial economy—as identified by the Supreme Court.[166]

[166] 133 S. Ct. 1426 at 1432.