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ARTICLE

BACK TO SCHOOL: A LESSON ON THE DUAL STANDARDS FOR CLASS ASCERTAINABILITY

N. CHETHANA PERERA

I. INTRODUCTION: CLASS IS IN SESSION

The Telephone Consumer Protection Act (TCPA) allows fax recipients to sue for a penalty between $500 and $1,500 for receiving an unsolicited fax advertisement.[1] An employee at Sandusky Wellness Center (Sandusky) received one such unsolicited fax from Medtox Scientific Incorporated (Medtox).[2] Sandusky proceeded to file a lawsuit against Medtox under the TCPA.[3]

As a lone plaintiff, Sandusky would have received a maximum of $1,500 for the single unsolicited fax it received from Medtox.[4] With the average cost of receiving a one-page fax being under a dollar, a $1,500 reward to the injured fax recipient seems quite adequate.[5] Medtox went even further by offering to pay Sandusky $3,500—well over the statutory fine Sandusky was entitled to under the TCPA.[6] But Sandusky, or perhaps its lawyers, saw an opportunity to multiply Medtox's penalty, in Federal

1. Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3) (2012) ("(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or (C) both such actions. If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.").

2. Sandusky Wellness Ctr. LLC v. Medtox Sci., Inc., No. CIV. 12-2066, 2014 WL 3846037, at *1 (D. Minn. Aug. 5, 2014), *rev'd*, 821 F.3d 992 (8th Cir. 2016).

3. *Id.*

4. *Id.*

5. Forman v. Data Transfer, Inc., 164 F.R.D. 400, 404 (E.D. Pa. 1995) ("The statute provides for a *minimum* recovery of $500 for each violation as well as treble damages if the plaintiff can prove willful or knowing violation. This most likely exceeds any actual monetary loss in paper, ink or lost facsimile time suffered by most plaintiffs in such a case. The statutory remedy is designed to provide adequate incentive for an individual plaintiff to bring suit on his own behalf." (emphasis in original)).

6. *Sandusky Wellness Ctr.*, 2014 WL 3846037.

Rule of Civil Procedure (FRCP) 23. Rule 23 allows plaintiffs with similar injuries to pursue their claims in a class action.[7] Thus, Sandusky sought class certification, a required prerequisite to bring a class action suit.[8] The district court found that the class was not ascertainable, and the Eighth Circuit reversed, holding the class ascertainable.[9]

Because class actions rarely go to trial,[10] the real conflicts in litigation are centered on class certification.[11] The denial of certification sounds the "death knell" for plaintiffs' claims, because of the financial impracticability of bringing individual actions.[12] On the other hand, class certification may coerce defendants into unfair settlements.[13] The potentially drastic consequences for parties have encouraged courts to carefully and meaningfully determine class certification requirements.

In addition to the express requirements of Rule 23,[14] courts have read into the rule an implicit requirement of ascertainability to certify a class.[15] Ascertainability is a way to identify and define a proposed class,[16] it "goes to the heart of the question of class certification."[17] For a class to be ascer-

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7. *See generally* FED. R. CIV. P. 23.

8. *Sandusky Wellness Ctr.*, 2014 WL 3846037, at *1.

9. Sandusky Wellness Ctr. LLC v. Medtox Sci., Inc., 821 F.3d 992, 998 (8th Cir. 2016).

10. Charles B. Casper, *The Class Action Fairness Act's Impact on Settlements*, 20 ANTITRUST 26, 26 (2006) ("Trials in class action cases are quite rare.").

11. Class certification is described as "preeminently important" for a class action to go forward. Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 325 (2011). The drafters of Rule 23 also recognized the importance of class certification because they amended Rule 23 to allow interlocutory appeal of certification decisions. FED. R. CIV. P. 23 advisory committee's note to 1998 Amendment, subd. (f) ("An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.").

12. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008), as amended (Jan. 16, 2009) ("[D]enying or granting class certification is often the defining moment in class actions . . . for it may sound the 'death knell' of the litigation on the part of plaintiffs . . . .").

13. Newton v. Merrill Lynch, 259 F.3d 154, 162 (3d Cir. 2001), as amended (Oct. 16, 2001) ("[Class certification may] create unwarranted pressure to settle nonmeritorious claims on the part of defendants . . . .").

14. *See* FED. R. CIV. P. 23.

15. *See* Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 946 (11th Cir. 2015) ("Under Rule 23, certification is proper where the proposed classes satisfy an implicit ascertainability requirement. . . ."); *see also* Byrd v. Aaron's Inc., 784 F.3d 154, 161–62 (3d Cir. 2015), as amended (Apr. 28, 2015) ("[T]he ascertainability requirement is implicit rather than explicit in Rule 23 . . . .").

16. 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1760, at 144 (3d ed. 2016) ("[T]he class must not be defined so broadly that it encompasses individuals who have little connection with the claim being litigated; rather, it must be restricted to individuals who are raising the same claims or defenses as the representative.").

17. Geoffrey C. Shaw, *Class Ascertainability*, 124 YALE L.J. 2354, 2370 n.69 (2015) (quoting *In re* Copper Antitrust Litig., 196 F.R.D. 348, 359 (W.D. Wis. 2000)).

tainable, "the general outlines of the membership of the class [must be] determinable from the outset of litigation."[18] Yet, federal courts disagree as to what determines an ascertainable class. Some courts apply a lower standard for ascertainability, and require the class to be "defined with reference to objective criteria."[19] These courts focus on objective criteria to define a class.[20] Other courts, applying the heightened standard of ascertainability, require the proposed class to have a "reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition."[21] These courts emphasize looking at the plaintiff's proposed method of identifying class members to make sure it is practical and feasible.[22] Due to the different ascertainability standards, in many cases, whether a plaintiff's class action suit will go forward depends on the jurisdiction in which the suit is brought.

This Note discusses the dual standards of ascertainability and recommends that the Supreme Court grant certiorari to apply a uniform standard. First, the Note discusses the history and purpose of Rule 23.[23] Second, the Note explains the explicit and implicit requirements of Rule 23.[24] Third, the Note examines and evaluates the policy justifications for both ascertainability standards.[25] Finally, the Note concludes by advocating for the heightened standard for class ascertainability.[26]

II. History Class: The Origin and Purpose of Rule 23

A. *Origins Of Rule 23*

Representative actions were first used in American courts to adjudicate the rights of a large group of individuals with a common interest.[27] In the first representative actions, only parties active in the litigation were bound by the court's judgment.[28] In 1966, the creation of Federal Rule of Civil Procedure 23 allowed representative plaintiffs to bind absent class members

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18. Wright, *supra* note 16, at 136–137.

19. Mullins v. Direct Digital, 795 F.3d 654, 662 (7th Cir. 2015).

20. Shaw, *supra* note 17, at 2358 ("Some courts have placed greater emphasis on the objectivity of the class's definition, which is said to protect against excessive administrative burdens over the course of the litigation.").

21. Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015), as amended (Apr. 28, 2015) (citing Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593–94 (3d Cir.2012)).

22. Shaw, *supra* note 17, at 2358–2359 ("Other courts have directly scrutinized the administrative feasibility of identifying individual members, requiring plaintiffs to propose and defend methods for identifying the class's membership.").

23. *Infra* Part II.

24. *Infra* Part III.

25. *Infra* Part IV.

26. *Infra* Part V.

27. W.G. Watson Jr., *Parties: Representative Suits under Federal Rule 23(a)(3)*, 35 Ca. L. Rev. 443, 444–445 (1947) (discussing the history of representative suits in the United States).

28. *Id.* (discussing how absent parties were not bound by judgments in representative suits because of res judicata).

as well.[29] This rule created an exception to traditional principles of res judicata—an individual could now be bound by a judgment in litigation she was not party to.[30] Because Rule 23 went against traditional res judicata principles, courts imposed certain procedural and constitutional requirements on it.[31]

While Rule 23 is procedural, it undoubtedly affects parties' substantive rights.[32] Rule 23 gives the party bringing the class action an incentive to pursue claims that the party may have otherwise abandoned.[33] For example, X may find it cost prohibitive to bring a $100 claim against Corporation Y, but Rule 23 allows X to bring a $1,000,000 claim against Corporation Y by joining with similarly situated plaintiffs. Rule 23 is controversial because it affects the substantive balance between parties by making litigation easier for the party bringing the class action.[34] Notwithstanding the controversy, courts and scholars have identified two policy reasons to justify class adjudication under Rule 23: (1) the regulatory perspective; and (2) the negative-value principle.[35]

B. Rule 23 as a Regulatory Mechanism

Rule 23 was amended in 1966 at the height of the civil rights movement.[36] Many civil rights advocates and social justice activists saw Rule 23 as a regulatory mechanism. A member of the 1966 Advisory Committee amending Rule 23 discussed how civil rights were a major driving force for revising Rule 23: "If there was [a] single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights,

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29. Note, *Class Actions Under Federal Rule 23(B)(3) — the Notice Requirement*, 29 MD. L. REV. 139, 139 (1969).

30. Watson, *supra* note 27, at 444–445; *see also* Hansberry v. Lee, 311 U.S. 32, 40 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." (citations omitted)).

31. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348–349 (2011) ("In order to justify a departure from that rule, a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.'" (quoting E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977))).

32. *See Hansberry*, 311 U.S. at 42 (discussing how class action suits implicate defendants' due process rights).

33. Mullins v. Direct Digital, 795 F.3d 654, 665 (7th Cir. 2015) ("'[O]nly a lunatic or a fanatic' would litigate the claim individually. . . .") (quoting Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004)).

34. Jack B. Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 299 (1973) ("It makes litigation easier either for plaintiffs or defendants, thereby affecting the substantive balance between the two.").

35. *See* David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 590, 613 (2013).

36. Lisa Vox, *Civil Rights Movement Timeline From 1965 to 1969*, THOUGHTCO. (last updated Jan. 22, 2012), https://www.thoughtco.com/civil-rights-movement-timeline-from-1965-to-1969-45431.

and explicitly, segregation."[37] The class action device was envisioned as the "workhorse of institutional reform in civil rights . . . ."[38] Rule 23 became a tool for ending racial segregation in the face of unsuccessful government action.[39]

While ending segregation may have been a driving force behind amending Rule 23, the committee members did not see Rule 23 as solely benefiting civil rights activists.[40] During the late 1960s and the early 1970s, passionate advocates used class action suits to deinstitutionalize mental health facilities, to reform prison conditions, to challenge public accommodation laws, and to pursue many other causes.[41] Procedural Rule 23 became a tool to enforce substantive rights that government agencies alone could not achieve.[42] The Supreme Court recognized that class actions suits were a response to "injuries unremedied by the regulatory action of government."[43]

Rule 23 gave plaintiffs the resources to pursue their cases and the large judgments to deter unlawful behavior.[44] Rule 23 also allowed plaintiffs to attract private lawyers who were otherwise unwilling to take cases involving low value, individual claims.[45] But it is important to note that deter-

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37. S. Rep. No. 106-420, at 11 n.6 (2000).

38. Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners?* 56 ME. L. REV. 223, 236 (2004).

39. *Id.* at 225.

40. For example, committee members also discussed how Rule 23 could effectively apply to a class of consumers, licensees, and licensors. 39 F.R.D. 69, 102 ("Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the 'tying' condition.").

41. Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L. J. 399, 402 n.7 (2014) ("See, e.g., Soc'y for the Good Will to Retarded Children, Inc. v. Cuomo, 572 F. Supp. 1300 (E.D.N.Y. 1983) (ordering better living conditions at a state institution for mentally handicapped children), vacated, 737 F.2d 1239 (2d Cir. 1984); Manicone v. Cleary, No. 74 C 575, *slip op*. (E.D.N.Y. June 30, 1975) (granting subject to certain limitations, inter alia, prisoner access to telephones); United States v. Kahane, 396 F. Supp. 687 (E.D.N.Y.) (right of defendants to obtain food meeting dietary requirements), modified, 527 F.2d 492 (2d Cir. 1975); Hart v. Cmty. Sch. Bd., 383 F. Supp. 699 (E.D.N.Y. 1974) (ordering an integration plan for the Mark Twain middle school in Coney Island, Brooklyn), aff'd, 512 F.2d 37 (2d Cir. 1975); Wilson v. Beame, 380 F. Supp. 1232 (E.D.N.Y. 1974) (tolerance for Muslim prisoners).").

42. Marcus, *supra* note 35, at 593 ("Captured or resource-strapped public agencies cannot adequately enforce the substantive law, requiring a privately-initiated alternative." (citations omitted)).

43. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

44. Marcus, *supra* note 35, at 593.

45. 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 action prosecuting his or her rights. A class action

rence, rather than the small individual compensation, was the primary purpose of these suits.[46]

C. Rule 23 Overcoming Negative Value Suits

A negative expected value suit occurs when a plaintiff's total litigation costs exceed the expected judgment.[47] Benjamin Kaplan, one of the primary drafters of the modern version of Rule 23, saw the bundling of plaintiffs into a "class" as a way to overcome the lack of incentive to pursue a low value claim.[48] Kaplan believed Rule 23 "provide[d] means of vindicating the rights of people who individually would be without effective strength to bring their opponents to court at all."[49]

Rule 23 made pursuing small value claims financially worthwhile. The Supreme Court supported this compensatory function of Rule 23 in *Eisen v. Carlisle & Jacquelin*.[50] In *Eisen*, a lone plaintiff's stake was a mere seventy dollars.[51] The Court explained that "[n]o competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all."[52] The Court also recognized that Rule 23 allowed plaintiffs to litigate otherwise negative-value claims without passing on the costs of the suit to the defendant.[53] *Eisen* exemplifies how Rule 23 allowed plaintiffs to enforce substantive rights by overcoming financial obstacles to pursue small recoveries—all without compromising defendants' rights.[54]

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solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.").

46. Marcus, *supra* note 35, at 593 (citing Beverly C. Moore, Jr., *Does it Go Far Enough*, 63 A.B.A. J. 837, 842 (1977) ("The primary function of the class action is deterrence of harmful conduct . . . . Judicial efficiency and compensation of small claimants are merely desirable by-products.")).

47. Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 Notre Dame L. Rev. 1057, 1059–60 (2003) ("The concept of the negative value claim is most often applied when the value of the claim is itself is too small to justify the cost of prosecution.").

48. The 1966 amendment to Rule 23 addressed the lack of economic incentive for an individual plaintiff to enforce her or his private rights. Benjamin Kaplan, *A Prefatory Note*, 10 B.C. Indus. & Com. L. Rev. 497, 497 (1969).

49. *Id.*

50. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

51. *Id.* at 157.

52. *Id.* at 161.

53. *Id.* at 178–79.

54. *Id.* Scholars also discuss the benefits of Rule 23 in helping plaintiffs' low-value cases go forward without passing on costs to defendants. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 390 (1967) ("The object is to get at the cases where a class action promises important advantages of economy and effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party.").

III. The ABCs of Rule 23: The Explicit and Implicit Requirements

A. *The Explicit Requirements Of Rule 23*

Rule 23 has a number of explicit requirements that are necessary to maintain a class action suit.[55] A class must satisfy all of the requirements in Rule 23(a) and then fit into one of the three categories in Rule 23(b).[56] These requirements serve a number of purposes. In light of our judicial system's preference for individual litigation, these requirements help safeguard absent class members' rights to pursue litigation and defendants' rights against inconsistent judgments.[57] These requirements also limit the drain of judicial resources that such a large suit could easily entail by ensuring that a class action is economically and administratively feasible.[58] Failure to satisfy *any* of Rule 23's requirements will result in a denial of class certification.[59]

First, Rule 23(a)(1) requires numerosity in a class, that is, "the class [must be] so numerous that joinder of all members is impracticable."[60] Numerosity serves two purposes: (1) it makes sure that the legal system's preference for individual litigation is not compromised; and (2) it ensures that using joinder is unfeasible and that a class action is therefore the most efficient way to litigate.[61] Because the numerosity requirement is policy based, courts weigh the facts carefully to determine whether numerosity is met instead of having a strict requirement.[62]

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55. *See* Fed. R. Civ. P. 23(a)–(b).

56. *Id.*

57. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 402–03 (1980) ("The justifications that led to the development of the class action include the protection of the defendant from obligations inconsistent, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims." (citations omitted)).

58. *Id.*

59. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011) (denying class certification because the group of plaintiffs failed to meet the commonality requirement of Rule 23(a)); *but see* Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016) (affirming class certification because plaintiffs met all of Rule 23's requirements).

60. *See* Fed. R. Civ. P. 23(a)(1).

61. Beverly Reid O'Connell & Karen L. Stevenson, Rutter Group Practice Guide: Federal Civil Procedure Before Trial, Ch. 10, 10:258 (Rutter Group 2007) ("Individual litigation is preferred where it is possible to join all members' claims in a single lawsuit. The 'numerosity' requirement ensures that the class action device is used only where it would be inequitable and impractical to require every member of the class to be joined individually.").

62. Gen. Tel. Co. of the Nw. v. Equal Emp't Opportunity Comm'n, 446 U.S. 318, 330 (1980) ("The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations.").

Second, Rule 23(a)(2) requires commonality in questions of law *or* fact to the class.[63] In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court stated:

> [c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,' . . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.[64]

Commonality ensures that a common legal question exists for the class, and thus provides the basis to bind a similarly situated individual to the outcome of the entire class.[65]

Third, Rule 23(a)(3) requires typicality: in other words, the claims or defenses raised by the class representatives should be typical of the claims or defenses raised by others in the class.[66] Courts classify a claim as "'typical' if it arises from the same event or practice or course of conduct that gives rise to the claims of the other class members, and if her or his claims are based on the same legal theory."[67] Typicality ensures the representative is indeed a member of the class, and by pursing her best interests, will also pursue the best interests of the entire class.[68]

Fourth, Rule 23(a)(4) requires that the representative party will adequately protect the interests of the class.[69] This requirement ensures there are no conflicts of interest between the representative and the rest of the class.[70] Because of the due process concerns of a judgment binding absent parties, both Rule 23(a)(3) and Rule 23(a)(4) ensure that the representative will pursue the best interests of the class.[71]

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63. *See* FED. R. CIV. P. 23(a)(2). The disjunctive "or" in this part of the rule shows that the plaintiffs only need a question of law *or* fact in common—not both. *Id.*

64. *Wal-Mart*, 564 U.S. at 349.

65. A group of individuals bringing a class action suit need to show that a court can answer a question of law or fact that will resolve each individual class member's litigation. *Id.*

66. *See* FED. R. CIV. P. 23(a)(3).

67. Beattie v. CentryTel, Inc., 511 F.3d 554, 561 (6th Cir. 2007) (quotations and citations omitted).

68. 1 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS, § 3:28 (5th ed. 2016) [hereinafter NEWBERG ON CLASS ACTIONS].

69. *See* FED. R. CIV. P. 23(a)(4).

70. Conflicts of interest between parties may include class members seeking conflicting remedies, or if some class members benefit from the alleged misconduct. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) (class members with existing health problems may prefer a larger payment immediately while class members waiting to develop health problems may prefer to keep the fund as large as possible for the future); *see also id.* ("The adequacy inquiry seeks to uncover conflicts of interest between named parties and the class they seek to represent.").

71. The Constitution demands that absent parties' interests are protected and pursued if a judgement is to bind them. NEWBERG ON CLASS ACTIONS, *supra* note 68, at § 3:51; *see also* William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 810 n.79 (2007) ("There is no reason to believe . . . that the concept of adequate representation present in the rules is anything other than the level of constitutional protection of

Finally, class members also have to satisfy one of the three prerequisites in Rule 23(b).[72] This Note looks only at Rule 23(b)(3)—class actions for money damages—because ascertainability issues generally arise here. Rule 23(b)(3) outlines the additional procedural safeguards for class actions seeking money damages.[73] Supplementing Rule 23(a)(2), Rule 23(b)(3) requires common questions of law or fact to the *class* to predominate over issues of individual members.[74] The rule also requires class adjudication to be superior to other adjudication methods, and for class adjudication to be fair and efficient.[75]

B. *The Implicit Requirement Of Rule 23*

1. *Brief History of the Implied Ascertainability Requirement*

The language of Rule 23 has no mention of ascertainability, rather, ascertainability is a judicially created concept.[76] The first mention of ascertainability was in 1970 with the Fifth Circuit's opinion in *Debremaecker v. Short*.[77] In *Debremaecker*, a group of plaintiffs protesting the Vietnam War sought class certification on the basis of being "active in the 'peace movement,'" and for being "harassed and intimidated," or fearing harassment and intimidation.[78] The Fifth Circuit asserted that, "[i]t is elementary that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable."[79] Thus, the Fifth Circuit held against class certification, finding that a "peace movement" was inherently uncertain because of the broad range of activities that could be lumped under the term.[80]

Eleven years later, in *Simer v. Rios*, the Seventh Circuit stressed the need for a class to be ascertainable.[81] In *Simer*, the Seventh Circuit rejected a proposed class who was "eligible for CIP assistance but who w[as] denied assistance or who w[as] discouraged from applying because of the existence of the invalid regulation . . . ."[82] The court emphasized the difficulty—

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absent class member interests necessary to deem their virtual participation in litigation fundamentally fair." (quoting Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 353 (1999))).

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

73. *Id.*; *see also* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 341 (2011) ("The Rule's history and structure indicate that individualized monetary claims belong instead in Rule 23(b)(3), with its procedural protections of predominance, superiority, mandatory notice, and the right to opt out.").

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

75. *Id.*

76. *See* FED. R. CIV. P. 23.

77. J. Cl. DeBremaecker v. Herman Short, 433 F.2d 733 (5th Cir. 1970).

78. *Id.* at 734.

79. *Id.* (citations omitted).

80. *Id.*

81. *See* Simer v. Rios, 661 F.2d 655 (7th Cir. 1981).

82. *Id.* at 669.

indeed the "Sisyphean task"—of identifying a class based on an individual's state of mind.[83] The Seventh Circuit also discussed the policy justifications behind requiring an ascertainable class: (1) alerting the court to the burdens of identifying the class; and (2) ensuring that individuals actually harmed by the injury form the class.[84]

Through the 1980s and 1990s, courts treated ascertainability leniently.[85] The overwhelming majority of class action suits in federal courts were securities litigation, where there was generally ample documentation to identify class members.[86] Consumer class actions—where courts now grapple with ascertaining a class—rarely found their way to federal courts during this time.[87] Thus, the case law from this period gives limited insight into the requirements of ascertaining a class. But Supreme Court jurisprudence on the explicit requirements of Rule 23 give scholars and lower courts some guidance on the level of rigor required to ascertain a class.[88]

2. *The Supreme Court on Class Certification*

The Supreme Court's stance on class certification seems to fit the larger trend of increasing the burden on plaintiffs bringing class action suits. Initially, the Supreme Court implemented a lower standard for class

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83. *Id.*

84. Jamie Zysk Isani & Jason B. Sherry, *Ascertainability: Class Action Certification*, CLASS ACTION LITIG. REP. (BNA), 2 (May 8, 2015). The first justification helps a court make sure that class adjudication will be an efficient and cost effective. *Id.* The second adjudication helps "protect putative class members, who are seeking the relief, and defendants, who benefit from res judicata when a judgment is entered for or against the class." *Id.*

85. *Id.*

86. Tom Murphy, *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. E-SUPP. 34, 39 n.26 (2016); *see generally* Basic Inc. v. Levinson, 485 U.S. 224 (1988) (class action claim under the Securities Exchange Act of 1934); Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) (securities fraud class action); *In re* Cendant Corp. Litig., 264 F.3d 201 (3d Cir. 2001) (securities fraud class action); *In re* Silicon Graphics Inc. Secs. Litig., 183 F.3d 970 (9th Cir. 1999) (securities fraud class action); DiLeo v. Ernst & Young, 901 F.3d 624 (7th Cir. 1990) (securities fraud class action)).

87. For a federal court to have subject matter jurisdiction to hear a case, it must have federal question jurisdiction and/or diversity jurisdiction. *See* 28 U.S.C. §§ 1331–1332 (2016). Federal question jurisdiction exists when the plaintiff's claim arises from federal law or the Constitution. *See* 28 U.S.C. § 1331. Federal question jurisdiction rarely existed because plaintiff consumers did not have standing to sue under federal laws for claims typical today—like false advertising. *See, e.g.*, Serbin v. Ziebart Int'l Corp., 11 F.3d 1163, 1178–1179 (3d Cir. 1993) (holding that plaintiffs do not have standing to sue under the Langham Act for false advertising). Diversity jurisdiction, during this time period, required each plaintiff to meet the minimum amount in controversy. *See, e.g.*, Zahn v. Int'l Paper Co., 414 U.S. 291, 298–99 (1973) ("None of the named plaintiffs and none of the unnamed members of the class before the Court alleged claims in excess of the requisite amount."). Thus, low value consumer class action suits rarely reached federal courts through diversity jurisdiction. *See* Murphy, *supra* note 86, at 39 n.27.

88. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 353 (2011) (requiring plaintiffs to meet a higher burden of proof to satisfy Rule 23).

certification in *Eisen v. Carlisle & Jacqueline*.[89] But a trilogy of cases after *Eisen* evidenced the Court advocating for a heightened standard. This brief section covers the progression of the Supreme Court's stance on certification rigor.

In *Eisen*, the Court reprimanded the district court's decision to deny class certification by conducting a preliminary investigation into the merits of the case.[90] The Court, in dicta, stated that "nothing in either the language or history of Rule 23 [ ] gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[91] Thus, in 1974, the Supreme Court seemed to instruct lower courts to apply a less rigorous standard during class certification.[92]

Less than ten years later, without addressing *Eisen*, the Supreme Court began advocating for a more demanding approach to class certification in *General Telephone Company of Southwest v. Falcon*.[93] The Court affirmed the Third Circuit's reversal of the district court's class certification, holding that courts must "probe behind the pleadings" because the certification process "'generally involves considerations that are enmeshed in the [plaintiff's] factual and legal issues. . .'."[94] Indeed, the Court called for a "rigorous analysis" to ensure a plaintiff complies with Rule 23.[95] The Court also implied that courts should look into the judicial efficiency of adjudicating a proposed class suit.[96] The Court justified its decision to affirm the Third Circuit because "the maintenance of respondent's action as a class action did not advance 'the efficiency and economy of litigation which is a principal purpose of the procedure.'"[97] The Court re-emphasized that one of the greatest benefits of the class action tool was to save "the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23."[98]

In 1997, the Court provided further evidence for a more rigorous standard for class certification in *Amchem Products, Inc. v. Windsor*.[99] In *Amchem*, the district court certified a class of people who had been exposed to asbestos and (1) developed injuries because of their exposure; or (2) who

89. Eisen v. Carlisle & Jacqueline, 417 U.S. 156 (1974).

90. *Id.* at 177.

91. *Id.*

92. *See id.*

93. *See* Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982).

94. *Id.* at 160 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978)).

95. *Id.* at 160–61.

96. *See id.* at 159 (quoting Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974)).

97. *Id.*

98. *Id.* at 155 (quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979)).

99. *See* Achem Products, Inc. v. Windsor, 521 U.S. 591 (1997).

may develop injuries because of their exposure.[100] The Supreme Court affirmed the Third Circuit's decision to decertify the class and suggested that plaintiffs need to meet a higher burden of proof to certify a class.[101] The Court noted that the plaintiff's proposed class did not meet the express requirements of Rule 23.[102] Importantly, for our discussion of ascertainability, the Court noted that the Advisory Committee for Rule 23 "warned district courts to exercise caution when individual stakes are high and disparities among class members great."[103]

In 2014, in *Wal-Mart Stores, Inc. v. Dukes*, the Court once again required a higher burden of proof for the plaintiffs to certify a class.[104] The Court overturned the lower court's class certification because of a failure to rigorously examine the plaintiff's proposed class.[105] The Court cited *Falcon* as requiring "significant proof" demonstrating the relationship between the plaintiff's class members and the common injury alleged.[106] The Court also clarified that *Eisen*'s rejection of merits inquiries was the "purest dictum" and was "contradicted by [the Supreme Court's] other cases."[107] While *Dukes* dealt with the express requirements of Rule 23, lower courts have relied on *Dukes* to enforce a higher standard at the ascertainability stage as well.[108]

In sum, while *Eisen* may have advocated a lower standard for class certification, the Supreme Court's stances in *Falcon*, *Amchem*, and *Dukes* show a trend towards a stricter standard for certification on the explicit requirements of Rule 23—which may also apply to the implicit requirement of ascertainability.[109]

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100. *Id.* at 597

101. *Id.* at 628.

102. *Id.*

103. *Id.* at 594.

104. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 353 (2011) ("'[S]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision making processes.' We think that statement precisely describes respondents' burden in this case." (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982))).

105. *Id.*

106. *Id.*

107. *Id.* at 352 n.6.

108. Stephanie Haas, Note, *Class is in Session: The Third Circuit Heightens Ascertainability with Rigor in* Carrera v. Bayer Corp., 59 VILL. L. REV. 793, 803 n. 68 (2014) ("*See, e.g.*, Kottaras v. Whole Foods Mkt., Inc., 281 F.R.D. 16, 22 (D.D.C. 2012) (explaining D.C. Circuit's previously 'low hurdle' required to show compliance with Rule 23 was no longer an accepted method following *Wal-Mart*); *see also* M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832, 838 (5th Cir. 2012) (vacating class certification order after finding district court failed to conduct rigorous analysis of commonality required by *Wal-Mart*).").

109. *See* Ashish Prasad, *Class Certification after* Wal-Mart v. Dukes, 21 PRETRIAL PRAC. & DISCOVERY 11, 11–13 (2012).

3. *The Class Action Fairness Act's Effect on Ascertainability*

In 2005, Congress passed the Class Action Fairness Act (CAFA) to prevent the abuse of the class action device in state courts by pushing consumer class actions into federal courts.[110] Congress passed CAFA after finding, "that abuses of the class action device undermined the national judicial system, interfered with the free flow of interstate commerce, misconstrued the concept of diversity jurisdiction as intended by the Framers, and enriched counsel at the expense of class members."[111] CAFA was passed to "create federal court jurisdiction over interstate cases with national importance, assure fair and prompt recoveries for class members with legitimate claims, and benefit the economy."[112]

By changing two requirements for class actions, CAFA flung the doors wide open for small value consumer class actions to enter federal courts.[113] First, class actions now only needed minimal diversity; in other words, one plaintiff had to be diverse from at least one defendant.[114] Second, CAFA increased the amount in controversy requirement from $75,000 to $5,000,000, but allowed the class members to aggregate their claims to reach the five million mark.[115]

As small value consumer class actions increasingly gained federal subject matter jurisdiction, federal courts began grappling with how to ascertain these new classes. Unlike the prior securities class actions where records were ample, small value consumer class actions have few records to help identify class members.[116] Stores and manufacturers do not have records on the identity of consumers buying their products, or the date and

110. *See* Nicole Ochi, Note, *Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies After CAFA & MMTJA*, 41 Loy. L.A. L. Rev. 965, 972 (2008) ("In passing CAFA, Congress found that abuses of the class action device undermined the national judicial system, interfered with the free flow of interstate commerce, misconstrued the concept of diversity jurisdiction as intended by the Framers, and enriched counsel at the expense of class members. Congress enacted CAFA to create federal court jurisdiction over interstate cases with national importance, assure fair and prompt recoveries for class members with legitimate claims, and benefit the economy.").

111. *Id.*

112. *Id.*

113. Small value consumer class actions decreased in state courts and increased drastically in federal courts. For example, the number of class actions filed in the state court in Madison County, Illinois dropped from eighty-two pre-CAFA to a mere sixteen post-CAFA—a drop of more than ninety percent. John Beisner et al., *CAFA Update: The Class Action Jurisdictional World Clarifies*, 2008 Rocky Mountain Min. L. Found., 3-1. Meanwhile, in the Ninth Circuit, class action filings increased by 400% and removals increased by over 100%. Steven S. Gensler, *The Other Side of the CAFA Effect: An Empirical Analysis of Class Action Activity in the Oklahoma State Courts*, 58 U. Kan. L. Rev. 809, 835 (2010). Data from the Third, Tenth, and Eleventh Circuits also show significant differences in filing and removal rates. *Id.* at 834.

114. 28 U.S.C. § 1332(d)(2) (2016).

115. *Id.*

116. Isani & Sherry, *supra* note 84, at 2–3.

price of these purchases.[117] Consumers are even worse at record keeping. The overwhelming majority of consumers rarely keep receipts for everyday items like Red Bull drinks and Subway sandwiches that may spawn class action suits.[118] Courts struggled with the level of proof needed to ascertain a class and whether that proof was required before or after class certification.[119] Thus, the stage was set for a circuit split on the requirements of ascertainability for class action certification.

IV. Classroom Brawl: The Battle Over A Standard for Ascertainability

The Sixth, Seventh, and Eighth Circuits are in the minority in applying a lower standard for ascertainability.[120] These courts hold that an ascertainable "class must be defined clearly and that membership be defined by objective criteria . . . ."[121] To better explain what this standard entails, the Seventh Circuit has discussed three concerns plaintiffs should address in proposing how to ascertain (or identify) a class. First, a proposed class should avoid vagueness.[122] This can be done by "identify[ing] a particular group harmed during a particular time frame, in a particular location, in a particular way."[123] Second, a proposed class should not be defined by subjective criteria. Such criteria, like a proposed class member's state of mind, will fail.[124] But objective criteria, like the defendant's conduct, will pass the test.[125] Third, a party proposing a class should steer clear of "fail-safe classes"—a class that only includes members whose claims would be successful on the merits.[126] Whether a class member belongs in the class should "not depend on the liability of the defendant."[127]

The First, Second, Third, Fourth, and Eleventh Circuits are in the majority in applying a heightened standard for ascertainability.[128] In addition to a class being defined by objective criteria, these circuits also require "a

117. *See, e.g.*, Carrera v. Bayer Corp., 727 F.3d 300, 304 (3d Cir. 2013) (noting the manufacturer had no records of consumers who bought its products).

118. *See id.* ("[T]here is no dispute that class members are unlikely to have documentary proof of purchase, such as packaging or receipts.").

119. Isani & Sherry, *supra* note 84, at 2–3.

120. *See, e.g.*, Sandusky Wellness Ctr. v. Medtox Sc., Inc., 821 F.3d 992 (8th Cir. 2016); Mullins v. Direct Digital, 795 F.3d 654, 654 (7th Cir. 2015); Young v. Nationwide Mut. Ins. Co., 693 F.3d 532 (6th Cir. 2012).

121. *Mullins*, 795 F.3d at 657.

122. *Id.* at 659–660.

123. *Id.* at 660.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Mullins*, 795 F.3d at 660.

128. *See, e.g.*, Brecher v. Republic of Argentina, 806 F.3d 22 (2d Cir. 2015); Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 945 (11th Cir. 2015); *In re* Nexium Antitrust Litig., 777 F.3d 9 (1st Cir. 2015); EQT Products Co. v. Adair, 764 F.3d 347 (4th Cir. 2014); Carrera v. Bayer Corp., 727 F.3d 300, 300 (3d Cir. 2013).

reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition."[129] The method proposed for identifying class members must be "manageable" and require little, if any, individualized fact finding.[130] Courts applying this standard look carefully at the records suggested to ascertain a class to make sure they do in fact identify the class members and the injury the class members allege in common.[131]

The Seventh Circuit has given an in-depth analysis of the lower ascertainability standard the Sixth and Eighth Circuits apply.[132] In return, the Third Circuit has comprehensively analyzed the heightened standard that the First, Second, Fourth, and Eleventh Circuits apply.[133] Both sides of the divide have identified four policy concerns underpinning their respective standards: (1) judicial efficiency; (2) unfairness to absent class members; (3) unfairness to bona fide class members; and (4) the protection of defendants' due process rights.[134] This section examines and evaluates these policy concerns.

A. *Judicial Efficiency*

The first policy consideration courts look at when deciding to apply the lower or heightened standard is judicial efficiency.[135] Administrative convenience, judicial efficiency, and administrative efficiency are used interchangeably by courts when discussing the time and resources involved with class actions.[136] For uniformity, this Note uses judicial efficiency to refer to all of these terms.

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129. Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015), as amended (Apr. 28, 2015) (citing Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593–94 (3d Cir.2012)).

130. *Carrera*, 727 F.3d at 307–08 (quoting NEWBERG ON CLASS ACTIONS, *supra* note 68, at § 3:3)).

131. *See, e.g.*, *id.* at 310–12 (finding the plaintiff's proposed class unascertainable because the plaintiff's proposed methods of affidavit identification would require a series of mini-hearings).

132. Sandusky Wellness Ctr. v. Medtox Sci., Inc., 821 F.3d 992, 995–96 (8th Cir. 2016) (explaining the Seventh Circuit's approach to ascertainability).

133. *Id.* (explaining the Third Circuit's approach to ascertainability).

134. *See, e.g.*, Mullins v. Direct Digital, 795 F.3d 654, 663–73 (7th Cir. 2015) (explaining the Seventh Circuit's view of ascertainability in context of the four policy considerations).

135. *See, e.g.*, *Carrera*, 727 F.3d at 307 ("If a class cannot be ascertained in an economical and 'administratively feasible' manner, significant benefits of a class action are lost." (quoting Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593–94 (3d Cir.2012) (internal citations omitted))).

136. *Compare Carrera*, 727 F.3d at 305 ("[The heightened ascertainability standard] eliminates serious administrative burdens that are incongruous with the *efficiencies* expected in a class action by insisting on the easy identification of class members." (emphasis added)), *with Mullins*, 795 F.3d at 663 ("This concern about *administrative inconvenience* is better addressed by the explicit requirements of Rule 23(b)(3) . . . .").

The Supreme Court has long recognized judicial efficiency as a crucial concern when certifying a class for the express requirements of Rule 23.[137] Indeed, judicial efficiency is an important consideration in a system "where judges and facilities are in short supply . . . ."[138] In many cases, adjudicating class actions is more efficient than adjudicating individual claims.[139] But, class actions still use a significant amount of judicial resources, especially money and time—trials can cost millions and last months. Thus, courts carefully consider judicial efficiency when deciding whether to certify a class and proceed with a class action suit. In fact, circuit courts have addressed judicial efficiency more than any other policy factor when deciding which standard to apply.[140] This section examines both sides of the debate on judicial efficiency and class ascertainability, and then concludes that the heightened ascertainability standard better serves this policy rationale.

1. Heightened Ascertainability Standard

The First, Second, Third, Fourth, and Eleventh Circuits have all voiced concerns with the lower standard of ascertainability on the grounds of judicial efficiency.[141] The Third Circuit was the most vocal proponent of this concern when it implemented a heightened ascertainability standard in *Carrera v. Bayer Corp*.[142] In *Carrera*, the plaintiff sought certification for a class that bought a deceptively advertised diet pill.[143] The Third Circuit asserted that, in addition to the objective criteria used to identify a class, there must also be an "administratively feasible" way of ascertaining a proposed class.[144] The court denied certification, in part, because the plaintiff's proposed method of affidavits would require a series of mini trials to identify the class—a method the *Carrera* court believed was unmanageable.[145]

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137. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 291, 618 (1997) ("The development [of class action certification jurisprudence] reflects concerns about the efficient use of court resources . . . .").

138. Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 48 (1975).

139. *Id.*

140. *Compare Carrera*, 727 F.3d at 307 ("If a class cannot be ascertained in an economical and 'administratively feasible' manner, significant benefits of a class action are lost (citations omitted)), *with Mullins*, 795 F.3d at 663 ("Imposing a stringent version of ascertainability because of concerns about administrative inconvenience renders the manageability criterion of the superiority requirement superfluous." (citing Daniels Luks, Note, *Ascertainability in the Third Circuit: Name That Class Member,* 82 FORDHAM L. REV. 2359, 2395 (2014))).

141. *See* Brecher v. Republic of Argentina, 806 F.3d 22 (2d Cir. 2015); Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 945 (11th Cir. 2015); EQT Products Co. v. Adair, 764 F.3d 347 (4th Cir. 2014); *Carrera*, 727 F.3d at 300.

142. *See Carrera*, 727 F.3d at 300.

143. *Id.* at 304.

144. *Id.*

145. *Id.* at 307–08 ("The method of determining whether someone is in the class must be 'administratively feasible . . . . [A] plaintiff does not satisfy the ascertainability requirement if

In contrast to the courts that advocate for a lower standard to keep true to the purpose of class action suits,[146] the *Carrera* court explained that "[i]f a class cannot be ascertained in an economical and 'administratively feasible manner,' significant benefits of a class action are lost."[147]

In *EQT Products Co. v. Adair*, the Fourth Circuit considered identifying members of the plaintiff's proposed class by looking at title documents.[148] The Fourth Circuit reversed the district court's decision to certify the class because of its concerns over judicial efficiency.[149] The court asserted that the plaintiff's method of certification involved "complications pos[ing] a significant administrative barrier to ascertaining the ownership classes."[150] These complications included "numerous heirship, intestacy, and title-defect issues plagu[ing] many of the potential class members' claims to the gas estate."[151] The Fourth Circuit stated that a court should give significant consideration to the administrative manageability of identifying injured plaintiffs before concluding that a class is ascertainable.[152] (emphasis added)

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individualized fact-finding or mini-trials will be required to prove class membership . . . . Administrative feasibility means that identifying class members is a manageable process that does not require much, if any, individual factual inquiry.'" (citing NEWBERG ON CLASS ACTIONS, *supra* note 68, at § 3:3)); *see also* Bakalar v. Vavra*,* 237 F.R.D. 59, 64 (S.D.N.Y. 2006) ("Class membership must be readily identifiable such that a court can determine who is in the class and bound by its ruling without engaging in numerous fact-intensive inquiries.").

146. *See, e.g.*, Mullins v. Direct Digital, 795 F.3d 654, 663 (7th Cir. 2015) ("Imposing a stringent version of ascertainability because of concerns about administrative inconvenience renders the manageability criterion of the superiority requirement superfluous." (citing Luks, *supra* note 140, at 2395)).

147. *Carrera*, 727 F.3d at 307 (citation omitted). One of the benefits the Third Circuit discusses is to save "'the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.'" *Id.* (quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979)).

148. *See* EQT Products v. Adair, 764 F.3d 347, 355 (4th Cir. 2014) (discussing how the court can look at various ownership schedules).

149. *Id.* at 358 ("After reviewing the magistrate judge's R & R and the district court's certification orders, we conclude that the district court abused its discretion in at least two ways. First, it failed to rigorously analyze whether the administrative burden of identifying class members in the ownership cases would render class proceedings too onerous.")

150. *Id.* at 359.

151. *Id.*

152. *Id.* at 359–360 ("The fact that verifying ownership will be necessary for the class members to receive royalties does not mean it is not also a prerequisite to identifying the class. Without even a rough estimate of the number of potential successors-in-interest, we have little conception of the nature of the proposed classes or who may be bound by a potential merits ruling. Lacking even a rough outline of the classes' size and composition, we cannot conclude that they are sufficiently ascertainable. On remand, the district court should reconsider the ascertainability issues posed by the ownership classes. At a minimum, the district court should endeavor to determine the number of potential class members who have obtained their interest in the gas estate after the defendants first prepared the ownership schedules. The court should also give greater consideration to the administrative challenges it will face when using land records to determine current ownership, and assess whether any trial management tools are available to ease this process. The district court should also determine whether it is possible to adjust the class definitions to avoid or mitigate the administrative challenges we have identified.").

The Second Circuit also clarified, "that the touchstone of ascertainability is whether the class is 'sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.' "[153] In *Brecher v. Republic of Argentina*, the Second Circuit reversed the district court's certification of a proposed class of bondholders suing Argentina for defaulted bonds.[154] The Second Circuit held that the plaintiff's objective standard of owning an interest in a bond—with no limitation, like a time period—was insufficiently definite to ascertain the class.[155] The court discussed how the lack of any limitation to identify particular bondholders would require mini-hearings to determine the class.[156] In fact, the Second Circuit went on to compare the proposed class to a class of people wearing blue shirts.[157]

> A class defined as 'those wearing blue shirts,' while objective, could hardly be called sufficiently definite and readily identifiable; it has no limitation on time or context, and the ever-changing composition of the membership would make determining the identity of those wearing blue shirts impossible. In short, the use of objective criteria cannot alone determine ascertainability when those criteria, taken together, do not establish the definite boundaries of a readily identifiable class.[158]

2. *Lower Ascertainability Standard*

Both the Sixth and Seventh Circuits have expressed concern over adopting the heightened ascertainability standard based on the justification of judicial efficiency.[159] The Eighth Circuit has also voiced its concern that the heightened ascertainability standard "gives one factor in the balance absolute priority, with the effect of barring class actions where class treatment

153. Brecher v. Republic of Arg., 806 F.3d 22, 24 (2d Cir. 2015).

154. *Id.* at 23.

155. *Id.* at 25.

156. *Id.* at 26 ("A hypothetical illustrates this problem. Two bondholders—*A* and *B*—each hold beneficial interests in $50,000 of bonds. *A* opts out of the class, while *B* remains in the class. Following a grant of summary judgment on liability, both *A* and *B* then sell their interests on the secondary market to a third party, *C. C* now holds a beneficial interest in $100,000 of bonds, half inside the class and half outside the class. If *C* then sells a beneficial interest in $25,000 of bonds to a fourth party, *D,* the absence of a temporal limitation like the continuous holder requirement ensures that neither the purchaser nor the court can ascertain whether *D* 's beneficial interest falls inside or outside of the class.").

157. *Id.* at 25.

158. *Id.*

159. Mullins v. Direct Digital, 795 F.3d 654, 663 (7th Cir. 2015) ("Imposing a stringent version of ascertainability because of concerns about administrative inconvenience renders the manageability criterion of the superiority requirement superfluous." (citing Luks, *supra* note 140, at 2395)); *see also* Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 540 (6th Cir. 2012) ("It is often the case that class action litigation grows out of systemic failures of administration, policy application, or records management that result in small monetary losses to large numbers of people. To allow that same systemic failure to defeat class certification would undermine the very purpose of class action remedies.").

is often most needed: in cases involving relatively low-cost goods or services, where consumers are unlikely to have documentary proof of purchase."[160]

The Seventh Circuit has explained in detail its justification for applying the lower standard of ascertainability.[161] In *Mullins v. Direct Digital*, the court recognized that the proposed class members could not be identified at the outset of the litigation.[162] Yet, the Seventh Circuit insisted on applying the lower ascertainability standard.[163]

The Seventh Circuit reasoned that Rule 23(b)(3) already requires that the class device be "superior to other available methods for fairly and efficiently adjudicating the controversy."[164] The court reasoned that Rule 23(b)(3)'s superiority requirement requires a judge to consider alternatives.[165] These alternative methods include: decertifying a class at a later stage, insisting on the plaintiff's strategy for notifying and managing the class, and appointing a special master.[166] The court explained that the lower ascertainability requirement gives judges appropriate discretion[167] to decide whether a class is indeed unwieldy at the best point in the litigation—instead of going against "the well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns."[168]

The court also discussed how the heightened ascertainability requirement encouraged judges to "look at the problem in a vacuum" and only consider the costs of a class action suit.[169] Instead, the Seventh Circuit advocated for courts to weigh the "*costs and benefits*" of the class device.[170] The court encouraged considering whether, "'judicial management of a class action . . . will reap the rewards of efficiency and economy for the entire system that the drafters of the federal rule envisioned . . . .'"[171] The Seventh Circuit feared that courts would use the heightened standard "to erect a nearly insurmountable hurdle at the class certification stage in situa-

160. Sandusky Wellness Ctr. v. Medtox Sci., Inc., 821 F.3d 992, 996 (8th Cir. 2016) (quoting *Mullins*, 795 F.3d at 658).

161. *Mullins*, 795 F.3d at 663–673 (explaining its justifications for applying the lower standard).

162. *Id.* at 661 ("Direct Digital asserts that the only method of identifying class members here is by affidavits from the putative class members themselves. That remains to be seen. We do not know yet what sales and customer records Direct Digital has. We assume for purposes of this decision that Direct Digital will have no records for a large number of retail customers. We also assume that many consumers of Instaflex are unlikely to have kept their receipts since it's a relatively inexpensive consumer good.").

163. *Id.* at 658.

164. *Id.* (citing FED. R. CIV. P. 23(b)(3)).

165. *Id.* at 664.

166. *Id.*

167. *Mullins*, 795 F.3d at 664.

168. *Id.* at 663.

169. *Id.*

170. *Id.*

171. *Id.* at 664 (citing WRIGHT ET AL., *supra* note 16, at § 1780).

tions where a class action is the only viable way to pursue valid but small individual claims."[172]

Similarly, the Sixth Circuit expressed concerns over judicial efficiency's potential to keep out the very kind of class actions Rule 23 is meant to encompass. In *Young v. Nationwide Mutual Insurance Co.*, the Sixth Circuit's leading class action case, the court affirmed the district court's decision to allow class certification[173]—despite the need to manually review hundreds of files.[174] The Sixth Circuit believed that denying class certification because of concerns over judicial efficiency would allow defendants to "escape class-wide review due solely to the size of their business or the manner in which their business records were maintained."[175] The court further stated:

> It is often the case that class action litigation grows out of systemic failures of administration, policy application, or records management that result in small monetary losses to large numbers of people. To allow that same systemic failure to defeat class certification would undermine the very purpose of class action remedies.[176]

B. *Unfairness To Absent Class Members*

The second consideration that courts look at when deciding to apply the lower or heightened standard is unfairness to class members.[177] Absent class members are part of the certified class, but are not actively involved in the litigation.[178] Because these class members are "absent" (and not directly involved) they have little control over the selection of counsel, and have no say in the type or structure of the recovery.[179] These absent class members

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172. *Id.* at 662.

173. Young v. Nationwide Mutual Ins. Co., 693 F.3d 532 (6th Cir. 2012); *see also* Rikos v. Procter & Gamble Co., 799 F.3d 497, 525 (6th Cir. 2015) ("In our circuit, the ascertainability inquiry is guided by *Young*, 693 F.3d 532.").

174. *Young*, 693 F.3d at 540 ("[T]he need to manually review files is not dispositive.").

175. *Id.*

176. *Id.*

177. *See* Carrera v. Bayer Corp., 727 F.3d 300, 305–306 (3d Cir. 2013) ("Second, [the heightened ascertainability standard] protects absent class members by facilitating the best notice practicable under Rule 23(c)(2) in a Rule 23(b)(3) action. Third, it protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable.").

178. Class Action Litig. Info., http://www.classactionlitigation.com/glossary.html ("Absent Class Member[:] A person who by the class definition is a class member but is not actually named in the complaint and does not generally actively participate in the litigation.") (last visited Oct. 6, 2016).

179. Steven T. O. Cottreau, *The Due Process Right to Opt Out of Class Actions*, 73 N.Y.U. L. Rev. 480, 487 (1998) ("[C]lass members have little control over the selection of class counsel and even less control over counsel's conduct after selection . . . class members [also] cannot choose the structure of relief offered as part of a settlement agreement. Some may prefer injunctive relief, others monetary damages, and yet others an in-kind benefit. Individual actions allow each class member to negotiate a settlement that offers the greatest utility.").

rely on the named plaintiff to adequately represent their interests.[180] Absent class members should receive some type of notice so they can opt out of the class if they do not think they are adequately represented.[181] If absent class members do not opt out, they are bound by the judgment and cannot bring their own suit.[182] The different standards of ascertainability have different standards for what is required at certification to identify all the absent class members, and what type of notice is required for these members.[183] This section examines what each side says on unfairness to absent class members in the context of class ascertainability, and then discusses why the heightened standard better protects these members.

1. Heightened Standard of Ascertainability

Only the Third Circuit has explained how the heightened standard of ascertainability protects absent class members.[184] The *Carrera* court discussed how enforcing the heightened standard "protects absent class members by facilitating the best notice practicable under Rule 23 . . . ."[185] Rule 23(b)(3) requires class members to be provided with notice of a pending class action,[186] and Rule 23(c)(2)(B) specifies that any class certified under Rule 23(b)(3) requires the "best notice that is practicable under the circumstances."[187] The best practicable notice rule allows class members to avoid being bound by the certified class' final decision if they want to litigate

180. Patrick Woolley, *Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages*, 58 U. KAN. L. REV. 917, 925 (2010) ("[A]bsent class members, relying on the promise that their interests will be protected, may choose not to participate in the class suit . . . .").

181. WRIGHT ET AL., *supra* note 16, at § 1765 (3d ed. 2016) ("In many contexts, notice of the action is the touchstone that satisfies due process; the notice must be sufficient to give the party an opportunity to appear and join in the lawsuit or to challenge the claims of representation. Indeed, it has been suggested that adequate representation may not be constitutionally required if sufficient notice is provided.").

182. Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 HARV. J.L. & PUB. POL'Y 855, 894 (2005) ("[I]nclusion in the class is binding on that party . . . ."); *see also* Cottreau, *supra* note 179, at 481 ("[I]f the court enters judgment, the class will be bound and no members of the class will have the right to bring individual actions.").

183. *Compare* Carrera v. Bayer Corp., 727 F.3d 300, 305–306 (3d Cir. 2013) ("Second, [the heightened ascertainability standard] protects absent class members by facilitating the best notice practicable under Rule 23(c)(2) in a Rule 23(b)(3) action. Third, it protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable.") with Mullins v. Direct Digital, 795 F.3d 654, 665 (7th Cir. 2015) ("For Rule 23(b)(3) classes, Rule 23(c)(2)(B) requires the 'best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.' The rule does not insist on actual notice to all class members in all cases. It recognizes it might be *impossible* to identify some class members for purposes of actual notice." (quoting Shaw, *supra* note 17, at 67–69)).

184. *Carrera*, 727 F.3d at 305–06 ("Second, [the heightened standard] protects absent class members by facilitating the best notice practicable under Rule 23(c)(2) in a Rule 23(b)(3) action.").

185. *Id.*

186. FED. R. CIV. P. 23(b)(3).

187. FED. R. CIV. P. 23(c)(2)(B).

their claims individually.[188] The Third Circuit advocated that the best way to ensure that absent class members receive the best practicable notice was to require plaintiffs to propose some method to identify all class members at the certification stage.[189]

2. *Lower Standard of Ascertainability*

Only the Seventh Circuit has addressed unfairness to absent class members in the context of ascertainability.[190] The *Mullins* court asserted that Rule 23 "does not insist on actual notice to all class members"[191] because such notice might be impossible in some cases.[192] Instead, the court thought a notice plan need only be "'commensurate with the stakes.'"[193] The Seventh Circuit also thought that courts could consider the likelihood of someone using her opt-out right[194]—and then went on to say that, "'only a lunatic or a fanatic' would litigate the claim individually."[195] Thus, the lower the individual claim, the less a court can require from a notice plan.[196] *Mullins* discussed how the heightened ascertainability standard "upsets this balance" because "insisting on actual notice to protect the interests of absent class members, yet overlooks the reality that without certification, putative class members with valid claims would not recover anything at all."[197] The Seventh Circuit feared that the requirement of actual notice would create a bar too high for most low-value consumer class action suits.[198]

188. WRIGHT ET AL., *supra* note 16, at § 1786 (3d ed. 2016) ("Without the notice requirement it would be constitutionally impermissible to give the judgment binding effect against the absent class members. The notice serves to inform absentees who otherwise might not be aware of the proceeding that their rights are in litigation so that they can take whatever steps they deem appropriate to make certain that their interests are protected. In this way, it guarantees each class member an opportunity to have a day in court or, at least, to oversee the conduct of the action by the representatives.").

189. *Id.*

190. Mullins v. Direct Digital, 795 F.3d 654, 665–667 (7th Cir. 2015) (discussing unfairness to absent class members).

191. *Id.* at 665.

192. *Id.* ("[The Rule] recognizes it might be impossible to identify some class members for purposes of actual notice. While actual individual notice may be the ideal, due process does not always require it." (citations omitted)).

193. *Id.* at 666 (citing Hughes v. Kore of Ind. Enter., Inc., 731 F.3d 672, 676 (7th Cir. 2013)).

194. *Id.*

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

196. *Mullins*, 795 F.3d at 665.

197. *Id.* at 666.

198. *Id.* ("When it comes to protecting the interests of absent class members, courts should not let the perfect become the enemy of the good.").

C. Unfairness To Bona Fide Class Members

The third concern courts consider when deciding whether to apply the heightened or lower standard is unfairness to bona fide class members.[199] A bona fide class member is one who makes a claim to the damages award in good faith, without fraud or deceit.[200] Some courts reason that the heightened standard helps screen out fraudulent class members who may decrease the recovery of a bona fide class member.[201] Alternatively, other courts enforce the lower ascertainability standard—rejecting the premise that false class members unfairly receive a share of recovery and asserting that the heightened standard actually deprives bona fide class members of any recovery.[202] This section takes an in-depth look at the discussion on both sides, and explains why the heightened standard is more fair to bona fide class members.

1. Heightened Standard

The Third and Eleventh Circuits have justified the heightened standard of ascertainability because of unfairness to bona fide class members. But each of these circuits took a slightly different approach in determining how many fraudulent parties can be included.

To take away the chance of fraudulent claims diluting a legitimate class member's recovery, the Third Circuit requires a plaintiff to present a model showing how a court can reliably screen affidavits for accuracy.[203] In *Carrera*, the court rejected the plaintiff's model to screen affidavits because the plaintiff did not propose a model specific to the case.[204] The plaintiff proposed a model that distributed payment to a settlement class—even though the standards for approving a settlement class and certifying a litigation class are different.[205] The court also rejected the plaintiff's model because plaintiff did not establish the *reliability* of the model.[206] Indeed, the

199. *See e.g.*, 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.").

200. *Bona Fide*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining bona fide as "[i]n or with good faith; honestly, openly, and sincerely; without deceit or fraud.").

201. *See Carrera,* 727 F.3d at 310 ("It is unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims.").

202. *See Mullins*, 795 F.3d at 663–69 (rejecting the Third Circuit's justification of unfairness to bona fide class members to justify the heightened ascertainability standard).

203. *Carrera*, 727 F.3d at 310–11 (3d Cir. 2013).

204. *Id.* at 311.

205. *Id.*

206. *Id.* ("At this stage in the litigation, the district court will not actually see the model in action. Rather, it will just be told how the model will operate with the plaintiff's assurances it will be effective. Such assurances that a party 'intends or plans to meet the requirements' are insufficient to satisfy Rule 23.").

court explained how the number of fraudulent claims could range between five and fifty percent under the plaintiff's suggested model.[207]

Arguably, the Eleventh Circuit applies a slightly broader standard by requiring a plaintiff, seeking class certification by affidavits, to propose *some* way to screen out fraudulent claims.[208] In *Karhu*, the plaintiff had not proposed any model to screen out false affidavits. The court required the plaintiff to submit "a specific proposal as to how identification via affidavit would successfully operate."[209] It is unclear whether the Eleventh Circuit would go further and also require a plaintiff to establish a model's reliability—as the Third Circuit did in *Carrera*.[210]

2. *Lower Standard*

Only the Seventh Circuit has addressed this concern—but it has done so in detail.[211] The *Mullins* court found two problems with courts relying on unfairness to bona fide class members to justify a heightened standard.[212]

First, the court did not think that there was a significant enough risk of fraudulent claims to dilute the recovery of bona fide class members.[213] The court explained that there is no empirical evidence to support recovery dilution.[214] The court also thought the value of each class member's recovery seemed too low for a person to risk perjury by signing a false affidavit.[215] The court acknowledged that there is some risk of fraud, and that theoretically fraudulent class claimants could claim more than legitimate class claimants.[216] But the court said that in reality, claim rates for class actions are generally between five and fifteen percent—meaning that even a large number of fraud claims would not reduce a legitimate class member's re-

207. *Id.* ("Carrera has suggested no way to determine the reliability of such a model. For example, even if a model screens out a significant number of claims, say 25%, there is probably no way to know if the true number of fraudulent or inaccurate claims was actually 5% or 50%.").

208. Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 949 (11th Cir. 2015) ("A plaintiff proposing ascertainment via self-identification, then, must establish how the self-identification method proposed will avoid the potential problems just described.").

209. *Id.*

210. This is not clear because the plaintiff did not submit a model to test proposed class members' affidavits for fraudulent claims. If such a model was submitted, the Eleventh Circuit may have determined that a mere proposal was enough to pass muster at the certification stage. Alternatively, the court may have determined—like the Third Circuit—that a plaintiff establish the reliability of a proposed screening method.

211. *See Carrera,* 727 F.3d at 310 ("It is unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims.").

212. *Id.*

213. Mullins v. Direct Digital, 795 F.3d 654, 667 (7th Cir. 2015) ("[T]he risk of dilution based on fraudulent or mistaken claims seems low, perhaps to the point of being negligible.").

214. *Id.* ("In this case, for example, the value of each claim is approximately $70 (the retail price). Direct Digital has provided no evidence, and we have found none, that claims of this magnitude have provoked the widespread submission of inaccurate or fraudulent claims.").

215. *Id.*

216. *Id.*

covery.[217] Regardless, the Seventh Circuit thought courts have ample tools to combat fraudulent claims.[218] These include auditing processes, follow up notices, and empirical means to measure the likelihood of fraud.[219]

Second, the court thought that denying class certification because of a "fear of dilution" would bar deserving class members from *any* recovery.[220] The court asserted that "by 'focusing on making absolutely certain that compensation is distributed only to those individuals who were actually harmed,' the heightened ascertainability requirement 'has ignored an equally important policy objective of class actions: deterring and punishing corporate wrongdoing.' "[221]

The *Mullins* court also challenged the heightened ascertainability standard's treatment of plaintiff affidavits.[222] The court acknowledged that plaintiffs have the burden to satisfy Rule 23, but believed that affidavits amply met these requirements.[223] The court claimed that there was no legal basis to deny self-serving affidavits—they are used in other legal circumstances, like motions for summary judgment, and there is always fair opportunity for the opposing party to challenge them.[224] The Seventh Circuit claimed that district court judges have ample discretion to devise ways to screen these affidavits if needed.[225]

D. *Protecting Defendants' Due Process Rights*

The Supreme Court has recognized that the requirements of Rule 23 are "grounded in due process."[226] Thus, the fourth and final concern courts look at when deciding whether to apply the heightened or lower standard of ascertainability is a defendant's due process rights.[227] In the context of class

217. *Id.*

218. *Id.* at 667–68.

219. *Mullins,* 795 F.3d at 667–68.

220. *Id.* at 668.

221. *Id.* (citing Byrd v. Aaron's Inc., 784 F.3d 154, 175–176 (3d Cir. 2015), as amended (Apr. 28, 2015) (Rendell, J., concurring)).

222. *Id.* at 668–69.

223. *Id.* ("Why are affidavits from putative class members deemed *insufficient as a matter of law* to satisfy this burden? In other words, no one disputes that the plaintiff carries the burden; the decisive question is whether certain evidence is sufficient to meet it." (emphasis in original)).

224. *Id.* at 669 ("If not disputed, self-serving affidavits can support a defendant's motion for summary judgment, for example, and defendants surely will be entitled to a fair opportunity to challenge self-serving affidavits from plaintiffs. We are aware of only one type of case in American law where the testimony of one witness is legally insufficient to prove a fact. *See* U.S. Const., Art. III, § 3, cl. 1 ('No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.'). There is no good reason to extend that rule to consumer class actions.").

225. *Mullins,* 795 F.3d at 669 ("Given the significant harm caused by immunizing corporate misconduct, we believe a district judge has discretion to allow class members to identify themselves with their own testimony and to establish mechanisms to test those affidavits as needed.").

226. Taylor v. Sturgell, 553 U.S. 880, 901 (2008).

227. *Compare Mullins*, 795 F.3d at 672 ("[T]he concern about protecting a defendant's due process rights does not justify the heightened ascertainability requirement. In all cases, the defen-

ascertainability, courts discuss two rights that defendants have. First, is the right protected by the doctrine of res judicata: a defendant's right to be protected from litigation on an issue that has already been fully litigated.[228] This is a concern for class actions suits because dissatisfied class members can claim that the named plaintiff did not adequately represent them.[229] If these dissatisfied members establish inadequate representation in court, they can sue the defendant again.[230] Second, is the right for a defendant to fully defend against a claim.[231] While this is a well-established due process right for individual actions, this right takes on new complexity in a class action where there may be hundreds, thousands, or even millions of members using unsupported affidavits to claim an injury.[232] This section considers how both sides view defendants' due process rights, and then explains how the heightened standard better protects these rights.

1. *Heightened Ascertainability Standard*

The Third and Eleventh Circuits have been the most vocal in regard to defendants' due process rights. In *Carrera*, the Third Circuit warned that

dant has a right not to pay in excess of its liability and to present individual defenses, but both rights are protected by other features of the class device and ordinary civil procedure.") *with* Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 594 (3d Cir.2012) ("Forcing BMW and Bridgestone to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications.").

228. 50 C.J.S. *Judgments* § 926 (2016) ("Broadly speaking, the doctrine of res judicata treats the final determination of an action as speaking the infallible truth as to the rights of the parties as to the entire subject of the controversy, so that such controversy and every part of it must stand irrevocably closed by such determination. The sum and substance of the whole doctrine is that a matter once judicially decided is finally decided.").

229. 18A Charles Alan Wright et al., Federal Practice and Procedure § 4455 (2d ed. 2016) ("There must in fact be adequate representation. Absent class members do not have a duty to intervene to protect themselves; instead, they can remain aloof, relying initially on the duty of the court to ensure adequate representation and ultimately on the opportunity to mount a collateral attack for inadequate representation.").

230. *Id.*

231. Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 Utah L. Rev. 319, 319 (2012) ("In civil proceedings, due process guarantees defendants a right to mount a full defense based on presentation of any probative 'rebuttal evidence' that they 'choose.' ").

232. *Id.* at 319–320 ("When defendants want to rely on individualized evidence—that is, evidence unique to individual claims—it's simply impossible to lump together large numbers of those claims into a class action and, at the same time, respect defendant's rights to present that evidence. Take an employment discrimination suit alleging that a very large class of employees was denied promotions because of its members' gender. After investigating the unique features of each class member's employment history, defendants might find evidence that a number of class members were refused promotions because they were bad employees, not because they were women. And if just one of these women had sued the defendant, the defendant would certainly be allowed to develop that evidence. Yet, if the class is very large—compromising, say, hundreds of thousands, or even millions, of women—providing defendants the opportunity to rebut each claim based on particularized evidence would be utterly infeasible. Hundreds of thousands of minihearings, after all, could take years or even decades to complete.").

taking a plaintiff's "say so"[233] on a method to ascertain a class, such as self-identifying affidavits, "would have serious due process implications."[234] The Eleventh Circuit also acknowledged that accepting affidavits, without any verification method, would essentially deprive a defendant of her or his ability to individually challenge claims.[235] Conversely, the Eleventh Circuit discussed how protecting the defendants' due process rights by allowing them to challenge any and every self-identifying affidavit would be "administratively infeasible."[236] The heightened standard requires a plaintiff to go beyond mere assertions of a method to identify a class. The plaintiff must also "establish that the records are in fact useful for identification purposes and that identification will be administratively feasible."[237]

The Third Circuit further explained how a lower standard might subject a defendant to multiple suits.[238] The court discussed how legitimate class members, whose recoveries were materially reduced by fraudulent claims, could bring another suit against the defendant claiming that the named plaintiff did not adequately represent them.[239] Even more alarming, if a class action won its suit, these dissatisfied class members could "apply the principles of issue preclusion to prevent [a defendant] from re-litigating whether it is liable . . . ."[240]

2. *Lower Ascertainability Standard*

Once again, of the three circuits applying the lower ascertainability standard, only the Seventh Circuit has addressed ascertainability in context of defendants' due process rights.[241] The *Mullins* court acknowledged that, "a defendant has a due process right not to pay in excess of its liability and to present individualized defenses if those defenses affect its liability."[242] But the court went on to say that "[i]t does not follow that a defendant has a

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233. Carrera v. Bayer Corp., 727 F.3d 300, 304 (3d Cir. 2013) (citing Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 594 (3d Cir.2012)).

234. *Id.* at 306 (citing *Marcus*, 687 F.3d at 583).

235. Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 948 (11th Cir. 2015) ("On the one hand, allowing class members to self-identify without affording defendants the opportunity to challenge class membership 'provide[s] inadequate procedural protection to . . . [d]efendant[s]' and 'implicate[s their] due process rights.'" (quoting Perez v. Metabolife Int'l, Inc., 218 F.R.D. 262, 269 (S.D. Fla. 2003))).

236. *Id.* at 949; *see also id.* at 948–49 ("On the other hand, protecting defendants' due-process rights by allowing them to challenge each claimant's class membership is administratively infeasible, because it requires a 'series of mini-trials just to evaluate the threshold issue of which [persons] are class members.'" (quoting Fisher v. Ciba Specialty Chems. Corp., 238 F.R.D. 273, 302 (S.D. Ala. 2006))).

237. *Id.* at 948.

238. Carrera v. Bayer Corp., 727 F.3d 300, 310 (3d Cir. 2013).

239. *Id.*

240. *Id.* ("When class members are not adequately represented by the named plaintiff, they are not bound by the judgment." (citing Hansberry v. Lee, 311 U.S. 32, 42 (1940)).

241. Mullins v. Direct Digital, 795 F.3d 654, 669–672 (7th Cir. 2015).

242. *Id.* at 669.

due process right to a *cost-effective* procedure for challenging every individual claim to class membership."[243]

The court gave three examples of class actions suits to show why the heightened standard "is not the only means, or even the best means, to protect the defendant's due process rights."[244] The first model used aggregate damage models where adding or subtracting class members does not affect a defendant's liability or damages—and thus does not implicate a defendant's due process rights.[245] The second model, which fits most consumer class actions, was a common method to determine individual damages.[246] The third model was individualized damage determinations without a common method (like a calculation applied to different sets of class members).[247] The court did not think the second and third models implicated any due process rights since a defendant has the opportunity to individually challenge each claim.[248]

In addressing the concern of protecting a defendant's due process rights, the *Mullins* court reiterated its discussion of using self-identifying affidavits. The *Mullins* court claimed that self-identifying affidavits, which are used in other court proceedings, were ample to satisfy Rule 23.[249] The court also emphasized that district court judges' ability to screen the affidavits alleviated any concerns about using them.[250]

E. Resolving the Dispute

1. Judicial Efficiency

Some courts are concerned that applying the higher ascertainability standard for judicial efficiency purposes will eliminate consumer class action suits. These courts are not entirely unjustified in thinking this—indeed, many courts that apply the heightened standard of ascertainability have de-

243. *Id.*

244. *Id.* at 671.

245. *Id.* at 670.

246. *Id.* at 670–71.

247. *Mullins,* 795 F.3d at 671–672.

248. *Id.*

249. *Id.* ("Why are affidavits from putative class members deemed *insufficient as a matter of law* to satisfy this burden? In other words, no one disputes that the plaintiff carries the burden; the decisive question is whether certain evidence is sufficient to meet it." (emphasis in original)); *see also id.* at 669 ("If not disputed, self-serving affidavits can support a defendant's motion for summary judgment, for example, and defendants surely will be entitled to a fair opportunity to challenge self-serving affidavits from plaintiffs. We are aware of only one type of case in American law where the testimony of one witness is legally insufficient to prove a fact. See U.S. Const., Art. III, § 3, cl. 1 ('No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.'). There is no good reason to extend that rule to consumer class actions.").

250. *Id.* at 669 ("Given the significant harm caused by immunizing corporate misconduct, we believe a district judge has discretion to allow class members to identify themselves with their own testimony and to establish mechanisms to test those affidavits as needed.").

nied certification for certain suits because they are not judicially efficient.[251] But these courts are not denying *all* small claims consumer class action suits. The First Circuit affirmed the certification of a class suit because an administratively feasible mechanism was identified,[252] and the Eleventh Circuit gave suggestions on what could constitute such a mechanism.[253] These cases, and others, show that small claims consumer class actions may proceed—and indeed may thrive—under a heightened ascertainability standard, as long as the plaintiff identifies a way to ascertain its class in a manageable manner.[254]

The First Circuit used administrative concerns to affirm certification of a class action suit. In *In re Nexium Antitrust Litigation*,[255] the district court certified a class of individual consumers of a heartburn drug that AstraZenica produces.[256] On appeal, the defendants argued for overturning class certification because the plaintiffs' method of ascertaining the class would require differentiating injured and uninjured parties at a later stage.[257] The First Circuit affirmed the district court's class certification concluding that, "so long as it is established that such a [administratively feasible] mechanism *can* be identified, the presence of a de minimis number of uninjured members at the class certification stage does not defeat a class action."[258]

251. *See, e.g.,* Brecher v. Republic of Arg., 806 F.2d 22 (2d Cir. 2015) (denying class certification because bond interest history was not administratively feasible to ascertain the class); *see also* EQT Prod. Co. v. Adair, 764 F.3d 347, 359 (4th Cir. 2014) (denying class certification because title documents were not administratively feasible to ascertain the class); *see also* Carrera v. Bayer Corp., 727 F.3d 300, 303 (3d Cir. 2013) (denying class certification because affidavits were not administratively feasible to ascertain a class).

252. *In re* Nexium Antitrust Litig., 777 F.3d 9, 332 (1st Cir. 2015).

253. Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 950 (11th Cir. 2015).

254. *See e.g.,* Sethavanish v. ZonePerfect Nutrition Co., No. 12-2907-SC, 2014 WL 580696, at *5 (N.D. Cal. Feb. 13, 2014) ("For example, in some cases, retailer or banking records may make it economically and administratively feasible to determine who is in (and who is out) of a putative class. Moreover, even though there is no requirement that a named plaintiff identify all class members at the time of certification, that does not mean that a named plaintiff need not present some method of identifying absent class members to prevail on a motion for class certification."); *see also* Byrd v. Aaron's Inc., 784 F.3d 154, 170 (3d Cir. 2015), as amended (Apr. 28, 2015) ("The Byrds' proposed method to ascertain 'household members' is neither administratively infeasible nor a violation of Defendants' due process rights. Because the location of household members is already known (a shared address with one of the 895 owners and lessees identified by the Byrds), there are unlikely to be 'serious administrative burdens that are incongruous with the efficiencies expected in a class action.'" (citations omitted)).

255. *In re Nexium,* 777 F.3d at 9.

256. *Id.* at 14 ("All persons or entities in the United States and its territories who purchased or paid for some or all of the purchase price for Nexium or its AB-rated generic equivalents . . . in capsule form, for consumption by themselves, their families, or their members, employees, insureds, participants or beneficiaries, during the period April 14, 2008[,] through and until the anticompetitive effects of Defendants' unlawful conduct cease." (quoting In re Nexium (Esomeprazole) Antitrust Litig., 297 F.R.D. 168, 182 (D. Mass. 2013), *aff'd sub nom. In re Nexium*, 777 F.3d at 9).

257. *Id.* at 18.

258. *Id.* at 32 (emphasis in original). The trial court accepted the plaintiff's mechanism of an expert conducting "a classwide overcharge analysis to show common proof of damages" to ascer-

The First Circuit's opinion is consistent with its older rulings that required an administratively feasible mechanism for ascertaining a class.[259]

In contrast, the Eleventh Circuit did not grant the plaintiff's proposed class, but gave suggestions as to how the plaintiff could ascertain its class in an administratively feasible manner.[260] In *Karhu v. Vital Pharmaceuticals Inc.*, the Eleventh Circuit affirmed the district court's denial of class certification.[261] The Eleventh Circuit agreed with the district court's assessment of the plaintiff's proposed method of identifying class members through the defendant's sales data as "incomplete, insofar as [plaintiff] did not explain how the data would aid class-member identification."[262]

At the district court, the plaintiff filed a motion to reconsider and explained a detailed process to identify class members. But the district court denied the plaintiff's motion because he should have presented this method when he originally filed for certification.[263] The Eleventh Circuit explained that the plaintiff's fears of consumer class actions being "eradicated" because of the heightened ascertainability standard was unfounded.[264] The court explained that the plaintiff had previously succeeded in identifying administratively feasible methods—and likely would have succeeded had he explained initially how to use sales data to ascertain the class.[265]

2. *Unfairness to Absent Class Members*

Courts advocating for the lower ascertainability standard ignore the policy concern of unfairness to absent class members because they think that the heightened standard sets too high a bar for plaintiffs during class certification.[266] The Seventh Circuit justifiably believes that asking the plaintiff to produce records identifying each member at the class certification stage is too high a bar.[267] But the Seventh Circuit misconstrued the

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tain the class. In re Nexium (Esomeprazole) Antitrust Litig., 297 F.R.D. 168, 182 (D. Mass. 2013), *aff'd sub nom.* In re Nexium Antitrust Litig., 777 F.3d 9 (1st Cir. 2015).

259. *See, e.g.,* Crosby v. Soc. Sec. Admin., 796 F.2d 576, 580 (1st Cir. 1986) ("A class whose "members [are] impossible to identify prior to individualized fact-finding and litigation . . . fails to satisfy one of the basic requirements for a class action").

260. Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 949–950 (11th Cir. 2015).

261. *Id.* at 950.

262. *Id.* at 949.

263. *Id.* ("Karhu did not explain to the court that it envisioned a three-step identification process: (1) use the sales data to identify third-party retailers, (2) subpoena the retailers for *their* records, and (3) use those records to identify class members. Therefore, the district court acted within its discretion when it rejected Karhu's proposal to identify class members via VPX's 'sales data.'" (emphasis in original)).

264. *Id.* at 950.

265. *Id.*

266. Mullins v. Direct Digital, 795 F.3d 654, 666 (7th Cir. 2015) ("The heightened ascertainability approach upsets this balance. It comes close to insisting on actual notice to protect the interests of absent class members, yet overlooks the reality that without certification, putative class members with valid claims would not recover anything at all.").

267. *Id.*

heightened standard. The standard only requires a plaintiff to show what records it may use to identify class members.[268] For example, in *Byrd*, the Third Circuit granted certification to a class where the plaintiff did not produce records identifying each class member but presented evidence that class members could be identified through public records.[269] Thus, "there is no records requirement"[270] at the ascertainability stage—the requirement the Seventh Circuit feared would destroy low value class action suits.

The Seventh Circuit thought that actual notice to each of the hundreds, or possible thousands, of class members was too high a bar.[271] But again, the Seventh Circuit misunderstood the heightened standard. The Third Circuit was not discussing whether each individual class member would be given actual notice, but rather, whether a class member could identify whether she was a part of the class from the notice.[272] Under the lower standard, a class member may not be able to determine whether she is part of the suit and yet be barred from bringing future action against the defendant.[273]

By requiring a plaintiff to identify (but not produce) documents to ascertain the proposed class, the heightened standard carries out the best practicable notice standard required by Rule 23.[274] Knowing a plaintiff's identification method ensures that a class member can look at a notice and determine whether she is indeed part of a class action suit.[275] The heightened standard of ascertainability should be applied because it best protects absent class members' interests.

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268. Byrd v. Aaron's Inc., 784 F.3d 154, 169–170 (3d Cir. 2015), as amended (Apr. 28, 2015) ("We were careful to specify in Carrera that '[a]lthough some evidence used to satisfy ascertainability, such as corporate records, will actually identify class members at the certification stage, ascertainability only requires the plaintiff to show that class members can be identified.' . . . Carrera stands for the proposition that a party cannot merely provide assurances to the district court that it will later meet Rule 23's requirements." (quoting Carrera v. Bayer Corp., 727 F.3d 300, 306–307, 311 (3d Cir. 2013))).

269. *Id.* at 169 ("The Byrds' proposed classes consisting of 'owners' and 'lessees' are ascertainable. There are 'objective records' that can 'readily identify' these class members . . . .").

270. *Id.* at 164.

271. *Mullins*, 795 F.3d at 665 ("Courts also have asserted that the heightened ascertainability requirement is needed to protect absent class members. If the identities of absent class members cannot be ascertained, the argument goes, it is unfair to bind them by the judicial proceeding. A central premise of this argument is that class members must receive actual notice of the class action so that they do not lose their opt-out rights. We believe that premise is mistaken." (citing *Carrera*, 727 F.3d at 307; Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir.2012)).

272. *Carrera*, 727 F.3d at 308 ("[A]scertainability only requires the plaintiff to show that class members *can* be identified.") (emphasis added).

273. *See Mullins*, 795 F.3d at 666 ("We did not insist on first-class mail even though the notice plan likely would not reach everyone in the class. We approved the plan because the notice plan was 'commensurate with the stakes.'").

274. *See Carrera*, 727 F.3d at 305–06 ("[The heightened standard] protects absent class members by facilitating the best notice practicable under Rule 23(c)(2) in a Rule 23(b)(3) action."); *see also id.* at 307 ("[A]t the commencement of a class action, ascertainability and a clear class definition allow potential class members to identify themselves for purposes of opting out of a class.").

275. *Id.* at 307.

3. *Unfairness to Bona Fide Class Members*

Courts applying the lower standard also ignore the concern of unfairness to bona fide class members because they think that fraudulent claims do not affect the recovery of a bona fide class member.[276] The Seventh Circuit's perception of a miniscule—and largely insignificant—risk of fraudulent claims is certainly true for some class actions.[277] For example, in *Mullins*, the class was asking the defendant to refund each defective product sold because the class was pursuing a consumer fraud claim.[278] *Mullins* was an uncapped settlement—the amount the defendant paid was determined by the number of refunds.[279] Thus, fraudulent claims would not significantly affect the recovery of a bona fide class member.[280]

Conversely, in some class actions, fraudulent claims can have an immense effect on the recovery of a bona fide class member. The class action suit Careathers brought against Red Bull effectively proves this.[281] The plaintiff sought class certification for a group of consumers allegedly injured by Red Bull's deceptive advertising phrase, "Red Bull Gives You Wings."[282] The parties agreed to a settlement where each class member who purchased Red Bull between January 1, 2002 and October 3, 2014 would receive an estimated $10 check or $15 voucher for Red Bull Products.[283] Red Bull capped its payout at $13 million;[284] the more claims that were filed, the less money each class member would receive. The parties created a website to allow class members to file affidavits to create a claim.[285] Instead of the estimated 1.3 million claimants, over two million people filed claims—causing the site to crash within hours.[286] The recovery per class member quickly dwindled to four dollars or a four pack of Red Bull energy drinks.[287] Class members received less than half of their estimated recovery—showing that fraudulent claims can affect bona fide class members' recovery.[288] Although capped settlements are becoming increas-

276. *Mullins*, 795 F.3d at 667 (7th Cir. 2015) ("[I]n practice, the risk of dilution based on fraudulent or mistaken claims seems low, perhaps to the point of being negligible.").

277. *Id.* ("In this case, for example, the value of each claim is approximately $70 (the retail price). Direct Digital has provided no evidence, and we have found none, that claims of this magnitude have provoked the widespread submission of inaccurate or fraudulent claims.").

278. *Id.* at 657.

279. *Id.* at 670–71

280. *Id.* at 667.

281. Onika Williams, *Red Bull Class Settlement Flies Despite Dilution of Class Recovery*, Am. B. Ass'n (Sept. 18, 2015), https://apps.americanbar.org/litigation/litigationnews/top_stories/091815-class-recovery-payout-cap.html.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. Williams, *supra* note 281.

288. *Id.*

ingly popular in consumer class action suits, the Second Circuit failed to consider their effect.[289]

This same case would likely have come out drastically different under the heightened ascertainability standard. The heightened standard does not rule out affidavits altogether, instead it requires some type of screening process to weed out fraudulent claims.[290] The parties could have used such a screening process to only pay legitimate class members who had an injury—rather than a fraudulent class member who read about the suit on Buzzfeed and proceeded to file a false affidavit.[291] The heightened approach simply pushes up the Seventh Circuit's auditing proposals to the ascertainability stage so that there is a plan in place if a situation similar to Red Bull actually materializes.[292] The heightened standard protects bona fide class members by ensuring they receive the recovery they are entitled to.[293]

4. *Protecting Defendants' Due Process Rights*

Finally, by incorrectly shifting the burden to defendants on self-serving affidavits, the lower ascertainability standard cavalierly addresses defendants' due process rights. The Seventh Circuit correctly identified that, like summary judgment motions, affidavits are allowed in many court proceedings. But the court omits an important point.[294] Conclusory and self-serving affidavits—like the affidavits used in low-value consumer class actions, are insufficient to withstand a motion for summary judgment *without support* on the record.[295] By allowing a plaintiff to propose a class and

289. *See, e.g.*, *id.*

290. *See* Carrera v. Bayer Corp., 727 F.3d 300, 311 (3d Cir. 2013) ("[W]e will afford Carrera the opportunity to submit a screening model specific to this case and prove how the model will be reliable and how it would allow Bayer to challenge the affidavits."); *see also* Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 949 (11th Cir. 2015) ("A plaintiff proposing ascertainment via self-identification, then, must establish how the self-identification method proposed will avoid the potential problems just described.").

291. Jacob Davidson, *Thanks for Ruining the Red Bull Settlement, Internet*, TIME (Oct. 9 2014), http://time.com/money/3484564/red-bull-settlement-ruined/ ("Buzzfeed's post alone [was] viewed more than 4.6 million times . . . .").

292. *See, e.g.*, *Carrera*, 727 F.3d at 310–311.

293. *Id.* at 310.

294. Mullins v. Direct Digital, 795 F.3d 654, 669 (7th Cir. 2015) ("If not disputed, self-serving affidavits can support a defendant's motion for summary judgment, for example, and defendants surely will be entitled to a fair opportunity to challenge self-serving affidavits from plaintiffs. We are aware of only one type of case in American law where the testimony of one witness is legally insufficient to prove a fact. See U.S. Const., Art. III, § 3, cl. 1 ('No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.'). There is no good reason to extend that rule to consumer class actions.").

295. Jeffrey L. Freeman, *Propriety, under Rule 56 of the Federal Rules of Civil Procedure, of granting summary judgment when deponent contradicts in affidavit earlier admission of fact in deposition*, 131 A.L.R. FED. 403, at § 3 (1996) ("Conclusory allegations and self-serving affidavits, without support in the record, do not create a triable issue of fact, sufficient to withstand a motion for summary judgment, and therefore, a party cannot avoid summary judgment through

prevail on hearsay affidavits, the Seventh Circuit wrongly shifts the burden to the defendant to prove "say so" on the claims.[296]

The lower ascertainability standard also goes against the very purpose of Rule 23—to *efficiently* adjudicate multiple claims in one suit.[297] The Seventh Circuit asserts that a defendant's due process rights are protected as long as a defendant has the chance to challenge any self-serving affidavits.[298] The court's label of a "'lunatic or fanatic'"[299] for someone who would file an individual consumer claim, likely also fits any defendant who tries to investigate hundreds, or potentially thousands, of individual affidavits. Even if a defendant had the resources and time to protect the due process rights she or he has under the Seventh Circuit's view,[300] such a process goes against the very purpose of the class action device—saving judicial resources.[301] The Seventh Circuit failed to consider the time and expense a defendant expends exercising its due process rights.

The lower ascertainability standard potentially leaves a defendant open to subsequent litigation on the same issues by some of the same class members.[302] The Seventh Circuit, and other courts applying the lower ascertainability standard, failed to address this due process concern. Plaintiffs can, and indeed have, tried to escape a class judgment by claiming inadequate representation.[303] This opens up yet another can of worms as the Supreme Court has not addressed how much preclusive effect a court should give to a prior court's findings on adequacy of class representation.[304] Thus, a plaintiff could potentially claim inadequate class representation because

introduction of self-serving affidavits that contradict prior sworn testimony." (citing FED. R. CIV. P. 56; Mav of Michigan, Inc. v. Am. Country Ins. Co., 289 F. Supp. 2d 873 (E.D. Mich. 2003))).

296. *See Mullins,*795 F.3d at 669.

297. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 155 (1982) (explaining how class actions save "the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." (quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979))).

298. *Mullins*, 795 F.3d at 669 ("It does not follow that a defendant has a due process right to a *cost-effective* procedure for challenging every individual claim to class membership.") (emphasis in original)).

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

300. *Id.* at 669 ("It is certainly true that a defendant has a due process right not to pay in excess of its liability and to present individualized defenses if those defenses affect its liability.").

301. *Falcon*, 457 U.S. at 155 (explaining how class actions save "the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." (quoting *Califano*, 442 U.S. at 701)).

302. Carrera v. Bayer Corp., 727 F.3d 300, 310 (3d Cir. 2013)

303. *See, e.g.*, Wolfert *ex rel.* Estate of Wolfert v. Transamerica Home First, Inc., 439 F.3d 165, 170 (2d Cir. 2006).

304. *See* William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 794 (2007) ("Class action scholars and lawyers had hoped that Stephenson would settle the question of whether adequate representation findings could be relitigated collaterally, but it did not. With Justice Stevens recusing himself, the Court split 4-4 and thus simply affirmed the Second Circuit's outcome (permitting Stephenson's case to go forward) without rendering a decision of its own.").

of the fraudulent claims that significantly reduced the plaintiff's recovery—and open a defendant up to litigation on the same issues.

The heightened standard of ascertainability is justified by the concern of protecting defendants' due process rights—defendants have a right to be protected from improper litigation on the same issues, and being forced to improperly defend against "say so" affidavits.[305] Protecting a defendants' due process rights also helps uphold the judicial efficiency justification behind adopting Rule 23.

VI. Last Day of School: What's the Verdict on Ascertainability?

There is a deepening split on the standard for class ascertainability. One side argues for a heightened standard at certification, while the other side fears that such a standard will eliminate consumer class actions. But, when one looks at the policy considerations on ascertainability, the heightened standard preserves consumer class actions and allows them to thrive, as long the plaintiff identifies an administratively feasible mechanism to ascertain its class. All the while, the heightened standard also promotes judicial efficiency, increases fairness to absent and bona fide class members, and protects defendants' due process rights. The Supreme Court should adopt the heightened standard of ascertainability to address these policy considerations and to ensure that class certification is adjudicated consistently across federal courts.

305. *Carrera*, 727 F.3d at 304–306 (citing Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 594 (3d Cir.2012)).