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The Heightened Standard of Ascertainability: An Unnecessary Hurdle to Class Action Certification

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ABSTRACT

"The class action is one of the few legal remedies the small claimant has against those who command the status quo." –Justice W.O. Douglas.

Since its inception, the class action has provided a means of compensation for plaintiffs whose claims may be too small to litigate individually. For decades, courts have held that any proposed class must be sufficiently defined. That is, proposed classes must be clearly "ascertainable." The federal circuit courts, however, have recently split as to what standard to apply when determining whether a class is ascertainable. Five circuits now apply a "heightened standard," while four circuits apply a "weak standard." The Fifth, Tenth, Federal, and D.C. Circuits have yet to decide on the issue.

The standards differ only slightly, but, most significantly, the heightened standard requires that an administratively feasible mechanism exist by which to verify class claims. The administratively feasible requirement has become the focal point of the circuit split. Proponents of the heightened standard argue that the standard relieves the court from needless and tedious fact-checking. Conversely, critics argue that the heightened standard imposes an unnecessary burden on proposed classes.

This Comment will argue that the heightened standard of ascertainability is an unnecessary hurdle that prevents the class action device from functioning as it is designed. The procedural safeguards already written into Rule 23 of the Federal Rules of Civil Procedure are more than sufficient to ensure administrative efficiency. Moreover, no reason has been provided that sufficiently justifies an administratively feasible requirement. This Comment will ultimately conclude that the Supreme Court should resolve the circuit split by adopting the weak standard of ascertainability.

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I. INTRODUCTION

Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") governs class actions.[1] To achieve certification, proposed classes must satisfy the requirements prescribed by Rule 23(a)–(b).[2] In addition to these explicit requirements, courts have found an "ascertainability" requirement implicit within Rule 23.[3] That is, to be certified, a class must satisfy the explicit

1. FED. RULE CIV. P. 23; *see* Candace A. Blydenburgh, *Class Actions: A Look at Past, Present, and Future Trends*, *in* RECENT TRENDS IN CLASS ACTION LAWSUITS: LEADING LAWYERS ON OVERCOMING CHALLENGES IN THE CERTIFICATION PROCESS AND ANALYZING THE IMPACT OF SUPREME COURT DECISIONS (2015), *available at* 2015 WL 4967445, at *1; Stephanie Haas, Third Circuit Review, *Class is in Session: The Third Circuit Heightens Ascertainability with Rigor in* Carrera v. Bayer Corp., 59 VILL. L. REV. 793, 796 (2014); *infra* Part II.B.

2. FED. RULE CIV. P. 23; Erin L. Geller, Note, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 FORDHAM L. REV. 2769, 2774 (2013).

3. *See* Robinson v. Gillespie, 219 F.R.D. 179, 184 (D. Kan. 2003); White v. Williams, 208 F.R.D. 123, 129 (D.N.J. 2002); Buford v. H&R Black, Inc., 168 F.R.D. 340, 346 (S.D. Ga. 1996); Geller, *supra* note 2, at 2774.

requirements of Rule 23 and be sufficiently ascertainable.[4] Ascertainability requires classes to be sufficiently defined so as to identify potential class members.[5] Like the explicit Rule 23 requirements, ascertainability can act as an independent bar to class certification.[6]

While most federal courts have recognized ascertainability as an additional requirement for class certification, the circuit courts are split on what standard to apply when determining ascertainability.[7] Four circuits have adopted the weak standard of ascertainability.[8] The weak standard requires classes to be defined by reference to objective criteria.[9] Class definitions that are not vague and not based on subjective criteria, such as a class member's state of mind, will typically satisfy the weak standard.[10] Five circuits, on the other hand, have adopted the heightened standard of ascertainability.[11] The heightened standard is a two-prong approach: "(1) the class is defined with reference to objective criteria; and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition."[12] Administratively feasible mechanisms could include receipts, proofs of purchase, or other records indicating that an individual falls within the class.[13]

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4. *See* 7A MARY KAY KANE ET AL., FEDERAL PRACTICE AND PROCEDURE § 1760 (3d ed. 2016); 2 JOHN F.X. PELOSO ET AL., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 19:8 (Robert L. Haig ed., 4th ed. 2016).

5. *See* 7A KANE ET AL., *supra* note 4, at § 1760; 2 PELOSO ET AL., *supra* note 4, at § 19:8.

6. *See also* Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 359 (3d Cir. 2013) (explaining that ascertainability and the Rule 23(b)(3) predominance requirement "remain separate prerequisites to class certification"); Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 587 (3d Cir. 2012) (explaining that ascertainability is "an essential prerequisite of a class action"); Geoffrey C. Shaw, *Class Ascertainability,* 124 YALE L.J. 2354, 2358 (2015).

7. *See* Alison Frankel, *Class Action 'Ascertainability' Issue is Going to Supreme Court* Mullins v. Direct Digital, 22 WESTLAW J. CLASS ACTION 5, at *1 (2015) ("The 7th Circuit analyzed the legal reasoning and policy considerations underlying the 3rd Circuit's standard for ascertainability, and resoundingly rejected all of them.").

8. *See* Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1123 (9th Cir. 2017); Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., 821 F.3d 992, 996–97 (8th Cir. 2016); Rikos v. Procter & Gamble Co., 799 F.3d 497, 525 (6th Cir. 2015); Mullins v. Direct Dig., LLC, 795 F.3d 654, 672 (7th Cir. 2015).

9. *See Rikos*, 799 F.3d at 525–26; *Mullins*, 795 F.3d at 659.

10. *See, e.g.*, *Mullins*, 795 F.3d at 659–60.

11. *See* Brecher v. Republic of Arg., 806 F.3d 22, 24 (2d Cir. 2015); Karhu v. Vital Pharm. Inc., 621 F. App'x 945, 947 (11th Cir. 2015); *In re* Nexium Antitrust Litig., 777 F.3d 9, 19 (1st Cir. 2015); EQT Prod. Co. v. Adair, 764 F.3d 347, 358–59 (4th Cir. 2014); Carrera v. Bayer Corp., 727 F.3d 300, 307–08 (3d Cir. 2013).

12. Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015).

13. *See* Parsons v. Phila. Parking Auth., No. 13-0955, 2016 WL 538215, at *4 (E.D. Pa. Feb. 11, 2016); Bello v. Beam Glob. Spirits & Wine, Inc., No. 11-549 (NLH/KMW), 2015 WL 3613723, at *11 (D.N.J. June 9, 2015).

At its heart, the circuit split involves the heightened standard's administratively feasible requirement.[14] Proponents argue that the requirement relieves the court from needless and tedious fact-checking.[15] Critics, however, argue that the requirement imposes an unnecessary burden on proposed classes.[16] This Comment will discuss both the weak and heightened standards of ascertainability.[17] In Part III, justifications for the heightened standard will be addressed and rejected as unnecessary.[18] Ultimately, this Comment will conclude that the heightened standard presents an unnecessary hurdle for class certification, and, as a result, the Supreme Court should resolve the circuit split by adopting the weak standard of ascertainability.[19]

II. BACKGROUND

To understand the role that ascertainability plays in class certification, a discussion of Rule 23 is required. This Part begins by identifying the function and purpose behind Rule 23,[20] and then details the Rule's requirements for proper class certification.[21] Finally, the ascertainability doctrine is introduced, and both the heightened and weak standards of ascertainability are discussed.[22]

A. The Function and Purpose of Rule 23

Rule 23 prescribes the requirements for class action certification.[23] A proposed class must satisfy all of the Rule 23 requirements before a court can "certify" the class and allow the suit to progress as a class action.[24] As a result, the certification process often becomes "the make-or-break moment" for class actions.[25] Plaintiffs will likely abandon uncertified

14. *See* Sarah R. Cansler, Recent Development, *An "Insurmountable Hurdle" to Class Action Certification? The Heightened Ascertainability Requirement's Effect on Small Consumer Claims*, 94 N.C. L. REV. 1382, 1383–84 (2016); Daniel Luks, Note, *Ascertainability in the Third Circuit: Name That Class Member*, 82 FORDHAM L. REV. 2359, 2388–93 (2014); *see also Mullins*, 795 F.3d at 662–63.

15. *See Carrera*, 727 F.3d at 307–08; Cansler, *supra* note 14, at 1392–94.

16. *See Mullins*, 795 F.3d at 663–65; Luks, *supra* note 14, at 2395.

17. *See infra* Parts II.C.I, II.C.II.

18. *See infra* Part III.C, III.D.

19. *See infra* Part III.E.

20. *See infra* Part II.A.

21. *See infra* Part II.B.

22. *See infra* Part III.C.

23. FED. RULE. CIV. P. 23; Blydenburgh, *supra* note 1, at *2; Haas, *supra* note 1, at 796.

24. Briseno v. ConAgra Foods, 844 F.3d 1121, 1124 (9th Cir. 2017); Sandusky Wellness Ctr. v. Medtox Sci., Inc., 821 F.3d 992, 995 (8th Cir. 2016).

25. Jason Steed, *On "Ascertainability" as a Bar to Class Certification*, APPELLATE ADVOCATE, Summer 2001, at 626.

classes because litigating an individual claim will usually cost more than any individual award.[26] Conversely, defendants will likely settle with a certified class because a settlement will frequently cost less than defending a class action.[27]

Originally passed in 1938,[28] Rule 23 is intended to be a mechanism through which large groups of injured individuals can litigate claims en masse.[29] Rule 23 is especially beneficial in cases involving low-value consumer claims, which may be impossible to litigate individually.[30] Congress amended Rule 23 in 1966 to further the goal of en masse litigation.[31] The amendments were designed to increase the variety of claims that could be certified as a class action.[32] Although not a traditional method of litigation, the class action is viewed as an important litigation device because it provides a means of compensation for the "economically less powerful."[33]

B. The Rule 23 Requirements for Class Certification

To certify a class, the court must determine whether a proposed class is sufficiently ascertainable and engage in a "rigorous analysis" to determine whether the class meets the requirements of Rule 23(a)–(b).[34] The court's rigorous analysis is sequential.[35] The approach begins by

26. Chamberlan v. Ford Motor Co., 402 F.3d 952, 957 (9th Cir. 2005) ("A plaintiff who is denied certification might be left with only one path to appellate review: proceeding to a final judgment on the merits of an individual claim that, without the class, is worth far less than the cost of litigation.").

27. *See* Blair v. Equifax Check Serv., Inc., 181 F.3d 832, 834 (7th Cir. 1999)("[A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation[.]"); Steed, *supra* note 25, at 626.

28. *See* Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 405 (2014).

29. *See* Blydenburgh, *supra* note 1, at *1; Haas, *supra* note 1, at 796.

30. *See Blair*, 181 F.3d at 834 ("For some cases the denial of class status sounds the death knell of the litigation, because the representative plaintiff's claim is too small to justify the expense of litigation."); Blydenburgh, *supra* note 1, at *1; Haas, *supra* note 1, at 796.

31. *See* Cansler, *supra* note 14, at 1386; Mullinex, *supra* note 28, at 401–02.

32. *See* Cansler, *supra* note 14, at 1386; Mullinex, *supra* note 28, at 401–02.

33. Blydenburgh, *supra* note 1, at *3.

34. Sandusky Wellness Ctr. v. Medtox Sci., Inc., 821 F.3d 992, 996 (8th Cir. 2016); Rikos v. Proctor & Gamble Co., 799 F.3d 497, 504 (6th Cir. 2015); Geller, *supra* note 2, at 2774.

35. Blydenburgh, *supra* note 1, at *6 ("Once the requirements of Rule 23(a) are established, a plaintiff must then seek to certify the form of class action under Rule 23(b).").

analyzing the class under Rule 23(a).[36] If the class satisfies the subsection (a) requirements, the court will then analyze the class under Rule 23(b).[37]

Rule 23(a) enumerates four requirements that a class must satisfy.[38] Colloquially, these requirements are: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.[39] Numerosity requires that the plaintiffs be so numerous that joinder of the individual lawsuits is unfeasible.[40] Commonality requires that there be common questions of law among the class members that will result in common answers.[41] Typicality requires that the class representatives allege injuries and claims that are similar to other members' alleged injuries and claims.[42] Finally, adequacy of representation requires evidence to show that the class representatives' counsel will adequately protect the other members' interests.[43]

Once the four Rule 23(a) requirements are satisfied, the court will analyze the class under Rule 23(b).[44] Rule 23(b) states:

> A class action may be maintained if Rule 23(a) is satisfied and if:
>
> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual

36. FED. R. CIV. P. 23(a); *see* Blydenburgh, *supra* note 1, at *6.

37. *See* FED R. CIV. P. 23(b) ("A class action may be maintained if Rule 23(a) is satisfied and if . . . ."); Blydenburgh, *supra* note 1, at *6.

38. FED. R. CIV. P. 23(a); *accord* Blydenburgh, *supra* note 1, at *2.

39. FED. R. CIV. P. 23(a), (b); PELOSO ET AL., *supra* note 4, at § 19:8; Blydenburgh, *supra* note 1, at *2.

40. Blydenburgh, *supra* note 1, at *2, *5.

41. *Id.* at *2, *6.

42. *Id.* The "class representatives" are the named plaintiffs whose claims represent those of the class at large. *See* 7A KANE ET AL., *supra* note 4, at § 1766.

43. Blydenburgh, *supra* note 1, at *2, *6.

44. FED. R. CIV. P. 23(b); Blydenburgh, *supra* note 1, at *6.

> members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Rule 23(b) thus provides for three categories of class actions, and the proposed class must fall within one of these categories.[45] Rule 23(b)(1) provides for a class that reduces the risks associated with litigating the class members' claims individually.[46] Rule 23(b)(1) is primarily concerned with preventing inconsistent judgments,[47] meaning situations where an individual judgment for one class member may preclude another class member from bringing a similar suit.[48] Rule 23(b)(2) provides for a class where the defendant's conduct may necessitate injunctive relief.[49] Rule 23(b)(3) allows for a class where the claims common to the class make individual litigation inferior to the class action device.[50] The majority of classes seek certification either under Rule 23(b)(2) for injunctive relief or Rule 23(b)(3) for monetary damages.[51]

The merits of a class's claims are mostly separate from the determination of whether the class has satisfied the Rule 23 certification requirements.[52] For example, a class seeking compensation for tortious negligence will still have to satisfy the elements underlying the negligence claims after satisfying the Rule 23 certification requirements.[53] The court will not conduct an in-depth analysis of the negligence claims to determine whether the class meets the Rule 23 certification requirements.[54] The court, however, is not entirely precluded from looking into the merits of the claims at this earlier stage. The court may look into the class's substantive claims, but only to the extent that the inquiry will assist the court in determining whether the class has met the Rule 23 requirements.[55]

The hurdles for a proposed class do not end with satisfying the Rule 23(a) and (b) requirements.[56] In addition to analyzing the class under Rule 23(a)–(b), the court must determine whether the class has been sufficiently

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45. FED. R. CIV. P. 23(b).
46. FED. R. CIV. P. 23(b)(1).
47. *See* PELOSO ET AL., *supra* note 4, at § 19:16.
48. *See id.*
49. FED. R. CIV. P. 23(b)(2).
50. FED. R. CIV. P. 23(b)(3).
51. Blydenburgh, *supra* note 1, at *6.
52. *See* PELOSO ET AL., *supra* note 4, at § 19:8.
53. *See* Blydenburgh, *supra* note 1, at *2.
54. *See id.*
55. *See* PELOSO ET AL., *supra* note 4, at § 19:8.
56. *See id.*; *see also* Brent W. Johnson & Emmy L. Levens, *Heightened Ascertainability Requirement Disregards Rule 23's Plain Language*, ANTITRUST, Spring 2016, at 68 (explaining situations in which classes may fail to be clearly ascertainable).

defined.[57] This definitional requirement is now known as the doctrine of "ascertainability."[58]

C. *The Ascertainability Requirement*

Ascertainability is a certification requirement in addition to the Rule 23(a)–(b) requirements.[59] Determined on a case-by-case basis, ascertainability mandates that the class be sufficiently defined.[60] Although a sufficient definition is required, the proposed class definition need not be so precise that every class member is identified at the certification stage.[61]

Unlike the explicit requirements of Rule 23(a)–(b), ascertainability is often described as an additional, "implicit" Rule 23 requirement.[62] Essentially, by outlining the requirements that a class must meet to achieve certification, Rule 23 "presumes the existence of an identifiable 'class.'"[63] If the class is not clearly ascertainable, then the court cannot identify a particular "entity" to analyze under Rule 23.[64] Although the ascertainability requirement began as a judicially-created doctrine, the amendments to Rule 23 in 2003 may have incorporated the doctrine.[65] Some courts have held that the ascertainability requirement is now codified within Rule 23(c)(1)(B).[66] Regardless of where the authority is derived, most federal circuit courts have recognized an additional ascertainability requirement to certification.[67] Furthermore, proposed

57. *See* Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., 821 F.3d 992, 995 (8th Cir. 2016); Brecher v. Republic of Argentina, 806 F.3d 22, 24 (2d Cir. 2015); EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014); Geller, *supra* note 2, at 2776.

58. *See* Steed, *supra* note 25, at 626; Johnson & Levens, *supra* note 56, at 68.

59. *See Sandusky Wellness Ctr.*, 821 F.3d at 995; 7A KANE ET AL., *supra* note 4, at § 1760; PELOSO ET AL., *supra* note 4, at § 19:8.

60. *See* 7A KANE ET AL., *supra* note 4, at § 1760; PELOSO ET AL., *supra* note 4, at § 19:8.

61. *See* Johnson & Levens, *supra* note 56, at 68 (explaining that the "traditional understanding of ascertainability" is "that a class must be clearly defined").

62. *See* Steed, *supra* note 25, at 626; Geller, *supra* note 2, at 2778; Shaw, *supra* note 6, at 2358; Johnson & Levens, *supra* note 56, at 68.

63. Steed, *supra* note 25, at 627.

64. *Id.*

65. *See* Geller, *supra* note 2, at 2778–79; *see also* FED. R. CIV. P. 23(c)(1)(B) ("An order that certifies a class action must define the class . . . .").

66. *See* Benito v. Indymac Mortg. Serv., No. 2:09-CV-001218-PMP-PAL, 2010 WL 2089297, at *2 (D. Nev. May 21, 2010); Riedel v. XTO Energy, Inc., 257 F.R.D. 494, 506 (E.D. Ark. 2009) (citing FED. R. CIV. P. 23(c)); *see also* FED. R. CIV. P. 23(c)(1)(B) ("An order that certifies a class action must define the class . . . ."). *But see* Shaw, *supra* note 6, at 2399–2400 (arguing that Rule 23(c)(1)(B) does not codify the ascertainability doctrine).

67. *See* Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., 821 F.3d 992, 995 (8th Cir. 2016); Brecher v. Republic of Argentina, 806 F.3d 22, 24 (2d Cir. 2015); EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014); Steed, *supra* note 25, at 626.

classes may be denied certification solely because the class is not sufficiently ascertainable.[68]

Several justifications have been provided for an additional ascertainability requirement.[69] First, an ascertainable class provides notice to potential members, thus allowing the potential members an opportunity to opt-out of any class action.[70] Second, defining a class is necessary to ensure that any damages award is properly allocated to class members at the conclusion of a case.[71] Third, having an ascertainable class ensures that the proper individuals are bound by the judgment at the conclusion of a case.[72]

The federal circuit courts are currently split as to the appropriate standard for determining class ascertainability.[73] On one side of the split, courts apply a "weak" standard of ascertainability.[74] Meanwhile, the other side applies a "heightened" standard of ascertainability.[75] The Fifth, Tenth, District of Columbia, and Federal Circuits have not adopted the weak or heightened standard of ascertainability, and the Supreme Court has not yet determined the appropriate standard to use. Petitions for certiorari were filed for both *Rikos v. Procter & Gamble Co.*[76] and *Mullins v. Direct Digital, LLC*,[77] but both petitions were denied in early 2016.[78] As a result, the circuit split persists, and the debate over whether a class should meet the weak or heightened standard of ascertainability remains.

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68. *See* Shaw, *supra* note 6, at 2354; *see also* Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 359 (3d Cir. 2013) (explaining that ascertainability and the Rule 23(b)(3) predominance requirement "remain separate prerequisites to class certification"); Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 587 (3d Cir. 2012) (explaining that ascertainability is "an essential prerequisite of a class action").

69. *See* Shaw, *supra* note 6, at 2363.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Compare* Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013) ("The method for determining whether someone is in the class must be 'administratively feasible.'") *with* Mullins v. Direct Dig., 795 F.3d 654, 658 (7th Cir. 2015)("Nothing in Rule 23 mentions or implies this heightened requirement under Rule 23(b)(3), which has the effect of skewing the balance that district courts must strike when balancing whether to certify classes.").

74. *See* Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1123 (9th Cir. 2017); Sandusky Wellness Ctr., LLC v. Medtox Sci., 821 F.3d 992, 996–97 (8th Cir. 2016); Rikos v. Procter & Gamble Co., 799 F.3d 497, 525 (6th Cir. 2015); Mullins v. Direct Dig., LLC, 795 F.3d 654, 672 (7th Cir. 2015).

75. *See* Brecher v. Republic of Arg., 806 F.3d 22, 24 (2d Cir. 2015); Karhu v. Vital Pharm. Inc., 621 F. App'x 945, 947 (11th Cir. 2015); *In re* Nexium Antitrust Litig., 777 F.3d 9, 19 (1st Cir. 2015); EQT Prod. Co. v. Adair, 764 F.3d 347, 358–59 (4th Cir. 2014); Carrera v. Bayer Corp., 727 F.3d 300, 307–08 (3d Cir. 2013).

76. Rikos v. Procter & Gamble Co., 799 F.3d 497 (6th Cir. 2015).

77. Mullins v. Direct Dig., LLC, 795 F.3d 654 (7th Cir. 2015).

78. *See Rikos*, 799 F.3d at 502, *cert. denied*, 136 S. Ct. 1493 (2016); *Mullins*, 795 F.3d at 657, *cert. denied*, 136 S. Ct. 1161 (2016).

1. Weak Ascertainability

Four circuits have adopted the weak standard of ascertainability.[79] The weak standard of ascertainability requires that "classes be defined clearly and based on objective criteria."[80] Weak ascertainability focuses solely on the class definition's text to determine whether the class has been properly defined.[81] Plaintiffs can follow several guidelines to ensure that the proposed class is defined by reference to objective criteria. Specifically, vague class definitions that lack specific objective references will fail to be sufficiently ascertainable.[82] Subjective definitions that rely on a plaintiff's state of mind will also fail to be sufficiently ascertainable.[83] Definitions that are based on the members' success on the merits will also fail to be sufficiently ascertainable.[84] For example, a definition including "all individuals negligently injured by Corporation X" would be based on the success of a negligence claim and would not satisfy the weak standard.

To satisfy the weak standard, the class definition must be based on objective criteria.[85] For example, in *Gevedon v. Purdue Pharma*,[86] the proposed class definition was based on addiction and mental health problems arising from prescription drug use.[87] The court concluded that such a definition was too subjective and involved too much investigation into a class member's state of mind to be based on objective criteria.[88] Conversely, in *Alliance to End Repression v. Rochford*, the proposed class consisted of individuals who were "engaged in lawful political, religious, educational or social activities" and were subjected to harrassment or abuse from various government entities as a result of those activities.[89] The court explained that the class was ascertainable because the class was based on the defendants' observable actions as opposed to the defendants' or plaintiffs' subjective states of mind.[90]

79. *See Briseno*, 844 F.3d at 1123; *Sandusky Wellness Ctr., LLC.*, 821 F.3d at 996–97; *Rikos*, 799 F.3d at 525; *Mullins*, 795 F.3d at 672.

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

81. *See* Cansler, *supra* note 14, at 1384; *see also Mullins*, 795 F.3d at 659.

82. *Mullins*, 795 F.3d at 659 ("We and other courts have long recognized an implicit requirement under Rule 23 that a class must be defined clearly and that membership be defined by objective criteria rather than by, for example, a class member's state of mind.").

83. *Id.* at 660.

84. *Id.*

85. *Id.* at 659; Rikos v. Procter & Gamble Co., 799 F.3d 497, 526 (6th Cir. 2015).

86. Gevedon v. Purdue Pharma, 212 F.R.D. 333 (E.D. Ky. 2002).

87. *Id.* at 336 ("The Plaintiffs seek to certify a class based on medical problems, addiction, and damages resulting to those who 'obtain' OxyContin® and suffer addiction and other adverse conditions.").

88. *See id.* at 336–37.

89. All. to End Repression v. Rochford, 565 F.2d 975, 976 (7th Cir. 1977).

90. *Id.* at 977.

2. Heightened Ascertainability

Five circuits have adopted the heightened standard of ascertainability.[91] The heightened standard was created by the Third Circuit in *Marcus v. BMW of North America, LLC*.[92] In *Marcus*, the proposed class consisted of consumers with allegedly faulty car tires.[93] The Third Circuit expressed concern about the definition's vagueness and worried that proposed class members could not be identified through the defendant's records.[94] The court remanded the case and required the lower court to determine whether an "administratively feasible" mechanism was available to determine class membership if class membership could not be determined through the defendant's records.[95] Importantly, the court indicated that using affidavits to self-identify as a class member would likely not provide a sufficient alternative to records or proof of receipts.[96]

Currently, the heightened standard is a two-prong approach: "(1) the class is defined with reference to objective criteria; and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition."[97] Thus, the heightened standard takes the weak standard's objective criteria requirement and adds an additional administratively feasible prong.

The heightened standard's stringent requirements suggest that only individual receipts or records that demonstrate class membership will satisfy the administratively feasible requirement.[98] For example, in *Bello v. Beam Global Spirits & Wine, Inc.*,[99] the proposed class alleged deceptive advertising after Skinnygirl Margaritas were represented as being "all natural."[100] The class definition allowed individuals without proof of receipt to self-identify as class members by presenting sworn affidavits detailing where and when the product was purchased.[101] The court first found that the class definition was sufficiently based on objective criteria because the definition required a purchase, geographic

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91. *See* Brecher v. Republic of Arg., 806 F.3d 22, 24 (2d Cir. 2015); Karhu v. Vital Pharm. Inc., 621 F. App'x 945, 947 (11th Cir. 2015); *In re* Nexium Antitrust Litig., 777 F.3d 9, 19 (1st Cir. 2015); EQT Prod. Co. v. Adair, 764 F.3d 347, 358–59 (4th Cir. 2014); Carrera v. Bayer Corp., 727 F.3d 300, 307–08 (3d Cir. 2013).

92. Marcus v. BMW of N. Am., LLC, 687 F.3d 583 (3d Cir. 2012).

93. *Id.* at 588.

94. *See id.* at 594.

95. *Id.*

96. *See id.*

97. Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015).

98. *See* Cansler, *supra* note 14, at 1401; Luks, *supra* note 14, at 2393.

99. Bello v. Beam Glob. Spirits & Wine, Inc., No. 11-549 (NLH/KMW), 2015 WL 3613723 (D.N.J. June 9, 2015).

100. *Id.* at *1.

101. *Id.* at *6–7.

area, and time period.[102] The defendants, however, did not have records or receipts to identify individual class members.[103] As a result, the court explained that it could not efficiently verify the accuracy of any specific class claim.[104] The court concluded that the proposed class was not sufficiently ascertainable because it had no administratively feasible mechanism to independently verify class membership.[105]

Likewise, in *Parsons v. Philadelphia Parking Authority*,[106] the proposed class alleged that payment was inappropriately collected for parking meters across the City of Philadelphia.[107] The proposed class definition included individuals who had paid parking meters at times when parking was supposed to be free.[108] The potential class members, however, had been unable to provide any records or receipts to reflect payment at times when the parking meters were supposed to be free.[109] The court acknowledged that receipts or records are not required to prove class membership.[110] Nonetheless, the court concluded that it could not identify a specific class member that fell within the proposed class definition without such records or receipts.[111] The court concluded that, because no administratively feasible mechanism existed to verify class claims, the proposed class was not sufficiently ascertainable.[112]

In *Carrera v. Bayer Corp.*,[113] the Third Circuit provided four policy concerns to justify the administratively feasible requirement.[114] First, the court explained that the requirement "eliminates serious administrative burdens" in determining class membership.[115] Second, the requirement provides an efficient method for absent class members to determine class membership.[116] Third, the requirement protects existing class members' claims by reducing the amount of fraudulent claims.[117] Fourth, the additional requirement protects defendants' due process rights by allowing

102. *Id.* at *11.
103. *Id.*
104. *See id.*
105. *Id.*
106. Parsons v. Phila. Parking Auth., No. 13-0955, 2016 WL 538215 (E.D. Pa. Feb. 11, 2016).
107. *Id.* at *1.
108. *Id.*
109. *Id.* at *4.
110. *See id.*
111. *See id.*
112. *See id.*
113. Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013).
114. *Id.* at 307–08, 310; Johnson & Levens, *supra* note 56, at 69.
115. *Carrera*, 727 F.3d at 307–08.
116. *Id.* at 307.
117. *Id.* at 310.

defendants to challenge the evidence used to determine class membership.[118]

The above policy concerns provided by the Third Circuit all serve one primary purpose: prevent the need for "individualized fact-finding or 'mini-trials'" in determining the validity of class membership claims.[119] The goal is to make class membership determinations a "manageable process."[120] The policy concerns iterated by the Third Circuit have been influential among other courts that have adopted the heightened standard.[121]

The consequences of using the heightened standard of ascertainability could be severe. As a prerequisite to class certification, large groups of individuals with otherwise legitimate claims may be denied relief solely because the proposed class is unascertainable.[122] This disadvantage is especially prevalent in low-value consumer cases, where class members might lack the receipts or other documents necessary to satisfy the heightened standard's administratively feasible prong.[123] Moreover, these severe consequences are not the product of Rule 23's explicit language. Instead, the ascertainability standard was judicially-created and applied in addition to Rule 23.[124] Therefore, the doctrine should not add words to the language of Rule 23 or render any part of Rule 23 meaningless.[125]

To summarize, ascertainability (1) requires that the proposed class be sufficiently defined and (2) is analyzed alongside Rule 23.[126] Unlike Rule

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118. *Id.* at 307.

119. *Carrera,* 727 F.3d at 305.

120. *Id.* at 307–08.

121. *See In re* Nexium Antitrust Litig., 777 F.3d 9, 19–20 (1st Cir. 2015) (citing the Third Circuit's decisions in *Carrera*, 727 F.3d at 306–07 and Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 592–93 (3d Cir. 2012)); EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014) (citing the Third Circuit's decision in *Marcus*, 687 F.3d at 592–94).

122. *See* Karhu v. Vital Pharm., Inc., 621 Fed. Appx. 945, 946–50 (11th Cir. 2015) (upholding the district court's denial of class certification on ascertainability grounds); Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 359 (3d Cir. 2013) (explaining that ascertainability and the Rule 23(b)(3) predominance requirement "remain separate prerequisites to class certification"); *Marcus*, 687 F.3d at 587 (explaining that ascertainability is "an essential prerequisite of a class action").

123. *See Carrera*, 727 F.3d at 309–12 (concluding that consumer affidavits would be insufficient to prove class membership); Shaw, *supra* note 6, at 2354.

124. *See supra* note 56–60 and accompanying text.

125. *See* Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1127–28 (9th Cir. 2017); Mullins v. Direct Dig., LLC, 795 F.3d 654, 663 (7th Cir. 2015); Hibbs v. Winn, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provision, so that no part will be inoperative or superfluous, void or insignificant . . . .") (citation omitted); Water Quality Ass'n Emps.' Benefit Corp. v. United States, 795 F.2d 1303, 1309 (7th Cir. 1986)("It is a basic principle of statutory construction that courts have no right . . . to either add words to or eliminate other words from the statute's language.").

126. *See supra* notes 59–60 and accompanying text.

23's explicit requirements, ascertainability is a judicially-created requirement that is "implicit" within the language of Rule 23.[127] Courts, however, are split as to whether a "weak" or "heightened" standard should apply when determining the ascertainability of a class.[128] The weak standard simply requires classes to be defined by reference to objective criteria.[129] Subjective states of mind, for example, will fail to be sufficiently ascertainable.[130] The heightened standard requires that classes be defined by reference to objective criteria *and* that there be an administratively feasible method by which to identify class members.[131] Proofs of purchase or consumer receipts seem to be the surest way of satisfying the heightened standard.[132] The heightened standard is a relatively new standard that is gaining traction among the circuit courts, and its impact on low-value consumer claims could be substantial.[133]

III. ANALYSIS

The rationale underlying the heightened standard is insufficient to justify the additional administratively feasible requirement. First, the administratively feasible requirement renders Rule 23(b)(3)'s superiority and manageability requirements meaningless.[134] Second, the adminstratively feasible requirement contradicts Rule 23(c)(2)(B)'s requirement that potential class members receive only the most practicable notice.[135] Third, the risk of fraudulent class claims is *de minimus* and does not justify the use of an adminstratively feasible requirement.[136] Fourth, the heightened standard misinterprets the scope of defendants' due process rights during a class action.[137] Overall, the heightened standard should be abandoned because the administratively feasible prong imposes an unnecessary burden on potential classes and ultimately prevents the class action mechanism from functioning as it is designed.

127. *See supra* note 62–64 and accompanying text.
128. *See supra* note 73–75 and accompanying text.
129. *See supra* note 80 and accompanying text.
130. *See supra* note 81–83 and accompanying text.
131. *See supra* note 97 and accompanying text.
132. *See supra* note 98–112 and accompanying text.
133. *See supra* note 121–23 and accompanying text.
134. *See infra* Part III.A.
135. *See infra* Part III.B.
136. *See infra* Part III.C.
137. *See infra* Part III.D.

A. The Administratively Feasible Requirement Renders the Rule 23(b)(3) Manageability and Superiority Requirements Meaningless

Written within Rule 23(b)(3) are manageability[138] and superiority requirements.[139] These provisions require that the class action device be manageable as a whole and superior to any other litigation method.[140] Collectively, the manageability and superiority requirements facilitate administrative convenience in class action litigation.[141] The heightened standard of ascertainability, however, renders the Rule's manageability and superiority requirements meaningless.

One justification underlying the administratively feasible requirement is the need for "administrative convenience" in determining class membership.[142] By imposing the administratively feasible requirement on potential classes, trial courts presumably do not have to expend substantial resources to determine class membership.[143] The administratively feasible requirement, however, is unnecessary because a different, pre-existing requirement is already built into Rule 23 that ensures that trial courts do not expend substantial resources to determine class membership.[144] The manageability requirement written into 23(b)(3)(D) requires courts to analyze "the likely difficulties in managing a class action" when determining whether a class action is the appropriate litigation method.[145] If a court faces substantial difficulties in managing a class's definition or verifying class claims, then the court can rely on Rule 23's manageability clause to deny certification.[146] Therefore, courts do not need a judicially-created administratively feasible requirement outside of Rule 23 to ensure convenience in determining class membership. Addressing administrative convenience through ascertainability robs Rule 23(b)(3)(D)'s explicit manageability requirement of any authority and renders it meaningless.[147]

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138. FED. R. CIV. P. 23(b)(3)(D).

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

140. *See id.*

141. *See* Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1126 (9th Cir. 2017); Mullins v. Direct Dig., LLC, 795 F.3d 654, 663–65 (7th Cir. 2015).

142. *Mullins*, 795 F.3d at 663–65; *see also* Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012).

143. *See* Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013) ("[A] trial court should ensure that class members can be identified 'without extensive and individualized fact-finding or mini-trials' . . . .").

144. Fed. R. Civ. P. 23(b)(3)(D).

145. *Id.*

146. *See Briseno*, 844 F.3d at 1127–28; *Mullins*, 795 F.3d at 664.

147. *See Briseno*, 844 F.3d at 1126 ("Imposing a separate administrative feasibility requirement would render that manageability criterion largely superfluous. . . ."); *Mullins*,

A superiority requirement is also written into Rule 23(b)(3), which requires "a class action [to be] superior to other available methods for fairly and efficiently adjudicating the controversy."[148] The superiority requirement is "comparative: the court must assess efficienty with an eye toward 'other available methods.'"[149] Viewing administrative convenience as a matter of ascertainability, however, ignores the superiority requirement's comparative analysis.[150] Instead, ascertainability isolates the court's administrative convenience analysis to the current class action only.[151] As a result, any administrability benefits the class action may offer are not compared to other litigation devices and may go unrealized.[152] Likewise, any administrability problems facing the class are emphasized because they are not viewed against the problems associated with alternative litigation methods.[153] The superiority requirement's comparative analysis places the current class in perspective with other litigation methods and allows courts to compare both the administrative costs and benefits facing the current class against other litigation methods.[154] Instead of addressing administrative convenience through ascertainability, a careful application of Rule 23(b)(3) will ensure that the class is administratively convenient as compared to other litigation methods without depriving the superiority requirement of meaning.

In sum, administrative convenience is an insufficient justification for adopting the heightened standard because Rule 23's manageability and superiority requirements already provide sufficient administrative convenience.[155] Gauging administrative convenience through ascertainability only renders the manageability and superiority requirements meaningless.[156]

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.").

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

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

150. *See Briseno*, 844 F.3d at 1128; Johnson & Levens, *supra* note 56, at 71.

151. *Briseno*, 844 F.3d at 1128 (citing *Mullins*, 795 F.3d at 663); *Mullins*, 795 F.3d at 663; Johnson & Levens, *supra* note 56, at 71.

152. *Mullins*, 795 F.3d at 664–65.

153. *See Mullins*, 795 F.3d at 663; Johnson & Levens, *supra* note 56, at 71.

154. *See Briseno*, 844 F.3d at 1128; *Mullins*, 795 F.3d at 663.

155. *See supra* notes 138, 146.

156. *See supra* note 139.

B. The Administratively Feasible Requirement Contradicts Rule 23(c)(2)(B)'s Requirement that Potential Class Members Receive Only the Most Practicable Notice

Courts have justified the administratively feasible requirement by arguing that it protects absent class members.[157] Individuals who fall within the class definition will be bound by any judgment, so potential members deserve notice of the action and an opportunity to opt out of any future judgment.[158] Courts reason that the administratively feasible prong facilitates the identification of potential members by requiring efficient and sure methods of identification, such as receipts, so that potential members may receive notice of the action and the opportunity to opt out.[159]

This argument, however, assumes that all potential class members are entitled to actual, individual notice of the action.[160] Rule 23(c)(2)(B) requires only "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort" for Rule 23(b)(3) classes.[161] If class members are individually identified, then proper notice can be provided via first-class mail.[162] Rule 23's language does not entitle potential class members to actual, individual notice in every class action and even recognizes that individual notice will not always be possible.[163]

In addition, due process does not entitle class members to individual notice.[164] Notice can be provided through public means, such as advertising or posting the notice in a public place, without offending due process.[165] Like Rule 23, due process does not entitle the potential class members to individual notice at the class certification stage because "courts may use alternative means such as notice through third parties, paid advertising, and/or posting in places frequented by class members" to

157. *See Mullins*, 795 F.3d at 665; Carrera v. Bayer Corp., 727 F.3d 300, 310 (3d Cir. 2013).

158. *See, e.g.*, *Mullins*, 795 F.3d at 665; *Carrera*, 727 F.3d at 307.

159. *See, e.g.*, *Mullins*, 795 F.3d at 665; *Carrera*, 727 F.3d at 307.

160. Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1128–29 (9th Cir. 2017); *Mullins*, 795 F.3d at 665.

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

162. *Briseno*, 844 F.3d at 1129 (citing *Mullins*, 795 F.3d at 665); *Mullins*, 795 F.3d at 665.

163. *Briseno*, 844 F.3d at 1129 (citing *Mullins*, 795 F.3d at 665); *Mullins*, 795 F.3d at 665.

164. *Briseno*, 844 F.3d at 1129 (citing *Mullins*, 795 F.3d at 665); *Mullins*, 795 F.3d at 665.

165. *Briseno*, 844 F.3d at 1129 (citing *Mullins*, 795 F.3d at 665); *Mullins*, 795 F.3d at 665.

provide notice.[166] Moreover, by presuming individual notice is required for all class members in all situations, the administratively feasible prong contradicts the notice requirement prescribed by Rule 23.[167] Courts should instead focus on the standard for notice in Rule 23(c)(2)(B) and ensure that classes are not burdened by a notice requirement that is greater than what Rule 23 and due process require.

C. *The Risk of Fraudulent Class Claims is* De Minimus *and Does Not Justify the Use of an Administratively Feasible Requirement*

The administratively feasible requirement is said to protect class members with valid claims from fraudulent claimants.[168] Without the additional requirement, the concern is that erroneous or fraudulent class claims will dilute the recovery amount for class members with valid claims.[169] Because the class recovery amount is pooled, dilution would occur when fraudulent class members free ride on the class action and prevent legitimate claims from receiving larger payouts from the pool.[170]

No evidence, however, is available to suggest that fraudulent claims are a substantial problem within class actions.[171] Moreover, even if the rates of fraudulent claims were higher, the valid recoveries would likely not be reduced by the fraudulent recoveries.[172] Class membership claims are often very low, and a rate of 10 percent to 15 percent of all potential class members actually claiming membership would not be atypical.[173] In fact, when statements of proof are required to make a claim, rates of potential members actually claiming membership "rarely exceed 50 [percent]."[174] Thus, even with higher rates of fraudulent claims, the fraudulent claimants would likely receive a portion of the unclaimed recovery rather than a portion of the valid recovery.[175] The above lack of evidence demonstrating that fraudulent claims are a problem suggests that valid class members' claims are not being diluted.

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166. *Mullins*, 795 F.3d at 665; *see Briseno*, 844 F.3d at 1129 ("Courts have routinely held that notice by publication in a periodical, on a website, or even at an appropriate physical location is sufficient to satisfy due process.").

167. FED. R. CIV. P. 23(c)(2)(B) ("[T]he court must direct to class members the best notice that is practicable under the circumstances, include individual notice to all members who can be identified through reasonable effort.").

168. *Briseno*, 844 F.3d at 1128; *Mullins*, 795 F.3d at 666.

169. *Briseno*, 844 F.3d at 1130; *Mullins*, 795 F.3d at 666.

170. *Briseno*, 844 F.3d at 1130; *Mullins*, 795 F.3d at 666; Carrera v. Bayer Corp., 727 F.3d 300, 310 (3d Cir. 2013).

171. *Briseno*, 844 F.3d at 1130; *Mullins*, 795 F.3d at 667.

172. *Briseno*, 844 F.3d at 1130; *Mullins*, 795 F.3d at 667.

173. *See* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 119 (2007).

174. *Id.* at 120.

175. *Briseno*, 844 F.3d at 1130; *Mullins*, 795 F.3d at 667.

Hypothetically, a situation could arise in which valid class claims are substantially higher and fraudulent claimants do in fact reduce the recovery of valid claims. Yet, even in this situation, the consequences of the ascertainability requirement should outweigh this concern. Failing to have an ascertainable class will result in an uncertified class, and class members with valid claims will likely receive no compensation as a result.[176] Thus, even if a class with a high rate of fraudulent claims is certified, valid claims receiving a diluted recovery is better than valid claims receiving nothing at all.[177] The problem of fraudulent or erroneous claims is therefore *de minimus*, and the need to protect valid claims does not justify the administratively feasible requirement.

D. The Heightened Standard Misinterprets the Scope of Defendants' Due Process Rights During a Class Action

The heightened standard has been defended on grounds that the administratively feasible requirement protects defendants' due process rights.[178] The Third Circuit, for example, has explained that, because a defendant has a right to present every available defense, then a defendant in a class action must have the right to challenge the evidence used to demonstrate class membership.[179] The administratively feasible prong therefore appears to provide an efficient means by which defendants can protect their due process rights and challenge class membership.[180]

A defendant's right to present every available defense, including challenges to class membership, is undisputed.[181] The *method* by which class members identify themselves, however, is irrelevant to the defendants' due process rights.[182] Individuals using affidavits to "self-identify" as class members do not deprive defendants of their due process right to challenge those membership claims.[183] Rather, affidavits simply do not provide the convenience that receipts or proofs of purchase would. Convenience, however, is irrelevant to due process. As discussed above,

176. *See Briseno*, 844 F.3d at 1130 (quoting *Mullins*, 795 F.3d at 668) ("[I]f certification is denied to prevent dilution, deserving class members 'will receive nothing, for they would not have brought suit individually in the first place."); *see also* Chamberlan v. Ford Motor Co., 402 F.3d 952, 957 (9th Cir. 2005) ("A plaintiff who is denied certification might be left with only one path to appellate review: proceeding to a final judgment on the merits of an individual claim that, without the class, is worth far less than the cost of litigation.").

177. *See Mullins*, 795 F.3d at 668.

178. *Briseno*, 844 F.3d at 1130–31; *Mullins*, 795 F.3d at 668.

179. *See* Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013).

180. *See Mullins*, 795 F.3d at 669; *Carrera*, 727 F.3d at 307.

181. *See Briseno*, 844 F.3d at 1130–31; *Mullins*, 795 F.3d at 669.

182. *See Briseno*, 844 F.3d at 1131–32 (emphasis added); *Mullins*, 795 F.3d at 669.

183. *See Briseno*, 844 F.3d at 1131–32 (emphasis added); *Mullins*, 795 F.3d at 671.

the administratively feasible prong would likely prevent individuals from self-identifying through affidavits because there are no records or receipts to verify the claims.[184] As a result, consumers with low-value claims who have thrown away their receipts and have only their experiences to swear by will likely be left injured and without compensation.[185] Instead of focusing on the *convenience* of challenging evidence of class membership, any due process concerns should be addressed through the *opportunities* that defendants are afforded to challenge claims of class membership.[186]

Regardless of the evidence used to claim class membership, the defendant always has the opportunity to challenge that evidence.[187] Even in the case of self-identification through affidavits, defendants are afforded the opportunity to challenge the claims made within the affidavits.[188] The type of evidence provided by potential class members is thus irrelevant for determining whether a defendant's due process rights have been violated.[189] Instead of strengthening defendants' due process rights by providing new opportunities to challenge class claims, the administratively feasible requirement focuses on the convenience of challenging the evidence used by individuals to demonstrate class membership, and provides a minimum threshold of convenience that potential members must meet.[190]

The administratively feasible requirement does nothing to ensure defendants' due process rights and imposes an unnecessary evidentiary hurdle that class members must overcome.[191] The heightened standard misinterprets the scope of due process, and the administratively feasible

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184. *See supra* Part II.C.2.

185. *See* Blair v. Equifax Check Serv., Inc., 181 F.3d 832, 834 (7th Cir. 1999)("For some cases the denial of class status sounds the death knell of the litigation, because the representative plaintiff's claim is too small to justify the expense of litigation."); Blydenburgh, *supra* note 1, at *1; Haas, *supra* note 1, at 796.

186. *Mullins*, 795 F.3d at 669. The *Mullins* court stated:

> A defendant has a due process right to challenge the plaintiffs' evidence at any stage of the case, including the claims or damages stage. . . . 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. . . . 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.

Id.

187. *Briseno*, 844 F.3d at 1131–32; *Mullins*, 795 F.3d at 669.

188. *Mullins*, 795 F.3d at 671. The *Mullins* court stated:

> Suppose an employee files an affidavit falsely claiming that she worked 60 hours a week when in fact she worked only 50 . . . [S]o long as the defendant is given a fair opportunity to challenge the claim to class membership . . . its due process rights have been protected.

Id.

189. *Briseno*, 844 F.3d at 1131–32; *Mullins*, 795 F.3d at 671–72.

190. *Mullins*, 795 F.3d at 669.

191. *See supra* note 178.

requirement is an insufficient justification for ensuring that defendants are afforded due process.[192]

E. Recommendation

The Supreme Court is in the best position to resolve the current federal circuit split. The Supreme Court should follow the Seventh Circuit's lead in *Mullins* and adopt the weak standard of ascertainability.[193] A uniform standard of ascertainability will prevent geography from determining a class action's fate. Moreover, a uniform weak standard of ascertainability among the federal circuit courts will ensure that Rule 23 functions as it is designed.[194] Resolution by the Supreme Court would ensure that proposed classes, especially low-value consumer classes, are no longer burdened by an unnecessary administratively feasible requirement.[195]

IV. CONCLUSION

As an independent bar to certification, ascertainability can potentially be a dispositive issue.[196] An unascertainable class will result in an uncertified class, which may leave individuals with otherwise legitimate claims left uncompensated.[197]

Both the weak standard and the heightened standard aim for the same goal: to create a sufficiently defined class.[198] The heightened standard, however, imposes an unnecessary hurdle for proposed class definitions and does not allow Rule 23 to function as it is designed.[199] Each justification provided for the heightened standard is needless or better addressed through Rule 23's explicit requirements.[200] The current circuit split means that identical potential classes may be subjected to different standards of ascertainability simply based on choice of forum. Given the high stakes involved with class action lawsuits, uniformity is required within the federal courts. The Supreme Court should resolve the split by holding that the weak standard applies when determining whether a class is sufficiently ascertainable.

192. *See Briseno*, 844 F.3d at 1131–32; *Mullins*, 795 F.3d at 672.
193. *See supra* Part II.C.1.
194. *See supra* Part III.A.
195. *See supra* Part III.
196. *See supra* note 68.
197. *See supra* Part II.A; *see also supra* Part II.C.2.
198. *See supra* Part II.C.
199. *See supra* Part III.
200. *See supra* Part III.

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