Ascertaining the Bounds of Ascertainability

A Defense Perspective

by Jeffrey J. Greenbaum and Jason L. Jurkevich

By now, class action lawyers are or should be familiar with the ascertainability prerequisite for class certification, which requires the members of a proposed class to be identified through objectively verifiable criteria that can be challenged by the defendant and in an administratively feasible manner, without resorting to highly individualized fact-finding or mini-trials. In recent years, the concept of ascertainability as a prerequisite to class certification—on par with the explicit requirements for class treatment set forth in Federal Rule of Civil Procedure 23(a) and (b), and subject to the same 'rigorous analysis' the United States Supreme Court has applied to those criteria for class certification[1]—has received increased attention from both district and circuit courts of appeal, perhaps most prominently in a trilogy of Third Circuit cases, *Marcus v. BMW of North America,*[2] *Hayes v. Wal-Mart Stores*[3] and *Carrera v. Bayer Corp.*[4] In the wake of those decisions, courts both in and out of the Third Circuit have applied the reasoning of those cases to deny class certification where the lack of adequate records or other objective criteria would prevent the identification of class members without the need either for extensive individual fact-finding or self-identification by the class members that would not provide defendants with an adequate means of challenging membership in the class.

From a defense perspective, the Third Circuit's ostensibly straightforward rules on ascertainability provide a potentially powerful tool to seek dismissal of class allegations that are based on overly broad class definitions, and where the class members—those whose interests are potentially at stake—cannot be identified or found. The notion recognizes that Rule 23(b)(3) class actions cannot recover damages on behalf of absent class members, and that there is no class to certify if those people cannot be identified or found. The ascertainability requirement appears to have its greatest relevance in retail consumer class actions, where it is unlikely either plaintiffs or defendants will have records that identify individual class members. Indeed, *Marcus, Hayes* and *Carrera* all involved retail consumer claims. Ascertainability, however, has also been used, with some success, to bar or limit putative class actions involving employee wage and hour claims, damages resulting from a release of hazardous chemicals, and allegedly deceptive insurance billing practices.

Defense lawyers should be careful when opposing class certification on ascertainability grounds because some jurists have criticized the potentially harsh consequences to plaintiffs that may result from a strict application of the Third Circuit's ascertainability jurisprudence. Correctly framing issues and arguments may mean the difference between successfully defeating a proposed class, on the one hand, and an expensive litigation or settlement, on the other.

The Third Circuit's Ascertainability Trilogy—*Marcus, Hayes* and *Carrera*

Beginning with *Marcus,* the Third Circuit held that "[c]lass ascertainability is an essential prerequisite of a class action, at least with respect to actions under Rule 23(b)(3)."[5] In order to maintain a class action, a plaintiff must show, by a preponderance of the evidence, that the class is "currently and readily ascertainable based on objective criteria." In addition, a plaintiff must show, by a preponderance of the evidence, that a reliable and administratively feasible mechanism exists to determine "whether putative class members fall within the class definition." By contrast, if class members cannot be identified "without extensive and individualized fact-finding or 'mini-trials,'" or without accepting "the say-so of putative class members" in the form of affidavits, without any meaningful ability for the defendant to challenge them, the class definition fails.[6]

The Third Circuit listed three objectives behind its approach to ascertainability. First, by requiring easy identification of class members, ascertainability eliminates serious

administrative burdens that are inconsistent with the efficiencies expected in a class action. Second, easy identification of class members protects absent class members by facilitating the 'best notice practicable.' Third, ascertainability protects defendants because it ensures those bound by the final judgment are clearly identifiable.[7]

The Third Circuit found the plaintiffs' proposed class in each case was not readily ascertainable, and would require either individualized fact-finding or force the defendant to accept affidavits from putative class members without any meaningful ability to challenge them. In *Marcus,* the plaintiff sought to certify a class of individuals who bought or leased new or used BMW vehicles that: 1) were equipped with Bridgestone 'run-flat tires,' and 2) that had gone flat and been replaced. The court found the class was not readily ascertainable because BMW's records could not identify the class members. For example, BMW's records would not necessarily be able to identify subsequent owners of vehicles. Additionally, BMW's records did not necessarily identify which vehicles were equipped with Bridgestone tires as opposed to tires of other manufacturers. Moreover, because not all vehicle owners brought their cars to a BMW dealer for service, its records could not necessarily identify which potential class members' tires had gone flat and been replaced. In remanding the case after reversing class certification, the Third Circuit cautioned the district court against approving a method of ascertainability "that would amount to no more than ascertaining by potential class members' say-so" such as accepting affidavits from potential class members, which would raise serious due process concerns.[8]

In *Hayes,* the Third Circuit reversed the district court's certification of a class consisting of all consumers who purchased a Sam's Club service plan in New Jersey to cover as-is products. Even though the class was defined by reference to objective criteria, it was not administratively feasible to determine the members of the class. Sam's Club did not keep records of purchases of as-is items, and the plaintiffs' argument that such purchases could be determined by looking at records of price-override transactions (when a cashier manually overrides an item's original price and enters a discounted as-is price instead) was rejected because price-overrides were not just performed for as-is purchases. The court stated that whether or not a defendant's records makes it easier or more difficult to ascertain class members was irrelevant to the plaintiffs' burden to demonstrate ascertainability. "[T]he nature or thoroughness of a defendant's recordkeeping does not alter the plaintiff's burden to fulfill Rule 23's requirements."[9]

Carrera involved a proposed class of all purchasers of Bayer's One-a-Day WeightSmart weight-loss supplement in Florida. The plaintiffs argued that class members could be determined from records of sales made with retailer loyalty program cards and from online sales. However, the Third Circuit held the evidence presented did not establish that all retailers of WeightSmart in Florida had records of loyalty program purchases, or that such records identified purchases of WeightSmart, or that records existed for the relevant period. Moreover, the court rejected the plaintiffs' argument that the class could be ascertained from affidavits of class members, because Bayer would not have the ability to effectively challenge class membership.[10]

Beyond the Trilogy

In the wake of the foregoing trio of cases, courts have increasingly applied the Third Circuit's holdings to deny class certification where the proposed class definition would not allow for identification of class members by objective criteria and an administratively feasible process. One of the reasons for the proliferation of cases applying ascertainability seems to be that the rules for determining whether a class is ascertainable appear, on their face, straightforward and easy to apply. Consequently, class action defense lawyers have used ascertainability as an effective tool to challenge class certification.

Within the Third Circuit, there has been no shortage of district court decisions denying class certification, or alternatively narrowing the proposed class definition, because the definition proposed by the plaintiff did not meet the requirements for ascertainability. As was the case in the Third Circuit trilogy, many of these subsequent decisions are in cases involving retail consumer claims, where the lack of privity between ultimate purchaser and manufacturer often leads to a lack of records identifying class members, although the problem is not limited to situations where there is a lack of privity. With respect to retail consumer claims, many retailers do not maintain records of who purchased their products.

Thus, in *Stewart v. Beam Global Spirits & Wine, Inc.,*[11] in which the plaintiffs claimed the defendants made false claims regarding Skinnygirl margarita mix, the New Jersey federal district court denied class certification to proposed classes of all persons who purchased the product. The makers of the mix did not have any records that would identify consumers who purchased the product. The plaintiffs argued that, notwithstanding the Third Circuit's holdings in *Marcus, Hayes* and *Carrera,* affidavits by potential class members could satisfy the ascertainability requirement by employing various screening methods to filter out claims by non-class members. These included cross-referencing claims against comments sent to the defendants by customers via email; against social media where class members posted comments on, or 'liked,' the defendants' Facebook pages; using

"proven algorithms to identify fraudulent claims;" and cross-checking information on price and packaging provided by claimants against information obtained in discovery relating to, among other things, the identity of retailers and average prices paid. The court rejected these proposals because the plaintiffs had not offered any evidence to suggest the various screening methods would be successful. For example, there was no statistical evidence presented showing what percentage of consumers actually sent emails, posted comments to social media, or 'liked' a Facebook page; to the contrary, plaintiffs admitted that even non-purchasers may have 'liked' the defendants' Facebook pages.

Furthermore, beyond the court's doubts about the effectiveness of proposals for screening claimants that had not posted on social media, those were based on an affidavit prepared in connection with a case in another district involving a different product. "The methods proposed there were not created, developed or described with the facts of this particular case in mind."[12] In *Byrd v. Aaron's, Inc.*,[13] the court denied class certification in an action alleging violation of the Electronic Communications Privacy Act, where the proposed class definition did not use objective criteria but rather turned on the ultimate legal issues in the case) (*i.e.,* fail-safe class).

The use of ascertainability as a defensive tool against class certification has not been limited to retail consumer cases. Courts have denied class certification on ascertainability grounds in a variety of disputes when class membership cannot be easily determined based on objective criteria and in an administratively feasible manner, without resorting to affidavits by class members that cannot effectively be challenged except through individualized fact-finding or mini-trials. For example:

Debt Collection—In *Bright v. Asset Acceptance LLC,*[14] plaintiffs alleged the defendant debt collector violated the Fair Debt Collection Practices Act by calling consumers from a telephone number whose caller ID falsely displayed the name "Warranty Services." However, the proposed class included all consumers who received a call from the debt collector during a specified time period, and not just those who had caller ID. Moreover, only one telephone service provider displayed the incorrect caller ID. Chief Judge Jerome Simandle found the proposed class was not ascertainable because the plaintiff had not demonstrated an administratively feasible way to ascertain the class. "Neither Plaintiff nor [defendant] knows which consumers that [defendant] called had caller ID during the relevant time period. This information is not contained within [defendant]'s computer databases."[15]

Wage-and-Hour Litigation—In *Bobryk v. Durand Glass Mfg. Co.,*[16] the court denied class certification to the plaintiff's proposed class of employees suing under the New Jersey Wage and Hour Law, seeking overtime for time spent donning and removing personal protective equipment before and after their shifts. Different employees were required to wear different types of protective gear, and some employees were also required to have shift report conversations with the employees being relieved or the employees relieving them. These variables meant that different employees would have to spend different amounts of time with respect to their pre- and post-shift duties. The court would have to review each employee's duties (or at least the duties of each group of employees with the same job description) to determine how much time each should be compensated for pre- and post-shift activities, but it could not do so without undergoing an individual analysis of each employee and how much time it took him or her to complete such duties.

In *Adami v. Cardo Windows, Inc.,*[17] an action brought by car window installers for unpaid overtime, the plaintiffs failed to identify an administratively feasible method of identifying class members, which would require inquiry into each member's independent contractor status, hours worked, level of control or autonomy, rate of pay, and status as a sole proprietor or incorporated business entity.

On the other hand, in *Deangelis v. Bally's Park Place, Inc.,*[18] the court held that a class of casino workers seeking overtime pay for attending pre-shift meetings was ascertainable based on records showing which employees worked shifts on days that pre-shift meetings were held; the court ruled that attendance of pre-shift meetings could be assumed in the absence of any records showing roll call or attendance.

Health Insurance Billing Practices—In *Lipstein v. UnitedHealth Group,*[19] plaintiffs alleged the defendant health insurance claims administrator failed to follow the language of the healthcare plans when determining the amount of secondary insurance coverage payments for insureds who were enrolled in or eligible for Medicare but who had either received care from providers who had opted out of Medicare or received care from a Medicare provider but had not submitted a claim to Medicare. The proposed class definition included: 1) plan subscribers who had submitted claims for benefits, 2) where the plan was secondary to Medicare, 3) the administrator used an estimate of Medicare payments to determine the benefit payable, and 4) the subscribers received a reduced benefit as a result. The proposed class was not ascertainable because determining whether subscribers "received a reduced benefit as a result of United's estimation policy requires fact-intensive inquiries that would place a serious administrative burden on the Court" since different plans provided for different methodologies in estimating Medicare payments.[20]

Title Insurance—In *Haskins v. First American Title Ins. Co.,*[21] the court denied

certification to a proposed class of New Jersey homeowners who were allegedly overcharged for title insurance in connection with mortgage refinancing. After reviewing the deposition transcripts of the parties' experts, the court denied certification, finding the defendant's electronic records did not contain all the information necessary to determine, in an administratively feasible manner, the members of the class and the amount of their alleged overcharges. Instead, a file-by-file review of each transaction would be required.[22]

Release of Hazardous Chemicals—In *In re Paulsboro Derailment Cases,*[23] the court granted class certification to classes of *individuals* who incurred expenses and other financial losses because of a train derailment that caused a release of vinyl chloride and resulted in temporary evacuation and curfew orders, but denied certification to a class of *businesses* that also suffered income loss and other expenses due to the derailment. Ascertaining the individual classes was relatively straightforward because the borders of the evacuation and curfew areas were well defined, and residence in those areas could be verified through public records. Moreover, claimants could be required to provide some proof they incurred an expense or lost income, which would not entail extensive individual inquiry and would enable defendants to challenge membership.[24]

The class of affected businesses, however, was not ascertainable. Although the plaintiffs compiled a preliminary list of 381 businesses with mailing addresses within the affected areas, the court could not assume each business had physical operations within those areas, or that those physical operations were affected by the evacuation or curfew. Also, the plaintiffs offered no administratively feasible plan for determining whether each business suffered an income loss due to the derailment versus some unrelated reason.[25]

Outside the Third Circuit

The impact of the Third Circuit's ascertainability trilogy has not only been felt within this circuit. Several other circuit courts of appeal have recognized ascertainability as a requirement for class certification, including the Second, Fourth, Fifth, Sixth, and 11th circuits.[26] Even though the requirement of ascertainability has been widely recognized, the strictness with which it is applied in other circuits is not uniform.

For example, in *EQT Prod. Co. v. Adair,* the Fourth Circuit recently reversed the district court's grant of class certification in a case involving claims for unpaid royalties for coal-bed methane gas mining rights, where the classes were comprised of individuals who claimed ownership of gas rights on land where the defendants had drilling units, but whose rights were "in conflict" because others claimed the coal rights for the land. The lower court held that ownership schedules prepared by the defendants were sufficient to identify class members, and that any changes in ownership could be addressed through reference to public land records. The appellate court disagreed, noting that "resolving ownership based on land records can be a complicated and individualized process," and that trying to resolve the numerous issues regarding title "pose[s] a significant administrative barrier to ascertaining the ownership classes."[27]

The 11th Circuit, in *Walewski v. Zinemax Media,* upheld the denial of class certification for a class composed of all individuals who purchased any version of the video game Elder Scrolls IV, which, according to the plaintiffs, had an animation defect that manifested itself after 200 or more hours of play and prevented users from completing the game. As the court explained, the proposed class definition did not distinguish between purchasers of new or used versions of the game, even if the purchasers themselves never experienced the alleged defect, and even included retailers that bought used games for resale. Additionally, a gamer who received the game as a gift and experienced the defect would be excluded from the proposed class.

In *Karhu v. Vital Pharms., Inc.,*[28] the district court denied certification to class consisting of all persons who purchased the defendant's dietary supplement, other than for resale. Relying on *Carrera,* the court found that individual sales records were not available and thus the only way to identify class members was through affidavits, which would either deprive the defendant of its due process rights or require mini-trials to enable the defendant to challenge each member's affidavit. Use of affidavits would also invite fraudulent submissions and dilute the recovery of genuine class members.

In the Second Circuit, apart from recognizing ascertainability as an implied requirement of class certification in *In re Initial Public Offering Securities Litigation,* the court of appeals has not addressed the issue. The district courts, meanwhile, have not been uniform in their application of ascertainability.

In *Weiner v. Snapple Beverage Co.,*[29] Judge Denise Cote, of the Southern District of New York, denied certification to a class consisting of all individuals who purchased, in New York State, a Snapple beverage that had a label stating "All Natural," and that contained high-fructose corn syrup. Because not all Snapple products were labeled "All Natural," and because it was unlikely that individual class members saved receipts or product labels, or would remember individual purchases of Snapple, inviting affidavits by class members would merely be inviting speculation, or worse. "Moreover, the process of verifying class members' claims would be extremely burdensome for the court or any claims administrator."[30]

By contrast, in *Ebin v. Kangadis Food Inc.*,[31] Judge Jed Rakoff certified a nationwide class of all persons who purchased Capatriti 100% Pure Olive Oil, which allegedly contained an industrially processed substitute. The court held that the class criteria—purchase of the specific product by a given date—were objective. Even though the plaintiffs proposed a similar means of ascertainability as in *Snapple* (*i.e.,* producing a receipt or product label information, or submitting a sworn affidavit) Judge Rakoff declined to follow *Snapple,* reasoning the Second Circuit disfavored denying class certification solely on grounds of manageability, and that denying certification would "render class actions against producers almost impossible to bring."[32]

The court in *Gortat v. Capala Bros.*[33] expressed a similar view, stating that ascertainability "is not demanding. It is designed only to prevent the certification of a class whose membership is truly indeterminable."

A similar difference of opinion has developed among the district courts in the Ninth Circuit, where lower courts are split on whether, in low-value consumer class actions, affidavits are sufficient to identify class members based on otherwise objective criteria. For example, in *Jones v. ConAgra Foods Inc.*,[34] the plaintiffs brought claims alleging misleading food labeling regarding three of defendant's brands—Hunts' canned tomato products, PAM cooking spray and Swiss Miss hot cocoa—and sought to certify statewide classes of all persons who purchased each product. Judge Charles Breyer held that the proposed classes were not ascertainable because, even assuming the honesty of all class members, it was unreasonable to conclude they could remember which particular products they purchased and whether the products had the allegedly misleading labels. The court pointed out that there were "literally dozens of varieties with different…sizes, ingredients, and labeling over time," and not all of the products in question had the allegedly false claims on their labels at all times.[35]

Likewise, in *Sethavanish v. Zone Perfect Nutrition Co.*,[36] Judge Samuel Conti of the Northern District of California, following *Carrera,* denied class certification where the only way to identify class members who purchased the defendant's product, in the absence of retailer records, was by self-attesting affidavits. Other courts have come to similar conclusions.[37]

On the other hand, in *In re ConAgra Foods, Inc.*,[38] the district court held that a class consisting of all persons in 12 states who purchased varieties of Wesson Oil was sufficiently ascertainable for purposes of class certification. The court acknowledged the reasoning of *Carrera,* and decisions from other district courts in the Ninth Circuit that came to similar conclusions, but said the approach was too restrictive and would "effectively prohibit class actions involving low-priced consumer goods."[39] The court found the class members could be identified through objective criteria—purchase of a specific type of product during a specified period. Furthermore, the use of affidavits or claim forms submitted by absent class members was not problematic where all Wesson products during the class period contained the allegedly misleading label. The court noted that ConAgra could challenge individual claims "by comparing information about the individual's purchase with information it maintains concerning the retailers that sold its products during the class period or other similar information."[40]

The court came to a similar conclusion in *Lilly v. Jamba Juice,*[41] in which it certified a statewide class of individuals who purchased specified varieties of the defendant's smoothie kits. The *Jamba Juice* court minimized the concerns expressed by the Third Circuit. While the interest in providing notice to proper class members, and thus global peace to defendants, was legitimate, Rule 23 only requires the best practicable notice, and the plaintiffs had provided a plan for direct notice to consumers whose information was on file with the defendant combined with targeted Internet and print media campaigns to provide notice to other potential class members. The court also minimized the due process concerns expressed by the Third Circuit with respect to the use of affidavits by class members. The affidavits would be used only to identify the members of the class, not to establish the total amount of the defendant's liability. That would have to be proven at trial through admissible evidence, and subject to challenge by the defendant. Any objection that the use of affidavits would lead to false claims that would dilute the recovery to legitimate claimants was speculative at the certification stage, and—if it became an actual problem—could be addressed at a later stage.[42]

The Ninth Circuit may soon weigh in on the issue of ascertainability in consumer class actions, as the plaintiffs in *Jones v. ConAgra* have appealed.[43] That court recently addressed ascertainability more generally, albeit in a brief, unpublished opinion. *Martin v. Pacific Parking Systems*[44] involved a claim that the defendant printed the expiration dates of individual credit and debit cards on electronically printed parking receipts at Laguna Beach, in violation of the Fair and Accurate Credit Transactions Act. The plaintiff sought to certify a nationwide class of all individuals who received receipts containing the expiration dates of their credit or debit cards, but excluding anyone who actually suffered identity theft as a result.[45] In affirming the denial of class certification for lack of ascertainability, the Ninth Circuit observed the plaintiff had offered no administratively feasible manner in

which to identify class members other than through self-identification.

In a footnote, the court noted:

> Self-identification may suffice for some settlement-only classes. But those classes need not satisfy Rule 23(b)(3)(D)'s "manageability" requirement. "Confronted with a request for settlement-only class certification a district court need not inquire whether the case, if tried, would present intractable management problems... for the proposal is that there be no trial."[46]

This footnote alludes to the same 'manageability' problem noted by Judge Cote in *Snapple*. However, given that *Martin* is unpublished, and given the potential effect on consumer class actions, the above-cited footnote cannot serve as a reliable predictor of how the Ninth Circuit may rule in *ConAgra*.

Potential Pitfalls for Defense Lawyers

There is no question that ascertainability is a formidable tool for class action defense lawyers, in all kinds of class action cases, especially where the proposed class definition encompasses a number of variables, such as—in consumer cases—different types of products or services, different types of packaging or advertising, and different periods of time, or—in insurance cases—different policy or plan language, or—in employment cases—different groups of employees subject to different requirements, employed at different locations or at different times. Additionally, at least in the Third Circuit, the lack of records by which class members can be objectively identified provides a significant argument against class ascertainability.

Defense counsel should be cautioned, however, against focusing too heavily on ascertainability to the exclusion of the other, express requirements for class certification set forth in Rule 23. For example, defense counsel should take care to distinguish between individualized questions regarding identity of class members and individualized questions regarding a class member's ability to prove his or her claim. In *Grandalski v. Quest Diagnostics,*[47] the Third Circuit recently clarified that, while the former is properly the subject of an ascertainability inquiry, the latter is more appropriately analyzed under the predominance factor under Rule 23(b)(3). While both offer a potential basis on which to deny class certification, labeling the argument as falling under ascertainability instead of predominance may result in the argument being rejected.

Counsel should also be wary about arguing too forcefully that a plaintiff's inability to identify class members at the class certification stage is fatal to class treatment, if the plaintiffs have offered an otherwise plausible method of ascertaining class members based on objective criteria. In *Premier Health Center v. UnitedHealth Group,*[48] the plaintiffs sought to certify a class of medical providers who, after receiving payments from the defendant, were subject to retroactive requests for reimbursement of alleged overpayments (which allegedly violated the Employee Retirement Income Security Act), but excluded from the class definition any providers that either paid or authorized subsequent offsets, in response to the repayment demands. The defendant objected that the class was not ascertainable, even though its records could identify outstanding repayment demands, because the defendant received payments and processed offsets on a daily basis. Consequently, determination of the class members would require individualized inquiry regarding those providers that, between class certification and trial, authorized payments or offsets. In order to address that problem, Judge Dickinson Debevoise modified the nature of the injunctive relief sought by the plaintiffs, so the defendant would be barred from accepting payments or executing any offset as to any repayment demand as of the date of final judgment. "[A]scertainability requires only that the court be able to identify class members at some stage of the proceeding."[49]

Perhaps the greatest caution should be taken against assuming the strict application of ascertainability, as set forth in the Third Circuit trilogy, will continue to control. Although the Third Circuit, in *Carrera,* rejected a rehearing *en banc,* some members of the Third Circuit expressed the view that *Carrera,* in its seemingly absolute rejection of self-attesting affidavits as a means of identifying class members, went too far. Indeed, in his dissent from the court's denial of rehearing *en banc*, Judge Thomas Ambro—who authored the Third Circuit's opinion in *Marcus*—stated that, because ascertainability is a judicially created doctrine, flexibility with respect to its application is required, especially where the result may be to "eviscerate" the low-value consumer class action.[50]

How the Third Circuit will respond to this criticism in future cases, and how the Ninth Circuit and other courts of appeal apply ascertainability, will undoubtedly keep ascertainability in the forefront of hot-button class action issues for some time. In addition, the Advisory Committee on Civil Rules has its Rule 23 Subcommittee looking at class action issues, and has ascertainability as one of the issues on its agenda for possible incorporation into the rule. It will certainly be guided by additional circuit pronouncements on ascertainability as it continues its examination. ⚖

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ENDNOTES

1. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011).
2. 687 F.3d 583 (3d Cir. 2012).
3. 725 F.3d 349 (3d Cir. 2013).
4. 727 F.3d 300 (3d Cir. 2013), *reh'g en banc denied,* No. 12-2161, 2014 U.S. App. LEXIS 15553 (3d Cir. May 2, 2014).
5. By contrast, the Third Circuit has recently held that ascertainability is not a requirement for certification of a class under Rule 23(b)(2). *Shelton v. Bledsoe,* 2015 U.S. App. LEXIS 253, *8-*18 (3d Cir. Jan. 7, 2015).
6. *Marcus,* 687 F.3d at 592-93; *Hayes,* 725 F.3d at 355-56, *Carrera,* 727 F.3d at 306-07.
7. *Marcus,* 687 F.3d at 593; *Hayes,* 725 F.3d at 356; *Carrera,* 727 F.3d at 307.
8. *Marcus,* 687 F.3d at 594.
9. *Hayes,* 725 F.3d at 352, 355-56.
10. *Carrera,* 727 F.3d at 308-311.
11. No. 11-5149 (NLH/KMW), 2014 U.S. Dist. LEXIS 87487 (D.N.J. June 27, 2014).
12. *Id.* at *37-*43.
13. No. 11-101Erie, 2014 U.S. Dist. LEXIS 44322 (W.D. Pa. Jan. 31, 2014), *adopted by,* 2014 U.S. Dist. LEXIS 42762 (W.D. Pa. March 31, 2014).
14. 292 F.R.D. 190 (D.N.J. 2013).
15. *Id.* at198.
16. No. 12-5360(NLH)(JS), 2014 U.S. Dist. LEXIS 137168 (D.N.J. Sept. 29, 2014).
17. 299 F.R.D. 68 (D.N.J. 2014).
18. 298 F.R.D. 188 (D.N.J. 2014).
19. 296 F.R.D. 279 (D.N.J. 2013).
20. *Id.* at 291.
21. No. 10-5044 (RMB/JS), 2014 U.S. Dist. LEXIS 9559 (D.N.J. Jan. 27, 2014), *reconsideration denied*, 2014 U.S. Dist. LEXIS 103771 (D.N.J. July 30, 2014).
22. *Id.* at *31-*40.
23. No. 13-784 (RBK/KMW), 2014 U.S. Dist. LEXIS 115542 (D.N.J. Aug. 20, 2014).
24. *Id.* at *21-*22.
25. *Id.* at *24-*25.
26. *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 30 (2d Cir. 2006); *EQT Prod. Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014); *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 639 (5th Cir. 2012); *Am. Copper & Brass, Inc. v. Lake City Indus. Prods.*, 757 F.3d 540, 545 (6th Cir. 2014); *Walewski v. Zenimax Media, Inc.*, 502 Fed. Appx. 857, 861 (11th Cir. 2012).
27. *EQT,* 764 F.3d at 359.
28. No. 13-60768-CIV-COHN/SELTZER, 2014 U.S. Dist. LEXIS 26756 (S.D. Fla. March 3, 2014), *reconsideration denied,* 2014 U.S. Dist. LEXIS 97219 (S.D. Fla., July 17, 2014), *app. pending,* No. 14-11648 (11th Cir.).
29. No. 07 Civ. 8742 (DLC), 2010 U.S. Dist. LEXIS 79647 (S.D.N.Y. Aug. 5, 2010).
30. *Id.* at *41-*42.
31. 297 F.R.D. 561 (S.D.N.Y. 2014).
32. *Id.* at 567.
33. No. 07-CV-3629 (ILG), 2010 U.S. Dist. LEXIS 35451 (E.D.N.Y. April 9, 2010) (in wage and hour case, court held that class of individuals employed by defendant for specified period of time was ascertainable).
34. No. C 12-01633 CRB, 2014 U.S. Dist. LEXIS 81292 (N.D. Cal. June 13, 2014).
35. *Id.* at *35-*36.
36. No. 12-2907-SC, 2014 U.S. Dist. LEXIS 18600 (N.D. Cal. Feb. 13, 2014).
37. *See, e.g., Astiana v. Ben & Jerry's Homemade Inc.,* No. C 10-4387 PJH, 2014 U.S. Dist. LEXIS 1640 (N.D. Cal. Jan. 7, 2014), *In re POM Wonderful LLC Marketing & Sales Prac. Litig.,* No. ML 10-02199 DDP (RZx), 2014 U.S. Dist. LEXIS 40415 (C.D. Cal. March 25, 2014).
38. 302 F.R.D. 537 (C.D. Cal. 2014).
39. *Id.* at 566.
40. *Id.* at 567.
41. No. 13-cv-02998-JST, 2014 U.S. Dist. LEXIS 131997 (C.D. Cal. Sept. 18, 2014).
42. *Id.* at *13-*18.
43. *Jones v. ConAgra Foods Inc.*, No. 14-16327 (9th Cir.).
44. 583 Fed. Appx. 803 (9th Cir. 2014), *cert. denied,* No. 14-486, 2015 U.S. LEXIS 251 (Jan. 12, 2015).
45. *See Rowden v. Pacific Parking Sys.,* 282 F.R.D. 581, 583-84 (C.D. Cal. 2012), *aff'd sub nom., Martin v. Pacific Parking Sys.,* 583 Fed. Appx. 803 (9th Cir. 2014), *cert. denied,* No. 14-486, 2015 U.S. LEXIS 251 (Jan. 12, 2015).
46. *Martin,* 583 Fed. Appx. at 804 n.3 (*citing Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620 (1997)).
47. 767 F.3d 175 (3d Cir. 2014).
48. No. 11-425 (ES), 2014 U.S. Dist. LEXIS 120589 (D.N.J. Aug. 28, 2014).
49. *Id.* at *75 (*quoting* Newberg on Class Actions § 3:3 (5th ed.)).
50. *Carrera v. Bayer Corp.*, No. 12-2621, 2014 U.S. App. LEXIS 15553, at *5-*11 (3d Cir. May 2, 2014) (Ambro, J., dissenting).