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Proving The Retail Transaction: Ascertainability In Food And Cosmetic Mislabeling Class Actions

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Commentary

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Most consumers quickly discard receipts for food or cosmetics purchases, particularly when the items bought are low cost. This truism of human nature presents challenges to class certification when the consumer is the indirect purchaser, *i.e.*, the consumer purchases the product at retail rather than directly from the manufacturer. Should putative class members get a "pass" on proving the sales transaction simply because the litigation is commenced by means of class action? Should courts certify classes against manufacturers when the reasons for and possible harm from retail purchasers may differ significantly among putative class members?

Ascertainability emerged as a prominent issue for class certification after *Carrera v. Bayer Corp.*[1] *Carrera* and its Third Circuit kin[2] set forth a two-part ascertainability test, requiring both that a "class must be currently and readily ascertainable based on objective criteria"[3] and that a reliable and administratively feasible method exists for determining whether putative class members fall within the class definition.[4]

The Circuits' Differing Treatment of Ascertainability

Despite having been the class action issue *de jour* in the past few years, Rule 23 does not expressly mention ascertainability. It is unsurprising, then, that circuit courts have approached ascertainability differently, so much so that at one point the issue seemed destined for Supreme Court review. The circuits do concur on the need to define a class using objective criteria. The difference hinges on their views on whether the plaintiff must also show "administrative feasibility" – or, the ability to feasibly ascertain the members of a class.

Carrera established a high bar, rejecting plaintiffs' argument that the putative class of Bayer One-A-Day WeightSmart diet supplement purchasers could be determined through affidavits and retail records of online sales and loyalty cards.[5] The Third Circuit ruled that "the plaintiff must demonstrate his purported method for ascertaining class members is reliable and administratively feasible, and permits a defendant to challenge the evidence used to prove class membership."[6] Proof through retail records was insufficient because there was no evidence that these records could identify purchasers or even that such records existed.[7] Similarly, the court criticized proposed self-identifying affidavits because plaintiff's own inconsistent deposition testimony suggested it was unlikely that class members would remember the transactions.[8] The

Third Circuit in *City Select*[9] tempered *Carrera* and declined to pronounce that ascertainability never could be established by self-identification affidavits.

Other circuits also require the heightened showing of an administratively feasible method of establishing class membership. Although unpublished, the Eleventh Circuit so ruled in *Karhu v. Vital Pharmaceuticals, Inc.*[10] – a putative class action alleging false advertising brought by purchasers of a weight loss supplement. In affirming the trial court's denial of class certification based on ascertainability, *Karhu* instructed that "the plaintiff must propose an administratively feasible method by which class members can be identified."[11] The Eleventh Circuit then echoed *Carrera's* reticence to certify a class shown by self-identification, "without first establishing that self-identification is administratively feasible and not otherwise problematic."[12] *Karhu* leaned on *Bussey v. Macon Cnty. Greyhound Park, Inc.*,[13] to counsel that identification of class members is administratively feasible when it is a "manageable process that does not require much, if any, individual inquiry."[14] The *Karhu* court was concerned that due process required that defendants be given the opportunity to challenge class membership in an administratively feasible manner.[15]

The Fourth Circuit also requires more than a class defined through objective criteria. *EQT Prod. Co. v. Adair*[16] involved five proposed class actions claiming the deprivation of royalty payments from the production of coalbed methane gas. Four of the five proposed classes included persons with interests in gas estates in property tracts that conflicted with interests owned by different persons in coal estates for those same tracts.[17] The Fourth Circuit first explained that "Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'"[18] While noting that not every class member must be identified during class certification, class members must be identifiable without resorting to "individualized fact-finding or 'mini-trials.'"[19] The *EQT* court concluded that it would be difficult to determine class membership based on the defendants' ownership schedules, as some had not been updated for decades, and local land records did not provide an easy method of determining ownership.[20] The Fourth Circuit remanded for the district court to reconsider ascertainability, among other Rule 23 issues.[21]

The First Circuit in *In re Nexium Antitrust Litigation*[22] paid homage to *Carrera*, and required an administratively feasible method of ascertaining class membership.[23] It nevertheless permitted self-identification affidavits as an administratively feasible method.[24] *Nexium* involved a putative class complaining about alleged agreements that prevented the market entry of a generic alternative to Nexium, an over-the-counter heartburn medicine.[25] Defendants argued against certification in part because the class would include both allegedly harmed persons and unharmed persons – those brand-loyal consumers who would choose to purchase Nexium at the same price even with a generic competitor.[26] *Nexium* confirmed that ascertainability requires that the class definition must be sufficiently definite so that it "allow[s] the class members to be ascertainable."[27] Relying on *Carrera*, *Nexium* explained that "the court must be satisfied that, prior to judgment, it will be possible to establish a mechanism for distinguishing the injured from the uninjured class members."[28] While deferring to *Carrera* on the need for administrative feasibility, *Nexium* concluded that it was administratively feasible to determine class membership through self-identifying affidavits.[29]

Other circuits disagree, concluding that Rule 23 contains no administrative feasibility requirement for determining class membership. Perhaps both the earliest and most developed opinion was that of the Seventh Circuit in *Mullins v. Direct Digital LLC*.[30] *Mullins* ruled that *Carrera's* heightened ascertainability requirement upset the balance of interests involved in class certification of a proposed class of dietary supplement purchasers.[31] While acknowledging some of *Carrera's* concerns, *Mullins* concluded that ascertainability in the Seventh Circuit is limited to class definitions that are "too vague or subjective, or when class membership [is] defined in terms of success on the merits (so-called 'fail-safe' classes)."[32]

The Sixth Circuit followed *Mullins* in *Rikos v. Procter and Gamble Co.*,[33] and ruled that ascertainability posed no obstacle to the certification of a class of purchasers of Align, a probiotic nutritional supplement that purportedly promoted digestive health.[34] In so doing, *Rikos* declined to follow *Carrera*, noting that membership in a class need not be determined with 100% accuracy.[35] Despite rejecting *Carrera,* the Sixth Circuit, in *Rikos*, noted that the factual circumstances presented were distinguishable from *Carrera*, as more than one-half

of the supplement sales were online, evidence that could be supplemented by customer membership records and physician statements.[36] The Sixth Circuit thus concluded that putative class members could be identified through traditional models and methods.[37]

The Eighth Circuit concurred with the Sixth and Seventh Circuits in *Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.*[38] *Sandusky* involved the unsolicited receipt of a fax transmission from the defendant. The Eighth Circuit noted that the "circuits diverge on the meaning of ascertainability,"[39] but deferred to the Seventh Circuit analysis in *Mullins* to conclude that a class only "'must be adequately defined and clearly ascertainable'" – dispensing with any administrative feasibility argument.[40]

The Ninth Circuit also distanced itself from *Carrera* in *Briseno v. ConAgra Foods, Inc.*,[41] declining to adopt a separate administrative feasibility prerequisite to class certification. *Briseno* involved classes of consumers in several states who allegedly purchased Wesson cooking oils labeled as "100% Natural."[42] Like *Mullins*, the Ninth Circuit recognized limited categories of class definition deficiencies, such as: 1) indefinite definitions; 2) vague definitions; and 3) fail-safe definitions.[43] The Ninth Circuit required only that the class be defined by objective criteria, as in whether class members had purchased the products.[44] It did acknowledge, however, that Rule 23 otherwise addressed *Carrera's* policy concerns.[45]

At one point, it looked as though the Second Circuit might follow *Carrera.*[46] Instead, in *In re Petrobras Securities Litigation*,[47] the Second Circuit ruled that "administrative feasibility. . . is neither compelled by precedent nor consistent with Rule 23."[48] The Second Circuit decided that ascertainability is established by showing that a proposed class is "defined using objective criteria that establish a membership with definite boundaries."[49] *Petrobras* took the position that *Carrera's* heightened test seemed to "duplicate Rule 23's requirement that district courts consider 'the likely difficulties in managing a class action,'" noting that "manageability is a component of the superiority analysis."[50] Thus, *Petrobras* did not discard *Carrera's* concerns entirely; it recategorized them in a different Rule 23 compartment.

Most recently, the Fifth Circuit in *Seeligson v. Devon Energy Prod. Co., L.P.*,[51] declined to adopt *Carrera's* heightened ascertainability standard. Instead, *Seeligson* ruled that "a party need only demonstrate – 'at some stage of the proceeding' – that the class is 'adequately defined and clearly ascertainable.'"[52] In contrast to *EQT Prod.*, the Fifth Circuit ruled that public records provided sufficient objective criteria from which to identify royalty owners in Texas wells producing natural gas processed by defendant.[53] These decisions certainly suggest that ascertainability is a function of the circuit in which a case is pending. The Third Circuit inquiry definitely will be more searching, while the inquiry in other circuits is limited. The circuit split, however, is not the entire story, as the factual premise for determining the parameters of the class also is important. The reliability of evidence for different product transactions varies. To be sure, it may be difficult to factually harmonize *Carrera* with *Mullins*. On the other hand, *Rikos* involved proof other than self-identification, with significant numbers of online sales and physician statements.[54] Even *Petrobras* would agree that the facts of the transaction (*i.e.*, cost of product, how and where distributed and product differentiation) could impact a class action's manageability. Therefore, to some extent, the specifics of the underlying transaction will impact class certification, in some instances possibly transcending the "circuit split." Thus, in the First Circuit – where a showing of administration feasibility is required – a court may find that ascertainability is satisfied with minimal proof. Or, in the Second Circuit – where manageability is an alternative focus – a court could decline to certify if proof of the transactions is overwhelmingly difficult.

Denial of Class Certification on Ascertainability Alone

Given that ascertainability is at least to some extent factually based, it is worthwhile to explore decisions denying certification on ascertainability alone, even if they are older and precede a circuit court declining to adopt the heightened administrative feasibility standard.

By way of example, in *Stewart v. Beam Global Spirits & Wine, Inc.*,[55] the District of New Jersey denied certification for a class of indirect purchasers of Skinny Girl margarita mixes.[56] The plaintiffs had moved to certify three putative classes, two of which (express warranty and unjust enrichment) included purchasers in over 30 states.[57] The proposed method for ascertaining the classes was a process that included either a claim form or receipt.[58] Putative class members without a receipt would submit an affidavit stating the dates of purchase,

retailer and approximate price and description of the bottle.[59] Additional review would determine whether the bottle was accurately described and whether the retailer carried the product at the approximate price stated in the affidavit.[60] The district court concluded that, although the classes were adequately defined, plaintiffs failed to show an administratively feasible method of establishing class membership.[61] The proposed method would not detect the use of a single receipt for multiple claims or fraudulent receipts.[62] Moreover, the court criticized self-identification because of the difficulty that the named plaintiffs had in remembering details of their own purchases.[63] Thus, the process involved a faulty methodology – one that was nearly impossible to disprove and that would challenge claims administrators.

Stewart relied in part on *Weiner v. Snapple Beverage Corp.*[64] In *Weiner*, a pre-*Petrobras* decision, the Southern District of New York suggested that a putative class of New York Snapple purchasers suing for "All Natural" mislabeling was not ascertainable, declining to embrace a post-certification procedure that included the production of a receipt or declaration, given the inherent unreliability of consumer memories about beverage purchases.[65] Suggesting that the Second Circuit is open to exploring diverse factual settings, rather than overruling *Weiner*, *Petrobras* offered that *Weiner* employed a "fact-based" analysis, and denied certification based on predominance, rather than administrative feasibility.[66] Accordingly, *Weiner's* fact-based analysis arguably retains persuasive value, even if *Petrobras* dispensed with administrative feasibility.

A pre-*Briseno* decision – *Sethavanish v. ZonePerfect Nutrition Co.*[67] – ruled that, while class members need not be identified at the class certification stage, the plaintiff must present a plan for identification before a class of indirect purchasers can be certified.[68] *Sethavanish* involved a proposed nationwide class of indirect purchasers of "all natural" nutrition bars from both stores and online retailers.[69] The court reasoned that for class membership to be ascertainable, "[t]he class definition must be sufficiently definite so that it is administratively feasible to determine whether a particular person is a class member."[70] Because no effort had been made to present a method for determining class membership, the court could not find ascertainability.[71] *Sethavanish* has been criticized,[72] but post-*Briseno* decisions suggest that some courts still embrace its rationale.[73]

Ascertainability as One Factor Considered in Class Certification

More common than the denial of class certification based on ascertainability alone is its denial on multiple grounds, including ascertainability. Considering more than one factor can provide "cover" to preserve a district court decision, even in circuits that do not require administrative feasibility.

In *In re Clorox Consumer Litig.*,[74] a pre-*Briseno* decision, the Northern District of California denied class certification for Fresh Step cat litter purchasers claiming false advertising. Plaintiffs did not propose a method for discerning who purchased the products.[75] Citing *Carrera*, the court viewed self-identifying affidavits with disfavor, since the named plaintiffs themselves could not remember their purchases.[76] Plaintiffs suggested that the information might be obtained through retailers, but some identified retailers did not cooperate and others had insufficient information.[77] Notably, a manufacturers' loyalty program identified only a small percentage of purchasers.[78] The court also denied certification based on superiority and commonality.[79]

The Northern District of California criticized plaintiffs' failure to propose a feasible method for ascertaining class membership in *Herskowitz v. Apple, Inc.*,[80] but fell short of denying certification based on the proposed methodology by itself. Instead, the court denied certification in part because individual issues would predominate the proceeding.[81]

Against the backdrop of similar arguments, the Eastern District of New York denied certification for a putative class of vitamin C supplements purchasers in the pre-*Petrobras* case *Hughes v. Ester C Co.*[82] Plaintiffs had alleged that health promises for certain vitamin C supplements were misleading. The court found that plaintiffs did not sustain their burden on ascertainability because there was no basis for finding that class members would retain a receipt, label or documentation of their purchase.[83] In addition, the Ester C intellectual property was licensed to 150 other companies, making it virtually impossible to determine which companies were licensed.[84] The court also found that common questions did not predominate under Rule 23(b)(3).[85] After *Petrobras*, the district court revisited the changes in Second Circuit law on reconsideration, but again denied certification because plaintiffs had not established a methodology that reliably would measure damages on a classwide basis.[86]

Similarly, in *Dapeer v. Neutrogena Corp.*,[87] in which plaintiffs claimed that Neutrogena misled consumers about Beach Defense Broad Spectrum SPF 70 Lotion's solar protection, the Southern District of Florida concluded both that the plaintiffs failed to satisfy ascertainability, and that the plaintiffs did not establish typicality.[88] The court added that the plaintiffs' proposal to subpoena retail records was not feasible.[89] Self-identifying affidavits would be unreliable and would not allow for the identification of uninjured purchasers.[90]

Following *Briseno*, the Southern District of California addressed ascertainability in *Conde v. Sensa*,[91] a weight loss product class action. The court noted that 84% of the class purchased from a website and their claims might be subject to arbitration.[92] Moreover, the class did not exclude purchasers who had already received refunds from a separate FTC settlement.[93] The court, however, did not rely on ascertainability grounds alone, also denying certification on predominance and superiority grounds.[94]

Bruton v. Gerber Foods Co.[95] also is instructive on *Briseno's* impact. *Bruton* was a class action alleging mislabeling of Gerber baby products.[96] The Ninth Circuit reversed the district court's prior denial of class certification on ascertainability grounds,[97] concluding that *Briseno* foreclosed a separate administrative feasibility requirement.[98] On remand, the district court denied certification again, concluding that the plaintiff lacked standing to pursue injunctive relief because the labels were changed years ago.[99] The district court also found that common questions did not predominate because plaintiff's damages theories did not differentiate between the various labels on the product.[100]

Ascertainability Through Self-Identification

A number of courts have certified food and cosmetic mislabeling classes in the face of administrative feasibility arguments, allowing putative class members to self-identify product purchases through affidavits. Indeed, self-identification is the most common method relied on to certify indirect purchaser classes in food and cosmetic class actions. Courts justify self-identification as a method of determining class membership because, without it, recovery by class action might not be pursuable.[101] These courts have acknowledged that it is unrealistic to expect consumers to retain receipts and that the absence of receipts should not preclude class certification.

Courts have used self-identifying affidavits to determine membership in classes, particularly when the purchase is likely to be memorable.[102] By way of example, *Pecover v. Electronic Arts Inc.*[103] involved a price-fixing scheme for purchasers of three specific video games on different gaming consoles. The Northern District of California found that the proposed class could self-identify with affidavits, reasoning that proposed class members could be identified with "little difficulty."[104] The court concluded that arguing that purchasers should remember purchasing one of the three video games during the self-identification was satisfactory.[105]

In *In re ConAgra Foods, Inc.*,[106] the Central District of California held that affidavits could be used to identify a class of indirect purchasers of 100% natural oil products. Even before *Briseno*, the court reasoned that *Carrera* was not Ninth Circuit law.[107] It suggested that the Ninth Circuit required only that a class definition describe a set of common characteristics that allow the consumer to identify himself or herself as having the right to recover.[108] The court relied on the uniformity of the labeling, *i.e.*, that every putative class member had been exposed to the labeling representations.[109] It was of no moment that the class as defined included persons not deceived by the labels.[110] *ConAgra* ultimately denied class certification without prejudice to allow the plaintiffs to address predominance deficiencies.[111]

The Second Circuit Court of Appeals concurred in *Langan v. Johnson & Johnson Consumer Cos.*,[112] suggesting that affidavits alone were sufficient because consumers would have little difficulty remembering purchases relating to their child's infancy and that defendants' identification concerns were overstated.[113] *Langan* also noted that *Petrobras* essentially foreclosed defendant's administrative feasibility argument.[114]

Ascertainability Through Customer Loyalty Membership Programs

Many retailers and some manufacturers track purchases through loyalty membership programs. Plaintiffs have argued that these membership programs provide a means of establishing class membership. To be sure, a loyalty program may identify purchasers that have enrolled in the loyalty program but, to state the obvious, it cannot identify unenrolled purchasers. Nor will it identify purchases transacted without a card by an enrolled member. Moreover, a given product may be sold through multiple retailers, such as through

retail pharmacies, liquor stores, specialty retailers and vending machines. Loyalty programs are ineffective at identifying sales at all retail outlets where the product is offered and thus rarely is a means of establishing class membership with precision.

Loyalty programs were criticized in *In re Simply Orange Juice Mktg. & Sales Practices Litig.*[115] The *Simply Orange* court was willing to certify the class through self-identification, but was reluctant to sanction loyalty programs as a method. It explained:

> [T]here is no indication that plaintiffs have contacted any of the relevant third parties to obtain such information in this case to-date. Moreover, there may be privacy concerns with opening up such data to plaintiffs. Furthermore, such a class would be under-inclusive of people who did not use customer loyalty or frequent shopper cards, or people who purchased from retailers who do not keep such records.[116]

The court certified three classes through self-identification evidence.[117]

As noted, *In re Clorox Consumer Litig.*[118] concluded that membership and loyalty cards had limited utility for ascertainability. While the loyalty card program collected purchase information for consumers who had purchased with the card, the program recorded only the consumer's address, not the date or location of purchase.[119] Some state consumer fraud statutes, however, apply only to residents or purchases occurring within the state. The court criticized the loyalty programs as representing only a small portion of total product sales.[120]

In *Carrera*,[121] the plaintiffs argued that ascertainability in part could be satisfied by a retail loyalty membership program and in part through by self-identification. The Third Circuit acknowledged that – depending on the facts – retailer records could work.[122] Plaintiffs, however, had failed to provide evidence that any purchasers of the weight loss supplement at issue could be so identified.[123]

By contrast, in *Rikos v. Procter & Gamble Co.*,[124] the Sixth Circuit approved customer membership programs and online sales as a method of establishing class membership. But in *Rikos*, more than one-half of the sales were consummated online, and those sales records would show the names and shipping addresses of purchasers.[125] And, since physicians recommended the supplement, the purchase could be verified through requests for a physician's statement for the customer.[126] These methods could be supplemented by receipts and affidavits.[127]

Ascertainability Through Proof of Purchase

Receipts remain the gold standard to prove purchases, and courts also have discussed this method of determining class composition. In *In re Digital Music Antitrust Litigation*,[128] the court's pre-*Petrobras* requirement of proof of purchase turned on the nature of the product and sale. In *Digital Music*, indirect purchasers of digital music alleged antitrust violations and defined two classes as including purchasers who had downloaded music in eight states and the District of Columbia.[129] Although the court denied class certification on other grounds, it held that the plaintiffs had demonstrated proof of purchase through credit card payments, confirmation emails, records of the digital retailers and the digital file itself.[130] Plaintiffs provided supporting evidence, through expert testimony, that e-retailers keep meticulous records of sales.[131]

In *Kurtz v. Kimberly-Clark Corp.*,[132] the Eastern District of New York certified a class of purchasers despite the lack of proof of purchase of Scott Flushable Wipes. Plaintiffs sued for false advertising, contending that the wipes were not "flushable."[133] The court in *Kurtz* focused on the nature of the alleged mislabeling as indicative of whether proof of purchase was necessary.[134] While finding that affidavits could establish proof of purchase, the court found that Costco kept records of purchases and most residents in the district owned a computer.[135] Thus, the court felt that proof of purchases was not wholly impossible, although not necessarily required.

By contrast, the Eleventh Circuit in *Karhu v. Vital Pharmaceuticals, Inc.*[136] ruled that ascertainability was not established based on the manufacturer's "sales data," because the sales data was for sales to distributors and third party retailers, and plaintiffs did not propose to identify the class by subpoenaing the retailers.[137] The Eleventh Circuit affirmed the district court's ascertainability analysis which addressed sua sponte the use

of receipts and affidavits.[138] The district court "rejected the receipts-based method on grounds that [the] low cost meant most class members would not retain their proof of purchase."[139]

Conclusion

It is tempting to conclude that the analysis of ascertainability in indirect purchaser class actions solely is a function of the circuit in which the case is brought – and it certainly is a significant factor. On the other hand, ascertainability also depends on the nature of the product, its price, the nature and changes in the labeling involved, the nature of the sales transactions, the nature of the records maintained and the number and type of retailers and points of sale. Even in circuits where courts are more receptive to class certification, courts can be troubled by shortcuts to identifying a class of indirect purchasers. Similar types of products, such as over-the-counter medications or supplements, can present differing landscapes for establishing class composition. Self-identification of purchases through affidavits remains an option, but one slanted with bias toward class certification. Ultimately, and regardless of how the analysis takes place, courts should embark on a searching inquiry on how the putative class will prove the sales transactions for indirect purchasers under Rule 23.

Endnotes

1. 727 F.3d 300 (3d Cir. 2013).
2. *Marcus v. BMW of North America, LLC*, 687 F.3d 583 (3d Cir. 2012); *Byrd v. Aaron's Inc.*, 784 F.3d 154 (3d Cir. 2015); *City Select Auto Sales, Inc. v. BMW Bank of North America, Inc.*, 867 F.3d 434 (3d Cir. 2017).
3. *Carrera*, 727 F.3d at 305; *Marcus*, 687 F.3d at 593.
4. *Byrd*, 784 F.3d at 166.
5. 727 F.3d at 304.
6. 727 F.3d at 308.
7. 727 F.3d at 308-09.
8. 727 F.3d at 309.
9. 867 F.3d at 440-42.
10. 621 F. App'x 945 (11th Cir. 2015).
11. *Id.* at 947.
12. *Id.* at 948.
13. 562 F. App'x 782 (11th Cir. 2014).
14. *Id.* at 787.
15. 621 F. App'x at 948-49.
16. 764 F.3d 347 (4th Cir. 2014).
17. 764 F.3d at 355.
18. *Id.* at 358.
19. *Id.*
20. *Id.* at 359.
21. *Id.* at 371. On remand, changes to Virginia law after the Fourth Circuit appeal simplified the analysis and the district court certified three of five classes for at least some of the causes of action asserted. *Adair v. EQT Prod. Co.*, 320 F.R.D. 379 (W.D. Va. 2017).
22. 777 F.3d 9 (1st Cir. 2015).
23. *Id.* at 19.
24. *Id.* at 20.
25. *Id.* at 13-14.
26. *Id.* at 17.
27. *Id.* at 19.
28. *Id.*
29. *Id.* at 20-21.
30. 795 F.3d 654 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016).
31. *Id.* at 658.
32. *Id.* at 657.

33. 799 F.3d 497 (6th Cir. 2015).

34. *Id.* at 525.

35. *Id.* at 525-26, citing *Young v. Nationwide Mutual Insurance Co.*, 693 F.3d 532, 539 (6th Cir. 2012).

36. *Id.* at 526-27.

37. *Id.* at 527.

38. 821 F.3d 992 (8th Cir. 2016).

39. *Id.* at 995.

40. *Id.* at 996.

41. 844 F.3d 1121, 1123 (9th Cir.), *cert. denied*, 138 S. Ct. 313 (2017).

42. *Id.* at 1123.

43. *Id.* at 1124 nn.3 & 4.

44. *Id.* at 1124. *See also True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 929 (9th Cir. 2018). *Clay v. Cytosport, Inc.,* No. 3:15-cv-00165-L-AGS, 2018 WL 4283032, at *3, 2018 U.S. Dist. LEXIS 153124, at *7-8 (S.D. Cal. Sept. 7, 2018).

45. *Briseno*, 844 F.3d at 1133.

46. *See Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015)(acknowledging that Rule 23 included an implied ascertainability requirement).

47. 862 F.3d 250 (2d Cir. 2017).

48. *Id.* at 264.

49. *Id.*

50. *Id.* at 268.

51. 761 F. App'x 329 (5th Cir. 2019).

52. *Id.* at 334.

53. *Id.*

54. 799 F.3d at 526-27.

55. No. 11-5149, 2015 WL 3613723, 2015 U.S. Dist. LEXIS 74116 (D.N.J. June 9, 2015).

56. 2015 WL 3613723 at *1, 2015 U.S. Dist. LEXIS 74116 at *1-3.

57. 2015 WL 3613723 at *1-2, 2015 U.S. Dist. LEXIS 74116 at *3-5.

58. 2015 WL 3613723 at *6, 2015 U.S. Dist. LEXIS 74116 at *17.

59. 2015 WL 3613723 at *7, 2015 U.S. Dist. LEXIS 74116 at *17.

60. 2015 WL 3613723 at *7, 2015 U.S. Dist. LEXIS 74116 at *18.

61. 2015 WL 3613723 at *11, 2015 U.S. Dist. LEXIS 74116 at *32-33.

62. 2015 WL 3613723 at *11, 2015 U.S. Dist. LEXIS 74116 at *34.

63. 2015 WL 3613723 at *12, 2015 U.S. Dist. LEXIS 74116 at *35-37.

64. No. 07-Civ-8742 (DLC), 2010 WL 3119452, 2010 U.S. Dist. LEXIS 79647 (S.D.N.Y. Aug. 5, 2010).

65. 2010 WL 3119452 at *13, 2010 U.S. Dist. LEXIS 79647 at *40-42.

66. *Petrobras*, 862 F.3d at 267 n.18.

67. No. 12-2907-SC, 2014 WL 580696, 2014 U.S. Dist. LEXIS 18600 (N.D. Cal. Feb. 13, 2014).

68. 2014 WL 580696 at *5, 2014 U.S. Dist. LEXIS 18600 at *17.

69. 2014 WL 580696 at *1-2, *1-2, 2014 U.S. Dist. LEXIS 18600 at *5.

70. 2014 WL 580696 at *4, 2014 U.S. Dist. LEXIS 18600 at *13 (quoting *Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 482 (N.D. Cal. 2011)).

71. 2014 WL 580696 at *6, 2014 U.S. Dist. LEXIS 18600 at *17-18.

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

73. *See Wortman v. Air New Zealand*, 326 F.R.D. 549, 561 n.10 (N.D. Cal. 2018)(acknowledging memory problems for indirect purchasers of low cost items, but concluding those concerns were inapplicable); *Morales v. Leggett & Platt, Inc.*, No. 2:15-CV-01911-JAM-EFB, 2018 WL 1638887 at *2, 2018 U.S. Dist. LEXIS 58480 at *5-6 (E.D. Cal. Apr. 5, 2018).

74. 301 F.R.D. 436 (N.D. Cal. 2014).

75. *Id.* at 441.

76. *Id.* at 440-41.

77. *Id.* at 441.

78. *Id.*

79. *Id.* at 442, 449.

80. 301 F.R.D. 460, 480 n.17 (N.D. Cal. 2014).

81. *Id.* at 469, 471-73, 480-81.

82. 317 F.R.D. 333 (E.D.N.Y. 2016).

83. *Id.* at 349.

84. *Id.* at 350.

85. *Id.* at 356.

86. *Hughes v. The Ester C Co., NBTY, Inc.*, 320 F.R.D. 337, 342 (E.D.N.Y. 2017).

87. No. 14-22113-Civ-Cooke/Torres, 2015 WL 10521637, 2015 U.S. Dist. LEXIS 177097 (S.D. Fla. Dec. 1, 2015).

88. 2015 WL 10521637 at *11-13, 2015 U.S. Dist. LEXIS 177097 at *32, *35, *37.

89. 2015 WL 10521637 at *7-8, 2015 U.S. Dist. LEXIS 177097 at *21-23.

90. *Id.*

91. No. 14-cv-51 JLS WVG, 2018 WL 4297056, 2018 U.S. Dist. LEXIS 154031 (S.D. Cal. Sept. 10, 2018).

92. 2018 WL 4297056 at *16, 2018 U.S. Dist. LEXIS 154031 at *50-51.

93. 2018 WL 4297056 at *17, 2018 U.S. Dist. LEXIS 154031 at *51.

94. 2018 WL 4297056 at *17, 2018 U.S. Dist. LEXIS 154031 at *52.

95. No. 12-cv-02412-LHK, 2018 WL 1009257, 2018 U.S. Dist. LEXIS 30814 (N.D. Cal. Feb. 13, 2018).

96. 2018 WL 1009257 at *1, 2018 U.S. Dist. LEXIS 30814 at *1.

97. 2018 WL 1009257 at *3, 2018 U.S. Dist. LEXIS 30814 at *7-8. *See also Bruton v. Gerber Foods Co.*, No. 12-cv-02412-LHK, 2014 WL 2860995, 2014 U.S. Dist. LEXIS 86581 (N.D. Cal. June 23, 2014); *Bruton v. Gerber Foods Co.*, 703 F. App'x 468 (9th Cir. 2017).

98. 2018 WL 1009257 at *3, 2018 U.S. Dist. LEXIS 30814 at *7-8.

99. 2018 WL 1009257 at *6, 2018 U.S. Dist. LEXIS 30814 at *19-20.

100. 2018 WL 1009257 at *5, 2018 U.S. Dist. LEXIS 30814 at *35.

101. *See Goldemberg v. Johnson & Johnson Consumer Cos.*, 317 F.R.D. 374, 398 (S.D.N.Y. 2016) ("denial of class certification in consumer protection cases . . . on the basis of ascertainability would severely contract the class action mechanism as a means for injured consumers to seek redress under statutes specifically designed to protect their interests"); *McCrary v. Elations Co., LLC*, No. EDCV 13-00242 JGB (OPx), 2014 WL 1779243 at *7-8, 2014 U.S. Dist. LEXIS 8443 at *22 (C.D. Cal. Jan. 13, 2014).

102. *See Wolf v. Hewlett Packard Co.*, No. CV 15-01221 BRO (GJSx), 2016 WL 7743692 at *10, 2016 U.S. Dist. LEXIS 181822 at *25-26 (C.D. Cal. Sept. 1, 2016).

103. No. C 08-2820 VRW, 2010 WL 8742757, 2010 U.S. Dist. LEXIS 140632 (N.D. Cal. Dec. 21, 2010).

104. 2010 WL 8742757 at *9, 2010 U.S. Dist. LEXIS 140632 at *24.

105. 2010 WL 8742757 at *9, 2010 U.S. Dist. LEXIS 140632 at *24-25. *See also Krueger v. Wyeth, Inc.*, 310 F.R.D. 468, 476 (S.D. Cal. 2015) (in class action against companies selling hormone replacement drugs, court ruled that even if affidavits are the only way to ascertain class members, they are a feasible method); *Ries v. Ariz. Bevs. USA LLC*, 287 F.R.D. 523 (N.D. Cal. 2012) (AriZona iced tea mislabeling case where the court found that class definition allowed for administrative feasibility, despite plaintiffs' inconsistent memory of purchases); *Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 539 (E.D.N.Y. 2017) ("Because it is unlikely that consumers will retain receipts, plaintiff may rely on affidavits for those without a receipt.").

106. 302 F.R.D. 537, 579-81 (C.D. Cal. 2014) (Class certification was denied on grounds of predominance), *modified*, 90 F. Supp. 3d 919, 1033, 1035 (C.D. Cal. 2015), *aff'd in part*, 844 F.3d 1121 (9th Cir. 2017).

107. *ConAgra Foods*, 302 F.R.D. at 566.

108. *Id.*

109. *ConAgra Foods* quoted cases where class certification was denied because the misrepresentation was not uniform or there were consumers who were not actually exposed to the misrepresentation. 302 F.R.D. at 568. *See Algarin v. Maybelline LLC,* 300 F.R.D. 444, 455 (S.D. Cal. 2014); *Red v. Kraft Foods, Inc.,* No. CV 10-1028-GW(AGRx), 2012 WL 8019257 at *4-5, 2012 U.S. Dist. LEXIS 186948 at *13-15 (C.D. Cal. Apr. 12, 2012).

110. The court in *ConAgra Foods* relied on multiple cases for the proposition that a class must have common characteristics to be ascertainable. 302 F.R.D. at 565-66. *See Forcellati v. Hyland's, Inc.*, No. CV 12-1983-GHK (MRWx), 2014 WL 1410264 at *5, 2014 U.S. Dist. LEXIS 50600 at *13 (C.D. Cal. Apr. 9, 2014); *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617 (1997); *McCrary*, 2014 WL 1779243 at *8, 2014 U.S. Dist. LEXIS 8443 at *24-25.

111. 302 F.R.D. at 581.

112. 897 F.3d 88 (2d Cir. 2018).

113. *Id.* at 91-92. *Langan* cited *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014), a class action involving the purchase of olive oil. The court felt confident that if a consumer could be trusted to remember an olive oil purchase, they would remember purchasing items for their infant. 897 F.3d at 91-92 n.2. *See also Price v. L'Oreal*, No. 17 Civ. 614 (LGS), 2018 WL 3869896 at *4, 2018 U.S. Dist. LEXIS 138473 at *11 (S.D.N.Y. Aug. 15, 2018) (The Southern District of New York echoed the sentiment of removing administrative feasibility as a requirement for ascertainability, requiring only objective criteria. The court mentions in a brief parenthetical self-identification as a means for ascertainability; the boundaries of "whether an individual purchased a Product during the class period" was sufficiently objective.) *Id. See also Singleton v. Fifth Generation, Inc.*, No. 5:15-CV-474 (BKS/TWD), 2017 WL 5001444 at *14, 2017 U.S. Dist. LEXIS 170415 at *41-42 (N.D.N.Y. Sept. 27, 2017) (The court held in a case mislabeling vodka as 'Handmade' that personal affidavits, receipts, rewards cards, and credit cards all met the "modest ascertainability requirement." Quoting *Petrobras*, the court concluded that proof of class membership is not required). *Id.*

114. 897 F.3d at 91-92 n.2.

115. No. 4:12-md-02361-FJG, 2017 WL 3142095, 2017 U.S. Dist. LEXIS 114806 (W.D. Mo. July 24, 2017), *vacated*, 2018 WL 3589456, 2018 U.S. Dist. LEXIS 127060 (W.D. Mo. Apr. 26, 2018).

116. 2017 WL 3142095 at *3, 2017 U.S. Dist. LEXIS 114806 at *16 n.5. *But see In re: Tropicana Orange Juice Mktg. & Sales Practices Litig.*, No. 2:11-07382; MDL 2353, 2018 WL 497071, 2018 U.S. Dist. LEXIS 9797 (D.N.J. Jan. 22, 2018) (In a strikingly similar case, the District of New Jersey denied class certification. It ruled that, despite the proposed use of an expert's computer program synthesizing loyalty card numbers and personal information to cross-check retailers' customer records, plaintiffs had not

shown that they could identify all or even most of the putative class members to ascertain the class.). 2018 WL 497071 at *9, *11-12, 2018 U.S. Dist. LEXIS 9797 at *28-30, *36-38.

117. 2017 WL 3142095 at *4, 2017 U.S. Dist. LEXIS 114806 at *17.

118. 301 F.R.D. at 441.

119. *Id.*

120. *Id.*

121. 727 F.3d at 308.

122. *Id.*

123. *Id.* at 309.

124. 799 F.3d 497, 526-27 (6th Cir. 2015).

125. *Id.* at 527.

126. *Id.*

127. *Id.*

128. 321 F.R.D. 64 (S.D.N.Y. 2017) (class certification denied on typicality grounds).

129. *Id.* at 72.

130. *Id.* at 90.

131. *Id.*

132. 321 F.R.D. at 539.

133. *Id.* at 492-93.

134. *Id.* at 539.

135. *Id.*

136. 621 F. App'x 945 (11th Cir. 2015).

137. *Id.* at 949.

138. *Id.* at 946-47.

139. *Id.* at 947. *See also Wasser v. All Market, Inc.*, 329 F.R.D. 464, 474 (S.D. Fla. 2018) (noting that receipts would be adequate, but "unlikely to capture more than a handful of class members."). ■

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