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The International Comparative Legal Guide to:

Class & Group Actions 2015

7th Edition

A practical cross-border insight into class and group actions work

Published by Global Legal Group, in association with CDR, with contributions from:

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London SE1 3PL, UK
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Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Information Press Ltd
October 2014

ISBN 978-1-910083-19-2
ISSN 1757-2797

Strategic Partners

MIX
Paper from responsible sources
FSC® C013262

General Chapters:

Country Chapters:

Chapter 5

Class Action Updates and Developments: The Ascertainability Requirement and Motions to Strike Class Allegations

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Although the results are still mixed, many courts in recent years have become more sceptical about allowing class actions to proceed where the identity of the class members and their alleged harm is obscure, and more open to striking unsupported class allegations in the early stages of litigation.

Federal courts have demonstrated an increased willingness to deny motions for class certification for lack of "ascertainability" of putative class members – particularly where certification is sought on behalf of consumers of products for which proof of individual purchase is lacking. In doing so, courts routinely rely on the Third Circuit's opinions in *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583 (3d Cir. 2012), and *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), *reh'g denied*, No. 12-2621, 2014 WL 3887938 (3d Cir. May 2, 2014), in which class certification was denied because plaintiffs had not demonstrated that class members were "'readily ascertainable based on objective criteria'". *Carrera*, 727 F.3d at 305 (quoting *Marcus*, 687 F.3d at 592-93). Some courts, on the other hand, have declined to follow the Third Circuit's reasoning, concluding that "[i]f class actions could be defeated because membership was difficult to ascertain at the class certification stage, 'there would be no such thing as a consumer class action'". *Astiana v. Kashi Co.*, 291 F.R.D. 493, 500 (S.D. Cal. 2013) (quoting *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 536 (N.D. Cal. 2012)).[1]

Defendants also are increasingly invoking cases such as *Carrera* to strike class allegations in the early stages of litigation, pointing to a lack of ascertainability and other potential bars to certification that are evident from plaintiffs' pleadings. Historically, motions to strike class allegations have met with mixed results from courts. *Compare John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) ("Where it is facially apparent from the pleadings that there is no ascertainable class, a district court may dismiss the class allegation on the pleadings."), *with Luppino v. Mercedes-Benz USA, LLC*, No. 09-CV-5582, 2013 WL 6047556, at *7 (D.N.J. Nov. 12, 2013) (denying motion to strike class allegations for lack of ascertainability as "premature", because "[d]ismissal of class claims prior to discovery and a motion to certify the class by plaintiff is the exception rather than the rule").

This chapter outlines the standards for both ascertainability and motions to strike class allegations, and examines recent case law interpreting and applying these standards.

The Ascertainability Requirement for Class Certification

Defendants have a constitutional right under the Due Process Clause "to raise individual challenges and defenses to claims" and "[a]scertainability provides due process by requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership". *Carrera*, 727 F.3d at 307. Thus, although the Federal Rule of Civil Procedure governing class actions (Rule 23) "does not expressly require that a class be definite in order to be certified, . . . courts have implied a requirement that a class be identifiable before it may be properly certified". *Friedman-Katz v. Lindt & Sprungli (USA), Inc.*, 270 F.R.D. 150, 154 (S.D.N.Y. 2010). This "ascertainability" requirement for class certification eliminates "serious administrative burdens that are incongruous with the efficiencies expected in a class action", protects absent class members by facilitating the "best notice practicable" in a Rule 23(b)(3) action, and protects defendants by ensuring that those who will be bound by the final judgment are identifiable. *Marcus*, 687 F.3d at 593 (citations omitted).

Ascertainability requires that it be "administratively feasible for the Court to determine whether a particular individual is a member of the proposed class. Furthermore, for a class to be sufficiently defined, the identity of the class members must be ascertainable by reference to objective criteria". *Cima v. WellPoint Health Networks, Inc.*, 250 F.R.D. 374, 377-78 (S.D. Ill. 2008) (citations omitted); *see also*, *e.g.*, *Carrera*, 727 F.3d at 305 ("[A]n essential prerequisite of a class action . . . is that the class must be currently and readily ascertainable based on objective criteria. If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials', then a class action is inappropriate.") (internal quotation omitted).

The Third Circuit's decision in *Marcus* is instructive. There, plaintiff asserted consumer fraud, breach of warranty, and breach of contract claims "on behalf of all purchasers and lessees of certain model-year BMWs equipped with Bridgestone RFTs [run-flat tires] sold or leased in New Jersey with tires that 'have gone flat and been replaced'". 687 F.3d at 588. Reversing the District of New Jersey's certification of the class, the Third Circuit explained that putative class members were not "readily ascertainable based on objective criteria". *Id.* at 593. Recognising that "BMW could not know which of the vehicles that fit the class definition had Bridgestone RFTs", and that "even if the proper cars with the proper tires could be identified,

defendants' records would not indicate whether all potential class members' Bridgestone RFTs 'have gone flat and been replaced'", the court "caution[ed] . . . against approving a method [of ascertaining class members] that would amount to no more than ascertaining by potential class members' say so. . . . Forcing BMW and Bridgestone to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications". *Id*. at 593-94.

The Third Circuit again addressed the ascertainability requirement in *Carrera*. There, the plaintiff asserted consumer fraud claims and sought "certification of a class of consumers who purchased Bayer's One-A-Day WeightSmart diet supplement in Florida". 727 F.3d at 303. Relying on *Marcus*, the Third Circuit explained:

> "A plaintiff does not satisfy the ascertainability requirement if individualized fact-finding or mini-trials will be required to prove class membership. Administrative feasibility means that identifying class members is a manageable process that does not require much, if any, individual factual inquiry. . . . [T]o satisfy ascertainability as it relates to proof of class membership, 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."

Id. at 307-08 (citations omitted). The court accordingly rejected both of plaintiff's proposed methods for ascertaining class members – retailer records and class member affidavits – as failing to satisfy these criteria. *Id*. at 308-09. "[T]here [was] no evidence that a single purchaser of WeightSmart could be identified using records of customer membership cards or records of online sales", and the proposed affidavits would deny defendants of the opportunity "to challenge class membership", of particular importance "where the named plaintiff's deposition testimony suggested that individuals will have difficulty accurately recalling their purchases of WeighSmart". *Id*. at 309. Accordingly, the court reversed the district court's certification of the class. *Id*. at 312. Recently, the Third Circuit underscored that ascertainability is distinct from "predominance", and focuses on "whether objective records could readily identify class members". *Grandalski v. Quest Diagnostics Inc.*, No. 13-4329, slip op. at 19-20 (3d Cir. Sept. 11, 2014) (upholding denial of certification where "individual inquiries would be required" and "[s]uch specific evidence is incompatible with representative litigation").

District courts have applied *Marcus* and *Carrera* to deny certification of consumer classes where proof of purchases is lacking. For example, the District of New Jersey recently denied certification of a class of consumers of defendants' "Skinnygirl Margarita" beverages:

> "Plaintiffs' only suggested method for ascertaining the putative class members here rests entirely on the submission of affidavits . . . . Without any independently verifiable proof of purchase through receipts, retail records, or otherwise, the Court finds it unlikely that putative class members will accurately remember every Skinnygirl Margarita purchase they made during the class period, let alone where these purchases were made and the prices they paid each time. Given the general inaccuracies of individuals' memories, the submission of affidavits supplying such information would be very likely to invite speculation, or worse, not to mention that this process would result in an extremely burdensome task for the Court or a claim administrator attempting to verify class members' claims. . . . While the proposed class definitions appear to be based on objective criteria, i.e., who made purchases of Skinnygirl Margarita during a specified time frame, Plaintiffs' only proposed method for identifying class members relies on the completely subjective information provided by individuals claiming entitlement to class relief."

Stewart v. Beam Global Spirits & Wine, Inc., No. 11-5149, 2014 WL 2920806, at *3-4, *7 (D.N.J. June 27, 2014); *see also*, *e.g.*, *Byrd v. Aaron's, Inc.*, No. 11-101E, 2014 WL 1316055, at *4 (W.D. Pa. Mar. 31, 2014) (denying class certification for lack of ascertainability because determining class membership involved "exactly the kind of intense factual inquiries that *Marcus* dictates be avoided").

Likewise, courts in other jurisdictions have followed the reasoning of the Third Circuit to reject class certification where ascertainability is lacking. For example, courts have:

- Reversed class certification where "the proposed classes raise serious ascertainability issues because they are defined to include both former and current gas estate owners" who could not be easily identified by "ownership schedules" or "land records". *EQT Prod. Co. v. Adair*, No. 13-414, 2014 WL 4070457, at *7 (4th Cir. Aug. 19, 2014).
- Denied a motion for class certification brought on behalf of consumers of defendant's cat litter product for lack of ascertainability because "[c]ustomers do not remember when they purchased Fresh Step cat litter or how much they bought", and certain retailers "do not have any way of identifying Fresh Step purchasers". *In re Clorox Consumer Litig.*, No. 12-00280, 2014 WL 3728469, at *4 (N.D. Cal. July 28, 2014).
- Denied certification of a class of purchasers of a weight loss supplement where class members could not be identified from defendants' and third-party retailers' records, few purchasers were likely to have retained receipts from their purchases, and consumer affidavits would be unreliable. *Karhu v. Vital Pharms., Inc.*, No. 13-60768, 2014 WL 1274119, at *3 (S.D. Fla. Mar. 27, 2014), *reconsideration denied*, 2014 WL 3540811 (S.D. Fla. July 17, 2014).
- Decertified a class of juice product consumers, reasoning that "where purported class members purchase an inexpensive product for a variety of reasons, and are unlikely to retain receipt or other transaction records, class actions may present such daunting administrative challenges that class treatment is not feasible". *In re POM Wonderful LLC*, No. ML 10-02199, MDL No. 2199, 2014 WL 1225184, at *6 (C.D. Cal. Mar. 25, 2014).
- Denied certification of a class of consumers of defendant's snack bars for lack of ascertainability after "find[ing] the reasoning of *Carrera* . . . persuasive", and explaining that "[i]t is unclear how Plaintiff intends to determine who purchased ZonePerfect bars during the proposed class period, or how many ZonePerfect bars each of these putative class members purchased". *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907, 2014 WL 580696, at *5-6 (N.D. Cal. Feb. 13, 2014).

In other cases, however – including California district courts, where a split of authority has developed[2] – courts have been less receptive to refusing class certification on ascertainability grounds. Although courts accepting ascertainability arguments to deny class certification have focused on due process problems, administrative difficulties, and fraudulent claims that could result from certification, courts rejecting ascertainability arguments tend to invoke the potential impact on class actions regarding low-cost consumer products. *See*, *e.g.*, *Astiana*, 291 F.R.D. at 500 ("[i]f class

actions could be defeated because membership was difficult to ascertain at the class certification stage, there would be no such thing as a consumer class action") (citation omitted). Under this approach, "[t]he requirement of an ascertainable class is met as long as the class can be defined through objective criteria", regardless of the "inability to feasibly ascertain the identity . . . of class members". *Forcellati v. Hyland's, Inc.*, No. CV 12-1983, 2014 WL 1410264, at *5 (C.D. Cal. Apr. 9, 2014) (finding nationwide class of consumers of cold and flu products ascertainable, because "Plaintiffs have precisely defined their class based on an objective criteria: purchase of Defendants' [products] within a prescribed time frame", and rejecting argument that individual class members cannot be identified, because "facilitating small claims is the policy at the very core of the class action mechanism") (internal quotation omitted).[3]

In light of this split of authority, the scope of the ascertainability requirement and its potential to bar class certification will continued to evolve. Additionally, the United States Supreme Court has been asked to review a case arising out of the *Deepwater Horizon* oil spill that raises questions about the propriety of a settlement class including numerous members who did not sustain injury, which may provide guidance for ascertainability considerations. *See BP Exploration & Production Inc. v. Lake Eugenie Land & Dev., Inc.*, No. 14-123 (U.S. 2014). Although ascertainability is unlikely to result in "no such thing as a consumer class action", *Astiana*, 291 F.R.D. at 500 (quoting *Ries*, 287 F.R.D. at 536), it may well have a significant impact on the types of consumer class actions filed, and the jurisdictions in which such claims are brought.

Motions to Strike Class Allegations

An additional developing area of class action law involves motions by defendants to strike class allegations from plaintiffs' pleadings. Pursuant to Federal Rule 23, a court "may issue orders that . . . require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly". Fed. R. Civ. P. 23(d)(1)(D); *see also* Fed. R. Civ. P. 23(c)(1)(A) ("At an early practicable time after a person sues . . . the court must determine by order whether to certify the action as a class action".). In addition to motions to strike, some courts have invoked Federal Rule 23(c)(1)(A) to permit defendants preemptively to bring motions to deny class certification prior to plaintiffs moving to certify putative classes. *See*, *e.g.*, *Kasalo v. Harris & Harris, Ltd.*, 656 F.3d 557, 563 (7th Cir. 2011) ("a court may deny class certification even before the plaintiff files a motion requesting certification"); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 941 (9th Cir. 2009) ("A defendant may move to deny class certification before a plaintiff files a motion to certify a class".).

Courts have used these provisions in recent years to strike class allegations where it is evident from the pleadings that plaintiffs' proposed classes cannot be certified.[4] For instance, courts have struck class allegations where it is evident from the pleadings that proposed classes are not objectively ascertainable;[5] where individual issues regarding injury, damages, and causation will predominate over questions common to proposed classes;[6] and where plaintiffs' claims and putative classes will necessarily invoke the law of multiple states with conflicting laws.[7]

Other courts, however, have traditionally denied motions to strike class allegations as "premature" when brought before plaintiffs have moved for class certification. *See*, *e.g.*, *Chen-Oster v. Goldman, Sachs & Co.*, 877 F. Supp. 2d 113, 117 (S.D.N.Y. 2012) ("Motions to strike are generally looked upon with disfavor [and] a motion to strike class allegations . . . is even more disfavored because it requires a reviewing court to preemptively terminate the class aspects of . . . litigation, solely on the basis of what is alleged in the complaint and before plaintiffs are permitted to complete the discovery to which they would otherwise be entitled on questions relevant to class certification. Generally speaking then, motions of this kind are deemed procedurally premature".) (internal quotation omitted).[8]

In recent months, courts following the reasoning of *Marcus* and *Carrera* have demonstrated an increased willingness to consider motions to strike class allegations on the grounds that class definitions include members who are not readily ascertainable. On the facts alleged in many of those cases, however, defendants' motions have been denied.[9] Nonetheless, as ascertainability case law continues to develop, it likely will provide further support for early motions to strike class allegations, forcing plaintiffs to carefully define putative classes in their pleadings to avoid such challenges.

Conclusion

Case law interpreting *Carrera* and *Marcus* continues to develop, and the ascertainability requirement may ultimately pose significant challenges to plaintiffs' ability to pursue consumer class actions regarding products for which proof of purchase is frequently lacking. In addition to its ultimate impact on motions for class certification, the ascertainability requirement could likewise support early defence motions to strike class allegations. The extent to which courts will rely on ascertainability considerations – both in response to motions for class certification and motions to strike class allegations – continues to unfold.

Endnotes

1 Courts also are more apt to deny class certification for lack of ascertainability where class definitions are premised on *subjective* criteria, such as the class members' states of mind. *See*, *e.g.*, *Conigliaro v. Norwegian Cruise Line Ltd.*, No. 05-21584-CIV, 2006 WL 7346844, at *4 (S.D. Fla. Sept. 1, 2006) (denying certification of class that included cruise ship passengers who "had their cruise ruined", which "provides no meaningful standard for determining class membership", and depends on "hopelessly subjective standards [that] yield[] considerable indeterminacy and imprecision"). This chapter focuses on cases where classes are defined by objective criteria, but nonetheless present difficulties with class member identification.

2 *See Sethavanish*, 2014 WL 580696, at *5-6 ("Courts in this circuit are split on the issue" of ascertainability).

3 *See also*, *e.g.*, *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014) (certifying a nationwide class of purchasers of defendant's "100 percent pure olive oil" and rejecting defendant's ascertainability argument, which "would render class actions against producers almost impossible to bring. . . . [T]he class action device, at its very core, is designed for cases like this where a large number of consumers have been defrauded but no one consumer has suffered an injury sufficiently large as to justify bringing an individual lawsuit. Against this background, the ascertainability difficulties, while formidable, should not be made into a device for defeating the action".); *McCrary v. Elations Co., LLC*, No. EDCV 13-00242, 2014 WL 1779243, at *8 (C.D. Cal. Jan. 13, 2014) (certifying class of purchasers

of defendant's dietary supplement and declining to follow *Carrera*: "It appears that . . . in any case where the consumer does not have a verifiable record of its purchase, such as a receipt, and the manufacturer or seller does not keep a record of buyers, *Carrera* prohibits certification of the class. While may now be the law in the Third Circuit, it is not currently the law in the Ninth Circuit".).

4 *See*, *e.g.*, *Loreto v. Procter & Gamble Co.*, No. 1:09-cv-815, 2013 WL 6055401, at *2 (S.D. Ohio Nov. 15, 2013) (recognising that "[a] court may strike class action allegations before a motion for class certification where the complaint itself demonstrates that the requirements for maintaining a class action cannot be met") (*citing Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 945 (6th Cir. 2011)); *Wright v. Family Dollar, Inc.*, No. 10 C 4410, 2010 WL 4962838, at *1 (N.D. Ill. Nov. 30, 2010) ("[W]hen the defendant advances a legal argument based on the pleadings, discovery is not necessary for the court to evaluate whether a class action may be maintained. Particularly given that Rule 23(c)(1)(A) instructs courts to determine whether a class may be certified '[a]t an early practicable time,' courts may – and should – address the plaintiff's class allegations when the pleadings are facially defective and definitively establish that a class action cannot be maintained".).

5 *See*, *e.g.*, *John*, 501 F.3d at 445 ("Where it is facially apparent from the pleadings that there is no ascertainable class, a district court may dismiss the class allegation on the pleadings".); *Tietsworth v. Sears, Roebuck & Co.*, 720 F. Supp. 2d 1123, 1147 (N.D. Cal. 2010) (striking class allegations where class of consumers of certain model washing machines was "not ascertainable"); *Schilling v. Kenton Cnty., Kentucky*, No. 10-143, 2011 WL 293759, at *6 (E.D. Ky. Jan. 27, 2011) (striking class allegations where class definition was "fatally flawed because the Court cannot determine its individual members without reviewing the evidence relative to each" potential member); *Bauer v. Dean Morris, LLP*, No. 08-5013, 2011 WL 3924963, at *3 (E.D. La. Sept. 7, 2011) (striking class allegations where "[t]he need to conduct such individual inquiries to determine who qualifies as a member of the class undermines the administrative benefits of Rule 23").

6 *See*, *e.g.*, *In re Yasmin & Yaz Mktg.*, 275 F.R.D. 270, 276 (S.D. Ill. 2011) (striking class allegations because "highly individualized factual inquiries" would be required to "establish[] causation", such that "individual issues of fact predominate"); *Green v. Green Mountain Coffee Roasters, Inc.*, 279 F.R.D. 275, 284-85 (D.N.J. 2011) (striking class allegations after recognising that "proving a defect is a highly individualized inquiry unsuitable for class treatment", and denying class certification because "the Complaint does not allege that all individuals in New Jersey who purchased the [product at issue] have experienced the defect", such that "common issues of fact do not predominate") (internal quotation omitted); *Lyons v. Bank of Am.*, No. C 11-1232, 2011 WL 6303390, at *7 (N.D. Cal. Dec. 16, 2011) (granting motion to strike class allegations because "the proposed class includes many members who have not been injured", which precludes a finding of predominance of common issues); *Bauer*, 2011 WL 3924963, at *7 (striking class allegations where certain elements of damages sought could not "be determined by a formulaic calculation", such that "individualized damage inquiries would predominate over common issues").

7 *See*, *e.g.*, *Pilgrim*, 660 F.3d at 949 (striking class allegations where plaintiffs brought consumer protection claims that "are governed by different States' laws, a largely legal determination, and no proffered or potential factual development offers any hope of altering that conclusion, one that generally will preclude class certification"); *In re Yasmin & Yaz Mktg.*, 275 F.R.D. at 276 (striking class allegations, and holding that "because governing choice of law principles require application of the substantive laws of the fifty states and the District of Columbia – laws which vary amongst the jurisdictions – the case cannot be maintained as a nationwide class action").

8 *See also*, *e.g.*, *Martin v. Ford Motor Co.*, 765 F. Supp. 2d 673, 680 (E.D. Pa. 2011) ("courts within the Third Circuit have . . . [found] a motion to strike class allegations premature where a motion for class certification has not been made and denied"); *In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, 505 F. Supp. 2d 609, 615-16 (N.D. Cal. 2007) ("While plaintiffs' class definitions are suspicious and may in fact be improper, plaintiffs should at least be given the opportunity to make the case for class certification based on appropriate discovery . . . . Accordingly, [defendant's] motions to dismiss or strike the class allegations are premature and are denied, but without prejudice to [defendant's] ability to move to strike or dismiss the class allegations if and when class certification is sought".).

9 *See*, *e.g.*, *McPeak v. S-L Distribution Co., Inc.*, No. 12-348, 2014 WL 4388562, at *7, 10 (D.N.J. Sept. 5, 2014) (denying motion to strike class allegations, but recognising that "the timing of this motion is [not] dispositive on its own", and addressing defendants' ascertainability argument based on *Carrera* and *Marcus* before determining that "on the face of the operative complaint", class members were potentially ascertainable by reference to "objective methods, such as through Defendant's records of its Distributor Agreements").

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