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Implied Class Warfare: Why Rule 23 Needs an Explicit Ascertainability Requirement in the Wake of *Byrd v. Aaron's Inc.*

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IMPLIED CLASS WARFARE: WHY RULE 23 NEEDS AN EXPLICIT ASCERTAINABILITY REQUIREMENT IN THE WAKE OF *BYRD v. AARON'S INC.*

Abstract: On April 16, 2015, in *Byrd v. Aaron's Inc.,* the U.S. Court of Appeals for the Third Circuit articulated its heightened standard for Rule 23's implied requirement that a class be ascertainable. This standard has proven to frustrate Rule 23's historical purpose of providing small-claim plaintiffs a mechanism through which they can economically prosecute their rights, especially in the context of consumer class actions. The Seventh Circuit Court of Appeals has rejected the heightened standard introduced by the Third Circuit in favor of a "weak" interpretation of Rule 23's implied ascertainability requirement. This Comment argues that Rule 23 needs to be amended to explicitly include ascertainability as a requirement to class certification so that the certification process can be adjudicated consistently in federal courts. Further, this Comment argues that modeling such an amendment on the Seventh Circuit's "weak" version of the implied ascertainability requirement will best return Rule 23 to its historical purpose.

INTRODUCTION

Benjamin Kaplan, a principal drafter of reformed Rule 23 of the Federal Rules of Civil Procedure, hoped that the rule would "shake the law of class actions free of abstract categories . . . [and] rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation."[1] Recent developments in class action adjudication, however,

[1] Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) [hereinafter Kaplan, *A Prefatory Note*]. Reformed Rule 23 refers to the rule after its amendment by the Advisory Committee on Civil Rules in 1966. *See* FED. R. CIV. P. 23 advisory committee's note to 1966 amendment. The 1966 amendment was the first amendment after the Advisory Committee adopted the rule in 1937. *See id.* The amendment sought to address the problem that arises when there is no economic incentive for someone to enforce his or her private rights individually, and it resulted in a rule similar to Rule 23's form today. *See id.; see also* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 390 (1967) [hereinafter Kaplan, *Continuing Work*] ("The object is to get at the cases where a class action promises important advantages of economy and effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party.").

have resulted in the emergence of a new abstraction, called ascertainability, which defendants have used as a tool to block class certification.[2]

Rule 23 sets the requirements for class certification.[3] The Rule requires that the proposed class satisfy standards of numerosity, commonality, typicality, and adequacy before a court may certify it.[4] Notably absent in Rule 23 is an explicit requirement that the class be ascertainable.[5] Since 1970, however, federal courts have looked outside the text of Rule 23 to include an implied ascertainability requirement to certification.[6] To satisfy

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[2] *See* Carrera v. Bayer Corp. (*Carrera II*), 727 F.3d 300, 303 (3d Cir. 2013) (defendant successfully challenging certification by establishing that its own records could not identify its customers); *see also* Rachel H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 731 (2013) (noting the ease with which an experienced class action defense attorney can frequently defeat certification).

[3] *See* FED. R. CIV. P. 23. Class action plaintiffs must have their class certified by the court before they are able to litigate, and Rule 23 provides the guidelines that federal courts must use when deciding whether or not to certify a proposed class. *See id.* Rule 23 was first adopted with the rest of the Federal Rules of Civil Procedure in 1937 by the Advisory Committee on Civil Rules. *See* FED. R. CIV. P. 23 advisory committee's note to 1937 amendment. It was modeled after Equity Rule 38, which allowed numerous persons to bring a single action as a group if it would be impracticable to bring them all before the court individually. *See id.* It has since been amended seven times by the Advisory Committee on Civil Rules, with the first amendment taking place in 1966 and representing the beginning of Rule 23's current purpose to provide individuals a mechanism to enforce private rights when bringing those rights individually would not be economically reasonable. *See* FED. R. CIV. P. 23 advisory committee's notes to 1946, 1966, 1987, 1998, 2003, 2007, 2009 amendments; *see also* Kaplan, *Continuing Work*, *supra* note 1, at 390 (explaining the policy driving the 1966 amendment to Rule 23).

[4] FED. R. CIV. P. 23(a)(1)–(3). Numerosity means that "the class is so numerous that joinder of all members is impracticable." *Id.* at 23(a)(1). Commonality means that "questions of law or fact" in the case are "common to the class." *Id.* at 23(a)(2). Typicality means that "the claims or defenses" of the parties representing the class will be "typical of the claims or defenses of the class." *Id.* at 23(a)(3). Adequacy means that the parties representing the class "will fairly and adequately protect the interests of the class." *Id.* at 23(a)(4); *see also* Joseph A. Seiner, *The Issue Class*, 56 B.C. L. REV. 121, 132–37 (2015) (providing a general overview of the class certification process for plaintiffs).

[5] *See* FED. R. CIV. P. 23; *see also* Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 307–08 (2010) (discussing that federal courts have implied an ascertainability within Rule 23 and enforce that requirement along with those explicitly written within the Rule); Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L. J. 399, 424–25 (2015) (providing an overview of federal courts' inconsistent application of ascertainability as an implicit requirement not explicitly written in Rule 23); Geoffrey C. Shaw, *Class Ascertainability*, 124 YALE L. J. 2354, 2357 (2015) (noting that ascertainability appears nowhere within the text of Rule 23 despite its increasing role in federal courts' Rule 23 analyses).

[6] *See* Simer v. Rios, 661 F.2d 665, 669–70 (7th Cir. 1981) (holding that district court appropriately included ascertainability in the certification inquiry); DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970) ("It is elementary that in order to maintain a class action, the class sought to be represented must be . . . clearly ascertainable."); *see also* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 588–89 (9th Cir. 2009) (explicitly applying an ascertainability requirement); *In re* Initial Pub. Offering Sec. Litig., 471 F.3d 24, 30, 44–45 (2d Cir. 2006) (explicitly incorporating ascertainability in its Rule 23 predominance inquiry). Federal courts have implied an ascertainability requirement within Rule 23 for two general policy reasons. *See* Daniel Luks, *Ascertainabil-*

the implied ascertainability requirement, a class must be clearly defined by objective criteria.[7]

The implied ascertainability requirement has faced intense scrutiny.[8] Critics take issue with the fact that it is a judge-made requirement.[9] Critics also question the requirement's practical effect on Rule 23's historic mission of protecting small-claim consumers who would have no incentive to seek relief if not for the class action mechanism.[10] Small-claim consumer class action suits have suffered the most from the implied ascertainability requirement.[11]

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ity in the Third Circuit: Name That Class Member, 82 FORDHAM L. REV. 2359, 2370–71 (2014). First, Rule 23 is silent on how precisely a class must be defined, so an ascertainability inquiry can help avoid administrative burdens that arise when a class is defined vaguely or by subjective criteria. *See id.* Second, because the class definition tells the court "who deserve[s] notice, are entitled to relief, and are bound by a final judgment," an ascertainability inquiry can help the court reach a more precise definition that will better protect "the due process rights of absent litigants." *See id.*

[7] *See* Mullins v. Direct Dig., LLC, 795 F.3d 654, 657 (7th Cir. 2015) (defining the implied ascertainability requirement as requiring a clearly and objectively defined class); Byrd v. Aaron's Inc. (*Byrd II*), 784 F.3d 154, 163 (3d Cir. 2015) (noting the first part of the Third Circuit's two-part implied ascertainability requirement is a class defined by objective criteria).

[8] *See* Carrera v. Bayer Corp., No. 12-2621, 2014 WL 3887938, at *3 (3d Cir. May 2, 2014) (Ambro, J., dissenting from denial of en banc review); Gilles, *supra* note 5, at 307–08 (quoting John C. Coffee & Stephen Paulovic, *Class Certification: Developments over the Last Five Years, 2002–2007*, *in* 8 CLASS ACTION LITIGATION 2008: PROSECUTION AND DEFENSE STRATEGIES 195–96 (2007)); Shaw, *supra* note 5, at 2389–92 (quoting Tom Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. INDUS. COM. L. REV. 501, 504 (1969)).

[9] *See Carrera*, 2014 WL 3887938, at *3 (Ambro, J., dissenting from denial of en banc review) (pointing out the judicially created nature of the implied ascertainability requirement in his dissent); Shaw, *supra* note 5, at 2356 (noting that the implied ascertainability requirement is "untethered" to the text of Rule 23).

[10] *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161, 186 (1974) ("The class action is one of the few legal remedies the small claimant has against those who command the status quo."); Gilles, *supra* note 5, at 307–08 (quoting Coffee & Paulovic, *supra* note 8, at 195–96) (criticizing the emerging ascertainability requirement, because small-claim consumer classes that would have had an easy path to certification in the 1970s and 1980s are now facing new barriers to certification); Shaw, *supra* note 5, at 2389–92 (quoting Ford, *supra* note 8, at 504) (explaining that the implied ascertainability requirement conflicts with the Rule drafters' intent for Rule 23 to harness economies of scale and to incentivize small claimants to seek relief).

[11] *See, e.g.*, *Byrd II*, 784 F.3d at 172 (holding that consumer-plaintiff could not satisfy an ascertainability inquiry without proposing a method by which corporate-defendant could identify its customers); *Carrera II*, 727 F.3d at 312 (denying class certification on ascertainability grounds because consumer-plaintiff could not establish a way for corporate-defendant to identify purchasers of its allegedly faulty weight-loss supplement); Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 356 (3d Cir. 2013) (reversing certification of class of Sam's Clubs customers because they were unable to establish a method for Sam's Club to identify its customers); Marcus v. BMW of N. Am., LLC (*Marcus II*), 687 F.3d 583, 612 (3d Cir. 2012) (reversing certification of a class of car owners because it could not establish that its class members could be identified by defendant's records); John v. Nat'l Sec. Fire & Cas. Co., 501 F.3d 443, 445 (5th Cir. 2007) (upholding dismissal of proposed class of homeowner insurance customers because named plaintiff failed the implied ascertainability requirement); Xavier v. Phillip Morris USA Inc., 787 F. Supp. 2d 1075, 1078, 1091 (N.D. Cal. 2011) (declining to certify proposed class of Marlboro smokers seeking

The implied ascertainability requirement has also become the subject of a sharp, publicized circuit split between the Third and Seventh U.S. Circuit Courts of Appeals.[12] In 2015, the Third Circuit in *Byrd v. Aaron's Inc.* addressed the implied ascertainability requirement and introduced a heightened ascertainability standard that could prove fatal for the types of classes that the drafters of Rule 23 intended to accommodate.[13] In contrast, the Seventh Circuit in its 2015 decision in *Mullins v. Direct Digital, LLC* chose as its interpretation a "weak" version of the implied ascertainability requirement, which can be easier on small-claim consumer class actions.[14]

This Comment argues that Rule 23 should be amended to adopt an explicit ascertainability requirement modeled on the Seventh Circuit's "weak" version of the ascertainability requirement.[15] Part I provides a brief history of the implied ascertainability requirement's role in the class certification process as well as an overview of the Third Circuit's heightened ascertainability standard.[16] Part II discusses the current circuit split on the application

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medical monitoring on ascertainability grounds); Weiner v. Snapple Beverage Corp., No. 07 Civ. 8742(DLC), 2010 WL 3119452, at *12–13 (S.D.N.Y. Aug. 5, 2010) (refusing to certify a class of Snapple tea drinkers on ascertainability grounds).

[12] *Compare Byrd II*, 784 F.3d at 163, 172 (imposing a heightened ascertainability standard for certification), *and Carrera II*, 727 F.3d at 312 (vacating a proposed consumer class's certification for ascertainability concerns), *with Mullins*, 795 F.3d at 657–58, 662 (explicitly rejecting the Third Circuit's heightened ascertainability standard and adopting a "weak" standard instead). The circuit split, and its potential impact on small-claim consumer-plaintiffs, has begun to attract media attention in the wake of *Mullins*. *See generally* Carl Goldfarb, *Circuits Split on Class Certification Requirements*, DAILY BUS. REV. (Aug. 24, 2015), http://www.dailybusinessreview.com/id=1202735514936/Circuits-Split-on-Class-Action-Certification-Requirements?slreturn=20150814223844 (providing an overview of the circuit split created by the Seventh Circuit in *Mullins*); Michael R. Carroll & Burt M. Rublin, *7th Circuit Rejects "Heightened" Ascertainability for Class Actions*, BALLARD SPAHR, LLP (July 30, 2015), http://www.ballardspahr.com/alertspublications/legalalerts/2015-07-30-7th-circuit-rejects-heightened-ascertainability-requirement-for-class-actions.aspx [https://perma.cc/6B5G-CC5K] (explaining the newly created circuit split in a law firm-published post).

[13] *See* 784 F.3d at 163 (articulating that a proposed class must establish (1) that its class is objectively defined and (2) that there is an administratively feasible mechanism for identifying class members); Ford, *supra* note 8, at 504 (recognizing that the purpose of Rule 23 is to accommodate small claimants and stating that this purpose may be frustrated if courts apply the rule rigidly); Kaplan, *A Prefatory Note*, *supra* note 1, at 497 (explaining that a mission of Rule 23 was to accommodate individuals who would only prosecute their rights if they could do so as a group).

[14] *See Mullins*, 795 F.3d 657 (interpreting the implied ascertainability requirement as simply requiring that a class is clearly defined by objective criteria and granting certification of consumer class). The court pointed to a series of consumer class actions that have been defeated by heightened ascertainability standards in other circuits that may have survived with its own interpretation of the implied ascertainability requirement. *See id.*; *see also Byrd II*, 784 F.3d at 176–77 (Rendell, J., concurring) (discussing how interpreting the implied ascertainability requirement as simply requiring a clear class definition would be more consistent with Rule 23's core policy of accommodating small-claim plaintiffs).

[15] *See infra* notes 97–106 and accompanying text.

[16] *See infra* notes 19–61 and accompanying text.

of the implied ascertainability requirement.[17] Finally, Part III argues that Rule 23 should be amended to explicitly include an ascertainability requirement modeled on the Seventh Circuit's "weak" version of the implied ascertainability requirement, which reflects Rule 23's purpose better than the Third Circuit's heightened ascertainability standard.[18]

I. THE EVOLUTION OF THE IMPLIED ASCERTAINABILITY REQUIREMENT AND THE THIRD CIRCUIT'S HEIGHTENED ASCERTAINABILITY STANDARD

In the last five years of applying the implied ascertainability requirement, the Third Circuit has heightened the ascertainability standard that plaintiffs must meet before their class will be certified.[19] Section A provides a brief history of the ascertainability requirement and its evolution toward a heightened standard within the Third Circuit.[20] Section B provides the facts and procedural history of *Byrd*.[21]

A. A Brief History of the Implied Ascertainability Requirement, from Creation to Its Eventual Form in the Third Circuit

In 1970, the Fifth Circuit Court of Appeals asserted that it was "elementary" that a class must be adequately defined and clearly ascertainable before a court should certify it, and the court included that requirement in its inquiry despite it not being written in Rule 23.[22] Ten years later, the Seventh Circuit Court of Appeals adopted the application of an implied ascertainability requirement.[23] Federal courts applied the implied ascertainability

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[17] *See infra* notes 62–96 and accompanying text.

[18] *See infra* notes 97–106 and accompanying text.

[19] *See, e.g.*, *Byrd II*, 784 F.3d at 163 (articulating a heightened ascertainability standard that puts the burden on plaintiffs to establish a way the court may identify class members); *Carrera II*, 727 F.3d at 307 (vacating a class certification on ascertainability grounds because plaintiff could not establish how the court may identify class members); *Hayes*, 725 F.3d at 356 (reversing class certification on ascertainability grounds because plaintiff did not present a way for class members to be identified through defendant's records); *Marcus II*, 687 F.3d at 593–94, 612 (discussing the policy concerns motivating the Third Circuit's ascertainability standard, and vacating class certification because plaintiff did not meet that standard).

[20] *See infra* notes 22–44 and accompanying text.

[21] *See infra* notes 45–61 and accompanying text.

[22] *See DeBremaecker*, 433 F.2d at 734.

[23] *See Simer*, 661 F.2d at 669–70 (adopting ascertainability as an implied requirement to class certification). The court adopted the implied ascertainability requirement so that it could be alerted to any potential burdens that it may face identifying class members before the proceeding. *See id.* It also wanted to ensure that it would be able to identify those individuals injured by class action defendants so that they may enjoy any relief granted. *See id.* Since its adoption in the Seventh Circuit, ascertainability as an implied requirement within Rule 23 has also been adopted by the First, Second, Third, Fifth, Ninth and Eleventh Circuit Courts of Appeals. *See* Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012) ("[A] plaintiff seeking to represent a proposed class must establish that the proposed class is adequately defined and clearly ascertainable." (quot-

requirement leniently, and with little discussion, in the decades following those decisions.[24] The non-controversial nature of the implied ascertainability requirement during these decades was due to the types of class action suits federal courts heard.[25] The typical class action cases reaching federal courts during this period were financial securities disputes in which each class member was easily ascertained from financial records.[26] It was nearly impossible for consumer class actions to reach federal court and thus courts often avoided harder questions about ascertainability.[27]

This all changed when Congress passed the Class Action Fairness Act in 2005, which effectively opened the doors to federal courts for consumer

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ing *Debremaecker*, 443 F.2d at 734)); *Marcus II*, 687 F.3d at 591 (including the implied ascertainability requirement as a preliminary matter in a Rule 23 analysis); *John*, 501 F.3d at 445 (acknowledging ascertainability as part of the Rule 23 certification process); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d at 30 (including the implied ascertainability requirement in the Rule 23 analysis); Crosby v. Social Sec. Admin. of U.S., 796 F.2d 576, 580 (1st Cir. 1986) (adopting ascertainability as an implied requirement to Rule 23).

[24] *See, e.g.*, Dunnigan v. Metro. Life Ins. Co., 214 F.R.D. 125, 135–36 (S.D.N.Y. 2003) (quickly concluding that the class was ascertainable because members were clearly identified in MetLife insurance records); *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 209 F.R.D. 323, 336–37 (S.D.N.Y. 2002) (stating that ascertainability was not an issue in the case because it was clear who owned a well that was allegedly contaminated); O'Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 327 (C.D. Cal. 1998) (concluding that class was ascertainable after little discussion because it was clear to see who lived in the area allegedly exposed to carcinogens); *see also* Jamie Zysk Isani & Jason B. Sherry, *Ascertainability: Class Action Certification*, CLASS ACTION LITIG. REP. (BNA), at 2–3 (May 8, 2015).

[25] *See* Isani & Sherry, *supra* note 24, at 2–3. For a federal court to have the subject matter jurisdiction required to hear a case, it must have either federal question jurisdiction or diversity jurisdiction. *See* 28 U.S.C. §§ 1331–1332 (2012). Federal question jurisdiction exists when a case arises under the Constitution or federal law. *Id.* § 1331. Diversity jurisdiction exists when the amount in controversy is at least $75,000 and the dispute is between citizens of different States or between U.S. citizens and citizens of foreign nations. *Id.* § 1332(a).

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

[27] *See* Isani & Sherry, *supra* note 24, at 2–3. Consumer class action cases rarely met the diversity requirement for jurisdiction in federal court because each class member had to satisfy the amount in controversy requirement, which is difficult when a class is comprised of low-value consumer claims. *See id.* (citing Zhan v. Int'l Paper Co., 414 U.S. 291, 301 (1973) (rejecting a class action in federal courts because each class member could not satisfy the amount-in-controversy requirement)). Subject matter jurisdiction in federal court was typically unattainable for consumer class actions because consumers did not have standing to sue under the federal laws meant to protect consumers from corporate misconduct, like false advertising. *See* Isani & Sherry, *supra* note 24, at 2–3 (citing Made in the USA Found. v. Philips Food, Inc., 365 F.3d 278, 279–80 (4th Cir. 2004) (establishing that consumers do not have standing to sue for false advertising under the Lanham Act, a federal consumer protection statute)).

class action suits.[28] Now facing tougher questions regarding class certification for small-claim consumer class actions, federal courts have been interpreting the implied ascertainability requirement inconsistently.[29]

The Third Circuit has set itself apart from the other circuits with its application of the implied ascertainability requirement because it requires that plaintiffs meet a heightened standard of ascertainability before the court will grant certification.[30] Two recent cases in the Third Circuit began to carve out this heightened ascertainability requirement.[31] First, in 2012, the Third Circuit reversed a class's certification on ascertainability grounds in *Marcus v. BMW of North America, LLC*.[32] The named plaintiff, Jeffrey Marcus, sought relief through a class action claim against BMW for allegedly equipping its cars with faulty tires.[33] The district court certified a class defined as all purchasers and lessees of certain model-year BMWs equipped with the allegedly defective tires sold or leased in New Jersey.[34] On appeal, the Third Circuit reversed the certification on ascertainability concerns.[35] The court emphasized that the implied ascertainability requirement is not simply about defining a class in objective terms, but rather that a plaintiff must also show the court that there is an administratively feasible mecha-

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[28] *See* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary Review*, 156 U. PA. L. REV. 1439, 1441 (2008) ("The scope of putative class actions that, at the end of the day, [the Class Action Fairness Act of 2005] brings within the subject matter jurisdiction of federal courts is very broad."); Isani & Sherry, *supra* note 24, at 3. The Class Action Fairness Act ("CAFA") allows a class action to establish diversity jurisdiction in federal court as long as the class collectively seeks at least $5 million, rather than requiring that each individual member satisfy the amount-in-controversy requirement of diversity jurisdiction. *See* 28 U.S.C. § 1332(d).

[29] *Compare Byrd II*, 784 F.3d at 163, 172 (imposing a heightened ascertainability standard for its implied ascertainability requirement), *and Carrera II*, 727 F.3d at 312 (vacating certification because plaintiffs failed to meet a heightened ascertainability standard for the implied ascertainability requirement), *with Mullins*, 795 F.3d at 657–58 (interpreting the implied ascertainability requirement as requiring only a clearly and objectively defined class).

[30] *See Byrd II*, 784 F.3d at 163; *Carrera II*, 727 F.3d at 308; *Marcus II*, 687 F.3d at 592–93. The heightened standard has two prongs: (1) the class must be defined by objective criteria and (2) there must be "a reliable and administratively feasible mechanism" through which class members can be identified. *See Byrd II*, 784 F.3d at 163 (quoting *Hayes*, 725 F.3d at 355). The Third Circuit holds that its heightened ascertainability standard eliminates serious administrative burdens by ensuring that the court will not have to conduct "mini-trials" within a class action case to ascertain class members. *See Marcus II*, 687 F.3d at 593. It also holds that its heightened ascertainability standard class members who are not present by ensuring that they may receive the "best notice practicable." *See id.*

[31] *See Carrera II*, 727 F.3d at 308; *Marcus II*, 687 F.3d at 593.

[32] 687 F.3d at 612.

[33] Marcus v. BMW of N. Am., LLC (*Marcus I*), No. 08-5859 (KSH), 2010 WL 4853308, at *1 (D.N.J. Nov. 19, 2010), *vacated* 687 F.3d 583.

[34] *Id.* at *18.

[35] *Marcus II*, 687 F.3d at 588, 594. BMW presented evidence to establish that its records would not be able to easily identify the individuals who purchased cars with the allegedly defective tires. *Id*. at 594.

nism for identifying class members.[36] Marcus's inability to establish that BMW's records could identify class members was what ultimately caused the Third Circuit to reverse the class certification.[37]

Second, in 2013, the Third Circuit took the ascertainability requirement a step further in *Carrera v. Bayer Corp.*[38] Gabriel Carrera brought a consumer class action suit against Bayer Corporation for the alleged false advertising of its weight-loss supplement.[39] The district court certified a class defined as "all persons who purchased [the weight-loss supplement] in Florida," and Bayer appealed.[40] Carrera, attempting to address the standard that the Third Circuit applied in *Marcus*, prepared for the court a mechanism to ascertain class members.[41] It involved class members submitting affidavits declaring that they purchased the supplement and how much they purchased.[42] The court rejected this proposed mechanism, reasoning that affidavits could lead to fraudulent claims and limit recovery for true class members.[43] It concluded that such a threat meant that Carrera's proposed mechanism was not an administratively feasible method for identifying class members, and therefore did not satisfy the implied ascertainability requirement.[44]

B. The Third Circuit Uses Byrd *to Articulate Its Two-Pronged, Heightened Standard for the Implied Ascertainability Requirement*

In *Byrd*, the Third Circuit recognized the lack of precision that had characterized its recent applications of the implied ascertainability requirement and sought to finally set forth a clear standard.[45] The court did so by articulating a two-pronged test to meet its heightened ascertainability standard: (1) the class is objectively defined and (2) the plaintiffs can present "a

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[36] *See id.* at 594.

[37] *See id.* at 588, 594.

[38] *See* 727 F.3d at 306 (holding that a plaintiff must present evidence that its class members can be identified in an administratively feasible way).

[39] Carrera v. Bayer Corp. (*Carrera I*), No. 08-4716 (JLL), 2011 WL 5878376, at *1 (D.N.J. Nov. 22, 2011), *vacated*, 727 F.3d 300 (3d Cir. 2013).

[40] *Carrera II*, 727 F.3d at 303; *Carrera I*, 2011 WL 5878376, at *9.

[41] *Carrera II*, 727 F.3d at 308.

[42] *Id.*

[43] *Id.* at 310. The court stated that using affidavits from individuals who declare themselves class members exposes true class members to the threat of having to share their potential recovery with fraudulent class members. *See id.* Judge Rendell, concurring in *Byrd*, pointed out that such a concern may be out of touch with reality. *See Byrd II*, 784 F.3d at 175 (Rendell, J., concurring). She stated, "the chances that someone would, under the penalty of perjury, sign a false affidavit stating that he or she bought Bayer aspirin for the sake of receiving a windfall of $1.59 are far-fetched at best." *Id.*

[44] *See Carrera II*, 727 F.3d at 310.

[45] *See Byrd II*, 784 F.3d at 161–62 ("[T]here has been apparent confusion in the invocation of ascertainability in this Circuit . . . . We seek here to dispel any confusion.").

reliable and administratively feasible mechanism" for identifying class members.[46]

The named plaintiffs in *Byrd*, Brian and Crystal Byrd, filed a class action against Aaron's, Inc. and its franchisee store Aspen Way Enterprises, Inc. (collectively "Defendants").[47] The lawsuit alleged that the Defendants had violated the Electronic Communications Privacy Act of 1986 ("ECPA").[48] The Defendants operated a business that sells and leases residential and office consumer electronics.[49] Mrs. Byrd had entered into a lease agreement with Defendants to rent a laptop computer, and it was eventually repossessed by the Defendants.[50] Upon repossession, an agent of Defendants presented Mrs. Byrd with a screenshot of a poker website that Mr. Byrd had visited, as well as a picture of him playing online poker, which was taken by the laptop's built-in camera.[51]

The Defendants allegedly obtained the picture through spyware software the company had installed on the laptop it leased to the Byrds.[52] The spyware was capable of collecting screenshots, keystrokes, and images from a computer's built-in camera.[53] The Byrds alleged that the Defendants had used this spyware over the course of approximately one month to secretly access the leased laptop 347 times on eleven different days.[54]

The Byrds filed a class-action complaint against the Defendants, alleging violations of the ECPA.[55] The Byrds moved to certify the class under Rule 23 with the following proposed class definition: "all persons who leased and/or purchased one or more computers from Aaron's, Inc., and their household members, on whose computers [the spyware] was installed and activated without such person's consent on or after January 1, 2007."[56]

The district court denied certification on ascertainability grounds.[57] It reasoned that the Byrds could not satisfy the implied ascertainability requirement because they failed to define "household members" in the class definition and to provide a mechanism for how class members could be identi-

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[46] *Id.* at 163 (quoting *Hayes*, 725 F.3d at 355).

[47] *Id.* at 158.

[48] Byrd v. Aaron's, Inc. (*Byrd I*), Civil Action No. 11-101E, 2014 WL 1316055, at *2 (W.D. Pa. Mar. 31, 2014), *rev'd*, 784 F.3d 154 (3d Cir. 2015).

[49] *Id.* at *1.

[50] *Byrd II*, 784 F.3d at 159; *Byrd I*, 2014 WL 1316055, at *1.

[51] *Byrd II*, 784 F.3d at 159; *Byrd I*, 2014 WL 1316055, at *1.

[52] *Byrd I*, 2014 WL 1316055, at *1–2.

[53] *Id.* at *2.

[54] *Id.*

[55] *Id.*

[56] *Id.* at *5.

[57] *See id.* at *6 ("Because none of class definitions proposed by Plaintiffs satisfies the threshold analysis of ascertainability, the motion to certify the class should be denied.").

fied.[58] The Byrds appealed.[59] The Third Circuit took the Byrd's appeal as an opportunity to anchor the implied ascertainability requirement to a concrete set of guidelines.[60] The court reversed the district court's denial of class certification and remanded the case to be decided under the new guidelines.[61]

II. ASCERTAINABILITY'S ROLE IN CERTIFICATION IS STILL UNSETTLED LAW DESPITE THE THIRD CIRCUIT'S CLEAR STANDARD IN *BYRD*

The role of the implied ascertainability requirement in the class certification process remains unsettled law.[62] The Third Circuit Court of Appeals has established a heightened standard for the implied ascertainability requirement, but that standard has yet to garner consensus even within the Third Circuit.[63] In addition, three months after the Third Circuit's 2015 decision in *Byrd v. Aaron's Inc.*, the Seventh Circuit Court of Appeals in *Mullins v. Direct Digital, LLC* rejected the Third Circuit's heightened ascertainability standard in favor of its own "weak" version of the implied ascertainability requirement, creating a circuit split.[64] Section A discusses both the Third Circuit's 2013 decision in *Carrera v. Bayer Corp*. and *Byrd*, two cases that demonstrate the conflict within the Third Circuit.[65] Section B discusses the

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[58] *Id.* at *5.

[59] *Byrd II*, 784 F.3d at 158.

[60] *See Byrd II*, 784 F.3d at 161–62. The court set forth two prongs for its heightened ascertainability standard for the implied ascertainability requirement: (1) the class is objectively defined and (2) the plaintiffs can present "a reliable and administratively feasible mechanism" for identifying class members. *See id.* at 163 (quoting *Hayes*, 725 F.3d at 355).

[61] *See id.* at 172.

[62] *Compare* Byrd v. Aaron's Inc. (*Byrd II*), 784 F.3d 154, 163 (3d Cir. 2015) (interpreting the implied ascertainability requirement as imposing a heightened ascertainability standard on plaintiffs), *with* Mullins v. Direct Dig., LLC, 795 F.3d at 657–58, 662 (7th Cir. 2015) (explicitly rejecting the Third Circuit's application of ascertainability and instead interpreting a "weak" version of the implied ascertainability requirement).

[63] *See Byrd II*, 784 F.3d at 172–77 (Rendell, J., concurring) (calling for the end of the heightened ascertainability standard that the majority had set forth); Carrera v. Bayer Corp., No. 12-2621, 2014 WL 3887938, at *3 (Ambro, J., dissenting from denial of en banc review) (calling upon the Judicial Conference's Committee on Rules of Practice and Procedure to weigh in on Rule 23 in light of the 2013 Third Circuit precedent (citing Carrera v. Bayer Corp. (*Carrera II*), 727 F.3d 300, 312 (3d Cir. 2013))). *Compare Byrd II*, 784 F.3d at 163 (articulating a two-prong, heightened ascertainability standard for the implied ascertainability requirement), *and Carrera II*, 727 F.3d at 312 (vacating class certification because plaintiff did not satisfy the court's ascertainability inquiry), *with Byrd II*, 784 F.3d at 172 (Rendell, J., concurring) (advocating for the Third Circuit to eliminate its heightened ascertainability standard), *and* Carrera, 2014 WL 3887938, at *3 (Ambro, J., dissenting from denial of en banc review) (arguing that the Third Circuit's heightened ascertainability standard is in conflict with Rule 23's historical purpose).

[64] *See Mullins*, 795 F.3d at 657–58, 662. *See generally* Goldfarb, *supra* note 12 (discussing the circuit split that the Seventh Circuit created in *Mullins* when it rejected the Third Circuit's heightened ascertainability standard).

[65] *See infra* notes 67–83 and accompanying text.

Seventh Circuit's "weak" version of the implied ascertainability requirement applied in *Mullins* and how it differs from the Third Circuit's approach.[66]

A. Division Within the Third Circuit on Its Heightened Ascertainability Requirement

Despite the clear precedent established by *Byrd*, the Third Circuit has yet to settle on an interpretation of the implied ascertainability requirement.[67] Two recent opinions demonstrate that the heightened ascertainability standard has failed to garner consensus in the Third Circuit: Judge Ambro's dissenting opinion, joined by three others, in the Third Circuit's decision to deny en banc review of *Carrera*, and Judge Rendell's concurrence in *Byrd*.[68]

In 2012, Judge Ambro authored a formative opinion on the implied ascertainability requirement in the Third Circuit's decision in *Marcus v. BMW of North America, LLC*.[69] In his dissent of the Third Circuit's decision to deny en banc review in *Carrera*, however, he argued that the Third Circuit had taken the requirement too far.[70] He noted that the policy at the core of Rule 23 is to overcome the problem that small recoveries do not provide the economic incentive for a single person to prosecute his or her rights.[71] He stated that while he believed that an ascertainability inquiry is important for Rule 23 to work, the court must be careful as it decides how difficult the implied ascertainability requirement should be for plaintiffs so as to not disconnect Rule 23 from its core policy.[72] He also pointed out that the court's decision in *Carrera*

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[66] *See infra* notes 84–96 and accompanying text.

[67] *Compare Byrd II*, 784 F.3d at 172, 174–75 (Rendell, J., concurring) (arguing that the ascertainability standard articulated in *Byrd* made the implied requirement unreasonably difficult for plaintiffs to satisfy), *and Carrera*, 2014 WL 3887938, at *3 (Ambro, J., dissenting from denial of en banc review) (advocating for the Judicial Conference's Committee on Rules of Practice and Procedure to look into the implied ascertainability requirement in response to the court's decision in *Carrera*), *with Byrd II*, 784 F.3d at 163, 172 (articulating a two-prong, heightened standard for the implied ascertainability requirement), *and Carrera II*, 727 F.3d at 312 (vacating the class's certification because it failed the court's heightened ascertainability standard by not providing a mechanism through which the court could identify who had purchased defendant's weight-loss supplement).

[68] *See Byrd II*, 784 F.3d at 172–77 (Rendell, J., concurring); *Carrera*, 2014 WL 3887938, at *1–3 (Ambro, J., dissenting from denial of en banc review).

[69] *See* Marcus v. BMW of N. Am., LLC (*Marcus II*), 687 F.3d 583, 583, 593–94 (3d Cir. 2012) (establishing a standard for the implied ascertainability requirement that requires that plaintiffs establish an administratively feasible method for identifying individual class members so as to avoid "mini-trials" during a class action proceeding); *see also supra* notes 31–37 (discussing how the Third Circuit's decision in *Marcus* began to carve out the circuit's heightened ascertainability standard for the implied ascertainability requirement).

[70] *See Carrera*, 2014 WL 3887938, at *1–3 (Ambro, J., dissenting from denial of en banc review) ("Our court's opinion in *Carrera* gives the impression to many that we now carry [the implied ascertainability requirement] too far.").

[71] *See id.* at *2 (citing Amchem Prods. v. Windsor, 521 U.S. 591, 617 (1997)).

[72] *See id.* at *1–2.

could give defendants an incentive to conduct business in a way that makes it nearly impossible for class action plaintiffs to find a method for ascertaining class members that would satisfy the Third Circuit.[73] He therefore called upon the Judicial Conference's Committee on Rules of Practice and Procedure to look into Rule 23 and instruct courts as to how difficult the implied ascertainability requirement should be for plaintiffs.[74]

In *Byrd*, Judge Rendell suggested in her concurrence that it was time to eliminate the Third Circuit's heightened standard for the implied ascertainability requirement.[75] She was concerned that it narrows the availability of class actions in a way that the drafters of Rule 23 could not have intended.[76] The historical purpose of class actions, she argued, is to provide a mechanism through which individuals can prosecute their small-value claims in a way that makes economic sense, and it may be defeated by the Third Circuit's ruling in *Byrd*.[77] She also quoted Judge Ambro's dissent to the denial of en banc review in *Carrera* to take issue with the Third Circuit's ruling for allowing

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[73] *See id.* at *1. In *Carrera*, the defendant did not sell its weight-loss supplement directly to consumers, so it did not have records through which customers could be easily identified. *See Carrera II*, 727 F.3d at 308. Given that this was why the proposed class was found to have failed the implied ascertainability requirement, Judge Ambro called the defendant's behavior a "fortuity that will undoubtedly become more prevalent should the Court's decision become entrenched in law." *See Carrera*, 2014 WL 3887938, at *1 (Ambro, J., dissenting from denial of en banc review).

[74] *See Carrera*, 2014 WL 3887938, at *3 (Ambro, J., dissenting from denial of en banc review). Rule 23 has been amended seven times since it was adopted with the rest of the Federal Rules of Civil Procedure in 1937. *See* FED. R. CIV. P. 23 advisory committee's notes to 1937, 1946, 1966, 1987, 1998, 2003, 2007, 2009 amendments. The Judicial Conference's Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules are the first to evaluate proposed amendments to the Federal Rules of Civil Procedure. *How the Rulemaking Process Works*, USCOURTS.GOV, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works [https://perma.cc/79LM-EXB9]. If the Advisory Committee chooses to explore a proposed amendment, it will ask the Standing Committee for permission to publish a draft of the amendment. *Id.*; *see also* Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323, 328–31 (1991) (providing an overview of the proposal, review, and promulgation procedures for amending the Federal Rules of Civil Procedure). At that point, judges, practitioners, and the general public will be invited to comment on the draft language for the amendment, and, based on those comments, the Advisory Committee will "discard, revise, or transmit" the proposed amendment to the Standing Committee. *How the Rulemaking Process Works*, *supra*. The Standing Committee then conducts its own review of the proposed amendment and recommends the amendment to the Judicial Conference only if it is satisfied with the language. *Id.*; Baker, *supra*, at 328–31. The Judicial Conference then recommends the proposed amendment to the U.S. Supreme Court with additional proposed changes, if necessary, and the Court may choose whether to promulgate the proposed amendment. *How the Rulemaking Process Works*, *supra*.

[75] *See Byrd II*, 784 F.3d at 177 (Rendell, J., concurring) ("I suggest that it is time to retreat from our heightened ascertainability requirement in favor of following the historical meaning of ascertainability under Rule 23.").

[76] *See id.* at 172.

[77] *See id.* at 176–77.

defendants the opportunity to thwart a plaintiff's attempts at class certification by conducting business in a way that makes it impossible to easily identify its consumers.[78]

She proposed replacing the heightened ascertainability standard with one that requires only that a proposed class be clearly defined.[79] She argued that the second prong of the heightened ascertainability standard endorsed in *Byrd*, which requires that plaintiffs establish an administratively feasible method through which the court may identify class members, is unnecessary and inconsistent with Rule 23's historical purpose.[80] The Third Circuit has reasoned that its heightened ascertainability standard helps to prevent fraudulent claims of class membership.[81] Judge Rendell rejected this analysis and argued that it is unlikely that someone would perjure himself or herself simply to recover a piece of a class action award because of how insubstantial individual payouts generally are once damages are distributed to each class member.[82] In addition, Judge Rendell argued that courts should afford plaintiffs the opportunity to work with judges and to identify class members as the class action proceeds, rather than requiring plaintiffs to establish a method for identifying class members at the outset of litigation.[83]

B. The Seventh Circuit Rejects Byrd *and Creates a Circuit Split*

Rather than adopt the Third Circuit's heightened ascertainability standard, the Seventh Circuit in *Mullins* applied a "weak" version of the implied ascertainability requirement.[84] In *Mullins*, the court considered a class action brought by consumers against Direct Digital, LLC, which advertised that its

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[78] *See id.* at 173 (quoting *Carrera*, 2014 WL 3887938, at *3 (Ambro, J., dissenting from denial of en banc review)).

[79] *See Byrd II*, 784 F.3d at 177 (Rendell, J., concurring) ("I would therefore . . . hold that (1) hereafter, our ascertainability analysis will focus on class definition only, and (2) the District Court's analysis regarding the second prong of our ascertainability was unnecessary.")

[80] *See id.* at 174–77 (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974)) (noting that the historical purpose of Rule 23 is to provide individuals with small claims a mechanism through with they can prosecute their claims in a way that makes economic sense).

[81] *See Carrera II*, 727 F.3d at 310; *Marcus II*, 687 F.3d at 594.

[82] *See Byrd II*, 727 F.3d at 175 (Rendell, J., concurring). Judge Rendell stated, "[T]he chances that someone would, under penalty of perjury, sign a false affidavit stating that he or she bought Bayer aspirin for the sake of receiving a windfall of $1.59 are far-fetched at best." *Id.* She was referring to the facts of *Carrera*, in which the plaintiff's request to certify a class in an action against Bayer aspirin failed because the court felt allowing class members to identify themselves by signing an affidavit stating that they were members could violate Bayer's due process rights. *See id.* (citing *Carrera II*, 727 F.3d at 310).

[83] *Byrd II*, 727 F.3d at 174 (Rendell, J., concurring). Specifically, she observed that this element to the heightened ascertainability requirement "puts the class action cart before the horse and confuses class certification." *Id.*

[84] *See Mullins*, 795 F.3d at 657–59, 662 (interpreting the implied ascertainability requirement as simply requiring that a proposed class be defined clearly and by objective criteria).

medical product, Instaflex Join Support ("Instaflex"), was clinically tested to improve joint flexibility and mobility when in reality it was nothing more than a sugar pill placebo.[85] The plaintiffs moved to certify the following class: "all consumers in Illinois and states with similar laws, who purchased Instaflex within the applicable statute of limitations of the respective Class States, for personal use until the date notice is disseminated."[86] Invoking *Carrera*, Direct Digital argued that the court should deny class certification on ascertainability grounds because the plaintiffs did not present the court with an administratively feasible method for determining who had purchased Instaflex.[87] The district court rejected this argument and certified the class.[88]

On appeal, the Seventh Circuit affirmed the class certification.[89] The court acknowledged its own use of the implied ascertainability requirement, but rejected the heightened standard endorsed by the Third Circuit in *Byrd*.[90] The court instead applied its "weak" version of the implied ascertainability requirement, which simply requires that a class be defined clearly and by objective criteria.[91] It held that the policy concerns motivating the Third Circuit's heightened ascertainability standard are better addressed by carefully applying the explicit requirements of Rule 23.[92] The court pointed to Rule 23's explicit superiority requirement as being able to address the potential

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[85] Mullins v. Direct Dig., LLC, No. 13 CV 1829, 2014 WL 5461903, at *1 (N.D. Ill. Sept. 30, 2014), *aff'd*, 795 F.3d 654 (7th Cir. 2015).

[86] *Id.*

[87] *See* Defendant's Opposition to Plaintiff's Renewed Motion for Class Certification at 5–6, *Mullins*, 2014 WL 5461903 (No. 1:13-cv-01829) (citing *Carrera II*, 727 F.3d at 305–09). Direct Digital invoked *Carrera* in its argument because it similarly involved alleged false advertising with respect to a medical product. *See id.* In *Carrera*, the Third Circuit held that the proposed class was not ascertainable because the plaintiffs did not present an administratively feasible way to prove that each member had actually purchased the product. *See Carrera II*, 727 F.3d at 312. Direct Digital argued that the same standard should be applied to deny certification of the proposed class in *Mullins*. *See* Defendant's Opposition to Plaintiff's Renewed Motion for Class Certification, *supra*, at 6. ("Mullins cannot certify any class because he failed to identify any objective method for ascertaining any Instaflex purchasers.").

[88] *Mullins*, 2014 WL 5461903, at *4 ("Plaintiff's class is ascertainable because it is objectively contained to all individuals who purchased Instaflex for personal use during the [finite] class period . . . ."). The U.S. District Court for the Northern District of Illinois held that plaintiff's proposed class was ascertainable because it was "objectively contained to all individuals who purchased Instaflex for personal use during the class period and the class period is finite." *Id.* at *2.

[89] *Mullins*, 795 F.3d at 657.

[90] *See id.* at 657–58 ("We . . . have long recognized an implicit requirement under Rule 23 that a class must be defined clearly and that membership must be defined by objective criteria . . . . We decline to follow [the Third Circuit] . . . . Nothing in Rule 23 mentions or implies [its] heightened requirement . . . .").

[91] *See id.* at 657.

[92] *Id.* at 658 (arguing that the goals of Third Circuit's heightened ascertainability standard can be better captured by the explicit "superiority" requirement of Rule 23).

administrative burdens of a proposed class that the Third Circuit's heightened ascertainability standard is meant to address.[93]

The court also took issue with the Third Circuit's heightened ascertainability standard for requiring courts to dismiss a potentially burdensome class at the outset of litigation.[94] The Seventh Circuit's "weak" version of the implied ascertainability requirement, in contrast, allows the court to take a "wait and see" approach to potentially problematic classes, with the option to decertify a class later in litigation if necessary.[95] To illustrate its point, the court pointed to several cases in which consumer classes were decertified under a heightened standard of ascertainability but may have survived in the Seventh Circuit.[96]

III. ENDING THE IMPLIED ASCERTAINABILITY REQUIREMENT: AMENDING RULE 23 TO EXPLICITLY INCLUDE IT

Rule 23 should be amended to explicitly include an ascertainability requirement.[97] The drafters of Rule 23 hoped to "shake the law of class actions

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[93] *See id.* at 663. Rule 23(b)(3) requires that the class action device be "superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). The Seventh Circuit asserts that Rule 23's superiority requirement calls upon courts to balance the "manageability concerns" of a proposed class with the availability of alternatives for adjudicating a proposed class's claim. *See Mullins*, 795 F.3d at 658, 663. It therefore concludes that a "heightened ascertainability standard upsets this balance" by giving "absolute priority" to manageability concerns and ignoring the fact that small-value claims often have no alternative to the class action mechanism for prosecuting their claims. *Id.*

[94] *See Mullins*, 795 F.3d at 663–64.

[95] *See id.* at 664.

[96] *See id.* at 657 (citing *Carrera II*, 727 F.3d at 307–12 (weight-loss supplement consumers); Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1089–90 (N.D. Cal. 2011) (cigarette smokers); Weiner v. Snapple Beverage Corp., No. 07 Civ. 8742(DLC), 2010 WL 3119452, at *12–13 (S.D.N.Y. Aug. 5, 2010) (Snapple beverage consumers)).

[97] *See* LAWYERS FOR CIVIL JUSTICE, COMMENT TO THE RULE 23 SUBCOMMITTEE OF THE ADVISORY COMMITTEE ON CIVIL RULES 2 (Nov. 3, 2015), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_to_civil_rules_committee_11-3-15.pdf [https://perma.cc/H35Y-P2EM] (advocating to the Rule 23 Subcommittee that Rule 23 needs to be amended to include an explicit ascertainability requirement); Mullenix, *supra* note 5, at 437, 441–44 (calling for Rule 23 amendment and proposing solutions to the confusions caused by the implied ascertainability requirement); Shaw, *supra* note 5, at 2403 (arguing that the ascertainability requirement has done its work "in the shadows of implication" and that Rule 23 now needs to be amended to explicitly include an ascertainability standard). Robert E. Keeton, former chair of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, a body responsible for developing the Federal Rules of Civil Procedure, stated, "Federal Rules of Practice and Procedure ought to be user-friendly . . . [and] even superbly drafted rules are at risk of becoming less consistent, clear, and readable . . . and the need for amendment is inevitable." *See* Robert E. Keeton, *Preface* to BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES, at i (1996). The process of amending the Federal Rules of Civil Procedure involves several layers of consideration and approval that begins with consideration by the Advisory Committee on Civil Rules and ends with the U.S. Supreme Court, which will promulgate the amendment if accepted. *See How the Rulemaking Process Works*, *supra* note 74. The topic of ascertainability is currently

from abstract categories."[98] Now, after years of inconsistent interpretations of an implied ascertainability requirement by federal courts, the concept of "ascertainability" has emerged as a new abstraction from which class action law must be shaken through an amendment to Rule 23.[99]

The implied ascertainability requirement has become especially problematic for small-claim consumer plaintiffs.[100] Rule 23's historical purpose was to accommodate those types of claims, and an amendment should therefore be tailored to returning Rule 23 to that purpose.[101] The Seventh Circuit court of Appeals' "weak" version of the implied ascertainability requirement would best return Rule 23 to its historical purpose.[102] The Third Circuit Court

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listed as "on hold" by the Rule 23 Subcommittee of the Advisory Committee on Civil Rules, which means that the committee felt that amendment was not appropriate at its last meeting in April, 2015, but that it recognized that it is a developing issue. *See* ADVISORY COMM. ON CIVIL RULES, RULE 23 SUBCOMMITTEE REPORT 89 (Nov. 5–6, 2015), http://www.uscourts.gov/file/18536/download [https://perma.cc/3FLG-96A9].

[98] *See* Kaplan, *A Prefatory Note*, *supra* note 1, at 497.

[99] *Compare* Byrd v. Aaron's Inc. (*Byrd II*), 784 F.3d 154, 162 (3d Cir. 2015) (imposing a two-prong, heightened standard for ascertainability as part of the implied ascertainability requirement), *with* Mullins v. Direct Dig., LLC, 795 F.3d 654, 657 (7th Cir. 2015) (interpreting the ascertainability requirement as only requiring that a proposed class be clearly defined by objective criteria). *See also* Stephanie Haas, *Class in Session: The Third Circuit Heightens Ascertainability with Rigor in* Carrera v. Bayer Corp., 59 VILL. L. REV. 793, 804–05 (2014) (providing an overview of the inconsistent applications of the implied ascertainability requirement); Mullenix, *supra* note 5, at 424–25 (discussing how application of the implied ascertainability requirement has not been consistent among federal courts); Shaw, *supra* note 5, at 2403 (arguing that Rule 23 needs to be amended to reflect a single interpretation).

[100] *See, e.g.*, *Byrd II*, 784 F.3d at 172 (household electronics consumers); Carrera v. Bayer Corp. (*Carrera II*), 727 F.3d 300, 312 (3d Cir. 2013) (weight-loss supplement consumers); Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 356 (3d Cir. 2013) (Sam's Club shoppers); Marcus v. BMW of N. Am., LLC (*Marcus II*), 687 F.3d 583, 612 (3d Cir. 2012) (car owners); John v. Nat'l Sec. Fire and Cas. Co., 501 F.3d 443, 445 (5th Cir. 2007) (homeowners insurance customers); Xavier v. Phillip Morris USA Inc., 787 F. Supp. 2d 1075, 1078, 1091 (N.D. Cal. 2011) (Marlboro smokers); Weiner v. Snapple Beverage Corp., No. 07 Civ. 8742(DLC), 2010 WL 3119452, at *12–13 (S.D.N.Y. Aug. 5, 2010) (Snapple tea drinkers); *see also* Gilles, *supra* note at 5, at 307 (discussing how the implied ascertainability requirement has been used repeatedly by federal courts to decline certification to consumer class actions).

[101] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring solo action prosecuting his or her rights" (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997))); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161, 186 (1974) (noting that small-claim plaintiffs have no incentive to litigate individually, and asserting that "[t]he class action is one of the few legal remedies the small claimant has against those who command the status quo"); *see also* Ford, *supra* note 13, at 504 (arguing that Rule 23's most important purpose is to provide a vehicle for a large group of small claimants to seek recovery); Kaplan, *Continuing Work*, supra note 1, at 390 (a drafter of the 1966 Rule 23 amendment explaining that the purpose of reformed Rule 23 was to accommodate plaintiffs who would not have the economic incentive to pursue a case individually).

[102] *See Mullins*, 795 F.3d at 657 (noting that an application of the Seventh Circuit's "weak" version of the implied ascertainability requirement, which simply requires that a class be objectively defined, may have prevented consumer class actions in other courts from being denied certi-

of Appeals' interpretation, which imposes on plaintiffs a heightened ascertainability standard, frustrates that purpose and should therefore not be included in an amendment.[103]

The Seventh Circuit's "weak" version of the implied ascertainability requirement simply requires that a class be defined clearly and by objective criteria.[104] This interpretation of the implied ascertainability requirement, unlike the Third Circuit's interpretation, does not allow a defendant the opportunity to block class certification simply by conducting its business in a way that makes it impossible to easily identify its customers.[105] By not extending this practical immunity to defendants, the Seventh Circuit's "weak" ascertain-

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fication); *Byrd II*, 784 F.3d at 177 (Rendell, J., concurring) (arguing that the implied ascertainability should be interpreted as only requiring a clear class definition so as to be consistent with the historical purpose of Rule 23); *see also* Shaw, *supra* note 5, at 2397–98 (advocating that, to remain consistent with Rule 23's historical purpose, the policy concerns motivating the Third Circuit's heightened standard for the implied ascertainability requirement should be captured by a rigorous application Rule 23's explicit superiority requirement, similar to the Seventh Circuit's "weak" interpretation of the implied ascertainability requirement).

[103] *See Mullins*, 795 F.3d at 658 (asserting that the Third Circuit's heightened ascertainability standard gives absolute priority to manageability and therefore prevents Rule 23 from accommodating small-claim plaintiffs); *Byrd II*, 784 F.3d at 175–76 (Rendell, J., concurring) (expressing concern that the Third Circuit's heightened ascertainability standard defeats Rule 23's core purpose); Carrera v. Bayer Corp., No. 12-2621, 2014 WL 3887938, at *2 (3d Cir. May 2, 2014) (Ambro, J., dissenting from denial of en banc review) (arguing that the Third Circuit's heightened ascertainability standard will allow "some wrongs to [go] unrighted" because it makes it certification more difficult on small-claim plaintiffs); *see also* Haas, *supra* note 99, at 815 ("A heightened ascertainability standard is irreconcilable with both the class action's core policy of incentivizing small-claims plaintiffs to seek justice as well as the compensation and deterrence functions of the class action mechanism."); Shaw, *supra* note 5, at 2397–98 (discussing how the Third Circuit's heightened ascertainability standard for the implied ascertainability requirement is inconsistent with the drafters' intentions for Rule 23).

[104] *See Mullins*, 795 F.3d at 657. ("We . . . have long recognized an implicit requirement under Rule 23 that a class must be defined clearly and that membership be defined by objective criteria . . . .").

[105] *See id.* at 668 ("Ascertainability . . . is particularly misguided when applied to a case where any difficulties encountered in identifying class members are a consequence of a defendant's own acts or omissions." (quoting Daniels v. Hollister Co., 113 A.3d 796, 801 (N.J. Super. Ct. App. Div. 2015))); *Carrera*, 2014 WL 3887938, at *1–3 (Ambro, J., dissenting from denial of en banc review) (warning that the Third Circuit's heightened ascertainability standard could allow wrongdoers to "[game] the system" and escape liability for their conduct by conducting business in a way that makes it impossible to easily identify their customers); *see also* Shaw, *supra* note 5, at 2398 (citing Gold v. Midland Credit Mgmt., Inc., 306 F.R.D. 623, 635 (N.D. Cal. 2013)) (discussing the ironic results and unfortunate incentives that are created when certification is blocked because of a business-defendant's lack of adequate record-keeping). Defendants in the Third Circuit have enjoyed this immunity effect because of the heightened ascertainability standard. *See Carrera II*, 727 F.3d at 308, 312 (vacating the lower court's decision to certify plaintiff's class after defendant presented evidence that its own records were insufficient to identify class members); *Marcus II,* 687 F.3d at 593–94, 612 (stating that certification of plaintiff's proposed class depended on whether or not defendant's records of the relevant transactions could identify class members, and putting the burden on plaintiff to suggest an administratively feasible alternative if the records could not).

ability requirement makes it easier for small-claim consumer claimants to hold corporations accountable for their conduct, and will finally return Rule 23 to its core policy roots.[106]

CONCLUSION

In *Byrd*, the Third Circuit articulated its heightened standard for Rule 23's implied requirement that a class be ascertainable. This standard has proven to be especially hard on consumer class actions. The Seventh Circuit created a circuit split when it rejected the Third Circuit's heightened standard, and instead held that the implied ascertainability requirement simply asks that a class be defined by clear and objective criteria. This interpretation is easier on consumer class actions, and is therefore more consistent with Rule 23's historical purpose. To ensure that class certification is adjudicated consistently in federal courts, and consistently with the historical purpose of the class action mechanism, Rule 23 should be amended to explicitly adopt the Seventh Circuit's interpretation of ascertainability.

TOM MURPHY

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[106] *See Amchem Prods.*, 521 U.S. at 617 (holding that the core policy of Rule 23 is to give individual the economic incentive to prosecute his or her private rights); *Eisen*, 417 U.S. at 186 (holding that the purpose of Rule 23 is to give individual a mechanism through which they can prosecute their private rights against those who command the status quo); *Mullins*, 795 F.3d at 657 (listing several consumer class actions that were decertified that may have survived certification under the Seventh Circuit's "weak" version of the implied ascertainability requirement); *Byrd II*, 784 F.3d at 175–76 (Rendell, J., concurring) ("[The Third Circuit's] ascertainability doctrine . . . has ignored . . . important policy objectives of class actions: deterring and punishing corporate wrongdoing." (citing Hughes v. Kore of Ind. Enter., Inc., 731 F.3d 672, 677 (7th Cir. 2013))).