

CLASS ACTIONS

Strict Ascertainability Standard Continues to Apply in Third Circuit

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Predictions from some quarters that the Third Circuit's decision in *Byrd v. Aaron's*, 784 F.3d 154 (3d Cir. 2015), signaled a weakening of the "ascertainability" standard for class actions brought in the federal courts in New Jersey have not been borne out, as a survey of District of New Jersey decisions demonstrates that the courts continue to apply a strict standard for "ascertainability." This trend has consequences for consumer class actions in which there is difficulty verifying who is in the class or in which the means of doing so is not administratively feasible.

In recent years, the Third Circuit has led the way in defining a

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Unless and until the Supreme Court rules otherwise, the strict ascertainability standard articulated by the Third Circuit prevails.

strict standard for analyzing when a proposed class is "ascertainable" for class certification purposes. Unlike other circuits and New Jersey state courts that just require a proposed class to be objectively defined, the Third Circuit

also requires that class members be identifiable by verifiable and administratively feasible means. The law in the Third Circuit was settled in a trilogy of decisions in *Marcus v. BMW of North America*, 687 F.3d 583 (3d Cir. 2012); *Hayes v.*

Wal-Mart Stores, 725 F.3d 349 (3d Cir. 2013); and *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).

The Third Circuit laid the groundwork for its current analysis in *Marcus*, in which the court reaffirmed that “an essential prerequisite of a class action ... is that the class must be currently and readily ascertainable based on objective criteria,” and also that “[i]f class members are impossible to identify without extensive and individualized fact-finding or ‘mini-trials,’ then a class action is inappropriate.” The *Marcus* panel held that the mere “say so” of the class member is not enough to establish class membership.

That rule is particularly apt in consumer class actions where the product at issue is a low-cost retail item, and consumers will be unlikely to have receipts or other proof of purchase.

In *Carrera*, the Third Circuit recognized that “the plaintiff must demonstrate his purported method for ascertaining class members is reliable and administratively feasible, and permits a defendant to challenge the evidence used to prove class membership.” The panel rejected the plaintiffs’ proposal to use third-party retailer records to identify class members because there was no evidence that “a single purchaser” there could be identified by those records. The panel also rejected the plaintiffs’ proposal to use affidavits of class members to establish class membership because “it does not address a core concern of ascertainability: that a defendant must be able to challenge class membership.”

In *Hayes*, the district court noted that the defendant “had no method for determining how many of the 3,500 ... transactions that took place during the class period” met the class definition. The panel remanded the case for the plaintiff to “offer some reliable and administratively feasible alternative” for determination of class membership.

The Third Circuit addressed ascertainability a fourth time in *Byrd v. Aaron’s*, 784 F.3d 154 (3d Cir. 2015). There, the putative class was only comprised of 895 people, and the defendant had some “objective records” to “readily identify” class members, and other class members could be identified by filling out a simple form. The panel held that the form filled out by putative class members could be verified through already-known address information as well as additional public records, which the panel found was consistent with *Carrera* because “[c]ertainly, *Carrera* does not suggest that no level of inquiry as to the identity of class members can ever be undertaken. If that were the case, no Rule 23(b)(3) class could ever be certified.”

Some commentators have concluded that *Byrd* has watered down the ascertainability requirement in the Third Circuit. To support this view, some point to Judge Rendell’s concurring opinion in *Byrd*, which “suggest[ed] that it is time to retreat from our heightened ascertainability requirement in favor of following the historical meaning of ascertainability under Rule 23,” i.e., an objective class definition. A review of the District of New Jersey cases

since *Byrd*, however, reveals that courts addressing ascertainability have interpreted *Byrd* as consistent with, and not limiting, the *Marcus/Carrera/Hayes* trilogy.

For example, Judge Hillman in *Bello v. Beam Global Spirits & Wine*, 2015 WL 3613723 (D.N.J. June 9, 2015), denied class certification because the plaintiffs’ “proposed reliance on affidavits alone, without any objective records to identify class members or a method to weed out unreliable affidavits, fails to satisfy the ascertainability requirement under the law of this Circuit.” Judge Hillman noted that *Byrd* did not alter the analysis but “only further explained and affirmed the standard articulated in *Marcus*, *Hayes* and *Carrera*.”

Other cases since *Byrd* have continued to apply a strict ascertainability requirement. In *Mladenov v. Wegmans Food Markets*, 124 F. Supp. 3d 360 (D.N.J. 2015), Judge Irenas struck the class allegations at the pleading stage because the plaintiffs could not demonstrate any reliable way to determine who saw the allegedly deceptive signs at issue. The plaintiffs in *Mladenov* argued that the motion to strike the class allegations should be denied under *Byrd*. But Judge Irenas held that “[b]ased on the Court’s understanding of the *Byrd* opinion, if the records plaintiffs rely upon are insufficient to identify those included within the specifically defined class, an ascertainability issue arises.”

Similarly, in *City Select Auto Sales v. BMW Bank of North America*, 2015 WL 5769951 (D.N.J. Sept. 29, 2015), the plaintiff argued

that the defendant's ascertainability argument failed under *Byrd* because class membership "can be verified by cross-reference to objective records." Judge Hillman disagreed, finding that the records were insufficient to verify class membership. He also rejected the plaintiffs' argument that a defendant's "lack of records and business practices makes it more difficult for a plaintiff to ascertain the members of an otherwise objectively verifiable low-value class, which may cause class members to suffer." Judge Hillman explained that "the decisions in *Marcus, Hayes, Carrera, and Byrd* are precedential opinions, and the standards set forth therein must be followed by this Court. These cases make clear that a defendant's lack of records does not alleviate a plaintiff's burden of demonstrating that a class can be certified."

In another case, *Martinez v. Equifax*, 2016 WL 226639 (D.N.J. Jan. 19, 2016), Judge Chesler granted the defendant's motion to strike class allegations where the class definition "meets neither part of the *Byrd* ascertainability requirements," because "it lacks any reference to objective criteria" and "there appears to be no reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition."

To be sure, there have been decisions since *Byrd* in which the courts have found that the proposed classes satisfied the ascertainability

requirement. But those opinions did so not because *Byrd* "watered down" the ascertainability requirement but on grounds that existed prior to *Byrd*. In *Nepomuceno v. Midland Management*, 2016 WL 3392299 (D.N.J. June 13, 2016), and *Martinez-Santiago v. Public Storage*, 312 F.R.D. 380 (D.N.J. 2015), the courts found that the putative classes satisfied the ascertainability standard because they were objectively defined and class members could be identified through the defendants' records, without need for mini-trials, which is consistent with the pre-*Byrd* law. In *Harnish v. Widener University School of Law*, 2015 WL 4064647 (D.N.J. July 1, 2015), the defendants' ascertainability argument was rejected not only because the putative class (enrolled students who paid tuition) was objectively defined and could be reliably identified through the defendant's records, without mini-trials, but also because the court found that the defendant's argument (that the proposed class was overbroad because it included members who were not exposed to the alleged misrepresentation) was "irrelevant for ascertainability" and was more properly "considered within the rubric of the relevant Rule 23 requirements."

In other words, the grounds for finding ascertainability in *Nepomuceno*, *Martinez-Santiago* and *Harnish* were available before *Byrd*. Therefore, one cannot conclude from these decisions that the district courts viewed *Byrd* as having

relaxed the ascertainability requirements in the Third Circuit.

Based on the Third Circuit's "quartet of cases" in *Marcus, Hayes, Carrera* and *Byrd*, and their District of New Jersey progeny that have been decided post-*Byrd*, the Third Circuit still applies a strict version of the ascertainability requirement, and that's how the district courts in New Jersey apply those decisions. Attempts by plaintiffs to argue that *Byrd* signals a "U-turn" by the Third Circuit have been rejected by district courts, and putative classes continue to be rejected on ascertainability grounds.

There is a split among the federal circuits on the ascertainability requirement, and it is likely that the Supreme Court at some point will weigh in on this issue. But the law in the Third Circuit is well-settled and is based on the implicit existence of a strict ascertainability requirement under Fed. R. Civ. P. 23. Unless and until the Supreme Court rules otherwise, the strict ascertainability standard articulated by the Third Circuit prevails. That rule means that in a consumer class action in the District of New Jersey, the plaintiff must demonstrate that there is a reliable method of verifying class membership and of enabling a defendant to challenge a putative class member's claim that he or she belongs in the class, and that the methodology does not require mini-trials. Otherwise, the plaintiff will find ascertainability to be an obstacle to certifying a class. ■