

**YOU STAY CLASSY ADVISORY COMMITTEE: THE NEED
TO AMEND RULE 23 TO INCLUDE EXPLICIT
ASCERTAINABILITY IN THE WAKE OF *SANDUSKY
WELLNESS CENTER, LLC v. MEDTOX SCIENTIFIC, INC.***

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I. INTRODUCTION

Under the Federal Rules of Civil Procedure, Rule 23 sets forth explicit requirements for a putative class of plaintiffs to be certified by a court before the class is able to litigate a class action suit.¹ Before a court can certify a putative class, the class must meet the four explicit requirements set out in Rule 23, namely numerosity, commonality, typicality, and adequacy.² In addition to these explicit requirements, however, is a requirement that the putative class be ascertainable.³ Notwithstanding the absence of such a requirement in Rule 23's text, federal courts have long included an implicit ascertainability requirement for class certification.⁴ To be ascertainable, "members of a certified class must be sufficiently definite, that is, class members must be easily ascertained or determined using objective criteria."⁵ While all federal circuits acknowledge the existence of some form of implied ascertainability requirement, certain circuits have applied it differently.⁶

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¹ See FED. R. CIV. P. 23.

² FED. R. CIV. P. 23(a)(1)–(4).

³ See FED. R. CIV. P. 23.

⁴ See *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (holding that it is "elementary" that a putative class must be "adequately defined and clearly ascertainable" to maintain a class action); *Simer v. Rios*, 661 F.2d 655, 669–70 (7th Cir. 1981) (adopting a stand-alone ascertainability requirement implied within Rule 23).

⁵ John H. Beisner et al., *The Implicit Ascertainability Requirement for Class Actions*, PRACTICAL LAW ARTICLE, (Feb. 27, 2014), <https://www.skadden.com/sites/default/files/publications/The%20Implicit%20Ascertainability%20Requirement%20for%20Class%20Action%20s.pdf>.

⁶ Compare *Carrera v. Bayer Corp.*, 727 F.3d 300, 308–12 (3d Cir. 2013) (vacating certification of class as plaintiffs failed to meet a heightened ascertainability standard for the implied ascertainability requirement), and *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (affirming the need for a heightened standard announced in *Carrera* and articulating a two-pronged heightened ascertainability standard for the implied ascertainability

The split among the federal circuits was created by the Third and Seventh Circuits' diverging applications of the ascertainability requirement.⁷ In 2015, the Third Circuit, in *Byrd v. Aaron's Inc.*, adopted a "heightened" ascertainability standard comprised of a two-prong test, creating a higher hurdle for putative classes to certify than previous applications of ascertainability had contemplated.⁸ This version of ascertainability requires that a plaintiff show "(1) the class is 'defined with reference to objective criteria'; and (2) there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'"⁹ Later that year, the Seventh Circuit acknowledged that ascertainability exists as an implicit, stand-alone, threshold requirement, but rejected the heightened ascertainability standard created in *Byrd*.¹⁰ In *Mullins v. Direct Digital, LLC*, the Seventh Circuit instead adopted a "weak" version of ascertainability more favorable to small-value consumer class actions.¹¹ To satisfy this version of an ascertainability requirement, a plaintiff need only show that class membership is defined "clearly and with objective criteria."¹²

Despite the highly publicized circuit split, the United States Supreme Court denied certiorari for the *Mullins* decision,¹³ and, more recently, declined to address the split again in a case out of the Sixth Circuit implicating the same issues.¹⁴ Additionally, in April 2015, the Civil Rules Advisory Committee (Advisory Committee) considered whether ascertainability should be an independent threshold requirement for class certification.¹⁵ On the heels of the Supreme Court's most recent refusal to address this issue, however, the Advisory Committee declined to include

requirement), with *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657–59 (7th Cir. 2015), cert. denied, 136 S. Ct. 1161 (2016) (adopting a "weak" implied ascertainability requirement which requires only a clearly and objectively defined class).

⁷ Compare *Carrera*, 727 F.3d at 312 (applying a heightened ascertainability standard), and *Byrd*, 784 F.3d at 163 (applying a heightened ascertainability standard), with *Mullins*, 795 F.3d at 657–59, cert. denied, 136 S. Ct. 1161 (2016) (applying a "weak" ascertainability standard).

⁸ See 784 F.3d at 163.

⁹ *Id.* at 163 (citing *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013)).

¹⁰ *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), cert. denied, 136 S. Ct. 1161 (2016).

¹¹ See *id.* 659–72.

¹² *Id.* at 672.

¹³ *Direct Digital, LLC v. Mullins*, 136 S. Ct. 1161, 1162 (2016) (mem.).

¹⁴ *Procter & Gamble Co. v. Rikos*, 136 S. Ct. 1493, 1494 (2016) (mem.).

¹⁵ See generally *Advisory Committee on Civil Rules, Agenda Book*, U.S. COURTS, 74, 77, 254 (Apr. 2015), http://www.uscourts.gov/sites/default/files/fr_import/CV2015-04.pdf (discussing both the Third Circuit's approach and the Seventh Circuit's approach to whether ascertainability is a criterion of class membership); see also Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1607 (2016).

ascertainability in its proposed changes to Rule 23.¹⁶ Thus, neither the Supreme Court, nor the Advisory Committee, has stepped in to resolve the conflicting applications of an implied ascertainability requirement among the several federal circuits.

Most recently, the Eighth Circuit deepened the circuit split when it addressed the debate over the proper application of an implied ascertainability requirement in *Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.*, decided in May 2016.¹⁷ The court stated that it does not recognize ascertainability as a separate, threshold requirement for class certification, but rather asserts that ascertainability should be factored into a “rigorous analysis” of Rule 23.¹⁸ Because the Eighth Circuit does not provide much in the way of analysis with respect to the standard announced in the case,¹⁹ lawyers and legal commentators are divided over whether the Eighth Circuit has created a new, third standard in applying an ascertainability requirement in class certification²⁰ or whether it has merely joined the Seventh Circuit, and others like it, by adopting a “weak” form of ascertainability.²¹

¹⁶ See Amanda Bronstad, *Circuit to Weigh ‘Ascertainability’ in Class Actions*, 140 THE RECORDER 1, 1 (2016).

¹⁷ 821 F.3d 992 (8th Cir. 2016).

¹⁸ *Id.* at 996.

¹⁹ *See id.*

²⁰ *See, e.g., Eighth Circuit Declines to Adopt Separate Ascertainability Test for Class Action Certification*, PRACTICAL LAW ARTICLE (May 6, 2016), <http://us.practicallaw.com/w-002-2175> (acknowledging that “[t]he Eighth Circuit, however, has not addressed whether ascertainability is a separate, preliminary requirement for class action certification); Joseph C. Wylie II et al., *Eighth Circuit Articulates New Ascertainability Standard in TCPA Class Actions*, TMTLAWWATCH.COM (May 11, 2016), <http://www.tmtlawwatch.com/2016/05/eighth-circuit-articulates-new-ascertainability-standard-in-tcpa-class-actions/> (reporting that the Eighth Circuit rejected “heightened” ascertainability in favor of its own ascertainability standard); *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 443, n.3 (3d Cir. 2017) (“The Eighth Circuit rejects the ascertainability requirement all together.”).

²¹ *See, e.g., A Serious Circuit Split on Class Ascertainability*, LAW360 (June 30, 2016), <http://www.law360.com/articles/813021/a-serious-circuit-split-on-class-ascertainability> (reporting that the Eighth Circuit has joined the Seventh Circuit in its articulation of ascertainability); Beasley Alleno, *Eighth Circuit Adopts Favorable Class Ascertainability Threshold*, JEREBEASLEYREPORT (Aug. 19, 2016), <http://www.jerebeasleyreport.com/2016/08/eighth-circuit-adopts-favorable-class-ascertainability-threshold/> (reporting that the Eighth Circuit joined the Seventh and Sixth Circuits in their articulation of an ascertainability standard); *In re Petrobras Sec.*, 862 F.3d 250, 265 (2d Cir. 2017) (holding that the Second Circuit “join[s] the Sixth, Seventh, Eighth, and Ninth” in rejecting heightened ascertainability); *see also Did the 8th Cir. Create Yet Another Class Member Test?*, BUREAU OF NATIONAL AFFAIRS (May 11, 2016), <http://www.bna.com/8th-cir-create-n57982071492/> (presenting both positions).

This Comment argues that the Eighth Circuit has created a third, distinct articulation of ascertainability that allows judges to ignore the requirement altogether, which only bolsters calls for reforming Rule 23.²² Further, it urges the Advisory Committee to amend Rule 23 to include an explicit ascertainability requirement modeled after the Third Circuit's heightened two-pronged standard.²³ Part II of this Comment provides an explanation of the historical underpinnings of Rule 23 and the judicial creation of the implied ascertainability requirement. Next, Part III describes the initial circuit split on the proper application of the implied ascertainability requirement that followed thereafter. Part IV discusses the *Sandusky Wellness Center, LLC v. Medtox Scientific* decision and the Eighth Circuit's treatment of ascertainability therein. Part V argues that this version of ascertainability is a third, distinct standard that differs from the standard articulated by the Seventh and Third circuits. In addition, Part V provides a potential explanation for this newly articulated standard and discusses the possible implications thereof. Part VI considers the Supreme Court's choice to not address the circuit split and recent Supreme Court cases that suggest that, if the Court addressed the issue, the Court would either adopt a "weak" version of ascertainability or do away with ascertainability altogether, as the Court has focused its decisions only on the explicit requirements of Rule 23. Finally, Part VII urges that the *Sandusky* decision, and the potential implications thereof, now warrants that the Advisory Committee resolve the circuit split by amending Rule 23 to include an explicit ascertainability requirement, namely one modeled after the Third Circuit's heightened standard. Part VIII concludes.

II. JUDICIAL CREATION OF THE ASCERTAINABILITY REQUIREMENT

A. *Rule 23 of the Federal Rules of Civil Procedure*

Rule 23, originally promulgated in 1938, is the principle Rule of Federal Civil Procedure that governs the procedure and administration of class action lawsuits in the federal judicial system.²⁴ The Advisory Committee created the modern version of Rule 23 through amendments made to the Federal Rules of Civil Procedure in 1966.²⁵ The amended Rule 23 includes four explicit threshold requirements that a putative class needs to meet in order to certify as a class.²⁶ The four subparts of Rule 23(a) outline

²² See *infra* Part V.

²³ See *infra* Part VII.

²⁴ See, e.g., FED. R. CIV. P. 23; Linda S. Mullenix, *Ending Class Actions As We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 405 (2014).

²⁵ See Mullenix, *supra* note 24, at 405.

²⁶ FED. R. CIV. P. 23(a)(1)–(4); see also Joseph A. Seiner, *The Issue Class*, 56 B.C. L.

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these requirements: numerosity, commonality, typicality, and adequacy.²⁷ These explicit threshold requirements reflect the Advisory Committee's desire to maintain efficiency in managing the class action device post-amendment.²⁸ Benjamin Kaplan, one of the principal drafters of the amended Rule 23, hoped that the new version of 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."²⁹ A requirement that a putative class be ascertainable, however, is absent from the explicit requirements listed under Rule 23(a).³⁰

B. *Genesis of the Ascertainability Requirement*

Generally, courts have agreed that Rule 23 requires a putative class be clearly defined by objective criteria in order to be certified.³¹ This requirement—that a class be clearly defined by objective criteria—finds its root in the plain language of Rule 23, which requires that "[a]n order that certifies a class action must define the class and the class claims, issues, or defenses."³² Eventually, this requirement was dubbed "ascertainability."³³ This ascertainability requirement, as it was initially conceived, centered on

REV. 121, 132–37 (2015) (furnishing a general overview of the class certification process).

²⁷ The text of Rule 23(a) reads in pertinent part:

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a)(1)–(4).

²⁸ See Sarah R. Cansler, *An "Insurmountable Hurdle" to Class Action Certification? The Heightened Ascertainability Requirement's Effect on Small Consumer Claims*, 94 N.C. L. REV. 1382, 1387 (2016); see also FED. R. CIV. P. 23(b)(3) advisory committee's note to 1966 amendment ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.").

²⁹ Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

³⁰ See FED. R. CIV. P. 23.

³¹ See Brent W. Johnson & Emmy L. Levens, *Heightened Ascertainability Requirement Disregards Rule 23's Plain Language*, ANTITRUST, Spring 2016, at 68; see, e.g., *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 139 (1st Cir. 2012); *Bakalar v. Vavra*, 237 F.R.D. 59, 64 (S.D.N.Y. 2006); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970).

³² See FED. R. CIV. P. 23(c)(1)(B); see also Johnson & Levens, *supra* note 31, at 68.

³³ See Johnson & Levens, *supra* note 31, at 68.

whether the class definition effectuated adequate dissemination of notice to class members and ensured the preclusive effects of a judgment were certain.³⁴

Moreover, shortly after the 1966 amendment to Rule 23, federal courts began to apply an implied ascertainability requirement when undergoing the class certification analysis.³⁵ In 1970, the Fifth Circuit declared that in order to maintain a class action it is “elementary” that the putative class must be “adequately defined and clearly ascertainable.”³⁶ Following the Fifth Circuit’s decision, ten years later, the Seventh Circuit acknowledged a stand-alone ascertainability requirement, when it concluded that ascertainability is a proper inquiry for a district court when deciding whether to certify a putative class.³⁷ In the decades following these two decisions, federal circuits enforced an implicit ascertainability requirement rather leniently, and there was little discussion among federal courts as to what its proper application should be.³⁸ The implied ascertainability requirement was not found to be controversial during these decades because of the types of class action suits that the federal courts were hearing during that time.³⁹

The typical kind of class actions that classes brought in federal courts during this time were securities disputes and, usually, each class member was readily ascertained through the financial records involved.⁴⁰ Plaintiffs rarely brought small-value state-law consumer class actions, such as

³⁴ *Id.*

³⁵ See Tom Murphy, *Implied Class Warfare: Why Rule 23 Needs an Explicit Ascertainability Requirement in the Wake of Byrd v. Aaron’s Inc.*, 57 B.C.L. Rev. E-Supp., 34, 38–39 (2016), <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3488&context=bclr>.

³⁶ *DeBremaecker*, 433 F.2d at 734.

³⁷ See *Simer v. Rios*, 661 F.2d 655, 669–70 (7th Cir. 1981).

³⁸ See, e.g., *Dunnigan v. Metro. Life Ins. Co.*, 214 F.R.D. 125, 135–36 (S.D.N.Y. 2003) (concluding, with little discussion, that the prospective class was ascertainable as 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) (declaring that the issue of ascertainability was not implicated in the case because it was evident who owned an allegedly contaminated well); *O’Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 327 (C.D. Cal. 1998) (holding, after only a brief discussion, that the prospective class was ascertainable as it was clear who lived in an area allegedly exposed to carcinogens). See also Jamie Zysk Isani & Jason B. Sherry, *The Ascendancy of Ascertainability as a Threshold Requirement for Certification*, BLOOMBERG BNA, 2–3 (May 8, 2015), <https://www.hunton.com/images/content/3/3/v3/3367/The-Ascendancy-of-Ascertainability.pdf>; Murphy, *supra* note 35, at 38–39.

³⁹ See Isani & Sherry, *supra* note 38, at 2–3.

⁴⁰ See generally *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) (class action claim brought pursuant to the Securities Exchange Act of 1934); *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983) (securities fraud class action); *In re Cendant Corp. Litig.*, 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). See also Murphy, *supra* note 35, at 39.

consumer fraud actions, in federal courts as it was nearly impossible for these types of class actions to meet the amount in controversy requirement,⁴¹ or the complete diversity requirement,⁴² to avoid addressing the more difficult questions underlying the “ascertainability” requirement.⁴³ In 2005, however, Congress passed the Class Action Fairness Act (CAFA), which changed the requirements necessary to plead diversity for class actions,⁴⁴ effectively opening the door to federal courts for state-law consumer class actions.⁴⁵

One of CAFA’s intended purposes was to expand federal courts’ discretion to exercise diversity jurisdiction over class action suits.⁴⁶ To effectuate this purpose, CAFA includes two key features.⁴⁷ First, it increases the amount in controversy requirement from \$75,000 to \$5 million, but this \$5 million threshold requirement can be satisfied by the aggregated sum of each individual plaintiff’s claims.⁴⁸ Second, it relaxes the “complete” diversity requirement, permitting jurisdiction where at least one plaintiff is diverse from at least one defendant in the action, or in other words, where “minimal diversity” exists.⁴⁹ Consequently, these changes marked significant departures from the former threshold requirements necessary to plead diversity jurisdiction to bring a class action into federal court.⁵⁰

⁴¹ Before the Class Action Fairness Act was passed in 2005, at least one plaintiff class member, individually, needed to assert a claim equal to, or in excess of, \$75,000, exclusive of interest and costs, in order to satisfy the amount in controversy requirement necessary to plead diversity jurisdiction in federal courts. 28 U.S.C. § 1332(a); *see* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 566 (2005); *see also* David J. Lender et al., CLASS ACTION FAIRNESS ACT OF 2005 (CAFA): OVERVIEW 2 (2013), http://www.weil.com/~media/files/pdfs/CAFA_Overview.pdf. This requirement made it difficult for small-value claims, where no individual plaintiff class member could him or herself assert a claim of damages for \$75,000, to plead diversity jurisdiction.

⁴² Before the Class Action Fairness Act, parties to the suit had to maintain “complete” diversity, meaning that not one of the plaintiff class members could be a citizen from the same state as any of the defendants in the action if the class intended to plead diversity jurisdiction to get into federal court. 28 U.S.C. § 1332(a) (2012); LENDER ET AL., *supra* note 41, at 1.

⁴³ *See* Isani & Sherry, *supra* note 38, at 2–3.

⁴⁴ 28 U.S.C. § 1332(d) (2018).

⁴⁵ *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, [CAFA] brings within the subject matter jurisdiction of federal courts is very broad.”); Isani & Sherry, *supra* note 38, at 3.

⁴⁶ 28 U.S.C. § 1332(d); *see also* LENDER ET AL., *supra* note 41, at 1.

⁴⁷ *See* LENDER ET AL., *supra* note 41, at 1.

⁴⁸ 28 U.S.C. § 1332(d)(2), (6); *see also* LENDER ET AL., *supra* note 41, at 1.

⁴⁹ 28 U.S.C. § 1332(d)(2); *see also* LENDER ET AL., *supra* note 41, at 1–2.

⁵⁰ *See* LENDER ET AL., *supra* note 41, at 1–2.

In the years following the enactment of CAFA, the number of class action suits filed in, or removed to, federal courts substantially increased.⁵¹ Suits filed as original proceedings in federal courts based on diversity jurisdiction were among this increase,⁵² which invariably included small-value consumer claims that could not be brought into federal courts before the enactment of CAFA. Accordingly, CAFA significantly changed the way putative classes could bring suit in federal courts, which, in effect, permitted small-value consumer class actions to make their way into federal court like never before.

III. CIRCUIT SPLIT AS TO THE APPROPRIATE THRESHOLD OF THE ASCERTAINABILITY REQUIREMENT

A. *The Third Circuit's Adoption of a Heightened Ascertainability Standard*

In the wake of CAFA, faced with many more small-value consumer class actions, federal circuits have had to address the difficult questions underlying ascertainability and have been deeply divided as to the appropriate application of the “ascertainability” requirement.⁵³ The circuit split is best exemplified by the divergent applications of ascertainability in the Third and Seventh Circuits.⁵⁴

⁵¹ See Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 3 (2008), <https://www.fjc.gov/sites/default/files/2012/CAFA0408.pdf> (reporting 1370 pre-CAFA federal court cases compared with 2354 post-CAFA federal court cases); see also Kalee DiFazio, *CAFA's Impact on Forum Shopping and the Manipulation of the Civil Justice System*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 133 (2012); Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593 (2008).

⁵² See LEE III & WILLGING, *supra* note 51, at 6 (reporting statistics on class actions filed as original proceedings in federal courts based on diversity jurisdiction). In the pre-CAFA period studied, diversity class actions filed as original proceedings averaged 11.9 per month. *Id.* That figure increased to 34.5 per month from March 2005 through June 2006. *Id.*

⁵³ Compare *Carrera v. Bayer Corp.*, 727 F.3d 300, 312 (3d Cir. 2013) (vacating certification of class as plaintiffs failed to meet a heightened ascertainability standard for the implied ascertainability requirement), and *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (affirming the need for a heightened standard announced in *Carrera* and articulating a two-pronged heightened ascertainability standard for the implied ascertainability requirement), with *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 657–59 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016) (adopting a “weak” implied ascertainability requirement which requires only a clearly and objectively defined class).

⁵⁴ Compare *Byrd*, 784 F.3d at 163, (adopting a two-pronged heightened ascertainability standard for the implied ascertainability requirement), with *Mullins*, 795 F.3d at 657–59, *cert. denied*, 136 S. Ct. 1161 (2016) (adopting a “weak” implied ascertainability requirement which requires only a clearly and objectively defined class).

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The Third Circuit, in *Byrd v. Aaron's Inc.*,⁵⁵ was the first of the two circuits to articulate its version of implied ascertainability. The plaintiffs in *Byrd* filed a class action suit against Aaron's, Inc. and its franchisee store Aspen Way Enterprises, Inc. ("Defendants"), alleging that Defendants had violated the Electronic Communications Privacy Act of 1986 (ECPA).⁵⁶ One of the named plaintiffs, Crystal Byrd, entered into a lease agreement with Defendants, who operated a business that sold and leased residential and office consumer electronics, to rent a laptop computer, which Defendants eventually repossessed.⁵⁷ One of Defendants' agents, upon repossession of the laptop, presented Mrs. Byrd with a screenshot of a poker website that, her husband, the other named plaintiff in the action, Brian Byrd, had visited, in addition to a picture of him playing online poker, taken by the laptop's built-in camera.⁵⁸ Defendants were allegedly able to obtain the picture through spyware software installed on the laptop, which was capable of collecting screenshots, keystrokes, and images from the computer's built-in camera.⁵⁹

The Byrds alleged that this spyware was used by Defendants to secretly access the laptop 347 times on eleven different days, over the course of approximately one month.⁶⁰ Upon filing the class action pursuant to the ECPA, the Byrds moved to certify the class under Rule 23, using 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."⁶¹ The district court denied class certification, reasoning that the Byrds did not satisfy the implied ascertainability requirement for failing to define "household members" in the proposed class definition and failing to provide a mechanism for readily identifying class members.⁶²

On appeal, the Third Circuit took the opportunity to address the confusion within the Circuit as to the proper application of the implied ascertainability requirement.⁶³ It pronounced a two-pronged test for

⁵⁵ 784 F.3d 154 (3d Cir. 2015).

⁵⁶ *Id.* at 158.

⁵⁷ *Id.* at 159.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Byrd*, 784 F.3d at 160.

⁶² *Byrd v. Aaron's, Inc.*, No. CIV. A. 11-101E, 2014 WL 1316055, at *5-6 (W.D. Pa. Mar. 31, 2014), *rev'd and remanded*, 784 F.3d 154 (3d Cir. 2015), *as amended* (Apr. 28, 2015).

⁶³ *See Byrd*, 784 F.3d at 161-62 ("[T]here has been apparent confusion in the invocation and application of ascertainability in this Circuit We seek here to dispel any confusion.").

satisfying ascertainability, namely that a plaintiff must show that “(1) the class is ‘defined with reference to objective criteria’; and (2) there is ‘a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.’”⁶⁴ Although this is now referred to as a “heightened” ascertainability requirement, the court reasoned that these two inquiries were not overbearing at the class certification stage as the test requires only that the plaintiffs adequately demonstrate that the class members can be identified through some administratively feasible mechanism, not that they actually identify each class member.⁶⁵ After articulating the clear two-pronged test for ascertainability, the court then reversed the district court’s denial of class certification and remanded the case to be decided under the two-prong test it had articulated.⁶⁶

B. *The Seventh Circuit’s Rejection of Heightened Ascertainability*

Less than three months after the *Byrd* decision, the Seventh Circuit, in *Mullins v. Direct Digital, LLC*, rejected the Third Circuit’s articulation of an implied ascertainability requirement and instead adopted a “weak” form of ascertainability.⁶⁷ The named plaintiff in *Mullins*, Vince Mullins, brought a class action pursuant to the Illinois Consumer Fraud and Deceptive Business Practices Act, on behalf of consumers of a medical product sold by the defendant, Direct Digital, LLC.⁶⁸ Mr. Mullins alleged that the defendant fraudulently advertised the product, Instaflex Joint Support (Instaflex), as having been clinically tested and shown to improve joint health, when really the product was no more than a sugar pill placebo.⁶⁹ The plaintiffs moved to certify the class using the following proposed class definition: “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.”⁷⁰ The defendant cited to the heightened ascertainability of the Third Circuit, particularly the one articulated in *Carrera*, in arguing that the plaintiffs failed to present the court with an administratively feasible method for determining which consumers actually purchased Instaflex in Illinois and thus should be denied class

⁶⁴ *Id.* at 163 (citing *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013)).

⁶⁵ *See id.* at 163 (“[I]t does not mean that a plaintiff must be able to identify all class members at class certification—instead, a plaintiff need only show that ‘class members *can* be identified.’”) (citing *Carrera v. Bayer Corp.*, 727 F.3d 300, 308 n.2. (3d Cir. 2013)).

⁶⁶ *Id.* at 172.

⁶⁷ 795 F.3d 654 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016).

⁶⁸ *Id.* at 658.

⁶⁹ *Id.*

⁷⁰ *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).

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certification under the implied ascertainability requirement.⁷¹ The district court found the defendant's argument unpersuasive and certified the class.⁷²

On appeal, the Seventh Circuit affirmed the lower court's decision to certify the putative class.⁷³ While the court acknowledged that the Seventh Circuit had long recognized a stand-alone implied ascertainability threshold requirement for class certification, it declined to follow the heightened standard articulated by the Third Circuit in *Byrd*.⁷⁴ Instead, the court applied a "weak" version of the implied ascertainability requirement; while this version of ascertainability is still a stand-alone threshold requirement for class certification, it stands in contrast to the Third Circuit's heightened version, as it requires only that class membership be defined "clearly and with objective criteria."⁷⁵ Accordingly, the Seventh Circuit rejected heightened ascertainability in favor of its "weak" form, signaling a circuit split as to the appropriate application of an ascertainability requirement in certifying putative classes.

C. *The Policy Concerns Underlying the Third Circuit's Heightened Ascertainability Standard*

The Third Circuit has expressed four primary policy concerns that ultimately motivated its adoption of the two-pronged heightened ascertainability standard as articulated in the *Byrd* decision.⁷⁶ The first, and most significant, of these policy concerns involves administrative convenience. The Third Circuit has advocated that the heightened standard is necessary as it "eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action by insisting on the easy identification of class members."⁷⁷ The heightened standard successfully does this by ensuring that class members are readily identifiable by the court without the need for "extensive and individualized fact-finding

⁷¹ 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 v. Bayer Corp.*, 727 F.3d 300, 305–09 (3d Cir. 2013)).

⁷² *Mullins*, 2014 WL 5461903, at *2 ("Plaintiff's class is ascertainable because it is objectively contained to all individuals who purchased Instaflex for personal use during the class period and the class period is finite.").

⁷³ *Mullins*, 795 F.3d at 657.

⁷⁴ 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").

⁷⁵ See *id.* at 672.

⁷⁶ See generally *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012); *Carrera*, 727 F.3d at 307.

⁷⁷ *Marcus*, 687 F.3d at 593 (citation and internal quotation marks omitted).

or mini-trials.”⁷⁸

The second policy concern involves potential unfairness to absent class members. The Third Circuit has also asserted that its heightened ascertainability requirement is needed to protect absent class members, for if the identities of absent class members cannot be ascertained, it is unfair to bind them by the judicial proceeding.⁷⁹

Moreover, the third policy concern centers on unfairness to the bona fide class members. The Third Circuit maintained that, if class members are identified only by their own affidavits, individuals without a valid claim will submit erroneous or fraudulent claims and dilute the share of recovery for the bona fide class members; thus, heightened ascertainability is necessary to protect these bona fide class members.⁸⁰

Finally, the fourth policy concern involves the due process interests of the defendant. The Third Circuit averred that the heightened ascertainability requirement is needed to safeguard the due process rights of defendants.⁸¹ Relying on cases about a defendant’s right to “present every available defense,”⁸² the Third Circuit asserted that the defendant in a class action suit must be afforded a similar right to challenge the reliability of evidence submitted to prove class membership.⁸³

In *Mullins*, the Seventh Circuit expressly addressed each of these policy concerns.⁸⁴ Generally, the Seventh Circuit reasoned that the same concerns can be addressed through careful application of the explicit requirements of Rule 23.⁸⁵ Specifically, as to the Third Circuit’s concern over the administrative burdens a putative class creates and the second prong of the heightened standard was designed to address, the court pointed to Rule 23’s explicit superiority requirement as being sufficient to deal with such

⁷⁸ *Carrera*, 727 F.3d at 307 (citation and internal quotation marks omitted).

⁷⁹ *See id.* at 307; *Marcus*, 687 F.3d at 593.

⁸⁰ *See Carrera*, 727 F.3d at 310 (“It is unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims.”).

⁸¹ *See id.* at 307; *see also Marcus*, 687 F.3d at 594.

⁸² *Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

⁸³ *See, e.g., Carrera*, 727 F.3d at 307 (“Ascertainability provides due process by requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership.”); *Marcus*, 687 F.3d at 594 (“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.”).

⁸⁴ *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 663–72 (7th Cir. 2015); *see Johnson & Levens, supra* note 31, at 68 for a full discussion of the Seventh Circuit’s rejection of the Third Circuit’s policy considerations.

⁸⁵ *Mullins*, 795 F.3d at 658 (asserting that objective sought by the Third Circuit’s heightened ascertainability standard can be better accomplished through the explicit “superiority” requirement of Rule 23).

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problems.⁸⁶ Rule 23(b)(3) requires that the class action device be “superior to other available methods for fairly and efficiently adjudicating the controversy.”⁸⁷ The Seventh Circuit asserted 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.⁸⁸ The Seventh Circuit therefore concluded that a “heightened ascertainability requirement upsets this balance” by giving “absolute priority” to manageability concerns and ignoring the fact that plaintiffs with small-value claims often have no alternative to the class action mechanism for prosecuting such claims.⁸⁹ In the Seventh Circuit’s opinion, heightened ascertainability has the “effect of barring class actions,” particularly those involving small-value claims.⁹⁰

Moreover, the Seventh Circuit rejected the Third Circuit’s heightened ascertainability standard for requiring courts to dismiss a potentially burdensome class at the outset of litigation.⁹¹ The Seventh Circuit maintained that its “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.⁹² Thus, it seems that under the “weak” ascertainability standard, courts may not necessarily need to address the issue of ascertainability at the class certification stage, but sometime thereafter.⁹³

⁸⁶ *See id.* at 663.

⁸⁷ FED. R. CIV. P. 23(b)(3).

⁸⁸ *See Mullins*, 795 F.3d at 658, 663.

⁸⁹ *Id.*

⁹⁰ *Id.* at 658.

⁹¹ *See id.* at 663–64.

⁹² *See id.* at 664.

⁹³ *See* FED. R. CIV. P. 23; *see also* Amy R. Jonker, *Is Your Putative Consumer Class Ascertainable? The 7th Circuit Suggests It Doesn’t Really Matter at the Certification Stage*, FINANCIAL SERVICES L. BLOG (Nov. 3, 2015), http://www.cfs-lawblog.com/is-your-putative-consumer-class-ascertainable-the-7th-circuit-suggests-it-doesnt-matter-at-the-certification-stage_110315.

IV. THE SANDUSKY WELLNESS CENTER, LLC V. MEDTOX SCIENTIFIC
DECISIONA. *Factual Background and Procedural History of Sandusky*

The *Byrd* and *Mullins* decisions were the two principal applications of the implied ascertainability requirement;⁹⁴ until the Eighth Circuit weighed in on ascertainability in *Sandusky Wellness Center, LLC v. Medtox Scientific*.⁹⁵ In *Sandusky*, Sandusky Wellness Center, LLC (Sandusky), a chiropractic clinic, brought a class action under the Telephone Consumer Protection Act (TCPA) arising from the clinic's alleged receipt of an unsolicited facsimile advertisement from the defendant, Medtox Scientific, Inc., a toxicology laboratory, regarding lead testing services.⁹⁶ The defendant decided to contact numerous doctors and health related organizations via fax to inform them about its lead-testing capabilities.⁹⁷ To effectuate this plan, the defendant used a directory compiled by a health insurance company to create a contact list of 4,210 fax numbers by which the defendant transmitted a single-page fax to 3,256 numbers, including Sandusky's number.⁹⁸ While Sandusky, itself, was not on the list of health service providers given by the health insurance company to the defendant, one of the doctors who worked at the center had given Sandusky's number to the health insurance company, effectively enabling the defendant to send its fax to that number.⁹⁹ Important to the class action, the fax sent by the defendant did not include a proper opt-out notice as is required under the TCPA, giving rise to the underlying cause of action.¹⁰⁰ Sandusky moved to certify the proposed class under the following class definition: "All persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages regarding lead testing services by or on behalf

⁹⁴ Compare *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (adopting a two-pronged heightened ascertainability standard for the implied ascertainability requirement), with *Mullins*, 795 F.3d at 657–59, *cert. denied*, 136 S. Ct. 1161 (2016) (adopting a "weak" implied ascertainability requirement which requires only a clearly and objectively defined class).

⁹⁵ 821 F.3d 992 (8th Cir. 2016).

⁹⁶ *Id.* at 994.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* By its express terms, the TCPA applies only to unsolicited faxes. 47 U.S.C. § 227(a)(5), (b)(1)(C) (2018). The TCPA, however, includes an exception where a proper opt-out notice is included in the fax. 47 U.S.C. § 227(b)(1)(C)(iii). The language of the statute mandates that a proper notice is one that "states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine. . . ." 47 U.S.C. § 227(b)(1)(C), (b)(3). The fax in *Sandusky* did not include one such notice. *Sandusky*, 821 F.3d at 994.

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of Medtox, and (3) which did not display a proper opt out notice.”¹⁰¹ The district court denied class certification, holding that the putative class was “not ascertainable, because it [did] not objectively establish who is included in the class” as it was unclear whether the class included the owner of a fax machine receiving an injurious fax, the actual recipient of such a fax, or both.¹⁰²

B. *The Eighth Circuit’s Articulation of Ascertainability*

On appeal, the Eighth Circuit acknowledged that other circuits have recognized a stand-alone implied ascertainability threshold requirement for class certification under Rule 23 and the circuit split as to the appropriate application of the requirement, namely the Third Circuit’s heightened requirement and the Seventh Circuit’s “weak” standard.¹⁰³ In articulating its own standard, the court declared that the Eighth Circuit “has not addressed ascertainability as a separate, preliminary requirement,” but rather “adheres to a rigorous analysis of the Rule 23 requirements, which includes that a class ‘must be adequately defined and clearly ascertainable.’”¹⁰⁴ Under this articulation, the court held that the proposed class was ascertainable through fax logs showing the recipients of the fax, which serves as sufficient objective criteria for ascertainability.¹⁰⁵ Nevertheless, the court provided little in the way of analysis with respect to its articulation of ascertainability and how it should be applied, moving forward, within the Eighth Circuit.¹⁰⁶

¹⁰¹ *Sandusky*, 821 F.3d at 994.

¹⁰² *Sandusky Wellness Ctr. LLC v. Medtox Sci., Inc.*, No. CIV. 12-2066 DSD/SER, 2014 WL 3846037, at *3 (D. Minn. Aug. 5, 2014), *rev’d*, 821 F.3d 992 (8th Cir. 2016).

¹⁰³ *Sandusky*, 821 F.3d at 994.

¹⁰⁴ *Id.* at 995.

¹⁰⁵ *Id.* at 997.

¹⁰⁶ *See id.* at 996.

V. THE NEW *SANDUSKY* STANDARD AND ITS IMPLICATIONSA. *Sandusky* Established a Third and Distinct Standard for Ascertainability

The issue coming out of the *Sandusky* decision is whether the Eighth Circuit has articulated a new standard for applying the implied ascertainability requirement,¹⁰⁷ or rather, whether the Eighth Circuit merely joined the Seventh Circuit, and others like it, in adopting the “weak” standard of implied ascertainability.¹⁰⁸ This Comment takes the position that *Sandusky* did in fact create a new, distinct standard of ascertainability. The principle difference between the Seventh Circuit’s “weak” standard for implied ascertainability and the articulation pronounced by the Eighth Circuit in *Sandusky* is that the Seventh Circuit recognized the implied ascertainability requirement as a stand-alone requirement for class certification, whereas the opinion in *Sandusky* seems to suggest that the Eighth Circuit did not recognize ascertainability as a stand-alone threshold requirement.¹⁰⁹ This is consistent with criticism of *Sandusky* from commentators like David Almeida, a defense attorney specializing in class actions, who averred that the Eighth Circuit’s decision “goes to the left of the Seventh Circuit,” creating an even weaker test.¹¹⁰ It has even been suggested that the standard articulated in *Sandusky* is a “non-test,”¹¹¹ and is an analysis based strictly on the language of Rule 23.¹¹² Unlike the Seventh Circuit’s standard, which requires judges to affirmatively address the issue of ascertainability in their class certification analysis, the Eighth Circuit’s

¹⁰⁷ See, e.g., PRACTICAL LAW ARTICLE, *supra* note 20 (acknowledging that “[t]he Eighth Circuit, however, has not addressed whether ascertainability is a separate, preliminary requirement for class action certification); Wylie II, *supra* note 20 (reporting that the Eighth Circuit rejected “heightened” ascertainability in favor of its own ascertainability standard); City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc., 867 F.3d 434, 443, n.3 (3d Cir. 2017) (“The Eighth Circuit rejects the ascertainability requirement all together.”).

¹⁰⁸ See, e.g., LAW360, *supra* note 21 (reporting that the Eighth Circuit has joined the Seventh Circuit in its articulation of ascertainability); Alleno, *supra* note 21 (reporting that the Eighth Circuit joined the Seventh and Sixth Circuits in their articulation of an ascertainability standard); *In re Petrobras Sec.*, 862 F.3d 250, 265 (2d Cir. 2017) (holding that the Second Circuit “join[s] the Sixth, Seventh, Eighth, and Ninth” in rejecting heightened ascertainability); see also BUREAU OF NATIONAL AFFAIRS, *supra* note 21 (presenting both positions).

¹⁰⁹ Compare *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 657 (7th Cir. 2015) (“We and other courts have long recognized an implicit requirement under Rule 23 that a class must be defined clearly and that membership be defined by objective criteria.”), with *Sandusky*, 821 F.3d at 996 (“[T]his court has not addressed ascertainability as a separate, preliminary requirement. Rather, this court adheres to a rigorous analysis of the Rule 23 requirements, which includes that a class ‘must be adequately defined and clearly ascertainable.’”).

¹¹⁰ BUREAU OF NATIONAL AFFAIRS, *supra* note 21.

¹¹¹ See *id.* (asking whether the *Sandusky* standard may be a new test or even a “non-test”).

¹¹² See Wylie II, *supra* note 20.

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standard effectively allows judges, at their discretion, to give as much weight to ascertainability as they like or dispense of an ascertainability requirement altogether, without weighing it into their analyses at all.

Although *Sandusky* is a recent decision, the standard it articulated has already been interpreted by district courts within the Eighth Circuit in support of this position. For example, a district court in Missouri, interpreting the language of *Sandusky*, held in two cases that implied ascertainability is not a separate requirement for a putative class to certify.¹¹³ In *Labrier v. State Farm Fire & Casualty Co.*, the court decided a case involving a putative class of State Farm Fire and Casualty policyholders for an alleged breach of contract concerning their insurance policies.¹¹⁴ Citing to *Sandusky*, the district court rejected defendant State Farms' claim that ascertainability is a stand-alone requirement necessary to certify a class.¹¹⁵ The district court addressed adequacy of class definition and ascertainability as part of a "rigorous analysis" as pronounced by *Sandusky*; however, it did so as part of an analysis of the four explicit requirements of Rule 23, generally, rather than an analysis of ascertainability as a stand-alone threshold requirement.¹¹⁶

Additionally, in *Lafollette v. Liberty Mutual Fire Insurance Co.*, the same court also decided a similar case involving a putative class of Liberty Mutual Fire Insurance policyholders.¹¹⁷ Once again, citing to *Sandusky*, the district court rejected defendant Liberty Mutual's claim that ascertainability is a stand-alone requirement necessary to certify as a class.¹¹⁸ Again, the district court addressed adequacy of class definition and ascertainability as part of a "rigorous analysis" as pronounced by *Sandusky*; however, it did so specifically under its analysis of the explicit requirement of predominance pursuant to Rule 23(b)(3).¹¹⁹

Most recently, in *In re Hardieplank Fiber Cement Siding Litigation*, a district court in Minnesota, citing to *Sandusky*, seemingly did not include ascertainability in its class certification analysis.¹²⁰ Although the court observed that "[i]n the Eighth Circuit, the question of whether a proposed class is clearly ascertainable is answered as part of the rigorous analysis

¹¹³ See *Labrier v. State Farm Fire & Cas. Co.*, 315 F.R.D. 503, 511 (W.D. Mo. 2016), *leave to appeal granted* (Sept. 9, 2016), *rev'd sub nom. In re State Farm Fire & Cas. Co.*, 872 F.3d 567 (8th Cir. 2017), *reh'g denied* (Oct. 31, 2017); *Lafollette v. Liberty Mut. Fire Ins. Co.*, No. 2:14-CV-04147-NKL, 2016 WL 4083478, at *5 (W.D. Mo. Aug. 1, 2016).

¹¹⁴ 315 F.R.D. at 509.

¹¹⁵ *Id.* at 511.

¹¹⁶ *Id.* at 512, n.5.

¹¹⁷ No. 2:14-CV-04147-NKL, 2016 WL 4083478, at *1 (W.D. Mo. Aug. 1, 2016).

¹¹⁸ *Id.* at *5.

¹¹⁹ *Id.* at *5, n.6.

¹²⁰ No. 12-MD-2359, 2018 WL 262826 (D. Minn. Jan. 2, 2018).

performed under Rule 23,” considerations of ascertainability are decidedly absent from the court’s analyses for each of the explicit Rule 23 threshold requirements thereafter.¹²¹ Thus, in effect, the district court did not explicitly include ascertainability into its decision to deny the plaintiffs’ motion to certify the putative class in that case.¹²² Whether ascertainability was implicitly weighed into these analyses cannot be discerned from the text of the court’s issued opinion.¹²³

These decisions demonstrate that the Eighth Circuit’s articulation of ascertainability allows judges within the circuit to fold an inquiry on ascertainability, based on whether a class is “adequately defined and clearly ascertainable,”¹²⁴ into their overall analyses of Rule 23 generally, into an analysis of one of explicit threshold requirements of Rule 23, or to ostensibly dispense with the ascertainability requirement in their class certification analyses altogether. The Eighth Circuit’s decision may signal a return to the original text of Rule 23, one that does not include an explicit ascertainability requirement.¹²⁵ This articulation may also demonstrate an attempt by the Eighth Circuit to give judges more discretion in deciding whether to certify a putative class at the class certification stage by allowing judges to choose whether to consider ascertainability as a factor, rather than a stand-alone requirement, in their analyses of the four explicit requirements of Rule 23.¹²⁶ This approach differs markedly from the Third Circuit’s heightened standard, which not only considers ascertainability to be an implicit, stand-alone, requirement for class certification, but also requires a plaintiff to satisfy its two-prong inquiry.¹²⁷ The former is a discretionary standard with a low threshold, whereas the latter is a non-discretionary standard with a high threshold, putting the two in stark contrast with one another. Accordingly, in the wake of *Sandusky*, there now exist three separate and distinct standards used among the federal courts in applying ascertainability to class certification under Rule 23.¹²⁸

¹²¹ *Id.* at *13–16.

¹²² *See id.* at *1–20.

¹²³ *See id.*

¹²⁴ *See Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016).

¹²⁵ *See* FED. R. CIV. P. 23.

¹²⁶ *See Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 645 (8th Cir. 2012) (“The district court is accorded broad discretion to decide whether certification is appropriate . . .”) (citing *Rattray v. Woodbury Cnty., Ia.*, 614 F.3d 831, 835 (8th Cir. 2010)).

¹²⁷ *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (citing *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013)).

¹²⁸ *Compare* *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 659 (7th Cir. 2015) (articulating a stand-alone, albeit, “weak” implied ascertainability requirement for class certification), *with* *Byrd*, 784 F.3d at 163 (articulating a “heightened” stand-alone, implied ascertainability requirement for class certification), *and* *Sandusky*, 821 F.3d at 995–96 (holding that

B. *Potential Implications of the New Sandusky Standard*

The *Sandusky* articulation of ascertainability is not a stand-alone threshold requirement to class certification that a putative class has the burden to prove. Rather, it encompasses a more flexible version of ascertainability whereby judges are at liberty to incorporate an ascertainability inquiry into their overall analyses of the explicit requirements of Rule 23, or choose to disregard such an inquiry altogether.¹²⁹ This articulation of ascertainability may give judges too much discretion in deciding when to certify a class, especially if such decisions rest on varying opinions depending on a particular judge's view on the necessity and/or weight of the requirement.¹³⁰ The potential for arbitrary application of ascertainability means that both plaintiffs and defendants will be unable to reasonably anticipate how ascertainability will be weighed into the "rigorous analysis" of Rule 23 by a given judge, or whether it will be factored in at all. One commentator also argues that the vagueness of this approach also allows judges to delve into the merits of a particular class action case at the class certification stage, which is inconsistent with Supreme Court precedent.¹³¹

Furthermore, the split among the circuits as to the proper application of Rule 23 runs afoul of the principle that the Rules of Federal Civil Procedure are intended to be applied uniformly across all federal circuits.¹³² With the availability of three standards, two of which are more favorable to plaintiffs, class counsel now have the ability to forum shop between the circuits with lower ascertainability standards in order to ensure the class action will continue past the class certification stage. Likewise, defendants who wish

ascertainability is not a stand-alone requirement, but rather is to be considered as part of a "rigorous analysis" of Rule 23).

¹²⁹ See *Sandusky*, 821 F.3d at 996 ("[T]his court has not addressed ascertainability as a separate, preliminary requirement. Rather, this court adheres to a rigorous analysis of the Rule 23 requirements, which includes that a class 'must be adequately defined and clearly ascertainable.'").

¹³⁰ Compare *Labrier v. State Farm Fire & Cas. Co.*, 315 F.R.D. 503, 512 (W.D. Mo. 2016), *leave to appeal granted* (Sept. 9, 2016), *rev'd sub nom. In re State Farm Fire & Cas. Co.*, 872 F.3d 567 (8th Cir. 2017), *reh'g denied* (Oct. 31, 2017) (folding ascertainability generally into the explicit requirements of Rule 23), with *Lafollette v. Liberty Mut. Fire Ins. Co.*, No. 2:14-CV-04147-NKL, 2016 WL 4083478, at *1 (W.D. Mo. Aug. 1, 2016) (folding ascertainability specifically into its analysis of predominance pursuant to Rule 23(b)(3)), and *In re Hardieplank Fiber Cement Siding Litig.*, No. 12-MD-2359, 2018 WL 262826, at *1–20 (D. Minn. Jan. 2, 2018) (affirming that in the Eighth Circuit, ascertainability is assessed in analyses of the explicit threshold requirements of Rule 23, but not explicitly addressing ascertainability in the court's analyses of these requirements).

¹³¹ Rhys J. Williams, *Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.: The Eighth Circuit Joins the Ascertainability Standard Conversation*, 50 CREIGHTON L. REV. 155, 172–73 (2016) ("This lack of guidance could result in an impermissible expansion of ascertainability analysis, which leads to an improper evaluation of the merits of a case when certification should be the only question answered by Rule 23.").

¹³² See Charles Alan Wright, *Procedural Reform in the States*, 24 F.R.D. 85, 86 (1959).

to block class certification, assuming legitimate transfer arguments can be made,¹³³ may attempt to transfer to district courts within the Third Circuit, as the heightened ascertainability requirement gives defendants a better opportunity to block class certification.¹³⁴ As such, *Sandusky* has deepened the previously existing circuit split by establishing a third ascertainability standard that class plaintiffs may try to utilize in certifying a class and by creating the potential for arbitrary application of the standard within the Eighth Circuit by district court judges.

VI. THE SUPREME COURT'S RECENT DECISIONS ON RULE 23 SUGGEST IT WOULD ADOPT A "WEAK" FORM OF ASCERTAINABILITY

After the Seventh Circuit rejected the Third Circuit's heightened ascertainability standard in *Mullins*, the Supreme Court was petitioned to review the split, but declined to extend certiorari to the *Mullins* case.¹³⁵ The Supreme Court again avoided addressing the ascertainability issue by denying certiorari as to a Sixth Circuit decision that also rejected heightened ascertainability.¹³⁶ In addition to declining to address the issue of an implied ascertainability requirement, recent Supreme Court decisions have focused on the explicit requirements of Rule 23.¹³⁷

In *Comcast Corp. v. Behrend*, the United States Supreme Court explained that at the class certification stage:

a party must not only be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation . . . [t]he party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b).¹³⁸

¹³³ 28 U.S.C. § 1404 (2018) governs when party litigants may transfer venue in federal court. Specifically, paragraph (a) under the statute provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a). As such, litigants that can make a legitimate case for transfer of venue may be able to have a case transferred from one district court to another that is more desirable to that party.

¹³⁴ See 28 U.S.C. § 1404 (2018) for the requirements governing transfer of venue amongst the federal district courts.

¹³⁵ *Direct Digital, LLC v. Mullins*, 136 S. Ct. 1161 (2016).

¹³⁶ *Procter & Gamble Co. v. Rikos*, 136 S. Ct. 1493 (2016).

¹³⁷ See, e.g., *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (focusing on the explicit requirements of Rule 23 in outlining the required showing of a putative class to certify); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (refusing to read substantive provisions into the text of Rule 23).

¹³⁸ 569 U.S. at 33 (internal quotations and citations omitted).

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In the majority opinion, the Court mentions nothing regarding a showing of ascertainability when expounding upon a putative class plaintiff's burden on a motion for class certification.¹³⁹

Likewise, the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes* also chose not to read substantive provisions into the text of Rule 23.¹⁴⁰ Specifically, the Court refused to clarify Rule 23 based on the Advisory Committee Notes where the suggested clarification had “no basis in the Rule’s text” and did “obvious violence to the Rule’s structural features.”¹⁴¹ The Court instead held that “it is the Rule itself, not the Advisory Committee’s description of it, that governs.”¹⁴² These decisions demonstrate that the Supreme Court has concerned itself only with the explicit requirements of Rule 23 in assessing issues of class certification.¹⁴³ Although some commentators have concluded otherwise,¹⁴⁴ these decisions seem to suggest that if the Supreme Court does decide to address the issue of ascertainability, it is likely to adopt some weaker form of ascertainability, possibly one akin to the Eighth Circuit’s articulation which emphasizes the four explicit requirements of Rule 23, or dispense with ascertainability altogether. As will be set out below, however, heightened ascertainability offers a superior standard and, as such, the Advisory Committee should amend the Rule to include an explicit ascertainability requirement modeled after the Third Circuit’s two-pronged test.¹⁴⁵

VII. THE NEED TO AMEND RULE 23 TO INCLUDE AN EXPLICIT ASCERTAINABILITY REQUIREMENT MODELED AFTER THE THIRD CIRCUIT’S HEIGHTENED STANDARD IN THE WAKE OF *SANDUSKY*

A. *The Heightened Ascertainability Standard Is Superior to the “Weak” Ascertainability Standard for Effective Management of the Class Action Device*

In the wake of *Sandusky*, three versions of ascertainability, each differing in the degree as to the required threshold, now exist among the several circuits, effectively varying a given putative class’s ability to certify depending on the circuit in which suit is brought. As noted above, however,

¹³⁹ *See id.*

¹⁴⁰ 564 U.S. 338 (2011).

¹⁴¹ *Id.* at 338.

¹⁴² *Id.* at 363.

¹⁴³ *See also* Johnson & Levens, *supra* note 31, at 68.

¹⁴⁴ *See* Cansler, *supra* note 28, at 1384 (noting that prior to denying review of *Mullins*, the Supreme Court’s class action decisions suggested that the Court would be in favor of the heightened standard).

¹⁴⁵ *See infra* Part VII.

the Supreme Court has already twice declined to address this issue,¹⁴⁶ and recent decisions involving class actions suggest that the Court's focus on the explicit requirements of Rule 23 would lead it to either adopt a weaker ascertainability standard or reject ascertainability as a threshold requirement altogether.¹⁴⁷ Thus, because heightened ascertainability is a superior standard, it is incumbent upon the Advisory Committee to address the issue of ascertainability. Specifically, the Advisory Committee should determine that the Third Circuit's heightened standard is the appropriate application of the ascertainability requirement and should amend Rule 23 to include it as an explicit threshold requirement for class certification.

As set forth above, the Third Circuit adopted a heightened ascertainability standard to address four policy concerns, chief among them being administrative convenience.¹⁴⁸ The Seventh Circuit, in rejecting heightened ascertainability, asserted that the Third Circuit's approach places too much emphasis on manageability concerns, potentially barring small-value consumer claims.¹⁴⁹ The Seventh Circuit, however, failed to make clear how a "weak" standard will satisfy the need for efficiency that makes common issues predominate under Rule 23(b)(3).¹⁵⁰ It is also unclear "how this process will work in conjunction with Rule 23(b)(3)'s requirement to satisfy predominance and superiority."¹⁵¹ In this regard, while the Seventh Circuit raised valid concerns regarding the burden that heightened ascertainability may create for small-value consumer claims, the precision offered by the heightened standard, as compared to the "weak" standard, in managing putative classes at the outset of litigation makes it a more efficient and desirable standard.

Further, heightened ascertainability is not a death knell to a putative class in a small-value consumer class action as portended by the Seventh Circuit. The Third Circuit made clear in *Byrd* that the two-prong test is "narrow" and "does not mean that a plaintiff must be able to identify all class members at class certification—instead, a plaintiff need only show that class members *can* be identified."¹⁵² This does not create some insurmountable obstacle for putative classes in small-value consumer actions to overcome. Rather, it places on plaintiffs a reasonable and sensible burden that they can readily meet.

¹⁴⁶ *Direct Digital, LLC v. Mullins*, 136 S. Ct. 1161 (2016); *Procter & Gamble Co. v. Rikos*, 136 S. Ct. 1493 (2016).

¹⁴⁷ *See Comcast Corp. v. Behrend*, 569 U.S. 27, 27 (2013); *see also Wal-Mart Stores*, 564 U.S. at 338.

¹⁴⁸ *See supra* Part III.

¹⁴⁹ *See supra* Part III.

¹⁵⁰ *See Jonker, supra* note 93.

¹⁵¹ *See id.*

¹⁵² *Byrd v. Aaron's Inc.*, 784 F.3d 154, 165 (3d Cir. 2015) (emphasis added).

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For example, in *Martinez-Santiago v. Public Storage*,¹⁵³ a consumer class action brought in the District Court of New Jersey, the court found the putative class to be ascertainable in applying the two-prong inquiry articulated in *Byrd*.¹⁵⁴ Specifically, as to *Byrd*'s second-prong requiring a mechanism for identifying class members, the court held that it was "relatively straightforward, since it requires only an examination of Defendant's business records."¹⁵⁵ Also, as one commentator has observed, modern technology also affords class plaintiffs facile means for meeting the burdens placed on a putative class under the heightened standard.¹⁵⁶ Thus, while it may be more difficult for small-value consumer claims to certify as class actions under heightened ascertainability, there certainly is more room for small-value consumer claims under the heightened standard than the Seventh Circuit suggests.¹⁵⁷

B. *The Heightened Ascertainability Standard Better Comports with the Original Intent of Rule 23*

Furthermore, it has been advanced that the Third Circuit's heightened version of the ascertainability requirement does not comport with the original intent behind amended Rule 23.¹⁵⁸ The heightened standard, however, does in fact comport with the drafter's intent of maintaining efficiency in managing the class action device after amending Rule 23.¹⁵⁹ Particularly, by requiring a putative class to demonstrate membership at the certification stage, the heightened ascertainability standard ensures that small-value consumer claims comply with one of Rule 23's most important purposes: to "achieve economics of time, effort, and expense" through class actions.¹⁶⁰

¹⁵³ 312 F.R.D. 380 (D.N.J. 2015).

¹⁵⁴ *Id.* at 387.

¹⁵⁵ *Id.* at 388–89.

¹⁵⁶ Stephanie Starek, *Navigating the Ascertainability Spectrum: Analyzing the Policy Rationales Behind the Various Ascertainability Standards as Applied to Small-Value Consumer Class Actions*, 68 CASE W. RES. 213, 240–41 (2017) ("Potential class members can simply scan their email for their grocery store receipt and then submit proof that they are class members. Not only can technology help consumers prove their class membership, it can also help courts send adequate notice to class members.").

¹⁵⁷ See Cansler, *supra* note 28, at 1406.

¹⁵⁸ See, e.g., Murphy, *supra* note 35, at 34, 49 (arguing that the heightened ascertainability standard does not comport with the intent of the drafters of Rule 23, as the rule's purpose was to accommodate small-value class actions).

¹⁵⁹ Cansler, *supra* note 28, at 1387.

¹⁶⁰ See FED. R. CIV. P. 23(b)(3) advisory committee's note to 1966 amendment ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economics of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.").

The need to effectively manage the administration of class actions became particularly vital after Congress passed CAFA in 2005.¹⁶¹ This is because CAFA opened the door to federal courts for consumer class action suits that plaintiffs previously could not file in federal court,¹⁶² signaling a dramatic change in federal class action jurisprudence not likely contemplated by Rule 23's drafters. The ensuing increase in class actions brought in federal court after CAFA's enactment included suits filed as original proceedings based on diversity jurisdiction.¹⁶³ The suits invariably included the kinds of class actions that implicate the concerns voiced by the Third Circuit with respect to administrative convenience. Further, more recently, there has been "a steady increase in consumer class action settlements,"¹⁶⁴ caused, in part, by a boom in small-value consumer class actions such as food labeling actions, consumer privacy actions, and actions involving violations of the TCPA.¹⁶⁵ It is these kinds of class actions that largely implicate the policy concerns voiced by the Third Circuit. The Third Circuit's heightened ascertainability serves to address the real manageability concerns that the drafters had with,¹⁶⁶ and that federal courts face in, certifying putative classes, particularly in a post-CAFA world.¹⁶⁷ Accordingly, heightened ascertainability serves the very ends that motivated the drafters of Rule 23 to amend the rule in the first place.

¹⁶¹ See 28 U.S.C. § 1332(d) (2018); see also Burbank, *supra* note 45, at 1441; Isani & Sherry, *supra* note 38, at 3.

¹⁶² See Burbank, *supra* note 45, at 1441; Isani & Sherry, *supra*, note 38, at 3.

¹⁶³ See LEE III & WILLGING, *supra* note 51, at 6 (reporting statistics on class actions filed as original proceedings in federal courts based on diversity jurisdiction). In the pre-CAFA period studied, diversity class actions filed as original proceedings averaged 11.9 per month. *Id.* That figure increased to 34.5 per month from March 2005 through June 2006. *Id.*

¹⁶⁴ Stephanie Plancich, et al., *Consumer Class Action Settlements: 2010–2013 Settlements Increasing, with a Focus on Privacy*, NERA ECONOMIC CONSULTING (Jul. 22, 2014), http://www.nera.com/content/dam/nera/publications/archive2/PUB_Consumer_Class_Action_Settlements_0614.pdf.

¹⁶⁵ Christopher M. Murphy, *The Rise of Smaller Class Actions*, MWE (Aug. 6, 2014), <https://www.mwe.com/en/thought-leadership/publications/2014/08/the-rise-of-smaller-class-actions>.

¹⁶⁶ See FED. R. CIV. P. 23(b)(3) advisory committee's note to 1966 amendment ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.").

¹⁶⁷ LEE III & WILLGING, *supra* note 51, at 1–2 (reporting on a study measuring the dramatic increase in class action lawsuits brought in federal courts post-CAFA).

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VIII. CONCLUSION

Uniformity in the rules governing civil procedure in the federal judicial system offers a desirable certainty and predictability to would-be litigants. In the wake of *Sandusky*, however, three distinct applications of “ascertainability” now exist among the federal circuits.¹⁶⁸ The drafters of amended Rule 23 intended to “shake the law of class actions free of abstract categories.”¹⁶⁹ As such, implied ascertainability has become one such abstraction due to its disparate application as among the federal circuits.¹⁷⁰ Amending Rule 23 to include an explicit ascertainability requirement would shake the law of class actions free from implied ascertainability once and for all.

While others have called for the Advisory Committee to amend Rule 23 to include a “weak” form of ascertainability as adopted by the Seventh Circuit,¹⁷¹ this Comment takes the position that the Advisory Committee should elect to model its amendment after the two-prong test originally pronounced by the Third Circuit in *Byrd*.¹⁷² This heightened articulation of ascertainability best comports with the intent of Rule 23’s drafters, namely the efficient and effective management of the class action device. Given the rise of class actions filed in and removed to federal courts in a post-CAFA world and the continuing trend in the increase of small-value consumer class actions, heightened ascertainability offers the kind of precision needed to ensure that class actions, in all of their immensities and complexities, still remain sufficiently manageable.

While it is not within the scope of this Comment to resolve all inconsistencies among the federal circuits as to their respective applications of Rule 23, this much is clear: under this conception of a newly amended Rule 23, plaintiff classes will still effectively prosecute their claims,

¹⁶⁸ Compare *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015) (articulating a stand-alone, albeit, “weak,” implied ascertainability requirement for class certification), with *Byrd v. Aaron’s Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (articulating a “heightened,” stand-alone, implied ascertainability requirement for class certification), and *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 995 (8th Cir. 2016) (holding that ascertainability is not a stand-alone requirement, but rather is to be considered as part of a “rigorous analysis” of Rule 23).

¹⁶⁹ Kaplan, *supra* note 29, at 497.

¹⁷⁰ Murphy, *supra* note 35, at 34.

¹⁷¹ See Murphy, *supra* note 35 for the position that Rule 23 should be amended to include the Seventh Circuit’s “weak” version of ascertainability. This position focuses primarily on the potential hurdle posed to small-value consumer class actions under the heightened standard. *Id.*

¹⁷² Amending Rule 23 to include an explicit ascertainability requirement modeled after the Third Circuit’s heightened ascertainability standard is also consistent with recent congressional efforts to codify heightened ascertainability. See Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. § 1718(a) (2017). For a discussion of the rationale underlying the promulgation of this bill, see Starek, *supra*, note 156, at 238–39.

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defendants' due process rights will successfully be safeguarded, and all federal courts, irrespective of the particular forum, will undertake the process of certifying putative classes consistently across the federal circuits.