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INTRODUCTION

In 2009, Direct Digital, LLC, a manufacturer of nutritional supplements, released Instaflex, a "revolutionary" formula that was intended to relieve joint pain.[1] The company advertised that the product was "scientifically formulated" to "relieve discomfort," "improve flexibility," "increase mobility," and "support cartilage repair."[2] One bottle of Instaflex Joint Support containing ninety pills costs $69.99—a small price to pay for the promised benefits.[3] Consumers who planned on taking multiple pills daily as recommended likely bought multiple bottles.[4] Given the frequency of those purchases, as well as the fact that the bottles themselves are relatively inexpensive, it is also likely that few consumers kept receipts proving when and where they bought Instaflex.[5] There was also no evidence that retailers selling Instaflex kept records of who purchased it on any given date.[6]

This lack of recordkeeping did not seem problematic until the truth behind the pills was revealed. Despite Direct Digital's grand claims of the supplement's health benefits, Instaflex's primary active ingredient is glucosamine sulfate, meaning the pill contains little more than sugar.[7] Consumers expecting to purchase a nutritional

1. *Instaflex Advanced*, INSTAFLEX, http://www.instaflex.com/products/joint [http://perma.cc/2PRN-4X6Q]; *see Instaflex® Joint Support Featured On 'The Doctors' Television Program*, PRWEB, http://www.prweb.com/releases/Instaflex/Doctors/prweb11355816.htm [http://perma.cc/F9A7-KVUM] (displaying a Nov. 21, 2013, Instaflex press release).

2. Mullins v. Direct Dig., LLC, 795 F.3d 654, 658 (7th Cir. 2015) (quoting statements from Instaflex labels and marketing materials), *cert. denied*, 136 S. Ct. 1161 (2016).

3. *See* INSTAFLEX, *supra* note 1.

4. *See id.* (recommending a dose of three pills a day for four weeks to begin to achieve "significant relief"); *cf.* Defendant's Opposition to Plaintiff's Renewed Motion for Class Certification at 5–6, Mullins v. Direct Dig., LLC, No. 1:13-cv-01829 (N.D. Ill. May 27, 2014), 2014 WL 10337752 (quoting class member's sworn declaration documenting his daily use of Instaflex).

5. *Mullins*, 795 F.3d at 661.

6. *See id.*

7. Mullins v. Direct Dig., LLC, No. 13 CV 1829, 2014 U.S. Dist. LEXIS 155018, at *2–3 (N.D. Ill. Sept. 30, 2014).

supplement that would relieve their joint pain instead received a placebo, making it highly unlikely that Instaflex could live up to its billing.[8]

One Instaflex purchaser, Vincent Mullins, felt that the product was "phony" and fraudulently advertised.[9] But like many other Instaflex purchasers, he had no proof that he had purchased or used Instaflex.[10] He brought suit in the U.S. District Court for the Northern District of Illinois seeking a refund and to impose appropriate fines on Direct Digital, to compensate Instaflex purchasers for allegedly fraudulent marketing.[11] Because the value of his claim was small compared to the cost of litigating the suit by himself, Mullins needed to certify a class to successfully pursue his claim.[12] Courts have established two approaches to class certification—exemplified by decisions from the Third and Seventh Circuits—which would each result in radically different outcomes for Mullins's suit.

Under the first rule, created by the Third Circuit and since adopted by several other circuits, Mullins would not have been able to certify a class unless potential members could show objective proof of their Instaflex purchases.[13] Heightened ascertainability requires that the class representative define proposed classes based on objective criteria and that plaintiffs demonstrate a "reliable and administratively feasible" means of determining class membership.[14] Proposed classes that lack objective evidence to prove membership,

8. *Mullins*, 795 F.3d at 658.

9. *Mullins*, 2014 U.S. Dist. LEXIS 155018, at *1, *7.

10. *See* Defendant's Opposition to Plaintiff's Renewed Motion for Class Certification, *supra* note 4, at 1. Mullins claims he purchased Instaflex at a GNC with cash, did not keep his receipt, and threw the bottle away less than two weeks later. Petition for Writ of Certiorari at 5–7, Direct Dig., LLC v. Mullins, 136 S. Ct. 1161 (2016) (No. 15-549).

11. *Mullins*, 2014 U.S. Dist. LEXIS 155018, at *7–8.

12. *See* William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 709 (2006) (discussing how the plaintiffs in a large class action suit likely would not have been able to litigate their small claims without the class action device).

13. *See, e.g.*, Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 946 (11th Cir. 2015) ("[A] class is not ascertainable unless the class definition contains objective criteria that allow for class members to be identified in an administratively feasible way."); Byrd v. Aaron's Inc., 784 F.3d 154, 163–64 (3d Cir. 2015) (describing the history of the heightened ascertainability requirement in the circuit); Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011) ("Without an objective, reliable way to ascertain class membership, the class quickly would become unmanageable . . . ."); Weiner v. Snapple Beverage Corp., 07 Civ. 8742 (DLC), 2010 U.S. Dist. LEXIS 79647, at *40 (S.D.N.Y. Aug. 3, 2010) ("A class is ascertainable when defined by objective criteria that are administratively feasible . . . .").

14. *Byrd*, 784 F.3d at 163.

such as business records or receipts, often fail under the heightened ascertainability requirement.

Alternatively, some courts, including the Seventh Circuit, have followed a different approach.[15] Fearing that the heightened ascertainability requirement would make it unduly difficult to certify certain types of class actions—effectively destroying entire categories of claims—the Seventh Circuit flatly rejected it.[16] Instead, the court relied on its own "weak" definition of "ascertainability," holding that the inquiry should revolve around the adequacy of the class definition itself, not any potential difficulty in identifying individual class members.[17] Under this standard, potential class definitions should be screened only for vagueness, objectivity, and whether the class is defined in terms of success on the merits.[18] Consequently, the Seventh Circuit upheld the certification of Mullins's proposed class.[19]

The Seventh Circuit's decision created a circuit split, inviting the Supreme Court to settle these competing interpretations of "ascertainability." However, the Court denied certiorari in *Mullins* and allowed the Seventh Circuit's decision to stand. The decision to deny review may have more to do with internal Supreme Court politics in the wake of Justice Antonin Scalia's death than the merits of the case.[20] Nonetheless, the denial comes as something of a surprise. Prior to *Mullins*, the Court's recent class action certification decisions suggest support for the Third Circuit's heightened ascertainability requirement. Those decisions emphasize that class certification requires a close investigation into whether a proposed class meets the requirements for certification and whether the relevant claims can be litigated effectively and efficiently as a class

15. *See, e.g.*, Rikos v. Proctor & Gamble Co., 799 F.3d 497, 524–27 (6th Cir. 2015); Mullins v. Direct Dig., 795 F.3d 654, 658 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016). Both the Seventh and Third Circuits refer to the requirement of a " 'reliable and administratively feasible' way" to identify class members as the "heightened ascertainability requirement." *See Mullins*, 795 F.3d at 657; Byrd v. Aaron's Inc., 784 F.3d 154, 172 (3d Cir. 2015) (Rendell, J., concurring). This Recent Development adopts the same language.

16. *Mullins*, 795 F.3d at 657–58.

17. *Id.* at 659.

18. *Id.* at 659–60.

19. *Id.* at 674.

20. *See* Amanda Bronstad, *To Defense Bar's Dismay, SCOTUS Rejects Review of Class Action*, NAT'L L.J. (Mar. 2, 2016), http://www.nationallawjournal.com/id=1202751230219/To-Defense-Bars-Dismay-SCOTUS-Rejects-Review-of-Class-Action?slreturn=20160208195552 [http://perma.cc/SA74-DX7Y] (noting that Justice Scalia "authored some of the Supreme Court's most pivotal class action cases" and that his death leaves the Court's conservative wing without a "clear path to five votes . . . .").

action.[21] The Court has written that a class action must be "maintainable" to achieve class certification and that proposed class definitions require a "close look" to ensure that a class action is the most appropriate form in which to bring the claim in question.[22] More recently, the Court held that class certification was only appropriate after a "rigorous analysis" of the requirements for certification, providing implicit support for a strict certification requirement like heightened ascertainability.[23] Consequently, this Recent Development argues that the Supreme Court should resolve the split between the Third and Seventh Circuits by adopting the heightened ascertainability requirement. This rule serves as a useful tool for ensuring that class actions function efficiently and successfully, a concern that even the Seventh Circuit recognizes is crucial to the class action device.[24]

Analysis proceeds in four parts. Part I briefly discusses how the class action device has developed in recent decades, allowing heightened ascertainability to gain a foothold as a certification requirement. Part II provides the factual context for the Seventh Circuit's rejection of the requirement. Part III then analyzes why the heightened ascertainability requirement effectively addresses the policy concerns surrounding class actions. Finally, Part IV considers the issues that the heightened ascertainability requirement leaves open and evaluates how the Supreme Court should interpret the rule to balance the efficiency of class actions with the need to certify certain types of class actions.

21. *See* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (emphasizing that certification is only appropriate when a court is satisfied after "rigorous analysis" that all of the prerequisites for certification have been satisfied); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) ("[Class action] claims must depend upon a common contention . . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution . . . ."); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997) (noting that the Rule 23 amendments governing class actions emphasize that class actions should "achieve economies of time, effort, and expense").

22. *Amchem Prods.*, 521 U.S. at 614–15.

23. *Comcast Corp.*, 133 S. Ct. at 1432; *see also Wal-Mart*, 564 U.S. at 350 (holding that plaintiffs seeking certification under Rule 23 must "*affirmatively* demonstrate" that the class complies with the requirements for certification (emphasis added)). Scholars have also viewed the holding in *Wal-Mart* as making class certification more difficult to obtain. *See* Max Helveston, *Promoting Justice Through Public Interest Advocacy in Class Actions*, 60 BUFF. L. REV. 749, 750–51 (2012) ("[In *Wal-Mart*], the Court subjected the proposed class to an increased level of scrutiny and appears to have raised the bar for all future groups seeking class certification.").

24. *See Mullins*, 795 F.3d at 658 ("A court must consider 'the likely difficulties in managing a class action,' but in doing so it must balance countervailing interests to decide whether a class action 'is superior to other available methods for fairly and efficiently adjudicating the controversy.' " (quoting FED. R. CIV. P. 23(b)(3))).

I. THE DEVELOPMENT OF CLASS ACTIONS

Rule 23 of the Federal Rules of Civil Procedure, originally passed in 1938, governs the procedure and administration of class action suits.[25] However, the modern version of the rule developed out of amendments adopted in 1966.[26] The Advisory Committee designed those amendments to address certain problems that the previous version of the rule had created. Specifically, the Advisory Committee sought to eliminate the original rule's "overly formal" categories for class actions and to expand the scope of the available types of classes and claims.[27]

The amended Rule 23(a) outlines four prerequisites that any class must meet to be certified: (1) "numerosity" of parties, (2) commonality of legal or factual issues, (3) typicality of the named plaintiff's claim compared to the rest of the class, and (4) adequacy of the named plaintiff's representation of the class.[28] These prerequisites apply to every type of class actions that can be brought under Rule 23.[29] Rule 23(b)(3) describes the most common type of class action: an action in which legal or factual questions "predominate" over any individual questions of law or fact, rendering the class action device "superior" to other methods of adjudicating the claim fairly and efficiently.[30] Plaintiffs like Mullins often bring small consumer claims through this type of class action.[31]

25. *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).

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

27. *See* Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1213–14 (1966). The 1938 version of Rule 23, in relevant part, identifies three different types of class actions: (1) where plaintiffs wish to litigate a shared claim; (2) where adjudication of the claims will or may affect specific property involved in the action, even if the claims are not the same; and (3) where there is common law or fact among different claims and a common form of relief is sought. *See, e.g.*, John G. Harkins, Jr., *Federal Rule 23—The Early Years*, 39 ARIZ. L. REV. 705, 707 (1997). Some courts viewed these three types as strict classifications for class actions, while other courts expanded the classifications to achieve pragmatic solutions. *See* Cohn, *supra*, at 1214.

28. FED. R. CIV. P. 23(a); Mullenix, *supra* note 25, at 425.

29. *See* FED. R. CIV. P. 23(a)–(b). The two other types of class actions, not discussed in this paper, are found in Rule 23(b)(1) (when separate actions would create incompatible standards for parties defending a class action, or when the interests of individuals not parties to the litigation would be affected by the action) and Rule 23(b)(2) (when plaintiffs seek declaratory or injunctive relief rather than money damages). FED. R. CIV. P. 23(b); 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE AND PROCEDURE § 23.40(1) (3d ed. 2015).

30. FED. R. CIV. P. 23(b)(3); *see also* Louis W. Hensler III, *Class Counsel, Self-Interest and Other People's Money*, 35 U. MEM. L. REV. 53, 60 (2004) ("Most attempts to certify cases in federal court now invoke Rule 23(b)(3) . . . .").

31. *See* 5 MOORE ET AL., *supra* note 29, § 23.21[5][e].

The requirements for certification in Rule 23(a) and 23(b)(3) demonstrate the Advisory Committee's effort to ensure that the amended rule did not sacrifice efficiency or ease of administration in managing the class action device.[32] The Supreme Court has preserved this emphasis on managing the class action in its decisions addressing certification of 23(b)(3) class actions. In *Amchem Products v. Windsor*,[33] the Court wrote that Rule 23(b)(3) class actions balanced the interests of class members who would not have brought claims on their own with "systemic efficiency."[34] The Court noted that Rule 23(b)(3) provides a "nonexhaustive" list of factors courts could use to determine whether the class fails the predominance requirement, including the potential interest of class members in controlling the litigation individually and potential difficulties in managing the class action.[35] In *Amchem*, the Supreme Court denied certification for a class bringing asbestos-related claims because of the probable difficulty of managing the wide variety of claims brought by various class members.[36]

The Supreme Court recently addressed this issue again in *Comcast Corp. v. Behrend*,[37] finding that a proposed class failed the predominance requirement for certification under Rule 23(b)(3).[38] In explaining its holding, the Court wrote that Rule 23(b)(3) applied when a class action is "not as clearly called for," meaning that the Court must take a "close look" at whether common questions predominate to determine whether a class action is appropriate and manageable.[39] This in-depth analysis of proposed class definitions suggests that classes should be defined narrowly enough to avoid unwieldy and inefficient class actions.[40]

These decisions advance a theme in class action jurisprudence: Rule 23(b)(3) class actions must be efficient and manageable to

32. 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.").

33. 521 U.S. 591 (1997).

34. *Id.* at 615.

35. *Id.*; FED. R. CIV. P. 23(b)(3)(A), (D).

36. *See Amchem Prods.*, 521 U.S. at 625.

37. 133 S. Ct. 1426 (2013).

38. *See id.* at 1433.

39. *Id.* at 1432–33.

40. *See, e.g.*, *id.* at 1432; Elena Kamenir, Comment, *Seeking Antitrust Class Certification: The Role of Individual Damage Calculations in Meeting Class Action Predominance Requirements*, 34 GEO. MASON L. REV. 199, 225 (2015).

justify litigating claims collectively.[41] Many circuit courts recognize an implied prerequisite for certification that is not found in the text of Rule 23, requiring that classes must be "ascertainable" or specific enough to identify who might be a member of the class using objective criteria.[42] Some courts have gone further, adopting a heightened ascertainability rule requiring both objective evidence and a "reliable and administratively feasible" method to determine class membership based on that evidence.[43] By focusing on the ease of determining putative class members, this requirement seeks to ensure that class actions can be efficiently managed, in keeping with the Supreme Court's approach in *Amchem* and *Behrend*.[44] But some courts, such as the Seventh Circuit in *Mullins*, have refused to adopt the heightened ascertainability requirement, fearing that it might indiscriminately bar certain claims.[45]

II. FACTUAL BACKGROUND OF *MULLINS V. DIRECT DIGITAL*

The plaintiff's proposed class definition in *Mullins v. Direct Digital, LLC*[46] gave the Seventh Circuit an opportunity to evaluate the effect that the heightened ascertainability requirement would have on a small consumer claim.[47] In *Mullins*, plaintiff Vince Mullins sued defendant Direct Digital for fraudulently misrepresenting "Instaflex" as a medicine for joint pain relief, claiming that the product was little more than a sugar pill.[48] Mullins sought to certify a class of consumers under Rule 23(b)(3),[49] defining the class as

41. *See* 5 MOORE ET AL., *supra* note 29, § 23.46[1]–[2][a]; David E. Kouba & Carolyn A. Pearce, *Growing Insistence Among Courts for Ascertainability*, LAW360 (July 18, 2014), http://www.law360.com/articles/558013/growing-insistence-among-courts-for-ascertainability [http://perma.cc/NT2C-D9QD].

42. *See, e.g.*, *In re* Nexium Antitrust Litig., 777 F.3d 9, 19 (1st Cir. 2015) (citing Carrera v. Bayer Corp., 727 F.3d 300, 306 (3d Cir. 2013)); EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014) (citing Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 592–94 (3d Cir. 2012)); Matamoros v. Starbucks Corp., 699 F.3d 129, 139 (1st Cir. 2012); John v. Nat'l Sec. Fire & Cas. Co., 501 F.3d 443, 445 (5th Cir. 2007); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 44–45 (2d Cir. 2006); 1 WILLIAM RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS §§ 3:1, 3:3 (5th ed. 2011); 5 MOORE ET AL., *supra* note 29, § 23.21[3][a].

43. *See supra* notes 13–14 and accompanying text.

44. *See, e.g.*, Carrera v. Bayer Corp., 727 F.3d 300, 305–06 (3d Cir. 2013); *see also Behrend*, 133 S. Ct. at 1432–33; Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997); Kouba & Pearce, *supra* note 41.

45. *See* Rikos v. Proctor & Gamble Co., 799 F.3d 497, 524–27 (6th Cir. 2015); Mullins v. Direct Dig., LLC, 795 F.3d 654, 658 (7th Cir. 2015), *cert. denied*, 136 U.S. 1161 (2016).

46. 795 F.3d 654 (7th Cir. 2015).

47. *See id.* at 659–72.

48. *Id.* at 658.

49. FED. R. CIV. P. 23(b)(3).

individuals who purchased Instaflex for personal use before the class action notice was advertised.[50] The trial court granted certification, finding that the plaintiff's class met the requirements of Rule 23(a) and (b)(3).[51]

On appeal, Direct Digital relied on recent Third Circuit precedent applying the heightened ascertainability requirement to argue that Mullins's class should be denied certification. Under Direct Digital's interpretation, Mullins would have been required to show a "reliable and administratively feasible way" to determine, using objective evidence, whether a putative class member was truly part of the class.[52] Because Mullins's putative class members were unlikely to be able to prove that they purchased Instaflex through objective evidence like retail records or receipts, Direct Digital argued that the class definition failed to meet the heightened ascertainability requirement.[53] However, the Seventh Circuit refused to adopt the heightened ascertainability standard and affirmed certification,[54] concluding that Mullins's class definition met the certification requirements of Rule 23(a) and 23(b)(3).[55]

In doing so, the Seventh Circuit formulated its own standard, requiring only that Mullins's class definition meet the implicit requirement of "weak" ascertainability recognized in that circuit.[56] That weaker standard requires that for certification (1) the class not be too vaguely defined, (2) the class definition not be based on subjective criteria, and (3) the class not be defined "in terms of success on the merits."[57] The court affirmed the district court's grant of certification because Mullins's class met these requirements.[58]

50. *Mullins*, 795 F.3d at 658.

51. Mullins v. Direct Dig., LLC, No. 13 CV 1829, 2014 U.S. Dist. LEXIS 155018, at *5, *10 (N.D. Ill. Sept. 30, 2014) ("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."); *see also* 1 RUBENSTEIN ET AL., *supra* note 42, § 1:2 (discussing the prerequisites for class action certification).

52. *Mullins*, 795 F.3d at 661–62.

53. *See id.* at 661.

54. *Id.* at 672.

55. *Id.* at 660–61.

56. The Seventh Circuit does acknowledge an implicit requirement that a class be clearly defined based on objective criteria, or "ascertainable," in order for a Rule 23(b)(3) class to be certified. *Id.* at 659. It does not, however, recognize the additional element imposed by the heightened ascertainability requirement: that class members be determined in a "reliable and administratively feasible way." *Id.* at 662.

57. *Id.* at 659–60. A class definition based on the success of the merits is also called a "fail-safe class," where class members are only identifiable if the defendant is liable. *Id.* at 660. A classic example of a "fail-safe class" is one including all individuals who were

Specifically, the court emphasized that the class definition identified a particular group of individuals ("purchasers of Instaflex"), harmed in a certain way ("defrauded by labels and marketing materials"), during a specific time period ("purchased . . . within the applicable statute of limitations of the respective Class States . . . until the date notice is disseminated").[59] The definition was not based on subjective criteria because it focused on the class members' action of purchasing the product and the defendant's conduct regarding the labeling and marketing of the product.[60] Nor was the class defined on the success of the merits, such as by limiting the scope of the class to those who the defendant defrauded.[61] Because the class satisfied both the explicit requirements of Rule 23(b)(3) and avoided the pitfalls that the Seventh Circuit recognized as fatal to class certification, the court upheld Mullins's class certification and refused to adopt the heightened ascertainability requirement. In rejecting that rule, the Seventh Circuit highlighted several concerns that the rule would pose were it to be adopted by the Supreme Court.[62]

III. THE CIRCUITS' ANALYSES OF HEIGHTENED ASCERTAINABILITY

The Seventh Circuit's rejection of the heightened ascertainability requirement focused primarily on the potentially problematic effects that the rule would have on small consumer claims.[63] In this type of class action, where members are unlikely to be able to show proof of purchase through records or receipts, imposing such a requirement would almost always result in a denial of certification.[64] Without objective records, plaintiffs would be hard pressed to develop a "reliable and administratively feasible" method to prove class membership.[65] In essence, the Seventh Circuit refused to adopt heightened ascertainability because it "effectively bars low-value consumer class actions," at least where putative class members do not

"wrongfully" harmed by the defendant. *See* Erin L. Geller, Note, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 FORDHAM L. REV. 2769, 2770 (2012).

58. *Id.* at 660–61.

59. *Mullins*, 795 F.3d at 660–61; Mullins v. Direct Dig., LLC, No. 13 CV 1829, 2014 U.S. Dist. LEXIS 155018, at *2 (N.D. Ill. Sept. 30, 2014).

60. *Mullins*, 795 F.3d at 661.

61. *Id.* at 660; *see* 5 MOORE ET AL., *supra* note 29, at § 23.21[3][c].

62. *Mullins*, 795 F.3d at 661–62.

63. *See id.* at 662.

64. *Id.*

65. *Id.*

have documentary proof of their membership.[66] Without the option of bringing a class action, those small consumer claims would be too costly to pursue individually, leaving many potential plaintiffs with no way to pursue their claims.[67]

By contrast, courts like the Third Circuit that require heightened ascertainability reason that the requirement eliminates the administrative burdens of determining class membership, provides the best possible notice to absent class members, and ensures that individuals bound by the judgment are clearly identifiable.[68] This "forward-looking view" of certification focuses on how a court will manage the class action as it proceeds and whether the class will actually function as a class.[69] By requiring proof that putative class members can identify themselves through a "reliable and administratively feasible" method, the heightened ascertainability requirement seeks to ensure that class actions are manageable without requiring courts to resort to extensive "mini-trials" to determine who is a class member.[70] Thus, notwithstanding the denial of certiorari in *Mullins*, the heightened ascertainability requirement otherwise appears to satisfy the jurisprudential focus of the Supreme Court and others on class action manageability and efficiency—an element the Seventh Circuit's standard downplays.[71]

Nonetheless, the Seventh Circuit reasoned in *Mullins* that the various policy rationales supporting the heightened ascertainability requirement fail to justify its adoption because that requirement makes it nearly impossible to certify small consumer claims.[72] But while the requirement does preclude certification for claims without objective evidence of class membership, it does so to prevent inefficient and unmanageable class action proceedings that would require defendants to challenge each putative member's claim without proof.[73] This Part evaluates the Seventh Circuit's analysis of how heightened ascertainability works and demonstrates that the actual effects of heightened ascertainability are necessary to maintain

66. *Id.*

67. *See, e.g.*, *id.* at 665; Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("[O]nly a lunatic or a fanatic sues for $30.").

68. *See* Carrera v. Bayer Corp., 727 F.3d 300, 305–06 (3d Cir. 2013).

69. *See* Byrd v. Aaron's Inc., 784 F.3d 154, 162 (3d Cir. 2015).

70. *See Carrera*, 727 F.3d at 305.

71. *See Mullins*, 795 F.3d at 658 (reasoning that heightened ascertainability wrongly gives the manageability factor "absolute priority" over other considerations); *supra* notes 32–40 and accompanying text.

72. *See Mullins*, 795 F.3d at 668.

73. *See Carrera*, 727 F.3d at 307.

the important goals of manageability and efficiency in class action litigation.

A. Administrative Convenience

The ease with which a court can administer a class action has long been recognized as a crucial concern in certifying a Rule 23(b)(3) class action.[74] The Seventh Circuit began its analysis in *Mullins* by recognizing this concern in favor of adopting the heightened ascertainability requirement—namely that it furthers administrative convenience in a Rule 23(b)(3) action by ensuring that a class action is the "superior" method "for fairly and efficiently" addressing the claims at hand.[75] The Third Circuit has said that heightened ascertainability, because it focuses on accurately and efficiently identifying class members, "eliminates serious administrative burdens" that work against the efficiencies required for a Rule 23(b)(3) class action.[76]

Because the putative class members in *Mullins* would have no way to prove that they purchased the product at the certification stage without extensive fact-finding, the Seventh Circuit concluded that such a class could not be certified under the heightened ascertainability requirement due to the "administrative costs and headaches" that would be required to determine class membership.[77] The court reasoned that the requirement forced judges to view administrative concerns "in a vacuum," causing them to deny certification without considering the fact that, despite administrative concerns, a class action may be the only way for small consumer claims to be effectively litigated.[78] Thus, instead of requiring heightened ascertainability, the Seventh Circuit maintained that the explicit efficiency requirement and the manageability factor of Rule 23(b)(3) are sufficient to ensure that a class action is the superior vehicle for litigating the individual claims.[79]

74. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 618 (1997) ("The development [of class action practice] reflects concerns about the efficient use of court resources . . . .").

75. FED. R. CIV. P. 23(b)(3); *Mullins*, 795 F.3d at 663 (citing Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012)).

76. Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012). Whether a class action is "efficient" includes, in particular, considerations of whether the issue being litigated is common to all class members, as well as the "likely difficulties" in the management of a class action. *See* FED. R. CIV. P. 23(a)(2), (b)(3)(D); Helveston, *supra* note 23, at 759.

77. *See Mullins*, 795 F.3d at 663.

78. *See id.*; *supra* notes 65–66 and accompanying text.

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

This fear that courts would deny certification of small consumer claims due to administrative concerns is not entirely unjustified. Applying the heightened ascertainability requirement, the Third Circuit denied certification for a proposed class of small consumer claims under Rule 23(b)(3), similar to the class proposed in *Mullins*.[80] The plaintiffs in *Carrera v. Bayer Corp.*[81] purchased a diet pill of dubious effectiveness and were equally unlikely to have proof of purchase such as product packaging or receipts.[82] The Third Circuit seized on this deficiency, holding that a plaintiff cannot satisfy the ascertainability requirement if determining membership would involve "individualized fact-finding or mini-trials."[83] This confirms the Seventh Circuit's concern that small consumer class actions like *Mullins* or *Carrera* would fail because of the difficulty of efficiently determining class membership.[84] Furthermore, the outcome in *Carrera* is not an isolated incident; many classes have failed the heightened ascertainability requirement because of a lack of manageability or administrative feasibility in identifying class members.[85]

However, these cases also suggest ways that the plaintiffs can define their classes in an ascertainable and manageable way—one that satisfies the heightened ascertainability requirement even in a class action for small consumer claims.[86] Although the Seventh Circuit

80. *Compare id.* at 658 (proposing a class action against the seller of dietary joint supplements for allegedly engaging in fraudulent advertising), *with* Carrera v. Bayer Corp., 727 F.3d 300, 304 (3d Cir. 2013) (proposing a class action against Bayer for allegedly claiming that a diet pill enhanced metabolism).

81. 727 F.3d 300 (3d Cir. 2013).

82. *Id.* at 304.

83. *Id.* at 304, 307 (quoting Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012)).

84. *See, e.g.*, *Mullins*, 795 F.3d at 664; *Carrera*, 727 F.3d at 307.

85. *See, e.g.*, Grandalski v. Quest Diagnostics Inc., 767 F.3d 175, 185 (3d Cir. 2014) ("[T]he District Court properly found that individual inquiries would be required to determine whether an alleged overbilling constituted unjust enrichment for each class member. Such specific evidence is incompatible with representative litigation."); Sethavanish v. ZonePerfect Nutrition Co., No. 12-2907-SC, 2014 U.S. Dist. LEXIS 18600, at *17 (N.D. Cal. Feb. 13, 2014) ("Plaintiff has yet to present any method for determining class membership, let alone an administratively feasible method."). *But see* Byrd v. Aaron's Inc., 784 F.3d 154, 170 (3d Cir. 2015) ("The Byrds' proposed method to ascertain [class members] is neither administratively infeasible nor a violation of Defendants' due process rights.").

86. *See, e.g.*, *Sethavanish*, 2014 U.S. Dist. LEXIS 18600, at *17 ("[I]n some cases, retailer or banking records may make it economically and administratively feasible to determine who is in (and who is out) of a putative class."); Weiner v. Snapple Beverage Corp., 07 Civ. 8742 (DLC), 2010 U.S. Dist. LEXIS 79647, at *41 (S.D.N.Y. Aug. 5, 2010) ("Plaintiffs offer no basis to find that putative class members will have retained a receipt, bottle label, or any other concrete documentation of their purchases of Snapple beverages

feared that the heightened ascertainability requirement will cause courts to "err systematically against certification," the rule is not as harsh as the Seventh Circuit indicated.[87] Although Mullins did not present any receipts or records during the certification process,[88] a plaintiff providing such objective evidence ensures that determining class membership will not require individualized fact finding for each putative class member, and the class definition can meet the heightened ascertainability rule.[89]

But if putative class members cannot provide objective proof of their claims, a class action can become unwieldy, requiring that defendants engage in "mini-trials" to challenge each putative class member's claim that they belong in the class.[90] By requiring putative members to have some objective evidence proving their membership at the certification stage, the heightened ascertainability requirement avoids lengthy and costly litigation that undermines Rule 23(b)(3)'s efficiency requirement.[91] Consequently, the heightened ascertainability rule, with its focus on administrative convenience in determining class membership, fits within the Supreme Court's focus on manageability as a crucial requirement for certification.[92]

B. Unfairness to Absent Class Members

Another consideration in a Rule 23(b)(3) class action proceeding is the requirement that class members be provided with notice of the pending class action. Rule 23(c)(2)(B) requires that, for any class certified under Rule 23(b)(3), the court must provide to class members the "best notice that is practicable under the circumstances," which allows these class members to avoid being bound by a final decision in the proceeding if they choose to litigate

bearing the 'All Natural' description."). For further discussion about ways that plaintiffs might be able to meet the heightened ascertainability standard, see *infra* Part IV.

87. *See Mullins*, 795 F.3d at 664.

88. *See* Defendant's Opposition to Plaintiff's Renewed Motion for Class Certification, *supra* note 4, at 1.

89. Courts have not yet identified a bright-line rule as to what types of objective evidence meet the heightened ascertainability requirement; however, they have accepted retailer records, receipts, and government records. *See, e.g.*, *Byrd*, 784 F.3d at 169 (finding that the proposed class was ascertainable because there were "objective records" including government and retailer records that could "readily identify" class members); Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011) ("In order for a proposed class to satisfy the ascertainability requirement, membership must be determinable from objective, rather than subjective, criteria.").

90. *See* Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013).

91. *See id.* at 307–08; FED. R. CIV. P. 23(b)(3).

92. *See supra* notes 32–40 and accompanying text.

the claim individually.[93] According to the Seventh Circuit, a central premise of the heightened ascertainability requirement is that *all* class members must be readily identifiable so that they will receive actual and personal notice of the class action—ensuring that they can opt out.[94]

Assuming as the Seventh Circuit did that there were no records or proofs of purchase to show who was a member of the class defined in *Mullins*, there would be no way to provide actual notice to each individual putative class member because the parties could not identify their names and contact information. If heightened ascertainability requires actual notice, then *Mullins* (and other proposed classes where potential members may lack records to prove their membership) would fail the heightened ascertainability requirement, and the court would deny certification.[95]

This actual notice requirement does not flow from Rule 23(c)(2)(B), which mandates that courts provide the "best notice that is practicable under the circumstances" and only requires individual notice for members who can be identified through reasonable efforts.[96] The Seventh Circuit noted that some class members may be impossible to identify, which is why the Rule does not generally require actual notice.[97] By linking certification to actual notice and requiring the class representative to contact each and every possible member of a proposed class, the heightened ascertainability requirement would create a very high bar for small consumer claims. Thus, the Seventh Circuit feared that strict adherence to the

93. FED. R. CIV. P. 23(c)(2)(B); *see* 3 RUBENSTEIN ET AL., *supra* note 42, at §§ 8:5, 9:39.

94. *See* Mullins v. Direct Dig., LLC, 795 F.3d 654, 665 (7th Cir. 2015) ("If the identities of absent class members cannot be ascertained, the argument goes, it is unfair to bind them by the judicial proceeding. A central premise of this argument is that class members must receive actual notice of the class action so that they do not lose their opt-out rights." (internal citations omitted)), *cert. denied* 136 S. Ct. 1161 (2016). While Rule 23(c) requires that notice be provided to all class members in a Rule 23(b)(3) action, it does not require actual notice to each individual class member. FED. R. CIV. P. 23(c)(2)(B).

95. *See Mullins*, 795 F.3d at 665 ("[Rule 23] recognizes it might be *impossible* to identify some class members for purposes of actual notice.").

96. FED. R. CIV. P. 23(c)(2)(B).

97. *See, e.g.*, *Mullins*, 795 F.3d at 665; Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 396 (1967) ("In particular cases it may be practicable to give notice under (c)(2) which will reach each member of the class. That will not be possible in all cases . . . .").

requirement's actual notice requirement would render such class actions impossible to certify.[98]

But heightened ascertainability does not insist on actual notice. The Third Circuit has emphasized that the heightened ascertainability requirement facilitates, rather than ignores, the "best notice practicable" requirement under Rule 23(c)(2)(B).[99] For example, in a case involving a Rule 23(b)(3) class action against a cell phone provider, the Third Circuit wrote that "[w]here names and addresses of members of the class are easily ascertainable, . . . due process would dictate that the 'best notice practicable under the circumstances . . . would be individual notice.' "[100] In the absence of records to facilitate member identification, individual notice is not always required because it may not provide the best notice under the circumstances. When class members are asked to provide receipts to prove their membership, it may be impossible to identify members before production of those receipts. Therefore, the "best notice practicable" in such a situation may be to post a sign in the retailer's store.[101]

Furthermore, even if only a few class members choose to opt out,[102] the heightened ascertainability requirement maintains this fundamental right of class action litigation while balancing the need to facilitate the best possible notice to class members.[103] Rather than denying certification if every class member cannot be provided personal notice, requiring objective evidence to prove class membership preserves members' opt-out rights by identifying as many members as possible. Thus, a lower burden to provide notice to each individual class member outweighs the higher evidentiary burden placed on proving class membership because it maximizes the number of class members who can be reasonably notified. The heightened ascertainability requirement efficiently and accurately

98. *Mullins*, 795 F.3d at 665 ("When it comes to protecting the interests of absent class members, courts should not let the perfect become the enemy of the good.").

99. *See* Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012) (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.222 (2004)).

100. Larson v. AT&T Mobility LLC, 687 F.3d 109, 126 (3d Cir. 2012) (alteration in original) (quoting Greenfield v. Village Indus., 483 F.2d 824, 832 (3d Cir. 1973)).

101. *See* 5 MOORE ET AL., *supra* note 29, § 23.102[3].

102. *See* Francis E. McGovern, *Second-Generation Dispute System Design Issues in Managing Settlements*, 24 OHIO ST. J. ON DISP. RESOL. 53, 61 (2008) (discussing a case in which only 15.65% of actual class members elected to opt out of the class action upon receipt of notice).

103. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (holding that due process requires that an absent class member be provided with the opportunity to opt out of a class action); *Marcus*, 687 F.3d at 593.

facilitates the notice requirement, while preserving the right of individuals to opt out of the class action.

C. *Unfairness to Defendants and to Bona Fide Class Members*

Finally, the Seventh Circuit addressed the argument that the heightened ascertainability requirement ensures that bona fide class members' recovery will not be diluted by false or inaccurate claims.[104] Courts applying the heightened ascertainability requirement have expressed concern that, in cases like *Mullins* where there is no objective evidence, class membership determination would amount to little more than accepting each putative member's "say-so."[105] In the absence of objective evidence, class members may have to rely on more subjective methods of identification such as affidavits to prove their membership.[106] But, as the Third Circuit noted, affidavits present problems for both defendants and for bona fide class members.[107] Forcing defendants to simply accept affidavits as proof of class membership, without any kind of verification, would not be "proper or just."[108] Furthermore, the use of affidavits without further verification could result in the submission of fraudulent or erroneous claims that would dilute the pro rata share of any recovery for bona fide class members.[109]

Consequently, courts that have adopted heightened ascertainability require that when class members use affidavits to prove membership those affidavits must be verified in some way to ensure that there are no fraudulent claims.[110] The Third Circuit has recently explained that a plaintiff should present a model of how to reliably screen affidavits for honesty and accuracy.[111] Another court has adopted a slightly broader requirement, requiring a "specific proposal as to how identification via affidavit would successfully operate . . . ."[112] Because a class like the one in *Mullins* did not show

104. Mullins v. Direct Dig., LLC, 795 F.3d 654, 666 (7th Cir. 2015), *cert denied*, 136 S. Ct. 1161 (2016) (citing Carrera v. Bayer Corp., 727 F.3d 300, 310 (3d Cir. 2013)).

105. *Marcus*, 687 F.3d at 594; *see also* Perez v. Metabolife Int'l, Inc., 218 F.R.D. 262, 269 (S.D. Fla. 2003) (noting that affidavits are "uncorroborated and self-serving evidence").

106. *See Marcus*, 687 F.3d at 594.

107. Carrera v. Bayer Corp., 727 F.3d 300, 310 (3d Cir. 2013).

108. *See Marcus*, 687 F.3d at 594 (quoting Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1089–90 (N.D. Cal. 2011)).

109. *See Carrera*, 727 F.3d at 310.

110. *See, e.g.*, Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 948–49 (11th Cir. 2015); *Carrera*, 727 F.3d at 311.

111. *See Carrera*, 727 F.3d at 311–12.

112. *Karhu*, 621 F. App'x at 949.

any records or documents to prove class membership, the plaintiff would have to present some kind of successful model for screening those affidavits.[113]

The Seventh Circuit took issue with this approach to affidavits, finding that it renders them "insufficient as a matter of law" because of the challenges of demonstrating a successful model for screening affidavits that is unique to each case.[114] The court held that, as long as defendants have a chance at the claims administration phase to challenge the validity of each affidavit, they have not been denied due process.[115] The court also noted two problems with denying certification based on an assumed risk of dilution. First, there is no "empirical evidence" to suggest that there would be enough fraudulent or erroneous claims of membership to have an effect on bona fide class members' recovery—especially because so few class members claim recovery at all in a class action.[116] Second, using affidavits may be the only way that individuals with real claims can prove membership in a class.[117] If courts denied certification based on a fear that using only affidavits as evidence of class membership would allow fraudulent claims and dilute recovery, then class members with valid claims but no objective evidence could recover nothing at all.[118]

There is little evidence suggesting a high risk of fraudulent claims diluting recovery, especially because so few class members submit claims to recover at all.[119] This may apply to class actions like *Mullins*, in which the class is pursuing a consumer fraud claim and is asking for the defendant to refund the cost of every problematic product sold

113. A successful model for screening affidavits must reliably determine the veracity of the affidavits and must be specific enough to allow the defendant to challenge how the model attempts to determine veracity. *See Carrera*, 727 F.3d at 311–12. However, courts have not yet approved a model that meets these requirements, making it difficult to determine exactly what such a successful model might look like. *See infra* note 127 and accompanying text.

114. *See* Mullins v. Direct Dig., LLC, 795 F.3d 654, 668–69 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016).

115. *Id.* at 669 (noting that a defendant does not have a "due process right to a *cost-effective* procedure for challenging every individual claim to class membership").

116. *See id.* at 667 (citing Byrd v. Aaron's Inc., 784 F.3d 154, 175 (3d Cir. 2015) (Rendell, J., concurring)).

117. *See id.* at 668–69.

118. *Id.* at 668 ("To deny class certification based on fear of dilution would in effect deprive bona fide class members of any recovery as a means to ensure they do not recover too little.").

119. *See* McGovern, *supra* note 102, at 128 (noting a case in which the response rate for claims in a class action was 0.45% in the first six months).

and to pay appropriate fines.[120] If damages (excluding fines) will be determined by the number of refunds to be issued, a handful of fraudulent or erroneous claims are unlikely to significantly dilute the recovery of bona fide class members.[121]

But this is not the case for every class action or every class action involving small consumer claims. For example, in *Marcus v. BMW of North America*,[122] the class sued BMW for tires that "ha[d] gone flat and been replaced" and for bodily injuries caused by this defect.[123] Because these claims required proof that the tire went flat because of a manufacturer defect rather than some external cause (such as a nail on the road), BMW could have been forced to pay damages to those who had submitted fraudulent or erroneous affidavits.[124] Moreover, verifying the cause of each flat tire would involve the exact sort of "mini-trial" that the heightened ascertainability requirement was designed to avoid. Although these fraudulent or erroneous claims would not harm bona fide class members in such a situation, the claims would certainly harm defendants by forcing them to pay damages in excess of their liability, which even the Seventh Circuit noted would violate the defendants' right to due process.[125]

Heightened ascertainability undeniably makes it more difficult to use affidavits as proof of class membership, but the requirement does not necessarily render affidavits "insufficient as a matter of law."[126] Courts that have applied the heightened ascertainability requirement to the use of affidavits have consistently held that affidavits can be used as long as the plaintiff can demonstrate a successful screening method to weed out fraudulent or erroneous affidavits.[127] But those

120. *Mullins*, 795 F.3d at 670 (observing how most consumer fraud class actions involve a "common method" for determining damages and how other methods can determine damages in the aggregate); *see also* Carrera v. Bayer Corp., 727 F.3d 300, 309 (3d Cir. 2013) ("Carrera argues that he can prove at trial that Bayer owes a refund for every purchase of WeightSmart.").

121. *See Mullins*, 795 F.3d at 666–69.

122. 687 F.3d 583 (3d Cir. 2012).

123. *Id.* at 590.

124. *See id.* at 603–04 (discussing how damages determined by the cost of replacing each flat tire is dependent on what caused each tire to go flat).

125. *See Mullins*, 795 F.3d at 672.

126. *See id.* at 668–69.

127. *See* Weiner v. Snapple Beverage Corp., 07 Civ. 8742 (DLC), 2010 U.S. Dist. LEXIS 79647, at *17–18 (S.D.N.Y. Aug. 3, 2010) ("At the class certification stage, plaintiffs may demonstrate that these elements are susceptible to generalized proof by disclosing a suitable methodology. When plaintiffs attempt such a showing, however, they must demonstrate that the proposed methodology can be applied class-wide and 'that they could, at trial, marshal facts sufficient to permit them to rely upon' the proposed

courts have not yet approved a successful model or given an example of what a successful model might look like.[128] Thus, while it remains unclear what models would pass muster under heightened ascertainability, these cases do not render affidavits per se inadmissible.

Nonetheless, in some types of class action claims it is important to screen out fraudulent or erroneous affidavits to prevent defendants from paying more than they owe and to promote a more manageable process for identifying class members by reducing the number of putative class members a defendant must challenge.[129] In this sense, the heightened ascertainability rule's emphasis on an "administratively feasible" model to screen out false or erroneous affidavits serves a critical role by ensuring that defendants can efficiently and effectively challenge class membership and limit their liability to bona fide class members. The Supreme Court has written that without specificity in the class definition a defendant does not know how to properly defend the case.[130] The heightened ascertainability requirement creates that specificity so that defendants can efficiently exercise their right to challenge proof of class membership and limit their damages.[131]

IV. HANDLING THE EFFECTS OF THE HEIGHTENED ASCERTAINABILITY REQUIREMENT

Although the heightened ascertainability requirement supports Rule 23(b)(3)'s intended purpose of balancing the efficiency of class

methodology." (citations omitted) (quoting McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 229 (2d Cir. 2008))).

128. *See, e.g.*, Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 949 (11th Cir. 2015) ("Because Karhu had not himself proposed an affidavit-based method, he necessarily had not established how the potential problems with such a method would be avoided. Without a specific proposal as to how identification via affidavit would successfully operate, the district court had no basis to accept the method."); Carrera v. Bayer Corp., 727 F.3d 300, 311 (3d Cir. 2013) (remanding the case to allow plaintiff to propose a successful model without stating what that model should look like).

129. *See Mullins*, 795 F.3d at 672; *cf.* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013) (holding that any model supporting a plaintiff's damages must be consistent with its liability case, or "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class").

130. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160–61 (1982) (citing Johnson v. Ga. Highway Express, Inc., 417 F.2d 1122, 1125–27 (5th Cir. 1969) (Godbold, J., concurring)).

131. *Carrera*, 727 F.3d at 309; *see* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 360–67 (2011) (stating that the defendant had a right to individualized determinations of class members' right to employee back-pay and that defendant could assert individualized defenses accordingly).

actions, it still likely prevents certification for claims like that in *Mullins*. Due to the lack of objective evidence in that case, such as receipts, labels, or retailer records proving purchase of Instaflex, the class cannot meet the heightened ascertainability rule's requirement that putative class members have objective proof of their membership.[132]

The heightened ascertainability requirement was designed to improve the efficiency of class actions for small consumer claims, as well as to allow defendants to challenge potentially fraudulent claims made by individual class members.[133] Some have argued that the requirement's emphasis on objective evidence creates the unfair result of keeping some valid claims out of court.[134] However, the *Mullins* court itself recognized that only a "tiny fraction" of putative class members file claims, valid or not, to recover the small amount of damages they can expect from these small consumer claims.[135] With so few putative class members pursuing claims in the first place, even if the heightened ascertainability requirement bars classes like that of *Mullins* from certification, it will only affect a few potential claimants.

Moreover, the limited case law suggests possible workarounds for the few class members with valid small consumer claims who intend to participate in the class action. A concurring opinion from the Eleventh Circuit suggests that affidavits might at least approximate objective evidence for certain small consumer claims involving readily identifiable products.[136] Additionally, the Third Circuit's opinion in *Carrera* left the door open for a possible, if not yet discernable, way to prove that a model for screening affidavits would be successful.[137] The court suggests that proof of the model's success might serve as sufficiently objective evidence that could

132. *See Mullins*, 795 F.3d at 661 (reasoning that it is unlikely that customers would have kept their receipts in this inexpensive transaction).

133. *See supra* Sections III.A, III.C.

134. *See, e.g.*, Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 312–13, 330 (2009) ("[T]he ascertainability requirement readily sacrifices both deterrence and compensation in favor of an alternative value, namely, ensuring that compensation does not flow to uninjured parties.").

135. *See Mullins*, 795 F.3d at 668; *see also* Geoffrey M. Wyatt, *7th Circ. Stands Out on Ascertainability of Class Actions*, LAW360 (Oct. 5, 2015), http://www.law360.com/articles/710549/7th-circ-stands-out-on-ascertainability-of-class-actions [http://perma.cc/9RF5-N8S6].

136. *See* Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 952–53 (11th Cir. 2015) (Martin, J., concurring).

137. *See* Carrera v. Bayer Corp., 727 F.3d 300, 310–11 (3d Cir. 2013); *supra* note 126–28 and accompanying text.

satisfy the heightened ascertainability requirement.[138] These approaches suggest that, at least under particular circumstances, there may be ways for putative class members with small consumer claims to meet the heightened ascertainability requirement despite the outcome in *Mullins*.

A. Limited Use of Affidavits

Courts that have adopted the heightened ascertainability requirement emphasize that affidavits alone are insufficient to meet the requirement of objective proof of class membership.[139] If a plaintiff with a small consumer claim would have difficulty recalling the details of when she purchased the product in question, or even were she to purchase the exact product, an affidavit would be an unreliable evidentiary source.[140] Since affidavits in such cases are often based on individuals' subjective memories,[141] these courts are unwilling to consider them as the kind of objective evidence that prevents the filing of false claims and allows defendants to challenge individual class membership.[142]

However, in a recent concurring opinion, Judge Beverly B. Martin of the Eleventh Circuit suggests one possible way to use affidavits under the heightened ascertainability requirement.[143] When the value of the claims is low and individuals can easily determine for themselves if there are potential class members, affidavits alone might meet the heightened ascertainability requirement.[144] Where the potential recovery is small, unscrupulous would-be class members are less likely to file a fraudulent affidavit because the risk of perjury

138. *See Carrera*, 727 F.3d at 311.

139. *See Karhu*, 621 F. App'x at 948–49; Byrd v. Aaron's Inc., 784 F.3d 153–54, 170 (3d Cir. 2015); *Carrera*, 727 F.3d at 309–10.

140. *See Carrera*, 727 F.3d at 309 & n.5 (noting that the named plaintiff in the case could not remember when he purchased the product in question and confused the product with similar products on the market).

141. *See* Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1090 (N.D. Cal. 2011) (stating that an affidavit swearing to a class member's smoking history was inherently subjective because it was based on an estimate of cigarettes smoked over a certain time period).

142. *See, e.g.*, Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 594 (3d Cir. 2012) (noting that affidavits force defendants to rely on absent persons' declarations as true).

143. *See Karhu*, 621 F. App'x at 952–53.

144. *Id.* Individuals may have a difficult time determining whether or not they purchased a product when "a challenged product is similar to other unchallenged products on the market[.]" *Id.* at 953.

outweighs the potential reward.[145] Furthermore, defendants might be able to more readily defend against the validity of individual claims that use affidavits as evidence if the defendants can question the putative class member about a specific and easily identifiable product.[146] And because so few putative class members are likely to file claims, the defendants could do so without sacrificing the efficiency of the class action proceeding because they would have to defend fewer claims.[147] Under these circumstances, affidavits may approximate objective evidence because some of the subjectivity concerns about a class member's memories are removed when defendants can challenge the individual's memory about a specific product.[148]

While the limited use of affidavits may help some small consumer claims meet the requirements of heightened ascertainability, they would be ineffective in cases such as *Mullins*. There are a variety of Instaflex-brand pills on the market,[149] and it is possible that putative class members may not know which pills they purchased. This fact suggests that the claims themselves may be weak and that administering a class action suit would be costly and ultimately ineffective.[150] When class members are unable to recall whether they purchased the product in question, let alone provide proof of purchase, they probably cannot prove their claims in court at all—whether litigating in a class action or individually.[151]

145. *See* Mullins v. Direct Dig., LLC, 795 F.3d 654, 667 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016) (citing Byrd v. Aaron's Inc., 784 F.3d 154, 175 (3d Cir. 2015) (Rendell, J., concurring)).

146. *See* Carrera v. Bayer Corp., 727 F.3d 300, 309 (3d Cir. 2013) (stating that defendants cannot challenge affidavits in instances where the putative class members cannot accurately recall their relevant purchases); *cf. 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." (emphasis added)); Godec v. Bayer Corp., No. 1:10-CV-224, 2011 U.S. Dist. LEXIS 131198, at *23 (N.D. Ohio Nov. 11, 2011) (noting that defendants can present defenses against individual claimants).

147. *See* Wyatt, *supra* note 135.

148. *See Karhu*, 621 F. App'x at 953.

149. *See* INSTAFLEX, *supra* note 1 (listing a variety of Instaflex products, including Instaflex Joint Support, Instaflex Advanced, and Instaflex Bone Support).

150. *See* Randolph v. J.M. Smucker Co., 303 F.R.D. 679, 687 (S.D. Fla. 2014) (noting that because there were so many different types of Crisco oil on the market, the plaintiffs might have difficulty determining which type they purchased, creating "substantial difficulties" for the administration of the class action).

151. *See* Kouba & Pearce, *supra* note 41 ("If an individual is not a class member, that person cannot rely [on] any common findings of liability or share in any judgment in favor of the class. Thus, without proof that they are a class member, a claimant cannot prove that defendant is liable to him or her.").

However, one can easily envision a class action involving consumer claims about a unique but relatively inexpensive product.[152] Under different facts, certain small consumer claims may not be completely barred from certification if they can use affidavits in a way that closely approximates objective evidence like receipts or records.

B. Proving the Reliability of Affidavit Screening Models

Although the Third Circuit has refused to permit the use of unverified affidavits in heightened ascertainability cases, the court nonetheless indicated one way that putative class members might use affidavits to prove class membership. In *Carrera*, the Third Circuit rejected the plaintiff's proposal of a method to screen the accuracy and truthfulness of affidavits on the basis that there was no proof of the proposed method's reliability or effectiveness.[153] The court remanded the case to allow the plaintiff to submit a specific screening model and to show how the model could reliably determine the veracity of the affidavits in question.[154] These requirements would ensure that defendants have the opportunity to challenge the validity of the screening model of the affidavits, rather than engaging in "mini-trials" about the validity of each individual affidavit.[155] They would also prevent defendants from having to face "satellite litigation" about who is bound by the final judgment when the class was not sufficiently definite.[156] Finally, these requirements would prevent fraudulent or erroneous claims from diluting bona fide class members' recovery, so that those members will not receive less than they deserve.[157] Essentially, clear evidence of a successful model for screening affidavits might be sufficiently objective to satisfy the heightened ascertainability requirement.[158]

152. One example might be a unique food product like the Kinder Surprise Egg, which is inexpensive but poses a possible choking hazard because, while the hollow egg is made of chocolate, within it is a plastic container with a toy inside (although this particular product is banned in the United States). *See* Kathleen Caulderwood, *Kinder Surprise Chocolate Eggs Brought into Corporate Battles, Gun Debates*, INT'L BUS. TIMES (June 10, 2014, 6:53 PM), http://www.ibtimes.com/kinder-surprise-chocolate-eggs-brought-corporate-battles-gun-debates-1597618 [http://perma.cc/TWU4-XZAZ].

153. Carrera v. Bayer Corp., 727 F.3d 300, 311 (3d Cir. 2013).

154. *Id.*

155. *See* Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593–94 (3d Cir. 2012).

156. *Id.* at 593 (citing 1 RUBENSTEIN ET AL., *supra* note 42, § 3:1).

157. *Carrera*, 727 F.3d at 310.

158. *Cf.* Byrd v. Aaron's Inc., 784 F.3d 154, 173 (3d Cir. 2015) (Rendell, J., concurring) ("We have precluded class certification unless there can be objective proof—beyond mere affidavits—that someone is actually a class member.").

But the court's opinion provided no indication about what a successful model might look like.[159] Plaintiffs apparently would have to demonstrate the model "in action" at the certification stage, which may create a challenging evidentiary burden.[160] Without such a demonstration of the model, the opinion expresses doubt that a screening model could satisfy the heightened ascertainability requirement.[161] The court notes that the proof of the model's success must be more than "mere assurances" that the model will work.[162] Furthermore, such a model must be specific to the case in question, rather than a general model that does not screen for the particular facts or legal theories of the case.[163]

Although *Carrera* has ostensibly described a way that affidavits can be used in small consumer claims, it remains to be seen what a successful screening model would look like. However, assuming that a plaintiff can demonstrate a successful model to a court that has adopted the heightened ascertainability requirement, *Carrera* at least obliquely suggests a way that small consumer claims lacking other objective evidence like receipts or records can still meet the requirement.

The discussed proposal may provide an answer as to how some small consumer claims can be successfully adjudicated as class actions under the heightened ascertainability requirement. Classes like the one in *Mullins* may generally be barred under the requirement due to their lack of objective evidence and the difficulty of identifying whether putative class members purchased the product in question. However, the heightened ascertainability requirement may allow for some flexibility for certain small consumer claims involving low-cost, unique products or claims that can demonstrate a successful affidavit screening model.

159. *See Carrera*, 727 F.3d at 311.
160. *See id.*
161. *See id.*
162. *Id.* at 311–12.
163. *See id.* at 311.

CONCLUSION

Although the Seventh Circuit insisted that heightened ascertainability has the "effect of barring class actions," especially in cases involving small consumer claims,[164] the Third's Circuit's application of heightened ascertainability suggests that there may be more room for successful small consumer claims.[165] Nonetheless, heightened ascertainability makes it more difficult for small consumer claims to be certified as class actions.

If the Supreme Court reaches this issue and adopts the heightened ascertainability requirement, it would likely do so because the Rule 23(b)(3) focuses on the efficiency and manageability of class actions—a central concern in class certification.[166] But in order to prevent heightened ascertainability from keeping classes like that of *Mullins* from being certified, the Court should also consider the types of evidence that classes may use to prove certification under the heightened ascertainability requirement. In the absence of accessible records or individual proof of purchase, this may mean permitting disinterested third-party affidavits, defendant cross-examination of randomly selected affiant class members, or affidavits alone in cases where the value of the claims are low and individuals can easily identify themselves as class members.[167]

Considering such evidence allows claims without documentary evidence to proceed, while ensuring that the "proposed class will actually function as a class."[168] But regardless of the evidence the Court may permit in class certification, the heightened ascertainability requirement remains a valuable tool for securing the efficiency and manageability of class actions in cases involving small consumer claims. By requiring putative class members to somehow prove their membership at the certification stage, the heightened

164. Mullins v. Direct Dig., LLC, 795 F.3d 654, 658 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016).

165. *See supra* Parts I–II.

166. *See Mullins*, 795 F.3d at 658 ("A court must consider 'the likely difficulties in managing a class action,' but in doing so it must balance countervailing interests to decide whether a class action 'is superior to other available methods for fairly and efficiently adjudicating the controversy.' " (quoting FED. R. CIV. P. 23(b)(3)(d))); *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 . . . .").

167. *See* Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 953 (11th Cir. 2015) (Martin, J., concurring).

168. Byrd v. Aaron's Inc., 784 F.3d 154, 162 (3d Cir. 2015).

ascertainability rule ensures that small consumer claims comply with one of Rule 23(b)(3)'s most important purposes: to "achieve economics of time, effort, and expense" through class actions.[169]

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169. FED. R. CIV. P. 23(b)(3) advisory committee's note to 1966 amendment.

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