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REASON: _____

Challenging Class Actions

Standing and Ascertainability

While challenges to class actions usually center on the elements set out in Federal Rule of Civil Procedure 23, courts increasingly are receptive to arguments based on deficiencies not specifically enumerated in this rule. Understanding the evolving case law on these non-statutory grounds is critical to defeating a class action, or significantly limiting the scope of liability, as quickly and efficiently as possible.



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It is well-known that class actions may proceed only if the requirements for class certification under Federal Rule of Civil Procedure (FRCP) 23 are met. Would-be class plaintiffs bear the burden of showing that the case satisfies the requirements of numerosity, commonality, typicality and adequacy under FRCP 23(a) and falls under one of the three categories delineated in FRCP 23(b).

 Search [Class Actions: Certification](#) for more on the class certification requirements under FRCP 23.

For many years, it seemed as though courts considering motions for class certification were issuing “rubber stamp” decisions allowing proposed class actions to proceed. However, various developments in the case law seemingly have made it easier for defendants to deter class actions both before and at the certification stage. For example, two relatively recent decisions by the US Supreme Court emphasize that courts must undertake a “rigorous analysis” to determine whether the FRCP 23 requirements are satisfied, bolstering defense counsel’s efforts to oppose class certification (see *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011)).

 Search [How Defendants Can Use Class Certification to Their Advantage](#) for more on recent legal developments that may potentially benefit class action defendants.

Significantly, however, in addition to challenges based on the statutory class certification requirements, recent decisions confirm that lines of attack outside the four corners of FRCP 23 can be invaluable to defending a class action. In particular, with increasing frequency, courts are now:

- Dismissing class action claims or denying class certification based on arguments that the plaintiffs lack standing to pursue some or all of their claims.
- Denying class certification because a proposed class is not ascertainable.

A successful challenge based on lack of standing or ascertainability may provide clients with an effective way to obtain an early favorable settlement, if not an outright dismissal of the action.

 Search [Class Action Toolkit](#) for a collection of resources designed to assist counsel with class action procedure, requirements and practice in federal court.

STANDING

Article III of the US Constitution strictly limits the power of the federal judiciary to hear only actual cases or controversies. This principle of limited jurisdiction is manifested in the concept of standing, which “is the threshold question in every federal case, determining the power of the court to entertain the suit” (*Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62 (2d Cir. 2012)).

To satisfy Article III’s standing requirement, a plaintiff must allege that:

- The plaintiff suffered an actual, concrete and particularized injury-in-fact.
 - The defendant caused the injury.
 - Judicial intervention is likely to redress the injury.
- (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).)

If a plaintiff does not have standing, the court lacks subject matter jurisdiction to hear the plaintiff’s claim and it must be dismissed under FRCP 12(b)(1).

Simply styling a complaint as a class action does not alter the Article III standing requirement (*Lewis v. Casey*, 518 U.S. 343, 357 (1996)). “[E]ven named plaintiffs who represent a class ‘must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent’” (*Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976) (quoting *Warth v. Seldin*, 422 U.S. 490, 502 (1975))).

Counsel can challenge class plaintiffs’ standing at either:

- The motion to dismiss stage.
- The class certification stage.

The question of when to make the challenge is a strategic decision that depends in part on the law in the relevant jurisdiction.

CHALLENGING STANDING IN A MOTION TO DISMISS

A successful standing challenge at the motion to dismiss stage allows counsel to dismiss or significantly narrow the claims at the outset of a case. In the context of a class action, a motion to dismiss is directed at the named plaintiffs’ standing because, prior to class certification, the named plaintiffs are the only ones with a legally protectable interest and must demonstrate standing to bring the action on behalf of unnamed class members (see *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009)). Where the named plaintiffs’ standing is questionable, a motion to dismiss may be appropriate.

Standing can play a particularly significant role in consumer class actions where the named plaintiffs seek to represent a class based on alleged improper conduct related to several of the defendant’s products. In this context, courts are split on how the named plaintiffs demonstrate standing, with some courts focusing on whether the named plaintiffs actually purchased the products at issue and others allowing a claim to proceed where the named plaintiffs merely purchased something similar.

 Search [Key Issues in Consumer Data Breach Litigation](#) and [Expert Q&A on Standing in Data Breach Class Actions](#) or see page 20 in this issue for information on standing challenges in the context of data breach class actions.

Actual Purchase

In some jurisdictions, courts strictly apply to class actions the Supreme Court’s standing jurisprudence and the Constitution’s requirement that a plaintiff demonstrate an actual injury. In these jurisdictions, the named plaintiffs may not rely on injuries that the rest of the putative class may have suffered, but instead must allege that they personally have been injured. As

INJURY AND PREDOMINANCE UNDER FRCP 23(b)(3)

The extent of injury suffered by unnamed class members often is addressed not as a standing issue, but in terms of whether common issues predominate in an FRCP 23(b)(3) class action.

Indeed, the Supreme Court's decision in *Comcast Corp. v. Behrend* found that damages concerns could be considered at the class certification stage when weighing whether issues common to the class predominate over individual questions (133 S. Ct. at 1433). This ruling led some to argue that FRCP 23(b)(3) precludes class certification where class members admittedly have suffered a range of injuries, including some with no injury at all.

However, recent circuit court decisions resoundingly have found that class certification under FRCP 23(b)(3) is not foreclosed even where the damages inquiry might be individualized and the class may in fact include members who have not suffered any injury (see *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407 (2d Cir. 2015) ("*Comcast*, then, did not hold that a class cannot be certified under Rule 23(b)(3) simply because damages cannot be measured on a classwide basis."); *In re Nexium*

Antitrust Litig., 777 F.3d 9, 23 (1st Cir. 2015) ("*Comcast* did not require that plaintiffs show that all members of the putative class had suffered injury at the class certification stage — simply that at class certification, the damages calculation must reflect the liability theory."); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) ("If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification."), *cert. denied*, 134 S. Ct. 1277 (2014); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) ("[T]he presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3).").

A standing challenge at the class certification stage may be defense counsel's best weapon where there are members of the class that have not suffered any injury, since a predominance challenge based solely on the need for individualized damages calculations is unlikely to succeed.

as a result, a court may dismiss certain claims based on products made or sold by the defendant that the named plaintiffs never actually purchased or used. Without purchasing or using the product, the plaintiffs cannot plausibly claim to have suffered any actual injury.

For example, in *Reilly v. Amy's Kitchen, Inc.*, the plaintiff brought a class action claiming that the defendant misled consumers by labeling sugar as "evaporated cane juice." The plaintiff had purchased only three of the 60 products listed in the complaint, but she argued that all of the products were similarly mislabeled. The court dismissed for lack of standing the plaintiff's claims based on the products that she had not purchased and rejected her attempt to have the court defer a standing decision until the class certification stage. (*No. 13-21525*, 2014 WL 905441, at *1-2 (S.D. Fla. Mar. 7, 2014).)

Several other courts also have adopted this approach and held that claims based on products the named plaintiffs did not actually purchase should be dismissed (see, for example, *Leonhart v. Nature's Path Foods, Inc.*, No. 13-0492, 2014 WL 1338161, at *3-4 (N.D. Cal. Mar. 31, 2014); *Chin v. Gen. Mills, Inc.*, No. 12-2150, 2013 WL 2420455, at *3-4 (D. Minn. June 3, 2013); *Johns v. Bayer Corp.*, No. 09-1935, 2010 WL 476688, at *5 (S.D. Cal. Feb. 9, 2010)).

Similarity of Purchased and Non-purchased Products

In other jurisdictions, however, courts embrace a notion known as "class standing," which allows plaintiffs to assert claims for unnamed class members based on products the plaintiffs themselves did not purchase. Under this analysis, claims may survive a motion to dismiss, even where the named plaintiffs did not purchase the products at issue, provided the products the plaintiffs did buy were "sufficiently similar" to the non-purchased products (see, for example, *Jovel v. I-Health, Inc.*, No. 12-5614, 2013 WL 5437065, at *10 (E.D.N.Y. Sept. 27, 2013)).

Despite this more lenient approach, a recent summary order by the US Court of Appeals for the Second Circuit demonstrates how a class standing argument nonetheless can be defeated. In *DiMuro v. Clinique Laboratories, LLC*, the plaintiffs asserted claims related to the marketing of seven cosmetic products sold by the defendant under a particular product line, but alleged that they purchased and used only three of those products. The plaintiffs argued that they had class standing to bring claims based on all of the products due to the similarity of the supposedly false representations made about the products. The Second Circuit disagreed, dismissing the claims based on the non-purchased products because "each of the seven different products have different ingredients" and the defendant "made different advertising claims for each product." (572 F. App'x

STANDING CHALLENGES: KEY TAKEAWAYS

Before challenging a class action based on the plaintiffs' lack of standing, counsel should consider:

- **The strategic advantages of filing an FRCP 12(b)(1) motion to dismiss.** Challenging standing at the motion to dismiss stage is a way to draw the battle lines early on in a case and make clear to class plaintiffs that they are in for a fight. A strong motion to dismiss can create an opportunity for prompt and potentially inexpensive settlement discussions. This approach has an important benefit over other methods of challenging class actions, which typically do not occur until later in the litigation at the class certification stage, because, if successful, it can knock out a plaintiff's claim early and efficiently.
- **What products the named plaintiffs actually purchased.** In a consumer class action, counsel should analyze the complaint at the motion to dismiss stage to determine whether the products that form the basis for the plaintiffs' claims match those products that the plaintiffs allege to have actually purchased and used. Plaintiffs often are purposefully unclear on this point in an effort to expand both the universe of potential products at issue and the size of the class, increasing the value of their claims. If the plaintiffs seek relief for products they do not allege to have purchased or used, counsel has a strong lack of standing argument.
- **Any differences between the defendant's products.** Counsel should highlight any differences between products when faced with an argument for class standing at the motion to dismiss stage based on the similarity of the products purchased by the plaintiffs and any non-purchased products. This includes differences in the packaging, ingredients, method of consumption, directions for use or statements made in connection with the sale of the products. Any differences, however minor, are worth pointing out.
- **The class definition.** For standing challenges at the class certification stage, counsel should focus on the proffered definition of the class. If the definition is overly broad, as many are, and purports to include absent class members who may not have suffered an actual injury-in-fact, then the absent class members' lack of standing could alone defeat certification.

27, 29 (2d Cir. 2014); see also *Dysthe v. Basic Research LLC*, No. 09-8013, 2011 WL 5868307, at *1, *4-5 (C.D. Cal. June 13, 2011) (rejecting a standing argument in the context of summary judgment where the products had different ingredients, packaging and product descriptions and noting, "After all, just because an Old Fashioned and a Manhattan both have bourbon doesn't mean they're the same drink.")

By contrast, in *Weisblum v. Prophase Labs, Inc.*, the US District Court for the Southern District of New York recently denied the defendants' motion to dismiss for lack of standing in a case where the named plaintiffs asserted claims based on both purchased and non-purchased Cold-EEZE cold remedy products. The court distinguished its decision from the Second Circuit's summary order opinion in *DiMuro*, noting that *DiMuro* addressed class standing rather than Article III standing. The court, however, also noted that the Second Circuit has found a "tension" in the Supreme Court's case law as to whether differences between a named plaintiff's claims and the claims of putative class members is a matter of Article III standing or whether it goes to the propriety of class certification. (*No. 14-3587*, 2015 WL 738112, at *5-6 (S.D.N.Y. Feb. 20, 2015) (citing *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 160 (2d Cir. 2012)).) Nonetheless, the court found that the named plaintiffs had satisfied the sufficient similarity standard because the packaging of all Cold-EEZE products contained the specific alleged false representation that formed the basis for the lawsuit (*Weisblum*, 2015 WL 738112, at *6).

Defendants in jurisdictions that follow the class standing approach can prevail on a motion to dismiss by convincing the court that the non-purchased products were materially different from the ones the named plaintiffs actually purchased.

CHALLENGING STANDING AT THE CLASS CERTIFICATION STAGE

If efforts to challenge standing at the motion to dismiss stage are unsuccessful, class plaintiffs' motion for class certification presents another opportunity for defense counsel to raise the issue. However, courts diverge on the appropriate approach to Article III standing at the class certification stage. The case law presents two possibilities, with the inquiry turning on the court's treatment of absent class members. (See *In re Deepwater Horizon*, 739 F.3d 790, 798-802 (5th Cir. 2014) (discussing circuit split), cert. denied, 135 S. Ct. 754 (2014).)

Standing of Absent Class Members Need Not Be Established at Certification

Some courts focus solely on the injuries allegedly sustained by the named plaintiffs and disregard the standing of absent class members when considering standing at the class certification stage. Under this approach, the standing question is whether at least one named plaintiff is properly before the court. Any inquiry into absent class members is resolved by analysis of the FRCP 23 requirements (see *Box, Injury and Predominance under FRCP 23(b)(3)*).

For example, in *Kohen*, a case involving alleged manipulation of treasury notes, the defendants challenged the district court's certification of the plaintiff class, arguing that the class definition included individuals who lacked standing. The US

Court of Appeals for the Seventh Circuit affirmed the class certification decision, stating that it is “almost inevitable” that “a class will often include persons who have not been injured by the defendant’s conduct” because “at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown.” (571 F.3d at 676-77; see also *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020-21 (9th Cir. 2011); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 306-307 (3d Cir. 1998).)

Standing of Absent Class Members Must Be Established at Certification

Other courts, however, explicitly take into consideration the injuries absent class members allegedly suffered and refuse to certify classes in which absent class members lack standing. Under this approach, courts focus on the proposed class definition as a way to screen out inappropriate cases.

For example, in *Denney v. Deutsche Bank AG*, a case involving allegedly improper and fraudulent tax counseling, the Second Circuit made clear that absent class members must be considered in the class certification equation. Stating that “[n]o class may be certified that contains members lacking Article III standing,” the court concluded that the class must be “defined in such a way that anyone within it would have standing.” (443 F.3d 253, 264 (2d Cir. 2006).)

A few years later, the US Court of Appeals for the Eighth Circuit reached a similar conclusion and upheld the denial of class certification over concerns of absent class members’ lack of standing. The court was unequivocal, stating that “a class cannot be certified if it contains members who lack standing.” Or, put another way, “a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves.” (*Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1033-35 (8th Cir. 2010).)

ASCERTAINABILITY

Ascertainability is an implied prerequisite for maintaining a class action and focuses on whether proposed class members can be identified by objective measures. Although lack of ascertainability, unlike standing, is not an issue that would be raised on a motion to dismiss, it generally is considered a

threshold issue for class certification, and courts may require a showing of ascertainability before even addressing the FRCP 23 requirements.

Denials of class certification based on this ground have increased exponentially over the last couple of years. Counsel considering raising an ascertainability challenge should familiarize themselves with:

- What is meant by an objectively defined class.
- The rigorous analysis standard adopted by the Third Circuit in assessing whether a proposed class is ascertainable.
- Recent decisions by other courts that denied or granted class certification based on ascertainability.



Search [The Implicit Ascertainability Requirement for Class Actions](#) for more on the ascertainability requirement.

OBJECTIVELY DEFINED CLASS

Ascertainability essentially means that the proposed class must be readily identifiable by objective, as opposed to subjective, criteria. In other words, the class must be definite enough that it is administratively feasible for a court to determine class membership. (See, for example, *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014); *Carrera v. Bayer Corp.*, 727 F.3d 300, 306 (3d Cir. 2013).)

An objectively defined class is one for which it is easy to identify prospective class members or obtain the information leading to their identification. Examples include purchasers of a high-value item, such as a car, or employees in a wage and hour case where class membership is easily determined through employer records.

On the other hand, a subjectively defined class is one where the court would have to rely in large part on the “say-so” of class members to identify them. Many courts are hesitant to certify these types of self-identified classes. Examples include purchasers of low-cost consumer items, such as food and beverages, cosmetics or dietary supplements, where buyers, manufacturers and retailers are all unlikely to have maintained records showing the details of a particular purchase.

Although lack of ascertainability, unlike standing, is not an issue that would be raised on a motion to dismiss, it generally is considered a threshold issue for class certification.

THE THIRD CIRCUIT'S RIGOROUS APPROACH

The US Court of Appeals for the Third Circuit has taken a particularly strong stand on the issue of ascertainability, imposing a high burden on class plaintiffs.

In *Carrera*, the Third Circuit reversed a district court's class certification order in a case involving the purchase of low-cost consumer products, and held that the consumer class was not ascertainable because:

- Retailer records could not identify individual purchasers.
- The affidavits of proposed class members:
 - were unreliable;
 - would dilute true class members' recovery; and
 - failed to allow the defendant to challenge class membership.

The Third Circuit found that the ascertainability inquiry requires the same rigorous analysis applied in evaluating the FRCP 23 class certification requirements, and that a defendant has a due process right to challenge the proof used to demonstrate class membership. The Third Circuit explained that a "plaintiff may not merely propose a method of ascertaining a class without any evidentiary support that the method will be successful." (727 F.3d 300 at 306-309; see also *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 356 (3d Cir. 2013) (stating that the "petition for class certification will founder if the only proof of class membership is the say-so of putative class members or if ascertaining the class requires extensive and individualized fact-finding"); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593-94 (3d Cir. 2012) (cautioning against approving class identification method based only on alleged members' say-so).)

Notably, however, although the Third Circuit recently reaffirmed its prior reasoning, it held that the ascertainability requirement does not apply to class plaintiffs seeking only injunctive and declaratory relief under FRCP 23(b)(2) (see *Shelton v. Bledsoe*, 775 F.3d 554, 560-63 (3d Cir. 2015)).

OTHER RECENT CASES ADDRESSING ASCERTAINABILITY

While the trend of denying class certification based on ascertainability is firmly rooted in the Third Circuit, other courts also are considering the issue as an integral part of the certification analysis.

Certification Denied Based on Lack of Ascertainability

Although class actions are meant to facilitate cases where individual monetary claims are relatively low, making it unlikely that plaintiffs would proceed individually, courts are finding that plaintiffs may stretch this rationale too far. Indeed, many decisions denying class certification based on an unascertainable class arise in the context of alleged misleading labeling or advertising of inexpensive products (see, for example, *Langendorf v. Skinnygirl Cocktails, LLC*, No. 11-7060, 2014 WL 5487670, at *1 (N.D. Ill. Oct. 30, 2014) (pre-mixed margaritas labeled as "All Natural"); *In re Pom Wonderful LLC Mktg. & Sales Practices Litig.*, No. ML 10-02199, 2014 WL 1225184, at *6 (C.D. Cal. Mar. 25, 2014) (juice products advertised as providing various health benefits); *Karhu v. Vital Pharm., Inc.*, No. 13-60768, 2014 WL 815253, at *3 (S.D. Fla. Mar. 3, 2014) (over-the-counter

dietary supplement advertised as burning fat and achieving rapid fat loss); *Sethavanish v. ZonePerfect Nutrition Co.*, 12-2907, 2014 WL 580696, at *4-6 (N.D. Cal. Feb. 13, 2014) (nutrition bars labeled as "All Natural").

The lack of ascertainability in these types of cases, as in *Carrera*, may be based on:

- The absence of evidence capable of accurately identifying class members who purchased the products at issue, both from the plaintiffs' and defendant's records.
- A refusal to allow plaintiffs to self-identify.

Notably, in situations involving manufacturers that do not have records of exactly who purchased their products, plaintiffs have attempted to argue that class members can be identified by loyalty or frequent shopper cards issued by retailers. However, a recent opinion by the US District Court for the Northern District of California, a court that regularly deals with these types of cases, illustrates the problems with this argument. In *In re Clorox Consumer Litigation*, the plaintiffs alleged that Clorox's Fresh Step cat litter contained false and misleading advertising, and asserted that, although Clorox itself did not sell directly to consumers, the identities of class members could be determined in part through a loyalty program it operated. In denying class certification because there was no administratively feasible way to ascertain the class members, the court noted that:

- A very small percentage of Fresh Step purchases were registered through the loyalty program.
 - Even if a greater number of purchases were registered through the loyalty program, the program's utility in determining class membership would be limited because:
 - the program did not collect information on the date of purchase; and
 - the recorded location is the customer's address, rather than the location of the store where the product was purchased.
- (301 F.R.D. 436, 441-42 (N.D. Cal. 2014); see also *Randolph v. J.M. Smucker Co.*, 303 F.R.D. 679, 690 (S.D. Fla. 2014) (rejecting the plaintiff's request to issue subpoenas to retailers to identify purchasers through loyalty and reward cards).)

If class plaintiffs attempt to defeat an ascertainability challenge by arguing that loyalty cards can identify the proposed class members, counsel should focus on the low percentage of class members discernible through that method. Counsel should also keep in mind that loyalty cards cannot reliably identify the actual purchaser of a product, since purchasers can use cards issued in the name of a family member, friend or even a store's own cashiers.

The lack of an ascertainable class may be raised outside the consumer product context as well, including in cases involving:

- Violations of the Telephone Consumer Protection Act (see, for example, *Balschmitter v. TD Auto Fin. LLC*, 303 F.R.D. 508, 524-25 (E.D. Wis. 2014); *Quality Mgmt. & Consulting Servs., Inc. v. SAR Orland Food Inc.*, No. 11-06791, 2013 WL 5835915, at *2-4 (N.D. Ill. Oct. 30, 2013)).
- Insurance charges (see, for example, *Littleton v. State Farm Mut. Auto. Ins. Co.*, No. 14-05007, 2015 WL 128577, at *7 (W.D. Ark. Jan. 8, 2015) (automobile insurance); *Haskins v. First Am.*

ASCERTAINABILITY CHALLENGES: KEY TAKEAWAYS

Before challenging a class action based on lack of ascertainability, counsel should:

- **Scrutinize the proposed class definition.** Counsel should review the proposed class definition in the complaint at the very outset of the case to see if there are grounds for challenging ascertainability. This is especially true if the case deals with low-cost consumer products where neither the seller nor the buyer is likely to maintain records showing details of a particular purchase, or if the class definition constitutes a “fail safe” class.
- **Confirm whether the client maintains records and assess the percentage of identifiable class members.** In a consumer class action, counsel should ask the client right away whether it maintains records that would lead to the objective identification of class members. If the client does not sell directly to consumers, or does not maintain these records, there likely is a strong lack of ascertainability argument. Even if the client maintains some consumer-identifying records, counsel should find out what percentage of the total proposed class members are identifiable — the lower the percentage, the higher the chances of success on an ascertainability challenge.
- **Send out early, targeted discovery requests.** Pursuing early discovery can help counsel build a case that the class cannot be ascertained because the would-be class plaintiffs have no way to identify the class members.
- **Consider a preemptive motion to deny class certification solely on ascertainability grounds.** If there is a strong lack of ascertainability argument, this preemptive approach has the advantage of ensuring that the court focuses squarely on the ascertainability issue. Otherwise, there is a risk that the issue will get lost in the shuffle of class plaintiffs’ motion for certification, where the court will necessarily need to consider all of the FRCP 23 requirements.
- **Be cognizant of new information learned through ongoing discovery.** Even if the court initially grants class certification, as discovery progresses, new information can come to light that provides a basis to have the class decertified. If, at the end of discovery, the class plaintiffs cannot demonstrate to the court how the class members can be identified, that argument may lead to a decertification decision. (For more information, search [Decertifying a Class](#) on our website.)

*Title Ins. Co., No. 10-5044, 2014 WL 294654, at *13 (D.N.J. Jan. 27, 2014)* (title insurance); *Gooden v. SunTrust Mortg. Inc., No. 11-02595, 2013 WL 6499250, at *5-6 (E.D. Cal. Dec. 11, 2013)* (force-placed flood insurance)).

- Informal arrangements between employees and employers (see, for example, *Jenkins v. White Castle Mgmt. Co., No. 12-7273, 2015 WL 832409, at *4 (N.D. Ill. Feb. 25, 2015)* (payments made in cash to offset drawer and safe shortages)).
- “Fail safe” putative class actions, where class membership can be ascertained only by making merits determinations because the class is defined in terms of the ultimate question of liability (see, for example, *Plaza 22, LLC v. Waste Mgmt. of La., LLC, No. 13-618, 2015 WL 1120320, at *3 (M.D. La. Mar. 12, 2015)*; *Zarichny v. Complete Payment Recovery Servs., Inc., No. 14-3197, 2015 WL 249853, at *11-13 (E.D. Pa. Jan. 21, 2015)*; *Hurt v. Shelby Cnty. Bd. of Educ., No. 13-230, 2014 WL 4269113, at *7-8 (N.D. Ala. Aug. 21, 2014)*).

Certification Granted Based on Policy Concerns

Despite the momentum building in courts across the country to deny class certification based on lack of ascertainability, some courts, driven mainly by policy concerns, have given class plaintiffs more leeway in their class definitions. In particular, these courts have criticized the rigorous approach as potentially eviscerating consumer class actions involving low-cost products (see *Forcellati v. Hyland's Inc., No. 12-1983, 2014 WL 1410264, at *5 (C.D. Cal. Apr. 9, 2014)*; *McCrary v. Elations Co., LLC, No. 13-00242, 2014 WL 1779243, at *8 (C.D. Cal. Jan. 13, 2014)*; see also *Carrera v. Bayer Corp., No. 12-2621, 2014 WL 3887938, at *1 (3d Cir. May 2, 2014)* (*Ambro, J., dissenting from denial of rehearing en banc*)).

For example, in *Astiana v. Kashi Co.*, the court granted in part the plaintiffs’ motion for class certification, holding that the class was ascertainable because the class definition was not vague or confusing, and all purported class members were exposed to the alleged misrepresentation. The court noted that if class actions could be defeated because membership was difficult to ascertain at the class certification stage, “there would be no such thing as a consumer class action.” (291 F.R.D. 493, 500 (S.D. Cal. 2013).)

Similarly, in *Ebin v. Kangadis Food Inc.*, the court affirmatively noted that the plaintiffs could not point to any records objectively determining membership in the proposed class, nor was it likely that consumers maintained receipts. Nonetheless, the court emphasized that “the class action device, at its very core, is designed for cases like this where a large number of consumers have been defrauded but no one consumer has suffered an injury sufficiently large as to justify bringing an individual lawsuit. Against this background, the ascertainability difficulties, while formidable, should not be made into a device for defeating the action.” (297 F.R.D. 561, 567 (S.D.N.Y. 2014).)



Search [Class Action Certification: Case Tracker](#) for more cases granting and denying class certification based on ascertainability.