# Defending Class Actions Of Indirect Purchasers

## Class Action Trends and Key Cases

**Melissa Dorman Matthews**
Partner
*Hartline Dacus Barger Dreyer LLP*

8750 N. Central Expressway
Suite 1600
Dallas, Texas 75231
(214) 369-2100
(214) 369-2118 [fax]
mdorman@hdbdlaw.com

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Civil filings in U.S. District Courts rose 6 percent (up 17,524 cases) in 2017, to 292,076. Of the 433 miscellaneous applications reported, class actions accounted for 53 percent of the total.[1]

The Class Action Fairness Act of 2005 (CAFA) permits removal of class actions from state to federal court if damages sought are in excess of $5 million, and any class member is diverse from any defendant.

## THE RULES

Federal Rule of Civil Procedure 23, Class Actions

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

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

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> > (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> >
> > (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class

[1] *Federal Judicial Caseload Statistics 2017*, UNITED STATES COURTS, http://www.uscourts.gov/statistics-reports/federaljudicial-caseload-statistics-2017 (last visited May 15, 2018).

action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Rule 23 dates back to 1938, when the Federal Rules of Civil Procedure were established. The original Rule 23 provided for three types of class actions: the "true" class action, which concluded the rights of all class members, whether named in the suit or not; the "hybrid" class action, in which class members made separate claims against a common fund or property; and the "spurious" class action, in which the members of the class made separate claims involving common questions of law or fact.[2]

The rule was fraught with problems, and in 1966, the Advisory Committee on the Rules of Civil Procedure completely rewrote it.[3] The Advisory Committee intended that the new rule clarify the prerequisites for maintaining class actions, ensuring that a judgment for all class members was reached, and adding provisions to govern the conduct of class actions.

Products liability class actions can generally be divided into two types: personal injury class actions and property damage class actions. It is usually more difficult to certify class actions involving personal injury claims.[4]

This presentation focuses on non-personal injury class actions involving consumer goods, specifically those involving claims by indirect or secondary purchasers.

## THE CASES

Indirect purchasers are downstream purchasers who did not buy the product at issue from the defendant. The term originated in antitrust litigation, but is now used to describe consumers who acquired the product indirectly (as part of a purchase of a home, for example) or as a secondary purchaser. Most modern antitrust class actions allege price-fixing conspiracies or monopolization that raises prices to direct and indirect purchasers.

Manufacturers of consumer products and appliances face unique challenges in defending class actions, because the end users are not always ascertainable.

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[2] See 7A Charles Alan Wright et al., Federal Practice and Procedure § 1752, at 16-41 (2d ed. 1986).

[3] See 7A id. § 1751, at 18, § 1753, at 41.

[4] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-19, 628-29 (1997) (declining to certify a putative class of plaintiffs alleging injuries from asbestos exposure);

**The Challenge for Indirect Purchasers: Ascertainability**

Cases setting forth requirements for ascertainability do not have different requirements for indirect purchasers.

The cases in Section I below describe ascertainability requirements, and the specific cases in Section II involve indirect purchasers.

## I.
## General Requirements for Ascertainability

Various courts consider *ascertainability* to be a requirement under Rule 23. Ascertainability pertains to the ability of the court based on record evidence to utilize objective criteria to determine who is a class member (and who is not). The Fifth Circuit has referred to ascertainability as an "implied prerequisite of Rule 23." *National Security Fire and Casualty Company,* 501 F.3d 443, 445 (5th Cir.2007); *see also DeBremaecker v. Short,* 433 F.2d 733, 734 (5th Cir.1970) ("It is elementary that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable."), *In re A.H. Robins Co., Inc.,* 880 F.2d 709, 728 (4th Cir.1989); *Simer v. Rios,* 661 F.2d 655, 669 (7th Cir.1981); 5 James W. Moore, et al., MOORE'S FEDERAL PRACTICE § 23.21[1], at 23–47 (Matthew Bender 3d ed. 1997) ("It is axiomatic that in order for a class action to be certified, a class must exist ."). To satisfy the ascertainability requirement, a plaintiff must show that: (1) the class is defined with reference to objective criteria, and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within this definition. *Byrd v. Aaron's Inc*., 784 F.3d 154, 163 (3d Cir. 2015). A defendant must be able to test the reliability of the evidence submitted to prove class membership. *Carrera v. Bayer Corp.,* 727 F.3d 300, 307 (3d Cir.2013).

While a plaintiff need not show that absent class members have standing, "[t]he existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of Federal Rule of Civil Procedure 23[a]." *John v. National Security Fire and Casualty Co.,* 501 F.3d 443, 445 (5th Cir.2007) (internal citation omitted). "Where it is facially apparent from the pleadings that there is no ascertainable class, a district court may dismiss the class allegation on the pleadings." *Id.* "An identifiable class exists if its members can be ascertained by reference to objective criteria (ascertainability)." *Conrad v. General Motors Acceptance Corp.,* 283 F.R.D. 326, 328 (N.D.Tex.2012) (citing *In re Vioxx Products Liability Litigation,* 2008 WL 4681368, at *3 (E.D.La.2008)).

Classes are not ascertainable when "class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials.'" *Carrera v. Bayer Corp.,* 727 F.3d 300, 303-04 (3d Cir.2013) (citing *Marcus v. BMW of N. Am., LLC,* 687 F.3d 583, 593 (3d Cir.2012)). Rather, "the class must be currently and readily ascertainable based on objective criteria." *Marcus,* 687 F.3d at 593. Ascertainability must be established "so that it will be clear later on whose rights are merged into the judgment," as otherwise, "satellite litigation will be invited over who was in the class in the first place." *Marcus,* 687 F.3d at 593 (internal citations omitted). Thus, testing a putative class action for ascertainability "serves several important objectives:" (1) it eliminates administrative burdens that would run counter to the intended efficiency of class actions in general; (2) it serves to protect absent class members by ensuring that "the best notice practicable" can be provided to class members; and (3) it protects defendants by clearly identifying those who will be bound by the final judgment. *Id.*

Three recent Third Circuit cases, each in the context of a product liability class action, have refined the standard for what plaintiffs must show in order to satisfy the ascertainability requirement. In the first case, *Marcus v. BMW of North America, LLC,* the Third Circuit questioned the ascertainability of a class that a district court certified, made up of automobile purchasers whose vehicles came with a particular kind of "run-flat tires," which had "gone flat and been replaced." 687 F.3d at 592. The court observed that BMW did not keep records of which cars were fitted with the tires, and because some customers who had experienced flat tires would have replaced them somewhere other than at a dealership, neither BMW nor the plaintiff would have any way to know of all of the customers who had experienced flat tires, aside from them being a subset of all BMW purchasers during the relevant time period. *Id.* at 593–94. The Third Circuit also rejected the idea that simply having vehicle owners "submit affidavits that their [run-flat tires] have gone flat and been replaced" would be sufficient for ascertaining class membership because it would be based only on "potential class members' say so." *Id.* at 594.

In *Carrera v. Bayer Corp.,* the Third Circuit, relying on *Marcus,* vacated the certification of a class defined as all consumers who bought a particular dietary supplement in Florida. 727 F.3d at 304. The court found that the plaintiffs had not demonstrated ascertainability because there was no evidence that retailers maintained records of customers who purchased the supplement, and because the plaintiffs had not shown that proving class membership through affidavits would be reliable or that a model existed for screening the affidavits. *Id.* at 308–11. However, *Carrera* left open the door to certification if the plaintiff could submit a model for screening class members and show that it would be reliable and would "allow Bayer to challenge the affidavits" of potential class members. *Id.* at 311.

Finally, *Hayes v. Wal–Mart Stores, Inc.,* vacated the certification of a class of consumers who had purchased extended warranties for as-is products that were excluded from coverage under the warranties' service plan. 725 F.3d 349, 352 (3d Cir.2013). The class members were a subset of a larger pool of 3,500 customers who had completed retail transactions involving a manual override of the price of an item. *Id.* at 355. The defendant had no method of determining which price overrides were for as-is items, and the district court "reasoned that plaintiff should not be hindered from bringing a class action because defendant lacked certain records." *Id.* The Third Circuit, relying on *Marcus,* found that "the nature or thoroughness of a defendant's recordkeeping does not alter the plaintiff's burden to fulfill Rule 23's requirements." *Id.* at 356. On remand, the court observed that to adequately demonstrate ascertainability, the plaintiffs would have to show a reliable and administratively feasible method of determining whether a customer purchased an extended warranty for an as-is item, whether it came with a manufacturer's warranty, and whether the customer actually received service on the as-is item or a refund of the extended warranty cost. *Id.* There is a general prohibition against certifying putative classes where "proof of class membership is [based on] the say-so of putative class members." *Id.* at 356.

The *In re Paulsboro Derailment Cases* Court held the controlling requirement is not that *no* fact-finding be necessary, but that *extensive* individualized fact-finding cannot be required if a class is to be readily ascertainable. 2014 WL 4162790, at *6–7 (D.N.J. 2014), citing *Marcus,* 687 F.3d at 593. The Paulsboro Court held the putative class (those who lived in an evacuation zone and incurred lost expenses and income) was ascertainable because residence could be determined through public records; further, whether a putative class member incurred expenses or lost income due to obeying the evacuation is an objective inquiry that can be answered by asking each one "a single question to determine whether they are entitled to relief." *Id.*, citing *Wilkerson v. Bowman,* 200 F.R.D. 605, 610 (N.D.Ill.2001). The Court held this is hardly the type

of extensive individualized fact-finding that renders a class definition insufficient. *Id*.; *see also Tourgeman v. Collins Fin. Servs, Inc.,* Civ. No. 08–1392, 2011 WL 5025152, at *7 (S.D.Cal. Oct. 21, 2011) (finding a class may be ascertainable although it is defined to include persons who "paid money or incurred expenses" because the inquiry involved does not require extensive factfinding).

An ascertainability determination may require discovery. *See In re Paulsboro Derailment Cases*, 2014 WL 1371712, at *6 (D.N.J. Apr. 8, 2014) (internal citations omitted) ("The Court does not today decide that the putative class is ascertainable, but finds that before engaging in the 'rigorous analysis' required to determine if certification is proper, the Court should consider materials 'behind the pleadings,' including the product of any discovery that has taken place. Because 'the shape and form of a class action evolves only through the process of discovery,' the ascertainability determination in this case is better made with the benefit of a full record.").

## II.
## Specific Case Holdings

**Held ascertainable**:

*In re: Lenovo Adware Litig.*, 2016 WL 6277245, *17 (N.D. Cal. 2016) Class was ascertainable because indirect purchasers could be identified through Lenovo's records to the extent consumers registered their purchases with Lenovo or had their computers repaired by Lenovo; further members could self-identify by matching their laptop **serial numbers** against Lenovo's records to determine whether VirtualDiscovery (software at issue) was installed.

*In re Polyurethane Foam Antitrust Litigation*, 2015 WL 4459636, *6-7 (N.D. Ohio 2015) Defendants overwhelmingly dominated the U.S. flexible polyurethane foam market and plaintiffs made a sufficient showing they can trace and identify the manufacturer of foam in the product. "Although it will require sifting through substantial information, there does exist a practicable process to ascertain who is and is not a member of the IPP class.".

*Galvan v. KDI Distribuation Inc.*, 2011 WL 5116585, at *3–5 (C.D. Cal. 2011) Putative class of customers who purchased Krossland calling cards was ascertainable even though they could not be identified directly because there were only four possible service providers who distributed calling cards using their services and Krossland maintained a list of cards sold by its sales representatives on order sheets and invoices, as well as daily reports stating exactly which cards were distribute by Krossland's sales representatives.

*In re TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 583 (2010) Class held ascertainable where class members must live in one of the listed states, must have made a purchase during the class period, and the product must contain a TFT-LCD panel made by one of the defendants; whether a class member purchased a product containing an TFT-LCD panel made by a defendant can be determined by the **model number** or serial number of the product.

**Held not ascertainable**:

*In re Domestic Drywall Antitrust Litig.*, 2017 WL 3700999, *10 (E.D. Penn. 2017) There was no way to tell when the drywall was purchased, where it was purchased, and if it was purchased as

part of a completed home or building; further, “anyone who is an end user of drywall to the present time” is too open-ended.

*In re Wellbutrin XL Antitrust Litigation,* 308 F.R.D. 134, 150 (E.D. Penn. 2015) Assurances that there are extensive purchase records that could be used to ascertain whether individuals are members of the class is insufficient; plaintiff must introduce evidence showing those assertions are correct.

*In re Processed Egg Products Antitrust Litigation,* 302 F.R.D. 339, 348 (E.D. Penn. 2014) Thousands of direct purchasers of shell eggs and egg products located across the U.S. were identified as proposed members; class members ascertained were too numerous and their joinder would be impracticable.

*Dumas v. Albers Med., Inc.*, 2005 WL 2172030, at *7 (W.D. Mo. Sept. 7, 2005) Identifying the putative class members is simply not possible without an individualized inquiry into the facts and circumstances surrounding each purchase of Lipitor during the class period.

## WHAT DO CLASS ACTIONS LOOK LIKE TODAY?

**Pending consumer class actions include the following products, services, and damage remedies:**

### Consumer Products/Appliances

Tristar (Power Pressure Cookers): design defect, warranty extension and $72.50 credit for a purchase of a specified Tristar product.

Pella (ProLine Casement Windows): Design defect in aluminum clad wood casement, awning and/or transom windows manufactured between 1991 and 2009, allowing water intrusion, property damage. Current or former owners of the property with Pella ProLine windows installed with water related damages might be eligible for payment.

PPG Industries (Rescue It! And Revitalize Products): decking sealants, paints, stains with design defects, causing peeling, cracking, bubbling, and property damage, $6.5 million,

Target and Nice-Pak Products, Inc. (Up & Up Flushable Toddler Wipes): gift cards or coupons awarded for false advertisements of products as “flushable’ when the products clogged toilets and sewer systems

Vitamix (Blender), blade assembly defect, $70 Vita-Mix gift card or a new replacement blade assembly.

InSinkErator (Old Filter): instant hot water dispenser filtration system and an old filter cartridge causing property damage, new replacement filter (with a maximum of three filters) or $15 cash, plus percentage of property damage expenses.

BP Solar and Home Depot (Solar Panel) Solar panels with S-type junction boxes are defective, creating a fire hazard, replacement by an approved contractor.

Breathometer, Inc. (Original and Breeze): false claims regarding breathalyzer device, full refunds.

Conair (Cuisinart Food Processing Machine): riveted blade defect, eligible for replacement blade.

**Health Care/Beauty Products**

Boehringer Ingelheim and Teva Pharmaceutical (Aggrenox): Antitrust action claiming availability of less expensive generic versions of Aggrenox was delayed, $54 million settlement.

KT Health Holdings (KT Tape): Allegations of false advertising that the product would relieve pain from sports-related injuries and prevent sports-related injuries, $1.75 million settlement.

Proctor & Gamble (Align probiotic supplements): Allegations of false advertising of the health benefits of the supplements, up to $49.26 cash refund.

Universal Handicraft (Adore Organic Innovation): cosmetics company misrepresenting the products as containing plant stem cells, $25 cash or electronic adorecosmetics.com gift card for 50% of the price paid for the product.

**Clothing**

ANN Inc (Outlets): Misleading price tags showing an "original" or "regular" price at an Ann Taylor Factory or Loft Outlet Store.

Chippewa ("Made in USA"): Justin Brands, Inc. Footwear with "Made in USA" label when some parts were not made in the USA, California residents only, $50 Chippewa promo code per qualifying product purchased or $25 cash per qualifying product purchased.

**Advertising/Marketing**

Sports Warehouse (Advertising): California residents who bought products from Sports Merchandise that were advertised with a misleading price comparison, $3 million settlement.

I.C. Systems (Telephone Consumer Protection Act): Automated calls, $3.3 million settlement.

Amazon (Unauthorized In-app Charges): Children making unauthorized in-app purchasers, $70 million in consumer refunds.

Western Union (Fraud): Fraudulent wire transfers, $586 million in consumer refunds.

Guess (Advertising): Guess Factory misleading price advertisements, merchandise vouchers provided to purchasers.

Venture Data, LLC and Public Opinions Strategies, LLC (TCPA): Automated calls to cell phones with an opinion survey (occurred on three dates) $2.1 million settlement.

ExactTarget LLC (Simply Fashion Text Messages): Unsolicited text messages: $6.2 million settlement.

Global Tel*Link Corporation (TCPA): automated calls to cell phones, $8.8 million settlement.

Dish (Telemarketing): telemarketing calls to people on national Do Not Call Registry, $61 million judgment. A jury found DISH liable for the telemarketing calls to 18,066 telephone numbers.

**Utilities/Services**

Viridian Energy (Variable Rate): Excessive variable rates alleged for gas and electricity, cash payment or account credit.

Zuffa, LLC. (UFC): Viewing problems with August 26, 2017 Pay-Per-View boxing match between Floyd Mayweather Jr. and Conor McGregoron, $25 to $99.99 one-time payment, or up to three months of free access to UFC Fight Pass or $5 cash for food and drink.

**Vehicles**

Ford (PowerShift Transmission): Ford Fiesta and Ford Focus transmission defects, cash payment or Vehicle Discount Certificate.

Nissan (Timing Chain): Various Nissan vehicles with defective timing belts purchased or leased by California and Washington consumers, partial reimbursement of the repairs costs or a voucher towards the purchase of a new Nissan vehicle.

Nissan (Power Valve Screw): Various Nissan vehicles with power valve screws that easily detach, causing unstable engine idling or power loss, cash reimbursement.

Volkswagen (2.0-liter diesel emissions): Volkswagen will provide $10 billion in consumer refunds to settle a Federal Trade Commission complaint regarding Volkswagen's false advertising of the emissions level of the 2.0 liter diesel Volkswagen and Audi vehicles. (Also Fiat Chrysler, Audi)

Ford (MyFord Touch): Alleges that Ford knowingly sold defective MyFord Touch powered by SYNC operating system in certain Ford models. In Re MyFord Touch Consumer Litigation, Case No. 13-cv-03072-EMC, in the US District Court for the Northern District of California

BMW (i3 REx Range Extender), electric car defect causing the vehicle to lose speed and power mid-drive without warning. Rollolazo v. BMW of North America, LLC and BMW AG, Case No. 8:16-cv-00966, in the U.S. District Court, Central District of California Southern Division.

Stoneridge Control Device, Inc. (Chrysler Clutch Safety Interlock Devices): defective clutch safety interlocks can cause unintended vehicle movement, free replacement device.

Nissan (Continuously Variable Transmission): defective transmissions, warranty extension or pre-negotiated pricing under vehicle purchase programs.

Ford (Exhaust): Alleges that 2011-2015 Ford Explorer vehicles are defectively designed, allowing exhaust odor to enter into the vehicle, reimbursement for out-of-pocket expenses up to $500.

**Financial Institutions**

Bank of America (FCRA): improperly accessing consumer credit reports of former Bank of America customers after their account relationship with Bank of America ended, $1.6 million settlement.

Bank of America (Servicemembers Civil Relief Act violations): $41 million settlement.

Bank of America (Extended Overdrawn Balance Charges): cash payment or account credit from $66 million settlement if they incurred one or more $35 extended overdrawn balance charge between February 25, 2014 and December 30, 2017.

Bank of America (Overdraft Fees): cash payment or account credit from $6.6 million settlement.

Bank of America (Uber): overdraft fees for debit card transactions involving Uber, cash payment or account credit from $22 million settlement.