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## Consumer

### **Class Status OK in N.J. Expired Gift Card Suit; No Ascertainability Required at Certification**

**A** requirement of ascertainability “must play no role in considering the certification of a low-value consumer class action” under New Jersey law, a state appeals court said in a ruling hailed by consumer advocates (*Daniels v. Hollister Co.*, 2015 BL 147271, N.J. Super. Ct. App. Div., No. A-3629-13T3, 5/13/15).

The New Jersey Superior Court, Appellate Division, affirmed May 13 a trial court’s certification of a class of customers who allege clothing retailer Hollister Co. voided more than \$3 million worth of promotional \$25 gift cards Jan. 30, 2010, even though the cards expressly said they didn’t expire. Hollister customers received the cards after buying more than \$75 of merchandise.

Ascertainability, an implied prerequisite that has been read into Fed. R. Civ. P. 23, the federal rule governing class certification, requires that a class be defined by objective characteristics that allow for class members to be readily identified.

Deepak Gupta, a plaintiffs’ appellate attorney, called the New Jersey court’s decision in refusing to adopt an ascertainability requirement for consumer class actions certified under New Jersey state law “fantastic.”

The decision is a reflection that “state and federal judges are starting to realize that a strong ascertainability requirement proves too much, to require a showing at the front end,” he said. This is a question more for the claims administration process, he told Bloomberg BNA May 15 in an interview.

The ascertainability issue “had the potential to be a class action killer,” Gupta said, “but the argument may already be fading.”

The state court acknowledged that the U.S. Court of Appeals for the Third Circuit has adopted ascertainability requirements in consumer suits seeking certification under Rule 23, the federal rule, notably in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir., 2013) (14 CLASS 1058, 9/13/13).

The *Carrera* court rejected affidavits as dispositive of class membership, and required objective proof that plaintiffs had bought the dietary supplements at issue.

But such a requirement in consumer litigation “does not benefit the chief goal of our court rules—the fair and efficient administration of justice,” the court said in an opinion by Judge Clarkson Fisher.

The state court also said a more recent Third Circuit decision (*Byrd v. Aaron’s Inc.*, 2015 BL 107876, 3d Cir.,

No. 14-3050, 4/16/15) (16 CLASS 436, 4/24/15) seems to walk the *Carrera* ruling back a bit.

Gupta, of Gupta Beck LLC, agrees. With the *Byrd v. Aaron’s* decision, “even the Third Circuit is backing off,” said Gupta, who became involved in the *Carrera* case when the plaintiffs sought rehearing.

“A lot of courts are troubled by the implications” of a strict ascertainability requirement at the outset of a class action, Gupta said. “Class actions represent a balance between efficiency and accuracy. *Carrera* “prioritizes perfect accuracy above all else.”

**‘Fundamental Divide’?** “This case is a good example of a fundamental divide over the purpose and intended reach of the class action device,” Donald R. Frederico, a class-defense attorney, told Bloomberg BNA May 15 in an e-mail.

“Ideally, decisions whether to certify cases as class actions should balance the interests of putative class members in the efficient vindication of their rights, the interests of defendants in presenting their defenses, and the interests of the courts in affording all parties due process without becoming mired in unmanageable litigation,” Frederico, of Pierce Atwood LLP said.

“The New Jersey court’s decision emphasizes the consumers’ interest and downplays the rest.

“By rejecting the requirement of ascertainability in consumer class actions, the court is allowing a case to proceed as a class action even though the defendant will have no reliable way of knowing who is in the class, especially class members who no longer have their gift cards,” Frederico said.

“Unfortunately, the court has left unresolved how those class members will eventually be identified, essentially kicking the can down the road.”

Attempts to reach attorneys for the parties weren’t successful.

**Equal Playing Field.** The class action device was intended to empower “the smaller guy,” who lacks either the incentive to sue for a small recovery or the strength to take on a corporate giant in litigation, the opinion said. The policy of equalizing the playing field “has been the predominant theme” in all New Jersey Supreme Court class certification decisions.

“We therefore decline the invitation to water down—if not eliminate—the availability of the class-action device to low-value consumers by appending an onerous requirement that serves no equitable purpose and cannot be located in Rule 4:32-1,” New Jersey’s requirements for maintaining a class action, the opinion said.

Ascertainability isn’t found in Fed. R. Civ. P. 23. So far, the Third Circuit is the only federal appeals court

that's weighed in on ascertainability in a consumer class suit. The Eleventh Circuit recently heard oral argument in *Karhu v. Vital Pharm., Inc.*, No. 14-11648, a consumer suit that included ascertainability issues. *Jones v. ConAgra Foods, Inc.*, No. 14-16327, a case on appeal before the Ninth Circuit, could give that court a chance to weigh in.

But "federal experimentation with the ascertainability doctrine seems far from over and, indeed, this doctrinal wave may have broken before ever cresting," the opinion here said.

**Third Circuit 'Unsettled.'** The Third Circuit "appears quite unsettled," the state court said.

The New Jersey court noted that the Third Circuit split on whether to grant a full rehearing in *Carrera*, and it cited a strong dissent by Judge Thomas L. Ambro (15 CLASS 484, 5/9/14).

And the state court also referenced a concurring opinion by Judge Marjorie O. Rendell in *Byrd v. Aaron's Inc.*, which suggested "that the time has come to do away with this newly created aspect of Rule 23 in the Third Circuit."

"Accordingly, we agree with the concurring and dissenting judges in *Carrera* and *Byrd* that when the concept of ascertainability is applied inflexibly it becomes a device that served to burden or eliminate nascent

class actions without providing any societal benefit," the state court said.

In this case, any difficulties in identifying class members resulted from the defendant's own acts. "Had defendant obtained the identities of consumers when giving out \$25 gift cards, the problems it now offers as grounds for upending certification would not exist," the opinion said.

Even if ascertainability were relevant at this stage and in this case, it would pose no obstacle to certifying a class, the court said.

The court suggested that individuals who kept their cards could present them, as indicia of membership in the proposed class. Those who threw the cards away may need to show more, the court said, but "it has not been shown, however, how such a process unfairly hampers the defense."

Brian J. Murray of Jones Day in Chicago, argued the appeal for Hollister.

James Shedden of Shedden Law in Chicago, argued the appeal for the plaintiffs.

BY JULIE A. STEINBERG

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*The opinion is available at [http://www.bloomberglaw.com/public/document/Daniels\\_v\\_Hollister\\_Co\\_No\\_A362913T3\\_2015\\_BL\\_147271\\_NJ\\_Super\\_Ct\\_Ap](http://www.bloomberglaw.com/public/document/Daniels_v_Hollister_Co_No_A362913T3_2015_BL_147271_NJ_Super_Ct_Ap).*