

# Special Focus on Class Definition and Ascertainability

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- Express requirements of Rule 23
- *Implied* requirements of Rule 23 – class must be (1) adequately defined and (2) clearly ascertainable based on objective criteria.
- These requirements serve all parties and the court:
  - Class members can identify themselves
  - Defendants retain due process rights and know whom will be bound by a final judgment
  - Courts ensure the efficiencies of a class action

# Ascertainable = Identifiable

- Must be able to identify class members without “extensive and individualized fact finding or ‘mini-trials.’”
- Plan for identifying class members must be reliable and administratively feasible using objective criteria.
  - Class members’ “say so” should generally not be enough.
- Speculation is not enough – plaintiff must **prove** compliance with Rule 23 requirements. *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011).
  - “Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.”

# Notable Decisions

- *Marcus v. BMW of North America*, 687 F.3d 583 (3<sup>rd</sup> Cir. 2012).
- *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481 (7<sup>th</sup> Cir. 2012).
- *Carrera v. Bayer Healthcare Corp.*, 727 F.3d 300 (3<sup>rd</sup> Cir. 2013).
- *Martin v. Pacific Parking Systems Inc.*, 2014 U.S. App. LEXIS 14200 (9th Cir. July 25, 2014).
- *Steimel v. Minott*, 2014 U.S. Dist. LEXIS 38228 (S.D. Ind. Mar. 24, 2014).

- *Daniel F. v. Blue Shield of California*, No. C 09-2037, 2014 WL 3907150 (N.D. Cal. Aug. 11, 2014).
- *In re Clorox Consumer Litigation*, No. 12-00280, 2014 WL 3728469 (N.D. Cal. July 28, 2014).
- *Bruton v. Gerber Products Co.*, No. 12-CV-02412, 2014 WL 2860995 (N.D. Cal. June 23, 2014).

# Takeaways

- Investigate facts and develop through discovery
- Consider direct/rebuttal experts
- Demand notice and trial plans
- Consider preemptive motions to strike
- If facts develop, move to decertify
- Be cautious of impact arguments can have on settlement

**Thanks!**

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