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Food & Consumer Packaged Goods Litigation

Industry Insights: The Ongoing Circuit Split Over Ascertainability

Over the past several years, there has been a deepening circuit split over a key issue in class action litigation: whether a class must be "ascertainable" before it can be certified. The principle involved is reasonably straightforward — before a court certifies a class, there should be some method to determine the actual class members. The Circuit Courts of Appeal remain divided over this requirement's applicability, however, and recent developments indicate that the Supreme Court is not yet ready to resolve the issue. But, as the decisions highlighted here indicate, in those circuits where the requirement still applies, it remains an important tool in defeating class certification. Therefore, so long as certification is denied on these grounds, the effect of the circuit split will continue to be felt — thus leaving open the possibility of renewed Supreme Court interest down the road. The disparate approaches to ascertainability are exemplified in two decisions: *Carrera v. Bayer* from the Third Circuit, and more recently, *Briseno v. Conagra* from the Ninth Circuit. [Read the full article here.](#)

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