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Danielle Lazarus
University of Pennsylvania

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A Class of Their Own: Applying Weak Ascertainability to Settlement-Only Classes in the Third Circuit
Danielle Lazarus

“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”

Small claims class actions sit at the epicenter of a policy struggle. Are they vehicles for deterring defendants’ unlawful conduct, as suggested above by Amchem? Or must courts, when determining whether to certify small claims class actions, prioritize other policy goals such as efficiency, fair payouts to class members, and defendants’ due process rights?

The Third Circuit’s heightened ascertainability standard was born out of the latter three policy objectives. Heightened ascertainability mandates that, as a prerequisite to class certification, 1) a proposed class must be defined with reference to objective criteria, and 2) there must be a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition. Although four circuits, including the Third Circuit, have adopted heightened ascertainability standards, five circuits have adopted weak ascertainability standards. Under a weak ascertainability standard, there is no administrative feasibility requirement: classes must only be defined with reference to objective criteria, and the court need not analyze the mechanism put forth by the named plaintiff to identify potential class members. Thus, a proposed class filing suit in a circuit with a weak ascertainability standard has a greater chance at certification.

Following Amchem, which held that a district court may only certify proposed settlement-only classes if they satisfy all of Rule 23’s requirements, district courts are required to conduct

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1 Amchem Prods. v. Windsor, 521 U.S. 591, 617 (1997)
2 See Daniel Luks, Note, Ascertainability in the Third Circuit: Name That Class Member, 82 FORDHAM L. REV. 2359, 2364 (2014).
3 Byrd v. Aaron’s Inc., 784 F.3d 154, 163 (3d Cir. 2015).
ascertainability inquiries for both litigation and settlement-only classes. But in both *Prudential* and *Sullivan*, the Third Circuit insulated settlement-only classes from *Amchem*.⁴ Instead, in the Third Circuit, district courts certifying settlement-only classes do not need to conduct a manageability inquiry under Rule 23(b)(3)(D) due to the fact that “the settlement class presents no management problems because the case will not be tried.”⁵ Greater flexibility for settlement-only classes, the *Prudential* and *Sullivan* courts reasoned, would incentivize parties to settle, which would in turn achieve the important policy objectives of global peace and judicial economy.

Thus, as exemplified by the Third Circuit, courts often approve “settlement-only classes in cases that would most likely not pass muster as a litigated class action.”⁶ But the fate of settlement-only classes under the Third Circuit’s heightened ascertainability standard is less certain. *Comcast* is the first and only Third Circuit case to address ascertainability in the context of a settlement-only class.⁷ Citing to both *Carrera* and *Sullivan*, the *Comcast* court applied weak ascertainability to reverse the district court and hold that a settlement-only class comprised of current and former Comcast subscribers was in fact ascertainable.⁸ Administrative feasibility was “not implicated by this case,” the court found, “because the settlement agreement removes the need for a trial.”⁹ The court also reasoned that the manageability and due process concerns that often appear in the litigation context are not at issue in the settlement-only context.¹⁰

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⁴ *In re Prudential*, 148 F.3d 283, 321 (3d Cir. 1998); *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 303 (3d Cir. 2011).
⁵ *Sullivan*, 667 F.3d at 335 (Scirica, J., concurring).
⁷ *In re Comcast Corp. Set-Top Cable Television Box Antitrust Litig.*, 656 F. App’x 8 (3d Cir. 2016).
⁸ *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013); *Sullivan*, 667 F.3d at 335 (Scirica, J., concurring).
⁹ *Comcast*, 656 F. App’x at 9.
¹⁰ *Id.*
Comcast is one of many recent cases in which the Third Circuit has demonstrated a stronger willingness to apply weak ascertainability.\footnote{See, e.g., City Select Auto Sales, Inc. v. BMW Bank of N. Am., Inc., 867 F.3d 434, 448 (3d Cir. 2017) (Fuentes, J., concurring); Byrd v. Aaron's Inc., 784 F.3d 154, 172 (3d Cir. 2015) (Rendell, J., concurring); Carrera v. Bayer Corp., No. 12-2621, 2014 WL 3887938 (3d Cir. May 2, 2014) (Ambro, J., dissenting).} Weak ascertainability would mean the certification of more settlement-only classes, and the certification of more settlement-only classes would mean that Prudential and Sullivan’s policy objectives of global peace and judicial economy would be more consistently upheld. Keeping the Third Circuit’s more-favorable attitude toward weak ascertainability in mind, this paper will provide strategies for counsel to employ before the Third Circuit to insulate settlement-only classes from heightened ascertainability and to give the class they are representing a greater chance at certification.

In Part I, I survey existing ascertainability law. I first outline the Third Circuit’s heightened ascertainability standard, tracking the development of the Third Circuit’s treatment of ascertainability from 2012’s Marcus decision to 2015’s Byrd decision. I then contrast the Third Circuit’s heightened ascertainability standard with other circuits’ weak ascertainability standards, highlighting the Seventh Circuit’s Mullins decision that adopted weak ascertainability. I also discuss recent dissenting and concurring opinions that use Mullins as a guidepost to encourage adopting weak ascertainability in the Third Circuit.

In Part II, I analyze two Third Circuit cases, Prudential and Sullivan, that interpret Amchem in a way that grants settlement-only classes greater leniency and flexibility than litigation classes. I then analyze Comcast, and show how it draws upon Sullivan to reverse the district court’s determination that the proposed settlement-only class was not ascertainable.

In Part III, I sketch out two strategies for counsel use before the Third Circuit to advocate for weak ascertainability in the settlement-only context, capitalizing upon the court’s recent trend
favoring weak ascertainability. The first strategy demonstrates how the Third Circuit can read administrative feasibility into Rule 23(b)(3)(D) manageability inquiries. The second strategy proposes that settlement agreements between the parties can serve as substitutes for ascertainability inquiries by mitigating key policy concerns. In undertaking these strategies, the Third Circuit would remove administrative feasibility from the settlement-only context, and continue to treat settlement-only classes with greater flexibility in alignment with Prudential and Sullivan’s policy objectives of global peace and judicial economy.

I. Ascertainability in the Third Circuit

a. The development of the Third Circuit’s heightened ascertainability standard

In the Third Circuit, for a class to be ascertainable, 1) the class must be defined with reference to objective criteria, and 2) there must be a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition. The following three cases—Marcus, Carrera, and Byrd—demonstrate the evolution of the Third Circuit’s heightened ascertainability standard between Marcus in 2012 and Byrd in 2015.

In Marcus, the court established that ascertainability was, impliedly, part and parcel of Rule 23 inquiries. The court held that a proposed class of BMW owners whose cars were equipped with defendants’ faulty tires was not ascertainable because the defendants’ records were incomplete. Further, the only alternative method proposed by the named plaintiff to identify class members “would amount to no more than ascertaining by potential class members’ say so”

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12 Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593–594 (3d Cir. 2012).
13 Id.
15 Byrd, 784 F.3d at 163.
16 Marcus, 687 F.3d at 593–594.
via self-identifying affidavits.\textsuperscript{17} Thus, there was no administratively feasible mechanism for identifying class members.

The \textit{Marcus} court determined that searching a defendant’s records, if sufficiently comprehensive, would be an administratively feasible mechanism for identifying class members. But in \textit{Marcus}, the defendants’ records were incomplete. Although the defendants’ records contained information about the BMW purchasers, they did not pinpoint with certainty which cars were equipped with the specific faulty tires: BMW’s cars were assembled by a third-party company in Germany, and information about that process was not included in BMW’s records.\textsuperscript{18}

The court further determined that if a defendant’s records could not identify class members, then the named plaintiff must demonstrate that there exists a “reliable, administratively feasible alternative” for identifying class members.\textsuperscript{19} The court explicitly cautioned district courts against approving a mechanism that would “accept as true absent persons’ declarations that they are members of the class,” such as the self-identifying affidavits proposed by the named plaintiff in \textit{Marcus}.\textsuperscript{20} If the named plaintiff were to rely on the defendants’ incomplete records and self-identifying affidavits for identifying class members, the \textit{Marcus} court reasoned, then the court would have to hold individualized “mini-trials” to ensure that each alleged class member actually fit within the class definition.\textsuperscript{21} Classes that require “mini trials” to identify putative class members are not administratively feasible.\textsuperscript{22}

The \textit{Marcus} court rationalized imposing a heightened ascertainability standard with three policy objectives. First, requiring an administratively feasible mechanism for easily identifying 

\textsuperscript{17} \textit{Id.} at 594.
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.} at 593.
\textsuperscript{22} \textit{Id.}
class members would eliminate “serious administrative burdens that are incongruous with the efficiencies expected of class actions.”" 23 Second, administrative feasibility would protect absent class members by “facilitating the ‘best notice practicable’” under Rule 23(c). 24 Third, administrative feasibility would safeguard defendants’ due process rights by identifying who, exactly, would be bound by the court’s final judgment, and by allowing defendants to challenge the evidence before the court that purports to identify class members. 25

Two years after Marcus, Carrera applied the heightened ascertainability standard to a proposed class of purchasers of WeightSmart diet supplements. 26 Notably, the defendant in Carrera did not possess any WeightSmart sales records because it only sold WeightSmart through third-party retailers. 27 The named plaintiff proposed two mechanisms for identifying class members in the absence of sales records. First, the named plaintiff proposed searching the third-party retailers’ records of online sales and sales made with customer loyalty cards. 28 Second, the named plaintiff proposed collecting affidavits from WeightSmart customers, screened by an outside firm. 29 The court rejected both proposed mechanisms because the named plaintiff had “merely propose[d] a method of ascertaining a class without any evidentiary support that the method will be successful.” 30

First, the court rejected the mechanism involving records of online sales and loyalty card purchases because it was not “a manageable process that does not require much, if any, factual inquiry.” 31 Instead, the proposed method named only one WeightSmart retailer that had a loyalty

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23 Id. (quoting Sanneman v. Chrysler Corp., 191 F.R.D. 441, 446 (E.D. Pa. 2000)).
24 Id. (quoting MANUAL FOR COMPLEX LITIGATION, § 21.222 (4th ed. 2004)).
25 Id. (citing Xavier v. Philip Morris USA, Inc., 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011)).
27 Id. at 304.
28 Id. at 308.
29 Id.
30 Id. at 306.
31 Id. at 307–308 (quoting 2 NEWBERG ON CLASS ACTIONS § 3:3 (5th ed. 2011)).
card program, and the named plaintiff had provided “no evidence that a single purchaser of WeightSmart could be identified using records of customer membership cards or records of online sales,” as well as “no evidence that retailers even have records for the relevant period.”

Second, in rejecting the named plaintiff’s mechanism involving self-identifying affidavits, the court expanded upon two of the policy objectives it had highlighted in Marcus: specifically, defendants’ due process rights and the protection of unnamed class members. First, the court stated that, in order to ensure due process, “a defendant must be able to challenge class membership,” which a defendant would not be able to do based solely on self-identifying affidavits. Next, the court emphasized the need to protect unnamed class members not only to ensure adequate notice under Rule 23(c), as it noted in Marcus, but also because it was “unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims.” The court reasoned that class members who joined the class through fraudulent self-identifying affidavits would unfairly dilute the recovery paid out to legitimate class members. The court also determined that the named plaintiff’s proposal that an outside firm screen class members’ claims neither “show[ed] the affidavits would be reliable” nor “propose[ed] a model for screening claims that is specific to this case.”

Two years later, in Byrd, the Third Circuit backtracked somewhat from Carrera and certified a proposed class despite the named plaintiff’s reliance on affidavits to identify class members. In Byrd, the named plaintiff leased a computer from the defendant and later discovered

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32 Id. at 309.
33 Id. It did not help that the named plaintiff in Carrera had difficulty remembering that he purchased WeightSmart as opposed to another one of the defendant’s products. This called into doubt the reliability of self-identifying affidavits for all class members.
34 Id. at 309–310.
35 Id. The Carrera court held this to be the case despite plaintiff’s argument that the defendant’s due process rights were protected by a maximum possible payout of $14 million, since the defendant’s records showed that it sold $14 million worth of WeightSmart in Florida.
36 Id. at 311.
pre-installed spyware that had been videotaping her and members of her household.\textsuperscript{37} To identify class members, who included both computer lessees and the members of their households who had been videotaped, the named plaintiff proposed cross-checking addresses of lessees in the defendant’s sales records with addresses provided by household members in affidavits.\textsuperscript{38} The court held that the class was ascertainable, distinguishing \textit{Byrd}’s identification mechanism, which was administratively feasible, from \textit{Carrera}’s, which was not. Although \textit{Carrera}’s proposed class relied solely on affidavits without any “objective records to identify class members,” the \textit{Byrd} court made clear that “\textit{Carrera} does not suggest that no level of inquiry as to the identity of class members can ever be undertaken” because “[i]f that were the case, no Rule 23(b)(3) class could ever be certified.”\textsuperscript{39}

\begin{itemize}
  \item[b.] \textbf{Contrasting heightened and weak ascertainability standards}

  Ascertainability is currently subject to a circuit split. In addition to the Third Circuit, three other circuits have adopted heightened ascertainability standards: the First Circuit, the Fourth Circuit, and the Eleventh Circuit.\textsuperscript{40} Five circuits have adopted weak ascertainability standards: the Second Circuit, the Sixth Circuit, the Seventh Circuit, the Eighth Circuit, and the Ninth Circuit.\textsuperscript{41} Under a weak ascertainability standard, the named plaintiff does not need to

\textsuperscript{37} Byrd v. Aaron’s Inc., 784 F.3d 154, 159 (3d Cir. 2015).
\textsuperscript{38} Id. at 170.
\textsuperscript{39} Id. at 170–171 (emphasis in original).
\textsuperscript{40} See, e.g., Karhu v. Vital Pharm., Inc., 621 F. App’x 945 (11th Cir. 2015) (“A class is not ascertainable unless the class definition contains objective criteria that allow for class members to be identified in an administratively feasible way.”); \textit{In re} Nexium Antitrust Litig., 777 F.3d 9, 19 (1st Cir. 2015) (citing \textit{Carrera}, 727 F.3d at 306) (“The definition of the class must be ‘definite,’ that is, the standards must allow the class members to be ascertainable.”); EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014) (citing Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012)) (“A class cannot be certified unless a court can readily identify the class members.”).
\textsuperscript{41} See, e.g., \textit{In re} Petrobras Sec. Litig., 862 F.3d 250, 264 (2d Cir. 2017) (“The ascertainability doctrine that governs in this Circuit requires only that a class be defined using objective criteria.”); Brisen v. ConAgra Foods, Inc., 844 F.3d 1121, 1133 (9th Cir. 2017) (“We . . . declin[e] to adopt an administrative feasibility requirement.”); Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., 821 F.3d 992, 996 (8th Cir. 2016) (“[T]his court has not addressed ascertainability as a separate preliminary requirement.”); Rikos v. P&G, 799 F.3d 497, 525 (6th Cir. 2015) (“We see
demonstrate a reliable and administratively feasible mechanism for identifying potential class members. Instead, the named plaintiff must only define class membership with reference to objective criteria. Thus, in circuits with weak ascertainability standards, the court’s certification inquiry focuses only on the class definition provided by the named plaintiff, and not on how the named plaintiff intends to identify potential class members.

The difference between heightened and weak ascertainability is best illustrated by comparing the Third Circuit’s heightened ascertainability standard with the Seventh Circuit’s weak ascertainability standard. The most recent case discussing ascertainability in the Third Circuit is City Select. In City Select, the Third Circuit applied heightened ascertainability to a proposed class of recipients of unsolicited fax advertisements from the defendant loan company. The named plaintiff’s proposed mechanism for identifying class members involved cross-checking self-identifying affidavits with the defendant’s customer database even though, as the defendant argued, the database was over-inclusive, containing thousands more customers than the fax recipients. The Third Circuit held that the named plaintiff’s identification mechanism nonetheless fulfilled heightened ascertainability. First, the plaintiff defined the class with reference to objective criteria—inclusion in the customer database—and not merely based on a proposed class member’s state of mind. Second, the named plaintiff’s mechanism for identifying class members was administratively feasible because “affidavits, in combination with

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no reason to follow Carrera.”); Mullins v. Direct Dig., LLC, 795 F.3d 654, 658 (7th Cir. 2015) (“Nothing in Rule 23 mentions or implies this heightened requirement under Rule 23(b)(3).”).

42 Compare Byrd, 784 F.3d at 163 (“The ascertainability inquiry is two-fold.”) with Mullins, 796 F.3d at 662 (“The Third Circuit’s approach . . . goes much further than the established meaning of ascertainability and in our view misreads Rule 23.”).

43 City Select Auto Sales, Inc. v. BMW Bank of North America, Inc., 867 F.3d 434 (3d Cir. 2017).

44 Id. at 436.

45 Id. at 441.

46 Id. at 439 n.3 (citing 2 NEWBERG ON CLASS ACTIONS § 3:3 (5th ed. 2011)) (“Under the objective criteria requirement, ‘a class definition that depends on subjective criteria, such as class members’ state of mind, will fail for lack of definiteness.’”).
records or other reliable and administratively feasible means, can meet the ascertainability standard.”

On the other hand, in Mullins, the Seventh Circuit’s seminal case imposing weak ascertainability, the named plaintiff had to jump through considerably fewer hoops to certify the proposed class. In Mullins, the court held that the proposed class—purchasers of a falsely-advertised joint pain relief supplement—was defined with reference to objective criteria because the named plaintiff “defin[ed] the class in terms of conduct (an objective fact) rather than a state of mind.” The court then declined to adopt an administrative feasibility requirement because, in other circuits, administrative feasibility had “erect[ed] a nearly insurmountable hurdle at the class certification stage in situations where a class action is the only viable way to pursue valid but small individual claims.” Moreover, in establishing weak ascertainability, the Mullins court refuted the three policy objectives stressed by the Third Circuit in Marcus, Carrera, and Byrd: that heightened ascertainability encourages efficiency by reducing administrative burdens, prevents the dilution of payouts to unnamed class members, and protects the due process rights of defendants.

First, the Mullins court determined that any concerns over excessive administrative burdens were sufficiently addressed by Rule 23(b)(3)(D)’s manageability requirement. Rule 23(b)(3) requires the district court to “find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members.” In conducting that inquiry, the district court must consider “the likely difficulties in managing a class action”

47 Id. at 441 (citing Byrd, 784 F.3d at 170–71).
48 Mullins v. Direct Dig., LLC, 795 F.3d 654, 660 (7th Cir. 2015).
49 Id. at 662. 
50 Id. at 663 (“This concern about administrative inconvenience is better addressed by the explicit requirements of Rule 23(b)(3).”).
under Rule 23(b)(3)(D). According to the Mullins court, identifying class members was part and parcel of any Rule 23(b)(3)(D) manageability inquiry; thus, “imposing a stringent version of ascertainability because of concerns about administrative inconvenience renders the manageability criterion of the superiority requirement superfluous.”

Second, the Mullins court found the risk of payout dilution due to fraudulent claims to be negligible: it could point to “no empirical evidence that the risk of dilution caused by inaccurate or fraudulent claims in the typical low-value consumer class action is significant.” Moreover, the court found unrealistic that a claimant would sign an affidavit under the penalty of perjury to recover, as was the case in Mullins, the $70 retail price of the supplement in question.

Third, the Mullins court pushed back at the Third Circuit’s characterization of defendants’ due process rights, emphasizing that defendants do not possess the right “to a cost-effective procedure for challenging every individual claim to class membership,” as the Carrera court reasoned. Instead, defendants possess the narrower due process right to not “pay in excess of [their] liability and to present individualized defenses if those defenses affect [their] liability.” The Mullins court refused to ignore the “equally-important” policy objective of “deterring and punishing corporate wrongdoing,” and thus adopted weak ascertainability.

c. A push for weak ascertainability in the Third Circuit

Recently, three opinions—one dissenting and two concurring—by Third Circuit judges have encouraged walking back the Third Circuit’s heightened ascertainability standard. This

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53 Mullins, 795 F.3d at 663.
54 Id. at 667.
55 Id.
56 Id. at 669 (emphasis in original).
57 Id.
58 Id. at 668.
push against heightened ascertainability evolved gradually, beginning with an opinion written by Judge Ambro—notably, the author of the Marcus opinion that established the Third Circuit’s heightened ascertainability standard—dissenting to the Third Circuit’s denial of an en banc rehearing of Carrera.\(^59\) Judge Ambro stated that he “believe[s] . . . that Carrera goes too far” because proposed class members “should not be made to suffer” due to deficiencies in the defendant’s records.\(^60\) Judge Ambro further recognized that ascertainability, as a “creature of common law,” demands flexibility in its application, “especially in instances where the defendant’s actions cause the difficulty.”\(^61\) Although Judge Ambro, as Marcus’s author, believed that “the ability to identify class members is a set piece for Rule 23 to work,” he warned against as “rigid” an application of ascertainability as occurred in Carrera.\(^62\)

Two years later, Judge Rendell, who joined Judge Ambro’s Carrera dissent, wrote a concurrence to Byrd that explicitly called for the Third Circuit “to do away with this newly created aspect of Rule 23.”\(^63\) Judge Rendell believed that by prioritizing the prevention of fraudulent claims, heightened ascertainability “has ignored an equally important policy objective of class actions: deterring and punishing corporate wrongdoing.”\(^64\) If Judge Rendell’s language sounds familiar, that is because it is: the Seventh Circuit used Judge Rendell’s concurrence as one of the guideposts of its Mullins opinion, stating that the court “agree[s] in essence with Judge Rendell’s concurring opinion in Byrd,” and citing to it five different times.\(^65\)

\(^60\) Id. at *3 (“When, as here, a defendant’s lack of records and business practices make it more difficult to ascertain the members of an otherwise objectively verifiable low-value class, the consumers who make up that class should not be made to suffer.”).
\(^61\) Id.
\(^62\) Id.
\(^63\) Byrd v. Aaron’s Inc., 784 F.3d 154, 172 (3d Cir. 2015) (Rendell, J., concurring).
\(^64\) Id. at 175.
\(^65\) Mullins v. Direct Dig., LLC, 795 F.3d 654, 663 (7th Cir. 2015). Mullins also cited Judge Ambro’s Carrera dissent three times.
Most recently, in his City Select concurrence, Judge Fuentes also called for “rejecting our added ascertainability requirement” and “requir[ing] only that a class be defined in reference to objective criteria.”66 Pushing back against Marcus’s policy concerns about fraudulent class members and defendants’ due process rights, Judge Fuentes argued that “they are already sufficiently protected by the existing requirements of Rule 23.”67 Judge Fuentes also borrowed verbatim language from Mullins to support the proposition that defendants do not have a due process right to the most “cost-effective” method for challenging individual claims to class membership.68 Throughout his concurrence, Judge Fuentes cited to Mullins eight times, and Judge Rendell’s concurrence six times, indicating his desire to point the Third Circuit in the direction of a weak ascertainability standard.

II. Settlement-only classes in the Third Circuit

a. From Amchem to Prudential and Sullivan

Class actions can be certified for settlement purposes only when parties successfully negotiate a settlement agreement, negating the need to go to trial. Although Rule 23(e)(2) requires that a district court finds a proposed settlement agreement to be “fair, reasonable, and adequate” before approving it, settlement-only classes nonetheless often face an easier path toward certification.69 According to Professor Frankel, “from class counsel’s perspective, a big advantage of the settlement-only action is that class certification is easier and settlement approval is more likely because the class is being certified purely for settlement.”70

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66 City Select Auto Sales, Inc. v. BMW Bank of N. Am., Inc., 867 F.3d 434, 448 (3d Cir. 2017) (Fuentes, J., concurring).
67 Id. at 444.
68 Id. at 447 (citing Mullins, 795 F.3d at 669) (emphasis in original).
This has rung true in the Third Circuit in particular, especially in Prudential and Sullivan, two decisions issued in the wake of the Supreme Court’s Amchem decision. Amchem held that settlement-only classes may not be certified unless they satisfy all of Rule 23’s certification requirements, just like litigation classes. But the Court also stated in dicta that settlement was “relevant to a class certification” when it came to manageability inquiries, and that when “confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.”

Embracing Amchem’s dicta, both Prudential and Sullivan worked around Amchem’s holding, determining that, in certain circumstances, settlement-only classes may be certified even if they would not be certified for trial. Prudential and Sullivan emphasized the policy objective of global peace, which, they note, is especially difficult to come by in “any large, multi-district class action.” Settlement-only classes, therefore, serve “the important policy interest of judicial economy by permitting parties to enter into comprehensive settlements that prevent relitigation of settled questions at the core of a class action.” To safeguard these policy objectives, the Sullivan and Prudential courts allowed settlement-only classes greater flexibility, even if there would be manageability issues if the matter were to go to trial.

In Prudential, decided one year after Amchem, the Third Circuit affirmed the certification of a settlement-only class despite differences in the state laws that governed the class members’ claims. The court ultimately found that the Prudential class was manageable because the

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Actions, 82 GEO. WASH. L. REV. 951, 976 (2014) (“Recent cases have departed from Amchem, but unfortunately they have done so by adopting a more permissive stance toward settlement class actions.”).


72 Sullivan v. DB Investments, Inc., 667 F.3d 273, 311 (3d Cir. 2011).

73 In re Prudential, 148 F.3d 283, 308 (3d Cir. 1998).
“relatively minor differences in state law” among the class members’ claims could be overcome by trying claims governed by similar state laws together. 74 The court drew from Amchem’s dicta, determining that “after Amchem, the manageability inquiry in settlement-only classes may not be significant.”75

The Sullivan court also declined to determine whether a settlement-only class was manageable.76 In Sullivan, only some members of a proposed class of diamond purchasers had standing to bring their claims due to variations in state antitrust laws.77 Drawing upon both Amchem and Prudential, the court determined that “the concern for manageability that is a central tenet in the certification of a litigation class is removed from the equation.”78 Thus, variations in state law, even where standing was concerned, were matters of manageability, and because “a settlement would eliminate the principal burden of establishing the elements of liability under disparate laws,” there was no need for a manageability inquiry in the settlement-only context.79 In other words, at the certification stage for settlement-only classes, the district court need not conduct thorough inquiries into “the legal viability of asserted claims.”80

b. Ascertainability inquiries and settlement-only classes

Because Amchem requires that settlement-only classes undergo the same certification analyses as litigation classes, district courts across the country now conduct ascertainability inquiries when considering the certification of proposed settlement-only classes. In circuits with

74 Id. at 316.
75 Id. at 321. See also id. at 316 n.57 (“This [manageability] analysis, depending on the facts in each case, may no longer be necessary in the context of settlement-only class certification.”).
77 Sullivan, 667 F.3d at 273.
78 Id. at 302–303.
79 Id. at 303.
80 Id. at 305. The court stated that this should instead be handled during the Motion to Dismiss stage.
heightened ascertainability standards, courts have held that settlement-only classes satisfy the administrative feasibility requirement when defendants produce records through which plaintiffs can identify prospective class members.81 For example, in Silvis, a case concerning artificially-inflated utility prices, a court in the Eastern District of Pennsylvania determined that the defendant’s billing records “provide a reliable and administratively feasible mechanism for identifying” individuals who subscribed to the defendant’s “specific energy program during specific periods of time.”82 In contrast, in circuits with weak ascertainability standards, courts have focused their inquiries on the objectivity of the class’s definition.83 For example, in Wright, a court in the Northern District of Illinois held that a proposed class of recipients of phone calls that violated the Telephone Consumer Protection Act was ascertainable “because members belong to the class if they are on a list in [the defendant’s] records,” which meant that it was “possible to identify class members without any subjective criteria.”84

In the only case in which the Third Circuit has considered the application of heightened ascertainability to a settlement-only class, Comcast reversed a district court’s determination that a settlement-only class was not ascertainable. In reconciling the Third Circuit’s heightened

83 See, e.g., Lucas v. Vee Pak, Inc., No. 12-CV-09672, 2017 WL 6733688, at *4 (N.D. Ill. Dec. 20, 2017) (finding that a class defined as African-Americans who sought a work assignment but did not receive one was ascertainable); Gehrich v. Chase Bank USA, 316 F.R.D. 215, 226–27 (N.D. Ill. 2016) (finding that a class defined as the recipients of calls or texts from the defendant was ascertainable).
84 Wright v. Nationstar Mortgage LLC, No. 14 C 10457, 2016 WL 4505169, at *4 (N.D. Ill. Aug. 29, 2016). Compare id. (believing the plaintiff’s “allegations” that the defendant’s database recorded the date, time, and recipient of every phone call placed by the defendant’s automated system, instead of thoroughly discussing the adequacy of the defendant’s records) with Haight v. Bluestem Brands, Inc., No. 613CV1400ORL28KRS, 2015 WL 12830482, at *5 (M.D. Fla. May 14, 2015) (rejecting the certification of a Telephone Consumer Protection Act class whose settlement agreement did not define the word “received” in the context of phone call recipients because identifying class members would take “subsequent satellite litigation”).
ascertainability standard with *Sullivan’s* holding that manageability need not be analyzed in settlement-only classes, a panel of Judge Krause, Judge Scirica—who authored both *Prudential* and *Carrera*, as well as a concurrence to *Sullivan*—and Judge Fuentes—whose *City Select* concurrence pushed for the Third Circuit to adopt weak ascertainability—held in *Comcast* that the proposed settlement-only class was ascertainable “because the settlement agreement removes the need for a trial.”85

In *Comcast*, the named plaintiff and Comcast established in their settlement agreement a mechanism for identifying members of a class of both former and current Comcast subscribers who rented set-top boxes.86 Although Comcast possessed records of current subscribers, its records of former subscribers were incomplete.87 Thus, to identify former subscribers, the settlement agreement called for combining self-identifying affidavits with “additional documentation” ranging from credit card statements to police reports.88 The district court held that it was “implausible” that the proposed documentation “would ever demonstrate that an individual subscribed to Premium Cable from Comcast and rented a Set-Top Box.”89 Further, the court reasoned that relying on inconclusive evidence to prove class membership would violate Comcast’s due process right to challenge the evidence before the court that purports to identify class members.90 Thus, without reliable documentation, the class was not ascertainable because former Comcast subscribers would need to rely on “affidavits alone, without any objective records” to prove class membership, which was not administratively feasible.91

85 *In re Comcast Corp. Set-Top Cable Television Box Antitrust Litig.*, 656 F. App’x 8, 9 (3d Cir. 2016).
87 *Id.* at 147. Comcast only possessed records since 2011 for former subscribers, but the class period ran from 2005 until the court’s preliminary approval of the settlement agreement.
88 *Id.* at 151.
89 *Id.*
90 *Id.*
91 *Id.*
The Third Circuit reversed and remanded. In a three-sentence order, the court first determined that Comcast’s inability to “test the reliability of the evidence submitted to prove class membership” was not at issue because, in the settlement agreement, “the defendant has agreed that the evidence regarding class membership is sufficiently reliable.”\(^{92}\) Thus, policy concerns about defendants’ due process rights were not at stake because the mechanism put forth to identify class members was approved, in a settlement agreement, by the defendant.

Second, the court found that “the concern that ‘[t]he method of determining whether someone is in the class . . . be administratively feasible’ . . . is not implicated by this case, because the settlement agreement removes the need for a trial.”\(^{93}\) To support this proposition, the court cited to Judge Scirica’s \textit{Sullivan} concurrence, which stated that “the settlement class presents no management problems because the case will not be tried.”\(^{94}\) Thus, the \textit{Comcast} court determined that there was no administrative feasibility requirement for the proposed class because it was a settlement-only class, and settlement-only classes do not need to be tried. Just like in \textit{Sullivan}, which concluded that “variations [in state laws] are irrelevant to certification of a settlement class,”\(^{95}\) the variations between current and former subscribers were irrelevant to the certification of Comcast’s settlement-only class. Therefore, there was no need, from both a manageability and ascertainability perspective, to identify all class members at the certification stage.\(^{96}\)

\(^{92}\) \textit{In re Comcast Corp. Set-Top Cable Television Box Antitrust Litig.}, 656 F. App’x 8, 8 (3d Cir. 2016).
\(^{93}\) \textit{Id.} at 9 (citing Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013)).
\(^{94}\) \textit{Sullivan v. DB Investments, Inc.}, 667 F.3d 273, 335 (3d Cir. 2011) (Scirica, J. concurring). Page 335 of Judge Scirica’s concurrence makes two main points: first, that the court’s focus should be on the defendant’s conduct when determining whether a proposed class has satisfied Rule 23(a) commonality. This is not wholly relevant to identifying members of the \textit{Comcast} settlement-only class. Thus, I have concluded that the court is citing to Judge Scirica’s second point, about manageability, as discussed above.
\(^{95}\) \textit{Id.} at 304.
\(^{96}\) Interestingly, on remand, the district court did not discuss ascertainability at all. Instead, in a footnote, the district court wrote that although “ascertainability is typically a ‘necessary prerequisite’ of a Rule 23(b)(3) class,” “in this case, however, the Third Circuit has concluded that ascertainability is not a proper basis to deny certification.” \textit{In re Comcast Corp.}
III. Drawing from Comcast, Mullins, and Sullivan to circumvent the heightened ascertainability standard in the settlement-only context

As demonstrated by Comcast’s district court decision, the certification of settlement-only classes is jeopardized by heightened ascertainability. Although Comcast is the only Third Circuit case to have reversed a district court’s ascertainability determination in the settlement-only context, and the Comcast order is not precedential, Comcast nonetheless offers a blueprint for counsel attempting to avoid applying heightened ascertainability to settlement-only classes. I propose two pathways for doing so. First, I use Sullivan and Mullins to demonstrate how the Third Circuit could apply a weak ascertainability standard to settlement-only classes. Second, I propose that settlement agreements between the parties, in and of themselves, can serve as substitutes for ascertainability inquiries by mitigating key policy concerns.

a. Using case law to read ascertainability into manageability

Comcast stands for the proposition that administrative feasibility inquiries are unnecessary in the settlement-only context: because settlement-only classes will not go to trial, the court need not estimate “the likely difficulties in managing a class action” by “determining whether someone is in the class [through an] administratively feasible . . . method.”\(^97\) The Comcast decision therefore reads administrative feasibility into Rule 23(b)(3)(D) manageability inquiries. In Comcast, the Third Circuit suggests that, because Rule 23(b)(3)(D) applies only to litigation classes, as established in Sullivan, and because both Rule 23(b)(3)(D) and ascertainability seek to achieve the same core goal of identifying potential class members, the

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\(^{97}\) Fed. R. Civ. P. 23(b)(3)(D); Comcast, 656 F. App’x at 8.

Third Circuit should do away with the administrative feasibility requirement when certifying proposed settlement-only classes. Put another way, because *Sullivan* dictates that courts need not conduct a manageability inquiry when certifying settlement-only classes, reading administrative feasibility into manageability means that courts will not need to apply heightened ascertainability to settlement-only classes.

*Comcast’s* citation to Judge Scirica’s *Sullivan* concurrence is interesting for two reasons. First, the concept of ascertainability did not exist when the court decided *Sullivan: Marcus*, the first case to apply ascertainability to a proposed class in the Third Circuit, was decided one year after *Sullivan*. Second, in *Comcast*, whether the class was ascertainable or not did not turn on differences in state law among class members’ claims, but instead on differences between current subscribers, about whom Comcast possessed records, and former subscribers, for whom there were incomplete records. Thus, it is not immediately obvious why the *Comcast* court cited to *Sullivan*. But despite the differences between *Sullivan’s* variations in state law and *Comcast’s* variations in subscribers, *Sullivan’s* language about “litigating colorable claims” parallels language about “mini-trials” used by the Third Circuit in refining its ascertainability standard. The Third Circuit wrote in *Sullivan* that “litigating whether a claim is ‘colorable’ and defending who is in and who is not in the class would be an endless process, preventing the parties from seriously getting to, and engaging in, settlement negotiations. . . . [T]he ‘individualized’ nature of the task would doom the class certification process from the outset.”98 Under *Sullivan*, then, and in the interest of judicial economy, there is no need for proof on the merits of whether every individual class member belongs in a settlement-only class. This mirrors the Third Circuit’s language about ascertainability throughout the *Marcus* line of cases—that, at the certification

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98 *Sullivan*, 667 F.3d at 311.
phase, “a trial court should ensure that class members can be identified without extensive and individualized fact-finding or ‘mini-trials.’” 99 This parallel language reflects the near-identical nature of the ascertainability and manageability inquiries, and the identical goals each inquiry seeks to achieve.

Additionally, Mullins explicitly read administrative feasibility into manageability, by determining that ascertainability “is better addressed by the explicit requirements of Rule 23(b)(3),” as well as the district courts’ “discretion to press the plaintiff for details about the plaintiff’s plan to identify class members . . . if the proposed class presents unusually difficult management problems.” 100 According to Mullins, Rule 23(b)(3)(D) manageability inquiries are sufficient to “eliminate[] serious administrative burdens that are incongruous with the efficiencies expected in a class action” without a separate ascertainability inquiry. 101 Thus, the Mullins court believed that Rule 23(b)(3)(D) manageability encompasses administrative feasibility because, at their core, both inquiries seek to solve the same problem: identifying class members. In other words, because the Seventh Circuit already viewed identifying class members as part of its manageability inquiry, by the time Mullins appeared on its docket, there was no need for heightened ascertainability.

The biggest hurdle to reading administrative feasibility into manageability in the Third Circuit is Byrd, which stressed that ascertainability inquiries are conducted independently from and prior to Rule 23 analyses. 102 However, notably, some Third Circuit opinions have suggested

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100 Mullins v. Direct Dig., LLC, 795 F.3d 654, 663 (7th Cir. 2015) (citing Fed R. Civ. P. 23(b)(3)(D)) ("[Rule 23(b)(3)] requires that the class device be ‘superior to other available methods for fairly and efficiently adjudicating the controversy.’ One relevant factor is ‘the likely difficulties in managing a class action.’").
101 Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012).
102 Byrd v. Aaron’s Inc., 784 F.3d 154, 162 (3d Cir. 2015) ("The source of, or basis for, the ascertainability requirement as to a Rule 23(b)(3) class is grounded in the nature of the class-action device itself . . . the independent ascertainability inquiry ensures that a proposed class will actually function as a class.").
reading administrative feasibility into manageability despite *Byrd*. Before *Byrd* was decided, for example, *Marcus* stated that “ascertainability problems *spill over* into the [*Rule 23(b)(3)] predominance inquiry,”” and *Carrera* stated that “administrative feasibility means that identifying class members is a *manageable* process that does not require much, if any, individual factual inquiry.”

Further, Judge Rendell’s *Byrd* concurrence acknowledged the similarities between ascertainability and manageability, stating that administrative feasibility “does nothing to ensure the manageability of a class or the ‘efficiencies’ of the class action mechanism.” Judge Fuentes’ *City Select* concurrence is even more direct. Citing to *Mullins*, Judge Fuentes argued that “imposing a separate manageability requirement within ascertainability ‘renders the manageability criterion of the superiority requirement superfluous,’” and that the ascertainability requirement “understates the ability of district courts to manage their cases.”

In addition, other district-level Third Circuit cases since *Byrd* have read ascertainability into manageability, though not in the settlement-only context. For example, in *Vista Healthplan*, a district court in the Eastern District of Pennsylvania denied the named plaintiff’s motion for reconsideration after the plaintiff “argu[ed] that [Judge Goldberg] made clear errors of fact and law by conflating ascertainability with predominance.” In particular, the plaintiff

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103 Id. at 594 n.3 (emphasis added).
104 *Carrera*, 727 F.3d at 307–308 (citing 2 *NEWBERG ON CLASS ACTIONS § 3:3 (5th ed. 2011)*) (emphasis added).
105 *Byrd*, 784 F.3d at 175 (Rendell, J., concurring).
106 City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc., 867 F.3d 434, 447 (3d Cir. 2017) (quoting *Mullins v. Direct Dig.*, LLC, 795 F.3d 654, 663 (7th Cir. 2015)).
107 Id. at 448.
took issue with Judge Goldberg’s statement that “many individualized questions must be answered in order to determine whether an individual falls within the class definition.”\textsuperscript{110} However, Judge Goldberg maintained that “it is clear from [Byrd and Carrera] that in assessing whether a proposed ascertainability methodology is administratively feasible, the court may also consider the extent of individualized inquiry.”\textsuperscript{111} Thus, Judge Goldberg read ascertainability into manageability, and held that the proposed class was not ascertainable because “the problems identified with respect to ascertainability . . . would clearly cause problems with case management.”\textsuperscript{112}

Similarly, in Mladenov, a district court in the District of New Jersey determined that a proposed litigation class—comprised of grocery shoppers who purchased bakery products labeled as “fresh” when they were in fact frozen—was not ascertainable.\textsuperscript{113} Identifying the customers, the court found, “would require the exact type of ascertainability complication that Carrera warns against, namely requiring mini-trials to determine who belongs in the class,” which would result in “enormous difficulties in managing these class actions.”\textsuperscript{114} The Mladenov court thus deemed the class not ascertainable because of the manageability issues it would present.

Therefore, the Third Circuit has the tools at its disposal to read administrative feasibility into manageability in the settlement-only context. Counsel could cite to Comcast, Sullivan, Mullins, and the Byrd and City Select concurrences—as well as language from Marcus and Carrera—to arrive at a weak ascertainability standard for settlement-only classes. By reading

\textsuperscript{110} Id. at *12.  
\textsuperscript{111} Id. at *2.  
\textsuperscript{112} Id. at *5.  
\textsuperscript{114} Id.
administrative feasibility into manageability, and because *Sullivan* removes the need for manageability inquiries for settlement-only classes, the Third Circuit ascertainability inquiry for settlement-only classes should not require an analysis into the proposed class’s administrative feasibility.

b. **Using settlement agreements to overcome heightened ascertainability’s policy concerns**

   In *Comcast*, the “evidence [the parties] submitted to prove class membership” in their settlement agreement was “sufficiently reliable” because the defendant agreed to the terms of the settlement agreement.\(^{115}\) This suggests that settlement agreements mitigate concerns over defendants’ due process rights, as well as concerns over excessive administrative burdens. Perhaps, then, settlement agreements could act as substitutes for administrative feasibility inquiries, as long as parties define the proposed class with reference to objective criteria and agree on a mechanism for identifying class members in the settlement agreement. In other words, through settlement agreements, parties can eliminate two of the policy concerns associated with heightened ascertainability and administrative feasibility. First, because the parties will have agreed on how to carry out and pay for a mechanism for identifying class members, the parties will have mitigated concerns over imposing excessive administrative burdens on both the parties and the court to identify class members. Second, the parties will have eliminated concerns over the defendants’ due process right to challenge the evidence before the court because the defendant will have agreed to the adequacy of the evidence used to identify class members in the settlement agreement.

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\(^{115}\) *In re Comcast Corp. Set-Top Cable Television Box Antitrust Litig.*, 656 F. App’x 8, 8–9 (3d Cir. 2016).
In circuits with heightened ascertainability standards, district courts have held proposed classes to be ascertainable because of the existence of a settlement agreement.\textsuperscript{116} For example, in \textit{Gregory}, a court in the District of New Jersey determined that the proposed class was ascertainable because the settlement agreement defined the class using “objective, narrow criteria.”\textsuperscript{117} The court also noted that, in developing the settlement agreement, the parties worked together to find helpful identifying records, estimate the number of class members, and revise the initial proposed class definition.\textsuperscript{118} Additionally, the court pointed to the fact that the “[d]efendant neither disputes the class definition nor the scope of proposed class claims.”\textsuperscript{119} The proposed class was thus ascertainable due to the settlement agreement between the parties.

Although reading ascertainability into settlement agreements would protect the due process rights of defendants and alleviate worries over administrative burdens, it would not take care of the third policy concern discussed in the \textit{Marcus} line of cases: protecting unnamed class members, whose recovery could be diluted by fraudulent class members. But language from \textit{Carrera} suggests otherwise, and indicates that Rule 23(a)(4)’s adequacy of representation requirement could assuage concerns over fraudulent class members. \textit{Carrera} states that “if fraudulent or inaccurate claims materially reduce true class members’ relief, these class members could argue the named plaintiff did not adequately represent them because he proceeded with the understanding that absent members may get less than full relief.”\textsuperscript{120} Thus, a collateral Rule

\begin{itemize}
\item \textsuperscript{116} See also \textit{In re Auto. Parts Antitrust Litig.}, No. 12-CV-00103, 2016 WL 8200511 (E.D. Mich. Aug. 9, 2016) (“The Settlement Agreements spell out class membership in terms of the precise years involved, geographical limitations, and the type of purchase for each part . . . [a]lthough the identification process will necessitate additional review, the Court will not have to resort to mini trials to determine membership.”); \textit{In re Initial Pub. Offering Sec. Litig.}, 226 F.R.D. 186, 195–96 (S.D.N.Y. 2005) (“Essentially, the Issuers have solved the problem of ascertaining which class members may have known of the alleged scheme by agreeing to concede the issue.”).
\item \textsuperscript{117} Gregory v. McCabe, No. CIV. 13-6962 AMD, 2014 WL 2615534, at *4 (D.N.J. June 12, 2014).
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} \textit{Carrera v. Bayer Corp.}, 727 F.3d 300, 310 (3d Cir. 2013).
\end{itemize}
23(a)(4) review could protect unnamed class members from being inadequately represented during settlement negotiations and in the ultimate settlement agreement.

The Mullins court also determined that diluted recovery rarely, if ever, occurs, finding “no empirical evidence that the risk of dilution caused by inaccurate or fraudulent claims in the typical low-value consumer class action is significant.”\(^{121}\) Even if there were a risk, the Mullins court noted the infrequency with which eligible claimants actually submit claims for compensation in consumer class actions, making the danger of dilution “not so great that it justifies denying class certification altogether.”\(^{122}\) Further, courts have historically had many tools at their disposal to combat fraudulent claims, including claims administrators, auditors, and random sampling.\(^{123}\) The Mullins court therefore viewed the protection of unnamed class members as an issue outside the purview of a district judge’s administrative feasibility inquiry. Instead, dilution was merely a “claim administration issue[].”\(^{124}\)

Thus, a thorough claims administration process, coupled with the minimal administrative burdens and the due process protections offered by settlement agreements, could eliminate the need for an administrative feasibility requirement for settlement-only classes.

IV. Conclusion

In this paper, I proposed two ways for the Third Circuit to justify applying weak ascertainability to settlement-only classes. The two proposals would be most effective if presented together: the first proposal would draw from the precedent case law to read ascertainability into manageability, and the second proposal would draw upon settlement

\(^{121}\) Mullins v. Direct Dig., LLC, 795 F.3d 654, 667 (7th Cir. 2015).
\(^{122}\) Id.
\(^{123}\) Id.
\(^{124}\) Id.
agreements between parties to assure courts that key ascertainability policy concerns are being considered.

The time is ripe for the Third Circuit to apply weak ascertainability to settlement-only classes. The Third Circuit’s heightened ascertainability standard is only seven years old and, in its youth, faces both inconsistency in its application and instability in its future direction. Because the Third Circuit has historically certified settlement-only classes with more leniency, incentivizing parties to create settlement agreements for purposes of judicial efficiency and global peace, the Third Circuit should adopt a weak ascertainability standard for settlement-only classes. And the stage is set: with at least three judges pushing for a weak ascertainability standard, and with an established overlap between ascertainability and manageability, settlement-only classes represent fertile ground for the Third Circuit to take the first steps in removing its administrative feasibility requirement.