

# A Higher Bar to Class Certification in the Third Circuit?

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The Third Circuit recently ruled to reverse the certification of a class of consumers who alleged that Bayer falsely advertised the metabolism-boosting benefits of its WeightSmart dietary supplement. The court held that the class members were not ascertainable, rejecting the plaintiff's contention that it could look to retailers' customer-loyalty card records or affidavits to determine class membership.

With regard to loyalty cards, the Third Circuit concluded that there was "no evidence that a single purchaser of WeightSmart could be identified using records of customer membership cards or records of online sales [and] no evidence that retailers even have records for the relevant period."

Perhaps more significantly, the Third Circuit rejected the use of affidavits as a means to determine class membership, stating that the use of affidavits "does not address a core concern of ascertainability: that a defendant must be able to challenge class membership." The court based this conclusion, in part, on the plaintiff's deposition testimony suggesting that individuals will have difficulty accurately recalling which WeightSmart product they purchased and when. The court also (1) noted that ascertainability protects absent class members as well as defendants ("It is unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims)" and (2) considered the fraud protection methods employed by the Claims Administrator to be inadequate to meet the concern.

What does it mean for those defending class action cases? Well, at least in the Third Circuit, we can expect a close assessment on ascertainability issues and that affidavits are not likely going to be enough.