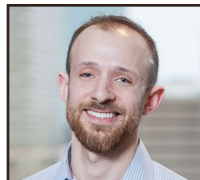

Reliable Analysis Is Key To Addressing Ascertainability

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There has been much discussion recently about the circuit court split on the ascertainability requirement in class certification.¹ Several circuits, most notably the Third Circuit, have adopted a “heightened” requirement that has made it more difficult for plaintiffs to demonstrate ascertainability of class membership. Other circuits have rejected this heightened standard and have adopted less burdensome requirements for plaintiffs to show ascertainability.

The class certification decision in *Vista Healthplan Inc. et al. v. Cephalon Inc. et al.* provides an example of the application of the Third Circuit’s heightened standard to a pharmaceutical matter.¹ In this case, U.S. District Judge Mitchell S. Goldberg denied certification of a class of end payers who purchased the wakefulness-promoting drug Provigil or its generic equivalent.

The proposed class consisted of both individual consumers and third-party payers (e.g., health insurance providers) that had paid for some portion of the retail purchase price of the drug. The matter was further complicated by the exclusion from the proposed class of eight categories of persons and entities, such as consumers whose insurance required them to pay only a flat dollar copayment.

In his decision, Judge Goldberg reviewed expert reports and testimony introduced by both plaintiffs and defendants on ascertainability issues. The defendants’ economic expert argued that due in part to the nature of the pharmaceutical industry, there was no

administratively feasible approach that would allow class members to be identified and that it was not possible to estimate damages without extensive individual inquiry.

The court ultimately agreed with the defendants' expert, ruling that the plaintiffs and their expert failed to demonstrate that the proposed mechanism for ascertaining class members was reliable and administratively feasible.

Despite the circuit court split and an increased focus on ascertainability in cases across circuits, the U.S. Supreme Court to this point has refused to review cases and render a decision that might provide guidance on the appropriate standard to apply. Earlier this year, it declined to hear *Direct Digital LLC v. Vince Mullins* from the Seventh Circuit and *Rikos v. Procter & Gamble Co.* from the Sixth Circuit.³

Given the uncertain legal environment regarding which standard will ultimately prevail and the heightened scrutiny of ascertainability by a number of federal courts, it is becoming more and more crucial for both plaintiffs and defendants to offer thorough and reliable analyses addressing ascertainability issues at the class certification stage.

These types of analyses may be best presented by expert witnesses, who are often in a superior position to provide opinions to the court that directly address whether the proposed class can be ascertained in an administratively feasible manner. As evident from *Vista Healthplan*, the role of experts can be critically important in addressing ascertainability issues.

The Ascertainability Requirement and Recent Case Developments

In the Third Circuit, the ascertainability requirement was highlighted in *Marcus v. BMW of North America LLC*.⁴ Here, it was noted that the ascertainability requirement — an essential prerequisite of class actions under Rule 23(b)(3) — was designed to lessen the serious administrative burdens and to maintain the efficiencies of class action lawsuits, while simultaneously protecting the absent class members and the defendants by clearly defining the class members who are to be included in the class.⁵

The standard in the Third Circuit was further developed in subsequent cases, including *Hayes v. Wal-Mart Stores*⁶ and *Carrera v. Bayer Corp.*⁷ Through this trio of cases, the ascertainability requirement was established as having two prongs. Firstly, a plaintiff must show that the class is “defined with reference to objective criteria,” and secondly, “a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition” must be presented by the plaintiff.⁸

Ultimately, the standard establishes that “[i]f class members are impossible to identify without extensive and individualized fact-finding or ‘mini-trials,’ then a class action is inappropriate.”⁹

A subsequent opinion from the Third Circuit highlights the still evolving nature of the ascertainability requirement. In *Byrd v. Aaron's Inc.*,¹⁰ the court pointed out that the some district courts had taken the ascertainability standard too far, and attempted to clarify some confusion in understanding the requirement.

Among other clarifications, the court noted that the plaintiff does not need to identify all the class members at the time of certification. However, the opinion reinforced that it is the plaintiff's burden to present not only a methodology to identify class members, but also evidentiary support showing that the methodology will be successful and administratively feasible.

In addition, the court noted that the ascertainability requirement should not be confused with other requirements in a class action lawsuit, including but not limited to the predominance requirement.

Ultimately, the Third Circuit certified the class in this case, finding that the defendant's own records, which provided the identities and addresses of 895 class members, were sufficient and detailed enough to satisfy the ascertainability requirement.

Court decisions in other circuits have varied in their choices of whether to apply the Third Circuit's heightened standard for ascertainability. Decisions in some of these circuits — including the Second Circuit (*Brecher v. Republic of Argentina*)¹¹ and the Eleventh Circuit (*Karhu v. Vital Pharmaceuticals Inc.*)¹² — have adopted both prongs of the ascertainability standard set out by the Third Circuit: that the class can be defined by objective criteria and that class members can be identified using an administratively feasible method.

In *Mullins v. Direct Digital*¹³ (in the Seventh Circuit), the court departed from the heightened standard of the Third Circuit by rejecting the need for an administratively feasible method. Instead, the court determined that the proposed class was defined by objective criteria and affirmed the district court's order granting class certification.

Similarly, in *Rikos v. Procter & Gamble Co.*¹⁴ (in the Sixth Circuit), the court stated that it saw no reason to follow the Third Circuit's approach and determined that the class should be certified because it was defined by objective criteria.

The Role of Experts in Addressing Ascertainability Issues

Given these recent decisions, the importance of expert analysis addressing ascertainability issues in class certification proceedings is becoming increasingly apparent. This holds particularly true for the second prong of the Third Circuit's requirement regarding the presentation of a reliable and administratively feasible method to identify class members.

Because plaintiffs bear the burden of showing class treatment is warranted, expert analysis can be critical to establishing that the proposed methodology is administratively feasible and will be successful in ascertaining the members of the proposed class. As noted in *Carrera and Byrd*, a plaintiff must provide evidentiary support that their proposed method for ascertaining class members will be successful.¹⁵

For defendants, there is an equally important role to be filled, as expert analysis can be used to rebut any methodologies or data analysis put forth by plaintiffs.

For example, an expert for plaintiffs may be able to query defendant or third-party databases that contain records of customers purchasing certain products at issue in a case. Depending on the proposed class definition, these types of data analyses may be sufficient in establishing that a methodology to identify class members exists and will be successful in an administratively feasible manner.

Alternatively, an expert for defendants may be able to refute an opposing expert's analysis by providing counterexamples where the plaintiff's proposed methodology incorrectly identifies class members, or by highlighting inconsistencies in the data that result in errors in categorizing potential class members. These types of analyses would suggest the need for individualized inquiry.

An expert with sufficient industry knowledge and experience with data analysis will be able to help address critical questions about the availability of data records and whether these data could be processed in an efficient manner to identify class members. Particularly in pharmaceutical matters involving indirect purchasers, the breadth of information necessary to ascertain class membership may extend beyond data records of which entities paid for a portion of the cost of a product.

This supplemental information may include contracts that define the relationships between the various entities in the supply chain (i.e., insurers, manufacturers, pharmacies, pharmacy benefit managers and consumers). Often, the need for this additional information results from plaintiffs' complex proposed class definitions that exclude several types of indirect purchasers.

The proposed class in Vista Healthplan is typical of many pharmaceutical cases in this respect. In this case, the proposed class excluded, among other purchasers, consumers who paid the same copay for the brand and generic version of the drug.¹⁶

It is often not possible to identify such consumers by reviewing their purchase histories. Rather, one must consult contracts between health plans and their members that describe their cost-sharing obligations for drug purchases.

Similarly, the proposed class excluded "fully insured health plans, i.e., plans that purchased insurance from another third-party payor covering 100% of the plan's reimbursement obligations to its members."¹⁷ Again, purchase records are insufficient to identify such entities. It is necessary to check each plan's contract to determine whether or not it is fully insured.

Industry experts who are knowledgeable about the complex relationships among parties in the healthcare industry may be particularly effective at identifying the types of information necessary to ascertain class membership.

Ultimately, experts are well positioned to answer a variety of questions that are at the heart of an ascertainability inquiry, including:

- What data records exist or could be accessed to identify class members?
- To the extent these data exist, how can they be compiled for analysis?
- Is documentary evidence necessary to supplement the available data records?
- What type of analysis must be undertaken to identify potential class members? Can examples be provided?

- Is there a particular methodology that ensures that the analysis can be performed in an efficient manner without resorting to individualized fact finding?
- To what extent do industry-specific factors need to be addressed in identifying possible class members?

By addressing these and other questions, experts can help courts sort through whether a class is ascertainable or not.

Conclusion

The growing importance of the ascertainability requirement in class certification proceedings, particularly in the Third Circuit, highlights the need for reliable expert analysis to address such issues.

Specifically, experts will be increasingly called upon to provide insights into whether a reliable method of ascertaining class members exists, and also whether there is evidentiary support that the method will be successful in an administratively feasible manner.

To the extent more courts adopt the ascertainability requirement set forth by the Third Circuit, and as more scrutiny is placed on these types of issues, expert testimony and analyses are likely to provide key contributions to class certification arguments.

Disclosure: Analysis Group supported expert witnesses in *Vista Healthplan Inc. et al. v. Cephalon Inc. et al.*

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Endnotes

- 1 See, for example, Matthews, Jacqueline K. "Class Cert. Unclear With Circuit Split on Ascertainability," Law360.com, April 25, 2016, available at: <http://www.law360.com/articles/787898/class-cert-unclear-with-circuit-split-on-ascertainability>; Fuller, Chad, et al. "A Serious Circuit Split on Ascertainability," Law360.com, June 30, 2016, available at: <http://www.law360.com/articles/813021/a-serious-circuit-split-on-class-ascertainability>.
- 2 Vista Healthplan Inc. et al. v. Cephalon Inc. et al., Case 2:06-cv-01833-MSG, Doc. 438, (E.D. Pa. June 10, 2015).
- 3 Salvatore, Cara. "Justices Leave Alone 7th Circ. Challenge To Class Standard," Law360.com, Feb. 29, 2016, available at: <http://www.law360.com/articles/764879/justices-leave-alone-7th-circ-challenge-to-class-standard>; Kass, Dani. "Justice's Reject P&G's Class Cert. Appeal in 'Snake Oil' Claim," Law360.com, March 28, 2016, available at: <http://www.law360.com/articles/776851/justices-reject-p-g-s-class-cert-appeal-in-snake-oil-claim>.
- 4 Marcus v. BMW of North America, LLC, 687 F.3d 583 (3d Cir. 2012).
- 5 Id. at 592-593.
- 6 Hayes v. Wal-Mart Stores Inc., 725 F.3d 349 (3d Cir. 2013).
- 7 Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013).
- 8 Hayes, 725 F.3d at 355.
- 9 Marcus, 687 F.3d at 593.
- 10 Byrd v. Aaron's Inc., 784 F.3d 154 (3d Cir. 2015).
- 11 Brecher v. Republic of Argentina, 802 F.3d 303 (2d Cir. 2015).
- 12 Karhu v. Vital Pharms. Inc., 621 F.App'x 945 (11th Cir. 2015).
- 13 Mullins v. Direct Digital LLC, 795 F.3d 654 (7th Cir. 2015).
- 14 Rikos v. P&G, 799 F.3d 497 (6th Cir. 2015).
- 15 Carrera, 727 F.3d at 306; Byrd, 784 F.3d at 163.
- 16 Vista Healthplan Inc. et al. v. Cephalon Inc. et al. June 10, 2015, at 8.
- 17 Id.

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