Recent Developments and Strategies to Strengthen Your Class Action Defense

by Brian Troyer, Partner, Thompson Hine LLP

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Class action law is developing more rapidly today in many areas than it has in many years. For drug and medical device companies, the focus of product-related class action activity has moved over the past ten or fifteen years from standard product liability class actions, which are of limited viability in the current landscape, to consumer and payer class actions for economic loss and antitrust class actions. This paper focuses on some of the recent developments in the areas of ascertainability, the use of statistics, and a potential new loophole around Rule 23(f) in the Ninth Circuit that would allow immediate appeals of denials of class certification.

Ascertainability Developments & Strategy Considerations

Ascertainability and overbreadth are the Scylla and Charybdis of class definitions. Generally speaking, ascertainability is a requirement of class certification that courts have found implicit in Rule 23 which concerns how readily it can be determined who meets a proposed class definition. But the ascertainability requirement exists in tension with what can be called the "fit" or breadth requirement, which concerns whether the class definition is properly tailored to the alleged factual and legal basis for the claimed relief, or, in other words, whether the definition includes only those who would have the same right to recovery as the plaintiff. As experienced practitioners learn, the more tailored the class definition is to the factual and legal theory of the case, the more difficult it likely will be to determine who meets the class definition. Conversely, the simpler and more objective the class definition — and thus the more ascertainable its members — the more divorced it tends to become from the alleged cause of action, and the more likely the class is to be overbroad.

Issues of ascertainability and overbreadth have proliferated in the past decade as developing law has continued to expose fault lines in class action theory, and as plaintiffs have tried to represent sprawling classes including many uninjured members. The era of the "no injury" class action is also an era of endemic class definition defects. As federal courts have grappled with these issues, a circuit split has recently developed over the standard for ascertainability.

The Third Circuit's Two-Pronged Standard

The Third Circuit adopted a rigorous two-pronged standard beginning with *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583 (3d Cir. 2012), and *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013). In *Marcus,* the court held that a class of purchasers and lessors of cars with run-flat tires that had gone flat and been replaced at BMW dealerships was not ascertainable, because no records existed that could reliably identify people meeting the criteria. The court disapproved any method of ascertaining class membership that would depend upon class member "say so" in

the form of affidavits or that would not allow BMW the opportunity to contest the proof at trial. In *Hayes,* the court held that a consumer class was not ascertainable, because Wal-Mart's records did not show which "price overrides" for sales were for "as is" purchases. Again, the court disapproved of certification of a class whose members could only be identified through their self-serving attestation.

The Third Circuit's ascertainability standard reached a full synthesis in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2014), in which the proposed class would have consisted of purchasers of a health supplement. The court held that (1) membership in a class must be defined by objective criteria and (2) the plaintiffs' proposed "method for ascertaining class members is [a] reliable and [b] administratively feasible, and [c] permits a defendant to challenge the evidence used to prove class membership." *Id.* at 308. The proposed class did not meet these requirements, because no retailer records identifying purchasers existed, and mere submission of affidavits would not suffice, because the defendant would not have the opportunity to contest them. The court explicitly recognized defendants' due process right to challenge proof of class membership. *Id.* at 307 ("A defendant has a similar, if not the same, due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim."). The court also held in this trilogy of cases that, "[i]f class members are impossible to identify without extensive individualized fact-finding or 'mini' trials,' then a class action is inappropriate." *Id.* at 305 (internal quotation marks omitted).[1]

Some other courts have aligned with this approach. *See Karhu v. Vital Pharmaceuticals, Inc.*, No. 14-11648, 2015 U.S. App. LEXIS 9576 (11th Cir. June 9, 2015); *EQT Production Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014).

The Seventh Circuit's More Lenient Standard

The Seventh Circuit rejected the second prong of the *Carrera* standard in *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), however, holding that a class is ascertainable so long as the definition is clear and based on objective criteria. The court agreed that the efficiency and due process concerns animating the *Carrera* standard "are substantial and legitimate." *Id.* at 663. After examining several kinds of class definition problems, however, the court concluded that the feasibility and reliability of proof of class membership is better evaluated as part of the superiority analysis under Rule 23(b)(3), where the costs of identifying class members can be weighed as part of a balancing of costs and benefits of class treatment. The Seventh Circuit's approach thus would focus scrutiny on whether the superiority requirement can be satisfied where extensive individual inquiry and proof are required just to establish that a person is a member of the class. The court acknowledged that defendants have the right to raise all individual defenses to class members' claims and to challenge their proof at any stage. *Id.* at *13, 16. It also recognized that its position appears to be in the minority. *Id.* at *1.

[1] Plaintiffs in many pending cases and some commentators have argued that the Third Circuit retreated from *Carrera* in *Byrd v. Aaron's, Inc.*, 784 F.3d 154 (3d Cir. 2015) (class of computer lessees and family members ascertainable from company records). *Byrd,* however, reaffirmed the *Carrera* standard. There were company records in *Byrd* to help identify class members.

If the Seventh Circuit's approach is merely to evaluate the feasibility and reliability of class member identification under Rule 23(b)(3) rather than as part of a standalone requirement, it is reasonable to ask whether this is a difference in form rather than substance. The Seventh Circuit's answer to that question is that it matters how the inquiry is framed, because, "when addressed as a matter of ascertainability, courts tend to look at the problem in a vacuum, considering only the administrative costs and headaches," while the superiority analysis calls for balancing costs and benefits of class treatment. *Id.* at 663. Further experience will be necessary to show how much difference it makes in practice, but the Seventh Circuit, citing a student note, declared that courts that consider the burden and cost of identifying class members without considering "administrative solutions like those available under Rule 23(c) and (d) … will err systematically against certification." *Id.* at 664.

Timing, Substance, and Due Process

Part of the disagreement between *Mullins* and *Carrera* is about timing: whether class members must be identifiable — not identified, but identifiable — as a prerequisite to certification, or whether the plaintiff should be allowed to put off that showing until a later time, presumably after trial or judgment. The Seventh Circuit said this evaluation can wait:

> In addition, a district judge has discretion to (and we think normally should) wait and see how serious the problem may turn out to be after settlement or judgment, when much more may be known about available records, response rates, and other relevant factors. And if a problem is truly insoluble, the court may decertify the class at a later stage of the litigation. *See Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

Mullins, 795 F.3d at 664. This reasoning is difficult to reconcile with the Supreme Court's directive in *Wal-Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541 (2011), that class certification is only appropriate if a plaintiff has proved that all prerequisites *are* satisfied, not that they could be or are promised to be in the future. If proof of the feasibility of identifying class members is a requirement for class treatment at all, then it would seem to be a requirement that must be satisfied at the same time all the others must be — before the class is certified. In this respect, *Mullins* seems to mark an errant return to conditional class certification and the approach of "certify now, worry later" that the Supreme Court repudiated in *Wal-Mart.*

The other important part of the disagreement concerns the kinds of proof of class membership that are permissible. The Third Circuit ruled out affidavits and similar forms of class member "say so" because they are unreliable, and a defendant has the same right to contest class membership as the elements of the plaintiffs' and class members' claims, which make it cumbersome and inconsistent with the purposes of a class action. The Seventh Circuit's standard allows the use of such proof on the premise that it should be treated like evidence used for any other purpose.

One linchpin of the Seventh Circuit's reasoning for allowing class members to self-identify with affidavits is that, although a defendant has the right to challenge each class member's claim,

"[i]t does not follow that a defendant has a due process right to a *cost-effective* procedure for challenging every individual claim to class membership." *Id.* at 669. The court later remarks that "a defendant may need to decide how much it wants to invest in litigating individual claims." *Id.* The implication seems to be that class members could mail in postcard affidavits, and that proof would suffice to support the individual claims unless the defendant at that point undertook expensive means to challenge it, presumably through discovery and depositions.

What this reasoning overlooks is that merely mailing in a postcard affidavit would not carry a plaintiff's burden of proof at trial in any ordinary case. It ordinarily would be inadmissible hearsay. A plaintiff who claimed to have purchased a defective or fraudulently advertised product would have to give any testimonial proof at trial, before the jury. A plaintiff who claimed breach of a consumer contract likewise would have to testify at trial regarding the contract. An affidavit or deposition testimony can avoid summary judgment in these cases, but only because they represent evidence that would be presented in admissible form at trial.

There is nothing about certification of a class under Rule 23 that should change any of this. Rule 23 creates a procedural mechanism that allows small claims to be pursued more efficiently, but it does not relieve or lessen any class member's burden of proof. The mere submission of a postcard, affidavit, or the proverbial "claim form" does not satisfy that burden and therefore should not alone be occasion for a defendant to have to undertake any challenge to such proof — not, that is, before a class member actually comes forward to prove the claim in court.

Granted, class actions have long proceeded under the fiction that none of this is true, that submission of a postcard or claim form attesting to class membership entitles a claimant to recovery based on a class judgment. But it is equally clear that it *is* a fiction, and persistence in error does not make it correct. *Mullins*, at least in its reasoning, perpetuates this erroneous conception of the class action as a proceeding in which absent class members never *really* have to prove any entitlement to recovery in a way that is consistent with the rules of evidence or due process. Instead, *Mullins* seems to imply that class members can simply rely on their own self-serving hearsay declarations, and a defendant must at that point decide whether to undertake individual defenses. Under normal rules of evidence and due process — which, again, are supposed to apply in a class action as in any other case — the plaintiff in fact must first come to court.

Kicking the Can Down the Road

The Seventh Circuit's reasoning raises another question: Why would identification of class members be more feasible at or after trial than at class certification? If ascertainability means essentially what the Seventh Circuit says it means — that when class members present themselves, they can be identified — why would that be more feasible after trial? Why shouldn't a plaintiff be able and required to show *how* that would occur as a prerequisite to class certification, rather than

only later? The Mullins decision looks very much like simply "kicking the can down the road" from this perspective.[2]

That same criticism was part of Judge Kayatta's dissent in *Astrazeneca AB v. UFCW (In re Nexium Antitrust Litig.),* 777 F.3d 9 (1st Cir. 2015) ("*In re Nexium*"), a reverse payment, pay-for-delay case brought under state law that preceded *Mullins*. *In re Nexium* was argued and decided principally as an overbreadth case, but it was decided in a way that implicates ascertainability. The class in *In re Nexium* was objectively defined as Nexium purchasers and payers, but the district court acknowledged the class would include some purchasers who were uninjured because, for example, they were brand loyalists who would not have purchased a generic product even if it had been available.[3] The court nevertheless certified the class, and the First Circuit affirmed, finding that the inclusion of a *de minimis* number of uninjured class members should not prevent class certification *so long as the uninjured members can be excluded before final judgment*, and that Astrazeneca had not proved that no mechanism could be devised to exclude them.[4]

The court cited *Carrera* in finding the class was ascertainable and noted that proper identification of eligible class members must be "'administratively feasible' and protective of defendants' Seventh Amendment and due process rights." *Id.* at 19. *In re Nexium* thus involves a classic tradeoff between overbreadth and ascertainability. The class *was* indeed overbroad as defined. The courts recognized this by requiring that uninjured members be excluded before final judgment. The courts implicitly redefined the class with qualifiers like "and is not a brand loyalist," but put off until another day how and when those qualifiers would have to be given effect.[5] The district court and court of appeals, in truth, papered over an ascertainability problem.

Judge Kayatta's cogent dissent points out a number of key problems with the majority opinion in *In re Nexium*, including its effectively "kicking the can down the road," its subtle shifting of the burden of proof to Astrazeneca, and the impropriety of the court's speculating that some means of excluding uninjured class members could be devised, when there was no effort to do so by the plaintiffs or the district court. The dissent also focused on the troubling question the majority did not answer, and which has not been answered in many other class action opinions:

> Even more daunting, what happens if tens or hundreds of thousands of Nexium purchasers file affidavits? How exactly will defendants exercise their acknowledged right to 'challenge individual damage claims at trial'?

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[2] It is often overlooked — and seemingly is by the Seventh Circuit in many of its class certification decisions — that defendants have a constitutional right "to have a jury properly determine the question of liability and the extent of injury by an assessment of damages." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

[3] Astrazeneca did not contest the Rule 23(a) requirements, including commonality. Because the Supreme Court held in *Wal-Mart* that plaintiffs must show that all class members necessarily would have suffered the "same injury" to establish commonality, defendants should be cautious about conceding commonality in cases involving uninjured class members and overbroad classes.

[4] One of the more troubling aspects of *In re Nexium* is its implicit shifting of the burden of proof onto the defendant. The majority avoided acknowledging that it did this by finding that plaintiffs had met their burden of showing that the class was not overbroad.

[5] Making the class definition subject to these to-be-effected qualifications effectively made this a form of fail-safe class, dependent on merits inquiry for each member.

Id. at 35. Indeed, when individual inquiries, discovery, and trial would be needed just to sort bona fide claimants from the uninjured, when and how is that process to take place? The district court and the parties would have confronted that logistical morass had the Nexium plaintiffs prevailed on the merits. As it happened, they avoided the problem because the Nexium case was tried to a defense verdict while Astrazeneca's petition for interlocutory appeal under Rule 23(f) was pending.

Two Important Lessons

One important lesson from these cases is that flexibility and adaptability are always at a premium in defending class actions. It is not a secret that the prerequisites for class certification and the issues involved frequently overlap, and that there often are different ways to present the same arguments against class certification. In the Seventh Circuit and courts that might follow it (pending any resolution of the ascertainability standard by the Supreme Court), defendants whose ascertainability arguments are limited by *Mullins* can still present those arguments under Rule 23(b)(3). Equally important is knowing a particular judge's class certification views, where available. Many judges tend to see class certification issues through some Rule 23 lenses more than others. Ascertainability is one of those issues: some judges tend to see issues in terms of class definitions, and some do not. Defendants again need to be adaptable and flexible.

A second lesson which takes a closer look to see is that there are potential pitfalls to be avoided by defendants under *both* ascertainability standards. The drawbacks of *Mullins* for defendants are more readily apparent, but defendants should also beware under *Carrera* approach of the risk of a requirement more exacting proof of class membership being used to justify limiting the opportunity to challenge it. If we say we want reliable proof, to what extent do we imply that we accept it as conclusive? In advocating for more rigorous proof of class membership, defendants should beware of trapping themselves into giving too much effect to documentary proposed as proof. Defendants rightly resist the use of unsupported affidavits for class members to identify themselves because they are unreliable. But documents and records can be unreliable as well. In fact, many kinds of records used to identify class members can be inaccurate, even fraudulent, or used inaccurately or fraudulently.[6]

Defendants therefore should think not only about what kinds of proof of class membership should be required, but also about the effect they should be given and what opportunity they will have to contest them. Defense counsel are well advised to study the *Carrera* and *Mullins* decisions and focus on protecting their due process rights *throughout* the proceeding. One aspect of that vigilance should be to ensure that more rigorous ascertainability and class definition standards do not come at the expense of due process later in the process. In some cases, a defendant may not be very concerned with this problem. It may not care *who* submits a sales receipt, so long as only one payment is made per receipt. But in other cases the procedural

[6] As just one example, documentation of securities holdings, such as registers, account records, and subscription agreements, are subject to fraud and inaccuracy. *See Gresser v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist. LEXIS 43302 (D. Md. March 31, 2014) (evidence including a sticky note proved that plaintiff and proposed class representative was not a bona fide note holder but rather had a side deal to receive additional interest and benefits).

opportunity that the defendant has to challenge proof of class members may be more important than the type of proof allowed in the first place.

Statistical Evidence & Trial by Formula

Use of statistical evidence has become a key area of controversy in class actions against drug and medical device companies, as it has in class actions generally. The Supreme Court provided some guidance on the use and limitations of statistical evidence in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), and in *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013).

In *Wal-Mart,* the Supreme Court held that statistical analyses comparing the pay and promotion rates of men and women by region could not provide common proof of gender discrimination, and that it was improper to certify the enormous class in that case under a scheme of "trial by formula," in which test cases would have been adjudicated in summary proceedings, with the results of winners and losers averaged and extrapolated to all class members. In *Comcast*, it held that the lower courts should have assessed the validity and fit of the plaintiff economists' damage model to the sole remaining theory of liability and antitrust injury in the case as part of the "rigorous analysis" required for class certification.

Both before and after those decisions, many courts have rejected the use of econometric analyses, such as regressions and conjoint studies, as class-wide proof of causation and injury in cases challenging the marketing of drugs and medical devices. *See, e.g.*, *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121 (2d Cir. 2010), *cert. denied*, 131 S.Ct. 3062 (2011) (reversing class certification and vacating denial of summary judgment in Zyprexa litigation); *Saavedra v. Eli Lilly and Co.*, 2014 U.S. Dist. LEXIS 179088 (C.D. Cal. Dec. 18, 2014) (denying class certification); *International Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co.*, 929 A.2d 1076 (N.J. 2007) (reversing class certification and holding theory of fraud on the market based on economist's opinion incapable of proving ascertainable loss under New Jersey's Consumer Practices Act). Some courts in fact have held that claims of price inflation or overpayment based on allegedly fraudulent promotional claims do not even state a claim under RICO or state consumer fraud statutes in the absence of allegations that the drug was ineffective or unsafe and thus medically inappropriate. *E.g.*, *Ironworkers Local Union 68 v. AstraZeneca Pharmaceuticals, LP*, 634 F.3d 1352 (11th Cir. 2011) (affirming dismissal).

A Departure & Setback

In 2013, however, the First Circuit sharply departed from this body of precedent, holding in its trilogy of opinions in the Neurontin sales and marketing litigation that an economist's opinion purporting to find that off-label promotion caused inflated prices and sales was sufficient to prove causation under RICO. *See Kaiser Foundation Health Plan, Inc. v. Pfizer, Inc.*, 712 F.3d 21 (1st Cir. 2013) (affirming judgment for plaintiff on RICO and UCL claims), *cert. denied*, 132 S. Ct. 786 (2013); *Aetna, Inc. v. Pfizer, Inc.*, 712 F.3d 51 (1st Cir. 2013) (reversing summary judgment on RICO claim and vacating summary judgment under a Pennsylvania Insurance Fraud Statute), *cert. denied*, 132 S. Ct. 786 (2013); *Harden Manufacturing Corp. v. Pfizer, Inc.*, 712 F.3d 60 (1st Cir. 2013) (reversing summary judgment on RICO claims, vacating summary judgment on New Jersey

statutory claims, and vacating and remanding for further proceedings denial of TPP class certification), *cert. denied*, 132 S. Ct. 786 (2013).

District Court Judge Saris's opinions denying certification of TPP and consumer classes in the Neurontin cases were a model analysis of the flaws in a typical attempt to pursue a theory of fraud on the market as a basis for class certification in a prescription drug case. *See In re Neurontin Sales & Mktg. Litig.*, 257 F.R.D. 315 (D. Mass. 2009); *In re Neurontin Sales & Mktg. Litig.*, 244 F.R.D. 89 (D. Mass. 2007). She explained why econometric analysis could not properly be used to show price inflation in a prescription drug market, and why, even if it could be used to show inflated *sales* (quantity), it could not support class certification, because it cannot distinguish sales allegedly caused by fraud from those that would have occurred anyway. All these issues, rather, are matters of intensive individual inquiry.

The First Circuit's rulings rejecting Judge Saris's analysis represent a high-water mark in judicial deference to quantitative social science, and not just quantitiative social science but quantitative social science that falls in important respects outside the mainstream and is justly regarded by many as junk science. The court's reliance on Dr. Meredith Rosenthal's opinion in vacating denial of certification of the TPP class was particularly adventuresome, because, as Judge Saris had explained, Dr. Rosenthal could offer no means of accounting for differences *among* TPPs and did not attempt to do so. The First Circuit never addressed that problem.

The Supreme Court denied Pfizer's petition for *certiorari* in the Neurontin litigation, as it had denied the plaintiffs' petition in the Zyprexa litigation. While the Second Circuit's approach to statistical proof in the Zyprexa litigation represents a predominant view, therefore, a significant degree of unresolved disagreement and uncertainty exists in the courts about the proper role, if any, of aggregate statistical evidence in drug and medical device marketing class actions.

Forthcoming from the Supreme Court: Broad Guidance or Narrow Ruling?

The case most closely watched at present regarding use of statistical proof to satisfy Rule 23 is *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146, argued in the U. S. Supreme Court on November 10, 2015. A wage and hour case under the federal Fair Labor Standards Act (FLSA) and Iowa law, *Tyson Foods* concerns employees who allegedly worked unpaid overtime for "doffing and donning," or putting on and taking off special clothing and equipment. The case was certified as a collective action under the FLSA and as a class action under Iowa law, and was tried on that basis. The plaintiffs' economists calculated average donning and doffing times for two categories of workers based on time studies of a sample of employees. Based upon those calculations, the jury awarded about $6 million, or roughly half the amount requested by the plaintiffs, as a lump sum award to the class. As Tyson Foods argued, this seems to be a prototypical example of the improper use of statistics to "paper over" dispositive differences among members of the class, some of whom admittedly would have no unpaid overtime and thus no claims, even accepting the validity of applying average unpaid time calculations to all employees. Because of this, the class action bar had anticipated a possibly important ruling by the Supreme Court in *Tyson Foods*.

The reactions of the justices at oral argument, however, suggest that *Tyson Foods* might not result in a broadly applicable and consequential decision providing guidance about aggregate statistical proof under Rule 23. At least four justices appear to view the issue as controlled not by Rule 23 but by substantive case law under the FLSA, specifically the Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In *Mt. Clemens* the Court held that when an employer has not kept adequate records, and an employee proves that he has done uncompensated work, the employee's burden of proof is carried if

> he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative [sic] the reasonableness of the inference to be drawn from the employee's evidence.

Id. at 688. In *Mt. Clemens,* the employees' burden was satisfied by a formula adopted by the district court to determine a uniform amount of uncompensated time for each employee. Tyson Foods argued that the *Mt. Clemens* rule applies only to the extent or amount of damages, not to the fact of injury or damage, noting the same distinction is made in antitrust law, from which the rule was adapted. Nevertheless, several justices appeared strongly to believe the same rule should also apply to the fact of injury and damage.

The record in *Tyson Foods* also contains ambiguities that raise doubt about the reach of the Court's forthcoming decision. The jury awarded only about half the lump sum requested, and the record does not reveal why. They were not asked to answer interrogatories that would explain the amount they awarded. They might have discounted the averages for uncompensated time calculated by plaintiffs' experts, or they could have imposed a discount for a number of employees they did not believe had worked uncompensated overtime even with the added time. In addition, several justices took interest in how the lump award would be allocated after remand and seemed to believe that questions relating to elimination of uninjured class members could be addressed then, or at least that the issue would not be fully ripe until then. According to the plaintiffs, there will be an allocation process after remand, and their experts can identify the specific employees entitled to recovery based on their experts' analyses. Tyson countered that the record does not provide a basis for allocation, because the jury did not make sufficiently specific findings.

The long and short of it is that these ambiguities and disagreements about the record, and the unique rule of proof under the FLSA that some Justices appear to believe resolves the questions at hand, raise doubt that the Supreme Court will hand down a decision of broad application and reach regarding use of statistical proof as a foundation for class treatment.

In the meantime, the more skeptical view of econometric and statistical proof in drug and device cases still appears to hold sway in the lower courts. A recent, good example is *Saavedra v. Eli Lilly and Co.*, 2014 U.S. Dist. LEXIS 179088 (C.D. Cal. Dec. 18, 2014). The plaintiffs in *Saavedra* claimed economic loss under four states' consumer laws on the ground that the withdrawal symptom rate for Cymbalta was higher than represented. Specifically, they sought recovery of a difference between the value of the product they expected and the allegedly lesser value they

received. They proposed to offer an economist's opinion as to this difference in value, based on a conjoint study, as common proof of causation, reliance, and damages. The court denied their motion for class certification, finding that consumer value is subjective and detached from price, and that price is not a proxy for value in an inefficient market.

Saavedra thus highlights the continued salience of several points that are important in these cases. Prescription drug markets are complex and inefficient, and theories of economic loss as a result of fraud on the market cannot appropriately be applied in this context. In addition, it is critically important to focus on the precise measure of recovery allowed by governing law. Elements like the value or utility to a consumer are inherently subjective and variable from one consumer to another and thus should provide no valid basis for class treatment of such claims. While some courts have gone astray in this area, the better arguments remain that these economic principles and econometric tools are misused under Rule 23 in the context of drug and medical device marketing.

A Rule 23(f) Loophole?

In October 2016, Microsoft filed a petition for *certiorari* in a consumer case involving the Xbox 360, asking the U. S. Supreme Court to decide whether a court of appeals has jurisdiction to hear an appeal of denial of class certification after plaintiffs voluntarily dismiss their case to facilitate an immediate appeal. In a previous case, a federal district court denied class certification, and the Ninth Circuit denied a petition for interlocutory review. *In re Microsoft Xbox 360 Scratched Disc Litig.*, 2009 U.S. Dist. LEXIS 109075 (W.D. Wash. Oct. 5, 2009). Those individual claims were settled.

Later, the same lawyers filed another putative class action in the same court, arguing that the intervening decision *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168 (9th Cir. 2010), supported certification of a consumer class. The district court disagreed and struck the class allegations, *Baker v. Microsoft Corp.*, 851 F. Supp.2d 1274, 1276 (W.D. Wash. 2012), and the Ninth Circuit again denied the plaintiffs' Rule 23(f) petition. On remand, the new plaintiffs moved to voluntarily dismiss their claims with prejudice to obtain a final judgment from which they could appeal denial of class certification. Microsoft stipulated to the dismissal but in doing so took the position that plaintiffs would have no right to appeal the striking of their class allegations. A panel of the Ninth Circuit, however, took jurisdiction of the appeal, citing *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014), and reversed the order striking the class allegations. *Baker v. Microsoft Corp.*, 797 F.3d 607 (9th Cir. 2015) (amended order).

The Ninth Circuit's decision appears to create a circuit split. Five other courts of appeal have held that they lack jurisdiction to review a denial of class certification following a plaintiff's voluntary dismissal or abandonment of claims. *See Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245-47 (3d Cir. 2013); *Rhodes v. E.I. DuPont de Nemours & Co.*, 636 F.3d 88, 100 (4th Cir.), *cert. denied*, 132 S. Ct. 499 (2011); *Chavez v. Illinois State Police*, 251 F.3d 612, 629 (7th Cir. 2001); *Woodard v. STP Corp.*, 170 F.3d 1043, 1044 (11th Cir. 1999) (applying *Druhan v. Am. Mut. Life*, 166 F.3d 1324, 1325-26 (11th Cir. 1999) (holding the court has no jurisdiction over an appeal

following voluntary dismissal with prejudice) in the context of a putative class action); *Bowe v. First of Denver Mortg. Investors*, 613 F.2d 798, 801 (10th Cir. 1980).

On the other side, along with the Ninth Circuit, the Second Circuit has held that a plaintiff may procure appellate jurisdiction by having claims dismissed for failure to prosecute. *See Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 178-79 (2d Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991).[7]

The voluntary dismissal in *Baker* occurred, and was stipulated, following denial of the plaintiffs' Rule 23(f) petition, in which they argued that the denial of class certification was the "death knell" of their claims. The Ninth Circuit's opinion does not indicate whether the result would be different if plaintiffs dismissed without even seeking review under Rule 23(f).

The plaintiffs in *Saavedra* are pursuing a strategy that could shed some light on that question. That court twice denied class certification. The Ninth Circuit denied the plaintiffs' Rule 23(f) petition the first time. The district court denied class certification again in July. *See Saavedra v. Eli Lilly and Co.*, slip op., No. 2:12-cv-9366-SVW (MANx) (C.D. Cal. July 21, 2015). Over Eli Lilly's opposition, the court then granted the plaintiffs' motion to dismiss on October 23, 2016, and plaintiffs filed a notice of appeal on November 23. Lilly had argued that voluntary dismissal would be prejudicial to it, particularly since it recently had won three individual Cymbalta trials in which individual discovery was a key.

The Ninth Circuit's ruling would seem to open a significant loophole around Rule 23(f), allowing plaintiffs (but without corresponding right of defendants) to avoid the discretionary standard of the rule and instead file an appeal as of right. Given the circuit split and the significance of the issue, the Supreme Court may well choose to weigh in. A response to Microsoft's petition for certiorari in *Baker* is due to be filed December 14, 2015.

[7] The petition for *certiorari* did not concern the jurisdictional question.