

Cannabis Consumer Class Actions: The Implicit and Indispensable Ascertainability Requirement

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In the last month, plaintiffs have filed a spate of consumer class actions against manufacturers of cannabis-based products. Specifically, plaintiffs have focused on manufacturers of CBD products, claiming the amount of CBD in the product differs from the amount stated on the label. Plaintiffs purport to be consumers who purchased products. But instead of consuming the product, they engaged a third-party lab to test the amount of CBD in the product. When they find a product with a discrepancy, they file class action claims asserting consumer protection, warranty, and common law theories of recovery. This article addresses an important and often overlooked defense to these class action claims - ascertainability.

Although there remains a split of opinion among the federal circuit courts, until the Supreme Court resolves this issue, manufacturers facing a class action like those described above should argue that ascertainability is an indispensable, albeit implicit, element that plaintiffs must satisfy to prevail on class certification. The importance of this element is even more acute when the claims are directed at product manufacturers, as opposed to retail sellers.

The Eleventh Circuit highlighted this point in its 2015 opinion in *Karhu v. Vital Pharmaceuticals, Inc.*, 621 F. App'x 945 (11th Cir. 2015). In *Karhu*, the plaintiff alleged that he purchased a dietary supplement marketed by the defendant, and that supplement did not perform as advertised. The plaintiff sought to certify both a nationwide class and a subclass of New York purchasers. The district court denied certification because the plaintiff failed to meet the ascertainability requirement. The Eleventh Circuit affirmed.

The Eleventh Circuit reiterated that the burden is on the plaintiff to satisfy the requirements of certification under Rule 23, including that the "proposed class is adequately defined and clearly ascertainable." It explained, "[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. Identifying class members is administratively feasible when it is a 'manageable process that does not require much, if any, individual inquiry.'"

The court continued, "A plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible." The Eleventh Circuit concluded that a process in which putative class members would "self-identify" via an affidavit presented due process concerns by limiting the defendant's ability to challenge the affidavits. Such a process would result in mini-trials that would overcome the requirement that ascertainability be administratively feasible.

The court also held that the plaintiffs had failed to explain to the district court how a process of subpoenaing records from distributor and retailer intermediaries would solve the ascertainability prong.

The takeaway is that any manufacturing defendant that relies on distribution networks, as opposed to direct retail sales, should not overlook the ascertainability requirement when defending a class action. Defendants in these cases would be wise to force class representatives to prove ascertainability involving a putative class that likely did not purchase the goods directly from the defendant, and has no product left (after consuming it). Ascertainability and the requirement of administrative feasibility in identifying a class could be the difference-maker in the class certification analysis.

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