



## News Release

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### **DRI Files Amicus Brief Seeking Supreme Court Review in *Mullins v. Direct Digital, LLC***

#### *Split Among Circuits Regarding Ascertainability of Class Members At Issue*

**CHICAGO – (December 4, 2015)**—DRI – The Voice of the Defense Bar has filed an amicus brief seeking U.S. Supreme Court review in *Mullins v. Direct Digital, LLC*. The brief was filed through DRI's Center for Law and Public Policy.

In this case, Vince Mullins alleges that he bought Direct Digital's product Instaflex (a glucosamine supplement) to relieve knee pain. He says he remembers purchasing Instaflex from a GNC sometime in February 2013, but he has no proof of purchase: no receipt, no credit card record (because, he says, he paid with cash), and not even the bottle that he claims to have purchased. In March 2013, he filed a consumer class action against Direct Digital, alleging that statements on Instaflex's product packaging are not true and claiming that statements on the packaging violate the Illinois Consumer Fraud Act.

At the district court, Mullins moved to certify a class of "[a]ll consumers in Illinois and states with similar laws, who purchased Instaflex within the applicable statute of limitations." Direct Digital opposed, arguing primarily that Mullins had failed to satisfy Rule 23(b)'s ascertainability requirement. Citing authority from the Third and Eleventh Circuits, Direct Digital maintained that Mullins's proposed class could not be certified because he had made no showing that the members of the class could be feasibly and reliably ascertained. Mullins did not attempt to show that his proposed class could be feasibly and reliably ascertained; instead, he argued that the court should certify his class as long as it was defined by objective criteria, even if there was no way of actually applying that criteria to ascertain class members. The district court accepted Mullins's argument and certified the class.

The Seventh Circuit granted Direct Digital's request to appeal the district court's class certification decision under Rule 23(f). It held that the plaintiff has no obligation at the class certification stage to show that class members could be feasibly and reliably ascertained. Instead, the Seventh Circuit endorsed a “weak” test for determining whether the members of a class are “ascertainable” before certifying a case as a class action. The court expressly rejected the need for “reliable” and “administratively feasible” methods for examining class eligibility requirements. The court’s opinion reflects a clear circuit split: the Seventh and Sixth Circuits now apply this weak ascertainability test; whereas the Second, Third, Fourth, and Eleventh Circuits apply a stronger standard that requires administratively feasible methods for identifying class members prior to class certification.

The defendant has petitioned the Supreme Court of the United States for a writ of certiorari to address the circuit split, and to adopt the stronger standard as more protective of defendants’ rights and more consistent with the letter and spirit of Federal Rule of Civil Procedure 23. DRI submitted a brief as amicus curiae in support of the petition.

DRI’s brief addresses the important role the ascertainability requirement plays in protecting against abuses of the class action procedure, and describes the need for a strong, meaningful ascertainability standard to guard against those abuses. Specifically, applying a strong ascertainability standard protects Rule 23’s purpose of binding all class members to the outcome; avoids the need for time-consuming proceedings throughout the litigation to determine who is a class member; and reduces the likelihood that damages or settlement proceeds will be paid to third parties as *cy pres* relief when class members prove unidentifiable at the conclusion of a case. A strong ascertainability standard is an important procedural safeguard against some of the most recurring and familiar abuses that plague class action litigation.

The briefs co-authors, Scott Burnett Smith, Michael R. Pennington, Edmund Sauer, and Simon Bailey of the law firm Bradley Arant Boult Cummings LLP, will be made available for interview or expert comment through DRI’s Communications Office. The DRI brief in its entirety can be found [here](#).

#### ***About DRI – The Voice of the Defense Bar***

*For more than fifty years, DRI has been the voice of the defense bar, advocating for 22,000 defense attorneys, commercial trial attorneys, and corporate counsel and defending the integrity of the civil judiciary. A thought leader, DRI provides world-class legal education, deep expertise for policy-makers, legal resources, and networking opportunities to facilitate career and law firm growth. For more information, log on to [www.dri.org](http://www.dri.org)*

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