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Third Circuit Clarifies the Ascertainability Standard in Class Certification Proceedings

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In a precedential opinion issued on April 16, 2015, the Third Circuit sought to clarify its requirement that a proposed class be sufficiently ascertainable in order to be certified under Fed. R. Civ. P. 23(b)(3). Expressing concern that class action defendants had been invoking the ascertainability requirement with “increasing frequency in order to defeat class certification,” the Third Circuit cautioned that the ascertainability inquiry is limited to a determination of whether class members can be objectively identified at the certification stage. *Byrd v. Aaron’s Inc.*, No. 14-3050, slip op. at 28 (3d Cir. Ap. 16, 2015).

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The Byrd Decision

In *Byrd*, the plaintiff leased a laptop computer from Aspen Way, a franchisee of Aaron's Inc. When Aspen Way sought to repossess the laptop due to alleged non-payment, it disclosed a screenshot of Mr. Byrd using the computer on an internet poker website, which it had obtained through the use of spyware. The spyware installed on the laptop was capable of capturing screenshots, keystrokes, and webcam images of its users.

After seeing the photo and learning about the spyware, the Byrds initiated a class action suit against Aaron's, Aspen Way, and other Aaron's franchisees (which were subsequently dismissed from the case) for violations of the Electronic Communications Privacy Act (ECPA). In its motion for class certification, the Plaintiffs proposed the following class definitions:

Class I: All persons residing in the United States, who have purchased, leased, rented or rented to own, Aaron's computers and individuals who used said computers whose personal information, electronic communications and/or images were intercepted, used, disclosed, accessed, monitored and/or transmitted via PC Rental Agent or other devices or software without the customers authorization.

* * *

Class II: All customers of the Aaron's Defendants who reside in the United States, who have purchased, leased, rented or rented to own, Aaron's computers and individuals who used said computers whose personal information, electronic communications and/or images were intercepted, used, disclosed, accessed, monitored and/or transmitted by the Aaron's Defendants via PC Rental Agent or other devices or software without the customers authorization.

Plaintiffs also set forth an alternative definition for Class II as:

All persons residing in the United States, who have purchased leased, rented or rented to own, Aaron's computers from Aspen Way Enterprises, Inc., d/b/a Aarons Sales and Leasing, and individual who used said computers whose personal information, electronic communications and/or images were intercepted, used, disclosed, accessed, monitored and/or transmitted by Aspen Way and/or Aaron's via PC Rental Agent or other devices or software without the customers authorization.

Accordingly, the plaintiffs proposed to identify the class members by reference to individuals who were actually harmed by having their personal communications or electronic information intercepted by the spyware. Defendants argued that these proposed classes were not sufficiently ascertainable because there was no way objectively to determine which owners or lessees of the computers at issue had been so injured. See *Byrd v. Aaron's, Inc.*, No. 11-101, 2014 U.S. Dist. LEXIS 44322, at **19-20 (Jan. 31, 2014). The district court agreed, noting that “[n]ot every computer upon which [the spyware] was activated will state a claim under the ECPA for the interception of an electronic communication.” *Id.* at * 23.

The Third Circuit reversed the district court, and concluded that the proposed classes were sufficiently ascertainable. In so holding, the court stated that its two-prong ascertainability test requires only (1) a class to be “defined with reference to objective criteria,” and 2) that there is a “reliable and administratively feasible” method for determining the class. *Byrd*, slip op. at 22-23 (citing *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 593-94 (3d Cir. 2012)). The court further cautioned that in administering this “narrow” inquiry, district courts should not “infuse the ascertainability inquiry with other class-certification requirements.” *Id.* at 28. In this case, the court reasoned that the “owners and “lessees” of Aaron’s computers, as well as the identity of those computers on which spyware had been activated, could be identified objectively through Aaron’s records. The court concluded defendants’ argument that one could not determine whether personal information or electronic communications had in fact been intercepted (the precise language of the class definition) went to the question of predominance, not ascertainability.

The Effect on Ascertainability as a Tool to Defeat Class Certification

The Third Circuit’s decision in *Byrd* does not purport to change the previously articulated ascertainability standard. However, its clarification of the “narrow” inquiry will necessarily limit defendants’ ability to defeat against class certification on ascertainability grounds. More specifically, defendants will find it more difficult to argue against proposed classes whose members may be identified though objective records, even if those class members did not necessarily suffer an actual injury. While ascertainability remains a tool in defendants’ arsenal, parties opposing class certification will likely focus their arguments more sharply on the traditional four elements of the Rule 23 test.