Third Circuit "clarifies" ascertainability: Is the Circuit split?

May 7, 2015

Introduction

Ascertainability has received growing attention with the class action defense bar in recent years. An implied prerequisite to the express elements of Rule 23(a), the ascertainability inquiry asks two questions: Is the class defined by reference to objective criteria, and is there an administratively feasible mechanism available to the trial court to figure out who fits within the proposed class?

The inquiry is an important one. A court has no way of knowing who is in the class—and who is entitled to notice—if the class definition doesn't tell you precisely who is an eligible class member. If the class definition lacks definiteness, then the court can't figure out who is in the class without engaging in extensive, individualized fact-finding. That defeats the whole purpose of aggregate litigation and goes to the heart of the ascertainability inquiry.

There is a closely related constitutional concern. If the court can't tell who belongs in the class, then absent class members may not receive the notice they are entitled to, and may lose their right to opt out. Due process requires that the class representative fairly and adequately represent the interests of absent class members. But how can the representative fulfill this duty if they don't know who is in the class?

Defendants have a stake, too. They are entitled to the assurance that all class members are bound by the judgment. But if the class isn't ascertainable, then absent class members may be able to avoid the finality of judgment by showing that their interests either weren't implicated or protected.

The Third Circuit has been especially influential in this arena, having issued four cases in three years on this topic.[1] On April 16, 2015, it issued a fifth: Byrd v. Aaron's, Inc., No. 14-3050, 2015 U.S. App. LEXIS 6190 (3d Cir. April 16, 2015). Why? It said that it was "necessary to address the scope and source of the ascertainability requirement" because of "apparent confusion in the invocation and application" of the doctrine in the Third Circuit. Byrd, 2015 U.S. App. LEXIS at *9. Its concern:

> [D]efendants in class actions have seized upon [the] lack of precision by invoking the ascertainability requirement with increasing frequency in order to defeat class certification.

Id. at *10.

This headline surely demands the attention of every class action pactione. Is the Third Circuit having second thoughts about its prior decisions? A review of the Byrd case suggests that perhaps this is the case, at least for that panel. Indeed,

Byrd may do more than merely clarify the ascertainability inquiry. It has created a subtle, yet significant departure from its most recent pronouncement in this area and appears to have created an intra-circuit split in the process. Everyone should take notice. Here's what happened.

Byrd v. Aaron's, Inc.

Crystal and Bryan Byrd leased a lap top computer from Aspen Way, a franchisee of Aaron's, Inc., a national rent-to-own company. She claimed that she made all of the payments, but an agent appeared at her home to repossess the computer for non-payment. In the course of their conversation, the agent revealed that he had screen shots of a poker web site visited by Mr. Byrd, as well as a photo taken by the computer while he was playing. How did Aspen Way get this information? It had installed and activated spyware on the lap top without the Byrds' knowledge or consent. In fact, the spyware had accessed the Byrds' computer 347 times on eleven different days. It turned out that 895 other customers had the same issue. Byrd, 2015 U.S. App. LEXIS at *3–4.

Disturbed by this invasion of their privacy, the Byrds filed a Rule 23(b)(3) class action lawsuit asserting claims under the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C. § 2511. They sought to certify a class of all purchasers and lessees "and their household members," whose computers contained spyware that was "installed and activated without such person's consent." Id. at *5–6.

The Magistrate Judge, whose Report and Recommendation was adopted by the district court, denied class certification on the basis that the class was not ascertainable. The Magistrate Judge was troubled because the plaintiffs failed to define of the term "household members," and did not believe that they had adequately identified any way to determine who these people were from a review of public records. Id. at *8.

The Ascertainability Inquiry

The Third Circuit accepted interlocutory review, and reversed. It found four bases for reversal, all arising from a single conceptual flaw: The Magistrate Judge "conflated" the ascertainability analysis with the other elements of Rule 23 and, in so doing, furthered the "apparent confusion in the invocation and application of ascertainability in" the Third Circuit. Id. at *19, 22. The court took the opportunity "to dispel any confusion" on this subject. The court first reaffirmed "two-fold" inquiry for ascertainability:

> [It] requir[es] a plaintiff to show that: (1) the class is "defined with reference to objective criteria"; and (2) there is "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition."

Id. at *15 (citations omitted).

The court emphasized (a) that the "ascertainability requirement consists of nothing more than these two inquiries," (b) that it "is narrow," and (c) that it is distinct from each of the other elements of Rule 23. Id. at *15, 21.

The court also reaffirmed its prior holding in Carrera v. Bayer Healthcare Corp., 727 F.3d 300, 306 (3rd Cir. 2013), that "[t]he rigorous analysis requirement [of Rule 23] applies equally to the ascertainability inquiry." But the court cautioned: "If defendants intend to challenge ascertainability, they must be exacting in their analysis and not infuse the ascertainability inquiry with other class-certification requirements." Id. at *21.

Conflating The Elements Of Rule 23

The court then went on to demonstrate just how it believed the Magistrate Judge had conflated ascertainability with the other elements of Rule 23. The Magistrate Judge had, according to the court:

- "[B]lended the issue of ascertainability with that of the class definition" when he recited the class definition standard while purporting to rule on ascertainability. Id. at *22–23.
- Discussed whether the named plaintiffs were part of their own class, which relates to standing and not to either ascertainability or the class definition. Id.
- Found lack of ascertainability because the class was "underinclusive" (i.e., Aspen Way's business records could not tell which customers' information had been "intercepted," which was an element of the ECPA), even though ascertainability isn't designed to "force all potential plaintiffs who may have been harmed in different ways by" the same defendant into the same class. Id. at *25–27.
- Found lack of ascertainability because the class was "overly broad" (i.e., as defined the class included those whose spyware was activated but never intercepted, and thus included those who lacked standing). But that argument, according to the court, conflates ascertainability, over-breadth/predominance, and Article III standing. Each should be addressed separately, all subject to "rigorous analysis." Id. at *27–30.

The court then ruled that the term "household members" was ascertainable because the plaintiffs "presented the District Court with various ways in which 'household members' could be defined and how relevant records could be used to verify the identity of household members." Id. at *32. The key: Ascertainability "does not mean that a plaintiff must be able to identify all class members at class certification—instead, a plaintiff need only show that 'class members can be identified.'" Id. at *15 (quoting Carerra, 727 F.3d at 308 n.2) (emphasis in original).

Red Flag: Timing

It is this aspect of the ruling that raises red flags. The court acknowledged that there would be ambiguity in determining exactly who was—or wasn't—a "household member" of a purchaser or lessee. See id. at *34–35. But figuring out who and how many such "household members" were connected to the 895 class members "does not require a 'mini-trial,' nor does it amount to 'individualized fact-finding.'" Id. at 35. Why? Because "anyone charged with administering the fund resulting from a successful class action [will] ensure that person is actually among the 895 customers identified by the Byrds." Id. at *35.

In other words, the term "household members" was ascertainable not because it is administratively feasible for the trial court to figure it out at the class certification stage, but because a claims administrator would be able to sort it out after class certification and judgment on the merits.

If this is what the Third Circuit meant, it is startling indeed. As an implied prerequisite to Rule 23 certification, the ascertainability analysis has to be performed before certification, not after. And it needs to be performed by the court, not the claims administrator.

That's because the court needs to be able to ascertain class membership to ensure that class members receive notice before trial to so that they can either opt out or be bound by the judgment. Any rule that permits notice after trial re-introduces the now-discredited practice of one-way intervention, which Rule 23 was amended to preclude:

> Before 1966, actions for damages could be prosecuted in the federal courts as class actions without binding the absent class members prior to judgment. Absent class members were permitted to intervene and take advantage of a victory by the plaintiff in a "spurious class action," but only the named plaintiff was bound if the defendant prevailed. The 1966 revisions to Rule 23 were designed, in part, to end this one-way intervention. Now the district court is required to determine whether a class is maintainable, "as soon as practicable after the commencement of an action brought as a class action." Fed. R. Civ. P. 23(c)(1). If an action is to be maintained pursuant to Rule 23(b)(3), absent class members are to be provided "the best notice practicable under the circumstances" and an opportunity to exclude themselves from the class. Fed. R. Civ. P. 23(c)(2). Once this opt-out date has passed, absent members are bound by the judgment. In order to prevent one-way intervention, it is critical that the district court make the certification and direct notice to the absent class members at an early stage in the litigation.

Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 193 F.3d 415, 429–30 (6th Cir. 1999) (emphasis added) (citations omitted).

Red Flag: How Much Inquiry Is Appropriate?

But there's more. In Carrera, the court held that a truly "manageable process [is one] that does not require much, if any individualized factual inquiry." Carrera, 727 F.3d at 307. Think about this: Most courts say that "mini-trials" and individualized determinations cut against ascertainability. But few have quantified just how much individualized evidence will render a class un-ascertainable. In the Third Circuit, the answer was clear: "Not much, if any."

But the Byrd court took a very different view. It said:

> Carrera does not suggest that no level of inquiry as to the identity of class members can ever be undertaken. If that were the case, no Rule 23(b)(3) class could ever be undertaken. We are not alone in concluding that "the size of a potential class and the need to review individual files to identify its members are not reasons to deny class certification." See Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 539–40 (6th Cir. 2012).

Byrd, 2015 U.S. App. LEXIS at *35 (emphasis in original).

True, Carrera didn't say that "no" inquiry can ever be undertaken. But the Young case approved the review of hundreds of thousands of individual local government premium tax assignments as administratively feasible. Invoking Young stands in sharp contrast to the "not-much-if-any" standard approved in Carrera.

The Byrd case is thus inconsistent with Carrera, and suggests a deeper disagreement between the two panels not only as to how much inquiry is too much, but who should make the decision and when. This difference cannot be overstated. To delegate the ascertainability inquiry to a claims administrator to resolve thousands of individual questions eviscerates the mandate of both Wal-Mart Stores, Inc. v. Dukes, ___ U.S. ___, 131 S. Ct. 2541 (2011), and Carrera, that the trial court perform a "rigorous analysis" of each element of Rule 23 prior to class certification.

The Takeaways

Here are the takeaways:

- Ascertainability is a narrow inquiry and should be addressed separately from each of the other elements of Rule 23.
- Defendants challenging ascertainability must be "exacting in their inquiry," i.e., they must not conflate or confuse ascertainability with the other elements of Rule 23.
- The plaintiffs' burden is comparatively light: They need only show that a class can be identified, not that every class member is actually identified at class certification.
- Byrd appears to depart from the Carrera "not-much-if-any" standard quantifying the amount of effort that should be expended in ascertaining class members.
- Byrd raises serious questions about the timing of the ascertainability analysis, and the possible inadvertent introduction of the one-way intervention rule.

Footnotes

1. The "quartet" of cases is: Grandalski v. Quest Diagnostics, Inc., 767 F.3d 175, 179 (3d Cir. 2014); Carrera v. Bayer Corp., 727 F.3d 300, 306–08 (3d Cir. 2013); Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 354 (3d Cir. 2013); and Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 592–94 (3d Cir. 2012).

Authors

Drew H. Campbell
Partner

Columbus
614.227.2319
dcampbell@bricker.com