

Failed Class In Aaron's Spying Suit Asks 3rd Circ. For Cert.

By **Emily Field**

Law360, New York (October 27, 2014, 7:41 PM ET) -- A pair of consumers have asked the Third Circuit to overturn a lower court's denial of class certification in a lawsuit alleging Aaron's Inc. franchisees installed spyware on computers, arguing the class members can be reasonably identified through the rent-to-own retailer's records.

Plaintiffs Crystal and Bryan Byrd contended in a brief Thursday that Aspen Way Enterprises Inc., one of the retailer's franchisees, had conceded that the retailer had an index of nearly 1,000 computers with activated spying programs and devices. The plaintiffs say it is administratively feasible to compare that list with the retailer's lease records to identify class members whose electronic communications were intercepted in violation of the Electronic Communications Privacy Act.

The Byrds argued that Aaron's itself proved it could identify class members earlier this month when, two days before it filed its brief with the Third Circuit, it agreed to provide the state of California with a list of customers to whom the retailer owed restitution in a separate case.

Aaron's **agreed to pay** \$25 million to consumers to settle a suit brought by the California attorney general alleging the retailer used programs on its rented computers to spy on its customers.

"Apparently, Aaron's knows full well how to identify its customers when it so chooses," the Byrds said.

A Pennsylvania federal judge **denied class certification** in March, saying the proposed definitions were too vague. The judge said the definitions of the two classes the plaintiffs wanted to certify failed to meet ascertainability standards, agreeing with Aaron's that using "terms of art" from the ECPA in order to define the class effectively defined the class by reference to the alleged violation of the statute rather than "reference to objective criteria."

The judge also dismissed a claim of conspiracy to violate the ECPA but preserved the suit by ruling the Byrds had sufficiently pled a claim for direct liability under the ECPA.

The plaintiffs said in their reply brief to the circuit court that they merely have to show it is more likely than not that they can prove class membership objectively in a reliable and feasible manner and that their class definition of Aaron's customers who bought or leased a computer and their household members meets that standard.

"To avoid the objective class definitions presented, [defendants Aaron's and Aspen Way] confect the argument that [the Byrds] merely established a means of identifying the owner/lessee of the computer, not its user — a distinction intended to defeat the objective definitions by introducing irrelevant, subjective, factual considerations into the mix," the Byrds said.

The Byrds also said they proved household members are easily identified through objective evidence such as driver's licenses and school records, contrary to Aaron's contention that proving household membership is not extensive and individualized.

"The defendants create a mountain from a molehill," the Byrds said. "The district court accepted their argument by misapplying fact to law. This was an abuse of discretion."

The Byrds' lawsuit makes claims similar to those in a U.S. Federal Trade Commission lawsuit that Aaron's settled last October: that company franchisees installed DesignerWare LLC's PC Rental Agent software on the rent-to-own computers, which enabled them to spy on users.

The FTC suit claimed Aaron's knowingly played a direct and vital role in its franchisees' installation and use of software on rental computers that secretly monitored consumers, including by taking webcam pictures of them in their homes.

Representatives for the parties did not immediately respond to requests for comment Monday.

The plaintiffs are represented by Levin Fishbein Sedran & Berman, Jamieson & Robinson LLC, the Spence Law Firm LLC, Herman Gerel LLP and Herman Herman & Katz LLC.

Aaron's is represented by Buchanan Ingersoll & Rooney PC, Alston & Bird LLP and Knox McLaughlin Gornall & Sennett PC.

The case is Crystal Byrd et al. v. Aaron's Inc. et al., case number 1:11-cv-00101, in the U.S. District Court for the Western District of Pennsylvania.

--Additional reporting by Juan Carlos Rodriguez. Editing by Brian Baresch.

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