

Ninth Circuit Holds That Class Member Declarations Do Not Support Finding of Commonality in Class Action

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On September 3, 2013 in *Thomasson v. GC Services, LP*, -- Fed. Appx. --, No. 11-56100, 2013 WL 4713560 (9th Cir. Sept. 3, 2013), the U.S. Court of Appeals for the Ninth Circuit reversed and remanded with instructions to de-certify a class action alleging violations of the federal Fair Debt Collection Practices Act ("FDCPA"). This action was filed in May 2005, with the plaintiffs (a former law school student of one of putative class counsel, and his wife) claiming that the defendant-debt collection company violated the FDCPA and California's Invasion of Privacy Act ("CIPA") by allegedly failing to advise debtors that their telephone conversations may be monitored or recorded for quality assurance purposes. The district court granted summary judgment to the defendant on all counts but, on appeal, the Ninth Circuit reversed summary judgment and remanded on the FDCPA claim; it affirmed summary judgment on the CIPA claim.

On remand, the district court granted certification to a class consisting of 412 individuals whose telephone calls with the defendant allegedly were monitored without the debtors' consent but, at the same time, held that "Plaintiffs' class definition may require a threshold inquiry to determine class membership. It clearly requires an individualized inquiry into the content of the telephone calls to determine whether the advisement was given and, if so, when it was given." The Ninth Circuit granted the defendant's petition for an interlocutory appeal and reversed the district court's class certification order, finding that the lower court had abused its discretion. More specifically, the Ninth Circuit held that individualized inquiries into hundreds of telephone calls would be necessary in order to determine whether any advisement was given in each call and that the evidence submitted by the plaintiffs - 18 fill-in-the-blank declarations from putative class members - could not establish that the defendant acted uniformly and were only "anecdotal." At bottom, the court held that commonality and predominance were lacking and that no class could be certified.

Thomasson is just one in a line of recent decisions that have criticized the use of putative class member affidavits or declarations to meet Rule 23's class certification requirements. For example, in late August in *Carrera v. Bayer Corp.*, -- F.3d --, No. 12-261, 2013 WL 4437225 (3d Cir. Aug. 21, 2013), the Third Circuit found that a class could not be ascertained based on, among other things, consumer affidavits. For more information about the *Carrera* decision, please see our previous blog posting [here](#). *Thomasson* demonstrates that courts are continuing to scrutinize the quality of evidence that plaintiffs proffer to meet their class certification burdens.