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California Class Certification Ruling Offers Hope On Ascertainability

Possibly driving the final nail into the coffin of a \$360 million jury verdict, California's First District Court of Appeal affirmed for the second time a denial of class certification based on difficulty in identifying the members of the proposed class. While courts in recent years often have shirked their responsibility to carefully scrutinize class certification motions, the decision offers some reassurance to defendants hoping to defeat class certification based on ascertainability arguments. It also is a welcome signal to class action plaintiffs that not every court will indulge endless repleading after losses on the merits of the original claims.

Miller v. Bank of America, N.A., No. A132323 (January 25, 2013), is a challenge to setoffs against exempt funds such as social security deposits in bank accounts. The original theory of the case was that the defendant bank could not set off overdraft and bank fees against the balances of accounts in which Social Security and other public benefit payments had been deposited because such payments are legally exempt from levy. After plaintiffs prevailed at trial on this theory, the judgment was reversed by the California Supreme Court on the basis that activity within a single account is distinguishable from the unlawful two-account setoffs addressed in *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352 (1974), the case relied on by plaintiff.

After remand, plaintiff amended his complaint to allege a new two-account claim based on a new two-account class: persons "who had at least two accounts with the Bank, one of which received electronically deposited exempt funds, and from which the Bank seized exempt funds to collect sums allegedly owed from a separate account." Affirming the trial court, the Court of Appeal noted that the proposed class was overbroad because not all setoffs would affect funds exempt from levy, and plaintiff had failed to prove a reasonable means of determining when a setoff affected exempt rather than non-exempt funds. The court also affirmed the trial court's denial of further class certification discovery, saying it was "too late" for yet another bite at the apple after fifteen years of litigation.

By: *Giovanna A. Ferrari* and *Scott M. Pearson*

Giovanna A. Ferrari and *Scott M. Pearson* are partners in Seyfarth's Consumer Financial Services Litigation group. If you would like further information, please contact your Seyfarth attorney, Giovanna A. Ferrari at gferrari@seyfarth.com or Scott M. Pearson at spearson@seyfarth.com.