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Newcases of Business Litigation Interest

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Appealability—Class Actions—Orders Striking Class Allegations Without Prejudice Are Appealable

Determining whether certain orders relating to class action claims are appealable can be tricky and high stakes, as a party who fails to appeal an appealable order loses the right to do so. Under the death knell doctrine, an order that terminates class claims is appealable as tantamount to a dismissal of the action as to all class members. But what if the plaintiff is given leave to amend? That was the question in *Williams v. Impax Laboratories, Inc.*, 41 Cal.App.5th 1060 (2019). In December 2017, the trial court struck class allegations from Williams' complaint, holding Williams was not a suitable class representative, but gave leave to amend to add a new plaintiff. Williams did not appeal. Instead, she re-alleged the class allegations, but did not add a new class representative. The trial court again struck the class allegations based on the December 2017 order. Williams appealed. The court of appeal dismissed the appeal, holding the December 2017 order was appealable under the death knell doctrine even though Williams was given leave to amend. The court distinguished cases holding orders denying or decertifying a class without prejudice are not appealable. Unlike the December 2017 order in *Williams*, such orders do not "in effect strike the class allegations from the complaint." Because Williams had not appealed the December 2017 order, and because her appeal was effectively a challenge to that order, the appeal was dismissed.

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Appealability—Class Actions—Pre-Certification Orders Not Appealable as Injunctions

In *Brown v. Upside Gading, LP*, 42 Cal.App.5th 140 (2019), defendant Upside appealed from an order invalidating releases Upside obtained from putative class members, finding the releases were misleading, coercive, and one-sided. The order also required Upside to provide plaintiffs' counsel with copies of the releases and contact information for the signatories, and required the parties to meet and confer regarding a corrective notice to be sent to the putative class members. Upside appealed, arguing the order was appealable under CCP section 904.1(a)(6) as a mandatory injunction because it required Upside take specific action with respect to the putative class members. The court of appeal disagreed and dismissed the appeal. The court noted nearly all court orders "require[] some action or inaction from one or both parties or their counsel," but this "does not render nearly all court orders injunctive in nature." Rather, orders that are "part and parcel of the class certification process" cannot be considered injunctions, even if they require the parties to take some action related to the class.

Arbitration—Proving Agreement to Arbitrate—Authenticating Electronic Signatures

Although the law makes clear "[t]he burden of authenticating an electronic signature is not great" because "an electronic signature is attributable to a person if it is the act of the person," *Fabian v. Renovate Am., Inc.*, 42 Cal.App.5th 1062 (2019) is a cautionary tale that the moving party must sufficiently show the signature "is the act" of plaintiff. There, in support of its petition to compel arbitration, Renovate filed an arbitration agreement that appeared to bear plaintiff Rosa Fabian's electronic initials and signature. The agreement's signature box included the words "Docusigned by:," a printed electronic signature for "Rosa Fabian," a 15-digit alphanumeric character, and the words "Identify Verification Code: ID Verification Complete." After Fabian denied she placed the electronic signature on the agreement, the trial court held Renovate had failed to carry its burden of authenticating the electronic signature. The court of appeal affirmed, rejecting the argument that the agreement bearing Fabian's printed signature was authenticated by the use of Docusign. The court found Renovate had not provided any evidence from or about DocuSign, and had not explained the process Docusign uses to verify signatures, including who sent Fabian the agreement, how the agreement was sent to her, how Fabian's electronic signature was placed on the

agreement, who received the signed agreement, and how Fabian's identification was verified as the person who actually signed the agreement. "Most importantly," Renovate did not explain how Fabian's electronic signature was the "act of Fabian" by offering evidence that DocuSign assigned Fabian a unique "identity verification code" to initial and sign the agreement and did not explain the significance of the 15-digit alphanumeric characters or the words "Identify Verification Code: ID Verification Complete." Given the increased use of electronic signatures, attorneys must take care to understand and provide evidence of the process used to obtain those electronic signatures when putting the signed document into evidence.

Litigation—Attorney-Client Privilege—Exception Under Evidence Code § 958

Evidence Code section 958 creates an exception to the attorney-client privilege for communications "relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." In *O&C Creditors Group, LLC v. Stephens & Stephens XII, LLC*, 42 Cal.App.5th 546 (2019), the court of appeal held this exception applied to a party who had purchased an attorney's claim for fees from his former client. The facts of the case are complicated. In essence, attorney O'Reilly was forced into bankruptcy, and the trustee of his estate sold O'Reilly's claim for attorneys' fees from his former client, Stephens, to O'Reilly's former partner, Danko. The trustee also gave Danko access to Stephens's client files. The trial court ordered the files returned to Stephens, holding that Danko's right to receive confidential communications under section 958 must be made on a document by document basis, and Stephens should make that determination in the first instance. The court of appeal affirmed. The court rejected Stephens' claim that section 958 did not apply to a third-party "litigation shopper" like Danko, holding Danko "stands in the shoes of O'Reilly with respect to [the attorney fee] claim." The court also rejected Danko's broader claim to the entire file, holding that Danko's entitlement to privileged communications "is limited to communications that have been put at issue by" the fee litigation, and "[t]he trial court's carefully-crafted order ensures that only information related to communications that have been put at issue by the underlying litigation will be disclosed."

Litigation—Statute of Limitations—Malicious Prosecution Against Attorney

Although buried in an anti-SLAPP decision, the most interesting part of *Garcia v. Rosenberg*, 42 Cal.App.5th 1050 (2019) has nothing to do with the typical anti-SLAPP issues. There, the Garcias filed a malicious prosecution action against the attorney for the opposing party in a prior litigation. The attorney moved to strike. There was no question the claim arose from the attorney's protected petitioning activity in representing his client, so the motion turned on whether the Garcias could establish a probability of prevailing on their claim. The trial court concluded no, finding the Garcias could not show the previous litigation was terminated in their favor on the merits. The court of appeal disagreed with this finding, but affirmed the trial court's on a different basis—that the statute of limitations had run on the Garcias' claim. While the statute of limitations for a malicious prosecution claim is generally two years, when such a claim is brought against an attorney, it is governed by CCP section 340.6(a), which governs attorney malpractice claims. The Garcia's claim was thus untimely because it was brought more than 4 years after the dismissal of the prior litigation and more than 1 year after discovery of the wrongful act.

Litigation—Right to Jury Trial—No Waiver for Failure to Prepare

Chen v. Lin, 42 Cal.App.5th Supp.12 (2019) is yet another published decision reiterating a party's "inviolate right" to a jury trial. The trial court found the tenant in an eviction action waived her right to a jury trial because she failed to prepare for trial as required by the court's standing order and found for the landlord after conducting a bench trial. The appellate division reversed, holding while failing to prepare may subject a party to monetary sanctions, it does not constitute a waiver of the right to jury trial. The court notes: Code of Civil Procedure section 631(f) is the "exclusive authority governing civil jury waivers," and does not allude to a party's failure to prepare for trial. And because "[s]tripping a party of the right to trial by jury is reversible error per se," the judgment was reversed without showing the error was prejudicial.

Professional Responsibility—Lawyer Referral Services—Exercise of Judgment on Legal Issue Not Required to Constitute Referral

LegalMatch.com is an online service company that connects individuals seeking legal assistance to lawyers who have purchased a LegalMatch subscription. LegalMatch connects potential clients with lawyers solely based on their geographic location and area of expertise. In *Jackson v. LegalMatch.com*, 42 Cal. App. 5th 760 (2019),

the court tackled the question of whether such a company is a "lawyer referral service" within the meaning of Bus. & Prof. Code section 6155, which requires, among other things, such services be registered with the State Bar and meet certain minimum standards, including those limiting fees to an amount "which do not discourage widespread attorney membership." The trial court held LegalMatch was not a referral service under the statute because it "[did] not in fact exercise any judgment on any legal issue . . . ." In a matter of first impression, the court of appeal reversed. Relying primarily on the plain language of the statute, the court held a referral occurs when an entity simply directs or sends a potential client to an attorney regardless of whether the entity exercises some specific legal judgment in doing so.