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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JUDY WILLIAMS et al., Plaintiffs and Appellants, v. EMERGENCY GROUPS' OFFICE, Defendant and Respondent.	B229211 (Los Angeles County Super. Ct. No. BC400347)

APPEAL from orders of the Superior Court of Los Angeles County. Charles F. Palmer, Judge. Affirmed as to Russell Williams and dismissed as to Judy Williams.

Law Offices of Ron Bochner and Ron Bochner for Plaintiffs and Appellants.

White & Case, Bryan A. Merryman, Thomas J. Benedict; Michelman & Robinson and Andrew H. Selesnick for Defendant and Respondent.

Russell Williams (Russell) and Judy Williams (Judy) (collectively the Williamses) both appeal from an order denying class certification for claims against respondent Emergency Groups' Office (EGO). As to Russell's appeal, we find no error and affirm. Judy's appeal is dismissed. The trial court granted summary judgment against Judy on her individual claims long before Russell moved for class certification and she was not a party to that proceeding. She was not aggrieved by the denial of class certification and therefore lacks appellate standing.

In their opening brief, the Williamses request that we issue a writ of mandate reversing the order granting summary judgment, various orders denying the Williamses' discovery motions, and the order denying Russell's motion to reopen discovery. The request for writ relief is denied.

FACTS

On December 30, 2004, Russell presented in the emergency room of Mission Viejo Medical Center (medical center) and received medical care from Mission Viejo Emergency Medical Associates (Mission Viejo). EGO, which provides billing services to Mission Viejo, sent the Williamses a bill for $281. Eventually, Blue Shield of California (Blue Shield) sent the Williamses a check for $175.68. In an explanation of benefits letter, it stated that $281 was allowed but that $105.32 was applied to the deductible.

Judy asked EGO to accept $175.68 as full payment. EGO turned the offer down. In April 2005, the Williamses began sending payments of $5 to $15 per month. For the next few years, EGO sent account statements to Russell indicating the unpaid balance.

The bill was eventually paid off.

The Williamses filed a class action lawsuit against EGO for violating the Rosenthal Fair Debt Collection Practice Act (the Act),[1] as well as the federal law that the Act incorporates, and alleged: EGO's various communications failed to state that this is an attempt to collect a debt and any information obtained will be used for that purpose

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[1] Civil Code section 1788 et seq.

(Civ. Code, § 1788.17; 15 U.S.C. § 1692e(11)); EGO failed to provide the Williamses with a validation notice within five days of the initial communication (Civ. Code, § 1788.17; 15 U.S.C. § 1692g); EGO represented that the Williamses were responsible to pay the balance of their medical bills not covered by insurance (Civ. Code, § 1788.17; 15 U.S.C. § 1692e(2) & (10)); EGO did not use its true name (Civ. Code, § 1788.17; 15 U.S.C. § 1692e(14)); and EGO used unfair or unconscionable means to collect or attempt to collect an alleged debt (Civ. Code, § 1788.17; 15 U.S.C. § 1692f(1)). Based on the foregoing allegations, the Williamses also sued EGO for unfair business practices under sections 17200 and 17500 of the Business and Professions Code.

In January 2009, Judy served special interrogatories on EGO seeking information about the billing services it provides to Mission Viejo and other medical providers. Unhappy with EGO's responses, Judy filed a motion in April 2009 to compel further responses. Many months later, EGO moved for summary judgment or adjudication against both of the Williamses. The trial court granted summary judgment as to Judy. As to Russell, the trial court granted summary adjudication of his validation notice cause of action and his unfair business practices cause of action. Judy's motion to compel further responses to special interrogatories was denied.

Russell propounded his own discovery. Eventually, the trial date was continued from December 21, 2009, to a future date. In early 2010, Russell filed motions to reopen discovery, to compel EGO to provide further responses to requests for admissions, and to compel EGO to provide a further response to special interrogatory No. 28. Soon after, Russell filed a motion for class certification. The motion defined the class as "[a]ll persons who, during the time period from one year before the complaint was filed through the present . . . received a communication from EGO that: [¶] 1. Did not contain a notice that EGO was a debt collector; and/or [¶] 2. Used a name other than [EGO's] own."[2]

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[2] This class definition is a complete revision of the one in the complaint. The complaint defined the class as all "similarly-situated insured consumers . . . who were treated at a California medical facility and provided emergency room professional or

On October 4, 2010, the trial court denied Russell's motions to compel further discovery responses and to certify a class. A month later, the trial court denied the motion to reopen discovery.

This timely appeal followed.

DISCUSSION

I.

Russell's Appeal

Among others, Russell identifies the following issue on appeal: Did the trial court consider and rely upon improper criteria or did it make improper legal assumptions in determining that class elements were not met?

A. Standard of Review; Class Action Law.

An order denying class certification is reviewed for an abuse of discretion. (*Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 654.) As our Supreme Court instructs, an appellate court will "not disturb a trial court ruling on class certification which is supported by substantial evidence unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]." (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470 (*Richmond*).) Thus, "'[s]o long as [the trial] court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld.' [Citations.]" (*Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 764–765.)

A class action may be brought "'when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." (*Richmond*, *supra*, 29 Cal.3d at p. 470.) Therefore, "[t]he party seeking certification as a class representative must establish the existence of an ascertainable class and a well-defined community of interest among the class

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other services by entities who did not have contracts with their insurers . . . , resulting in their being 'balance billed' by EGO without appropriate disclosure or consent for the difference between what their insurers paid and what the [s]ervice [p]roviders deemed to be appropriate, higher charges."

members. [Citation.] The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. [Citation.]" (*Ibid.*)

"A largely settled feature of state and federal procedure is that trial courts in class action proceedings should decide whether a class is proper and, if so, order class notice before ruling on the substantive merits of the action. [Citations.] The virtue of this sequence is that it promotes judicial efficiency, by postponing merits rulings until such time as all parties may be bound, and fairness, by ensuring that parties bear equally the benefits and burdens of favorable and unfavorable merits rulings. The rule stands as a barrier against the problem of 'one-way intervention', whereby not-yet-bound absent plaintiffs may elect to stay in a class after favorable merits rulings but opt out after unfavorable ones." (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1074.) Only in exceptional circumstances, or if the parties request it, should a trial court deny certification based on the merits of a class claim. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 443.)

B. The Act; Federal Law.

The Act governs certain debts and debt collectors.

A "debt" means money "due or owing or alleged to be due or owing from a natural person to another person." (Civ. Code, § 1788.2, subd. (d).) We note that the Attorney General has explained that the terms due and owing "have not been defined in the Act and may have different meanings depending upon their context. 'Due' generally means 'having reached the date at which payment is required' [citation] or 'immediately enforceable' [citation]. 'Owing' generally means 'due to be paid' [citation] or 'that is yet to be paid' or 'owed' [citation]. [¶] We have examined the statutory history of the Act's provisions in some detail. [Citations.] The legislative purposes appear to be focused entirely upon debts that have become delinquent and subject to immediate collection activities. This construction of the phrase 'due and owing' would have the effect of conforming the Act's provisions to federal law. [Citations.]" (85 Ops.Cal.Atty.Gen.

217–218 (2002).) Thus, "the Act applies to debts that have become delinquent, making them subject to collection." (*Id*. at p. 218.) Obligations that are current rather than delinquent because the date for payment is yet to arrive "are not subject to the Act's requirements." (*Ibid*.) An Attorney General opinion is not binding, but it is entitled to considerable weight and we opt to follow it. Absent controlling authority, the opinion "is persuasive because we presume that the Legislature was cognizant of the Attorney General's construction of [Civil Code section 1788.2, subdivision (d)] and would have taken corrective action if it disagreed with that construction." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 104.)

The term "debt collection" means any act or practice in connection with the collection of consumer debts. (Civ. Code, § 1788.2, subd. (b).) "'[D]ebt collector' means any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection." (Civ. Code, § 1788.2, subd. (c).) The Act provides that every debt collector collecting or attempting to collect a consumer debt shall comply with the provisions of title 15 United States Code sections 1692b to 1692j of the federal Fair Debt Collection Practices Act. (Civ. Code, § 1788.2, subd. (c).)

"'[C]onsumer debt' . . . means money . . . due or owing or alleged to be due or owing from a natural person by reason of a consumer credit transaction." (Civ. Code, § 1788.2, subd. (f).) A "consumer credit transaction" means a transaction "between a natural person and another person in which . . . services . . . [are] acquired on credit by that natural person from such other person primarily for personal, family or household purposes." (Civ. Code, § 1788.2, subd. (e).) "[T]here is a consumer credit transaction when the consumer acquires something without paying for it." (*Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 759.)

Title 15 United States Code section 1692e prohibits debt collectors from making false or misleading representations "in connection with the collection of any debt." The "following conduct is a violation of this section: [¶] . . . [¶] (11) The failure to disclose in the initial written communication with the consumer . . . that the debt collector is attempting to collect a debt and that any information obtained will be used for that

purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector. . . . [¶] . . . [¶] (14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization." (15 U.S.C. § 1692e(11) & (14).)

C. Ascertainable Class.

"Whether a class is ascertainable is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members. [Citations.]" (*Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1271 (*Reyes*).) We turn to the issues.

1. Class definition.

Some cases hold that a court must determine "if class members may be identified from the most inclusive facial class definition. [Citation.]" (*Marler v. E.M. Johansing, LLC* (2011) 199 Cal.App.4th 1450, 1460.) Using this method, "courts are not concerned whether the definition is overbroad, and they do not consider community of interest factors in testing ascertainability." (*Ibid*.) Other courts "have taken a more nuanced approach." (*Ibid*.) Those cases are sensitive to the class's community of interest and consider "whether the class 'definition is overbroad', and if the plaintiffs have shown that 'class members who have claims can be identified from those who should not be included in the class.' [Citations.]" (*Ibid*.) The trial court had the option of utilizing the more nuanced approach.

As defined by Russell, the class is all persons who received a communication from EGO in which it did not use its name or state that it was a debt collector. The trial court found that the identified class was overbroad because it included persons who received communications that were sent for purposes not connected to debt collection and had no claim based on the complaint.

In finding the class definition overbroad, the trial court relied on the declaration of EGO's president and chief operating officer, Andrea Brault (Brault). In part, she declared the following. "EGO is regularly engaged in the business of providing medical billing services to emergency physician groups. . . . EGO functions as a back

office. . . . For example, for [Mission Viejo], EGO has employees on site at the hospital who, among other tasks, arrange to obtain copies of certain medical records and patient demographic information (including health coverage, where available) from the hospital. Once received, EGO logs the documents into its system, and the process of generating claims and statements begins. This includes, but is not limited to, coding of claims (taking medical record documentation and assigning a specific CPT code for each service rendered), entering data, verifying health coverage, sending statements, posting payments, submitting appeals, communicating with patients and payers, and other back office functions." "On behalf of [Mission Viejo], EGO sends several categories of written communications to [Mission Viejo's] patients. Those communications include informing patients that a claim was filed with their insurance company or other responsible payer, account statements stating the amount owed by patients to [Mission Viejo], and a final notice that the account will be reviewed for assignment to a collection agency, as well as other communications in response to individual requests from patients."

Substantial evidence supported the trial court's finding that the class was overbroad. Brault's declaration established that EGO does much more than send bills to medical patients. It provides back office functions. Due to that service, it presumably sends communications to employees, doctors, lawyers, accountants, insurance companies, collection agencies and others. As to communications with patients, not all of those communications are made in connection with efforts to collect consumer debt. Based on the evidence and reasonably deducible inferences, the trial court was justified in assuming that there is a large subclass of persons who received communications from EGO that do not trigger the Act.

A plaintiff seeking class certification "must prove that there is an identifiable group that was harmed by the defendant." (*Akkerman v. Mecta Corp., Inc.* (2007) 152 Cal.App.4th 1094, 1100.) It is therefore apparent that Russell wishes to represent only those persons with whom EGO communicated in violation of the Act. Simply put, however, the language used by Russell to identify the class does not "convey 'sufficient

meaning to enable persons hearing it to determine whether they are members of the class [he] wish[es] to represent.' [Citation.]" (*Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 858.)

Russell argues that "the [trial court's] finding that some of [EGO's] efforts might not have been for a debt collection purpose was based on an improper criteria and assumption . . . that the [Act] only applies to actual debt collection efforts." He acknowledges that Civil Code section 1788.17 makes federal law applicable to "every debt collector collecting or attempting to collect a consumer debt." Nonetheless, he contends that Civil Code section 1788.17 is narrower in scope than section 1692e and that the federal provision should control the scope of the regulated conduct. Section 1692e, we note, provides that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." In our view, any distinction between the statutes is illusory. The scope of conduct regulated by the state and federal provisions is equivalent because the collection or attempt to collect a debt subsumes any representations or means employed in connection with the collection of a debt. Thus, the trial court did not improperly assume that the regulated conduct was something narrower than it is.

Next, Russell highlights that after the trial court concluded that the class definition was overbroad and gave examples, it added: "[T]he proposed class definition includes many persons who have no claim pursuant to any of the remaining causes of action asserted in the complaint. Thus, determining which members of the defined class have claims under the remaining causes of action will require communication by communication review to determine who is a member of the class." The take away from this quote, as Russell sees it, is that the trial court "improperly stated as a criteri[on] that the review of documents to determine membership in the class meant the class was unascertainable[.]" But he is mistaken. He has confused class definition with class member identification, and the quoted language from the trial court was used as additional proof of overbreadth.

Still, a stone remains unturned. An overbroad class definition is grounds for denying class certification, but only if the plaintiff fails to suggest an alternative, more workable class. (*Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 919 (*Sevidal*); (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916, fn. omitted ["[I]f necessary to preserve the case as a class action, the [trial court] itself can and should redefine the class where the evidence before it shows such a redefined class would be ascertainable"].)

To the trial court, Russell advocated redefining the class as all persons who received billing communications from EGO in which it did not identify itself as a debt collector or use its own name. The problem is that this proposed new class remains overbroad and imprecise because it includes communications setting forth current charges that are not delinquent and also communications indicating that the recipient has a zero balance. Moreover, the class would include the clients of EGO who are billed for EGO's services.

In his opening brief, Russell proposes redefining the class as all persons who received communications connected with debt collection (alternatively debt collection communications) from EGO in which it did not identify itself as a debt collector or use its own name. This class definition was not commended to the trial court. We typically do not consider arguments that are raised for the first time on appeal. To do so would be unfair to EGO and the trial court. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29.) In any event, both definitions are vague and therefore overbroad because they include communications with insurance companies regarding delinquencies as well as communications with collection agencies and lawyers who represent the interests of EGO and its clients.

All of this analysis aside, Russell could not prevail even if he articulated a sufficiently well-drawn class. The trial court's ruling can be affirmed on other grounds. Whether we could conceive of a proper class definition on our own is therefore moot and we decline to engage in that exercise.

2. Numerosity.

As an alternative grounds for denying certification, the trial court found that Russell failed to show numerosity. With respect to that requirement, our recent decision in *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 154 (*Soderstedt*) is instructive.

In *Soderstedt*, the appellants alleged that there were 146 putative class members. We explained that a "party seeking class certification bears the burden of satisfying the requirements of Code of Civil Procedure section 382, including numerosity, and the trial court is entitled to consider 'the totality of the evidence in making [the] determination' of whether a 'plaintiff has presented substantial evidence of the class action requisites . . . .' [Citation.]" (*Soderstedt, supra,* 197 Cal.App.4th at p. 154.) The two declarations offered in support of class certification "failed to identify any number of putative class members or even to represent that the members were sufficiently numerous so as to warrant class action treatment." (*Ibid*.) This led us to hold: "In the absence of any evidence offered by appellants to support their allegation that there were 146 putative class members, the trial court properly concluded that appellants failed to meet their burden to show numerosity." (*Id*. at p. 155.)

The same analysis applies here. Russell alleged on information and belief that the number of class members exceeds 500. But as the trial court found, Russell failed to offer evidence to support his allegation. He argues that the exact number and identity of class members need not be shown. In his view, he is permitted to merely offer a reasonable estimate and cites *Reyes*, *supra*, 196 Cal.App.3d 1263 as authority. *Reyes* is not on point. The defendant in that case, the Board of Supervisors of San Diego County, conceded that there were over 15,000 class members comprised of "'all individuals sanctioned from the County's general relief program since April 10, 1983[.]'" (*Id*. at p. 1274.) The court concluded that the class was "sufficiently defined to meet the 'ascertainable' standard." (*Ibid*.) The bone of contention was the sufficiency of means for identifying the class members, and whether the class was "unmanageable because of the . . . administrative cost in identification[.]" (*Id*. at p. 1275.) The *Reyes* court

concluded the class members could be identified through the defendant's records, and that the defendant failed to show that "the administrative cost of retroactive relief outweighs appreciable benefits to the class." (*Id*. at p. 1275.) The court did not hold that the plaintiff could satisfy the numerosity requirement with a good faith estimate.

Next, Russell vouches that he may rely on reasonable inferences from the available facts to establish numerosity. He cites federal decisional authority such as *Jackson v. Foley* (E.D.N.Y. 1994) 156 F.R.D. 538, 542 ["'[i]t is permissible for the plaintiffs to rely on reasonable inferences drawn from the available facts'"]. Even if we followed the federal rule Russell espouses, it would not help him. The federal rule does not permit speculation. It requires that inferences be made from the facts and is not inconsistent with *Soderstedt*. Based on the record presented, any estimate of the number of class members is purely speculative.

Below, Russell argued: "Here, EGO has acknowledged it never provides the notice set forth by [section 1692e(11)] and it always uses others' names in sending out its bills in violation of [section 1692e(14). Under such circumstances, it is clearly inferable that there will be a sufficient number of class members and that EGO should be able to identify them. If it cannot, then alternative means—such as finding out who EGO performed billing services for in the statutory period and subpoenaing such entities will lead to class member identifications."

To us, it is not clearly inferable that there will be sufficient class members. The factual landscape contains too many significant gaps. For example, there is no evidence as to how many emergency physician groups used EGO's services during the class period, how many patients were seen and obtained services on credit, and how many patients failed to pay their bill on time and subsequently received communications attempting to collect past due amounts.[3] Though Russell argues that discovery will lead

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[3] We do not mean to suggest that this type of evidence is necessary. It is conceivable that numerosity could be inferred from a variety of facts. The salient point is the lack of evidence.

to sufficient evidence of numerosity, *Soderstedt* requires a plaintiff to offer proof rather than merely suggest a possibility of proof.

Underlying Russell's objection to the trial court's ruling is the theory that EGO's business records can provide the answers. This objection rests upon flawed footing. As in *Reyes*, the existence of pertinent records is relevant to the availability of means for identifying class members. The existence of those records, however, is not the panacea that Russell's ardently wishes for because it does not serve as a legal substitute for evidence of numerosity. We note that Russell's briefs contain a telling omission. Nowhere does he estimate the size of the putative class as defined by his certification motion or one of his alternative classifications. In the absence of a supported estimate, our analysis reaches its necessary terminus.

D. The Predominance of Common Questions.

When compared to issues requiring separate adjudication, the common issues must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and litigants. (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 913–914.) However, a "'court may properly deny certification where there are diverse factual issues to be resolved even though there may also be many common questions of law.'" (*Soderstedt*, *supra*, 197 Cal.App.4th at p. 154.) Moreover, class certification is improper when "class members would have to prove individually the existence of liability and damages." (*Caro v. Procter & Gamble & Co.* (1993) 18 Cal.App.4th 644, 669.) Also, certification must be rejected "'[i]f the rights of each member of the class are dependent upon facts applicable only to him.'" (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 705 (*Daar*).)

Courts regularly refrain from making a determination on the validity of a class claim. But every time "'the merits of the claim are enmeshed with class action requirements, the trial court must consider evidence bearing on the factual elements necessary to determine whether to certify the class. "When the trial court determines the propriety of class action treatment, "the issue of community of interest is determined on

the merits and the plaintiff must establish the community as a matter of fact." [Citation.]"' [Citation.]" (*Sevidal*, *supra*, 189 Cal.App.4th at p. 917.)

The certification motion stated that the predominate and common questions of law and fact included: the provision of service from a service provider; subsequent billing by EGO; EGO's failure to provide notice of debt collector status; and EGO's use of a name other than its own in seeking to collect a debt. While these issues were common to at least a subclass of members of the class defined by the certification motion,[4] the trial court properly understood that each member of this subclass would be required to litigate whether they received a communication from EGO that concerned debt collection or concerned money due and owing, and whether they received services on credit. Under *Soderstedt*, the trial court was permitted to deny class certification due to these diverse factual issues. There is no indication in the record that the trial court applied improper criteria or made improper legal assumptions. Nor did it decide the merits of pivotal disputed issues.[5] In deciding whether common issues predominate, the trial court's analysis only factored undisputed law enmeshed within class action requirements.

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[4] The class defined by the motion was broader than only those persons who received service from a health care provider.

[5] There are a variety of issues regarding liability that the trial court did not purport to determine. For example, the trial court must resolve whether a person can be a debt collector if its debt collection efforts pertain to a debt that was not in default when it was obtained. (Civ. Code, § 1788.2, subd. (c) [defining debt collector broadly enough to encompass anyone attempting to collect a debt regardless of the debt's status when it was obtained]; 15 U.S.C. § 1692a(6)(F) [subject to exception, a debt collector under federal law does not include a "person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person"].) A second legal issue the trial court will have to resolve is whether a debt collector in California can communicate in the name of the creditor. Such a communication would ostensibly be a violation of title 15 United States Code section 1692e(14). But Civil Code section 1788.13 provides: "No debt collector shall collect or attempt to collect a consumer debt by means of the following practices: [¶] (a) Any communication with the debtor other than in the name either of the debt collector or the person on whose behalf the debt collector is acting[.]" Notably, no case has decided whether title 15 United States Code section 1692e(14) or

All other issues regarding Russell's appeal are moot.

II.

Judy's Appeal

In her notice of appeal, Judy states that she is appealing from the denial of class certification. There are three fatal defects in Judy's appeal.

First, Judy did not join in Russell's motion for class certification, so she was not aggrieved by the order denying it. "Only a party who is aggrieved has standing to appeal. [Citation.] A party is aggrieved only if its 'rights or interests are injuriously affected by the [appealable order].' [Citation.]" (*Sabi v. Sterling* (2010) 183 Cal.App.4th 916, 947.) The interests "'"must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment."' [Citation.]" (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737.) Because she lacks standing to challenge the denial of class certification, Judy's appeal must be dismissed. (*Traudt v. City of Dana Point* (2011) 199 Cal.App.4th 886, 891.)

Second, the motion for class certification was properly denied, as we discussed in connection with Russell's appeal.

Third, the trial court entered an order granting EGO's motion for summary judgment against Judy. Even though there is no indication in the appellate record that the trial court entered judgment, the order remains in effect. We fail to see how Judy could seek class certification or qualify as an adequate class representative unless and until the order is reversed on appeal.

III.

The Request for Writ of Mandate

As a general rule, a writ petition should be filed within the 60-day period that is applicable to appeals. (*Volkswagen of America , Inc. v. Superior Court* (2001) 94

Civil Code section 1788.13 controls. With respect to putative class members, the trial court did not make any factual findings as to whether EGO sent them communications in an attempt to collect debts that were in default and therefore potentially covered by the Act.

Cal.App.4th 695, 701. "'An appellate court *may* consider a petition for an extraordinary writ at any time [citation], but has discretion to deny a petition filed after the 60-day period applicable to appeals, and *should* do so absent "extraordinary circumstances" justifying the delay.' [Citation.]" (*Ibid*.)

All of the orders the Williamses challenge in their request for writ of mandate occurred at least 10 months before they filed their opening brief, and more than two years after the case was fully briefed. Only after the case was fully briefed and assigned to Division Two of the Second Appellate District did their request for writ of mandate come to light. The Williamses offer no explanation for the delay with respect to the discovery motions and motion to reopen.

To explain the delay in challenging the order granting summary judgment on Judy's individual claims, she asks us to consider *Daar, supra,* 67 Cal.2d at pp. 698–699 and *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757 (*Baycol*). Those cases hold that an order dismissing class claims but otherwise preserving the named plaintiff's individual claims is an appealable judgment on the class claims. Judy argues: "Since [Judy's] standing is fundamental to the question of her adequacy to act as a class representative and that issue was adjudicated [in connection with the motion for summary judgment], it appears it is appropriate to take up the issue upon denial of class certification. Only denial of the [m]otion to [c]ertify rung the death knell for both Williams[es] to represent a class. It would have been inappropriate, would have run afoul of the rule of efficiency that *Daar* states, to bring a writ or appeal while [Russell] continued to represent the class. Otherwise, assuming Russell is not an adequate class representative, the case would have to go to trial as an individual matter only to be appealed on the issue of whether [Judy] had standing to act as a class representative. The resultant waste of time and effort seems to be the exact type of efficiency the holding[s] of *Daar* and [*Baycol*] were designed to prevent. So viewed as a writ or as part of the appeal from the denial of class certification itself, it appears the issue is properly before the court."

Although not clear, it is a fair assumption that Judy contends that it would have been impossible, futile or premature to challenge the order granting summary judgment with respect to her individual claims prior to the denial of Russell's motion for class certification. But this construct of tacit logic is structurally infirm, and *Daar* and *Baycol* cannot prop it up. *Daar* and *Baycol* do not speak to the timing of writ review of an order granting summary judgment on an individual plaintiff's claims. Further, we cannot perceive any legal or policy reason why Judy would have been prevented from mounting a challenge at an earlier date.

There is no showing of extraordinary circumstances justifying the delay. We therefore deny the request for writ relief.

DISPOSITION

Judy's appeal is dismissed. The order denying Russell's motion for class certification is affirmed. The Williamses' request for a writ of mandate is denied. EGO shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ