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No Signed Line Which Is Dotted

The year 2020 caused all of us to embrace a new era of remote Zoom mediations and hearings. We also learned how to electronically sign settlement agreements with geographically diverse participants. Electronic signatures allow convenience and efficiency, but there are specific rules that govern authentication. *Bannister v. Marinidence OPCO, LLC* (2021) 64 Cal.App.5th 541 applied those standards, and found that an employee did not electronically sign an arbitration agreement with her employer.

Bannister worked at a nursing facility for about three decades when Marinidence purchased the facility. A year later, Marinidence terminated Bannister, and she sued for alleged discrimination, retaliation, and other claims. In response, Marinidence filed a motion to compel arbitration, alleging that when it acquired the facility, Bannister electronically signed an arbitration agreement when completing the paperwork for new Marinidence employees. Bannister presented evidence that she never saw the agreement during the onboarding process, and did not affix her electronic signature to it. The trial court found that Marinidence failed to establish that Bannister signed an arbitration agreement, and denied the motion.

The Court of Appeal affirmed. On a petition to compel arbitration, the trial court must first determine whether an “agreement to arbitrate the controversy exists.” (Code Civ. Proc., § 1281.2.) The party seeking arbitration can meet its initial burden by attaching to the petition a copy of the arbitration agreement purporting to bear the respondent’s signature. Because Bannister challenged the validity of the signature, Marinidence had to establish by a preponderance of the evidence that the signature was authentic.

Civil Code section 1633.9, subdivision (a), governs the authentication of electronic signatures. It provides that an electronic signature may be attributed to a person if “it was the act of the person.” Further, “[t]he act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.” (*Id.*) For example, a party may establish that the electronic signature was “the act of the person” by presenting evidence that a unique login and password known only to that person was required to affix the electronic signature, along with evidence detailing the procedures the person had to follow to electronically sign the document and the accompanying security precautions.

Among other issues, Marinidence did not establish that Bannister was assigned a unique, private user name and password as the only person who could have accessed the onboarding portal and signed the agreement. Instead, the evidence showed that the requisite “Client ID” and pin code

was not employee-specific, and the employer had access to the information necessary to access the onboarding portal via employee personnel records. Bannister's evidence also indicated that the employer completed the onboarding process for other employees, which supported her claim that she did not execute the arbitration agreement.

The Takeaway: Civil Code section 1633.9 provides for a valid electronic record or signature to be shown "in any manner." To comply, make sure that the security procedure, context, and surrounding circumstances leave no doubt that a person's signature is attributable to that person.