CAIIA

Status Report

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July 2019

ABC Test for Independent Contractor Status Applies Retroactively
Credit to : Tyson and Mendes, La Jolla, CA

Last year, the California Supreme Court announced a new standard, known as the "ABC" test for determining whether a worker is an employee or independent contractor in wage and hour cases. (*Dynamex Ops. W. Inc. v. Superior Court* (2018) 4 Cal. 5th 903). Two weeks ago, the Ninth Circuit Court of Appeals held the *Dynamex* test applies retroactively in *Vasquez v. Jan-Pro Franchising International, Inc.* (2019 WL 1945001). As discussed below, the *Vasquez* decision could have far-reaching economic implications.

The Underlying Litigation

The *Vasquez* case was severed from a decade-old putative class action filed in the District of Massachusetts in 2008, involving nine janitors who claimed Jan-Pro, a major international cleaning business, developed a sophisticated three-tier franchise scheme to avoid paying its janitors minimum wages and overtime compensation by misclassifying them as independent contractors. After one of the claims was resolved in favor of Jan-Pro, in a parallel case pending in Georgia, the Massachusetts court dismissed the remaining claims on *res judicata* grounds but severed the three California claims which were then sent to the Northern District of California *(where the three California plaintiffs resided)*. The Ninth Circuit District Court granted summary judgment in favor of Jan-Pro *before* the *Dynamex* decision. Plaintiffs appealed and the Ninth Circuit Court of Appeals ordered the parties to brief the effect the *Dynamex* decision had on the merits of the case.

Multi-Tiered Franchising

Jan-Pro's franchise system was a three-tiered system. The first tier was between Jan-Pro and regional third-party entities known as master franchisees or master owners who intern contract with unit franchisees. In consideration of a franchise fee, the Master Owner provides an initial book of business, start-up equipment, cleaning supplies, and provides training to its unit franchisees. In the test case brought in Massachusetts, the plaintiff alleged he paid his Master Franchisor the sum of $23, 400 and was promised $100k in gross annual billings by the Master Franchisor. The test case plaintiff alleged his status as a unit franchisee was a "farce" and he was actually a direct employee of Jan-Pro.

High Stakes Economics

The *Vasquez* court noted the high stakes involved in its decision at the outset observing Jan-Pro's financial interest in "not opening the floodgates to nationwide liability for multiple years of back wages and overtime pay." (*Vasquez*, *supra*, at p. 3). The court also recognized the broader ramifications of its decision as informed by the heated rhetoric in *amicus* briefs filed in support of plaintiffs and Jan-Pro. (*Ibid.*). The National Employment Law Project submitted an amicus brief in support of the plaintiffs asserting a strong interest because of the impacts Jan-Pro's franchising scheme has on low-wage immigrant workers and their communities. (*Ibid.*). On the other hand, the International Franchise Association submitted a brief in support of Jan-Pro railing against the application of the ABC test adopted by the California Supreme Court because it would "sound the death knell for franchising in California" with impacts not only to the California economy but for "national economies." (*Ibid.*).

Retroactivity

On Appeal, Jan-Pro argued application of *Dynamex* retroactively violated its Due Process rights based on reliance and fundamental fairness. The Court of Appeals did not agree. In analyzing the issue under California law, the Court of Appeals noted the general rule that judicial decisions operate retrospectively and statutes only operate prospectively. (*Vasquez, supra*, at p. 8). The Court of Appeals also noted the California Supreme Court has allowed exceptions to retroactivity based on the parties' reliance on the former rule, whether the change is substantive or procedural, impact on administration of justice, and the purposes to

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CAIIA Newsletter
CAIIA Executive Office
9171 Gazette Ave.
Chatsworth, CA 91311-5918
Website: www.caiia.com
Email: info@caiia.com
Tel: (818) 721 4720

Editor: Kim Hickey
(818) 721 4720
khickey@caiia.com

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To add other insurance professionals to our e-mail list, please go to CAIIA. com or e-mail a request to statusreport@caiia.com.

California Association of Independent Insurance Adjusters, Inc.

President's Office:
Reliant Claims Service
P.O. Box 11200
Oakland, CA 94611
510 420-

President
John Ratto
Reliant Claims Services, Inc.
Oakland, CA
mail@reliantclaims.com

Vice President
Gene Campbell
Carter Insurance Claim,s Services, Inc.
Tustin, CA
gcampbell@carterclaims.com

Secretary/Treasurer
Richard Kern
SDG, Inc., San Diego
rkern@sgdinc.com

Two Year Directors
LeeAnn Junge – Thornhill & Associates – Chatsworth
leeann@thornhillandassociates.com

Phil Barrett
Barrett Claims Service, Ukiah,
phil@barrettclaims.com

One Year Directors
W.L McKenzie – Walsh Adjusting Company, San Diego
bill@walshadjusting.com

One Year Director

Jeff Caulkins,

John S. Rickerby Company, Glendale

jeff.c@johnsrickerby.com

OF COUNSEL
Kevin Hansen, Attorney, McCormick Barstow,LLP
7647 N. Fresno St.
Fresno CA 93729-8912
T. 559.433.1300
F. 559.433.2300
kevin.hansen@mccormickbarstow.com

President's Message

It is a bit strange preparing a July Presidents Message just a day before I get on a plane…. "I'm a leavin' on a jet plane, don't know when I'll be back again"… Keeps going through mind over and over again….

As many of you recall from my last president's message (because I know you read them all), my family and I are heading overseas to visit and stay with family. I will stay for 2 weeks and my wife and daughter will stay longer. It has been interesting trying to get everything "wrapped up" before we leave. It is an interesting concept because it is not as if the claims just magically shut down while I am away. To that end, it helps to have great staff (thank you Claire Shepherd!), and great clients, who take on the burden of answering the insureds questions and handling the claims while I am away. Broken record alert (yeah, read the previous reports)-- **this is a hard job!**.

John Ratto
CAIIA President

The first thing I noticed when I got back from taking our long overseas family visit four years ago, was that when I returned, the entire claims world had not completely fallen apart during my absence. My business did not shut down, clients were not upset during my absence, and no one was outside my office with pitchforks and torches! In other words, as Dean Beyer, my boss at D.L. Glaze Company, said to me; "It'll be there when you get back". It just wasn't that bad. In fact, sometimes the first week back is the best! I was well rested, claims were down, and I only had to put out "one or two fires".

Just briefly, shorter than most of my previous messages because my bags aren't going to pack themselves! To all of you, HAVE A GREAT SUMMER! Let your hair down (just try to keep it legal), have fun, and most importantly remember; ***"It'll be there when you get back".*** You will be refreshed and better equipped to handle all that claims can throw at you after a well deserved break.

Officers and board members have been talking and we are putting together some venues for the fall event. It will be somewhere in So. Cal. and because we may not want to wait until the August newsletter to provide you the information, we may be sending out a blast notification regarding the event before that date. Look for that notice.

Enjoy some downtime!

John Ratto, President

CAIIA President

NEWS OF AND FOR OUR MEMBERS

SAVE THE DATE

The CAIIA is proud to be exhibiting at or sponsoring the following upcoming event:

August 27-29,2019 Claims Conference of Northern California, Lake Tahoe, CA

TBD CAIIA Fall Meeting

DOI Announcement

Search for fugitive former insurance agent charged with multiple felonies underway

Apprehending alleged criminal before others are victimized drives search

LOS ANGELES, Calif. — Felony charges for grand theft and identity theft were filed against Alicia Calderon, 33, a former licensed insurance producer, after investigators discovered evidence that Calderon took money from and issued fraudulent policies for a commercial building and big-rig trucks leaving two consumers vulnerable to significant financial loss.

Calderon allegedly provided victims with fraudulent policies that included effective dates and coverage amounts. One victim suffered an uninsured loss as a result of Calderon's theft. The second victim was also involved in a collision where they were not at fault, but the collision report led to a DMV notification that their registration was flagged for suspension due to lack of coverage, after the insurer notified the DMV that no such policy existed.

"Calderon's flagrant use of an expired agent license to victimize hard working people is reprehensible," said Insurance Commissioner Ricardo Lara. "Her alleged crimes left every driver who shared the road with the uninsured big-rigs at great risk."

When the victims contacted Calderon regarding the uninsured loss and notices from the DMV, Calderon offered excuses and even charged one victim to rectify the DMV issues.

The Department of Insurance launched an investigation after receiving a consumer complaint earlier this year. Investigators found evidence Calderon accepted $11,700 in premium payments from two victims in 2017 for the purchase of liability coverage for a commercial building and tractor trailer. The investigation also revealed the policies Calderon submitted contained non-existent policy numbers and that she used another agent's license information constituting identity theft.

Calderon's bail has been set at $300,000 and her location is unknown at this time. The Department of Insurance is looking for any information on the suspect's whereabouts and is concerned there may be more victims who are unaware their policy is fraudulent. If anyone has information regarding Calderon, including if they purchased a policy from her, please contact the Department at 323-278-5000. The case is being prosecuted by the San Bernardino County District Attorney's Office.

Claims Conference of Northern California, August 27-29, 2019

Come join us in Lake Tahoe, CA for the Claims Conference of Northern California, August 27-29, 2019. CCNC is one of the largest and most diverse educational conferences in our industry. You'll network with top claim professionals from insurance companies, brokerages and agencies along with service providers from all over the western region of the United States.

Choose from a variety of educational courses covering a wide array of claim challenges and opportunities. Earn free adjuster continuing education credits from a number of key states. Visit with over 75 exhibitors/service leaders providing an array of claims products and services. For professional results and improvements, the Claims Conference of Northern California is the place to be, we continue to create a path to claims success.

Our 2018-19 President, Jennifer Pinney, is working along with a planning committee to update our technology, our education, our innovation in getting claims initiatives to the forefront; in an industry that is always moving, changing and growing. We look forward to sharing in this exceptional event with you this year. Make sure to save the dates on your calendar and prepare to be inspired!

Click this link to sign-up online: http://claimsconference.org/attendee-registration/

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be served by the new rule. (*Ibid.,* citing *Claxton v. Waters* (2004) 34 Cal. 4th 367). Ultimately, the Court of Appeals concluded the *Dynamex* ABC test was not a new rule but rather a clarification of established wage order law and given the strong presumption of retroactivity in California and the absence of any indication California courts are likely to hold Dynamex only applies prospectively, held *Dynamex* applies retroactively. (*Vasquez, supra*, at pp. 9-10).

Remand

The Court of Appeals remanded the matter back to the district court for further development of the record and reconsideration of Jan-Pro's summary judgment motion based on the Dynamex ABC test, which is now the standard for wage and hour cases in California. (*Vasquez, supra*, at p. 16). The Court of Appeals noted the distinction between the more stringent "ABC" test used in wage order cases as opposed to the common law test for independent contractors still used in the tort vicarious liability context. Wage orders, observed the court, "have more to do with incentivizing economic entities to internalize the costs of underpaying workers –costs that would otherwise be borne by society." (*Ibid.*).

"Roll out those lazy, hazy, crazy days of summer
You'll wish that summer could always be here."
Nat King Cole

Walmart Workers win Class Action Suit
Credit to Tyson and Mendes, La Jolla, CA

A California federal jury decided in April that Walmart owed a class of employees at its Chino fulfillment center $6.1 million because the retailer had not provided meal breaks when it required workers to pass through anti-theft metal detectors before leaving the building. The case is *Hamilton et al. v. Wal-Mart Stores Inc. et al.*, Case No. 5:17-cv-01415, in the U.S. District Court for the Central District of California. The case sheds additional light on an employer's obligation to provide a hassle-free break for its employees.

The class action case involved 5,000 employees who worked at the Chino, California fulfillment center. Plaintiffs brought a class action against Walmart, alleging violations of the Unfair Competition Law (UCL) for failing to (1) pay for all hours worked, (2) pay all overtime wages, (3) provide meal periods, (4) provide rest breaks, (5) pay final wages, and (6) provide accurate itemized wage statements. Plaintiffs also sought penalties under California's Private Attorney General Act (PAGA).

Named plaintiff Hamilton testified she "felt like a criminal" every time she passed through the metal detectors, and that the process sometimes cut into her 30-minute lunch break because she was forced to clock out before going through the checkpoint. Hamilton said the checkpoint discouraged her and other employees from leaving the warehouse to eat lunch. Named plaintiff Hernandez testified she never left the facility for lunch because she did not want to go through the hassle of the metal detectors.

Jury deliberation lasted a mere four hours. The jury found Walmart failed to provide meal breaks and discouraged workers from taking their breaks outside the building by requiring them to pass through a time-consuming security checkpoint. The decision mirrors the law articulated by the California Supreme Court in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, which held that employers must meet the following requirements in order to meet their obligations of providing meal breaks: (1) provide the employee with at least 30 minutes uninterrupted, (2) permit the employee to leave the premises, and (3) relieve the employee of all duty for the entire period.

The jury did not accept the named plaintiffs' claims regarding overtime, finding that Walmart met its legal requirements calculating overtime for employees working more than eight hours a day on an alternative workweek schedule.

Architects and Design Professionals Can Be Held Liable For Defects Based On Third Party Claims

Credit to Low, Ball & Lynch, San Francisco, CA

A homeowners association, on behalf of its members, sued a condominium developer and various other parties for construction design defects that allegedly made their homes unsafe and uninhabitable for a significant portion of the year. Two defendants were architectural firms that allegedly designed the homes in a negligent manner but did not make final decisions regarding how the homes would be built. Applying the Supreme Court's decision in Bily v. Arthur Young & Company (1992) 3 Cal.4th 390, and relying on the Weseloh Family LTD. Partnership v. K. L. Weseloh Construction Company, Inc. (2004) 125 Cal.App.4th 152, the trial court sustained a demurrer in favor of the defendant architectural firms, reasoning that an architect who makes recommendations but not final decisions on construction has no duty of care to future homeowners with whom he has no contractual relationship. The Court of Appeal reversed, concluding that the architect owes a duty to homeowners in these circumstances, both under common law and under the Right to Repair Act (Civil Code Section 895 et seq.) The Supreme Court agreed and held that the homeowner may state a cause of action against a design professional for negligence.

Skidmore, Owings & Merrill LLP (SOM) and HKS, Inc., (HKS) were architectural firms ("defendants") who provided architectural and engineering services to the Beacon Residential Condominiums ("the Project"), a residential community in San Francisco.
The Beacon Residential Community Association (BRCA) sued SOM and HKS. BRCA alleged numerous construction defects as a result of negligent architectural and engineering design and observation. BRCA also complained of "solar heat gain," excessively high temperatures resulting from the defendants' approval of inexpensive and nonfunctional windows, and a design lacking adequate ventilation within the residential units. The defendants were named in three causes of action: Civil Code Title 7 – Violation of Statutory Building Standards for Original Construction; Negligence Per Se in Violation of Statute; and Negligence of Design Professionals and Contractors. The defendants demurred to the complaint, arguing that under Bily v. Arthur Young & Co.(1992) 3 Cal.4th 370 and Weseloh Family Ltd. Partnership v. K.L. Wessell Construction Co., Inc. (2004) 125 Cal.App.4th 152, they owed no duty of care to BRCA or its members. The trial court sustained the demurrers and dismissed the case. The trial court reasoned that liability could not be premised on negligent design because without privity of contract, BRCA was required to show that the design professionals had "control" in the construction process and assumed a role beyond that of providing design recommendations to the owner. The court believed that BRCA failed to meet its burden.

The Court of Appeal reversed, holding that BRCA could state a claim based on design liability that was recognized both under common law and statutory law. The Court distinguishedWeseloh, in which judgment was affirmed in favor of design engineers who were sued after a retaining wall failed. There, the outcome was premised on the evidentiary record before the court and was of limited guidance. The Court said that no California court has yet extendedWeseloh to categorically eliminate negligence liability of design professionals to foreseeable purchasers of residential construction. The Court also observed that in Cooper v. Jevne(1976) 56 Cal.App.3d 860, an architect's duty of reasonable care is logically owed to those who purchase an allegedly defectively designed and built condominium.
The Supreme Court granted review. It began its discussion by pointing out that although liability for the supply of goods and services historically requires privity of contract between the supplier and the injured party, the significance of privity has been greatly eroded over the past century. The declining significance of privity had found its way into construction law. The Court noted that it had previously found that manufacturers of defective ladders, elevators, and tires could be liable to persons who were not in contractual privity with them but foreseeably injured by their products. Courts usually apply the same rule to someone responsible for part of a house; e.g., a defective railing.

In addition, the Court said that these third party liability principles had always been applied to architects where the architect plans and supervises the construction work and provides protection to any person who is foreseeably harmed. Generally, liability for deficient goods and services hinges on whether there is a relationship between the buyer and seller. However, the Supreme Court recognized that in certain circumstances a contractual relationship is not necessarily required. In this ruling, it relied on 50-year old precedents in Biankanja v. Irving(1958) 49 Cal.2nd 647. In Biankanja, the California Supreme Court outlined several factors which determine whether a duty of care is owed to non-contracted third parties. Biankanjaanalyzed many factors, including whether the declared harm was foreseeable from a defendant's conduct and how close of a connection there was between the conduct and the injuries.
The Court recognized that even though the design firms did not actually build the project, they conducted weekly inspections, monitored contract compliance, monitored design elements when issues arose, and advised the owners of any non-conforming work. In applying theBiankanja factors to these circumstances, the Supreme Court determined the homeowners were intended beneficiaries of the design work, and the design in the project bore a close connection to the alleged injuries. As a result, the Supreme Court held that the allegations in the complaint were sufficient, and if proven, established that the defendants owed a duty of care to the homeowners association.

Care, Custody or Control Exclusion Requires Complete and Exclusive Control by Insured

Credit to Haight, Brown and Bonesteel, Los Angeles, CA

In *McMillin Homes Construction v. Natl. Fire & Marine Ins. Co.* (No. D074219, filed 6/5/19) a California appeals court held that a "care, custody or control" exclusion did not bar coverage for defense of a general contractor as an additional insured under a subcontractor's policy, because the exclusion requires exclusive control, but the facts and allegations posed a possibility of shared control with the subcontractor.

McMillin was the general contractor on a housing project and was added as an additional insured to the roofing subcontractor's policy pursuant to the construction subcontract. The homeowners sued, including allegations of water intrusion from roof defects. McMillin tendered to the roofing subcontractor's insurer, which denied a defense based on the CGL exclusion for damage to property within McMillin's care, custody or control.

In the ensuing bad faith lawsuit, McMillin argued that the exclusion required complete or exclusive care, custody or control by the insured claiming coverage, which was not the case for McMillin. The insurer argued that the exclusion said nothing about complete or exclusive care, custody or control. Further, the intent to exclude coverage for damage to any and all property in McMillin's care, custody or control, to whatever degree, was demonstrated by the fact that the additional insured endorsement in question was not an ISO CG2010 form, but a CG2009 form, which expressly adds a care, custody or control exclusion to the additional insured coverage not found in the CG2010 form. The argument was that the CG2009 form evidences an intent to conclusively eliminate coverage for property in the additional insured's care, custody or control. In addition, the insurer argued that this result was also reinforced by its inclusion of an ISO CG2139 endorsement in the roofer's policy, which eliminated that part of the "insured contract" language of the CGL form, defining an "insured contract" as "[t]hat part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization." The insurer's argument was that by having eliminated coverage for contractual indemnity or hold harmless agreements, it had "closed the loop" of eliminating additional insured coverage for construction defect claims.

In a bench trial, the trial court agreed and entered judgment for the insurer. However, the appeals court reversed. The appeals court pointed out that the care, custody or control exclusion had already been judicially construed to require exclusive or complete control. (Citing *Home Indem. Co. v. Leo L. Davis, Inc.* (1978) 79 Cal.App.3d 863, 872.) And the facts indicated only shared control between the general contractor and its roofing subcontractor.

The *McMillin* court did not even discuss whether the difference between the CG2009 and the CG2010 forms had any effect, but merely ruled that the care, custody or control exclusion did not apply, presumably meaning either way. According to the court, "[w]here a policy term has been judicially construed, it is not ambiguous. (*County of San Diego v. Ace Property & Casualty Ins. Co.* (2005) 37 Cal.4th 406, 423.) '[T]he judicial construction of the term should be read into the policy unless the parties express a contrary intent.' (*Bartlome v. State Farm* (1989) 208 Cal.App.3d 1235, 1239.)" In footnote, the *McMillin* court also dismissed a distinction in the fact that the CG2009 form uses the words, "over which the insured exercises physical control," saying that physical control was a possibility under the circumstances.

Disagreeing that the insurer's interpretation would render additional incurred coverage totally illusory, the *McMillin* court did say that covering construction defect lawsuits was within McMillin's reasonable expectations, given that the requirement for procuring the coverage was contained in a construction subcontract.

As to the insurer's "close the loop" argument regarding elimination of contractual indemnity coverage by way of the modification to the insured contract definition under the CG2139 endorsement, the *McMillin* court questioned whether that would be a reasonable expectation for McMillin but found it irrelevant regardless, having already concluded that coverage was mandated because of its rejection of the care, custody or control argument. Thus, "[b]ecause the insurer did not prove coverage for the underlying construction defect litigation was impossible, it owed the general contractor a duty to defend the homeowner claim."

On the Lighter Side… Inspiration for your next vacation, here are some of the world's top vacation locations:

Grand Canyon-stretching 277 miles of the Colorado River with awe-inspiring views, trails and campgrounds.

Rio de Janeiro– explore the Sugarloaf Mountain's rocky peaks to the Copacabana beach then kick back with a caipirinha and a famous Brazilian barbeque.

Paris– the City of Love. The Eiffel Tower, romantic food and architecture down the banks of the Seine, explore the Louvre and shop along Boulevard Saint-Germain.

Argentine Patagonia– the southernmost tip of South America; marvels like Mount Fitz Roy and the Perito Moreno Glacier, penguins and seals and the art of the Cave of Hands.

Amalfi Coast, Italy– Colorful houses overlooking the Gulf of Salerno & home to impressive seafood and pasta restaurants.

Banff, Alberta– Canada's first national park, compelling vistas and activities for every season.

Credit to US News and World Report and to Getty Images for the photographs.