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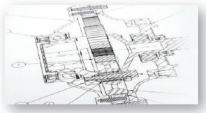



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FALL 2018

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COLEMAN & HOROWITT WELCOMES STEVEN G. POLARD

We are at it again. In the last newsletter, we introduced you to Linda K. Durost and Brandon A. Hamparzoomian. This time, we are pleased to introduce our newest attorney, **Steven G. Polard**.

Steven joins the firm as the managing partner for the Los Angeles office of Coleman & Horowitt. Prior to joining Coleman & Horowitt, Steven was a partner at Perkins Coie, Davis Wright & Tremaine and, most recently, Eisner Jaffe. Steven represents clients in complex commercial litigation, creditor rights and restructuring, and business and real estate transactions.

Steven is a graduate of the University of Kansas and received his law degree from Duke University School of Law. He is a member of the California Lawyers Association, Board of Governors - Japan America Association, International Law Section - Los Angeles County Bar Association, Bankruptcy Forum, Financial Lawyers' Conference, International Financial Institutions Association, California, and International Bankers Association, California. He can be reached at (310) 286-0233 / (800) 891-8362 or spolard@ch-law.com.

CALIFORNIA SUPREME COURT APPLIES AN ABC TEST FOR EMPLOYERS TO USE WHEN ASSESSING WHETHER WORKER IS AN EMPLOYEE OR INDEPENDENT CONTRACTOR

BY JUDITH M. SASAKI AND GREGORY J. NORYS

For years, even the most conscientious California employers have had difficulty determining whether a worker can correctly be classified as an independent contractor. The distinction is significant. Workers classified as employees are entitled to the benefits of a complex web of federal and state laws (particularly in California) that substantially increase the employer's costs. For each employee, the employer bears the responsibility for paying payroll, social security and employment taxes, as well as unemployment and worker's compensation insurance. Eliminating these costs by classifying a worker as an independent contractor is thus very enticing for many business owners. Misclassification of a worker, however, subjects the employer to a myriad of legal problems and liabilities.

In California, the Labor Code provides that all workers are presumed to be employees. The presumption is, however, rebuttable depending on the application of several factors outlined in two seminal cases. The common law test is set forth in *S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341 ("*Borello*"). In *Borello*, the determination of whether a worker is an employee or independent contractor depends upon the "multi-factor" or "economic realities" test. In *Martinez v. Combs* (2010) 49

Cal.4th 35 ("*Martinez*"), the determination of employee status is based on a broader standard known as the engage, suffer, or permit to work test. The coexistence of these two tests, together with their inconsistent application have been the source of some confusion by employers.

In a landmark decision issued earlier this year, the California Supreme Court provided business owners some clarification in making the distinction between independent contractors and employees in the context of California wage orders which impose legal standards relating to minimum wages, maximum hours, and basic working conditions such as meal and rest breaks. In *Dynamex Operations West, Inc. v. Superior Court* ("*Dynamex*"), the California Supreme Court considered the *Martinez* and *Borello* standards and adopted a modified version of *Martinez* which redefined the test to be applied in wage order disputes. As a result of *Dynamex*, a defendant disputing employee status in a wage order contest must now prove the following:

> (A) The worker is free from the hirers control and direction of the hirer in connection with performing the work, both under contract and in fact;
>
> (B) The worker performs work outside the usual course of the hiring entity's business; and
>
> (C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hirer.

The first prong of the ABC test is similar to the *Martinez* test in which the hiring company cannot exercise the same or similar control (i.e., means, manner, time, etc.) that it exercises over its own employees. The second and third prongs, however, could significantly change the status of who is classified as an independent contractor.

The *Dynamex* Court provided specific examples of who would qualify as independent contractors under the second prong of the ABC test. For example, the Court explained: When a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, they would be independent contractors because they are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. In these types of scenarios the workers would be deemed independent contractors.

On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom designed cakes, the workers are part of the hiring company's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In these types of scenarios the workers would be deemed employees.

The third prong of the ABC test requires evidence that the worker independently made the decision to go into business for himself or herself (risk with loss of profit). Such an individual generally takes the usual steps to establish and promote his or her independent business. For example, the individual may incorporate the business, get the business properly licensed, market and advertise the business, make routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like.

Employers should carefully evaluate their practice of classifying potential employees as independent contractors. Misclassification of workers carries serious fines and penalties, including back wages, and possibly back taxes.

Judith M. Sasaki *is a partner in the firm's Los Angeles office. Her practice has encompassed a broad range of subject matters and she has handled all aspects of litigation in the areas of complex commercial, entertainment, real estate, business and unfair competition cases. She can be reached at (310) 286-0233 / (800) 891-8362 or jsasaki@ch-law.com.*

Gregory J. Norys *is a partner in the firm's Visalia Office. He represents clients in commercial, construction, real estate, professional liability defense, tort defense, as well as municipal law, real estate transactions, and land use matters. He can be reached at (559) 248-4820 / (800) 891-8362 or gnorys@ch-law.com.*

VINEYARD BUYER'S FRAUD CLAIM DEFEATED DESPITE ACTUAL KNOWLEDGE OF SEVERE DEFECTS BY SELLER'S CONTRACTOR

BY BRANDON A. HAMPARZOOMIAN

If you are involved in real estate transactions as a seller, then you surely know that failure to disclose a material defect that you knew about is tantamount to lying about the defect, and is an invitation to be sued for fraudulent concealment. As a seller, you should also know that you are deemed to have constructive knowledge of material defects known by your broker or agent. But can the knowledge of third parties be imputed to the seller? What if, for example, you do not have any personal knowledge of any material defects, but your contractor did? Can your contractor's knowledge be imputed to you? This issue was addressed by California's First District Court of Appeal in *RSB Vineyards v. Orsi* (2017) 15 Cal.App.5th 1089, wherein the Court affirmed a grant of summary judgment in favor of the defendant sellers in a fraudulent concealment case. The Court held that even when there are material defects in the property, a seller's obligation to disclose arises only if the seller has actual or constructive knowledge of the deficiencies.

In *RSB Vineyards* the defendant sellers (Orsi) purchased a vineyard and building located in Sonoma County, California in 2009. The building on the property

was a residence that the sellers planned to convert into a wine tasting room. Following the purchase, the sellers hired an architect and licensed contractor to make substantial and extensive improvements to the property. The design plans were approved by the county and the finished work passed inspection. The buyers then operated a tasting room without any issue.

The sellers eventually wanted out of the wine tasting business and sold the vineyard and tasting room to the buyers (RSP Vineyards). The buyers waived all contingencies and inspection rights before closing. After the purchase, the buyers discovered several severe and material defects with the tasting room. These defects included the weakening of a wall due to an improperly constructed stairway, deficiencies in the building's resistance to wind and seismic activity, inadequate roof support, improperly spaced floor joists, dry rot that had been plastered over without repair, insufficient floor foundation, and a defective deck. The defects were so severe that the repairs would have been more expensive than demolishing and rebuilding the tasting room.

The buyers sued the sellers for fraud and misrepresentation, among other things. The buyers' primary theory of recovery on the fraud cause of action was that the sellers knew or possessed constructive knowledge of the various defects uncovered by the buyers and failed to disclose them while under a duty to do so. There was no doubt these defects were material. However, the obligation to disclose only arises if the seller has actual or constructive knowledge of the deficiencies.

After just seven months, the sellers obtained summary judgment based on the declarations of the four sellers and the declaration of buyers' engineer. The buyers were essentially unable to show how the sellers knew about the defects.

One way to satisfy this knowledge requirement is for the buyer to show that the seller had actual knowledge of the defect. Actual knowledge can be shown by direct evidence or by inference. However, as the Court of Appeal held, "[o]nly where the circumstances are such that the defendant 'must have known' and not 'should have known' will an inference of actual knowledge be permitted." Alternatively, to satisfy the knowledge requirement, the buyer can show that: (1) an agent of the seller knew about the defect; and (2) that agent's knowledge should be imputed to the seller.

On the issue of actual knowledge, each of the sellers' declarations confirmed that no one ever informed them about any defects and that they did not have any knowledge of the defects from any other source. The trial court granted summary judgment for the sellers, holding there was no reason to think the sellers knew about the defects since the buyers' own engineer conceded that the defects would have been apparent "only to a professional who was familiar with structural engineering and structural building code requirements."

On the issue of alleged imputed knowledge, the buyers argued that the sellers' construction professionals were the sellers' agents, and because the professionals knew about the defects, this knowledge was imputed to the sellers. This argument was unsuccessful. An agent is defined as "one who represents another ... in dealings with third parties." A contractor (or any other construction professional) is usually not an agent of the owner of real property because contractors do not represent property owners in dealings with third parties. So, while the professionals in this case acquired their knowledge of the defects while working for the benefit of sellers, the professionals were not working in a representative capacity for the sellers at the time the knowledge was acquired. Conversely, if the construction professionals had been sellers' real estate agents working in an agency capacity at the time the knowledge of the defects was acquired, then the knowledge would have been imputed to sellers.

While this case may look like a win for real estate sellers, sellers would be ill advised to treat this case as a license to be willfully ignorant when employing a construction contractor. This case does nothing to change the long-standing rule that real property sellers have a duty to disclose known material facts that are not known to or within the reach of (by diligent attention or observation) the buyer. Nor does this case affect the rule that property owners have a duty to inspect the work of contractors they hire. This case does provide that if a seller hires a contractor who, without making any representations to third parties, knows of defects that the buyer cannot reasonably discover and does not advise the seller of the defects, the seller may be able to escape liability.

Brandon A. Hamparzoomian *is an associate in the transactions department of the firm's Fresno office.* His practice includes business formation and dissolution, business restructuring, and mergers and acquisitions. He can be reached at (559) 248-4820 / (800) 891-8362 or ***bhamparzoomian@ch-law.com***.

Thank You

We recognize that no business can grow without referrals. We value the confidence you have placed in us with your business and referrals. We hope you will continue to show us your confidence with future referrals.

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RECENT DEVELOPMENTS

WE ARE PLEASED TO REPORT THE FOLLOWING DEVELOPMENTS:

- **Judith M. Sasaki** and **Craig A. Tristao** obtained a federal jury verdict in favor our client in an intensely disputed copyright case regarding rights to a book for a theatrical production and fifteen original songs. The copyright issues included claims of substantial similarity and origination. Post-trial motions by the opposing party were denied and an appeal is pending.

- **C. Fredrick Meine III** obtained judgment by Summary Judgment. In the action, our client purchased a promissory note that was secured by a pistachio orchard and personal property. After foreclosing on the real property, a substantial deficiency remained due. The debtor refused to turn over the personal property collateral, and an action for possession of said collateral was filed. The debtor engaged in discovery abuses and changed counsel numerous times to avoid the inevitable. Fred persevered and filed a motion for summary judgment, which was recently granted. As a result, our client may now foreclosure on personal property collateral adding to the recovery obtained by our office.

- **Keith M. White** settled several accessibility lawsuits brought under the Americans with Disabilities Act (ADA) and related state laws. The actions were brought by serial plaintiffs and their attorneys that roam the Central Valley claiming that our clients' businesses violated the accessibility provisions of the ADA. These litigants typically exploit minor technical violations of the accessibility codes in an effort to extort settlements. The goal in such cases is to secure prompt resolution and minimize the amount of attorney's fees that might otherwise be incurred and demanded in settlement. Keith regularly defends businesses in ADA claims and has an admirable record in resolving them promptly and for minimal expense.

- **Gregory J. Norys** resolved a complicated lot line dispute involving family members, without the need of trial.

- **David J. Weiland** settled an agricultural dispute without trial. Our client purchased commodities from a broker who overcharged for what was supplied. After suit was filed, the parties engaged in mediation resulting in a settlement that will pay our client and preserve the business relationship between the two parties.

- **David J. Weiland** and **Michael P. Dowling** settled an agricultural dispute without filing a lawsuit. In the action, our almond grower client was damaged by improperly specified pesticide chemicals supplied by a national company. The parties engaged in mediation resulting in a seven figure recovery in damages.

- **Craig A. Tristao** and **Judith M. Sasaki** resolved a potential class action lawsuit brought under the California Consumer Legal Remedies Act. The action alleged our clients misrepresented on-line services being provided. Craig and Judy were able to negotiate a settlement for less than the cost of defense.

- **Darryl J. Horowitt** and **David J. Weiland** assisted in bid disputes firm clients experienced in two separate public works projects. In each, our client submitted bids on public works projects, but the bids were rejected as non-responsive. Our clients asked that our firm assist in appealing the adverse decisions.

- **Darryl J. Horowitt** and **C. Fredrick Meine III** assisted in the preparation of a workout agreement that allowed for additional financing to be provided to a distressed bank customer, while also obtaining a full release and additional protections and collateral to the financial institution client.

- **Lee N. Smith** recently served as a panelist for a Primerus webinar on Prop. 65. Lee also authored the article "Status of Prop 65 and Glyphosate State vs. Federal" published in the Primerus Xpress monthly magazine (http://www.primerus.com/files/June%202018%20Xpress.pdf).

- **Darryl J. Horowitt** served as a panelist for the Primerus International Convocation in Miami on "International Arbitration: What Matters." Darryl also served as a presenter for a webinar with the same title for the ACC International Law division.

If you have any questions regarding any of the developments referenced above or have a similar matter you may wish to discuss with us, please contact Maria O'Neill at (559) 248-4820/(800) 891-8362 or by e-mail at moneill@ch-law.com.

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