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EMPLOYMENT LAW UPDATE

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JUDICIAL

California

Court of Appeal Holds That Trial Court, Not Arbitrator, Must Decide Class Arbitration Issue

In *Network Capital Funding Corporation. v. Papke*, the Fourth District Court of Appeal addressed the question of whether the court or the arbitrator decides if an arbitration agreement authorizes class arbitration. The appellate court held that unless the parties specify otherwise, it is the responsibility of the court to decide this question.

Employee Erik Papke ("Papke") served a demand for class arbitration upon defendant Network Capital Funding Corporation ("Network Capital"), alleging wage and hour claims on behalf of himself and other similarly situated employees. The arbitration agreement signed by Papke was silent on the issue of class arbitration. Network Capital sought a judicial declaration that: (1) it was the responsibility of the court to determine whether the arbitration agreement authorized class arbitration; and (2) the arbitration agreement at issue prohibited class arbitration. The trial court determined that it must decide these issues.

The appellate court agreed, concluding that the court must decide the question of whether an arbitration agreement authorizes class arbitration. The court noted that judges determine matters of arbitrability - gateway issues such as whether the parties agreed to arbitration or whether their agreement applies to the underlying dispute. On the other hand, arbitrators decide procedural issues. Deciding whether the arbitration agreement authorizes class arbitration is a gateway arbitrability issue. The court reasoned that this issue determines whose claims the parties agree to arbitrate: (1) only the named plaintiff's against the defendant; or (2) the named plaintiff plus the additional claims of other absent claimants. This threshold issue therefore determines the scope of the arbitration proceedings. Further, the court reasoned that, absent clear and unmistakable language to the contrary in the arbitration agreement, "it is presumed that the parties intended courts, not arbitrators, to decide whether the parties agreed to submit a particular dispute to arbitration." The court concluded that the broad language in which the parties agreed to submit "any claim, dispute, and/or controversy" to arbitration, did not "clearly and unmistakably" delegate this gateway issue to the arbitrator. Thus,

it was for the judge to decide whether the arbitration agreement prohibited class arbitration.

The appellate court also affirmed the trial court's determination that the arbitration agreement in this case did not authorize class arbitration. The court cited U.S. Supreme Court precedent for the proposition that a party may not be compelled to arbitrate on a class basis unless there is a contractual basis for concluding that the party agreed to do so, and this contractual basis may not be implied from silence in the arbitration agreement on the issue. Here, the arbitration agreement did not expressly authorize or prohibit class arbitration, and Papke failed to present extrinsic evidence showing an agreement to arbitrate on a class basis. Therefore, the court concluded that there was no contractual basis for compelling class arbitration.

Court of Appeal Clarifies Definition of "Employee"

In *Dynamex Operations West, Inc. v. Superior Court*, the Second District Court of Appeal clarified the definition of the term "employee" in the context of a misclassification lawsuit.

In a an effort to cut costs, Dynamex, Inc. ("Dynamex"), a nationwide provider of courier and delivery services, adopted a company-wide policy that converted each of its delivery drivers from employees to independent contractors. Pursuant to Dynamex's updated classification system, drivers performed pickups and deliveries using their personal vehicles while wearing Dynamex uniforms. Drivers either worked fixed routes assigned by Dynamex or were contacted by Dynamex to perform tasks. While Dynamex's policies permitted drivers to turn down assignments, multiple drivers testified that drivers who attempted to turn down assignments or perform work for other companies were blackballed.

In 2005, Charles Lee ("Lee") entered into an independent contractor agreement to work as a driver for Dynamex. Lee performed delivery services for Dynamex for fifteen days. Three months after his short tenure with Dynamex ended, he filed a class action lawsuit challenging the legitimacy of Dynamex's re-classification of drivers as independent contractors. Lee alleged that Dynamex's drivers performed identical tasks both before and after their re-classification. Nonetheless, following the re-classification, Dynamex ceased to abide by the provisions of Industrial Welfare Commission ("IWC") Wage Order No. 9, as well as various California Labor Code provisions applicable to employees.

Lee's motion for class certification was granted by the trial court. Dynamex moved to decertify the class, but the trial court allowed Lee to alter the class definition in keeping with the definition of "employee" provided by the IWC, as interpreted in the prior case of *Martinez v. Combs*.[1] In granting class certification, the trial court ruled that the common law definition of "employee" as stated in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*[2] was inapplicable.

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[1] According to *Martinez*, "to employ" means "(a) to exercise control over the wages, hours, or working conditions; or (b) to suffer or permit to work; or (c) to engage, thereby creating a common law employment relationship."

[2] Per *Borello*, under the common law, "the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."

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Thereafter, Dynamex petitioned the appellate court for a writ of mandate to decertify the class. Dynamex argued that the trial court's certification of the proposed class improperly adopted the IWC definition of "employee" instead of using *Borello's* common law test to distinguish between employees and independent contractors.

The appellate court affirmed in part and reversed in part. In its opinion, the appellate court explained that claims falling within the scope of IWC Wage Order No. 9 should be, and in this case were properly controlled by *Martinez*. However, *Borello* should control with respect to claims falling outside the scope of the wage order. The court therefore held that each of the claims related to the payment of wages must be analyzed under *Martinez*. The limited claims related to employee reimbursement for business expenses, however, must be reviewed in light of the common law definition of "employee" espoused by *Borello*. The case was remanded to the trial court for re-evaluation within those parameters.

Dynamex serves as a reminder that employers must understand the tests applied by courts to determine whether individuals have been properly classified as independent contractors. Given the prominence of misclassification issues in California, employers should be cautious when classifying workers as independent contractors, and should closely examine whether independent contractors meet the various tests for that classification.

This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Jenna Leyton-Jones, Christine Mueller, Heather Stone, Ryan Nell, Lauren Bates, Jennifer Suberlak or Shannon Finley at (858) 755-8500; or Jennifer Weidinger, Tristan Mullis or Andrew Chung at (310) 649-5772.