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Vedder Thinking | ArticlesHarrison M. Thorne Publishes "Retroactive Application of *Dynamex*," in *The Los Angeles Lawyer,*

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FOR NEARLY 30 YEARS, California businesses have used the *Borello* test (so named after *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*) to determine whether workers should be classified as employees or independent contractors.[1] Then, in its April 2018 *Dynamex* decision, the California Supreme Court adopted a different test—the ABC test—that presumes workers are employees for purposes of state wage order claims unless the hiring entity makes a significant showing to the contrary.[2] However, the court did not address whether the ABC test applies retroactively.

If the test applies retroactively, businesses may be held liable for misclassifying workers under the ABC test prior to its adoption by the court. Liability for misclassifying workers can be substantial, as misclassified workers may be entitled to up to three years of meal and rest break premiums, overtime pay, and other remuneration under applicable wage orders. Thus, for example, a business that failed to provide adequate meal breaks to its 10 workers may be liable for up to $156,000 ($20 per hour x 10 workers x 5 days per week x 156 weeks). That amount doubles if the business failed to provide adequate rest breaks.

Accordingly, whether the ABC test applies retroactively will significantly affect businesses in this state.

Dynamex and the ABC Test

Dynamex is a nationwide package and document delivery company. In 2005, a driver who worked as an independent contractor for Dynamex filed a lawsuit on behalf of himself and a class of similarly situated drivers, claiming that Dynamex misclassified its drivers as independent contractors rather than employees, thereby violating the applicable wage order and various sections of the California Labor Code.[3] After nearly a decade litigating whether the *Borello* test should be used to determine worker classification, the California Supreme Court in April 2018 weighed in and adopted the ABC test for wage order claims.[4] Under the ABC test, workers are presumed to be employees, unless the hiring entity proves:

> (A) [T]hat the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.[5]

Notably, the *Dynamex* Court failed to address whether the ABC test applies retroactively, and denied Dynamex's petition for rehearing seeking guidance on the issue without explanation.[6] Accordingly, lower courts have been tasked with determining whether the ABC test applies retroactively on a case-by-case, ad hoc basis.

As a general rule, judicial decisions are given retroactive effect.[7] However, considerations of fairness and public policy may require that a decision be applied only prospectively.[8] Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule.[9] Thus, retroactive application may be deemed inappropriate when a decision changes the law and would "unfairly undermine the reasonable reliance of parties on the previously existing state of the law."[10] "The most compelling example of such reliance occurs when a party has acquired a vested right or entered into a contract based on the former rule...."[11]

On the other hand, judicial decisions changing unsettled or poorly defined law are typically deemed foreseeable, thereby warranting retroactive application. For instance, while tort liability for spoliation of evidence had been recognized by at least two California courts of appeal since 1984,[12] California's Supreme Court had not officially recognized the tort, and various other state's courts had rejected the tort.[13] Accordingly, in *Penn v. Prestige Stations, Inc., the Fourth District Court of Appeal* held that reliance on the two court of appeal cases recognizing spoliation of evidence as a viable cause of action was not reasonable and reversed a jury's award of compensatory and punitive damages to a slip-and-fall plaintiff for spoliation of evidence issued prior to the California Supreme Court's rejection of tort liability for spoliation.[14] In short, whether a decision applies retroactively is often a fact-intensive inquiry that cannot be easily boiled down into a black-letter statement of law.

In the months following the *Dynamex* court's decision, various courts have been asked to decide whether the ABC test applies retroactively to litigation initiated prior to the decision. At least two state courts have held it does.

In *Johnson v. VCG-IS, LLC*, a class of exotic dancers brought suit in the Orange County Superior Court in 2015 alleging the club they worked at misclassified them as independent contractors and, therefore, did not pay them all wages due. During a May 2018 status conference preceding a motion for summary judgment and trial, the parties jointly requested that the court clarify whether the recently adopted ABC test would apply in the case. In a ruling on a motion in limine, Judge William Claster ruled that the ABC test applies retroactively, as 1) judicial decisions are generally given retroactive effect; 2) the *Dynamex* court "did not state that its decision applied only prospectively," which "suggests that the decision should apply retroactively;" and 3) the court denied Dynamex's petition for rehearing.[15]

Months later, the Fourth District Court of Appeal applied the ABC test retroactively in *Garcia v. Border Transportation Group, LLC*.[16] In *Garcia*, a taxi driver filed suit against a taxi company he formerly drove for and its owner, alleging that he was misclassified as an independent contractor and, therefore, did not receive meal and rest breaks, minimum wages, or overtime wages, and was wrongfully terminated, among other things. The defendants moved for summary judgment on all of the driver's claims, arguing that he was properly classified under the *Borrello* test. The trial court ruled in favor of the defendants, and the driver appealed the court's decision.

While the driver's appeal was pending, the California Supreme Court issued its *Dynamex* decision. The court of appeal invited the parties to brief the effect of *Dynamex* on the appeal; however, the defendants did not address retroactive application of the ABC test. Accordingly, the court did not officially address the issue. However, in a footnote, the court noted that 1) judicial decisions will be given retroactive effect unless doing so would unfairly undermine the parties' reliance on the previously existing state of the law, and 2) the *Dynamex* decision—which merely "extended principles stated in [established judicial decisions]"—represents "no greater surprise than tort decisions that routinely apply retroactively."[17] Thus, the court of appeal held that the ABC test would apply retroactively to the driver's wage order claims, but not to his non-wage order claims (including his overtime and wrongful termination claims).

The fight over retroactive application of the ABC test is also unfolding at the federal level. In 2015, a Grubhub driver filed a putative wage and hour class action alleging that he and other similarly situated drivers were misclassified and therefore did not receive meal premiums and overtime pay, among other things. After a bench trial, the District Court for the Northern District of California—applying the *Borello* test—found that Grubhub properly classified the driver as an independent contractor, and therefore entered judgment in Grubhub's favor.[18] The driver appealed the judgment to the Ninth Circuit Court of Appeals,[19] and while the appeal was pending, the California Supreme Court issued its *Dynamex* decision.

In his opening appellate brief, the driver argued that the California Supreme Court is the only court that can limit retroactive application of its decisions and that the court's rejection of Dynamex's petition to modify its decision is evidence that the ABC test applies retroactively.[20] Grubhub countered that the *Dynamex* court's decision not to address retroactivity "simply leaves [this] issue open for resolution on a case-by-case basis."[21] Moreover, Grubhub argued that the ABC test is a "tectonic shift" in labor law that was not foreseeable and thus cannot be retroactively applied.[22] The Ninth Circuit will issue its decision in the coming months.

What's Next

With the caveat that it is, of course, impossible to determine how the Ninth Circuit will rule in *Grubhub*, there are convincing arguments against retroactive application of the ABC test. First, prior to *Dynamex*, California courts applied the *Borello* test "nearly unanimously" to determine worker classification.[23] Indeed, the Department of Labor Standards

Enforcement has long endorsed the *Borello* test's application.[24] Accordingly, it is reasonable to assume that businesses relied on the previously existing state of the law, which weighs against retroactive application of the ABC test.[25] Second, the *Dynamex* decision created new law drastically different from existing law. Under *Borello*, the primary consideration for determining a worker's classification turns on whether a hiring entity has the right to control the "manner and means" by which a worker accomplishes the desired result.[26] Yet under the ABC test, a worker will be deemed an independent contractor only if a hiring entity satisfies all three prongs of the ABC test. Thus, a hiring entity's failure to prove any one of these three prerequisites will be sufficient to establish the worker is an employee.[27] Because prongs B and C do not require a showing of control, an employment relationship can exist under the ABC test even when a hiring entity exercises no control over a worker. This represents a significant departure from existing law, as before the *Dynamex* decision was issued, a business could typically avoid the employ¬er-employee relationship by refraining from exercising significant control over a worker. Third, the *Dynamex* Court's refusal to hear Dynamex's petition for rehearing is not evidence that the test applies retroactively, as the Court's refusal to hear a matter does not constitute a ruling on the merits.[28] Fourth, the two courts to apply the ABC test retroactively—*Johnson* and *Garcia*—offer no precedential value: the Johnson ruling was issued by a trial court in response to an exclusionary motion, and the Garcia decision's retroactivity discussion was relegated to dicta contained in a footnote.

On the other hand, the Ninth Circuit may determine that the decision to apply the ABC test retroactively is best made on a case-by-case basis. Indeed, the California Supreme Court has held that a "blanket pronouncement" on retroactivity may be inappropriate where the decision turns on a "variety of case-specific factors, including the degree of hardship or other adverse consequences that would result from a retroactive application of [the new decision]."[29] Additionally, whether a particular business relied on the *Borello* test may require individual inquiries. Yet, if the retroactivity decision is left to lower courts on a case-by-case basis, conflicting decisions by lower courts will likely lead to appeals, bringing the retroactivity decision back to the appellate level. This will likely inform the Ninth Circuit's decision in *Grubhub*.

Should the court hold the ABC test applies retroactively, affected businesses will likely appeal the decision to the California Supreme Court. While the court previously refused Dynamex's petition for rehearing, the massive influx of litigation may signal to the state's high court a need to address the retroactivity issue.

Preparing Businesses and Workers

In the midst of the legal maneuvering unfolding in the courts, California businesses should investigate their classification policies to 1) ensure compliance with the ABC test going forward, and 2) assess whether their classification policies complied with the ABC test pre-*Dynamex*, as businesses may see an influx of claims going back three years in the event the ABC test is deemed to apply retroactively.

Workers should likewise assess their job duties and work arrangements to ensure they are properly classified and thus receiving proper benefits under the new ABC test. In particular, employees are entitled to workers' compensation coverage, insurance coverage, paid leaves of absence, and myriad other benefits. To ensure they are properly classified, workers should consult with local labor law advocacy groups or an attorney.

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1 S.G. Borello & Sons, Inc. v. Department of Ind. Relations, 48 Cal. 3d 341 (1989).

2 The ABC Test applies only to Industrial Welfare Commission wage order claims. Dynamex Operations West, Inc. v. Superior Ct., 4 Cal. 5th 903, 964 (2018).

3 Dynamex, 4 Cal. 5th at 919.

4 For a more thorough discussion of the *Dynamex* decision, *see* Tamara Kurtzman, *Deconstructing Dynamex*, L.A. LAWYER, Sept. 2018.

5 Dynamex, 4 Cal. 5th at 916-17.

6 *Id*. at 903, *reh'g denied* (June 20, 2018).

7 *See* Newman v. Emerson Radio Corp., 48 Cal. 3d 973, 978 (1989).

8 Claxton v. Waters, 34 Cal. 4th 367, 378 (2004).

9 *Id*. at 378-79.

10 Newman, 48 Cal. 3d at 983.

11 *Id*. at 989.

12 *See* Smith v. Superior Ct., 151 Cal. App. 3d 491 (1984); *see also* Willard v. Caterpillar, Inc., 40 Cal. App. 4th 892 (1995).

13 *See* Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W. 2d 434, 437 (1990) (citing cases declining to adopt tort).

14 Penn v. Prestige Stations, Inc., 83 Cal. App. 4th 336, 341 (2000).

15 Johnson v. VCG-IS, LLC, No. 30-2015-00802813, Ruling on Motion in Limine, (Cal. Superior Ct. July 18, 2018).

16 Garcia v. Border Transp. Group, LLC, 28 Cal. App. 5th 558 (2018).

17 *Id*. at page 572 n.12.

18 Lawson v. Grubhub, Inc., No. 3:15-cv-05128, Dkt. No. 221 (N.D. Cal. Feb. 8, 2018).

19 *Id*., Dkt. No. 226 (Mar. 7, 2018).

20 Lawson v. Grubhub, Inc., No. 18-15386, Dkt. No. 28 (9th Cir. Nov. 9, 2018).

21 *Id*., Dkt. No. 41 (9th Cir. Jan. 9, 2019).

22 *Id*.

23 Lawson, No. 3:15-cv-05128, Dkt. No. 249 (N.D. Cal. Nov. 28, 2018).

24 *See* The 2002 Update of the DLSE Enforcement Policies and Interpretations Manual (Revised) (April 2017), §28, *available at* http://www.dir.ca

.gov/dlse/DLSEManual/dlse_enfcmanual.pdf.

25 *See* Newman v. Emerson Radio Corp., 48 Cal. 3d 973, 983 (1989).

26 S.G. Borello & Sons, Inc. v. Department of Ind. Relations, 48 Cal. 3d 341, 350 (1989).

27 Dynamex Operations West, Inc. v. Superior Ct., 4 Cal. 5th 903, 964 (2018).

28 *See* Camper v. Workers' Comp. Appeals Bd., 3 Cal. 4th 679, 689 n.8 (1992) ("[D]enial of a petition for review is not an expression of opinion of the Supreme Court . . ."); *see also* Rosen v. State Farm General Ins. Co., 30 Cal. 4th 1070, 1076 (2003) (It is a well-established rule that an opinion is only authority for those issues actually considered or decided.").

29 Rider v. Cty. Of San Diego, 1 Cal. 4th 1, 13 (1991).

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