GRUBE BROWN & GEIDT LLP

A KEY CALL ON CALIFORNIA INDEPENDENT CONTRACTOR CLASSIFICATION

by Lisa Brown, Grube Brown & Geidt LLP

On June 30, 2014, the California Supreme Court rounded out its term with *Maria Ayala et al. v. Antelope Valley Newspapers Inc.,* a highly anticipated decision concerning claims that employees were misclassified as independent contractors. Limiting its analysis solely to the common law test announced in its earlier decision in *S.G. Borello & Sons Inc. v. Department of Industrial Relations* (48 Cal. 3d 341 (1989)), the state high court unanimously affirmed the court of appeal's reversal of the trial court's order denying class certification. Three of the justices, however, wrote two separate concurrences.

Legal and Factual Background

Four newspaper carriers, Maria Ayala, Josefina Briseno, Rosa Duran and Osman Nunez, brought claims against Antelope Valley Newspapers Inc., a publisher of a daily newspaper. Plaintiffs alleged Antelope Valley misclassified them as independent contractors and sought compensation under a host of California Labor Code provisions, including for unpaid overtime, unlawful deductions, failure to provide breaks and failure to reimburse business expenses.

Plaintiffs moved for class certification and Antelope Valley opposed. The trial court denied certification, concluding that common issues did not predominate on the question of whether the plaintiffs were independent contractors. In addition, the trial court found that even if plaintiffs were misclassified, their claims for overtime and for meal and rest breaks would require additional claim-specific individualized inquiries. The Court of Appeal affirmed in part and reversed in part. It agreed with the trial court that the overtime, meal and rest break claims were not amenable to certification. The Court of Appeal reversed the certification decision on the misclassification claim as it affected other alleged Labor Code violations.

The California Supreme Court granted Antelope Valley's petition for review and affirmed in full.

Question Presented and Holding

Declining the invitation to consider the "additional tests for employee status [found in the California Industrial Welfare Commission wage orders]," the court limited its holding to the following narrow question: "whether plaintiff's theory that they are employees under the common law definition is one susceptible to proof on a classwide basis."

The court answered in the affirmative:

> At the certification stage, the relevant inquiry is not what degree of control Antelope Valley retained over the manner and means of its papers' delivery. It is, instead, a question one step further removed: Is Antelope Valley's right of

> control over its carriers, whether great or small, sufficiently uniform to permit classwide assessment? That is, is there a common way to show Antelope Valley possessed essentially the same legal right of control with respect to each of its carriers? Alternatively, did its rights vary substantially, such that it might subject some carriers to extensive control as to how they delivered, subject to firing at will, while as to others it had few rights and could not have directed their manner of delivery even had it wanted, with no common proof able to capture these differences?

Right to Control Under *Borello* Remains the Principal Test

In arriving at its holding, the court began with the examination of the common law test of employee/independent contractor status announced in *Borello*. Reiterating the language of *Borello*, the majority explained that "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."

Rejecting Antelope Valley's arguments, and substantial evidence demonstrating variation in how carriers conducted their business, the court explained that "what matters under the common law is not how much control a hirer exercises, but how much control the hirer retains the right to exercise."

The court criticized the trial court for "los[ing] sight" of this main question when instead it focused on the "considerable variation in the degree to which Antelope Valley exercised control over its carriers" and the fact that "the putative class as a whole was not subject to pervasive control as to the manner and means of delivering papers." These two questions, says *Ayala*, do not answer the main question of whether there are "variations in the underlying right to exercise that control that could not be managed by the trial court."

Trial Court Erred in Failing to Focus on the Written Contracts

Having established the legal framework, the court proceeded to apply it to the facts before it.

In *Ayala*, during the liability period, there were two "form" contracts between Antelope Valley and the putative class members. The majority explained that "[a]t the certification stage, the importance of a form contract is not in what it says, but that the degree of control it spells out is uniform across the class." The court found error with the trial judge for "afford[ing] only cursory attention to the parties' written contract" and instead concentrating on the myriad declarations that spelled out variations in the way the contractors performed their duties under the contract. "In so doing, the court focused on the wrong legal question — whether and to what extent Antelope Valley exercised control over delivery. But what matters is whether a hirer has the legal right to control the activities of the alleged agent and, more specifically, whether the extent of such legal right is commonly provable." (emphasis in original).

Majority explained that trial courts should not ignore the written language of an agreement: "[i]n cases where there is a written contract, to answer [the question of whether there is a legal right to control] without full examination of the contract will be virtually impossible." "Evidence of variations in how work is done may indicate a hirer has not exercised control over those aspects of a task, but they cannot alone differentiate between cases where the omission arises because the hirer concludes control is unnecessary and those where the omission is due to the hirer's lack of the retained right. That a hirer chooses not to wield power does not prove it lacks power."

Interplay Between Secondary Factors and the Predominance Inquiry at Certification

In dicta, the majority discussed the secondary factors and their importance at the certification stage.

The court first cautioned that the secondary factors must be "correctly" identified. Using the example of "place of work," the court drew a distinction between where someone picks up the newspapers and "who provides" the place of work, here being Antelope Valley. The fact that the carriers "could pick up papers at any of several Antelope Valley warehouses or drop locations … does not show variation in the underlying secondary factor."

The court then explained that "[i]n evaluating how a given secondary factor might affect class certification, a court must identify whether the factor will require individual inquiries or can be assessed on a classwide basis." And "[o]nce common and individual factors have been identified, the predominance inquiry calls for weighing costs and benefits." "When the issue of common law employment is involved, that weighing must be conducted with an eye to the reality that the considerations in the multifactor test are not of uniform significance. Some, such as the hirer's right to fire at will and the basic level of skill called for by the job are often of inordinate importance." The "proper course … is to consider whether the [individual variations] are likely to prove material … and, if material, whether they can be managed."

Unanswered Questions

Ayala provides critical guidance for independent contractor-employee misclassification disputes. However, there are significant questions that remain unanswered.

First is whether multifactor tests other than the common law test announced in *Borello* may be appropriately used by litigants and courts in evaluating the independent contractor misclassification allegations in lawsuits for alleged California Labor Code violations. "[W]e leave for another day the question what application, if any, the wage order tests for employee status might have to wage and hour claims such as these." The court's decision not to address this issue leaves open the possibility that scrutiny under *Borello* may not be the only analysis the courts should conduct at certification (or beyond). And it reminds the litigants to address all applicable tests in the very first instance. Here, the majority explained that it was the parties' reliance on the common law test that led the court to limit its holding.

Second is how the trial court will reconcile the evidence on remand. While the majority opinion heavily emphasized the "right to control" *Borello* factor, it explained that actual control as well as all the secondary factors remain in play and must be examined when evaluating predominance and manageability. Together with the directive issued just weeks ago in *Duran v. U.S. National Bank Association*, it is clear that the parties should and will continue to vigorously litigate the individualized issues related to all the *Borello* factors.

Third, the court's reliance on the existence of a written contract to find commonality at the certification stage is important for the parties to consider post-certification. In *Ayala*, there were two "form" contracts between Antelope Valley and the putative class members. The majority found fault with the trial court for affording "only cursory attention to the parties' written contract." What the court should have done instead, wrote Justice Werdegar, is to examine the contract closely to determine whether "the degree of control it spells out is uniform across the class." "In cases where there is a written contract, to answer [the question of whether the hirer has the legal right to control the activities of the alleged agent] without full examination of the contract will be virtually impossible." Because the majority placed such an emphasis on the written contracts (calling them a "significant factor"), post-certification it may be possible for litigants to present a persuasive argument to the court that the written contract — and the provisions such contract sets forth — should play an equally significant role in determining liability. Where, as will be the case in many if not all independent contractor arrangements, the written provisions in the contracts support a finding of an independent contractor relationship, the courts may be hard-pressed to ignore such a "significant factor" in deciding the merits of the case. Given the importance assigned to the written contracts by *Ayala*, now may be a great opportunity for companies to re-examine their agreements with an eye both towards certification and merits disputes.

Conclusion

Ayala is significant because: (1) it clarifies that the test for independent contractor status primarily rests on right to control under the common law test, but "actual control" should not be ignored and is still relevant in determining the parties' right to control; (2) it clarifies how the litigants and the courts should approach class certification of alleged independent contractor disputes; and (3) by affirming denial of class certification on overtime, meal and rest claims, it recognizes that employee contractor status is only a stepping stone to liability, so if barriers to class certification exist at other steps (like proving meal-period violations), class certification can be denied even when employee status can be determined on a classwide basis.

Finally, a note of caution to litigants. In *Ayala*, the majority found an inherent contradiction between the trial court's ruling that individual issues predominate with the ruling that Antelope Valley did not exercise sufficient control to render the putative class members employees. By concluding that the right to control was not susceptible to common proof, yet ruling that the right to control was not pervasive, the trial court "contradicted its own conclusion." This criticism serves an important reminder to both plaintiffs and defendants of the dangers of

overstating the merits of their cases at certification, and ending up with a contradictory opinion vulnerable to an attack on appeal.

Have a Law360 subscription? Click here to view this article on Law360.com.