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January 17, 2018

### VIA EFILING

Chief Justice Tani Cantil-Sakauye  
and Associate Justices  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102-4783

Re: *Dynamex Operations West, Inc., Petitioner v.  
The Superior Court of Los Angeles County,  
Respondent (Charles Lee, et al., Real Party in Interest)*  
Supreme Court Case No. S222732  
Court of Appeal Case No. B249546  
**Amicus Brief of California Employment Law  
Council (CELC) Addressing New Jersey ABC Test**

To the Honorable Chief Justice and Associate Justices of the Supreme  
Court of California:

The California legislature, in Labor Code section 3353 (“Independent Contractor”), defines an independent contractor as a person “Under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.” This Court’s opinion in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989), for the past 28 years, has provided the proper interpretation of that statute. Although often described as a right to control test because of the wording of the Labor Code, in reality *Borello* is a multifactor test, setting forth a dozen factors in addition to the control factor contained in the Labor Code.

The *Borello* test has been used by California courts and the DLSE to define who is and who is not an independent contractor in cases involving the Labor Code, the IWC orders, or both. The California legislature for 28 years has had the opportunity to change this Court’s interpretation of its statute, had it so desired, but it never did so. As demonstrated by our prior *amicus* brief, the DLSE purports to follow *Borello*, but described only some of the factors *Borello* considered relevant. The IWC has never questioned the application of the *Borello* factors to determine its “suffer or permit” language. Moreover, the IWC was defunded and went out of

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existence over a decade ago, and has had no opportunity to clarify its “suffer or permit” standard in light of the extraordinary developments that have taken place in our economy involving employee/contractor issues since the IWC was defunded.

The opinion of Division Seven of the Second Appellate District was the first court decision in California to suggest that the *Borello* standard did not apply to IWC orders. This Court is not the California legislature. The rationale used by the New Jersey Supreme Court in the *Sleepy’s* case actually mandates that this Court not change the multifactor *Borello* test which has been applied for almost three decades in the courts and by the DLSE. We respectfully suggest that the following factors mandate no change in the status quo – that the *Borello* multifactor test should continue to be applied to all employment litigation in California unless and until the legislature mandates change.

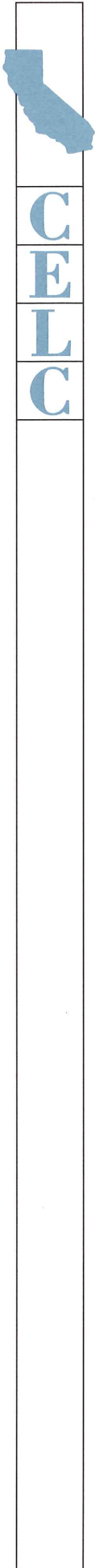
- The *Sleepy’s* case had a task somewhat like this Court’s – to reconcile two statutes. But unlike the *Dynamex* case, in *Sleepy’s* both of the statutes had been passed by the legislature: “The task presented to us in this certified question involves interpretation of two complementary statutes to determine and effectuate the intent of the Legislature.” 220 N.J. 289, 316 (2015). *The New Jersey court was emphatic that one test should govern both statutes:* “We determined that the same test or standard should be employed to determine the nature of an employment relationship under both statutes.” *Id.* at 312.
- The New Jersey court chose not to upset decades of interpretation by the New Jersey Department of Labor: “We also conclude that no good reason has been presented to depart from the standard adopted by the DOL to guide employment status determinations or to disregard the longstanding practice of treating both statutory schemes in tandem. *Id.* at 312. “DOL asserts that the selection of this standard [ABC standard] has never been challenged and no party or *amici* have refuted that contention.” *Id.* at 314.
- Unlike California, the ABC standard had been adopted by the New Jersey legislature for use in the Unemployment Insurance Code.
- Unlike California, the “suffer or permit” standard had been adopted by the New Jersey legislature for each of the two statutes being construed.
- The California legislature by contrast has acquiesced in the *Borello* test for 28 years.
- The DLSE in its manual acknowledged that *Borello* is the proper test under both statutes, but ignored several of the *Borello* factors.
- We are aware of no case that has refused to apply *Borello* to the IWC wage orders until the instant Court of Appeal decision.





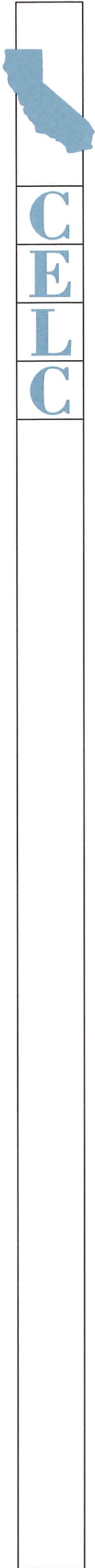
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- The opinion below holds that one could be an independent contractor under Labor Code causes of action, interpreted by *Borello*, but that for causes of action brought under the “suffer or permit” standard of the IWC order, the same individual would be classified as an employee.
- There is no indication that the IWC or the legislature intended such a result.
- The concept that this Court must choose between the IWC “suffer or permit” test and the *Borello* test is illusory. As noted above, *Borello* has been the test applied for almost three decades to cases involving both IWC and Labor Code claims.
- Assuming arguendo that there is a necessity for this Court to “choose” between the IWC “suffer or permit” test and the *Borello* test for Labor Code causes of action, there is no reason to select the IWC “suffer or permit” test. As noted, the IWC is in disrepute – it has been defunded. As noted above, it has had no chance to adopt its standard to the gig economy. The Ubers, Lyfts, Air B&Bs, and sophisticated high-tech consulting firms did not exist when the IWC went out of existence.
- In New Jersey, all the choices were between different statutes passed by the legislature and signed by the governor – the IWC, while a source of law, is not the equivalent of the legislature and the governor.
- The California legislature, unlike the New Jersey legislature, has never adopted the “suffer or permit” standard or the “ABC standard”.
- The multi-factor *Borello* test incorporates, in addition to the right of control contained in the ABC test, the following twelve factors:
  - (1) “Right to discharge at will, without cause”; not severable or terminable at will by the principal but gives rise to an action for breach of contract” (48 Cal. 3d at 350 & 351 n.5);
  - (2) “The skill required in the particular occupation.” *Id.* at 351;
  - (3) “Whether the principal or the worker supplies the instrumentalities, tools, and place of work for the person doing the work” *Id.* at 351;
  - (4) “The alleged employee’s investment” (*id.* at 355);



- (5) “The method of payment, whether by the time or by the job” (*id.* at 351);
- (6) “Whether or not the parties believe they are creating the relationship of employer-employee” (*id.* at 351);
- (7) “Opportunity for profit or loss depending upon managerial skill” (*id.* at 355);
- (8) “Employment of helpers” (*id.* at 355);
- (9) “A distinct occupation or business” (*id.* at 351);
- (10) “The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision” (*id.* at 351);
- (11) “The length of time for which the services are to be performed” (*id.* at 351); “The degree of permanence of the working relationship” (*id.* at 355); and
- (12) “Whether or not the work is part of the regular business of the principal” (*id.* at 351).

- The ABC test in factor (C) ignores these factors, and defines an individual as an employee if the individual performs her contracted services for one entity, so that if that entity were to go out of business, the contractor’s business would fail with it.
- Please consider how dramatic the change would be to move California from the *Borello* multifactor test to the ABC test. This Court, rather than the California legislature, would be changing California law to state that it is now irrelevant whether the alleged contractor had substantial profit potential, made significant investments, how the contractor was paid, the contractor’s right to employ helpers to assist in doing the work or to do all the work, who supplied the tools, skill required, and the like. Only the three ABC factors would matter, and if even one of them were not met, all the other *Borello* factors would become irrelevant. If there is to be such a dramatic change, it should be made by the legislature.
- A hypothetical which closely resembles an independent contractor case the undersigned tried and won under the *Borello* test will demonstrate the dramatic nature of such a change in California law.



Hypothetical:

Carl Contractor goes to Amazon, and proposes that he and his employee helpers do Amazon deliveries in a difficult mountain area. Amazon agrees. Carl employs four full time employees to help him with the work. Carl works out so well, that Amazon enters into contracts with numerous Carls in rural areas. A class action lawsuit is filed, alleging that the Carls are really employees. Amazon wins easily under the *Borello* test, since it does not control the manner in which the Carls did the work, the Carls have substantial profit opportunity, and made a significant investment, and the like. This Court then rules that the ABC test is the law in California. A new lawsuit is filed immediately after this Court's decision, going back four years under the unfair competition law. The plaintiff points out that under item (C) of the ABC test, the Carls are performing services only for Amazon, and if Amazon went out of business so would the Carls. Under the ABC test, the Carls are now deemed employees, and Amazon pays substantial damages despite having won the prior trial under the *Borello* test.

This hypothetical illustrates two points. The first is the dramatic nature of the change in California law that adopting the ABC test will cause – a change which CELC asserts should only be made by the legislature. The second is that if there is to be such a dramatic change, this Court should designate the change in law as prospective only, and entities which relied on the *Borello* test should not be instantly faced with liability extending back four years from this Court's decision.

CONCLUSION

In the *Sleepy's* case, the New Jersey Supreme Court dealt with “suffer or permit” standards adopted by the New Jersey legislature, and the ABC test also adopted by the New Jersey legislature. The undisputed facts were that the New Jersey Department of Labor had utilized the ABC test for many years under both statutes. These facts are totally different from the California situation. The California legislature has never adopted the “suffer or permit” test. The since defunded Industrial Welfare Commission did, but the *Borello* test has historically been used by both the courts and the administrative agencies to resolve independent contractor issues both under the Labor Code and the IWC orders. New Jersey is irrelevant, other than its common sense in conclusion that there should be one test under both statutes. If there is to be a dramatic change in California, it should come through the legislature.



Thank you for inviting CELC to provide *amicus* briefs.

Respectfully submitted,

CALIFORNIA EMPLOYMENT LAW COUNCIL

By: Paul Grossman  
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General Counsel





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CITY OF LOS ANGELES AND COUNTY OF LOS ANGELES ) ss:

I am employed in the City of Los Angeles and County of Los Angeles, State of California. I am over the age of 18, and not a party to the within action. My business address is 515 South Flower Street, Twenty-Fifth Floor, Los Angeles, California 90071-2228.

On January 17, 2018, I served the foregoing document(s) described as:

***Amicus Brief Of California Employment Law Council (CELC) Addressing New Jersey ABS Test***

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 17, 2018, at Los Angeles, California.

  
\_\_\_\_\_  
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