

# BANKER & TRADESMAN

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## OPINION

NO RESOLUTION

### SJC Declines To Address Heart Of Issue In *Monell* Ruling

Court Offers Suggestions For Resolution Of Independent Contractor vs. Employee Debate

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SPECIAL TO BANKER & TRADESMAN

The Supreme Judicial Court (SJC) issued its opinion last week in the eagerly anticipated case of *Monell v. Boston Pads, LLC* and left the real estate



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brokerage community with more questions than answers. In a case that many believed could either confirm a long-standing practice or cause a widespread shakeup in the industry, the SJC decided instead to issue a very narrow ruling and push the most important issue off for another day.

The case sought to clarify how real estate salespeople may be classified for employment purposes. Currently, independent contractor relationships are common in the real estate brokerage community, where salespeople often work sporadic hours outside of the office on their own schedules. The commission-only/independent contractor classification exempts brokerage firms from compliance with and the filing require-

ments of numerous employment and tax statutes.

However, real estate salespeople are also subject to significant control by the real estate brokers for whom they work, as required by the licensing statute for real estate salespeople. The brokerage firms in the case at hand classified their salespeople as independent contractors, yet mandated certain hours which salespeople were required to spend in the office, the payment of desk fees, dress codes and other rules and regulations, requirements which could be seen as creating an employment relationship. The salespeople argued that these requirements show that they were actually employees of the brokerage firms and the independent contractor agreements which they signed were utilized simply to avoid compliance with employment laws. The brokerage firms, accused in the case of failing to compensate their salespeople in accordance with minimum wage laws, overtime laws and other employment statutes, argued that these controls and requirements were necessary to satisfy the statutory requirements relating to the supervision of salespeople.

#### Two Suggestions For Resolution

The SJC agreed with the lower court that an application of the statutory three-prong test established to determine whether a person is an independent contractor does not apply to real estate salespeople, as

it directly conflicts with their licensing statute. The court determined that, given the requirements of the licensing statute, a real estate salesperson could never be categorized as an independent contractor under the three-prong test, thereby frustrating the section of the licensing statute which allows a salesperson to be either an employee or an independent contractor. However, the court then declined to make a determination whether, based on the facts of the case, the plaintiffs were employees or independent contractors, or to provide an alternative test on how to determine whether a real estate salesperson is an employee or an independent contractor. Instead, the court suggested two alternative routes to resolve this issue.

The first would be for the plaintiffs (or some other aggrieved salespeople) to re-examine the law and find an alternative legal basis which would establish how to draw the line between an employee and an independent contractor for real estate salespeople. The inherent difficulty in this option would be that any "test" or standard that the plaintiffs would try to advance must not directly conflict with the salesperson licensing statute. The plaintiffs would need to find a standard which would permit a salesperson, while sufficiently supervised and controlled in accordance with the licensing statute, to be either an employee or an independent

contractor given the specific factors of their relationship.

The second, and seemingly preferred, pathway suggested by the SJC, is for the legislature to resolve this issue. In 2008, the legislature passed legislation which would explicitly permit real estate salespeople and brokers to contract with their firms to determine how they would be classified for

employment purposes. Then-Gov. Deval Patrick, however, disapproved this language in a line item veto and it was never enacted.

With the ambiguity provided by Wednesday's ruling, the attention raised by this case and a new governor in office, it would seem to be an opportune time for the legislature to once again address this issue

and hopefully enact a measure to bring certainty to the industry before further litigation ensues. ■

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