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Friday, July 3, 2015

The eagerly awaited case of Monell v. Boston Pads, LLC

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Uncertainty in the employment practices of many brokerage firms continues as the Supreme Judicial Court (SJC) declined to address the main issue in the eagerly awaited case of *Monell v. Boston Pads, LLC*. With a potential to cause a significant change to a widespread practice of the industry, the SJC chose instead to issue a narrow ruling and push the central issue off for another day.

Currently, independent contractor relationships are common in the real estate brokerage community, where salespeople often make their own schedules and spend substantial portions of their day outside the office. By utilizing the commission-only/independent contractor classification, brokerage firms are exempt from compliance with and the filing requirements of often burdensome employment and tax statutes. The salespeople in *Monell* were classified as independent contractors pursuant to agreements signed at the beginning of the work relationship. However, a statutory three prong test exists in Massachusetts to determine whether, despite a contractual relationship, an individual is an employee or an

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independent contractor, based on certain employment practices. The brokerage firms in *Monell* 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 salespeople accused the brokerage firms of failing to compensate the salespeople in accordance with minimum wage laws, overtime laws, and other employment statutes. The brokerage firms countered that these controls and requirements were necessary to satisfy the statutory requirements relating to the supervision of salespeople and that real estate salespeople were exempt from the application of the three prong test. Massachusetts law requires significant control and supervision of salespeople by the brokers.

The SJC ruled in favor of the brokers and 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 the plaintiffs were employees or independent contractors based on the facts of the case or to provide an alternative test on how to determine whether a real estate salesperson is an employee or an independent contractor. The court did however provide some guidance on how this issue might be resolved in the future, either by itself or by the Massachusetts legislature.

The first proposed route would be for the plaintiffs (or some other aggrieved salespeople) to reexamine 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 the relationship between the salesperson and the party for whom he rendered services. 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. Governor Patrick, however, disapproved this language in a line item veto and it was never enacted.

The SJC acknowledged in the decision that this issue remains unresolved for brokerage firms looking for certainty that their classification of certain employees as independent contractors will not expose them to significant liability under employment statutes. Hopefully, the legislature can revisit this issue and provide clarity to these long standing practices of the industry.

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