REMARKS TO CALIFORNIA ASSEMBLY COMMITTEE
ON LABOR AND EMPLOYMENT

February 26, 2019

My name is John True. I am retired from the Alameda County Superior Court where I served for eleven years including six in a civil trial department. I am now engaged in the private practice of mediation and arbitration. I also teach law as an adjunct professor at Bay Area law schools including my alma mater, UC Berkeley Law, Stanford Law School and UC Hastings College of the Law. Before I was appointed to the bench in 2003, I was a practicing lawyer representing workers and labor unions over the course of about 27 years. I have also written and spoken extensively about labor and employment law issues. My CV is appended to the written version of these remarks.

I wish to share brief remarks on the significance of *Dynamex*[1] from the perspective of practitioner, judge and teacher.

1. In Practice

My introduction to the complexities of worker classification was dramatic. As a staff attorney at non-profit employment rights law organization which sponsored a legal clinic,[2] I found myself representing Garth Chojnowski, a middle-aged driver for a San Francisco taxi company. Garth had been let go by his company and had applied for unemployment benefits. He came to our clinic when his application was denied by the Employment Development Department on the grounds that he was not in fact an employee of the Company but a "lessee" of one of their cabs on a shift-by-shift basis. He was therefore deemed to be an independent contractor. When I asked where he lived, so I could set up an appointment to talk with him further, he gave me directions to a street out in the Avenues. There, a few days later, I found a beat up Chevrolet Caprice station wagon which had long ago seen it's better days. This was

---

[1] *Dynamex Operations West, Inc. V. Superior Court*, (Charles Lee et al., Real Parties in Interest), 4 Cal. 5th 903 (2018).

[2] The San Francisco Legal Aid Society Employment Law Center, now called Legal Aid at Work and its Workers Rights Clinic.

Garth's home and obviously had been for some time.

A young Hastings law student working at our clinic, was able – under my supervision – to convince an EDD Administrative Law Judge to grant UE benefits to Mr. Chojnowski, successfully arguing that the cab company had the right to control the material details of how Garth performed his job.

Garth was not the only San Francisco taxi driver to come into the clinic. I remember talking to others, including – vividly enough – the young widow of another driver who had been assaulted in his cab. He died in San Francisco General Hospital – a charity case – having been denied workers compensation benefits for the same reason that Garth couldn't get unemployment – he was a so-called independent contractor.

When we at the clinic began to look into this, we found somewhat to our surprise that the courts had already resolved these issues. We found two published taxicab decisions, one involving unemployment benefits and the other workers compensation. Both held that *cabdrivers are employees*. Both are still on the books.[3]

So why wasn't it the case that *all* taxicab drivers were employees when two Courts of Appeal had found that they are within the compass of the safety net that is supposed to protect workers in this state? After some more research and some organizing among cabdrivers, we brought a class-action lawsuit against five of the major cab companies in the City to try to get an answer to this question.[4] By the time our case was filed, the California Supreme Court had decided *Borello & Sons v. D.I.R.*[5] finding sharecropping farmworkers to be employees. We actually cited that case in our complaint along with the two published taxicab decisions we had

---

[3] *Yellow Cab and Golden Eagle Insurance Company v. Workers Compensation Appeals Board (Richard Edwinson, Real Party In Interest)*, 226 Cal.App.3d 1288 (First Dist. Ct. App. 1991); *Santa Cruz Transportation, Inc. v. California Unemployment Insurance Appeals Board (Ed Gallegos, Real Party In Interest)*, 235 Cal.App.3d 1363 (1991): (Sixth Dist. Ct. App. 1991).

[4] *Joseph Tracy, et al. v. Yellow Cab Cooperative, Inc.*, San Francisco Superior Court No. 938786, filed November 25, 1991.

[5] *S.G. Borello & Sons v. California Department of Industrial Relations*, 48 Cal.3d 341 (1989).

found.

Surely, we thought, we had the law on our side. *Borello* announced that the primary factor in making a determination of employee status was whether the employer had the right to exercise "all necessary control" over the "overall operations" of the business in which the worker was engaged. To be sure, the case set out a somewhat complicated checklist of other factors to look at, but it made it *quite* clear that the "test for determining whether the person rendering service to another is an 'employee' or an excluded 'independent contractor' must be applied with *deference to the purposes of the protective legislation.*"[6] This idea of deferring to the statutory purpose was an important signal, we thought.

Our lawsuit had two main goals. First, we wanted a judicial declaration that those we represented (along with others in situations just like theirs) were *employees* entitled to the safety net the law provides. We did not sue for minimum wages, overtime pay or anything other than the entitlement to unemployment insurance where applicable and to workers compensation benefits for injured cabdrivers. Establishing these rights, we felt, would clarify that the public fisc would not be burdened – as it apparently was being – with the need to support unemployed or injured workers. Employers would know their responsibilities, and workers would know their rights.

Second, we perceived a public benefit in taking the first step to raise the floor under vulnerable, marginally employed members of a precarious class of workers. With a broad finding of employee status, a whole set of workers of color, female workers, immigrants and others could begin to assert rights that are guaranteed to employees but denied to independent contractors. Workplaces (including taxicabs) could be made safer under OSHA and other laws applicable to employees. Wage theft could be more easily abated.

The taxi lawsuit went on for years. *Borello*, as we know, spawned a great deal of litigation in California and elsewhere that was expensive, frustrating and, at least the cases I was involved in, stressful. For both sides. Although the case made it clear that worker protective legislation was to be interpreted broadly, there remained problems.

---

[6] *Borello* at 48 Cal.3d. pp. 353-354.

One important one was the nature of the legal test under *Borello* as applied to class action litigation. Our clients bore the burden of proving that they shared a community of interest with other unnamed class members and that common factual and legal issues predominated over individual ones. *Borello's* multi-factor analysis for employee status usually complicated this process. One sentence from the case I remember being used over and over again in the class actions I handled is: "Each service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case."[7] This notion alone led to lengthy depositions, convoluted written discovery and judicial confusion.

2. On the Bench and in the Classroom

By the time I became a judge, it was clear that a multifactor approach was leading to a wide variety of results depending on which factors were emphasized. *Borello* and other cases (like the taxi decisions we found) were examples of a liberal application of the test,[8] but other cases went the other way.[9] The same seemed to be the case when it came to determining whether to grant or deny motions for class certification. While *Ayala v. Antelope Valley Newspapers, Inc.*[10] upheld class certification for newspaper carriers primarily because of the right of control

---

[7] *Borello,* 48 Cal.3d at p. 354.

[8] *See also, JKH Enterprises, Inc. v. Dep't of Indus. Rel.,* 142 Cal.App.4th 1046 (2006): finding couriers employees, because "[b]y obtaining the clients in need of the service and providing the workers to conduct it, JKH retained all *necessary* control over the operation as a whole."

[9] *Juarez v. Jani-King,* 273 F.R.D. 571 (N.D. Cal. 2011) (review in 9th Cir. stayed pending Dynamex): denied class cert to "franchise" janitors because common evidence of control merely showed "common hallmarks of a franchise;" *State Comp. Ins. Fund v. Brown*, 32 Cal. App.4th 188 (1995): "broker" of "intermodal freight" transportation not employer over "independent contractor" drivers, where drivers free to accept or reject assignments, could work for other companies, and no control over work schedule, among other things; *Desimone v. Allstate Ins. Co.*, 2000 WL 1811385 (Nov. 7, 2000 N.D. Cal.): finding "captive" insurance agents not employees as a matter of law, where agents controlled their work schedules, could hire help and delegate the work to them, and could engage in other entrepreneurial activities like advertising.

[10] *Ayala v. Antelope Valley Newspapers, Inc.,* 59 Cal.4th 522, 533 (2014).

evidenced by provisions in a common contract,[11] other cases have held otherwise – sometimes in the same industry.[12]

In 2010, the California Supreme Court decided *Martinez v. Combs,* a case under the California Wage Orders promulgated by the Industrial Welfare Commission.[13] The *Martinez* court had to interpret language in the IWC orders stating, in essence, that one whom an employer "suffers or permits to work" is an employee. This broad formulation, historically used to hold mill and mine owners accountable who disclaimed active hiring of, *e.g.,* small boys and girls at the turn of century, had the potential for a great deal of change.

3. Dynamex

What came, however was *Dynamex* and the "ABC Test[14] and, the court having spoken,

---

[11] *See also, Bowerman v. Field Asset Servs., Inc.*, 2015 WL 1321883 (N.D. Cal. Mar. 24, 2015): after earlier denial of class cert, court certified class of "vendors" who restore foreclosed properties, where contract and manuals showed common control and concern over "distinct business" factor addressed by redefining class to include those who spent at least 70% of time working for defendant; *Villalpando v. Exel Direct,* 303 F.R.D. 588 (N.D. Cal. 2014): certified class of pick-up and delivery drivers, relying on contract to show common evidence of control, rejecting import of variation in hiring help since all drivers subject to same requirements regarding such hires, and finding "distinct business or occupation" subject to common proof since everyone does the same type of work.

[12] *See, e.g., Sotelo v. Medianews Group, Inc.*, 207 Cal. App.4th 639 (2012): upheld denial of class cert for wage and hour claims on behalf of newspaper carriers, downplaying significance of common evidence of control because little control was needed due to the simplicity of the job, and instead focusing on individual issues re secondary factors, like "distinct business" and "opportunity for profit and loss" because of variation in hiring help; *Spencer v. Beavex, Inc.,* 2006 WL 6500597 (S.D. Cal. Dec. 15, 2006): variations in drivers' decisions to hire help raised predominate individual issues regarding "distinct business" factor.; *Narayan v. EGL*, 285 F.R.D. 473 (N.D. Cal. 2012): denied class cert to pick-up and delivery drivers despite common evidence of control and majority of secondary factors; instead, focusing on individual issues regarding "distinct business" because of variation in how individuals operated, such as who hired help and who worked for other companies.

[13] *Martinez v. Combs,* 49 Cal.4th 35 (2010).

[14] The ABC test: (all three must be met for independent contractor status to stand):
(A) The worker is free from direction and control in the performance of the service, both under the contract of hire and in fact; *and*
(B) The worker's services must be performed either

the question for the legislature is, does the ABC test make things better? The Committee will hear pros and cons from interested parties this morning. My experience as an advocate for low-wage workers suggests that it will more adequately serve the legislature's interest in lifting them up. My experience as a judge and a teacher is that it will bring welcome clarity, predictability and accountability to this important are of the law.

Thank you.

(i) outside the usual course of the employer's business or
(ii) outside all the employer's places of business; *and*

(C) The worker must be customarily engaged in an independently established trade, occupation, profession, or business of the same nature as the service being provided.