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California Appellate Court Issues a Decision That Mutual of Omaha Insurance Agents Qualify as Independent Contractors as a Matter of Law

January 2, 2012 by Thomas Kaufman (follow me on Twitter)

On December 31, 2011, as a final act for the year, the First Appellate District of the California Court of Appeal issued a good appellate decision for employers on the issue of independent contractor status, Arnold v. Mutual of Omaha. The case creates a veritable roadmap for insurance companies on how to treat agents so that they maintain their status as independent contractors rather than employees.

The Key Facts

Ms. Arnold worked as a non-exclusive insurance agent for Mutual of Omaha, which meant she was authorized to sell their products but was free to (and did) sell products of other insurance companies. Nonetheless, she claimed she was actually an employee rather than an independent contractor (IC), and that she therefore was entitled to recover for reimbursement of expenses and waiting time penalties for unpaid final wages on behalf of herself and a purported class of similarly situated agents. The factual record was very strong for the defense as to the limited control Mutual of Omaha exercised over Arnold (and its other agents):

(1) The contract Arnold signed with Mutual of Omaha expressly stated that the parties understood it was an independent contractor agreement.

(2) Her chief duties were to procure and submit insurance applications, collect money, and service clients.

(3) She was compensated entirely on commissions for products sold, with a chargeback if money was uncollected or refunded.

(4) She received no performance evaluations and nobody at Mutual of Omaha monitored or supervised her work schedule. Plaintiff decided when, where, and to whom she would market insurance.

(5) Although Mutual of Omaha provided some training on its products and sales techniques, it was not mandatory for ICs to take the training. The only mandatory training was as to compliance with certain state insurance laws and regulations.

(6) Mutual of Omaha provided some office space if agents wanted to use it, but it was optional, and agents had to pay for the "workspace and telephone service." Mutual of Omaha also did not pay for business cards or any other business expenses, although it provided certain services for a fee if an IC wanted them.

(7) Under the IC agreement in place, either party could terminate the relationship at any time with or without cause, or if Arnold failed to sell a Mutual of Omaha product for 180 days.

On this record, the trial court granted summary judgment to Mutual of Omaha that Arnold was an independent contractor rather than an employee. Arnold appealed.

What Makes the Case Noteworthy

The court of appeal affirmed, declaring that it was not even a close case. As a preliminary matter, the court held the common law test of employee v. IC applies to claims under Labor Code Section 2802. This is a multi-factor test (roughly 10 factors depending how you count them), codified in a decision called *S.G. Borelli & Sons, Inc. v. DIR*, 48 Cal. 3d 341 (1989). This holding is not exactly earth-shaking as the plaintiff's argument of statutory interpretation was not particularly cogent. It is the summary judgment aspect of the case that makes it notable, because the case sets forth a pretty good roadmap of what an insurance company who wants to have independent contractor agents should follow to preclude a lawsuit that the agents are really employees. The court pointed to the existence of undisputed facts on several specific issues as justifying summary judgment:

> "After a careful review of the opposing evidence, we find nothing that raises a material conflict with the supporting evidence summarized above. The salient evidentiary points established Arnold used her own judgment in determining whom she would solicit for applications for Mutual's products, the time, place, and manner in which she would solicit, and the amount of time she spent soliciting for Mutual's products. Her appointment with Mutual was nonexclusive, and she in fact solicited for other insurance companies during her appointment with Mutual. Her assistant general manager at Mutual's Concord office did not evaluate her performance and

> did not monitor or supervise her work. Training offered by Mutual was voluntary for agents, except as required for compliance with state law. Agents who chose to use the Concord office were required to pay a fee for their workspace and telephone service. Arnold's minimal performance requirement to avoid automatic termination of her appointment was to submit one application for Mutual's products within each 180-day period. Thus, under the principal test for employment under common law principles, Mutual had no significant right to control the manner and means by which Arnold accomplished the results of the services she performed as one of Mutual's soliciting agents."

The court mentioned that several other factors further tilted in Mutual of Omaha's favor, but it appears that establishing undisputed facts on the above items would generally be sufficient to support summary judgment. Furthermore, the court recognized that a plaintiff cannot avoid summary judgment simply by raising a triable issue of fact on one or two minor factors of IC status. Rather, the court held that if a reasonable factfinder considering all of the evidence together could not conclude that the agent was an employee, the employer is entitled to judgment:

> "The existence and degree of each factor of the common law test for employment is a question of fact, while the legal conclusion to be drawn from those facts is a question of law. (*Harris v. Vector Marketing Corp.* (N.D. Cal. 2009) 656 F.Supp.2d 1128, 1136.) Even if one or two of the individual factors might suggest an employment relationship, summary judgment is nevertheless proper when, as here, all the factors weighed and considered as a whole establish that Arnold was an independent contractor and not an employee for purposes of Labor Code sections 202 and 2802. (See *Varisco, supra,* 166 Cal.App.4th at p. 1106.)"

Sheppard Mullin has substantial expertise on handling independent contractor issues. If you have any question about the subject, please do not hesitate to contact your local Sheppard Mullin attorney.