



Real Estate Brokers Challenge Independent Contractor Law

By Mark A. Kablack

A RECENT MASSACHUSETTS SUPERIOR Court case, *Monell, et al. v. Boston Pads, LLC*, has drawn battle lines between real estate brokerage companies and their agents. The debate has been framed between two competing statutes: one regulating the brokerage profession and its licensing requirements (M.G.L. c. 112), and one regulating independent contractors (M.G.L. c. 149).

The independent contractor law and its implementing regulations establish the legal classification of an employee (together with wage, benefits and reporting requirements associated therewith) as compared with an independent contractor. The current law presumes an employment relationship unless: (i) the individual is free from control and direction in connection with the performance of a service; (ii) the service is performed outside of the usual course of business of the employer; and (iii) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

In the practical, day-to-day operations of a real estate brokerage company, it is commonplace for agents to perform routine office functions — often on a rotating basis — that may include reception duties, dealing with general customer inquiries and monitoring database listings. In this capacity, the brokerage regulates an agent's hours, often implements dress codes and dictates standard operating procedures. These office functions are performed apart from an agent's responsibilities of matching a seller to a buyer on any one particular real estate transaction. Many, including the plaintiffs in the *Monell* case, argue that performance of these routine office functions, by definition,

creates an employment relationship, triggering minimum wage, employment benefits and reporting requirements.

These views are contrasted with the brokerage arguments under the real estate statute. The statute provides that an agent may be affiliated with a broker either as an employee or as an independent contractor. It also provides that an agent *must* be under the auspices of a broker and supervised to ensure compliance with the licensing requirements of the industry. Therefore, "the statute requires brokers to exercise a degree of control over agents," whether they are considered employees or otherwise. The brokerage defendants in *Monell* argued that there is an inherent conflict between the two statutes and that the real estate statute should be the one that governs with respect to the real estate industry, creating, in essence, a specific exemption from the independent contractor law.

In any case involving statutory construction, a court will look first to the plain meaning of the statutory text. Second, the court will determine whether the plain meaning is reasonable and consistent with the history of the statute, including anecdotal information regarding legislative intent. In *Monell*, the judge agreed with the defendants and found that the plain meaning of the independent contractor law and the real estate statute were in conflict. He further found that both statutes were reasonable in light of competing legislative goals. When such conflicts arise, as in the *Monell* case, the judge will look to the timing of when conflicting laws are enacted, and whether one statute is more closely aligned with the nature of the matter or dispute at hand. These final tests will determine how the conflicting laws are to be reconciled. In *Monell*, the judge's final decision, ruling

in favor of the defendant brokerages, was influenced by two findings: (i) the real estate statute was most recently amended in 2010, making it the more current of the two laws; and (ii) the real estate statute deals specifically with brokerages and their agents, while the independent contractor law is more general in scope, applying to all matters of contracts and employment.

As of this writing, both parties in *Monell* are anticipating further appeals. So, this matter is far from concluded. It will be a fascinating case to watch in the months ahead, as the results could have severe implications for the operation of real estate brokerages and possibly other real estate professions throughout Massachusetts.

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