



750 National Press Building
529 14th Street, NW
Washington, DC 20045
Phone: (202) 591-2460
Fax: (202) 591-2445

Justice Duarte
Justice Blease
Justice Robie
California Court of Appeal
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 94514

Re: Publication Request: *Stull v. Noble Logistics Services*
(Court of Appeal Case No. C064308)

Dear Justices Duarte, Blease and Robie:

We are writing on behalf of the Messenger Courier Association of the Americas (“MCAA”) to urge the Court to publish its recent opinion issued in the *Stull v. Noble Logistics Services* case. As we discuss in greater detail below, we believe publication of the *Stull* opinion will better enable companies in the delivery industry to determine a driver’s status as an employee or independent contractor.

I. MCAA’s MISSION

MCAA is a non-profit industry association founded and operated by courier industry professionals for the goal of advancing the interests of those involved in the messenger and courier industry in the U.S., as well as abroad. MCAA’s members span the entire range of industry participants, from large international delivery companies all the way down to “mom and pop” operations. Regardless of size, MCAA seeks to assist, educate and advocate on behalf of all of its members.

With respect to the “independent contractor issue” (an admittedly hot button issue in the delivery industry), it should be noted that MCAA’s membership includes companies with all manner of operations, including those that use unionized employee drivers, non-union employee drivers, independent contractor operators and, as is often the case, a combination of employee and independent contractor drivers. MCAA neither promotes nor discourages any of these forms of operation. Rather, MCAA’s only mission in this area is to promote the development of a clear legal standard for determining whether a delivery driver is an independent contractor or an employee. It is for this reason that we seek publication of the *Stull* opinion.

II. REASONS FOR PUBLICATION

MCAA believes the *Stull* opinion meets the standard for publication set forth in the California Rules of Court, Rule 8.1105 for three separate reasons, each of which individually warrants publication. We address each reason separately below.

A. *Stull* Addresses A Significant Legal Issue Of Continuing Interest To Public

As the Court is no doubt aware, the proper classification of workers – either as independent contractors or employees – has been an area that has received substantial attention over the last five or so years. Indeed, the federal government and numerous state governments have made proper worker classification a priority in recent years as unemployment insurance funds became depleted due to the national economic crises. California is certainly no exception to this trend.

Based on information provided by our members, it appears that virtually all of MCAA's members with operations in California have been audited by California's Employment Development Department ("EDD") at some point during the last seven or so years. MCAA and its members fully understand and appreciate that audits are a necessary and critical component to government enforcement of and compliance with state and federal tax provisions. However, it is equally critical for tax requirements to be made clear, so that tax payers may understand and comply with their obligations, and that taxing authorities enforce these obligations fairly and in accordance with the law. Numerous reports from our members regarding their experience with the EDD lead us to believe that this may not be the case in California. MCAA's investigation of this issue, including review of the EDD's own website, only served to increase our concern.

In short, MCAA's review of the situation in California leads us to conclude that the EDD essentially takes the position that all couriers and messengers operating in California are employees under the standard established by the Supreme Court in *Borello* (the "*Borello* standard"). *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341(1989) ("*Borello*").¹ A sweeping claim of this magnitude could – and often should – be dismissed as hyperbole, but in this instance, the EDD makes no effort to hide its position. In a statement currently posted on the EDD's website,² the EDD makes clear that:

(1) delivery drivers may only be "properly classified" as employees;

EDD website³:

"During the past several years, California and other states have experienced a significant increase in the number of business attempting to cut operating costs by erroneously converting employees to independent contractors (ICs). However, these businesses are only creating the appearance of independence when EDD still considers these workers to be employees."

"Of the approximate 1,400 courier companies that operate in California, we estimate that 800 properly classify their drivers as employees."

¹ As the Court no doubt understands, the legal standard established in *Borello* and its progeny is used to determine independent contractor status for claims arising under both the California Labor Code and the Unemployment Insurance Code, the latter of which the EDD enforces. See, e.g., *Messenger Courier Association of the Americas, et al. v. Employment Development Department*, 175 Cal. App. 4th 1074 (2009).

²http://www.edd.ca.gov/Payroll_Taxes/Tax_News_for_Tax_Professionals.htm#AWordAboutEmployeesandIndependentContractorsintheCourierandMessengerIndustry

³http://www.edd.ca.gov/Payroll_Taxes/Tax_News_for_Tax_Professionals.htm#AWordAboutEmployeesandIndependentContractorsintheCourierandMessengerIndustry

“In 2002, EDD found that every company using or following a third-party contract provider scheme was out of compliance with California payroll tax laws.”

“The employers who are properly reporting their drivers as employees indicate they cannot fairly compete with companies using these types of schemes.”);

(2) the EDD’s goal is to “level the playing field” by forcing all delivery companies to use employee drivers;

EDD website⁴:

“In 2003, EDD spearheaded a multi-agency education and enforcement initiative to level the playing field [sic] for the courier and messenger industry in California.”

“They [companies using employee drivers] demand we level the playing field. We agree and this issue will remain a top priority for EDD.”

(3) the EDD (wrongly) interprets and publicly states that the case law supports its position that delivery drivers must be classified as employees.

EDD website⁵:

“Several important published court decisions relating to courier drivers have been issued: [identifying *JKH*⁶, *Air Couriers*⁷ and *NCM*⁸]. The sum of the above cases provides substantial support of EDD’s position that the courier drivers are employees. In September 2007 EDD published the Courier and Messenger Industry Information Sheet (DE231CI) which provides highlights of these cases.” (Underlining added.)).

The above EDD statements, as well as its September 2007 Courier and Messenger Industry Information Sheet (DE231CI), demonstrate the extent to which proper classification of delivery drivers remains an important issue of public concern. They also demonstrate the need for clarification of the applicable legal standard, which we address immediately below.

B. *Stull* Explains The Existing Legal Standard For Determining Independent Contractor Status

As this Court notes, “[a]s a practical matter, distinguishing between employees and independent contractors under the Labor Code’s definition can prove challenging.” *Stull* Opinion, pg. 13.

⁴http://www.edd.ca.gov/Payroll_Taxes/Tax_News_for_Tax_Professionals.htm#AWordAboutEmployeesandIndependentContractorsintheCourierandMessengerIndustry

⁵http://www.edd.ca.gov/Payroll_Taxes/Tax_News_for_Tax_Professionals.htm#AWordAboutEmployeesandIndependentContractorsintheCourierandMessengerIndustry

⁶ *JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal. App. 4th 1046 (*JKH*).

⁷ *Air Couriers International v. Employment Development Dept.* (2007) 150 Cal. App. 4th 923 (“*Air Couriers*”).

⁸ California Unemployment Insurance Appeals Board Precedent Tax Decision P-T-495 (2007) (“*NCM*”).

Published appellate court decisions applying the multi-factor *Borello* standard are therefore of critical importance because they provide much-needed guidance to companies faced with making status determinations (and the substantial penalties imposed for reaching the wrong conclusion). The *Stull* opinion is particularly helpful in this regard because it clarifies a number of aspects of the *Borello* standard as applied to delivery drivers.

1. *Stull* Distinguishes And Clarifies *Air Couriers*

First, and most importantly, the *Stull* opinion distinguishes and clarifies the holding of the *Air Couriers* case, which is of critical importance given the EDD's position discussed above. With the exception of the *Cristler* and *Millsap* cases, MCAA is unaware of any semi-recent published California cases in which delivery drivers have been held to be bona fide independent contractors. *Cristler v. Express Messenger Systems, Inc.*, 171 Cal. App. 4th 72 (4th App. Dist. 2009) ("*Cristler*"); *Millsap v. Federal Express Corp.*, 227 Cal. App. 3d 425, 432 (1991) ("*Millsap*"). Publication of the *Stull* opinion is therefore important because it clarifies that delivery drivers can indeed operate as bona fide independent contractors (if done properly). In this way, the *Stull* opinion would serve as a counter point to the *Air Couriers* and *JKH* cases, and could play an important role in forcing the EDD to moderate its unsupported position that all delivery drivers must be employees. The drastic need for such a counter point is made clear by the EDD's website statements and Information Sheet (DE231CI), which, as mentioned above, only identifies cases finding drivers to be employees. Without an example of a published case applying a detailed analysis of the *Borello* standard and finding a delivery driver to be a bona fide independent contractor,⁹ companies will be left to make status determinations with only half the picture.

2. *Stull* Clarifies Significance Of The "Integral Role" Factor

Second, the *Stull* opinion clarifies the *Borello* standard (as applied to delivery drivers) by explaining the relevance of what is sometimes referred to as the "integral role" factor, which states that evidence that a worker performs a function (or role) integral to the principal's business weighs in favor of employment status. The *Stull* holding clarifies that the integral role factor does not weigh in favor of an employment finding for delivery drivers simply because the principal engages in product delivery. In other words, where product delivery is incidental to the principal's actual business, the fact that it delivers product does not mean it is in the delivery business. Clarification of this point is important because, like the plaintiff in *Stull*, the EDD consistently attempts to rely upon the integral role factor to establish employment status, even where it is shown that the principal is not engaged in the business of performing actual delivery service (e.g., as in the case of freight brokers, freight forwarders and third party logistics companies in the business of arranging, but not performing, delivery service).

3. *Stull* Clarifies That Economic Realities Test Is Inapplicable

Third, the *Stull* opinion clarifies that the economic realities test of the federal Fair Labor Standards Act ("FLSA") does not apply to claims arising under California law. The fact that the

⁹ Here, we would note that while the *Cristler* case constitutes a "counter point" case to *JKH* and *Air Couriers*, the *Cristler* Court did not engage in the type of detailed discussion and application of the *Borello* standard as this Court does in the *Stull* opinion.

plaintiff and appellant in the *Stull* case argued for application of the economic realities test alone demonstrates the need for this clarification. Clarification of this point is also likely to aid the many companies that utilize independent contractors both in and outside of California. For these companies, publication of *Stull* will make it readily apparent that the *Borello* standard differs from the economic realities test, and that the former controls under California law. The need for this clarification is particularly acute for those companies whose non-California operations are located in states where federal law provides the primary standard for determining a worker's status.

C. *Stull* Reaffirms Principle Of Law Not Recently Applied In Reported Cases

While related to the above, publication of the *Stull* opinion is separately warranted due to the Court's informative discussion of the control factor and the principle that some measure of control can be exercised for a "definite and restricted purpose without incurring the responsibilities or acquiring the immunities of a master, with respect to the person controlled." *Stull* Opinion, pg. 17. This important principal was articulated in the 1991 *Milsap* case, which the Court cites, but it has been given little attention in the case law ever since. Publication of the *Stull* opinion will therefore serve to reiterate the continuing legitimacy of this principle, which is of utmost importance given the critical importance of the control factor and the fact that some evidence of "control" is arguably present in all independent contractor relationships. Publication of the Court's opinion will therefore help ensure that the *Borello* standard is applied in a fair and balanced manner by avoiding findings of employment based on a type or amount of control legally insufficient to give rise to an employer-employee relationship.

III. CONCLUSION

For the foregoing reasons, we request that the *Stull* opinion be published. We appreciate your consideration of this request.

Sincerely,



Bob DeCaprio,

MCAA Executive Director

cc: Karen J. Kubin, Esq.
Vito A. Costanzo, Esq.
Howard L. Hibbard, Esq.
Lisa K. Kehe, Esq.