

# Is a Newscarrrier an Employee or an Independent Contractor? Deterring Abuse of the “Independent Contractor” Label via State Tort Claims

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## I. INTRODUCTION: MISCLASSIFYING EMPLOYEES AS “INDEPENDENT CONTRACTORS”

For a worker in today’s economy, being designated an “independent contractor” can mean many different things. On the most basic level, it means being treated differently than employees for tax and benefit purposes: Independent contractors are ineligible for the minimum wage, health and safety protections, workers’ compensation, disability insurance, and right to form labor unions to which employees are entitled. Yet despite their ineligibility for such work-related benefits, the independent contractor label is not necessarily undesirable to all workers. Some workers, particularly those on the high end of the wage scale, actively embrace the designation and the “free agent” lifestyle to which it corresponds.<sup>1</sup> For many other workers, however, the designation is not so felicitous. In an era in which global competition has driven many companies to convert permanent jobs into subcontracted and temporary jobs, workers may find their once permanent jobs “reclassified” as independent contractor positions with the attendant loss of benefits and protections. For these workers, the label of independent contractor is thrust onto their work life involuntarily and can be the difference between receiving a living wage with the necessary benefits and protections and working in a job that, because one must pay

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1. Free agents can set their own schedules, work from home, work only part-time, and avoid the less savory aspects of corporate culture, such as office politics, harassment, and hierarchies. Nina Munk, *The Price of Freedom*, N.Y. TIMES, Mar. 5, 2000, §6 at 52. See also Edward Lenz, “Contingent Work” – *Dispelling the Myth*, 52 WASH. & LEE L. REV. 755 (1995) (arguing that contingent work serves employee interests in flexibility, getting started in the job market, and providing a bridge between job loss and new employment). Michael Lewis, *The Artist in the Gray Flannel Pajamas*, N.Y. TIMES, March 5, 2000, §6 at 45; see generally Daniel Pink, *Free Agent Nation*, FAST COMPANY, Dec. 1997, at 131. Evidence of the appeal of this “free-agent” trend can be found in recent mass media coverage, such as this March 5, 2000, issue of the New York Times Magazine entirely devoted to the new “free-agent” lifestyle.

for one's own health care, insurance and taxes,<sup>2</sup> does not allow one to make ends meet.

Employers have increasingly been turning to independent contractors as a cost-cutting strategy.<sup>3</sup> In some situations, this shift to independent contractors reflects a general restructuring of a company's workforce to meet new economic pressures, outsourcing the labor supply of the company's "non-essential" operations and retaining internal employees only for its "core competencies." In pursuing this strategy, these companies have made a choice: They have chosen to sacrifice control over the workers they call "independent contractors" in exchange for the cost savings that accrue from eliminating the tax and benefit burdens that those workers create. This choice is dictated by the IRS, state courts and legislatures, who, realizing that employers have much to gain from labeling their workers as independent contractors, have set limits and tests on when a worker may be so designated.<sup>4</sup>

Certain companies, however, have attempted to cut costs using the independent contractor label without making any sacrifices. They have tried to "hire independent contractors" without significantly restructuring their workforce or relinquishing control over the contracted workers. They have achieved this goal through a simple verbal trick: labeling workers as independent contractors for tax and benefit purposes while still effectively treating them as employees. While this practice allows companies to enjoy the best of both worlds, it is illegal: it amounts to using the independent contractor category as a loophole and leaves workers who ought to be covered by employer tax and benefit programs stuck bearing the burden themselves. Understandably, the IRS has not looked favorably upon such tactics, auditing companies with suspicious-looking income statements and suing those found guilty of such manipulations for back taxes.<sup>5</sup> Nevertheless, due to the substantial cost savings that companies can accrue from such tactics, the misclassifications continue in fields as far ranging as the insurance and high-tech software industries to

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2. Social Security and Medicare taxes for independent contractors is 15.3 percent of one's income, double the percentage that employees pay. Munk, *supra* note 1, at 54.

3. "Today over 8.5 million workers are classified as independent contractors, comprising the fastest growing worker segment in the U.S." *Ascend, Iomega and Novell Usher Trend Toward Outsourcing Independent Contractor Compliance Management*, BUSINESS WIRE, Jan. 18, 1999, at ¶ 3, available in LEXIS, News Group File.

4. While the specifics of the test vary depending on the adjudicatory body, the state, and the benefits being claimed, the standard test used by courts and the IRS is some form of the I.R.S. 20-factor common law test, which focuses on the question of whether or not the employer has "control" over the worker. See *infra* note 10.

5. "The U.S. General Accounting Office estimated in 1996 that independent contractors reported only 77 percent of their income, and questionable deductions submitted in 1992 left a \$29 billion dollar gap in taxes and government program funds. In order to recover these losses, Congress granted the IRS in 1995 an additional \$450 million and 600 people to support audits and the reclassification of independent workers. Since then, the government has reviewed more than 1 million independent contractors and reclassified 46 percent of the contractors to employees." BUSINESS WIRE, *supra* note 3.

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lower-paid service industries such as grocery delivering and home health care.<sup>6</sup> According to some studies, more than half of the nine million people who file as independent contractors are currently misclassified, at a loss of some \$20 billion a year to the government.<sup>7</sup> And as John McGucken, legal counsel for Maryland's Office of Unemployment Insurance, describes, "It's in almost all industries. The problem of misclassification is growing."<sup>8</sup>

What makes this misclassification strategy so difficult to stop is that it plays upon designations that are arguably subjective. The IRS and common law distinctions between employee and independent contractor are notoriously vague,<sup>9</sup> requiring courts and agencies to make case-by-case determinations analyzing some twenty different factors of a work relationship.<sup>10</sup> Depending on how much relative weight adjudicators give to various factors, they can arrive at different verdicts even when evaluating the classification of workers in largely similar companies within the same industry.<sup>11</sup> Such uncertainty of out-

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6. In May 1999, a group of Allstate insurance agents sued Allstate for falsely labeling them as independent contractors and thus denying them reimbursement for business expenses. Andrea Foster, *Congress eyes contractor issue: Labor-backed bill would simplify test of workers' status*, NAT'L LAW J., June 28, 1999, at B1. In a decision that garnered more media attention, the Ninth Circuit Court of Appeals ruled in 1997 that Microsoft had misclassified workers as independent contractors. *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996). The employees are now entitled to valuable stock options and may be owed medical and pension benefits. *Vizcaino v. Microsoft Corp.*, 173 F.3d 713 (9th Cir. 1999). See also Daphne Eviatar, *Same desk different deal: More full-time employees call themselves 'misclassified' in an age of contract workers. Behind the New Economy's big workplace conflict*, CHRISTIAN SCI. MONITOR, Feb. 28, 2000, at 11. The National Employment Law Project initiated a lawsuit in January 2000 against several grocery store chains in New York City alleging misclassification of their grocery deliverers as independent contractors. Some deliverers were paid only \$1 an hour, but the companies maintain that they are not owed minimum wage because they are independent contractors. *Id.* Maryland's Office of Unemployment Insurance recently found that a home healthcare agency had misclassified up to 500 home health aide attendants as independent contractors. *Id.*

7. *Lawsuit Against Time Warner Could be Only the Tip of the Iceberg, Says Contingent-Workforce Expert*, BUSINESS WIRE, Mar. 25, 1999, at ¶ 4, available in LEXIS, News Group File. In 1992, for instance, a Government Accounting Office study estimated that the federal government lost approximately \$2.1 billion in payroll-related taxes each year that it could have collected from 3.5 million independent contractors, whom were misclassified or failed to file tax returns. Mark McNally, *Independent Contractors Need Clear Status for IRS*, CAPITAL TIMES, Mar. 5, 1997, at 5C.

8. Eviatar, *supra* note 6.

9. Marc Linder rails against the "so-called control test." Marc Linder, *What's Black and White and Red All Over? The Blood Tax on Newspapers—Or, How Publishers Exclude Newscarriers from Workers' Compensation*, 3 LOY. POVERTY L.J. 57, 69 (1997).

10. Some of the twenty factors used in the IRS common law control test are: (1) how detailed instructions are, (2) whether the company trains the worker or not, (3) how integrated the worker's services are into the company's business operations, (4) whether the company and the worker have a continual relationship, (5) whether the company sets the worker's work hours, (6) whether the worker works on the company premises or not, (7) whether the company tells the worker what order or sequence in which the work should be done, (8) whether the worker is paid for time spent on the job or as a lump sum or commission, (9) whether the company furnishes tools or materials, (10) whether the worker realizes profits or losses, (11) whether the worker is making her services available to the general public, and (12) whether the company can discharge the worker at any time. Rev. Rul. 87-41, 1987-1 C.B. 296 (1987).

11. See, e.g., *Newspaper Drivers and Handlers Local Union No. 372 v. NLRB*, 682 F.2d 116, 117 (6th Cir. 1982). This opinion reveals how different outcomes can even be reached by the same adjudicatory body over one fact pattern. As the opinion notes:

This is the second time this case has been heard in this court. After the first hearing, it was

come gives companies the easy defense that even if certain factors suggested that their workers were employees, they reasonably believed that their workers were independent contractors. It is even possible that with such complicated determinations, many employers are genuinely confused. Furthermore, while these factors—which range from how detailed a worker’s instructions are to whether or not the company furnishes a worker with equipment—seem to be evaluating objective concrete conditions, they actually offer room for companies skilled at verbal manipulations to craft interpretations favorable to themselves even when the facts seem to be against them. For instance, a company can develop a policy of not calling the instructions it gives to workers “instructions,” but instead, “a description of tasks” or “desired results.” While such manipulations may seem strained, companies have often argued them convincingly enough to persuade courts to rule in their favor.<sup>12</sup> As such situations illustrate, verbal manipulations can be powerful tools to obscure the true nature of work practices and mislead adjudicators. Stopping this practice becomes a matter of picking apart the stories that companies tell, revealing how the labels they assign to policies and people do not match up with reality.

This Note examines a novel approach to deterring the misclassification of employees as independent contractors by utilizing state tort claims of fraudulent and negligent misrepresentation to hold employers who have misclassified their employees liable for denied benefits and unpaid taxes. This Note examines this approach in the context of the newspaper industry, whose longstanding practice of labeling newspaper deliverers (or “newscarriers”) as independent contractors has in many instances been deemed a “misclassification” by the IRS.<sup>13</sup> Utilizing this factual finding, a group of newscarriers in Ohio is currently attempting to fight back against the losses they have incurred due to this misclassification, and against the mislabeling practice as a whole. Their claims and how the claims may be used as a general strategy against misclassi-

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remanded by a different panel for a determination of whether or not the newspaper carriers involved were as a matter of fact independent contractors or employees.

On review by the Board and by a divided two-to-one vote, the Board found, contrary to its long standing previous policy, that newspaper carriers were employees . . . . The logic of this reversal appears to be entirely related to a change in composition of the Board, since the following facts relied upon by the Board in its decision were all available at the time of the *Newsday* decision.

*Id.* at 117 (citation omitted).

12. See, e.g., *Neve v. Austin Daily Herald*, 552 N.W.2d 45 (Minn. App. 1996) (holding that Neve, a newscarrier, was not an employee of the *Austin Daily Herald* for reemployment insurance purposes because, inter alia, the detailed descriptions provided to her—including the time by which she had to make deliveries, the bagging procedures for inclement weather, and the order in which she should deliver papers—were merely “defining [her] task,” and not indicative of the company’s control over her.)

13. A LEXIS search of IRS private rulings revealed that between 1993 and 1996, the IRS charged some 25 publishers with misclassifying their newspaper carriers as independent contractors. See e.g., Priv.Ltr.Rul. 96-40-012 (July 2, 1996); Priv.Ltr.Rul. 96-39-061 (June 26, 1996); Priv.Ltr.Rul. 94-02-001 (Jan. 25, 1993).

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fiction are detailed in Part III of the Note. It is the hope of these newscarriers and workers rights activists that these legal claims, which force employers to pay damages for their inaccurate statements, will make employers think twice before abusing the independent contractor label as a cost-saving strategy in the future.

### II. THE “LITTLE MERCHANT” MYTH: THE NEWSPAPER INDUSTRY’S CAMPAIGN TO LABEL NEWS CARRIERS “INDEPENDENT CONTRACTORS”

The newspaper industry is in fact an ideal industry in which to test the power of misrepresentation claims in counteracting the misclassification of workers. To begin, it is an industry that actively promotes the idea that its delivery workers are independent contractors, even as workers, courts and the IRS have challenged this practice.<sup>14</sup> Secondly, it is a practice that pervades the industry, with over 90% of newscarriers being classified by publishers as independent contractors.<sup>15</sup> Thirdly, its misclassifications have created serious injustice, with thousands of carriers being denied millions of dollars in tax contributions, benefits, and workers’ compensation in the instances where carriers have been injured on the job. Lastly, the industry has engaged in this practice for over a century, devising the myth of the “little merchant” in 1833 and propagating it ever since. The newspaper industry is therefore a perfect study in how sophisticated employers who wish to “have it both ways” will behave, and the rhetoric that they will employ towards this end. If advocates are able successfully to dismantle the fictions the newspaper industry has constructed, they will have gone a long way in learning how to combat the practice of misclassification by other industries throughout the economy.

This section will detail the designation of carriers promoted by the newspaper industry, how this designation does not square with reality, how the IRS has attempted to crack down on these misclassifications, and the newspaper industry’s efforts to fight back.

#### *The Myth: Carriers as “Little Merchants”*

The core of the newspaper industry’s misclassification practice is the

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14. *Id.*; See also, Julius Duscha, *On Many A Route, An Adult Has Taken A Child’s Job*, NEWSINC, Sept. 27, 1999, available in LEXIS, News Group File. Although the Small Business Job Protection Act [26 U.S.C.S. § 3508] has eliminated the threat of further IRS challenges to publishers, state agencies continue to challenge newscarriers’ independent contractor status because it exempts carriers from workmen’s and unemployment compensation, and thus reduces state tax revenues raised by those laws. Their status has also been challenged under other federal laws such as the National Labor Relations Act, Fair Labor Standards Act, Americans with Disabilities Act and other civil rights laws.

15. According to a 1994 Newspaper Association of America survey, publishers treated only 5.9 percent of 451,378 child and adult newspaper carriers as employees. Altogether, 387,385 were considered independent contractors, 37,582 were considered delivery agents, and 26,411 were considered employees. 1995 Circulation Facts & Figures and Logic 13 (1995), noted in Linder, *supra* note 9 at 72.

“little merchant” myth.<sup>16</sup> According to this myth, newscarriers are not employees of the newspaper, but instead, are independent sellers who buy papers at wholesale rates from the company and then sell them to the public at a profit. Because the carriers sell the papers to the public and are thus effectively running independent businesses that can realize profits and losses, they fall within the IRS definition of independent contractor.

The “little” in “little merchant” refers to the youth who, up until recently, typically filled these jobs, the proverbial paperboy developing work experience, business sense and discipline through his morning or afterschool paper route. Bound up in this myth is the notion that children do not need to be considered employees because they are not relying on these jobs for their livelihood, and thus they justifiably fall outside the usual realm of labor, employment and tax regulation.<sup>17</sup> Another implication of the myth is that if we do away with the paperboy’s independent contractor status, newspaper companies will not be able to afford them, and as a result we will be destroying an age-old American tradition, a valuable rite of passage for budding entrepreneurs. For example, as Senator Mike Enzi of Wyoming described in defense of a bill to immunize newspaper companies from IRS misclassification crackdowns:

In Wyoming . . . the IRS has taken after the last bastion of budding entrepreneurs, our paperboys and girls. The agency is saying they don’t qualify as independent contractors, therefore newspapers would have to put them on salary, paying all the benefits. Because of the added expense, newspaper readers go without the paper on their front step and kids have to find another way to make a couple of bucks. Lemonade stands in Wyoming aren’t very profitable in December.<sup>18</sup>

In other words, the independent contractor status of “little merchants” is crucial to their survival as a job opportunity for youth. As newspaper companies are well aware, this myth plays upon many cultural images and symbols popular in the American imagination: the Horatio Alger story of the self-made man, the ideals of “self-reliance, independence, responsibility, and perseverance,”<sup>19</sup> and the Norman Rockwell-esque image of the fresh-faced paperboy. While the logic of this myth might be tenuous—indeed, what about being an employee instead of an independent contractor prevents a youth from developing good business skills and discipline?—the power and resonance of these images encourages one to overlook such gaps.

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16. This myth is nothing new. See ALFRED MCCLUNG LEE, *THE DAILY NEWSPAPER IN AMERICA* 261 (1937). See also WILLIAM THORN AND MARY PFEIL, *NEWSPAPER CIRCULATION: MARKETING THE NEWS* 245 (1987) (noting that the little merchant system can be traced back to 1833, when publishers realized that the system would “put all the commercial advantages on the side of the publisher, which, [b]y demanding advance payment from middlemen . . . solved the delinquent subscriber problem and assured regular cashflow,” quoted in Linder, *supra* note 9 at 66.)

17. Linder, *supra* note 9 at 66.

18. *Enzi Proposes Fairness to Tax Code*, Congressional Press Releases, Federal Document Clearinghouse, Mar. 19, 1997.

19. Linder, *supra* note 9 at 67.

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A final portion of the myth asserts that news carriers' independent contractor status is critical to the economic viability of the newspaper industry. This story alleges that newspaper companies operate on such thin profit margins that if companies were forced to consider carriers employees and assume their tax and benefit burdens, they could not be economically competitive or viable.<sup>20</sup> Such assertions fly in the face of much contrary evidence. For example, two leading newspaper publishers, the *St. Petersburg Times* and the *Wall Street Journal*, treat their 4,000 or so carriers as employees without any harm to their economic viability and success.<sup>21</sup> Furthermore, statistics reveal that the newspaper industry continues to be one of the most profitable industries in the nation, with profit margins that hovered between 14% and 17% throughout the 1980s and 1990s.<sup>22</sup> In spite of this evidence, the newspaper industry has managed to convince adjudicators and legislatures through persuasive storytelling that considering "little merchants" full employees would have devastating results for the newspaper industry, and thus is a step that is strictly to be avoided.

### *Tactics to Help Bolster the Myth*

As these and the further examples detailed below begin to reveal, the "little merchant" myth does not square with reality. And having been challenged by the IRS on such discrepancies, the newspaper industry has realized that its story does not always stand up to scrutiny. Thus to bolster and lend credence to its story, it has made minor adjustments in the policies and language it uses in an effort to make carriers appear more like independent contractors. Advised by consultants, lawyers and newspaper association webpages that proffer advice on how exactly to tweak one's policies, publishers have attempted to fit its practices into IRS-favorable categories.

Some of these adjustments truly relinquish a degree of control over the carriers by attempting to "achiev[e] a defensible mix of factors enabling you to prove independent contractor status," according to Michael Zinser, a Nashville lawyer who specializes in independent contractor law as it affects newspapers.<sup>23</sup> But others are mere outward manipulations, either doing nothing to give carriers the control they would have if they were truly independent contractors, or only relinquishing control in word but not in deed.

A basic tactic many companies have initiated, for instance, is requiring

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20. Newspaper companies advanced this argument, for instance, in 1995 when lobbying the Arkansas legislature to exclude news carriers from the state's unemployment assistance program on the grounds that the workers were independent contractors. The legislature accepted this argument, stating that such a measure was "immediately necessary in order to . . . avoid unnecessary harm to newspaper companies." *Id.* at 65.

21. *Id.* at 106.

22. *Id.* at 105.

23. Julius Duscha, *On Many A Route, An Adult Has Taken A Child's Job*, NEWSINC, Sept. 27, 1999, available in LEXIS, News Group File.

carriers to purchase and provide their own plastic bags and rubber bands to wrap newspapers for delivery. Such a step seems to satisfy the IRS control test factor of companies not providing equipment to independent contractors. This practice is suspicious, however, given that publishers often have strict guidelines for the type of bags that can be used, print their own bags and then “sell” them to the carriers, or occasionally supply free bags and rubber bands as bonus incentives to carriers who have performed well.<sup>24</sup> These controlling factors seem to indicate that having carriers buy their own bags is simply to satisfy the letter of the IRS standard, not to give carriers the freedom to use whatever type of equipment that they, as “independent contractors,” might desire.

Another central but questionable tactic is the system newspaper companies have developed to compensate carriers. Publishers assert that the carriers are purchasing papers from them at wholesale rates, and then re-selling them to customers at retail rates of their own choosing in order to make a profit. This scenario fits neatly into the IRS test factor of the company not compensating the worker according to the time spent on the job, but instead for the completion of the task. It also satisfies the test factor of demonstrating that the worker is responsible for his own profit and loss.

The actual compensation systems publishers have set up, however, belie these assertions. To begin, one would think that if carriers were actually independent contractors, publishers would have no need to worry about their “compensation”: as independent sellers, they would be responsible for generating their own compensation through sales profits. However, newspaper companies seem to worry a great deal about carriers’ compensation. As Eric Robanske, circulation director for The Record Searchlight in Redding, CA, reveals in *Presstime*, the Newspaper Association of America’s trade publication, “Most newspapers have formulas [for compensation], but they’re difficult to structure and subject to a host of variables.”<sup>25</sup> As the same *Presstime* article describes, these difficult formulas include “var[ying] [the] wholesale rate based on the profit potential of each route” as Gannett, one of the country’s leading newspaper conglomerates, does, or charging “uniform wholesale prices for each newspaper” but “add[ing] subsidies based on route difficulty to ensure appropriate levels of profitability,” as in the practice of Knight Ridder, another

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24. A District Manager of a group of newscarriers described this practice of providing free bags as a “bonus” for good performance in posting he made to an online discussion group of newscarriers. *Independent Newspaper Carrier Resources Center, Carriers’ Forum, District Manager forum* (visited April 13, 2000) < [http://paper-boy.hypermart.net/archive-forum/District\\_Manager\\_Suggestions1-20.htm](http://paper-boy.hypermart.net/archive-forum/District_Manager_Suggestions1-20.htm)>. The “Supplies” forum of the same Carriers’ Forum revealed that the Cleveland Plain Dealer sells bags to its own carriers. *Independent Newspaper Carrier Resources Center, Carriers’ Forum, Supplies Forum* (visited April 13, 2000) < <http://paper-boy.hypermart.net/archive-forum/supplies1-20.htm>>.

25. Barbara Z. Gyles, *Carrier 2000: Today’s distribution pressures preview even bigger challenges in the next century*, *PRESSTIME*, Mar. 1999, at 43.

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conglomerate.<sup>26</sup> Such concern for ensuring the “appropriate levels of profitability” for the carriers seems odd, given the carriers’ independent contractor status, under which they should bear the risk of their own profits or losses. Such inconsistencies and the very difficulty publishers have in structuring such compensation systems makes one suspect that the systems are efforts to squeeze newspaper practices into IRS categories that they do not fit.<sup>27</sup>

Publishers and industry associations have also developed websites advising other papers on how to structure behavior so that nothing in the company suggests that the carrier is an employee. One website, sponsored by The Independent Newspaper Association, suggests numerous procedural safeguards to use when dealing with carriers, including avoiding placing carrier recruitment ads in “Help Wanted” sections, never using employment applications with carriers (but instead using vendor contract forms), and never distributing company handbooks or “anything akin to ‘work rules’ that might be supplied employees.”<sup>28</sup> “Be extremely careful with terminology,” it states, “even casual office language markets a thought process—i.e., evidence of intent.” It warns that “during an [IRS] audit, office managers, staff and independent contractors themselves may be questioned about specific terms used in day-to-day operations,” and in a telling statement, exhorts that: “These terms must not be simple camouflage to hide real policies enforced; they must accurately reflect the true daily relationship with independent contractors and the newspapers’ staff.” Finally, it suggests regularly reviewing the independent contractor concept at staff meetings with anyone who has any contact with the carriers.<sup>29</sup>

While one could construe these suggestions simply as legal advice on how to stay within the bounds of the law, the length, detail and stilted nature of the suggestions imply that publishers have something to hide. Indeed, the very fact that employees have to be counseled about the words they use to describe carriers or the ways in which they should interact with them suggests that their natural inclination is to describe and treat carriers as employees. These awkward policies, while saving some publishers from IRS detection, still do not eliminate the fact that under a pure analysis of whether publishers actually

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26. *Id.* at 43.

27. Eric Robanske also reveals in this article that publishers vary wholesale rates to make up for the time it takes to complete certain routes. “Someone might have 300 papers in town that [he or she] can deliver in an hour-and-a-half,” says Robanske. “Others can be in their vehicles for hours’ on long or cumbersome routes.” To equalize the disparity, publishers charge the person on the longer route a lower wholesale rate. Such an example illustrates how publishers, while ostensibly paying carriers for the number of papers delivered (or according to their alternative story, not paying them at all but allowing them to make profits from their own sales), are actually making what more closely resembles wage payments tied to numbers of hours worked. However, since such time-based wage payments would make the carriers look more like “employees” according to the IRS test, the publishers have come up with this intricate system of “varying their wholesale rates.” *Id.* at 43.

28. INDEPENDENT NEWSPAPERS WEBSITE (visited Apr. 14, 2000) <<http://www.newszap.com/ini/Files/contract/ic4.html>>.

29. *Id.*

control carriers, most adjudicators would find carriers to be employees.

*The Reality: Carriers as Company-Controlled Employees*

As these efforts by publishers suggest, the reality of a newscarrier's life is a far cry from the "little merchant" myth. To begin, newscarriers are now more likely to be adults rather than children.<sup>30</sup> From 1980 to 1990, the number of children delivering papers dropped 60%, while the number of adult carriers rose 112%, and in 1996, the Newspaper Association of America reported that adult carriers surpassed the number of kids for the first time.<sup>31</sup> The shift to adult carriers weakens the portion of the little merchant myth which holds that carriers should not be considered employees because they are children and thus outside the normal realm of tax and labor regulation. With a workforce now made up largely of adult carriers, newspapers have a harder time successfully arguing that they should be exempt from labor and employment laws, and as publishers suspect, are now more vulnerable to IRS scrutiny.<sup>32</sup> Rather than retreat, however, publishers have become even more aggressive in asserting that carriers are not employees and have turned towards legislative protections, described in the section below, to preserve the carriers' unprotected status.

Another reality of carriers' lives which challenges the little merchant story is the way they are compensated. According to the compensation system described above, carriers sell the papers and derive compensation directly from the customers, made up of the difference between retail prices and wholesale prices.<sup>33</sup> However, this assertion flies in the face of the fact that increasingly, customers pre-pay for their subscriptions through the mail or over the phone (known in newspaper parlance as "Paid in Advance" or "PIA") directly to the newspaper company,<sup>34</sup> and have no interaction whatsoever with the carriers, their supposed "sellers." While publishers have a pat explanation for this inconsistency—that the papers are serving as mere fiscal agents for the carriers and pass along the customer payments to carrier accounts—the simple deliveries that carriers make to "customers" with whom they have never dealt seem like strange sales relationships indeed.

A final irony of the true newscarrier situation is that publishers are having

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30. This shift is the result of a number of factors: the growing heft and weight of larger papers which youth on bicycles have difficulty handling, a trend towards morning editions which are more suited to adult carriers who can use cars and deliver in the pre-dawn hours, and persistent concerns about carrier safety and children's lack of insurance. Linder, *supra* note 9, at 72; *see also* Gyles, *supra* note 25 at 43.

31. Linder, *supra* note 9, at 73; *see also* Gyles, *supra* note 25, at 43.

32. Linder, *supra* note 9, at 74.

33. Historically, such systems of compensating carriers actually did exist. Paperboys would typically collect money directly from subscribers and field complaints on a weekly basis. This practice, however, has largely disappeared and pre-payment systems are now more the norm. Gyles, *supra* note 25, at 43.

34. *Id.* at 43.

a very difficult time retaining newcarriers. *Presstime* reported that in 1996, the NAA found that the average carrier turnover percentage was 51 percent, and that “once carriers come on board, keeping them becomes the priority.”<sup>35</sup> The article details the many methods publishers are employing to attract and retain carriers, from giving bonuses to carriers who introduce friends and to carriers who remain in service for several months, to forging connections with local job-training nonprofits.<sup>36</sup> What is odd about these efforts, however, is that if carriers are truly independent contractors, one would think that publishers could simply write contracts spanning certain lengths of time that carriers would not be able to terminate without breaching the contract. Indeed, in the world of independent contractors, “retention” should not be a problem, while breach of contract could be. The fact that publishers themselves have characterized the problem as one of retention and attrition seems to offer further evidence of the carriers’ employee status.

As these examples demonstrate, the reality is that publishers wish to maintain control over the work carriers do, but refuse to internalize the costs that should go along with such control. Noticing this discrepancy, the IRS began cracking down on publishers in 1993, auditing and charging numerous publishers with misclassification.<sup>37</sup> In response, the newspaper industry decided to take the offensive, aggressively lobbying state legislatures and Congress for laws to protect them from further scrutiny, as the next section describes.

*“Fixing” The Internal Revenue Code to Define Newscarriers as Independent Contractors*

Dogged by the persistent IRS attacks on their misclassification practice, the newspaper industry decided in 1996 to pursue a major change in federal law. While they had been lobbying state legislatures for decades with variable success to exempt themselves from state workers’ compensation and benefits fees,<sup>38</sup> the industry realized that a federal statute would most efficiently immunize them from further crackdowns by the IRS. Led by the Newspaper Association of America and with a cadre of well-seasoned lawyers, the industry successfully lobbied Congress for an amendment to the minimum wage bill

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35. *Id.* at 43.

36. *Id.* at 43.

37. *Supra* note 13.

38. A number of states have resisted the newspaper industry’s lobbying, and have even crafted statutes to unilaterally declare carriers employees. In 1935, Wisconsin made all newscarriers per se employees under the Workers’ Compensation statute of their state. WIS. STAT. § 102.076 (Supp. 1996). In 1953, New York made all child carriers statutory employees. In 1971 and 1972, Maryland and Kentucky respectively followed suit. However, the trend usually ran the other way: in 1931 and 1932, California and New Jersey respectively declared that carriers were independent contractors. More recently in response to vigorous lobbying by publishers, Arkansas, Montana, Washington, North Dakota, Georgia, and Mississippi have followed suit. Linder, *supra* note 9, at 87-89.

entitled, "The Small Business Job Protection Act."<sup>39</sup> This Act established that newscarrers, subject to certain minor restrictions, were categorically "direct sellers," and hence not employees for federal employment tax purposes. Thus, with the passage of the Act, the IRS could no longer go after publishers for inaccurately characterizing carriers as independent contractors because their hands were now tied by the new statute defining carriers as independent contractors.

Looking closely at the substance of the bill, one can see many of the industry-propagated myths serving as its foundation. For instance, the bill calls the carriers "direct sellers," perpetuating the idea that they are actually engaged in selling the papers, rather than simply delivering them for the company. Furthermore, the only requirements the bill places on the category of direct seller are: (1) that the person "is engaged in the trade or business of the delivering or distribution of newspapers," (2) that "substantially all the remuneration (whether or not paid in cash) for the performance of the services . . . is directly related to sales or other output (including the performance of services) rather than to the number of hours worked," and (3) that "the services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such services for Federal tax purposes."<sup>40</sup> In other words, two of the very devices that the newspaper industry has designed to give the appearance of meeting IRS standards—(1) creating a compensation system that appears to pay carriers by the piece while in truth paying them for time spent, and (2) having carriers sign contracts which explicitly say they are independent contractors, whether or not carriers fully understand the implication of such a statement—have been written into law as the defining characteristics of the new IRS standard. Naturally, such industry-tailored standards will serve to bar nearly all carriers from being considered employees for federal employment tax purposes.

The legislative history of the bill is also rife with "little merchant" myths. As the bill's legislative champion, Senator Phil Gramm, stated in legislative hearings on the bill,

One of the reasons that I have taken on this paperboy issue with a very strong commitment and zeal is that being a paperboy is one of the last jobs left where young people are actually in business for themselves. They buy their newspapers from the newspaper and then sell it to their customers. I bought 106 copies of the Ledger-Enquirer from the local newspaper and delivered it to 106 residences and businesses. I collected the money, as literally millions of paperboys have done since the colonial period, and in the process not only did I earn money, but I learned about how our market system works. I think it is vitally important that we not let the Internal Revenue Service destroy this great educational and business system that

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39. H.R. Con. Res. 3448, 104th Cong. (1996) (enacted).

40. 26 U.S.C.S. § 3508(b)(2)(A)(iii), (2)(B), (2)(C) (2000).

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is available to young people all over America.<sup>41</sup>

Either employing the power of these myths or other political muscle, Gramm was able to persuade his fellow legislators to write the Act into law. As a telling gesture of gratitude, the Newspaper Association of America rewarded Senator Gramm soon after the Bill's passage by inducting him into the Newspaper Carrier Hall of Fame.<sup>42</sup>

With the passage of the Small Business Job Protection Act, the story that newscarriers are independent contractors, at least for federal tax purposes, has been enshrined into law. While newspaper companies can still be held liable under state laws and for non-tax-related benefits, the IRS, the largest obstacle to their misclassification practices, has been taken out of the game. As John Murray, vice president of circulation marketing for the NAA, states, in the wake of the federal legislation, "there is little interest in converting to employees."<sup>43</sup> Thus, in order to have a chance of combating these misclassification practices—of *creating* an interest among publishers to convert carriers to their rightful status as employees, advocates must begin exploring new strategies of holding publishers accountable.

### III. FIGHTING BACK: UTILIZING STATE COMMON LAW CLAIMS TO HOLD MISCLASSIFIERS ACCOUNTABLE

With the advent of the Small Business Job Protection Act of 1996, newscarriers can no longer count on the IRS to assist them in preventing employers from misclassifying them as independent contractors and shirking the responsibility owed to them as employees. Furthermore, other more traditional methods of recouping the benefits and tax contributions their employers have denied them are of no assistance to the newscarriers. Federal and state employment laws either do not allow workers a private right of action to hold employers liable for their statutory violations (e.g., there is no express private right of action for employees to recover for an employer's non-payment of Social Security, Unemployment Insurance, Worker's Compensation) or are subject to court rulings which exclude newscarriers from statutory protection.<sup>44</sup>

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41. 142 Cong. Rec. S7427 (daily ed. July 9, 1996) (statement of Sen. Gramm).

42. *Texas Sen. Gramm Inducted into Newspaper Carrier Hall of Fame*, PR NEWSWIRE, Sept. 15, 1998, available in LEXIS, News Group File.

43. Gyles, *supra* note 25, at 43.

44. See, e.g., *Capital Cities/ABC, Inc. v. Ratcliff*, 141 F.3d 1405 (10th Cir. 1998) (holding that although the IRS had found that the carriers were employees under a common law test, the company did not have to include them in their retirement and welfare benefits plans because the newscarriers had signed their ERISA rights away in independent contractor agreements. The Court cited *Boren v. Southwestern Bell Tel. Co.* 933 F.2d 891 (10th Cir. 1991) as a controlling authority holding that personal service contracts, such as the independent contractor agreements at issue, were evidence of a worker's employment status, i.e., those who sign are independent contractors. Under *Boren*, the panel found no reason to look beyond the strict language of the agreements, which the judges said clearly left the carriers outside any rights to plan participation. In October 1998, the Supreme Court denied *certiorari* to the case.)

Faced with these challenges, advocates have begun pursuing a new strategy—utilizing state common law tort claims—in an effort to expose the fictions that newspaper companies and other misclassifiers have erected to avoid paying taxes and benefits. These common law claims seek to closely examine the act of classification, exploring the knowledge that the companies may have had about any false statements they made in the classification process, the financial benefits a company may have accrued from the misstatements, and whether misclassified employees were justified in relying on these misstatements. This strategy has not yet been widely employed, so its effectiveness is still largely unproven. But if it should prove successful in the several cases currently pending, using common law misrepresentation claims could become a powerful tool for misclassified employees in all fields to combat misclassification.

How exactly might such a strategy work? Below, I lay out the strategy's general contours, highlighting the evidence needed to make successful claims. I then identify the major objections defendants are likely to make to each claim, and pose some possible responses to these objections. As a concrete example of how this strategy is being used in practice, I present some of the claims asserted in *Robert McElwee v. Dayton Newspapers, Inc.*, the case I mentioned in the introduction. The case is currently being litigated, having partially survived a motion to dismiss in trial court. Although the case is still in the discovery phase and what results the trial will yield remain uncertain, introducing some of the arguments presented by both sides and in the judge's initial decision helps to illustrate the claims that misclassified employees in similar situations can make, the legal obstacles they will face, and their potential for success.<sup>45</sup>

#### *Claim One: Fraudulent Misrepresentation*

Fraudulent misrepresentation claims are powerful tort law assertions that a person or corporation has knowingly made statements that were false with the intention of having the listener rely on the false information to the listener's detriment. This claim can be used as a tool to fight misclassification in cases where there is clear evidence that a misclassifier knew that what she was saying was untrue. For instance, if one can show that an employer knew that a worker would be working onsite but wrote in a contract that she would be working offsite in order to make her seem more like an independent contractor,

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45. This case is being litigated under Ohio common law. Like most other states, however, Ohio derives much of its common law tort law from the American Law Institute's *RESTATEMENT (SECOND) OF TORTS* (1977). Thus, while Ohio courts have put their own gloss on how claims made by Ohio citizens should be adjudicated, the lessons learned from the Ohio experience may be applicable to newscarrers and other misclassified employees litigating similar claims in other states. That said, other states may have caselaw more or less favorable to successful misclassification claims.

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this would be a good example of fraudulent misrepresentation. It is not a claim that can or should be made in every misclassification case, however: without clear evidence of the maker's knowing deception, a plaintiff will not win such a claim and may be better off simply pursuing a negligent misrepresentation claim, where the person's explicit knowledge of the falseness of their statement is not required (please see next section). A successful fraudulent misrepresentation claim offers a plaintiff the potential for recovering damages beyond simple pecuniary losses: in certain cases, plaintiffs may be able to win punitive damages from defendants. This potential for punitive damages may be an important consideration for advocates who wish to send a strong message to employers that such misclassification practices will not go unpunished.

### *The Elements of a Fraudulent Misrepresentation Claim*

To make a successful fraudulent misrepresentation claim, a worker needs to prove the following elements:

That the employer made a false representation to him concerning a fact material to the transaction,

That the employer knew the falsity of this statement, or displayed utter disregard for its truth,

That the employer intended to induce his reliance on the misrepresentation,

That he, the recipient of the information, justifiably relied on the information, AND

That he, the recipient of the information, was injured due to his reliance on the information.<sup>46</sup>

Some states also have the additional requirement that the plaintiff assert this claim "with particularity," namely specifying the time and place the false statement was made and the person who made it.<sup>47</sup>

In clear cases of misclassification, many of these elements should not be hard to prove. The first element, that a false statement was made by an employer about a fact material to the transaction, can be substantiated by many of the "Independent Contractor Agreement" contracts drawn up between workers and employers. In a strong fraudulent misrepresentation claim, these contracts will contain statements about the worker's responsibilities or activities that clearly do not match up with reality. In the Ohio case, for example, the plaintiffs cite statements in their contracts which say that they will be sold newspapers from the publisher which they are then to resell to subscribers. They then point to substantial contrary evidence from their actual experience to prove the falseness of these statements. For instance, they note in their complaint that the

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46. This set of standards derives from the RESTATEMENT (SECOND) OF TORTS §§525-26 (1977) and has largely been adopted by most states.

47. See OHIO CIV. R. (9)(B).

publisher sets the prices, determines how and when customers' papers should be stopped for non-payment, must approve any communication between them and the customers, and collects payment directly from customers—all strong indications that the publisher is the true seller, in spite of its statements to the contrary in the contract.<sup>48</sup> The publisher's false statement that they are "re-selling newspapers" is "material" to the "transaction" at hand, because it strongly suggests that in the contractual transaction taking place, they, the workers, are independent contractors.

The requirement that employers intend for the workers to rely on these false statements can be proven by pointing to employer statements made orally or in writing that the workers are independent contractors and as such, are responsible for paying their own taxes and ineligible for employee benefits. The requirement that workers relied on this information and were injured due to such reliance is fulfilled by the fact that, based on these employer statements, they did not actually seek benefits or tax withholdings and were injured by being denied such provisions. Finally, the particularity requirement is also easily satisfied if the misstatements are documented in the contract the worker has dated and signed with the employer.

#### *Challenges and Possible Solutions:*

The harder elements of the claim to satisfy are the following, which defendant-employers are likely to refute in their defense:

Proving that the employer knew that the statement was false,

Proving that a statement, though a statement of opinion, is still actionable as fraud.

#### *Proving that the employer knew that the statement was false*

A fraudulent misrepresentation claim requires a worker to prove that the employer making the false statement actually knew that the statement was false. Such a task is difficult; it involves verifying the employer's mindset and intention, intangibles that are often hard to document, particularly with an uncooperative adversary. The person's knowledge and intention, or *scienter*, must often therefore be proven through indirect evidence, such as demonstrating that the statement involved facts that the employer must have known were false. An example might be a case in which the employer denied in contract that the company offered workers training when it was actually a well-known company practice to train these workers, or as in the Ohio case, the company purported in contracts to sell papers to carriers, while in truth, only gave papers to the

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48. Plaintiffs' Second Amended Complaint at 3-4, *McElwee v. Dayton Newspapers, Inc.*, (Ohio Ct. C.P. 2000) (Montgomery App. No. 98-3686) (on file with author).

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carriers to deliver.<sup>49</sup> Such examples strongly suggest scienter because they describe situations in which employers would have a hard time asserting that they did not know such statements were false; in order to do so, they would have to argue that they did not know their own company policies when writing the contracts. Such situations, where the plaintiffs are able to garner good indirect evidence that the defendant knew the statements were false, have a solid chance of winning a fraudulent misrepresentation claim.

More difficult claims are ones in which no evidence of the employer's mindset, direct or indirect, is available. For example, the second claim the Ohio newscarriers are advancing is that the very statement that carriers were independent contractors was one that the employer knew to be false.<sup>50</sup> To prove this claim requires the carriers to demonstrate that the company definitively knew that the carriers ought to be classified as employees but nevertheless classified them as independent contractors. Potential evidence of such knowledge could include memos from the employer's lawyer stating that newscarriers appear to be employees or statements by the employer himself that carriers are employees. Finding this type of proof, however, seems very unlikely so such a claim for fraudulent misrepresentation holds less promise for success.

### *Proving that a statement, though a statement of opinion, is still actionable as fraud*

Defendants are also likely to assert that certain statements, while false, do not expose the makers to charges of fraud because they are statements of opinion rather than statements of fact. In Ohio, for example, the defendants used this objection to challenge the claim that the employer's statement that the carriers were independent contractors was a fraudulent false statement for which they should be held liable.<sup>51</sup> Such a statement, defendants argued, is not a statement about a concrete fact, but is instead a statement of opinion about the law, and therefore only actionable for fraud if a defendant purports to have

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49. *Id.* at 3.

50. *Id.* at 4.

51. The newscarriers in this case can argue the falsity of the statement that they were independent contractors in spite of the Small Business Job Protection Act's statutory redefinition of carriers as independent contractors for several reasons. To begin, the statutory redefinition only went into effect on January 1, 1996; thus any statements made by publishers prior to this date are vulnerable to charges of being false according to the IRS 20-factor test. Furthermore, the Small Business Job Protection Act only redefines carriers as independent contractors with respect to federal employment tax purpose. In this case, the carriers are seeking reimbursement for pecuniary losses of federal employment tax payments, as well as of several other state and federal benefits such as retirement benefits, workers compensation and unemployment benefits. These other benefits are not subject to the statutory redefinition of newscarriers, but utilize their own common law test of whether a worker is an independent contractor or not (which is largely similar to the IRS test). Therefore, newscarriers can continue to assert that calling them independent contractors with regard to these benefits is a false statement. Plaintiffs' Memorandum in Opposition to the Defendants' Motion to Dismiss at 2-3, *McElwee v. Dayton Newspapers, Inc.*, (Ohio Ct. C.P. 2000) (Montgomery App. No. 98-3686).

“special knowledge” about the subject.<sup>52</sup> Because the publishers did not purport to have this type of “special knowledge” about the legal status of newscarriers, they allege, their statement of opinion cannot be held against them even if it is false.

Challenging this objection is a difficult task. Indeed, the presiding judge in the Ohio case dismissed this fraud claim on these very grounds. Plaintiffs’ attempts to argue that it was reasonable for the carriers to assume that the publisher had superior knowledge about the legal status of newscarriers in the industry was rejected, as was the contention that by presenting all carriers with a form contract stating they were independent contractors the publisher was effectively “purporting special knowledge” of this legal question.<sup>53</sup> As the judge put it, “the mere use of form contracts in no way makes a representation of superior or special knowledge on the part of the Defendants,” and that “the Plaintiffs may be presumed to know or have discovered [the appropriate legal status of newscarriers] for themselves with reasonable diligence.”<sup>54</sup> For these reasons, the carriers were not justified in relying on the defendants’ opinion that they were independent contractors and therefore cannot assert this claim of fraudulent misrepresentation.

While the Ohio ruling should make advocates aware of the possible perils of asserting this claim, there are several possibilities for challenging this objection in future litigation. The first possibility is to rely on the Restatement portion that gives weight to the form in which a statement is made.<sup>55</sup> According to the Restatement §538A, a statement’s form can help determine whether it is a statement of fact or of opinion. As Comment b. of §538A explains:

A representation of fact is a positive assertion that the fact is true. It implies that the maker has definite knowledge or information which justifies the positive assertion. A representation of opinion, on the other hand, is only one of the maker’s belief as to the fact. It implies that he does not have definite knowledge, that he is not sufficiently certain of what he says to make the positive statement, or at most, as stated in § 539, that he knows of no facts incompatible with the belief, or that he does know some facts that justify him in forming it. The difference is one between “This is true,” and “I think this is true, but I am not sure.”<sup>56</sup>

Advocates may be able to argue that unequivocal statements by employers that workers are independent contractors, made in contracts or orally, are

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52. Defendants rely on the RESTATEMENT (SECOND) OF TORTS §542 (1977) as a basis for this argument.

53. Decision, Order and Entry Overruling in Part and Sustaining in Part Defendants’ Motion to Dismiss Plaintiffs’ Second Amended Complaint at 6-7, *McElwee v. Dayton Newspapers, Inc.*, (Ohio Ct. C.P.) (Montgomery App. No. 98-3686).

54. *Id.* at 7.

55. Most states derive much of their common law tort law from the American Law Institute’s RESTATEMENT (SECOND) OF TORTS (1977), although their courts may have applied a unique interpretation to the Restatement language. Absent case law to the contrary, the Restatement provisions may be authoritative.

56. RESTATEMENT (SECOND) OF TORTS §538 A cmt. b (1977).

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statements of fact, rather than statements of opinion. As evidence, they may point to the form contracts that many workers are required to sign which state: "This is an independent contractor agreement,"<sup>57</sup> or to unwavering employer descriptions of their status as independent contractors. Such statements do not suggest that the designated independent contractor status is open to question, not even through a nod in legalese to suggest that this status is a subjective determination about which the workers might want consult a lawyer. Because the form and nature of these statements suggest that they are unquestionable, a plaintiff may be able to convince a court to treat them as statements of fact, rather than as non-actionable statements of opinion.

Another possibility for recovery on this claim is through a theory of implied fact. Even if a court insists that a statement is a statement of legal opinion, this theory still allows recovery if the legal opinion implies a set of false underlying facts. As Comment c of §545 of the Restatement explains:

Even though the language of a representation concerns only legal consequences and is in form an expression of opinion, it may, as in the case of any other statement of opinion, carry with it by implication the assertion that the facts known to the maker are not incompatible with his opinion or that he does know facts that justify him in forming it. (See § 539). Thus the statement that the maker has good title to land, although in form one of a legal conclusion, ordinarily will be understood to assert the existence of those conveyances or other events necessary to vest good title in him. So likewise a statement that one mortgage has priority over another may imply an assertion that one was made before the other; and a statement that a corporation has the legal right to do business in a state may carry with it an assurance that it has as a matter of fact taken all of the steps necessary to be duly qualified. When the recipient does not know the facts, he may justifiably rely upon these implied assertions and recover on the basis of a misrepresentation of the implied fact.<sup>58</sup>

As this section describes, a plaintiff can justifiably rely upon even an expression of legal opinion if the opinion implies a set of underlying facts. According to this logic, one could argue that even if an employer's statement that its workers are independent contractors is a legal opinion, the opinion contains within it the implicit factual assertions that the employer has taken steps to ensure that this designation is legal and accurate, or that the government has clearly classified these workers as independent contractors. Because these implied facts are false, workers can bring a fraud claim against the employer for knowingly conveying such false facts and leading them to rely on them to their detriment.<sup>59</sup>

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57. See, e.g., Exhibit C, Independent Contractor Distribution Agreement between DNI and Charles Bunning, McElwee v. Dayton Newspapers, Inc., (Ohio Ct. C.P. 2000) (Montgomery App. No. 98-3686) (on file with author).

58. RESTATEMENT (SECOND) OF TORTS §545 cmt. c (1977).

59. This argument also finds support in comment d, which again discusses how the form a statement takes can be dispositive. As comment d states, "A representation of law that might otherwise imply assertions of fact may be so clearly a statement solely of opinion that it does not carry an implication of fact. Thus one who says, 'I think that my title to this land is good, but do not take my word for it; con-

*Claim Two: Negligent Misrepresentation*

Another possible tort claim misclassified workers can pursue is negligent misrepresentation. This claim may be easier for plaintiffs to prove: unlike a fraudulent misrepresentation claim, the negligent misrepresentation claim does not require proof that a misstatement is a factual statement, that the misrepresenter purported to have “special knowledge” of the issue if the statement was an opinion, or that the makers knew the statement was false. The threshold is lower, as described below. Additionally, while it does not grant a successful plaintiff punitive damages, a negligent misrepresentation claim offers much of the same satisfaction that a fraud claim does in taking a misrepresenter to task for its loose adherence to the truth, and offering recovery to plaintiffs who have been wrongfully denied tax withholdings and benefits.

*The Elements of Negligent Misrepresentation Claim*

For workers to make a successful negligent misrepresentation claim, they must prove these following elements:

That false information was supplied for their guidance in business transactions by someone in the course of his business, profession or employment, or in any other transaction in which he had a pecuniary interest,

That the supplier of the information failed to exercise reasonable care or competence in obtaining or communicating the information, AND

That they suffered a pecuniary loss caused by her justifiable reliance upon the information.<sup>60</sup>

Similar to the fraudulent misrepresentation claim, workers can point to their contracts as evidence of false information, citing descriptions of their work that are inconsistent with reality. The fact that such information was supplied in contractual negotiations can fulfill the requirement that the information is supplied “for their guidance in business transactions” and “in the course” of their employer’s business transactions. Alternatively, they can assert that their employers had a pecuniary interest in having them sign contractual agreements that inaccurately suggested that they were independent contractors because such agreements saved the employers from paying their taxes and benefits. Plaintiffs can then attempt to demonstrate that employers “failed to exercise reasonable care in determining the truth and accuracy of the . . . information obtained and communicated” by showing that the employer had reason to

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sult your own lawyer,’ is not reasonably to be understood as asserting any fact at all with respect to the title.” While this hypothetical offers an example of a statement that in format is so clearly an opinion that it does not imply any facts, it also helps demonstrate the inverse—that representations of law that do not make clear that they are opinions by including equivocal phrases like, “I think” or “do not take my word for it,” can reasonably be interpreted as implying assertions of fact.

60. RESTATEMENT (SECOND) OF TORTS § 552 (1977); *Delman v. Cleveland Hts.*, 41 Ohio St. 3d 1 (1989).

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doubt that the workers were independent contractors (e.g. if the employer had been challenged by IRS with regard to the workers' status, as DNI had been,<sup>61</sup> or knew that the descriptions of the work did not match up so neatly with the reality), but did nothing to communicate these potential discrepancies to the workers. Finally, plaintiffs can satisfy the "pecuniary loss" standard by pointing to the tax payments they made that ought to have been made by employers and to the work-related benefits that they have been denied.

### *Possible Objections and Solutions*

The challenges defendants are likely to raise are the following:

That a person liable for negligent misrepresentation must be in the business of selling the false information (e.g. as a lawyer or an accountant) and that they, the defendant company, were not in the business of selling the information,

That pecuniary interest in a transaction only exists when there is consideration paid for the information received, and that since there was no consideration paid in this transaction, there was no pecuniary interest,

That the Economic Loss Rule of Torts bars recovery for losses that are purely economic, and losses of denied benefits and tax withholdings are purely economic.

### *The Misrepresenter must be in the business of selling the information that was false*

Defendant companies may assert that only individuals who are in the business of selling information, such as lawyers and accountants, can be charged with negligent misrepresentation. Such an argument was one of the publisher's main objections in the Ohio case.

The likelihood of countering this objection will be largely dependent on what the case law of a plaintiff's home state says. In Ohio, for instance, there are four cases that discuss the relevant requirements that are likely to shape the judge's assessment of negligent misrepresentation.<sup>62</sup> These cases seem to offer hope for a positive outcome for the Ohio newscarriers, revealing that while negligent misrepresentation has typically been invoked successfully in cases where misrepresenters were in the business of purveying information, this characteristic is not a *requirement* for making such an assertion. Plaintiffs in other states should similarly look to their case law to see whether "being in the

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61. Letter from Stephen L. Daige, District Director, Department of the Treasury, Internal Revenue Service to Brett Thurman, General Counsel, Dayton Newspapers, Inc. (Jan. 30, 1998) (on file with author).

62. The defendant in Ohio cites four cases to support their contention that there is a "requirement" that the misrepresenter be in the business of supplying information: *Harrell v. Crystal*, 81 Ohio App.3d 515 (1992) (attorneys), *Haddon View Inv. Co. v. Coopers & Lybrand*, 157, 436 N.E.2d 212 (1982) (accountants), *Gutter v. Dow Jones, Inc.* 22 Ohio St.3d 286, 288-89 (1986), and *Nichols v. Ryder Truck Rental, Inc.* (June 23, 1994), Cuyahoga App. No. 65376, unreported, at 4.

business of selling information” is not a requirement for the claim, but rather merely a standard scenario.

If a state’s case law does not help clarify the issue, plaintiffs can also turn to the Restatement §552 Comments and Illustrations for further assistance. Nowhere in the text of the comments is there language limiting misrepresenters to individuals in information-dispensing industries. Instead, the comments only limit claims to “information [provided] in connection with a commercial transaction. . . in which the maker was manifestly aware of the use to which the information was to be put and intended to supply it for that purpose.”<sup>63</sup> Therefore, any company that was “manifestly aware” that their workers would use the contractually-provided information, that they were independent contractors so as to not demand work-related benefits or an employer tax contribution, and that they intended to supply the information for this purpose, fits this definition of “commercial transaction.” §552’s illustrations also seem to cut against assertions that only misrepresenters who supply information in their line of business can be charged with negligent misrepresentation. Several cases from a variety of states cited in the Restatement offer counter-examples: in *Virginia Dare Stores v. Schuman*, the court holds that a store owner can be found liable for negligently misrepresenting the safety of standing on a countertop to a window cleaner, and in *Devore v. Hobart Mfg. Co.*, the court holds that a school could have been held liable for negligently misrepresenting the name of a steamer manufacturer to their injured employee if her reliance had been foreseeable.<sup>64</sup> These cases illustrate that makers of negligent misrepresentations need not be professional purveyors of expert information: they simply need to be individuals who provide false information in the course of their business knowing that the recipient will rely on that information.

*Pecuniary interest only exists when there is consideration paid for the information received.*

Defendants may also attempt to assert, as the Ohio defendants did, that based on the Restatement §552, a person only has a pecuniary interest in a transfer of information in which he receives “consideration paid to him for [the information] or pain in a transaction in the course of and as a part of which it is supplied.”<sup>65</sup> Therefore, if defendants did not receive any consideration in exchange for the false information they provided to the workers, they did not have a pecuniary interest in the transaction.

The Restatement may again be helpful to plaintiffs faced with such an

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63. RESTATEMENT (SECOND) OF TORTS §552, cmt. a (1977).

64. *Virginia Dare Stores v. Schuman*, 175 Md. 287 (1938); see also *Devore v. Hobart Mfg. Co.*, 367 So.2d 836 (La.1979).

65. Defendants’ Reply Memorandum at 9 (quoting RESTATEMENT (SECOND) OF TORTS §552 cmt. c. and cmt. d (1977)).

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objection. As the court in the Ohio case points out in its ruling, the Defendants conveniently “neglect[ed] to cite the very next sentence of the Restatement portion, which reads: ‘[The pecuniary interest] may, however, be of a more indirect character.’”<sup>66</sup> In other words, consideration is not a necessary indicator of pecuniary interest in the transaction: pecuniary interest can be indicated in other ways. The Ohio court goes on to state that the “payment of various taxes” by the carriers, as well as the Defendant’s ability to “avoid having to provide retirement, health and workers’ compensation benefits,” could constitute sufficient pecuniary interest.<sup>67</sup> Hence, the Restatement and the Ohio case both seem to suggest that an employer denying a worker his rightful benefits and tax withholdings constitutes sufficient pecuniary interest to make a negligent misrepresentation claim.

*The Economic Loss Rule of Torts bars recovery for losses that are purely economic.*

Defendants may also offer as a final argument that the “economic loss rule” of torts bars recovery for purely economic losses in misrepresentation cases. In Ohio, for example, the Defendants cited several state and federal cases as holding that “[i]n the absence of injury to persons or damage to property, economic losses cannot be recovered in tort.”<sup>68</sup>

Depending on the case law of the state where the case is brought, this last objection may also be countered with support from case law and Restatement citations. Ohio’s case law, for example, offers a mixed reading. Some Ohio decisions militate for granting recovery while others invoke the economic loss rule. Workers will need to assess the utility of their state’s case law on the economic loss rule. The Restatement, however, seems to offer strong support for misclassified workers. For example, §552(1) expressly states that a party may be liable for “pecuniary loss caused” by justifiable reliance upon false information supplied. In other words, since the Restatement effectively requires that a person suffer pecuniary loss as a result of receiving false information in order to plead negligent misrepresentation, it would be quite strange for it to then bar recovery for those very required pecuniary losses. Moreover, the Restatement itself specifies that pecuniary losses should be offered as damages in both fraudulent misrepresentation<sup>69</sup> and negligent misrepresentation cases.<sup>70</sup> It

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66. Decision, Order and Entry Overruling in Part and Sustaining in Part Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint, 9, *McElwee v. Dayton Newspapers, Inc.* (Ohio Ct. C.P. 2000) (Montgomery App. No. 98-3638) (on file with author), quoting Restatement Section 552(1), cmt. c.

67. *Id.*

68. Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint and Jury Demand, 7-8, *McElwee v. Dayton Newspapers, Inc.* (Ohio Ct. C.P. 2000) (Montgomery App. No. 98-3638) (on file with author).

69. RESTATEMENT (SECOND) OF TORTS §549 (1977).

would make no sense for the Restatement to lay out these damages for economic losses if it meant for the economic loss rule to bar any recovery.

\* \* \* \*

These two tort law claims—fraudulent misrepresentation and negligent misrepresentation—offer a new, potentially useful tool for workers and advocates seeking to hold accountable employers who misclassify their workers. While each claim has its pitfalls and the case law of different states may offer workers greater or lesser relief, the arguments laid out above present a starting point for workers who wish to try litigating these claims. Advocates are also currently exploring the common law claims of constructive contract, breach of the covenant of good faith and fair dealing, unjust enrichment, unconscionability, constructive fraud, and contracts of adhesion as other potential avenues for stopping the misclassification trend.<sup>71</sup> With time, this web of state law claims may create a strong incentive for employers to stop misclassifying workers and thereby denying them the benefits and treatment to which they are entitled.

#### IV. CONCLUSION

In this world of intense global competition, employers are constantly looking for ways to cut costs, even if the company's gains mean losses of wages and benefits for workers. The temptation to avoid paying taxes and benefits through the simple act of relabeling workers as independent contractors will always exist. The only bulwark that workers have against such mistreatment are laws and regulation that shut down these possibilities: laws that compel employers to pay a minimum wage, to take responsibility for their workers' on-the-job injuries, and to acknowledge that workers whose labor they control are indeed their employees.

Using state common law tort claims may become a powerful way to force employers to own up to the responsibilities they have been shirking. Fraudulent and negligent misrepresentation claims can draw attention to employers' misclassifications and compel employers to prove that the reality of how they treat workers actually meets the independent contractor label they have attached to the relationship. While such scrutiny may only drive certain publishers to become even more savvy about concealing the true status of carriers, it may persuade other employers to end their engagement in the misclassification game.

The newspaper industry has been a leader in this misclassification practice. And while newscarrers have been the main victims of misclassification, publishers are extending the practice to editorial stringers, office cleaning

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70. *Id.* at §552B (“The damages recoverable for a negligent misrepresentation are those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is a legal cause...”).

71. Laurence E. Norton II & Catherine K. Ruckelshaus, *Misclassification by Employers Violates the Common Law* (2000) (unpublished paper) (on file with author).

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workers, and the individuals who perform grounds maintenance. As noted before, many other industries are following their lead. The spread of this practice speaks to the urgent need for workers' rights activists to wage a vigorous campaign against newspaper companies and other misclassifiers by countering their marketing strategies with the truths of workers' lives, lobbying legislatures for better laws, and finding states with sympathetic law for litigating misrepresentation claims. Stopping a leader like the newspaper industry will send a strong message to other industries that misclassification is not a permissible strategy for cutting costs and avoiding labor standards, and that they must treat their workers as what most of them truly are—employees.

