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DON'T BLAME ME, I DIDN'T HIRE HIM! The Distinction Between Employees And Independent Contractors And Why It Matters.

By Jason R. Potter



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Assume you are the owner of a small general contracting company and need to temporarily supplement your labor on a job. You contact a local temporary employment agency, who sends you two workers to help fill the labor gap for a couple of days. The temporary agency exercises sole authority over these workers. They hire the workers, select the workers for particular jobs, fire the workers, pay the workers a designated wage, pay unemployment insurance for the workers, and maintain workman's compensation insurance for the workers. Your company directs them in the performance of their jobs. You believe these workers are employees of the temporary agency, not of your company, for which they are independent contractors. Not so fast. In a 1985 case entitled *Whitehead v. Safway Steel*, the Maryland Court of Appeals held that such temporary workers were actually employees of both the contracting company and the temporary agency.

Determining whether a worker is an employee or an independent contractor is an important, but potentially confusing determination which can have significant consequences for both employer and

worker. For example, an employer must complete and retain the I-9 Employment Eligibility Verification form for each employee hired but not for independent contractors. (Also exempt from the I-9 requirement are workers supplied by a temporary services agency, such as in the *Whitehead* case.) Furthermore, an employer must pay Social Security and Medicare taxes for employees but not for independent contractors.

In Maryland, an employer must also pay workman's compensation insurance, payroll taxes, and insurance taxes on employees, but not on independent contractors. In addition, a Maryland employee can sue under Maryland's Wage Payment and Collection Law (Labor & Employment §§ 3-501, et seq.) to recover earned, but unpaid, wages, including treble damages and attorney's fees. The law does not cover independent contractors. So, the distinction between employees and independent contractors is extremely important and knowingly mischaracterizing the former as the latter is illegal in Maryland and can lead to significant financial penalties.

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MARYLAND

To determine whether a worker is an employee or an independent contractor under Maryland law, courts generally consider five factors. First, did the employer select or hire this worker? Second, does the employer pay the worker's wages? Third, does the employer have the ability to discharge the worker? Fourth, does the employer have the right to direct the employee in the performance of his or her duties? Fifth, and finally, is the worker's work part of the employer's regular business? The more the answers to these questions are "yes", the more likely the worker will be considered an employee and not an independent contractor. However, where the employer has the right to direct the worker in the performance of his or her duties, Maryland courts generally find that factor alone is sufficient to create an employment relationship, as the holding in the *Whitehead* case shows.

In *Whitehead*, the worker was selected by the temporary agency, not the contractor. The agency also paid the worker's wages, although it obviously billed the contractor for those wages. Both the agency and the contractor could fire the worker. The worker's duties were almost certainly within the employer's normal business operations. However, the Court focused almost entirely on the extent of control the contractor exercised over the worker, which the Court found "clearly establishes an employer/employee relationship. [The employer] instructed [the worker] on the task to be performed, supervised his work, and was free to reassign him to any other duties that warranted attention." This, the Court concluded, was sufficient by itself for the worker to be an employee and not an independent contractor.

In 2009, Governor O'Malley signed into

law the Maryland Workplace Fraud Act, which makes it illegal for an employer to knowingly misclassify an employee as an independent contractor. In 2010, regulations were implemented which obligated those in the construction and landscaping industries to provide all independent contractors they hired with a notice summarizing the rights and responsibility of independent contractors. A copy of the notice may be obtained from the Maryland State Department of Labor, Licensing and Regulation website: <http://www.dllr.state.md.us/workplace/wpnotice.doc>.

IRS

As noted, the distinction between employees and independent contractors can also have important tax consequences to both the employer and the employee/independent contractor. The IRS, therefore, has broken down its analysis of this issue to focus on three general categories to determine whether a worker is an employee or an independent contractor. The first factor is a "behavioral" factor, which focuses on the extent to which the employer has a right to direct or control how the worker does the work. The second factor is a "financial" factor, which focuses on the extent to which the employer has the right to control the economic aspects of the worker's job. The greater the level of behavioral and financial control, the more likely the worker will be considered an employee and not an independent contractor. The third factor focuses on the "type of relationship" between the worker and employer. This factor looks at how the worker and the employer perceive their relationship to each other, which include whether a contract exists between the employer and the worker and what it says, as well as what benefits the employer pays for the worker, such as insurance, pension, taxes. This third factor also looks at the perma-

nency of the relationship between worker and employer and whether the worker's services are key to the employer's business. If the expectation is that the working relationship will continue indefinitely and the worker's services relate to an important aspect of the employer's business, the IRS is more likely to consider the worker an employee, rather than an independent contractor.

Due to the important consequences of classifying workers and because the analysis can be difficult, the IRS has provided a form that may be submitted to determine whether a worker is an employee or an independent contractor. The SS-8 "Determination of Worker Status for Purpose of Federal Employment Taxes and Income Tax Withholding" may be submitted by either the employer or the worker, and, once submitted, the IRS will make an official determination as to the worker's status. According to the IRS website, however, this determination may take as long as six months.

PENALTIES FOR IMPROPERLY CLASSIFYING AN EMPLOYEE AS AN INDEPENDENT CONTRACTOR

If an employer has misclassified an employee as an independent contractor and has no reasonable basis for doing so, the employer may be liable for employment taxes. If the U.S. Department of Labor determines that an employer has knowingly misclassified an employee as an independent contractor and failed to pay the worker the prevailing wage applicable to the project and/or full benefits under state statutes, the employer is debarred from further government contracting work for a period of three years.

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ADMIRALTY LAW HISTORICAL EXHIBIT OPENS AT U.S. DISTRICT COURTHOUSE IN BALTIMORE

Admiralty law governs most disputes arising out of maritime commerce on navigable waters of the United States. Admiralty cases were a substantial part of the docket of cases before the U.S. District Court in Maryland beginning in 1789. In April 2011 a committee of local maritime attorneys and judges of the U.S. District Court in Baltimore, including WC&S partner, David W. Skeen, completed work on an exhibit focusing on admiralty law in the District of Maryland. The exhibit traces the history of admiralty law from the 3,700 year old Code of Hammurabi to the Rules of Oleron (1150 A.D.), then the English admiralty courts and Maryland's colonial vice-admiralty courts to the present day federal courts. The Maryland State Archivist has provided a copy of the earliest known record of an admiralty proceeding in Maryland. In 1672 the Swedish vessel BURGH OF STADE and her cargo of yellow bricks were arrested, condemned and sold in Maryland for violation of the English Navigation Acts. The record of the proceeding was actually found in Sweden.

The Exhibit also describes and illustrates the basic concepts of admiralty law, such as comparative fault, limitation of ship-owners' liability, the warranty of seaworthiness, and the maintenance and cure remedy for injured seamen, through actual cases litigated in the district of Maryland. Pictures of famous collisions in the district of Maryland, including the 1913 explosion of the ALUM CHINE which killed 30 longshoremen loading dynamite; the 1956 collision of the liberty ship E. KIRBY SMITH with the M/V NYLAND, in 1956; the YORKMAR collision with the C&D Canal Bridge in 1973, and the 2004 capsizing of the water taxi LADY D in the Baltimore Harbor resulting in 5 deaths. Also displayed are a number of photographs of



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maritime and harbor scenes by famed local photographer, A. Aubrey Bodine.

The Exhibit was created with the professional assistance of The Design Minds, and funded by the Historical Society of the United States District Court for the District of Maryland. The Maryland Historical Society lent several exhibits of ship models and other artifacts, including a portrait of Joshua Barney, the first clerk of the U.S. District Court, who distinguished himself as a naval officer and privateer in the Revolution and the War of 1812. In addition to David Skeen, of Wright, Constable & Skeen, the Committee included other practicing maritime attorneys in Baltimore, including M. Hamilton Whitman, Jr., Chairman; James W. Bartlett, III; David McL. Williams; as well as Herbert Better and The Honorable James F. Schneider, U.S. Bankruptcy Court Judge. The Committee's work was overseen by U.S. District Judges J. Frederick Motz, and Catherine C. Blake.

One section of the exhibit features the people and practice of admiralty law in Maryland including Emory H. Niles (1892-1976) an admiralty lawyer (later Associate

Judge of the Supreme Bench of Baltimore City) and co-founder in 1923 of [American Maritime Cases](#), the specialty national legal reporter maintained by practicing admiralty attorneys and still published in Baltimore; Judge Roszel C. Thomsen (1901-1992), a U.S. District Court Judge with a particular interest in admiralty law; David R. Owen, an admiralty lawyer in Baltimore for 50 years, and former President of the Maritime Law Association of the United States and co-author of a book on the vice admiralty courts of Maryland; and John Henry Skeen (1883-1951) admiralty lawyer in Baltimore City from 1904-1950 whose handwritten 1905 book of accounts is on display showing fees charged, case dispositions, as well as his grades at the University of Maryland School of Law.

The admiralty exhibit is the first of several planned for the U.S. District Courthouse in Baltimore. Later exhibits will focus on federal fish and wildlife laws, civil rights, and the civil war. The Exhibit was inspired by a national movement to make public buildings more accessible and more interesting to the public.

The Admiralty Exhibit may be viewed at the U.S. District Courthouse, Garmatz Federal Courthouse, 101 W. Lombard Street, Baltimore, Maryland 21201, from 9:00 a.m. - 4:00 p.m. Monday through Friday. After passing through security the introduction to the exhibit can be seen on the first floor. Then take the elevator to the 3rd floor to view the Admiralty Exhibit itself. [WCS](#)

SORTING OUT THE FINANCIAL INTERESTS OF UNMARRIED COUPLES

By Mollie G. Caplis and Frederick L. Kobb

As Neil Sedaka reminded us in his 1962 hit pop song, “Breaking Up Is Hard to Do.” It’s messy, complicated, and inevitably, someone’s feelings get hurt. And as a result of the recent Court of Special Appeals decision in *Porter v. Zuromski*, 195 Md. App. 361 (2010), in Maryland, at least, there could also be significant financial consequences to breaking up.

In 1993, Donna Zuromski and Sean Porter started dating and eventually became engaged to be married. In 1997, while still engaged, Donna and Sean decided to buy a house together. Because Donna had poor credit at the time, the parties did not qualify for a loan together, but Sean was able to obtain a mortgage in his name alone to finance the purchase of the house. As a result, the house was titled solely in Sean’s name. The parties each contributed to the down payment, although Donna’s contribution was a bit less than Sean’s. Despite the fact that Donna was not on title to the property, the parties agreed that they would act as joint owners of the property and both contributed to the mortgage and other carrying costs. In addition, Sean agreed that he would add Donna’s name to the title in the future. In truth, as Sean admitted to the court, he never intended to make Donna a part owner of the property.

In addition to sharing the household expenses, including the mortgage payments, Donna and Sean each made significant improvements to the property through their individual efforts. Unfortunately, however, as the value of the home flourished, Donna and Sean’s relationship did not. They never married, and in 2007, when the relationship soured, Sean, still having sole title to the property, kicked Donna out. When Donna asked Sean to pay her one-half the equity in the home,



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Sean responded by refinancing the mortgage and cashing out almost all of the equity in the property.

Unhappy with Sean’s actions, Donna sued Sean and, among other things, asked the court to impose a constructive trust. A constructive trust is an equitable remedy that converts the holder of legal title to a property into a trustee for someone who in fairness should benefit from the property. The trial court ruled in favor of Donna and imposed a constructive trust because it found that Sean would be unjustly en-

riched if he were permitted to continue as the sole legal owner of the property. As an additional basis for imposing a constructive trust, the court found that Sean had taken advantage of a confidential relationship that existed between the parties. A confidential relationship is a legal concept that describes a situation where one party is dominated by the other party in a relationship, or where, under the circumstances, the weaker party is justified in assuming that the other will not act in a manner inconsistent with his or her welfare. In conjunction with imposing a constructive trust, the court ruled that Donna was entitled to a one-half interest in the property and appointed a trustee to prepare a new deed to add Donna to the title.

Disappointed with the results at the trial level, Sean appealed, arguing that the lower court erred by imposing a constructive trust. The appellate court affirmed the lower court’s decision, ruling that a constructive trust may be imposed not only where fraud or misrepresentation exists, but also when the circumstances render it inequitable for the party holding title to a property to retain it. In the eyes of the appellate court, Sean’s conduct “smack[ed] of misrepresentation if not fraud.” Apart from Sean’s wrongdoings, the Court concluded that a constructive trust was an appropriate remedy because it would be unfair for Sean to retain exclusive title to the property in light of Donna’s contributions to the property, which were made in reliance on Sean’s representation that she would be a co-owner of the property. The Court of Appeals also ruled that a constructive trust was justified because a confidential relationship existed between Sean and Donna (because the parties were

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In Maryland, an employer that has been found to have mistakenly or unknowingly misclassified an employee has 45 days within which to come into compliance. If the employer complies within that time period, no penalty will be assessed. However, if the employer does not comply, a penalty of up to \$1,000 may be imposed for each misclassified employee.

If an employer is found to have knowingly

misclassified employees as independent contractors, a penalty of up to \$5,000 per misclassified employee may be imposed. If the employer has previously been found to have misclassified employees, a penalty of up to \$10,000 may be imposed. If an employer is in violation three or more times, a penalty of up to \$20,000 per misclassified employee may be imposed.

There are myriad laws, regulations and

cases that interpret whether a worker is an employee or an independent contractor and this article is intended only as a general summary of some of them. Should you have more specific questions about employment classifications issues, please contact Jason R. Potter at Wright, Constable & Skeen, LLP. [WCS](#)

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engaged to be married, and Donna was justified in assuming that Sean would act in a manner consistent with her best interests), that Sean was the dominant party in that relationship (because he had sole title to the property), and that Sean had abused his confidential relationship with Donna (because Sean attempted to profit from the relationship by refusing to add Donna to the title on the property).

Of note, Sean argued that the decision to

impose a constructive trust was erroneous because it constituted an award of “palimony,” which prior court rulings have deemed impermissible in Maryland. The Court of Special Appeals rejected Sean’s argument, ruling that Donna’s claim for a constructive trust was not an action for support, or a remedy for a breach of a promise of marriage. Instead, the Court found that Donna’s claim was based on the principal that Sean would have been unjustly enriched had he been permitted

to retain sole title to the property.

So, as it turns out, Neil Sedaka was only half right. While breaking up is hard to do, when one party to a relationship is dishonest and doesn’t keep his or her promises, some remedies may be available to the injured party. [WCS](#)

ANNOUNCEMENT

Maryland’s Motor Vehicle Administration (MVA) recently announced it has added an emergency contact option to Maryland driver’s licenses. Maryland drivers can now add up to three emergency contacts to their driver’s license so police will know who to call if an accident occurs. The emergency contact information is stored electronically on an individual’s driver’s license and will be available only to authorized law enforcement personnel.

You can go to MVA’s website at www.mva.maryland.gov and add your three emergency contacts in just a few minutes. You will need to have your driver’s license number. Go to the website, on the right, find “Do It Online” and there you will see the choice and click “Emergency Contacts” and in the next menu again click on “Emergency Contacts” to add your emergency contacts. The entire process takes less than 10 minutes.



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