When Contract Should Preempt Tort Remedies: Limits On Vicarious Liability For Acts Of Independent Contractors

Deanna N. Conn*

Copyright ©2009 by the authors. Fordham Journal of Corporate & Financial Law is produced by The Berkeley Electronic Press (bepress). http://ir.lawnet.fordham.edu/jcfl
WHEN CONTRACT SHOULD PREEMPT TORT REMEDIES: LIMITS ON VICARIOUS LIABILITY FOR ACTS OF INDEPENDENT CONTRACTORS

Deanna N. Conn

I. INTRODUCTION ............................................................ 180
II. BACKGROUND REGARDING THE LAW OF VICARIOUS LIABILITY . 182
   A. Vicarious Liability was Initially Limited to the Acts of Workers Over Whom the Company Had Control or the Right to Exercise Control ........................................ 184
   B. Courts Abandoned the Unitary “Control Test” in Favor Of a Multi-Factor “Status” Test to Determine Whether The Worker was an Employee or an Independent Contractor ........................................ 185
   C. Vicarious Liability for the Acts of Employees is Unpredictable Because the Status of Workers is Indeterminate ................................................................. 186
   D. The Multi-Factor “Status” Test Is Results Driven .......... 188
   E. Exceptions Swallow the “General Rule” of Nonliability For Acts of Independent Contractors .................. 190
   F. Critique of the Current Law of Vicarious Liability ...... 198
III. ALTERNATIVE THEORIES HAVE BEEN ADVANCED FOR DETERMINING WHEN VICARIOUS LIABILITY FOR ACTS OF INDEPENDENT CONTRACTORS IS APPROPRIATE ............... 200
   A. Control Theory .............................................................. 201
   B. Enterprise Liability Theory ............................................. 203
IV. CONTRACT PREEMPTION THEORY OF VICARIOUS LIABILITY ...... 207
   A. Vicarious Liability for Torts Involving Contracting Parties ............................................................. 208
   B. Vicarious Liability for Torts Where the Tortfeasor Enjoys No Contractual Relationship with the Victim ...... 216
V. CONCLUSION ...................................................................... 219

1. The author wishes to thank Marvin A. Chirelstein, Professor Emeritus of Law at Columbia Law School, for his inspiration and economics-based approach to contract law. The author also wishes to thank Graeme W. Austin, J. Byron McCormick Professor of Law at the University of Arizona, and David E. Adelman, Harry Reasoner Regents Chair in Law, at the University of Texas School of Law, for their many comments and suggestions in connection with this Article.

179
I. INTRODUCTION

The current law regarding whether a company can be held vicariously liable for the torts of independent contractors is a morass. Companies do not know in what circumstances liability will attach. Uncertainty and inconsistency are rife and well documented. As the use of outsourcing continues to increase in the United States, an accurate assessment of the potential liability risks associated with independent contractors has become even more important. Companies in the United States are increasingly using independent contractors who are based overseas to perform a wide variety of functions, including not only customer service “call centers,” but also medical services, such as radiology and medical imaging diagnostics. More than ever, the law of vicarious liability needs to be predictable so that companies can make informed operational choices about who they hire. Companies should know what liability risks they reasonably face—both to assess whether the benefits of an undertaking outweigh the costs, and, more pointedly, to assess whether to use independent contractors rather than hire their own employees, over whom they have the greatest control. Currently, business choices simply fall hazard to guesswork, or worse, ‘inflated

2. Richard R. Carlson, Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying, 22 BERKELEY J. EMP. & LAB. L. 295, 335 nn.244-46 (2001) (collecting cases demonstrating the unpredictability in the current “multi-factor” test of employee status which is used to determine whether to attach vicarious liability); Joseph H. King, Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees, 62 WASH. & LEE L. REV. 417, 462 (2005) (criticizing current “ad hoc approach to the question of vicarious liability with all of the imponderability and unpredictability that currently plagues the area.”). See Richardson v. APAC-Mississippi, Inc., 631 So. 2d 143, 150 (Miss. 1994) (“[T]he various tests to determine the type of relationship are themselves generalities which can be viewed quite differently, depending upon which judge is applying them.”); Burns v. Labor & Indus. Relations Comm’n, 845 S.W.2d 553, 556-67 (Mo. 1993) (noting that the worker in question, a roofer, could be an employee even if the approximately thirty other fellow roofers hired by the same employer were independent contractors, because there were at least some facts unique to that particular roofer.”); Harger v. Structural Serv., Inc., 916 P.2d 1324, 1334 (N.M. 1996) (“A fact found controlling in one combination may have a minor importance in another.”); Engel v. Calgon Corp., 498 N.Y.S.2d 877, 878-79 (N.Y. App. Div. 1986) (finding that one agency’s determination that worker was employee under one state law did not preclude another agency from determining that worker was independent contractor under another state law).

risk assessment," resulting from a conclusion that there is always a risk that a company will be held liable for the acts of independent contractors, regardless of the circumstances.

This Article evaluates when, if at all, it is appropriate to hold companies that hire independent contractors liable for the acts of those independent contractors. Part II provides background regarding the current state of the law of vicarious liability, including its historical underpinnings, and the factors that contribute to unpredictability. Part III analyzes and critiques alternative theoretical models that scholars have advanced to address the problems in the current law. Scholars contend that a desirable model of liability is one that serves the oft-stated "twin" goals of tort law: deterrence and compensation. An important addition to these goals, however, which many scholars seem to overlook, is that tort law should also improve – or at least not hinder – economic efficiency. The current system of vicarious liability, as well as the proposals that have been advanced by scholars, do a poor job of advancing all three goals. Part IV of this Article advances an alternative theory called "Contract Preemption." Under this theory, torts are divided into two categories – those involving injury to a third party that entered into a contract relationship with the independent contractor and was ultimately injured, and those torts involving injury to a third party that has no privity with either the independent contractor or the company that hired the independent contractor.

This Article's primary thesis is that the model of tort liability necessarily should be different in these two very different constructs. The current vicarious liability model, as well as the alternative theories that have been advanced by scholars, have made no distinction between these two categories of torts because their focus is solely on the relationship between the company that hired the independent contractor, and the independent contractor. That relationship, while important, should not be the sole focus. Any model of tort liability should also consider the relationship between the independent contractor and the third party that is ultimately injured by the independent contractor. Under the Contract Preemption theory, parties who are injured in the first category of torts, where there is a contract relationship, should be limited to seeking recovery for their injuries from the independent contractor, but subject to one condition - the tort victim must have had

clear notice that he or she was entering into a contract with an independent contractor. So long as the victim had clear notice, no vicarious liability can attach to the company that hired the independent contractor. In this circumstance, contract effectively preempts tort remedies by cutting off tort recovery where there is privity between the tort victim and the independent contractor. If there is no notice to the tort victim that the company is in fact an independent contractor, then the model of liability should be the same as in the second category of torts.

In the second category of torts which involves injuries to third parties that enjoy no contractual relationship with either the independent contractor or the hiring company, the actual tortfeasor should still bear primary liability. If the independent contractor has insufficient assets, however, then the company that hired the independent contractors should bear the burden of making up the shortfall. The liability should not be uncertain, as it is today. Rather, there should be liability, but only secondary liability. In this second category of torts, contract still has an important role to play between the hiring company and the independent contractor. If the risks of injury by the independent contractor are high, but its assets are low, the hiring company can require, in its contract with the independent contractor, that the contractor obtain requisite levels of insurance. In this way, the company can use contract law to limit its tort liability - another variant of the theory of contract preempts tort liability.

This Article concludes that the Contract Preemption theory of vicarious liability is superior to both the current vicarious liability model and the alternative models advanced by scholars because the twin goals of tort law, deterrence and compensation, are better achieved with significantly less compromise to economic efficiency.

II. BACKGROUND REGARDING THE LAW OF VICARIOUS LIABILITY

The doctrine of vicarious liability traces its roots to the theory of “respondeat superior,” or “Let the Master Answer.” This maxim holds that the “master” is liable for the acts of his “servants,” even if the master is not at fault. Thus, from the vantage point of the “master,”

respondeat superior liability is a form of strict liability because the master is being held liable even though the master has done no wrong.\(^6\) Instead, the tort of another party is imputed to the master. In a wider sense, however, vicarious liability is clearly distinguishable from strict liability because vicarious liability does depend on establishing the fault or negligence of at least one party: the servant.\(^7\) Vicarious liability is defined as “liability for the tort of another person.”\(^8\)

In the pre-industrial era, there was little need to classify a worker as either a servant or an “independent contractor” because most of the work was domestic in nature, and the servant was typically tied to a particular household. In those circumstances, there was no doubt that the servant was employed by the master/owner of the household. If the servant injured someone, the master would bear financial responsibility.\(^9\) With industrialization, however, the classification of workers became more important. Parties needed to know who would be held responsible for injuries caused by a worker. Even before industrialization, there were some workers who were not tied exclusively to one employer and who acted as their own “masters,” akin to modern day independent contractors.\(^10\)

Some courts initially imposed liability on whoever paid for the work, even if that person had no control over the worker (i.e., even though the worker would be classified as an independent contractor in modern times).\(^11\) Ironically, this is the very model of liability that is advanced by “Enterprise Liability” theorists today, some 150 years later, as will be discussed infra. In the 1800s, however, courts moved away from and ultimately rejected this “payment responsibility” model, concluding that it was unfair to hold a company liable for the acts of another party over whom the company could exercise no control. The courts instead turned to a model that focused on the employer’s “control” or “right to control” the worker.\(^12\)

---

7. The one exception is that liability is sometimes imputed when the servant is strictly liable, without fault by the servant.
10. *Id.* at 303.
11. *Id.* at 304.
12. *Id.*
A. Vicarious Liability was Initially Limited to the Acts of Workers Over Whom the Company Had Control or the Right to Exercise Control.

Under the "control" test, if the master had the right to supervise the work, the master was held liable for the negligence of the worker. If the master did not have the ability to supervise or "control" the work, no liability would attach.\(^{13}\) This model was consistent with the system of fault-based liability that is generally favored in the United States.\(^{14}\) Instead of imposing "strict liability" for the torts of another party, liability of the master was considered appropriate because the employer was deemed to have either failed to supervise the work, or negligently selected the worker.\(^{15}\)

Under this vicarious liability model, companies were liable for the acts of their employees, over whom they could exercise "control" in the traditional sense of a master/servant relationship. By extension, courts believed it was appropriate that if a company exerted the same kind of control over a "contractor" as it did over one of its employees, liability should attach for the injuries caused by those workers.\(^{16}\) For reasons that are discussed infra, "control" is not the proper proxy for determining whether to impose vicarious liability. Indeed, courts moved away from a "control" approach because the simplicity of that test fell short when applied in a modern industrial and commercial setting. In some contexts, courts noted that highly skilled workers were effectively "beyond the control" of the employer because of their specialized knowledge, which the employer had little understanding or ability to supervise.\(^{17}\)

\(^{13}\) Id.
\(^{14}\) See Cantu, supra note 6, at 827.
\(^{15}\) See Carlson, supra note 2, at 304.
\(^{16}\) See McKee v. Brimmer, 39 F.3d 94, 98 (5th Cir. 1994) (stating that "an employer will not be allowed to escape liability by drafting a contract which labels its employee an independent contractor, but retains employer-like control over him"); Hederman v. Cox, 193 So. 19, 24 (Miss. 1940) ("The examining court must 'pierce through the screen of technical attitudes to what are the realities, and must regard substance rather than formal similitudes.'"); Deanne M. Mosley & William C. Walter, The Significance of the Classification of Employment Relationships in Determining Exposure to Liability, 67 Miss. L.J. 613, 626 & nn.44-45 (1998) (citing Gulf Ref'g Co. v. Nations, 145 So. 327, 333 (Miss. 1933)).
\(^{17}\) See Carlson, supra note 2, at 305.
B. Courts Abandoned the Unitary "Control Test" in Favor of a Multi-Factor "Status" Test to Determine Whether the Worker was an Employee or an Independent Contractor.

By the late 1800s, courts had added many factors to the list of things to consider when evaluating whether a worker was an "employee" in which vicarious liability would be appropriate, or an "independent contractor," in which vicarious liability would not be appropriate. Whether the employer could exercise "control" over the worker was often an important, but not an exclusive, factor. This multi-factor approach is reflected in Section 220 of the Restatement (Second) of Agency, which lists the following ten factors in evaluating whether a worker is an employee or an independent contractor:

(a) the extent of control which, by agreement, the master may exercise over the details of the work;
(b) whether the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in a particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by time or by the job;
(h) whether the work is part of the regular business of the employer;
(i) whether the parties believed they are creating the relation of master and servant; and
(j) whether the principal is or is not in the business.

In addition to the ten factors set forth in the Restatement of Agency, some courts consider additional factors, including whether the employer has a right to terminate the relationship (such a right implies greater control), whether there is freedom to serve other employers, whether the worker has employees, and the 'economic realities' test, which looks to the overall dependence of the worker on the employer, with more dependence suggesting the employer has greater control. In 1992, the

18. Id. at 310.
20. See Carlson, supra note 2, at 338-54.
U.S. Supreme Court applied a multi-factor test in *Nationwide Mut. Ins. Co. v. Darden* to determine whether insurance agents qualified as independent contractors.\(^{21}\) In *Darden*, the Supreme Court instructed that all of the factors “must be assessed and weighed with no one factor being decisive.”\(^{22}\) Courts currently rely on this multi-factor “status” test to initially ascertain a worker’s employee/independent contractor status, which determines whether the company that hired the worker will bear liability for that worker’s torts.\(^{23}\)

### C. Vicarious Liability for the Acts of Employees is Unpredictable Because the Status of Workers is Indeterminate.

There are multiple causes for vicarious liability law’s unpredictability, but a primary one is that the threshold determination of whether the tortfeasor will be deemed to be an employee or an independent contractor is itself unpredictable and fairly arbitrary. Indeed, courts actually only give the slightest regard to the labels that the parties attach to their dealings.\(^{24}\) Even if the contract executed by the company expressly states that the other party is an independent contractor, and not an employee, the courts disregard the parties’ “contract label” in favor of an analysis of the nature of the “actual” relationship between the parties.\(^{25}\) Courts feared employers would manipulate “labels” to try to avoid liability for their own employees’ acts. If the “actual” relationship is akin to that of an employee/employer relationship, the Courts will hold the hiring company liable for the acts of that person as a *de facto* employee. While that result may seem appropriate, using a multi-factor “status” test has many drawbacks. Further, the court’s paternalistic impulse to “watchdog” companies is

---

22. *Id.*
23. *Id.*; *Brown v. Cities Serv. Oil Co.*, 733 F.2d 1156 (5th Cir. 1984) (focusing on whether contractor’s work is part of “trade or business” of principal for purposes of evaluating whether worker is independent contractor or employee).
25. *Id.* at 625 & n.45 (quoting *Hederman v. Cox*, 193 So. 19, 24 (Miss. 1940) (stating that the “court must pierce through the screen of technical attitudes to what are the realities, and must regard substance rather than formal similitudes”) (“The court will look beyond the contract to see whether the classification contracted to is the employment relationship that actually exists.”)).
misplaced. As demonstrated in Part IV of this Article, straightforward economics is a better driver for determining when liability is appropriate.

One drawback of the multi-factor "status" test is that the constant addition of factors which must be considered contributes to the lack of predictability in the outcome.\textsuperscript{26} In practice, court determinations of whether there is an "actual" employee relationship using the multi-factor "status" tests have been fairly arbitrary. The outcome in any particular case depends on the importance that the court attaches to any one factor. Just "slight changes in circumstances," or "slight variations in a court's statement of the test, can shift an individual from one status to another."\textsuperscript{27} As a result, in seemingly similar circumstances, courts have reached opposite determinations, even after supposedly applying the same multi-factor test.\textsuperscript{28}

Another criticism of the multi-factor "status" test is that many of the factors have no bearing on whether the worker is an employee or an independent contractor, or on whether vicarious liability is appropriate. As an example, one factor that courts consider is the length of time which the person has been employed by the company. Even if the relationship between the parties is long term, this fact does not bear on whether the worker is an employee. Independent contractors can have long-standing contracts without being employees and without any "control" being exercised over their work.

Courts also consider whether the work is part of the "regular" business of the employer. An evaluation of this factor, however, depends on how the business is defined. If the business is defined as "manufacturing," then salespeople who distribute the product may not be considered as part of the "regular" business. In contrast, if the business is vertically integrated, distribution may be included as part of the company's "regular" business so that sales representatives would properly qualify as employees.

\textsuperscript{26} See Carlson, \textit{supra} note 2, at 309; see also King, \textit{supra} note 2, at 462 (criticizing current "ad hoc approach to the question of vicarious liability with all of the imponderability and unpredictability that currently plagues the area"); see also Richardson v. APAC-Mississippi, Inc., 631 So. 2d 143 (Miss. 1994); Burns v. Labor & Indus. Relations Comm'n, 845 S.W.2d 553 (Mo. 1993); Harger v. Structural Serv., Inc., 916 P.2d 1324 (N.M. 1996); Engel v. Calgon Corp., 498 N.Y.S.2d 877 (N.Y. App. Div. 1986).

\textsuperscript{27} See \textit{supra} note 2 (listing Journal articles and cases).

\textsuperscript{28} Id.
D. The Multi-Factor "Status" Test is Results Driven.

The problems that beset the current multi-factor test are exacerbated because the outcome of the employee status determination is often "results driven." This is because of a completely unrelated development: the passage of social welfare legislation aimed at improving working conditions. Starting in the late 1800s, states began passing wage and hour's laws restricting, for example, the number of hours that could be worked without employers paying overtime. The contemporary "successor" to these early laws is the Fair Labor Standards Act, which imposes minimum wage requirements and overtime payments based on number of hours worked, among other requirements.29 Another modern development was the passage of workers compensation laws, which were designed to ensure protection of the employee in the event of injury using a "no fault" system of liability. Workers compensation laws provided that, regardless of whether the employee had any fault in the injury, the employee was entitled to recover statutorily determined damages. In 1964, Title VII of the Civil Rights Act established protections to prevent gender or racial discrimination.30 Thereafter, the Age Discrimination in Employment Act and Americans with Disabilities Act were passed.31

The significance of these social welfare laws in the unrelated context of vicarious liability is that employee status directly bears on whether workers will be eligible for these statutory protections.32 Most of these laws extend their scope to "employees" only, making the

32. Jane M. McFetridge & Grace Hwang Lee, When Are Supervisors Personally Liable for Employment Law Violations?, 92 ILL. B.J. 628 (2004); Danielle Tarantolo, Note, From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce, 116 YALE L.J. 170 (2006); see MacLachlan v. ExxonMobil Corp., 350 F.3d 472 (5th Cir. 2003) (holding that status as employee or independent contractor determines eligibility for ERISA benefits as well as tax treatment); Eisenberg v. Advance Relocation & Storage Inc., 237 F.3d 111 (2d Cir. 2000) (holding that worker was "employee," rather than independent contractor and therefore was entitled to protections of Title VII); Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir. 1982) (holding that Title VII did not apply because worker was independent contractor).
determination of employee status critical to establishing eligibility for statutory coverage.\textsuperscript{33} When faced with the question of whether to extend these statutory protections to workers, courts often "stretch" in applying the various factors to find employee status.\textsuperscript{34} The precedent established by reaching a determination of "employee" status for that purpose necessarily leaves companies exposed to vicarious tort liability.\textsuperscript{35}

Another, different, "results driven" aspect results because tax authorities are keenly interested in establishing employee status to determine the employer's obligations for payroll taxes and income tax withholding.\textsuperscript{36}

It is therefore unsurprising that there is such unpredictability in the law of vicarious liability: the threshold determination of whether the tortfeasor will be deemed an employee or independent contractor is itself unpredictable, rather arbitrary, and results-driven.

If that were not enough, there is yet another set of factors that contributes to the unpredictability. Even when courts determine that a worker 'truly' is an independent contractor, the courts sometimes nevertheless impose vicarious liability for the acts of independent contractors. Courts have developed numerous "exceptions" to the "general rule" that employers should not be held vicariously liable for the acts of independent contractors. Indeed, this area of the law is a quintessential example of exceptions to the "general rule" effectively swallowing the rule altogether.\textsuperscript{37}

\textsuperscript{33} See supra notes 29-31.

\textsuperscript{34} See Carlson, supra note 2, at 311 ("Courts were frequently inclined to give added weight to factors other than control when the effect was to extend protection to needy workers rather than to impose tort liability on employers.").


\textsuperscript{36} Air Terminal Cab, Inc. v. United States, 478 F.2d 575 (8th Cir. 1973) (reviewing factors, including right to control, to establish whether worker was employee for tax purposes); Ware v. United States, 67 F.3d 574 (6th Cir. 1995) (same); Jeff Alden, Hiring the Independent Contractor, 60(3) BENCH & B. MINN. 21 (2003); Laura A. Quigley, Cost Increases for Misclassifying a Worker as an Independent Contractor, 16 TAX'N FOR LAW 140 (1987).

There are four major exceptions to the “general rule” that a company will not be held liable for the acts of independent contractors: (1) inherently dangerous activity; (2) non-delegable duties; (3) retained control; and (4) apparent agency. As discussed below, there appears to be no principled rationale for application of any of these exceptions, aside from the “apparent agency” exception. The other exceptions appear to reflect a results-driven determination that the injured party should be able to seek redress from the company that hired the independent contractor. While compensation is an important goal of tort law, it is not the only goal. So long as the hiring company exercised due care in selecting the independent contractor, none of these blanket exceptions, aside from the “apparent agency” doctrine, should apply.

1. Inherently Dangerous Activity.

Under the “inherently dangerous activity” exception, a company seeking to carry out an “inherently or intrinsically dangerous activity” will be liable for harm resulting from that activity, regardless of who undertakes the activity—whether it is an employee, or an independent contractor. The rationale for this exception is that because the activity is inherently dangerous, the activity is “tolerated only if the public is


39. Cutlip v. Lucky Stores, 325 A.2d 432 (Md. Ct. Spec. App. 1974) (discussing exception to rule of nonliability for acts of independent contractors); Rowley v. Baltimore, 484 A.2d 306 (Md. Ct. Spec. App. 1984), aff'd, 505 A.2d 494 (Md. 1986) (same); Bartholomew v. CNG Producing Co., 832 F. 2d 326 (5th Cir. 1987) (holding that principal will be held liable for acts of independent contractor in connection with ultrahazardous activity); Ewell v. Petro Processors of Louisiana, Inc., 364 So. 2d 604 (La. Ct. App. 1979) (same); Williams v. Gervais F. Favrot Co., 499 So. 2d 623 (La. Ct. App. 1987) (holding that construction work was not inherently dangerous and therefore company was not liable for acts of independent contractor); Hawkins v. Evans Cooperate Co., 766 F.2d 904 (5th Cir. 1985) (holding that manufacturer was not liable for negligence of independent contractor who shipped goods because shipping was not inherently dangerous activity).
protected in the event of injury." Under § 416 of the Restatement (Second) of Torts, a company that uses an independent contractor to do work that the company knows is likely to create harm to others unless necessary precautions are taken is liable for harm caused by the failure of the independent contractor to take the necessary precautions, even if the contract with the independent contractor mandates that the contractor take such steps.

The problem with this exception to the "general rule" of nonliability is similar to the problem that affects Enterprise Liability theory, discussed infra. By holding a company liable for acts of independent contractors, even though the company has less control over their actions, the "inherently dangerous" activity exception, like Enterprise Liability, may disincentivize the use of independent contractors. If liability is imposed regardless of whether the activity is undertaken by employees or by independent contractors, a company may be incentivized to use its own employees, over whom it has the most control. Perhaps this is the result that the courts seek because they believe that greater safety will be achieved. That conclusion does not necessarily follow, however. Independent contractors may specialize in undertaking the very activity that is risky and may well be better at the job than the company's own employees. By burdening the choice of which type of worker to use, the most efficient use of resources may be dampened.

In fact, if the independent contractor has lower rates of injury relative to the company's own employees because the contractor specializes in the particular field, the disincentive to use independent contractors may be overcome. This presumes, however, that market information is readily available. Absent solid data, if a company knows it will be held liable for the acts of independent contractors to the same extent as employees, the company may rationally favor using its own employees, over whom it has control, relative to using contractors over whom it has little control. The greater the potential liability risk, the stronger the disincentive may be to using independent contractors.

A surprising example of this is the aftermath of the Exxon Valdez

---


41. Restatement (Second) of Torts § 416 (1965); see also 41 Am. Jur. 2d Independent Contractors § 52 (2009); Lockhart, supra note 40 at § 2.

42. Restatement (Second) of Torts § 411 (1965).
disaster. When legislation was passed subjecting companies to unlimited liability for oil spills, commentators speculated that shipping would be relegated to wildcat and reckless independent contractors. Instead, many of the major oil companies expanded into the shipping business, hiring their own employees because even the possibility of vicarious liability was deemed too high a risk to delegate the work to others, over whom the oil companies had less control. While legislators may conclude that this was the right result, it may well be that oil companies should concentrate on that aspect of their business that they do best, drilling for oil, instead of also going into the shipping business. Those business interests that initially led companies to use independent contractors were superseded by the prospect of even potential vicarious liability for the acts of independent contractors.

One way the company may seek to overcome this disincentive is to obtain a full indemnity from the independent contractor for any liability that may result from the independent contractor’s activities. Even in this circumstance, however, the disincentive may not be fully overcome because an indemnity necessarily adds additional risk, depending on whether the independent contractor has sufficient assets, not only at the time the parties execute the agreement, but for the duration of the contract. If the independent contractor can obtain insurance, this may do a better job in reducing the disincentive to use independent contractors. In practice, however, even insurance is subject to many exclusions, making its application far from a foregone conclusion. Further, insurance may be unavailable as a practical matter.

The stated purpose of the “inherently dangerous activity” exception is to ensure that victims are compensated for their injuries. Innocent third parties should not have to bear the loss relative to the company that hired the contractor to perform the activity that made the injury possible. This compensation goal makes sense, at least as to “innocent” third parties, but it may be achieved without the loss of economic efficiency that results from the current model of liability, as will be discussed infra.


Another exception to the “general rule” of nonliability is the

---

44. _Id._ at 93.
amorphous non-delegable duty exception, which holds that liability for some undertakings cannot be delegated to others. This vague exception applies to duties that are said to be owed to the public generally.\textsuperscript{45} An example is if the company is required by statute or regulation to provide certain safeguards. If the independent contractor fails to abide by such safeguards, the company that hired the independent contractor may be held liable for the resulting injury, even if the company mandated as a matter of contract that the contractor undertake the particular safeguards.\textsuperscript{46} This resembles the "inherently dangerous activity" exception, except that it is broader in applying not just to "high risk" activities, but to any activity which is regulated or which is believed to impact the public generally.\textsuperscript{47}

The rationale for this common-law exception appears to reflect a determination that liability for a regulated or "public risk" should not be delegated, even though, in the case of regulated risk, the legislature that established the statutory or regulatory framework could presumably have imposed such restrictions itself, and did not do so. If the legislature wishes to require certification or licensing before undertaking a given task, the legislature can bar delegation to non-licensed parties or require all parties involved to have their own certification.

It is unclear why regulatory duties or duties owed to the public at large and the liability risks attendant to those duties should not be delegated to others who may well have greater expertise in a particular area. From the common law perspective, having a source of "deeper

\textsuperscript{45} See Lockhart, supra note 40, at § 3; see also RESTATEMENT (SECOND) OF TORTS § 409, cmt. b (1965); Saiz v. Belen Sch. Dist., 827 P.2d 102 (N.M. 1992) (holding that company had non-delegable duty to ensure precautions were taken in connection with high voltage system and therefore company was liable for negligence of independent contractor who installed fence too close to high voltage wire, resulting in death of student).

\textsuperscript{46} See Herbst v. Bothof Dairies, Inc., 719 P.2d 1231 (Idaho Ct. App. 1986) (principal, which undertook performance of cattle leases, had a non-delegable duty, to exercise adequate care and thus could be held liable for agent's failure to provide adequate care); Rietze v. Williams, 458 S.W.2d 613 (Ky. 1970) (imposing vicarious liability on hiring company); Griffith v. George Transfer & Rigging, Inc., 201 S.E.2d 281 (W. Va. 1973) (holding that public policy requires truck owners holding certificates from the Interstate Commerce Commission ("ICC") be held liable for negligent operation of their trucks, even if operators were independent contractors because potential for liability serves to enforce compliance with ICC safety regulations); see also RESTATEMENT (SECOND) OF TORTS § 424 (1965).

\textsuperscript{47} 2A C.J.S. Agency § 432 (2009).
pockets” may be deemed more important in a regulatory context, although this conclusion may not follow because the independent contractor need not be a solo entity that has fewer resources. Alternatively, courts may believe that safety or regulatory compliance will be better achieved by holding the hiring company liable. If, however, better safety, compliance, or compensation for injuries are the goals, these goals can be better achieved by imposing liability directly on the independent contractor, and only secondarily on the company that hired the independent contractor, if the independent contractor’s assets are insufficient. The independent contractor will have the greatest incentive to take due care if it is held directly liable. The hiring company already has sufficient incentive because it can be held directly liable if it fails to exercise due care in selecting the contractor. Holding it vicariously liable for the acts of the independent contractor does not accomplish any further ‘due care,’ because the company is not in a position to exercise that care. Further, effectively imposing liability risk on both parties increases the risk unnecessarily to the hiring company, as well as increasing the costs of insurance for one or both of the parties even though the independent contractor may well have sufficient assets to satisfy the loss.

The “non-delegable” duty exception to the “general rule” of nonliability is a rather amorphous exception that does not appear to advance the goals of deterrence, compensation or economic efficiency.

3. Retained Control.

Another exception to the “general rule” of nonliability is the “retained control” exception. This exception holds that if a company retains “too much” control over an independent contractor, vicarious liability will be imposed on the company. This exception is unpre-
dictable because it is difficult to measure the level of "control" that is being exerted, let alone to predict ahead of time how much control will be considered "too much," and therefore trigger vicarious liability. The application of this exception is often tied to the threshold determination of whether the worker is deemed a *de facto* employee.\(^{53}\) Where the company exercises significant control, courts conclude that the actual relationship is more akin to that of an employee in which vicarious liability is appropriate.\(^{54}\) Another view of the "retained control" exception is that it does not impose vicarious liability, but rather direct liability for having negligently exercised control over the contractor.\(^{55}\)

Certainly, when the hiring company exercises control, and as a result of that control, someone is injured, it should be held liable, but in that circumstance, it should be held directly liable, for its own negligence, as opposed to being held vicariously liable for the independent contractor's negligence.\(^{56}\) In this sense, the "retained control" exception makes sense, not as a means for imposing vicarious liability, but rather direct liability. This is a more predictable application of the rule because liability will only be imposed on the hiring company if it has exercised control over the particular acts of the independent contractor that caused the injury. The guesswork regarding "control" in the abstract will be eliminated. The issue will not be whether the hiring company has exercised control generally or whether it has the right to do so, but rather whether a specific mandate or protocol required by the hiring company caused the injury.\(^{57}\) Deterrence goals are not advanced by imposing liability on the hiring company over areas where the hiring company has not in fact exercised control.

One may question whether imposing liability on the hiring

---

\(^{53}\) See, e.g., 44 TEX. JUR. 3D Independent Contractors § 7 (2009).

\(^{54}\) See id.

\(^{55}\) Robert Michael Ey, *Cause of Action Against Employer of Independent Contractor To Establish Liability Based on Retained Control of Contractor's Work*, 8 CAUSES OF ACTION 2D 859, § 1 (2007).

\(^{56}\) See Pac. Fire Ins. Co. v. Kenny Boiler & Mfg. Co., 277 N.W. 226, 228 (Minn. 1937) (holding that although a contractor delegates performance to an independent contractor, a duty of due care still exists that may subject the contractor to liability for harm caused by the subcontractor).

\(^{57}\) See generally RESTATEMENT (SECOND) OF TORTS § 416 (1965) (discussing an employer's obligation to take certain safety precautions when hiring independent contractors).
company would incentivize the company to exert more control over the operations of the independent contractor that pose risk and thereby improve safety. First, as a practical matter, it may not be possible for the hiring company to exert control over an independent contractor's business. Second, the hiring company may be less competent in the particular area as the independent contractor. Incentivizing the wrong company will actually decrease safety. Third, and particularly problematic, there are other legal constraints in our current legal system that could effectively counteract any positive incentives that would result from imposing vicarious liability over the hiring company. Under the current law, "control" is a key factor that is used to determine employee "status," not only for imposing vicarious tort liability, but also for purposes of assessing whether the company will be liable for employee payroll taxes, income tax withholding, wage and hours law regulations, and the host of federal anti-discrimination laws. Indeed, our current system ironically disincentivizes companies from exercising control over safety and standards because that may jeopardize independent contractor status, thereby potentially subjecting the company to a host of social welfare laws and tax laws. Thus, even if the model of tort liability was changed to incentivize the exercise of control by the hiring company, this "incentive" to exercising control may be insufficient to overcome the many other disincentives that exist to exercising control.


The apparent agency exception holds that where an agent has "apparent authority" to bind a principal, and a third party justifiably relies upon such agency, the principal will be held liable for the acts of the apparent agent, even if that agent is actually an independent contractor. Significantly, apparent agency requires some act on the part of

58. See supra note 51 and accompanying text.
59. See supra note 57 and accompanying text.
60. See Carris v. Marriott Int'l, Inc., 466 F.3d 558 (7th Cir. 2006) (rejecting apparent authority exception to respondeat superior under Bahamian law was not against public policy); Sarkes Tarzian, Inc. v. U.S. Trust Co., 397 F.3d 577 (7th Cir. 2005) (holding that there was no conduct by principal that could serve to justify apparent authority theory of liability); Crinkley v. Holiday Inns, Inc., 844 F.2d 156 (4th Cir. 1988) (holding hotel liable under apparent authority exception because there was no notice that hotel was independently owned, except in restaurant, where guest did not
the principal that manifests the agency role, which causes the third party to reasonably believe that the person is an agent of the principal. That "manifestation" can be direct or indirect communications, potentially including advertisements that lead the third party to believe that the agent is acting on the principal's behalf. Apparent agency is sometimes referred to as 'agency by estoppel': the principal is estopped from denying the relationship based on the reasonable reliance of a third party on the acts of the principal. Both the Restatement of Agency and Torts set forth "apparent agency" or "apparent authority" as a basis for imposing vicarious liability.

This is the only sensible exception to the general rule of nonliability for acts of independent contractors. If the buyers of a product or service reasonably believe they are buying the product or service from an employee or direct agent of the company as a result of actions that were taken by the company itself, the company should be held liable. This is equitable because the business may be "aided in accomplishing the tort by the existence of the agency relation." Certainly when it comes to

---

63. See id.
64. See, e.g., Sarkes Tarzian, Inc., 397 F.3d at 586; Carris, 466 F.3d at 560.
66. Adam Alstott, Hospital Liability for Negligence of Independent Contractor Physicians Under Principles of Apparent Agency, 25 J. LEGAL MED. 485, 487-88 (2004) (discussing apparent agency as it relates to vicarious liability). See Mehlman v. Powell, 378 A.2d 1121 (Md. 1977); RESTATEMENT (SECOND) OF AGENCY § 267 (1958) ("One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such."); RESTATEMENT (SECOND) OF TORTS § 429 (1965) ("One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.").
business, the reasonable expectations of the consumer should and do matter. Notably, this exception only applies to torts that arise where there is a contracting relationship between the independent contractor and consumer since that is the only context in which an agency relationship can arise. The purpose of this exception is not related so much to advancing the general goals of tort law, namely compensating tort victims and deterring harm, so much as advancing general equitable considerations based on traditional contract and reliance principles.

The difficulty with the agency exception has been determining what acts of the principal should be deemed sufficient to estop the principal from denying an agency relationship. Here, the law would benefit from a bright line test. Rather than attempt to define what conduct may be sufficient to manifest an agency relationship, the independent contractor should have an affirmative duty to prevent any misimpression by disclosing that the independent contractor is not an employee or representative of the company, but instead is completely independent. The independent contractor should be contractually required by the principal to inform the consumer that the independent contractor will be responsible for any problems and that sole recourse will lie with the contractor, except for problems relating to defects in the product itself, which are subject to the limitations set forth in the warranty. Of course, if there is a defect in the product that causes injury, the manufacturer may be held liable under the law of products liability. Products liability law has no application to injuries that are not caused by the product, but instead result from the torts of the independent contractor.

F. Critique of the Current Law of Vicarious Liability.

As discussed above, one of the biggest problems that the current model of vicarious liability suffers from is unpredictability and inconsistency. The determination of a worker’s status as an employee


69. See Am. Safety Equip. Corp. v. Winkler, 640 P.2d 216 (Colo. 1982) (holding that manufacturer will be held liable for physical harm to consumer resulting from misrepresentation regarding product’s uses).

or independent contractor is unclear as a result of the application of multi-factor tests that often reflect competing pressures that are totally unrelated to the issue of vicarious liability, and instead reflect social welfare concerns. Further, because there are so many exceptions to the ‘general rule’ of nonliability, even when a worker is deemed to be an independent contractor, companies cannot reasonably predict whether they will be held vicariously liable for the acts of independent contractors. Companies can be sure of one thing: there is at least a risk that they will be held liable for the acts of another company. Our legal system should foster accurate risk assessment, not indeterminate risk assessment. Where risk assessment is inflated, companies are incentivized to take more care and resources to prevent risk than would otherwise be warranted. This imposes a cost without a benefit.

To the extent that the current model of liability advances the goals of deterrence and compensation, it does so inefficiently or not at all. Holding the hiring company liable when it does not have control over the acts of another party does not advance deterrence. If the hiring company is negligent in selecting the contractor, the company will already be held liable. Thus, the incentive for the hiring company to exercise care where it can actually do so already exists. Imposing liability for acts that it cannot control does not improve safety or advance deterrence. Further, holding the hiring company liable may actually reduce the level of care that is exercised by the independent contractor by deflecting some responsibility away from the independent contractor. The only real goal that is advanced by holding the hiring company and the independent contractor liable may be compensation. But even when compensation goals are legitimately served, the goal of compensation can be more efficiently achieved by imposing only secondary liability in the event the independent contractor lacks assets. In our current system of liability, the hiring company may be sued and held liable, even though the independent contractor has assets to cover the losses.

There may, however, also be a hidden cost to imposing even

71. See, e.g., Gregory C. Keating, The Theory of Enterprise Liability and Common Law Strict Liability, 54 Vand. L. Rev. 1285, 1305 (2001) (stating that it is “socially expedient to spread and distribute throughout the community the inevitable losses occasioned by injuries to employees engaged in industry”).

72. See, e.g., King, supra note 2, at 469-76.

73. RESTATEMENT (SECOND) OF TORTS § 411 (1964).
secondary liability. Any form of vicarious liability may disincentivize the use of independent contractors which may result in an inefficient allocation of resources. Compensation goals may come at the cost of efficiency. To the extent that indemnity and insurance are available, the disincentive can be somewhat ameliorated. Further, this disincentive to using independent contractors may be acceptable because innocent victims should be compensated. In some circumstances, however, that conclusion may not follow. Serving the goal of compensation may actually undermine deterrence when there is privity between the tortfeasor and the victim because it may encourage carelessness, as will be examined in Part IV of this Article.

At a minimum, this analysis suggests at least two things: (1) the multi-factor “status” tests for evaluating whether a worker is an employee or an independent contractor should not be used as a basis for determining whether to impose vicarious liability on companies; and (2) the courts should adopt a rule of vicarious liability that is not riddled with exceptions. Aside from the “apparent agency” doctrine, the other exceptions are unprincipled and do not advance predictability, an important goal that allows companies to make effective operational choices about who they hire. Even as to the “apparent agency” doctrine, the scope of its application is not always clear, resulting in unnecessary litigation as to the scope of the exception.

III. ALTERNATIVE THEORIES HAVE BEEN ADVANCED FOR DETERMINING WHEN VICARIOUS LIABILITY FOR ACTS OF INDEPENDENT CONTRACTORS IS APPROPRIATE

Faced with the unpredictability that permeates the current law of vicarious liability, and concerned that the many exceptions swallow the “general rule” of nonliability, scholars have struggled to find an alternative theory for determining when, if ever, a company should be held liable for the acts of independent contractors.74 While scholars generally

concur that the “employee status” test is unsatisfactory,\textsuperscript{75} no consensus has emerged as to an alternative test or theory.

\textbf{A. Control Theory.}

Some commentators advocate abandoning the multi-factor “employee status” test to return to a unitary “control” test in which the determinative factor is the level of control that is exerted by the company over the ‘details’ of the work, as opposed to the ‘final’ results that are obtained.\textsuperscript{76} Under this theory, vicarious liability is not imposed for the acts of a worker who is hired to accomplish the end result (e.g., plumbing that works), and who is not instructed in any manner regarding the details of how to accomplish the result. In contrast, a company that has a “right to control the physical conduct or method of doing the work of the person who causes an injury” will be held vicariously liable.\textsuperscript{77} The underlying rationale for imposing liability in this circumstance is that because the company is in control, it is in the best position to prevent or reduce injuries. Although the liability is considered to be vicarious, the underlying implication is that there was some “fault” in failing to supervise the work appropriately.\textsuperscript{78}

As discussed in connection with the “retained control” exception, to the extent that the hiring company has negligently exercised control, it should be held directly liable, not vicariously liable. Otherwise, using a “control test” to impose vicarious liability does little to advance predict-

\textsuperscript{75} See Carlson, supra note 2; Mosley & Walter, supra note 16.

\textsuperscript{76} Mosley & Walter, supra note 16, at 632; see also Michael R. Flynn, Note, The Law of Franchisor Vicarious Liability: A Critique, 1993 COLUM. BUS. L. REV. 89, 105 (1993) (suggesting liability be based on a “greater control” test). See also Dawson v. Home Interiors & Gifts, Inc., 890 S.W.2d 747, 748 (Mo. Ct. App. 1995) (noting the “pivotal” question in determining whether a salesperson is an employee, as opposed to an independent contractor, is whether the company has the “right to control the means and manner of the service, as distinguished from controlling the ultimate results of the service”).

\textsuperscript{77} John Dwight Ingram, Vicarious Liability of the Employer of an Apparent Servant, 41 TORT TRIAL & INS. PRAC. L.J. 1, 19 (2005); see also Moser v. Texas Trailer Corp., 623 F.2d 1006 (5th Cir. 1980) (holding that company did not exercise “control” over independent contractor shipper, and therefore was not liable); Murrell v. Goertz, 597 P.2d 1223 (Okla. App. 1979) (holding that newspaper was not liable for acts of newspaper carrier because newspaper did not control details of work); Carlson, supra note 2, at 340;.

\textsuperscript{78} See Dalley, supra note 65, at 535-36.
ability. Courts looked to additional factors beyond “control” because they found that the element of “control” was not always a satisfactory proxy for determining when liability should attach. In part, this is because it is often difficult to “measure” control because, as one commentator notes, “control does not exist in discrete, measurable and comparable units.” 79 It is difficult to determine ahead of time whether a company has exercised “too much” control, thereby subjecting the company to vicarious liability. Further, the problem of how you measure control, and which task is the focus of the inquiry, makes all the difference in determining the final outcome regarding whether the hiring company has exerted sufficient control to impose vicarious liability. If the “control test” is construed narrowly, so that the inquiry is whether the hiring company exercised control over the very conduct that caused the injury, then liability is less likely to attach to the hiring company. 80 If the mere “right to exercise control” is used as the test, liability will more likely attach. 81 Franchisers frequently face this problem because trademark owners typically exert a fair amount of control to ensure their brand quality is preserved. Nevertheless, this type of control rarely extends to control over day-to-day operations typical of an “employee.” 82 If the mere “right to exercise control” is used as the test, franchisors will often be held liable. If instead, the determination is whether the franchisor exercised control over the conduct that led to the injury, vicarious liability will attach less frequently. Unless the scope of the control test is well established in advance, predictability will not be advanced.

Similarly, distinguishing between control over “details,” as opposed to “end results” depends on how the task is defined. As one commentator suggests, if building a house is the stated end goal, directing details relating to plumbing may be deemed as exercising control, resulting in a determination that the plumbing subcontractor is an employee of the general contractor. 83

---

79. Id. See also Ingram, supra note 77, at 19 (noting that “it is sometimes suggested that the control test is cumbersome to apply, producing contrasting results in cases with quite similar facts”).
80. See King, supra note 2, at 435 (noting that “courts often distinguish franchisor’s setting of standards, which protects the uniformity, quality, and good name of the franchisor’s products and services from the control over the day-to-day operations of the franchisees”).
81. See id. at 429-36 (discussing the potential application of the control test).
82. See, e.g., id. at 432-33.
The "control test" does little to advance predictability or consistency. Deterrence is advanced, in theory, by holding the hiring company liable where it has control. Yet if the scope of the test is defined too broadly, the hiring company will be held liable for conduct even though it lacks control. Compensation goals may also fall short when there is no "control" exerted over the independent contractor. In that circumstance, innocent third parties will be left to seek recovery from the independent contractor, and may be left with no remedy if the contractor's assets fall short.

**B. Enterprise Liability Theory.**

A more prevalent alternative theory advanced by scholars is "Enterprise Liability." Under that theory, companies are held liable for the acts of independent contractors that they hire to the same extent as employees, without regard to their status one way or another. The rationale behind Enterprise Liability is that "the enterprise will reap the fruits and profits from the activities of those acting on its behalf, and accordingly should bear the burdens created by those activities too." Losses that result from using contractors should be borne by the party that contracted for the work as an "externality" of doing business so that the cost of goods fully reflects the costs of production.

1. The Strongest Attribute of Enterprise Liability is its Predictability.

The greatest strength of Enterprise Liability is probably its...
predictability. Predictability is an important touchstone of any system of vicarious liability. If the liability system is unpredictable, companies will not exercise the level of care that is appropriate. Exercising "too little" care is obviously undesirable. Alternatively, exercising "too much" care is also problematic because it unnecessarily increases the cost of goods without advancing safety. If a company incorrectly assesses that the risk of liability is higher than it actually is, it may obtain additional insurance, which comes at additional cost, even though the company does not actually bear such risk and even though the Company cannot control the conduct of the contractors that create the risk.

Enterprise Liability theory eliminates "guesswork" because the rule provides that the hiring company will always be liable for the acts of independent contractors, instead of only being liable if an exception to the general rule of nonliability applies, or if the worker is deemed to be an employee. Predictability allows companies to more accurately assess the "true" cost of using independent contractors, and to make adjustments by either (1) shifting work to their own employees, over whom they have more control; or (2) increasing the price of the company's goods so that the burden of liability is spread to all consumers of the product; or (3) by requiring the contractor to indemnify the hiring company and/or obtain requisite levels of insurance to cover any loss. This too will distribute the cost to consumers because the cost of the contractor's services will increase, which will be distributed to the contractor's clients, including the hiring company.

There is also a significant benefit of reducing unnecessary costs of litigation. The issue of the worker's status as an employee or independent contractor is eliminated, as is litigation regarding whether one of the exceptions to nonliability applies. Instead, the litigation focuses on whether the worker was negligent and the amount of the damages.

2. Compensation Goals are Advanced but Deterrence May be Somewhat Dampened.

Enterprise Liability theory furthers compensation goals because having two sources of recovery increases the likelihood that the victim will be made whole. The impact on deterrence is less clear, however, and may actually be somewhat dampened. One claimed benefit of Enterprise Liability theory is that it provides a strong incentive on the
hiring company to exercise great care in selecting the independent contractor, which furthers the "public interest."88 In truth, that incentive already exists because the hiring company can be held directly liable if it is negligent in selecting the contractor. Holding the hiring company liable even though it lacks control over independent contractors does little to advance deterrence. Further, it may somewhat lessen the incentive of independent contractors to take care because liability will be assessed against the hiring company. Nevertheless, because the hiring company will likely seek reimbursement from the independent contractor, the contractor’s incentive to use due care is still advanced. On the other hand, if the contractor has insufficient assets, it may simply take on more risk than is otherwise warranted because, at the end of the day, it may not in fact bear liability for that risk.89 On balance, Enterprise Liability may have a slight dampening effect on deterrence, but significant benefit in advancing predictability and compensation goals. Despite these advantages, Enterprise Liability has some significant shortcomings.


Enterprise Liability Departs from the Typical American Model of Fault.

One criticism of Enterprise Liability is that, on its face, it seems "unfair" that the liability exposure of a company should be the same regardless of whether the tortfeasor is an employee, or instead an independent contractor. The typical model of tort liability in the United States is to hold companies liable only when the company actually bears some fault. Theorists who espouse Enterprise Liability try to sidestep this problem by suggesting that the company can require an indemnity from the independent contractor.90 In fact, this does not fully solve the problem because an indemnity is only beneficial so long as the indemnifying party has sufficient assets to cover the liability. Putting

88. Id.
89. See, e.g., Keating, supra note 83, at 1291-94.
90. Robert W. Emerson, Franchisors’ Liability When Franchisees Are Apparent Agents: An Empirical and Policy Analysis of “Common Knowledge” About Franchising, 20 HOFSTRA L. REV. 609, 667 n.274 (1992) (proposing that franchisors be jointly and severally liable with their franchisee, but that the franchisor have a right to seek indemnity).
this aside, there is another, far more serious criticism, which can be leveled at Enterprise Liability theory. This criticism is the same one that infects the many “exceptions” that currently riddle the “general rule” of nonliability for acts of independent contractors, that is, imposing vicarious liability on the hiring company for acts of independent contractors may disincentivize the use of independent contractors, resulting in an inefficient allocation of resources. The only difference is that Enterprise Liability theory goes that much further in holding the company liable for all acts of independent contractors, regardless of the category of activity, whereas the “exceptions” to the general rule of nonliability only impose liability on the company when one of the “exceptions” applies.\footnote{91}{RESTATEMENT (SECOND) OF TORTS §§ 410-29; see Keating, supra note 83, at 1291-94 (debating the effect of enterprise theory on efficiency).}

**Enterprise Liability May Disincentivize Use of Independent Contractors, Resulting in an Inefficient Allocation of Resources.**

Enterprise Liability may be economically inefficient to the extent that it disincentivizes the use of independent contractors. As a general matter, a company has the most control over its own employees. To the extent that the exercise of “due care” lessens the potential for injury, an employer can closely supervise its employees and devise protocols to reduce the potential for injury. If work is outsourced to an independent contractor, the company can no longer exercise that control. Instead, the independent contractor presumably undertakes the role of exercising due care. If a company is held liable for the acts of independent contractors to the same extent as its own employees, the company may rationally have some incentive to simply use its own employees, where it can exert the most control.\footnote{92}{Disincentives to use independent contractors would be overcome in some instances when, for example, the hiring company knows the area requires special “expertise” that only the independent contractor can offer.}

Even if the hiring company obtains an indemnity from the independent contractor, this will not fully overcome the disincentive that exists because an indemnity necessarily adds additional risk, depending on whether the independent contractor has sufficient assets, not only at the time the parties execute the agreement, but thereafter, for the duration of the contract. If the independent contractor can obtain
insurance, this may do a better job in reducing the disincentive to use independent contractors, but even insurance is subject to many exclusions. Further, insurance may be unavailable as a practical matter, as evidenced by shipping interests following the Exxon Valdez disaster.\footnote{93. See Mitchell F. Dolin, \textit{An Overview of the Exxon Valdez Insurance Coverage Dispute}, 10 Int'l Ins. L. Rev. 313, 313-17 (1997).}

A desirable liability model is one that is predictable and serves the "twin" goals of tort law: deterrence and compensation. An important addition to these goals, however, is that tort law should also improve, or at least not hinder, economic efficiency. While Enterprise Liability brings a high level of predictability and does a good job in advancing the goal of compensating those who are injured, it does a marginal job of satisfying the goal of deterrence, and it does a poor job of advancing economic efficiency.

IV. CONTRACT PREEMPTION THEORY OF VICARIOUS LIABILITY

This article advances an alternative theory of vicarious liability: the Contract Preemption Theory ("Contract Preemption"). Contract Preemption divides torts into two categories. The first category involves injury to a third party who entered into a contract relationship with the independent contractor, and was ultimately injured as a result. The second category of torts involves injury to a third party who has no prior relationship with either the independent contractor or the company that hired the independent contractor. A classic example of the first category is a purchaser who buys a product from an independent sales representative who intentionally or negligently misrepresents the product's capabilities. Another example is someone who suffers injury from the operator of an independent franchise restaurant.\footnote{94. See, \textit{e.g.}, Miller v. McDonald's Corp., 945 P.2d 1107 (Or. Ct. App. 1997) (holding franchisor vicariously liable for injuries caused to patron by stone in hamburger).} Typical torts involve claims for food poisoning or premises liability based on falling due to a slippery floor, as an example.\footnote{95. See, \textit{e.g.}, Croteau v. Denny's Rest., Inc., 2002 Mass. App. Div. 81 (2002) (holding Denny's liable for illness resulting from salmonella poisoning); Gump v. Wal-Mart Stores, Inc., 5 P.3d 407 (Haw. 2000) (finding liability where customer was injured after slipping on a french fry dropped by another customer).}

The Exxon Valdez oil spill disaster is an example of the second
category of torts under Contract Preemption. Fishermen, or even the "public at large," suffered from the environmental damage that resulted from the oil spill. Those tort victims enjoyed no contractual relationship with the oil carrier. The model of tort liability necessarily should be different in these two very different constructs.

The existing vicarious liability model makes no distinction between these two categories of torts, nor do scholars who advance alternative theories of liability. Instead, current models focus solely on the relationship between the hiring company and the independent contractor, or they simply focus on compensating the victim. This omits a critical relationship that may exist between the independent contractor and the victim that is injured as a result of the independent contractor’s tort. To the extent that those parties shared a contractual relationship, the current models of tort liability fail to acknowledge it, and more critically, fail to consider how that relationship impacts deterrence goals. Instead of focusing solely on compensating the victim, the model of vicarious liability should also consider whether the companion goal of tort law, deterrence, is also advanced. The system of liability should encourage all parties, including the party who enters into a contract with the independent contractor, as well as the independent contractor and hiring company, to exercise due care. The current system of tort liability, as well as the alternative theories that are advanced by scholars, encourage carelessness by the tort victim.

A. Vicarious Liability for Torts Involving Contracting Parties.

For torts in the first category involving a party who entered into a contractual relationship with the independent contractor, that party should be limited to seeking recovery for their injuries directly from the independent contractor only. The only condition for this recovery limitation to apply is that the tort victim must have had clear notice that he or she was entering into a contract with an independent contractor. In that circumstance, the victim knew, ahead of time, that he or she was dealing with a “solo” entity and that if there was a subsequent loss, the purchaser would have to look to the assets of the independent contractor. That may be risky behavior, relative to doing business directly with the company that manufactured the goods, depending on the size and assets

97. See supra notes 76-93 and accompanying text.
of the independent contractor, relative to the hiring company. A typical example involves companies who use sales agents. Some companies have sales agents who are employees of the company. The cost of goods for those companies is necessarily higher, reflecting the overhead of maintaining a salaried work force of sales employees. In contrast, the cost of goods for an independent sales contractor may be cheaper because of the lack of overhead. There may also be some other benefit, such as ease of access to the goods for traveling sales representatives.

If the buyer chooses to get the benefit of the lower price or the convenience, instead of paying more by dealing with the manufacturer directly, it is also appropriate to saddle the buyer with the corresponding burden of being limited to seeking recovery for any injuries from the independent contractor (aside from those caused by product defects). So long as there is adequate notice of the independent contractor's status, including notice that recourse for any liability can only be satisfied by the independent contractor, the purchaser is in a position to evaluate whether to do business with that contractor. The purchaser can investigate whether the contractor has a solid reputation by checking references; can consider how long the independent contractor has been in business; can evaluate whether the contractor has sufficient assets to satisfy its liabilities; and can inquire if the contractor has insurance, among other things. If the purchaser chooses not to exercise such care, that carelessness should not be rewarded, as the current tort system provides when vicarious liability attaches to the hiring company. The current system allows the buyer to essentially 'reform' its contract by substituting the company it had chosen to do business with, with another company entirely. This is a truly radical transformation that is not appropriate when the buyer had adequate notice that he or she was contracting with an independent contractor in which recovery for any liability would be limited to that independent contractor. This Article advocates that in this circumstance, contract remedies should preempt tort recovery. The buyer should be left to seek recourse against the party that it actually contracted with to do business.

Enterprise Liability theorists frequently tout that, as between two innocent parties, the tort system should compensate the victim and require the company that has hired the independent contractor to pay for the injury, even though that company had no fault, because the company enjoys a corresponding benefit in selling product through the use of
independent contractors. This premise is flawed because the purchaser is improperly characterized as an 'innocent' party. The purchaser was either careless, or otherwise made a calculated determination that due diligence was not warranted. In either circumstance, the purchaser should be left to his or her own election. Ultimately, if it is important to do business with 'a company that stands behind its products,' purchasers can elect to take their business to companies that have integrated sales forces, or they can limit their business to independent contractors who have requisite levels of insurance. Either way, the cost of doing business will be reflected in the price of the goods, and efficiency will promote the desired model of business organization. The twin goals of tort law will be advanced, but not at the cost of economic efficiency.

1. Compensation and Deterrence Goals are Advanced.

The goal of compensation will be advanced, but not haphazardly, to any person who is injured regardless of their degree of recklessness. Purchasers who knowingly do business with independent contractors will be limited to seeking recovery directly from the independent contractor. If the independent contractor has limited assets, the purchaser will be left to fend for him or herself. That result is actually appropriate. The wider public should not be forced to bear the cost of one purchaser's carelessness, as will occur if the hiring company is forced to bear the cost and ultimately distributes that cost to all purchasers.

Deterrence, the other goal of tort law, is also better served under Contract Preemption. Holding the independent contractor directly liable for its own torts, instead of the company that hired the independent contractor, furthers the goal of deterrence. To the extent that due care can be exercised to reduce injuries to third parties as a result of conduct by the independent contractor, the independent contractor is obviously in the best position to exercise such care. Imposing liability on the company that hired the independent contractor, who has the least control over the independent contractor, does not serve deterrence well, except to the extent that the hiring company did not exercise care in selecting a competent independent contractor. In that event, there is no need to resort to vicarious liability. Rather, the hiring company may be held

98. See Ingram, supra note 77, at 19.
99. See supra notes 70-73 and accompanying text.
directly liable for its own negligence in failing to exercise care when selecting independent contractors. 100

2. Economic Efficiency is Advanced.

Contract Preemption also advances economic efficiency because there is no disincentive to using independent contractors. If it is more efficient for the company to delegate work or even whole parts of the business (e.g., distribution of product) to independent contractors, the company can make that election without the tort liability system unnecessarily burdening that choice. The model of liability should serve the twin goals of tort law without compromising economic efficiency. By holding companies liable for the acts of independent contractors to the same extent as if those contractors were employees, the use of independent contractors may be disincentivized. The alternative model of liability that is advanced here eliminates this disincentive by not imposing liability for the acts of independent contractors in those circumstances when the independent contractor has entered into an informed contractual relationship with the buyer. If it is better for a hiring company to use independent contractors, it will do so. There will be no inappropriate liability saddling its decision concerning any contracts in which an independent contractor has executed a contract with a third party.

3. Predictability is Advanced.

One strength of Contract Preemption is its simplicity. This model honors the parties' contract by adopting the label that the parties themselves attach to their relationships. There is no need to delve into the muddied 'multi-factor' test to determine employee/independent contractor status. Rather, if the parties designate that the relationship is that of an independent contractor (both as between the manufacturer and the contractor and as between the purchaser and the independent contractor), that will be the end of the inquiry. Where independent contractor status is clearly designated, the hiring company may not be held vicariously liable for the acts of the independent contractor.

Contract Preemption's predictability is as robust as that of Enterprise Liability. There is no place for any of the many exceptions

100. See, e.g., Keating, supra note 71, at 1291-94.
that currently riddle the “general rule” of nonliability, aside from the apparent agency doctrine. Apparent agency doctrine has a continuing place under the Contract Preemption theory of liability because if the company led the buyer to believe that the independent contractor was an agent/employee of the company, the company should be saddled with vicarious liability. Indeed, in that circumstance, notice of the independent contractor’s status must necessarily have been absent.\textsuperscript{101}

Vicarious liability that attaches under the current apparent agency exception is nevertheless distinguishable from the model of liability that is advanced here in two respects. First, the uncertainty regarding the scope of the apparent agency doctrine is Lessened in that a bright line test is imposed, requiring express notice to the consumer that the consumer is entering into a contract with an independent contractor. Second, the current system attaches primary liability on the hiring party, instead of secondary liability as is advocated here.\textsuperscript{102}

Regarding practicality, in the internet era companies can certainly take many steps to ensure that the buyer is informed of the status of independent contractors. The company can include prominent notice on its website that sales are handled by independent contractors and that the company is only responsible for product warranties and defects, but otherwise, recourse for any liability is limited to the independent contractor. Further, the company can require that the independent contractor distribute product warranty materials that also include a prominent notice of the contractor’s status, including a provision requiring that buyers initial such provisions as a prerequisite before any transactions can be executed with the buyer. Where the company takes such steps, it should not be held liable for the acts of independent contractors. Of course, If the company learns that it has hired an incompetent or untrustworthy contractor, it must act diligently to fire such contractor. Otherwise, so long as the company exercises due diligence and care, it cannot be held liable.

\textsuperscript{101} See supra notes 60-66 and accompanying text.

\textsuperscript{102} There are limited circumstances in which primary liability would continue to apply in the apparent agency context. In particular, if the consumer believes it is dealing only with the hiring company because the use of the independent contractor is “invisible” to the consumer, then the consumer would only know to sue the hiring company. Examples in this category include hospitals that outsource emergency room doctors, and outsourced workers that are “invisible” to the consumer, such as in the context of “call centers” that are handled by independent contractors.
One of the most typical uses of independent contractors is in sales. Instead of hiring a large force of employees to distribute their products, with high fixed salary costs, companies hire independent contractors to sell them. Contractors are often only paid on a commission basis, or they are paid a relatively low base salary with commissions as incentives. Using independent contractors significantly reduces the company's overhead costs and allows the company to change the size of its workforce based on demand, cyclical or seasonal needs. Torts that can arise include potential misrepresentations regarding the product or opportunity that is presented by the salesperson. A plaintiff may sue in tort because the duty to accurately represent the product arises independent of whatever remedies arise under the contract. As an example, the contract may provide for no product warranties and no refund right. Nevertheless, the remedy in tort may include rescission rights, as well as compensation for any physical or property injury.

In reviewing tort cases involving sales representatives, the most prevalent issue in determining whether vicarious liability will attach to the hiring company is determining whether apparent agency is established. If the salesperson issues an invoice to the buyer bearing the letterhead of the manufacturer, and business cards that state "sales representative," without disclosing the independent contractor's status, the buyer may well reasonably believe that the representative is an employee of the manufacturer. In those circumstances, courts have imposed vicarious liability on the hiring company. If the company instead requires salespeople to use their own invoices, and business cards that clearly designate the independent contractors' status, including a disclosure that any recourse for liability is limited to the independent contractor, then vicarious liability should not attach under the Contract Preemption theory advocated here. This result seems acceptable. Indeed, buyers are typically left with recourse solely against the entity that the buyer did business with. No further recourse is available there either. Thus, however "vulnerable" or ignorant the consumer may be, the buyer's recourse is limited in most transactions. There is no reason to provide the buyer with a "windfall" of being able

104. See Goodman v. FTC, 244 F.2d 584, 592 (9th Cir. 1957) (holding that company would be liable for acts of independent contractor because contractor gave appearance of being an agent of hiring company).
Another typical use of independent contractors is in the context of franchise operations. Many franchises are "independently owned and operated." Consumers may or may not appreciate that most franchises are not owned by the franchisor. Instead, the franchisee simply has a license to use the trademarks of the company. Often the franchisor imposes numerous controls over the franchisee’s operations to ensure that the quality of the product is consistent. The current law of vicarious liability is inconsistent in the franchise area. Depending on how broadly "control" is defined, franchisors are sometimes held liable for the torts of franchisees because of the level of control that franchisors exert over operations. Other courts do not attach vicarious liability if the tort involves conduct over which the franchisor did not exercise control.¹⁰⁵

Under Contract Preemption, franchisors would not be held vicariously liable so long as they took steps to ensure that consumers are given sufficient notice that franchises are independently owned and operated and that any liability claims will be limited to the franchisee only. This could be accomplished by including prominent notices inside franchise locations. Absent such notice, the franchisor could properly be held liable.¹⁰⁶

Another area in which the use of independent contractors is increasingly growing is outsourcing. Although a number of companies have their own operations overseas which staff employees, many outsourced workers are employees of relatively large overseas independent contractors. One example of this has occurred in the medical care industry. Beginning in the 1990s, there was a shortage of radiology technicians in the United States. As a result, medical care providers began using highly trained radiologists in India and other countries overseas to evaluate x-ray, MRI and other diagnostic films. Aside from providing needed expertise, the salary for even highly trained diagnostic technicians outside the United States (who typically obtained their


¹⁰⁶. See supra notes 60-66 and accompanying text (discussing apparent authority).
education in the United States) was as much as a third the cost of comparably educated technicians in the United States. Another advantage results from time differences. Radiology data can be sent to technicians in the evening, with the results being available the next day when the working day resumes in the United States. Tort liability typically arises in this context as a result of negligent or missed diagnoses.  

The use of outsourcing in this context, and many others, such as "call centers", is almost always "invisible" to the consumer. The consumer has no idea that an important function is being outsourced overseas using independent contractors. Rather, after the data is summarized by the outsourced technician, the results are sent to the United States medical care provider, who then follows up with the patient as needed. Under Contract Preemption, the "consumer" believes that he or she is only dealing with the United States care provider. As such, the outsourced radiologist acts as an agent (although not an apparent one) on behalf of the provider. In that context, the hiring company would be held vicariously liable because there is no notice to the victim that the diagnostic service is being performed by an independent contractor. A similar result would apply to use of any outsourced worker where the use is "invisible" to the consumer. Unless the hiring company took steps to advise the buyer that services are being provided by an independent contractor, with liability being limited to the independent contractor as to those services, the buyer would believe it is dealing with the hiring company alone. Regarding this category of torts, it is appropriate to impose vicarious liability in the same manner as for torts where the tortfeasor enjoys no contractual relationship with the victim.


108. See Alexander, supra note 107.
Under the Contract Preemption theory of tort liability that is advocated by this Article, tort liability for injuries in the first category should be strictly limited to the actual tortfeasor, the independent contractor, as long as there is adequate notice of the independent contractor’s status. Where notice of the independent contractor’s status is lacking, the liability should be the same as for category two, described below.

**B. Vicarious Liability for Torts Where the Tortfeasor Enjoys No Contractual Relationship with the Victim.**

In the second category involving injuries to third parties who enjoy no relationship with either the independent contractor or the hiring company, the tort liability model necessarily must be different. In this circumstance, there really is an entirely innocent party. In this second category of torts, the actual tortfeasor should still bear primary liability. If the independent contractor has insufficient assets, however, then the hiring company should bear the burden of making up the shortfall. In the current system, when vicarious liability attaches haphazardly either because the contractor is deemed to be an employee, or because one of the exceptions to the “general rule” of nonliability is deemed to apply, the liability is “joint and several,” in that the plaintiff may sue one or both of the parties, and collect against either. In addition to the uncertainty that pervades the law, the system of ‘joint and several’ liability is inefficient. Instead, the hiring company should bear secondary liability that only attaches if the assets of the independent contractor are insufficient.

Contract still has an important role for this second category of torts. If the risks of injury by the independent contractor are high, but its assets are low, the company can require, in its contract with the independent contractor, that the contractor obtain requisite levels of insurance. In this way, the company can use contract law to limit its tort liability - another variant of the theory of contract preempting tort liability. If the risks are low, the company need not mandate that its independent contractors obtain insurance. Alternatively, the hiring company can decide that it should handle the work itself by using its own employees. Again, under this theory the twin goals of tort law are better achieved, although at some cost to economic efficiency, as will be discussed below.

1. Compensation and Deterrence Goals are Advanced.

Contract Preemption achieves compensation goals in two ways: first, by forcing the independent contractor to pay for its negligence, and second, by requiring the hiring company to make up any shortfall. This is an equitable result because the company bears some “fault” in not requiring the independent contractor to obtain insurance, or otherwise in “accepting” the risk of exposure, much like the purchaser who has notice that it is dealing with an independent contractor in the first category of torts.\textsuperscript{110} This is an improvement over Enterprise Liability, which holds the hiring company liable even if the independent contractor has sufficient assets to compensate for the loss. Unnecessary transactional costs are thereby avoided. In the current system, if the hiring company is held liable for the acts of the independent contractor, that company will then have to seek indemnity from the independent contractor. There are times when the independent contractor will have sufficient assets to satisfy the loss. If the hiring company only has secondary liability, and the independent contractor has sufficient assets, no further “transaction” involving the hiring company will be necessary. A rule that at least has the possibility of a “single payor” is more efficient.

The Contract Preemption theory as to this second category of torts involving injuries to third parties who enjoy no relationship with either the hiring party or the independent contractor is also superior to the current system of liability. Under the current system, liability is uncertain, with the plaintiff having to prove either that the contractor was really a de facto employee, or alternatively, that one of the exceptions to the general rule of nonliability applies. Under Contract Preemption, there is liability, but only secondary liability in the event the independent contractor lacks sufficient assets.

Holding the actual tortfeasor liable better serves the goal of deterrence because the tortfeasor is in the best position to exercise care and to respond to the “incentive” of being exposed to liability for harm that it causes. Holding the hiring company secondarily liable does not advance deterrence, but it also does not detract from it, unlike Enterprise Liability, because the tortfeasor is at least held primarily liable.

\textsuperscript{110} See supra notes 76-93 and accompanying text.
2. **There May be Some Loss of Economic Efficiency**  
**But it is Offset by Compensation Goals.**

Regarding the second category of torts, imposing liability secondarily on the hiring company does result in some potential loss of economic efficiency. When privity is lacking between the contractor and the injured party, the hiring company will be saddled with vicarious liability in those instances in which the independent contractor lacks sufficient assets or insurance, even though the company lacks control over the acts of independent contractors. This does introduce some disincentive to using independent contractors. Nevertheless, in this circumstance, compensation goals outweigh concerns of economic efficiency because the injured party is truly innocent, and should not have to bear the loss. The hiring company benefits from use of contractors and therefore it is appropriate for it to pay for the loss if the independent contractor lacks sufficient assets. In the first category of torts, while the hiring company also benefits from the use of contractors, so too does the buyer. It is equitable for the benefit and risk to be borne by the buyer, so long as the buyer is an informed contracting party. Doing so encourages the buyer's exercise of due care.

In the second category of torts, Contract Preemption is similar to Enterprise Liability theory except that liability for the hiring company is secondary. As stated above, Enterprise Liability theory imposes some additional transaction costs because it requires the hiring company to seek reimbursement from the independent contractor instead of having the contractor pay for its liability directly. Under Contract Preemption, reimbursement is unnecessary when the independent contractor's assets are sufficient to compensate the victim. When the contractor's assets are insufficient, reimbursement would be unavailing. Enterprise Liability theory also makes no distinction between the two categories of torts, whereas under the Contract Preemption theory, the hiring company is only held liable when there is no privity between the contractor and the victim, and then only secondarily.

3. **Predictability is Advanced.**

The liability model advanced here is relatively predictable, even regarding the second category of torts, because the hiring company can evaluate the potential risk that the independent contractor will injure unrelated third parties, and can also evaluate whether the independent
contractor has sufficient assets or insurance to compensate those who are injured. This is far superior to the current model in which it is uncertain when vicarious liability will attach. Significant litigation costs are avoided in not having to litigate the threshold question of whether the individual is an employee or independent contractor or whether one of the exceptions applies. Instead, the company will know that it will be held liable, but only if the independent contractor lacks sufficient assets to cover the liability. This model is superior to “Control Theory” and “Enterprise Liability” because it better advances the goals of compensation and deterrence with greater economic efficiency.

V. CONCLUSION

The theory advanced in this Article is designated the “Contract Preemption” model of liability because contract effectively preempts tort remedies in the first category of torts by cutting off tort recovery where there is privity. In the second category of torts, contract still has an important role to play as between the hiring company and the independent contractor. If the risks of injury by the independent contractor are high, but its assets are low, the hiring company can require, in its contract with the independent contractor, that the contractor obtain requisite levels of insurance. In this way, the company can use contract law to limit its tort liability - another variant of the theory of contract preempts tort liability. Under this model of tort liability, as opposed to the current model of vicarious liability, or the alternative “Control” or “Enterprise Theory” models, the twin goals of tort law, deterrence and compensation, are better achieved, without as much compromise to economic efficiency.
Notes & Observations