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I. INTRODUCTION

When an employer misclassifies an employee as an independent contractor, should that employee have the right to sue his employer for failing to withhold and remit payroll taxes to the federal government or should the employee be limited to administrative remedies? Should the courts imply such a right of action in favor of employees or exercise restraint where Congress failed to explicitly provide for such a right? Finally, does providing employees the right to sue their employers in such cases make sense, taking into account various policy considerations such as fairness, efficiency and enforceability in the administration of tax law? This article reviews the law surrounding these questions and argues that both a correct application of existing law and policy considerations should preclude employees from suing their employers and require them to seek administrative remedies.

The Federal Insurance Contributions Act ("FICA")[2] establishes a federal tax based on wages paid to employees. FICA tax is remitted to the federal government, then deposited into the Social Security Trust Fund.[3] In a traditional employer-employee relationship, the employer withholds a percentage of the employee's wages from the employee's paycheck and the employer remits the money withheld to the federal government.[4] At the same time, the employer also remits a FICA tax (subject to certain credits) in an amount equal to the percentage of wages withheld from the employee.[5] In the employer-em-

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2. Federal Insurance Contributions Act, I.R.C. § § 3101-3128 (1986) (amended 2000) (§ 3113 repealed 1976). Unless otherwise indicated herein, all section references are to the Internal Revenue Code of 1986, as amended.

3. *See* McDonald v. S. Farm Bureau Life Ins. Co., 291 F.3d 718, 721 (11th Cir. 2002).

4. *Id.*

5. *Id.*

ployee relationship, therefore, the employee and the employer each share approximately one-half of the FICA tax liability.[6] By contrast, if a worker is classified as an independent contractor, rather than an employee, the worker bears all the tax burden on his wages under the Self-Employment Contributions Act ("SECA").[7]

Workers and employers are subject to varying tax consequences under the Internal Revenue Code (the "Code") depending on whether the worker is classified as an employee or an independent contractor. For example, whereas payments to independent contactors may be fully deductible by the employer, payments to employees may be only partly deductible due to limitations on excessive compensation.[8]

Most workers categorized as "employees" are common law employees. "Common law employees" are typically individuals who perform services for an "employer" under certain common law rules.[9] The term "employee" is not defined for income tax withholding purposes.[10] However, as used in the income tax withholding statutes, "employee" means a "common law employee."[11] Treasury regulations identify several common law factors that can be used to determine whether a worker is a "common law employee."[12]

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6. *Id.*

7. *See McDonald*, 291 F.3d at 721.

8. I.R.C. § 162 (1986) (amended 1998); Tax Management Portfolio (BNA) 391-3d T.M. at A-1 (2001).

9. I.R.C. § §3121(d)(2)-(3), 3306(i) (1986) (amended 2000).

10. I.R.C. § 3401(c) (1986) (amended 2001).

11. *See* 26 C.F.R. § 31.3121(d)-1(c)(1) (2000).

12. § 31.3121(d)-1(c)(2) provides:

> Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

The Internal Revenue Service (the "Service") long took the position that there were twenty factors for worker classification,[13] but later acknowledged that other factors may be important to the analysis.[14] The Service considers "control" the primary factor in determining whether a worker is an employee or an independent contractor. In general, when the person for whom services are performed has the right to control a worker and direct that worker's activities, this degree of control usually indicates that the worker is an employee rather than an independent contractor.[15] However, notwithstanding the primacy of the "control test," worker classification remains a case-by-case analysis of individual facts and circumstances.[16]

Unlike employees, self-employed persons or independent contractors have no separate employer to pay the "employer portion" of the FICA tax.[17] The result is that self-employed persons pay the entire amount of tax due (paying both the "employee" and "employer" portions of the tax). Accordingly, an employer who properly classifies its workers as independent contractors, rather than employees, avoids payment of the "employer" portion of the FICA tax.

Due to the fact-and-circumstances approach to classification and the significant tax ramifications involved, worker classification is a hotbed of litigation.[18] In particular, workers who claim that their employers improperly classified them as independent contractors have sued those employers directly, seeking relief under FICA remuneration for their improper payment of the "employer portion" of FICA, or an order forcing those employers to correct the workers' Social Security accounts.[19] The problem for many would-be plaintiffs is that

13. Rev. Rul. 87-41, 1987-1 C.B. 296.

14. *See supra* note 12 (regarding various factors considered in the regulations); Employment Tax Handbook 104.6, §5.8.1 (Apr. 21, 1999) ("IRS Handbook"); Independent Contractor or Employee? Training Materials, IRS Training Course 3320-102, TPDS 84238I (Oct. 30, 1996) (cited in Tax Management Portfolio (BNA) 391-3d T.M. at A-2 (2001)). The IRS has, among all such factors, emphasized "control" as the standard and main test. IRS Handbook (cited in Tax Management Portfolio (BNA) 391-3d T.M. at A-2 (2001)).

15. § 31.3121(d)-1(c)(2).

16. *Id.*

17. In reality, of course, self-employed persons pay SECA, not FICA tax.

18. *See, e.g.,* Vizcaino v. Microsoft Corp., No. C93-178D, 1994 U.S. Dist. LEXIS 21039 (W.D. Wash. Apr. 15, 1994), *rev'd and remanded by*, 97 F. 3d 1187 (9th Cir. 1996), *reh'g en banc*, 105 F. 3d 1334 (9th Cir. 1997), *cert. denied*, 522 U.S. 1098 (1998); Burnetta v. Com'r, 68 T.C. 387 (1977); Burrey v. Pac. Gas & Elec. Co., 159 F. 3d 388 (9th Cir. 1998); Herman v. Time Warner, Inc., 56 F. Supp. 2d 411 (S.D.N.Y. 1999); Brown-Graves Co. v. Cent. States, Southeast & Southwest Areas Pension Fund, 206 F.3d 680 (6th Cir. 2000).

19. *See, e.g.*, Sanchez v. Overmeyer, 845 F. Supp. 1178 (N.D. Ohio 1993).

FICA,[20] by its terms, is silent on the issue of whether workers may maintain such a private right of action.

Plaintiffs seeking relief under federal statutes have often turned to the courts where the statute of limitations has expired or their administrative remedies have been exhausted. Historically, the Federal courts have been reluctant to authorize a private right of action under federal law where a statute itself is silent on the matter.[21]

In *Cort v. Ash*[22] the United States Supreme Court set forth a four-factor test for determining whether private rights of action may be implied from a federal statute.[23] The Supreme Court further modified its four-part test in later rulings appointing Congressional intent as the key factor in finding a private right of action. In *Middlesex County Sewer Authority v. National Sea Clammers Association*,[24] the Supreme Court refined the analysis of Congressional intent under what has become known as the "*Sea Clammers* doctrine."[25] Under the *Sea Clammers* doctrine, courts should deny private rights of action under statutes accompanied by a "comprehensive enforcement system."[26] Such a system, the doctrine reasons, is evidence that Congress intended an administrative, not private, remedy for aggrieved parties.

Despite the Supreme Court's announcement of the *Sea Clammers* doctrine, the Federal courts remain divided on the question of whether FICA confers such a private right of action to employees against their employers.

Part II.B. describes the four-factor test that the Supreme Court set forth in *Cort v. Ash*. Part II.D. outlines the Supreme Court's later establishment of the *Sea Clammers* doctrine. Part III examines the current divide among Federal courts on whether a private right of action exists under FICA. Parts IV and V then outline the issue of worker classification in light of the administration of FICA and SECA. Finally, Part VI sets forth an analysis supporting the application of the *Sea Clammers* doctrine as the appropriate standard of review and determines that, based on the *Sea Clammers* analysis and

20. Federal Tax Law is also silent.

21. Cort v. Ash, 422 U.S. 66, 85 (1975); *see infra* notes 36-43 and accompanying text.

22. *Cort*, 422 U.S. 66.

23. *Id.* at 78. The relevant factors to consider include: (1) whether a federal right in favor of the plaintiff is created by statute; (2) whether there is an indication of explicit or implicit legislative intent to create or to deny a remedy; (3) whether implying a remedy for the plaintiff is consistent with the underlying purposes of the legislative scheme; and (4) whether the cause of action is one that is traditionally relegated to state law. *Id.*

24. 453 U.S. 1 (1981).

25. *See infra* note 59 and accompanying text.

26. Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981); McDonald v. S. Farm Bureau Life Ins. Co., 291 F.3d 718 (11th Cir. 2002).

key policy considerations, no private right of action should exist under FICA.

II. THE EVOLVING IMPLIED PRIVATE RIGHT OF ACTION DOCTRINE

A. *General Principles*

Courts traditionally equated legal rights with attendant remedies.[27] A right[28] without a remedy,[29] it has been said, is a "monstrous absurdity."[30] Under this traditional approach courts filled gaps that the legislature left by supplying a remedy to enforce a statute that contained rights and duties, but lacked enforcement provisions.[31] Courts applied this traditional standard without conducting an independent inquiry whether the statute provided for such a right of action.[32]

Courts applied this standard[33] until the 1970s when they divided the single traditional inquiry into three distinct inquiries concerning rights, rights (or causes) of action, and remedies.[34] Breaking from the

27. Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 68 (2001); *see* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 66 (1992) (stating "[f]rom the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court, although it did not always distinguish clearly between a right to bring suit and a remedy available under such a right."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting Blackstone: '[I]t is a general indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.' "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.").

28. Zeigler, *supra* note 27, at 147 n.3 ("[a] legal right is one that imposes a correlative duty on another to act or refrain from acting from the benefit of the person holding the right.") (citing Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *in* FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS, at 35-38 (Walter W. Cook ed., 1919)). A right of action is a right "'to seek judicial relief from injuries caused by another's violation of a legal requirement.'" *Id.* (citing Cannon v. Univ. of Chicago, 441 U.S. 677, 730 n.1 (1979) (Powell, J. dissenting)).

29. *Id.* (stating that a remedy is a relief granted by a court).

30. *Id.* at 68 (citing Kendall v. United States, 37 U.S. (12 Pet.) 524, 624 (1838)).

31. *Id.*

32. Zeigler, *supra* note 27, at 68.

33. *See* Cort v. Ash, 422 U.S. 66 (1976).

34. Davis v. Passman, 442 U.S. 228, 239 (1979). See generally Susan J. Stabile, The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action, 71 NOTRE DAME L. REV. 861 (1996); Donald H. Zeigler, Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts, 38 HASTINGS L.J. 665 (1987); H. Miles Foy, III, Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts, 71 CORNELL L. REV. 501 (1986); Robert H. A. Ashford, Implied Causes of Action Under Federal Laws: Calling the Court Back to Borak, 79 NW. U. L. REV. 227 (1984); Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 HARV. L. REV. 1193 (1982); Tamar Frankel, Implied Rights of Action, 67 VA. L. REV. 553 (1981); Thomas L. Hazen, Implied Private Remedies Under Federal Statutes: Neither a Death Knell Nor a Morato-

traditional approach, these courts developed separate criteria to determine whether a statute created an implied right of action.[35]

B. *Cort v. Ash*

In 1975, the Supreme Court confirmed the separate status of an implied right of action inquiry in *Cort v. Ash*.[36] In that case, Ash, a stockholder in Bethlehem Steel Corporation ("BSC"), claimed that BSC directors had authorized the use of company funds for political advertisements in the 1972 presidential campaign in violation of a federal criminal statute.[37] Ash sought injunctive relief against further expenditures and damages in favor of BSC.[38] The issue was whether a private right of action for damages against the BSC directors was implied in favor of a BSC stockholder under the applicable criminal statute.[39]

The Court identified four criteria relevant to inquiries of this nature: (1) Is the plaintiff one of the class for whose "especial benefit" the statute was enacted?; (2) Is there any indication of Congressional intent to create such a remedy?; (3) Is a private remedy consistent

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rium – Civil Rights, Securities Regulation, and Beyond, 33 VAND. L. REV. 1333 (1980) (providing discussions of the implied right of action cases).

35. In Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453 (1974), and Sec. Investor Prot. Corp. v. Barbour, 421 U.S. 412 (1975), the Court focused solely on whether a private right of action in favor of plaintiffs could be inferred from the statute involved. The *Nat'l R.R.* Court stated:

> The threshold question clearly is whether the Amtrak Act or any other provision of law creates a cause of action whereby a private party such as the respondent can enforce duties and obligations imposed by the Act; for it is only if such a right of action exists that we need consider [standing and jurisdiction].

Nat'l R.R. Passenger Corp., 414 U.S. at 456; *see also Barbour*, 421 U.S. at 413-14 ("The question presented by this case is whether such customers have an implied private right of action under the Securities Investor Protection Act of 1970 (Act or SIPA) to compel the SIPC to exercise its statutory authority for their benefit."). In *National Railroad Passenger Corp.*, plaintiffs sought to enjoin discontinuance of certain passenger trains, claiming that procedures required by the Rail Passenger Service Act of 1970 had not been followed before terminating service. *Nat'l R.R. Passenger Corp.*, 414 U.S. at 455 n.3. In both cases, the court refused to imply a private right of action because plaintiffs' suits might prevent the achievement of the statutory goals. The legislative history of the Rail Passenger Service Act demonstrates that Congress rejected a provision that would have permitted a private action to enforce the Act's provisions. *Nat'l R.R. Passenger Corp.*, 414 U.S. at 459-61 (citing Supplemental Hearings on H.R. 17849 and S. 3706 before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 91st Cong. 85 (1970)). The *Barbour* Court stated that the overall structure and purpose of the legislative scheme are incompatible with such an implied right. *Barbour*, 421 U.S. at 421.

36. Cort v. Ash, 422 U.S. 66 (1975).

37. *Id.* at 71-72.

38. *Id.*

39. *Id.* at 68.

with the underlying purposes of the legislative scheme?; and (4) Is the cause of action one traditionally relegated to state law, so that an implied right of action would be inappropriate?[40] The Court later emphasized that the ultimate goal of this inquiry is to determine the intent of Congress in enacting the statute.[41]

The Court found that the federal statute in question was, at its core, a criminal statute, but conceded that there may be instances where a criminal statute, intended to protect a group of citizens, gives rise to a private right of action on behalf of a member of that group.[42] However, the Court found that this was not an occasion where a private right of action may be implied. In support of its holding, the Court analyzed the four factors described above.

Taking these four factors in turn, the Court first stated that BSC shareholders were not intended to benefit from the statute, which was enacted as a protection against corruption within the political system.[43] Second, the legislative history and the plain language of the statute gave no indication that Congress intended to provide a private cause of action for damages or an injunction.[44] Third, the Court found that the damages and injunctive relief, which BSC shareholders were seeking, would not further the goal of the statute (i.e., its underlying scheme).[45] Finally, the Court found that the actions of the BSC board of directors might give rise to a suit, under state law, on behalf of shareholders for breach of fiduciary duty. The Court reasoned that, to allow such a suit under the federal criminal statute in question, would impose "an area traditionally committed to state law."[46]

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40. *Cort*, 422 U.S. at 78 (citing Sec. Investor Prot. Corp. v. Barbour, 421 U.S. 412, 423 (1975); Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 458, 460 (1974); J.I. Case Co. v. Borak, 377 U.S. 426, 434 (1964); Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916); *see also* Health Care Plan, Inc. v. Aetna Life Ins. Co., 966 F.2d 738, 740-42 (2d Cir. 1992) (applying the *Cort* factors); Sadler v. Citibank, N.A., 947 F.2d 642, 643-44 (2d Cir. 1991) (also applying the *Cort* factors).

41. Thompson v. Thompson, 484 U.S. 174, 179 (1988) (asserting that the *Cort* factors and traditional tools of statutory interpretation are "guides to discerning that intent").

42. *Cort*, 422 U.S. at 80.

43. *Id.* at 81-82.

44. *Id.* at 83-84. The Court stated that by remaining silent on the issue of damages, Congress intended for the relationship between the corporation and shareholders to continue to be governed by state law.

45. *Id.* at 84. "Recovery of derivative damages by the corporation for violation of § 610 would not cure the influence which the use of corporate funds in the first instance may have had on a federal election." *Id.*

46. *Cort*, 422 U.S. at 85.

C. *Cort v. Ash Progeny: Intent Emerges as Dominant Factor*

Until *Cort*, the Supreme Court had never identified a right of action as a separate analysis required for the award of a remedy under a federal statute. However, in its aftermath, the Supreme Court conducted a *Cort* analysis in a series of cases, reaffirming that a right of action inquiry was a separate and critical part of the rights and remedies equation.[47]

In two of these cases, *Touche Ross & Co. v. Redington* [48] and *Transamerica Mortgage Advisors, Inc. v. Lewis*,[49] the Court elevated the second prong *Cort* criterion – namely, whether Congress intended to create a private right of action – as the predominant factor and downplayed the other three criteria.

In *Touche Ross*,[50] the Supreme Court refused to imply a private right of action under §17(a) of the Securities Exchange Act of 1934 on behalf of brokerage firm customers in their action against accountants who conducted a faulty audit of the firm's records.[51] The Court stated that its "task [was] limited solely to determining whether Congress intended to create the private right of action asserted" by the plaintiffs.[52] The Court explicitly stated that the third and fourth *Cort* factors favored implication of a private right of action, but noted that "such inquiries have little relevance to the decision of this case."[53]

In *Transamerica*,[54] the Court framed this issue as "whether Congress intended to create the private remedy asserted."[55] The Court strongly emphasized the centrality of the Congressional intent inquiry, "[w]e accept this as the appropriate inquiry to be made in resolving the issues presented by the case before us."[56] Despite its announcement of the four-factor test, in later cases, the Court applied the *Cort* factors inconsistently. While it appeared to recognize the predominant Congressional intent factor, the Court gave other factors substantial attention in some cases, while hardly mentioning them in others.[57]

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47. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 316-17 (1979); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59-72 (1978); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 37-41 (1977).

48. 442 U.S. 560 (1979).

49. 444 U.S. 11 (1979).

50. *Touche Ross & Co.*, 442 U.S. 560 (1979).

51. *See id.* at 570.

52. *Id.* at 568.

53. *Id.* at 575.

54. *Transamerica Mortgage Advisors, Inc.*, 444 U.S. 11.

55. *Id.* at 15-16 (citing *Touche Ross & Co.*, 442 U.S. at 568).

56. *Id.* at 16.

57. *See* Univers. Research Ass'n v. Coutu, 450 U.S. 754, 770 (1981) (stating that to determine the ultimate question of whether Congress intended to create a private right of action, the Court

The *Transamerica* Court also appeared confused as to whether the *Cort* test was in fact composed of four factors or one (i.e., Congressional intent). In *California v. Sierra Club*,[58] the Court stated that *Cort* was the "preferred approach for determining whether a private right of action should be implied from a federal statute."[59] The *Sierra Club* Court further stated that the *Cort* factors were "the criteria through which" Congressional intent is determined.[60] However, in a concurring opinion, Justices Rehnquist, Burger, Stewart and Powell wrote that "the Court's opinion places somewhat more emphasis on *Cort v. Ash* . . . than is warranted in light of several more recent 'implied right of action' decisions which would limit it,"[61] and stated that it is "clear that the so-called *Cort* factors are merely guides in the central task of ascertaining legislative intent . . . that they are not of equal weight . . . and that in deciding an implied-right-of-action case courts need not mechanically trudge through all four of the factors when the dispositive question of legislative intent has been resolved."[62]

Yet, in other cases, certain Justices have thundered against the application of *Cort* and suggested that the original *Cort* analysis had been overruled. For instance, Justice Scalia stated, "[T]he Court is not being faithful to current doctrine in its *dicta* denying the necessity of an actual congressional intent to create a private right of action, and in referring to *Cort v. Ash* . . . as though its analysis had not been effectively overruled by our later opinions."[63] Justice Scalia went so far as

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would consider *three* factors set forth in *Cort v. Ash*, 422 U.S. 66 (1975) (citing *Touche Ross & Co.*, 442 U.S. at 575-76). The fourth factor ("whether the cause of action is one traditionally relegated to state law") is not mentioned. In Northwest Airlines, Inc. v. Transp. Workers Union of America, 451 U.S. 77, 91 (1981), the Court restated the *Cort* factors:

> The ultimate question . . . is whether Congress intended to create the private remedy . . . . Factors relevant to this inquiry are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies.

58. 451 U.S. 287 (1981).

59. *Id.* at 292 (quoting *Transamerica Mortgage Advisors, Inc.*, 444 U.S. at 26 (White, J., dissenting)).

60. *Id.* at 293 (citing Davis v. Passman, 442 U.S. 228, 241 (1979)).

61. *Id.* at 302 (Rehnquist, J., concurring).

62. *Sierra Club*, 451 U.S. at 302 (Rehnquist, J., concurring); Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981) (making only brief reference to the issue and stating that the focus is on the intent of Congress and that the other *Cort* factors are used to discern intent). In Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 535-42 (1984) and Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 145-48 (1985), the Court acknowledged that Congressional intent is the main focus, but then proceeded to conduct a four-factor analysis.

63. Thompson v. Thompson, 484 U.S. 174, 188 (1988) (Scalia, J., concurring) (emphasis added)). Justice Scalia goes on to state: "I am at a loss to imagine what congressional intent to create a private right of action might mean, if it does not mean that Congress had in mind the creation of a private right of action." *Id.* (Scalia, J., concurring).

to suggest that the Supreme Court "should get out of the business of implied private rights of action altogether."[64]

This confusion has not gone unnoticed. The Court has acknowledged its "great difficulty in establishing standards for deciding when to imply a private cause of action under a federal statute which is silent on the subject."[65] While the Court's standard, or standards, are unclear, the results of its application are not. In numerous cases where the statutory and legislative history were silent on the issue, the Court required clear evidence of Congressional intent to provide a private right of action[66]—more often than not, it found none.[67]

D. *Sea Clammers Doctrine*

In its 1981 decision in *Middlesex County Sewerage Authority v. National Sea Clammers Association*[68] *("Sea Clammers")*, the Supreme Court revisited *Cort* and its progeny. The *Sea Clammers* court added an additional guideline and level of judicial scrutiny to the Congressional intent factor. Whereas this patchwork of cases asks only whether Congress intended to allow a private right of action under a statute, the *Sea Clammers* analysis asks, in addition, whether a "comprehensive enforcement system" accompanies the statute.[69] The *Sea Clammers* court restrained the private right of action doctrine for statutes accompanied by such a "comprehensive enforcement system."[70] A comprehensive enforcement system usually entails authority for government officials to bring suit against the violator, extensive administrative procedures, and possibly administrative remedies. The Supreme Court added this additional level of scrutiny through the application of the canon of statutory construction that if a statute expressly provides a particular remedy, courts should not invent remedies of their own.[71]

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64. *Id.* at 192 (O'Connor, J., concurring).

65. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 656 (1999) (Kennedy, J., dissenting).

66. *Id.*

67. *Thompson*, 484 U.S. at 190 (Scalia, J., concurring) (pointing out that court rejected claims of implied right of action in nine of eleven recent cases); *see also* Stabile, *supra* note 34, at 870 n.65.

68. 453 U.S. 1 (1981).

69. *See id.* at 19-20.

70. *See id.* at 20; *see also* Salazar v. Brown, 940 F. Supp. 160 (W.D. Mich. 1996) (holding that no private cause of action exists under FICA and referring to the additional comprehensive enforcement system requirement as the "*Sea Clammers* Doctrine").

71. *Sea Clammers*, 453 U.S. at 14-15:

> In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under MPRSA and FWPCA. As we stated in *Transamerica Mortgage Advisors [v. Lewis]*, "it is an elemental canon of statutory construction that where a statute ex-

In *Sea Clammers*, an organization that harvested fish and shellfish off the coasts of New York and New Jersey sued government officials seeking an injunction and damages for the defendants' failure to properly police pollution in these waters.[72] The plaintiffs brought suit under the Federal Water Pollution Control Act ("FWPCA") and the Marine Protection, Research, and Sanctuaries Act ("MPRSA").[73]

Congress constructed the FWPCA and MPRSA quite similarly. Both statutes provided that a citizen could bring a suit against any person, including the United States, to enforce provisions of each statute. Each statute provided that plaintiffs bringing suit must provide 60 days notice of the alleged violation before commencing an action. Finally, both statutes provided for the award of civil penalties to the federal government for violation of the statutes' provisions. Neither statute expressly authorized a private suit for damages.

The *Sea Clammers* plaintiffs sought injunctive relief under each statute, as well as $250 million in compensatory damages, and $250 million in punitive damages.[74] The plaintiffs failed to comply with the notice provisions of the statutes.[75]

In evaluating whether a private individual could bring suit for damages under either statute, the *Sea Clammers* court focused on each statute's "unusually elaborate enforcement provisions."[76] In light of such enforcement provisions, the Court stated that "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies of private citizens suing under MPRSA and FWPCA."[77]

The Court's analysis of the statutes' enforcement provisions was grounded in the second *Cort* factor—legislative intent.[78] The Court stated that the legislative history of both statutes gave no indication that Congress intended to create a private right of action aside from that already provided in the statutes.[79] The statutes' elaborate en-

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pressly provides a particular remedy or remedies, a court must be chary of reading others into it." In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.

72. *Id.* at 1.

73. *Id.* The plaintiffs also brought a federal common-law nuisance claim. The Court ruled that this claim was not available to private parties. *Id.* at 2. For purposes of the discussion here, only claims under FWPCA and MPRSA will be evaluated.

74. *Id.* at 5.

75. *Sea Clammers*, 453 U.S. at 6-7.

76. *Id.* at 13.

77. *Id.* at 14.

78. *See supra* note 40.

79. *Sea Clammers*, 453 U.S. at 17-18.

forcement mechanisms, as evidenced in the legislative history of FWPCA and MPRSA, provided the impetus for the Court's ruling that no private right of action existed.

III. THE SPLIT ON WHETHER A PRIVATE RIGHT OF ACTION EXISTS UNDER FICA IN WORKER MISCLASSIFICATION CASES

The federal courts are divided on whether a private right of action exists under FICA,[80] where employees have been misclassified as independent contractors. While the courts all analyze this issue under the same *Cort v. Ash* framework, they diverge in their application, producing conflicting and inconsistent results.[81] The determinative factor in this divergence appears to be the manner in how those courts choose to apply the four-factor *Cort v. Ash* analysis and to what extent, if at all, the courts heed the increased scrutiny that the *Sea Clammers* doctrine requires.

A. *Courts Finding a Private Right of Action Exists*

There are a number of cases that hold a private cause of action exists under FICA.[82] None of these cases, however, engage in the stringent four-part analysis that *Cort v. Ash* requires. The soundest cases[83] supporting a private right of action are *Sanchez v. Overmyer*[84] *and Ford v. Troyer*.[85]

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80. The same dispute affects an employee's Federal Unemployment Tax Act ("FUTA") liability.

81. *See, e.g.,* Deleu v. Scaife, 775 F. Supp. 712 (S.D.N.Y. 1991) (suggesting that there is no private right of action under FICA, where plaintiff was seeking monetary damages); DiGiovanni v. City of Rochester, 680 F. Supp. 80 (W.D.N.Y. 1988) (finding no private right of action under the general federal income tax withholding provisions of 26 U.S.C. § 3402); Spilky v. Helphand, No. 91 CIV. 3045, 1993 WL 159944 (S.D.N.Y. May 11, 1993) (holding that there is no private right of action under FICA and FUTA); Salazar v. Brown, 940 F. Supp. 160 (W.D. Mich. 1996) (holding that no private right of action exists under FICA and referring to the additional comprehensive enforcement system element as the "Sea Clammers Doctrine"); White v. White Rose Food, 62 F. Supp. 2d 878 (E.D.N.Y. 1999), *on remand from* 128 F.3d 110 (2d Cir. 1997); *see* Cal. v. Sierra Club, 451 U.S. 287, 302 (1981) (Rehnquist, J., concurring).

82. *See, e.g.,* Colunga v. Young, 722 F. Supp. 1479 (W.D. Mich. 1989), *aff'd*, 914 F.2d 255 (6th Cir. 1990) (note that in affirming *Colunga*, the Sixth Circuit never reached the FICA issue); Saintida v. Tyre, 783 F. Supp. 1368 (S.D. Fla. 1992); Calderon v. Witvoet, 764 F. Supp. 536 (C.D. Ill. 1991), *aff'd in part, rev'd in part*, 999 F.2d 1101 (7th Cir. 1993); Charite v. Jones, 116 Lab.Cas. ¶ 35,384, No. 89-2548, 1990 WL 165247 (S.D. Fla. Aug. 13, 1990); Certilus v. Peeples, 101 Lab.Cas. ¶ 34,587, No. 81-46 Civ-DC-12, 1984 WL 3175 (M.D. Fla. July 17, 1984).

83. It is interesting to note that both cases were brought by *pro se* plaintiffs. This fact may explain the courts' leniency (and imprecision) in applying the elements of *Cort v. Ash*.

84. 845 F. Supp. 1178 (N.D. Ohio 1993).

85. 25 F. Supp. 2d 723 (E.D. La. 1988).

1. *Sanchez v. Overmyer*

In *Sanchez*, plaintiffs were agricultural workers alleging that their former employers' classification of them as independent contractors violated FICA.[86] The defendant-employers moved for judgment on the plaintiff's pleadings, asserting that no private right of action exists under FICA. Rejecting the defendants' assertions, the *Sanchez* court cited "numerous" federal cases where the "courts have entertained actions by agricultural workers for an employer's violation of the FICA."[87] The *Sanchez* court acknowledged, however, that where no private right of action is explicitly provided for in a federal statute (as is the case with FICA), courts must apply the four-factor *Cort. v. Ash* test.[88] By the *Sanchez* court's own admission, none of the "numerous" cases that the court cited "engage in the stringent four-part analysis required by *Cort.*"[89]

The *Sanchez* court engaged in a brief, but persuasive, discussion of the *Cort v. Ash* four-factor analysis.[90] Addressing the first *Cort* factor—whether the plaintiffs were of the class for whose especial benefit the statute was enacted—the court focused on the purpose of the "Social Security system" in general and not FICA individually.[91] This system[92] "was instituted to create a trust fund to benefit workers upon

86. *Sanchez*, 845 F. Supp. at 1179.

87. *Id.* at 1180 (citing Colunga v. Young, 722 F. Supp. 1479 (W.D. Mich. 1989), *aff'd*, 914 F.2d 255 (6th Cir. 1990); Saintida v. Tyre, 783 F. Supp. 1368 (S.D. Fla. 1992); Calderon v. Witvoet, 764 F. Supp. 536 (C.D. Ill. 1991), *aff'd in part, rev'd in part*, 999 F. 2d 1101(7th Cir. 1993); Charite v. Jones, 116 Lab.Cas. ¶ 35,384, 1990 WL 165247 (S.D. Fla. Aug. 13, 1990); Certilus v. Peeples, 101 Lab.Cas. ¶ 34,587, No. 81-46 Civ-DC-12, 1984 WL 3175 (M.D. Fla. July 17, 1984); Strong v. Williams, 89 Lab.Cas. ¶ 33,929, No. 78-124-CIV-TG, 1980 WL 8134 (M.D. Fla. Apr. 22, 1980)).

88. *Id.*

89. *Id.* (citing Deleu v. Scaife, 775 F. Supp. 712 (S.D.N.Y. 1991) (suggesting no private right of action under FICA where plaintiff sought monetary damages); DiGiovanni v. City of Rochester, 680 F. Supp. 80 (W.D.N.Y. 1988) (finding no private right of action under federal income tax withholding provisions of the Code).

90. *Sanchez*, 845 F. Supp. at 1181. The *Sanchez* Court stated the following regarding the first prong of the test:

> The FICA is not, unlike most other provisions of the tax code, a general provision intended to benefit the government by outlining a general revenue collection scheme. Rather, the Social Security system was instituted to create a trust fund to benefit workers upon disability or retirement, in order to "save men and women from the rigors of the poorhouse as well as from the haunting fear that such a lot awaits them when journey's end is near." The preface to the Social Security Act itself states that the purpose of the Act is to establish "a system of [f]ederal old-age benefits." There is little doubt that plaintiffs are members of the principal group the FICA was enacted to benefit: workers of the United States.
>
> *Id.* (citations omitted).

91. *Id.*

92. Which presumably, in so far as the *Sanchez* Court was concerned, includes both FICA and the Social Security Act ("SSA").

disability or retirement" and "establish 'a system of federal old-age benefits.'"[93] "There is little doubt," the court insisted, "that plaintiffs are members of the principle group FICA was enacted to benefit: workers of the United States."[94]

Focusing on the second, and preeminent, *Cort* factor—Congressional intent—the court noted that nothing within FICA, or its legislative history, provided support for the creation of a private right of action.[95] Quoting *Thompson*,[96] the *Sanchez* court stated that a finding of Congressional intent to create a private right of action "does not require evidence that Members of Congress, in enacting the statute, actually had in mind the creation" of such a right.[97] The Court further stated that the implied right of action doctrine would be a virtual "dead letter" if its application were limited to correcting drafting errors when Congress simply forgot to codify its intention to provide for a right of action.[98]

Undeterred, the court stated that, despite the statute's silence on the issue, legislative intent may be determined through examination of the structure and language of the statute or the circumstances surrounding its enactment.[99] On this basis, the court reasoned that the relief the plaintiff was seeking[100] was "consistent with the purposes of the FICA and the circumstances of its passage,"[101] since "[w]orking men and women will not be able to draw social security upon their retirement unless they and their employers have contributed to the fund during their working years."[102] The court was of the view that such a private right of action was necessary so that workers properly classified as employees could compel their employers to correct their

93. *Sanchez*, 845 F. Supp. at 1181 (citing Helvering v. Davis, 301 U.S. 619, 641 (1937), Soc. Sec. Bd. v. Nierotko, 327 U.S. 358, 364 (1946)) (stating that the purpose of the Social Security Act was to provide funds for the support of workers who "have ceased to labor."). Notably, the *Sanchez* Court failed to examine FICA under the "especial benefit" prong of the *Cort* test.

94. *Id.* at 1181. In the opinion of the author, SSA, not FICA, was intended to provide this benefit.

95. *Id.* (citing Cannon v. Univ. of Chicago, 441 U. S. 677, 694 (1979)).

96. 484 U.S. 174, 179 (1988).

97. *Sanchez*, 845 F. Supp. at 1181.

98. *Id.* (citing *Thompson*, 484 U.S. at 179).

99. *Id.*

100. In *Sanchez*, the plaintiff-employee sought an order to force his former employer to correct his employment record and make appropriate FICA contributions for wages he earned as an employee, not monetary damages. The *Sanchez* Court never reached the question of whether a private right of action for monetary damages is implied under FICA. *Id.* at 1181-82.

101. Sanchez, 845 F. Supp. at 1181 (citing *Helvering*, 301 U.S. at 641).

102. *Id.* The *Sanchez* Court apparently ignored the fact that the employer's obligation to contribute funds under FICA are independent of the government's disbursement obligations under the Social Security Act.

earnings records and make the "required and correct contribution" to the FICA trust fund.[103]

Furthermore, the court attached particular significance to the indemnification clause of FICA.[104] The court reasoned that this provision indemnifies an employer in an employee-based action for FICA deductions.[105] Through implication, the court concluded that it must be assumed that Congress contemplated employee-based actions under FICA against employers for incorrect amounts paid or failure to pay.[106]

Finally, the court summarily concluded that both the third (consistency with legislative scheme) and fourth (action not traditionally relegated to state law) *Cort* factors were met.[107]

2. *Ford v. Troyer*

Ford v. Troyer[108] is a worker misclassification case brought under FICA.[109] The plaintiff, Ford, claimed his former employer, Troyer Enterprises ("Troyer"), improperly classified him as an independent contractor.[110] As a result of the misclassification, Troyer was alleged to have failed to withhold and remit federal social security taxes.[111] Ford sought to compel Troyer to pay the employer share of these FICA taxes.[112] Troyer claimed that Ford was an independent contractor and, accordingly, that he had no private right of action for any alleged failure, on Troyer's part, to withhold those taxes.[113]

The *Ford* court acknowledged, as did the *Sanchez* court, that "there is no express right of action for an employee to sue his employer" under FICA, and that courts are divided on the question of whether an implied private right of action exists under those statutes.[114]

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103. *Id.*

104. *See* I.R.C. § 3102(b) (2001).

105. *Sanchez*, 845 F. Supp. at 1181.

106. *Id.* at 1181-82.

107. *Id.* at 1182. According to *Sanchez*, FICA was enacted to establish a trust fund for retirement. The *Sanchez* Court stated that permitting a private right of action is consistent with this purpose. Further, the court noted that the establishment and maintenance of a natural retirement and welfare fund is not a matter traditionally relegated to the states. *Id.*

108. 25 F. Supp. 2d 723 (E.D. La. 1998).

109. *Id.* at 725.

110. *Id.*

111. *Id.*

112. *Ford*, 25 F. Supp. 2d at 725.

113. *Id.*

114. *Id.* at 726; *see supra* note 89.

The *Ford* court adopted the reasoning of *Sanchez* to determine that such an implied right of action does exist.[115] The court, with little other discussion, found Sanchez's position concerning the indemnification provision of FICA particularly "persuasive."[116] The court also distinguished the withholding of income tax from the withholding of FICA taxes.[117] In contrast to FICA taxes, the court found no authority for a private right of action for an employer's failure to withhold income taxes, since §3403 of the Code prohibits an employer from being liable "to any person."[118] The court reasoned that "while the withholding of income taxes is to benefit the federal government as a revenue collection measure, the withholdings under FICA . . . are intended to fund the social security program which is for the benefit of the employee."[119]

B. *Courts Finding No Private Cause of Action*

There is moderate support among the lower courts and the federal circuit courts for the position that a private right of action does not exist under FICA.[120]

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115. *Id.*

116. *Ford*, 25 F. Supp. 2d at 726 (citing Campbell v. Miller, 836 F. Supp. 827 (M.D. Fla. 1993) (finding a private right of action for injunctive relief to enforce FICA and FUTA); Colunga v. Young, 722 F. Supp. 1479, 1489 (W.D. Mich. 1989) (finding an employer violated FICA by failing to withhold and pay its portion of employee's social security taxes). *Compare* Salazar v. Brown, 940 F. Supp. 160 (W.D. Mich. 1996) (finding no private right of action under FICA); Spilky v. Helphand, No. 91 Civ. 3045, 1993 U.S. Dist. LEXIS 6196 (S.D.N.Y. May 11, 1993), No. 91 CIV. 3045, 1993 WL 159944 (S.D.N.Y. May 11, 1993) (no private right of action for employer's failure to withhold or pay social security and unemployment taxes); Deleu v. Scaife, 775 F. Supp. 712 (S.D.N.Y. 1991) (no private right of action against employer for failure to pay social security and unemployment taxes)).

117. *Id.*

118. *Id.* In *Sanchez*, the court emphasized the indemnity provision of §3101(b) of the Code, which provides that "an employer who deducts FICA taxes from an employee's wages will 'be indemnified against the claims and demands of any person for the amount of any such payment . . . .'" Sanchez v. Overmyer, 845 F. Supp. 1178, 1181 (N.D. Ohio 1993). The *Sanchez* Court stated:

> This indemnification provision has been in the Social Security Act since its original enactment in 1935. The logical inquiry then is against whom is the employer indemnified? The only possible answer is that this provision indemnifies an employer in an action brought by the employee over FICA deductions from the employees wages . . . by implication it must be assumed that Congress envisioned actions under FICA by employees against employers for incorrect amounts paid or complete failure to pay FICA taxes.

Id. at 1181-82.

119. *Ford*, 25 F. Supp. 2d at 726.

120. *See e.g.*, Deleu v. Scaife, 775 F. Supp. 712 (S.D.N.Y. 1991) (suggesting no private right of action under FICA); DiGiovanni v. City of Rochester, 680 F. Supp. 80 (W.D.N.Y. 1988) (finding no private right of action under the general federal income tax withholding provisions); Spilky v. Helphand, No. 91 Civ. 3045, 1993 U.S. Dist. LEXIS 6196 (S.D.N.Y. May 11, 1993), No. 91 CIV.

1. *McDonald v. Southern Farm Bureau Life Insurance Co.*

Perhaps, the most compelling authority that a private right of action does not exist under FICA is *McDonald v. Southern Farm Bureau Life Insurance Co.*[121] McDonald worked as an insurance agent and agency manager for Southern Farm Bureau Life Insurance Co. ("SFBL").[122] McDonald's employment agreement with SFBL classified him as an "independent contractor" and stated that "nothing contained herein shall be construed to create the relationship of employee and employer between [McDonald] and [SFBL]."[123] Notwithstanding the terms of his employment contract, McDonald claimed he was an employee of SFBL,[124] not an independent contractor, because SFBL exercised substantial control over his work activities.[125] As an independent contractor, McDonald would be responsible for payment of the entire tax applicable to his wages under SECA.

McDonald claimed that the SFBL's misclassification of him as an independent contractor and failure to pay the employer portion of the FICA tax violated FICA.[126] McDonald further claimed that SFBL's misclassification caused him to pay FICA taxes he would have not otherwise paid since, as an employee, he would have only paid the employee portion of that tax.[127]

The *McDonald* court posed the issue in the case as "whether the text, structure, or legislative history of FICA creates by implication a private cause of action."[128] In order to make this determination, the court reviewed the four-part *Cort v. Ash* analysis, noting that the "central inquiry" is whether Congress intended to create a private right of action.[129]

3045, 1993 WL 159944 (S.D.N.Y. May 11, 1993) (holding no private right of action exists under FICA and FUTA); Salazar v. Brown, 940 F. Supp. 160 (W.D. Mich 1996) (holding no private right of action exists under FICA); White v. White Rose Food, 62 F. Supp. 2d 878 (E.D.N.Y. 1999), *on remand from*, 128 F.3d 110 (2d Cir. 1997).

121. 291 F.3d 718 (11th Cir. 2002).

122. *Id.* at 721.

123. *Id.*

124. *Id.*

125. *McDonald*, 291 F.3d at 721. Specifically, McDonald claimed SFBL regulated his hours, dictated the manner in which he sold insurance, provided him with an office, supplies and secretarial support, and regulated his advertising. *Id.*

126. *Id.* at 721-22.

127. *Id.* at 722.

128. *Id.*

129. *McDonald*, 291 F.3d at 722-23. "'[L]ike substantive federal law itself,'" stated the Court, "'private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.'" *Id.* at 723 (quoting Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (citations omitted)).

The court cautioned that the "bar for showing legislative intent is high" and that "[w]ithout it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."[130] The *McDonald* court applied the *Cort* factors as follows:

1. "Especial Benefit": Language, Structure, and Legislative History

The *McDonald* court asserted that there is no basis in the statute for asserting FICA was enacted for the "especial benefit" of employees such as the plaintiff.[131] FICA, the court reasoned, is simply a tax assessment statute designed to raise revenue.[132]

McDonald argued along the same lines as the court's reasoning in *Sanchez*— the court should not focus on FICA itself, but rather the SSA and the Social Security program as a whole.[133] McDonald argued that, since the funds from FICA taxes must be used exclusively to fund Social Security[134] and the SSA was enacted for the especial benefit of American workers,[135] FICA benefits American workers as much as the SSA.[136]

The court was unconvinced, stating that McDonald disregarded the "crucial distinction" between FICA and the SSA.[137] According to the *McDonald* court, FICA is "no different than any other tax specifically designed to benefit the federal government by raising revenue."[138] By contrast, the SSA "unambiguously and intentionally provides funds for disabled and retired employees."[139] The SSA, not FICA, was enacted to provide this benefit.[140] The court further noted that a quali-

130. *Id.* at 723 (quoting *Alexander*, 532 U.S. at 286-87 (internal quotations omitted)).

131. *Id.*

132. *Id.* The court noted that all of the Code provisions enacted pursuant to FICA concern the business of revenue collection: taxation rates, deduction and collection procedures, and explanation of the types of employment and wages covered. *Id.*

133. *McDonald*, 291 F.3d at 723.

134. *Id.* at 724 (citing 42 U.S.C. § 911(a) (mandating that FICA collections "shall not be included in the totals of the budget of the United States Government . . . and shall be exempt from any general budget limitation imposed by statute . . .")).

135. *Id.* at 723 (citing 42 U.S.C. § 301, *et seq.*; Soc. Sec. Bd. v. Nierotko, 327 U.S. 358, 364 (1946) (stating that the purpose of the Social Security Act "is to provide funds through contributions by employer and employee for the decent support of elderly workmen who have ceased to labor.")).

136. *Id.* at 724.

137. *McDonald*, 291 F.3d at 724.

138. *Id.*

139. *Id.*

140. *See id.*

fying employee receives Social Security benefits regardless of whether his employer has complied with FICA.[141]

2. Congressional Intent

FICA's legislative history, the *McDonald* court noted, "is completely devoid of any indication that private lawsuits . . . were even briefly contemplated by Congress."[142] The court dismissed McDonald's contention that Congressional intent could be inferred from the mere fact that a private right of action would be "consistent" with the "broad purpose" of the Social Security Act.[143]

McDonald's next argument, also consistent with *Sanchez*, focused on the so-called "indemnification provision" of FICA. McDonald argued that Congress "would not have explicitly indemnified employers if it did not assume that employees would have been able to bring lawsuits under FICA."[144] The court responded to this argument with an analysis of §3102(b):

> Section 3102(b), which appears as part of the statute's section on deductions from employees' wages, protects employers who properly deduct FICA taxes from an employee's wages against claims by employees that the money withheld and used to pay the tax should have been paid to the employee as part of his salary. Because Congress requires employers to withhold the FICA contribution and pay the excise tax, it included the indemnification provision to protect employers from lawsuits by employees who do not want their salaries reduced in compliance with FICA. Section 3102(b) offers no reason to imply a private cause of action.[145]

3. Consistency with Legislative Scheme

The *McDonald* court stated that courts must be extremely reluctant and exercise great caution before seeking to provide additional remedies where statutes have prescribed available remedies.[146]

Invoking the *Sea Clammers* doctrine, the court then engaged in a detailed analysis supporting its opinion that permitting private rights

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141. *McDonald*, 291 F.3d at 724. "[A]s long as an employee's wages are properly reported to the Internal Revenue Service . . . he will receive Social Security benefits even if the employer has completely failed to pay its share of the FICA excise tax." *Id.* (citing 42 U.S.C. § 413(a)(2)(A)(ii)).

142. *Id.*

143. *Id.* (citing Alexander v. Sandoval, 532 U.S. 275, 288 (2001) ("'In determining whether statutes create private rights of action, as in interpreting statutes generally, legal context matters only to the extent it clarifies text.'") (citations omitted)).

144. *Id.* at 725.

145. *McDonald*, 291 F.3d at 725.

146. *Id.* (citing Karahalios v. Nat'l Fed'n of Fed. Employees, 489 U.S. 527, 533 (1989)).

of action under FICA "would undermine the administrative procedures that have been expressly created in order to assist workers who . . . have been assessed improper FICA taxes."[147]

According to *McDonald*, this "comprehensive regulatory scheme" includes the following:

(i) Aggrieved parties may file with the Service Form SS-8 "Determination of Employee Work Status for Purposes of Federal Employment Taxes and Income Tax Withholding." Filing Form SS-8 permits workers to obtain a worker classification determination from the Service;[148]

(ii) Workers may file the with the Service for a refund of self-employment taxes allegedly overpaid;[149]

(iii) Workers may sue the government for a tax refund;[150] and

(iv) The SSA provides an "administrative mechanism through which a worker may seek to correct any errors or omissions in the records of his wages. . ."[151]

The *McDonald* court reasoned that the weight of these combined procedures, available through the Service and the Social Security Administration, "do not admit of a third approach, under which employees and employers would litigate benefit and taxation issues outside the statutory structure and without the presence of the agencies created by Congress to administer this complicated system."[152] In the court's view, allowing such private lawsuits would interfere with the framework and procedures that Congress established.[153]

Finally, the court concluded, although implying a private right of action might not "offend basic principles of federalism" (the fourth *Cort* factor), Congressional intent clearly precludes the implication of a private right of action making it unnecessary to "trudge through all four" *Cort* factors.[154]

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147. *Id.*

148. *Id.*

149. *McDonald*, 721 F.3 at 725 (citing 26 U.S.C. § 6511(a)).

150. *Id.* (citing 28 U.S.C. § 1346(a)(1)).

151. *Id.* (citing 42 U.S.C. § 405(c)(4)-(5) "This mechanism is superintended by the Social Security Administration, the largest adjudicatory body on the face of the earth, and provides the safeguards of an adversary hearing before a professional Administrative Law Judge and eventual judicial review."). *Id.* (quoting Salazar v. Brown, 940 F. Supp. 160, 164 (W. D. Mich. 1996)) (internal quotations omitted).

152. *Id.* at 725-26.

153. *McDonald*, 721 F.3d at 726.

154. *Id.* (quoting Liberty Nat'l Ins. Holding Co. v. Charter Co., 734 F.2d 545, 558 (11th Cir. 1984)) (internal quotations and punctuation omitted).

2. *Salazar v. Brown*

Further persuasive authority that a private right of action does not exist for a plaintiff's FICA claim is *Salazar v. Brown*.[155] In *Salazar*, the plaintiffs were agricultural workers.[156] Despite signing a one-page contract acknowledging that they were an "independent contractor," the workers asserted that they were employees, not independent contractors, and sought to compel compliance with FICA.[157] The workers requested a declaration that the employer had violated FICA and an injunction directing defendant to file appropriate tax returns and remit the employer's "share" of FICA taxes due on the workers' earnings.[158]

The *Salazar* court held that, in light of the comprehensive enforcement systems that Congress expressly created for both Social Security and FICA obligations, the *Sea Clammers* Doctrine foreclosed the implication of a private cause of action under FICA.[159] The *Salazar* court fully discussed the comprehensive enforcement system that exists for FICA in its analysis of Congressional intent under the second prong of *Cort v. Ash*.[160] The *Salazar* court referenced in detail the "complicated and interrelated system of statutes and regulations that make up the federal social welfare program" under the SSA and the Code.[161] The *Salazar* court also pointed to the extensive administrative provisions of the SSA and the Code for proper crediting of an employee's wage records.[162] Finally, the court pointed to the criminal and civil penalties under the IRC that exist to enforce both FICA and FUTA.[163] Implicit in the court's analysis is the simple fact that the sheer scope of administrative remedies available to employees and the government weigh against finding an implied right of action. Why else would Congress be silent on the issue of such private rights, but go to such great lengths to provide a wide range of administrative remedies?

Moreover, the *Salazar* court specifically addressed the flaws of the *Sanchez* court's rationale, as discussed above, in light of various Sixth

155. 940 F. Supp. 160 (W.D. Mich. 1996).

156. *Id.* at 161.

157. *Id.* at 161-62.

158. *Id.* at 162.

159. *Salazar*, 940 F. Supp. at 164.

160. *Id.* at 164-65.

161. *Id.* at 162.

162. *Id.* at 164.

163. *Salazar*, 940 F. Supp. at 163-64.

Circuit cases addressing the *Sea Clammers* doctrine.[164] The court specifically held that the comprehensive enforcement systems that Congress expressly created for both Social Security and FICA obligations provides clear evidence that Congress provided precisely the remedies it considered appropriate. In so holding, the court noted that "[C]ongress has passed thousands of amendments to the Social Security Act and the Internal Revenue Code, virtually on a yearly basis, without once creating a private right of action."[165]

3. *McElwee v. Wharton*

Another case that supports the proposition that a private cause of action does not exist under FICA, particularly in a FICA misclassification case, is *McElwee v. Wharton*.[166] This decision foreclosed yet another mechanism for relief through the FICA statute. The employee, a sales representative for various Bibles and religious books,[167] sought to proceed on an equitable theory of recovery (tax restitution), rather than under the FICA statutes.[168] The court, however, reasoned that the rationale of *Salazar* applies equally in a restitution claim.[169] Thus, in granting the employer's motion to dismiss, the court held that there was no need to recognize a new equitable theory of recovery where the employee has other remedies available.[170] Of the specific remedies available, the court listed: (1) administrative action under the SSA if the mischaracterization affects rights to retirement benefits; (2) the employee may urge the Service to enforce the legal tax obligations of the employer; and (3) if the employee mistakenly paid SECA taxes which were not due, the employee may claim a refund from the Service.[171]

In addition to the above, many courts have expressed policy concerns with allowing a private right of action under FICA, or FUTA, because of the possibility for inconsistent results of actions brought by employees and the Service.[172] Moreover, the courts expressed con-

164. *Id.* at 166 (citing Cline v. Rogers, 87 F.3d 182 (6th Cir. 1996); *accord*, Local 3-689, Oil. Chem. & Atomic Int'l Union v. Martin Marietta Energy Sys., Inc., 77 F.3d 131, 134 (6th Cir. 1996); Bailey v. Johnson, 48 F.3d 965, 968 (6th Cir. 1995)).

165. *Id.* at 166.

166. 19 F. Supp. 2d 766 (W.D. Mich. 1998).

167. *Id.* at 768.

168. *Id.* at 770.

169. *Id.* at 771.

170. *McElwee*, 19 F. Supp. 2d at 771.

171. *Id.*

172. *See, e.g., Salazar*, 940 F. Supp. at 167.

cern over the impact on judicial efficiencies and the Service's administrative process.

Courts finding no private right of action under FICA cite the complexity of the statute and its administrative remedies (along with those of the SSA), and note its function as a means of generating revenue apart from the SSA to emphasize that it was not designed for the "especial benefit" of a person. In light of the courts' focus on Congressional intent, it is important to highlight the system that Congress created for FICA's administration. The following section contains a review of the statutory framework of FICA and discusses the administrative relief provisions for worker misclassification issues.

IV. LEGISLATIVE FRAMEWORK

A. *FICA and Social Security*

The Social Security Act[173] was enacted in 1935 as part of an extensive program of retirement, unemployment, and welfare benefits for qualifying individuals who were unemployed or unable to work. Today, the progeny of those original programs include old-age, survivor and disability insurance benefits, as well as hospital insurance benefits for the aged and disabled. Those programs are financed primarily from taxes that employers, employees and the self-employed pay under the provisions of FICA[174] and SECA.[175] Unemployment insurance benefits are financed solely from taxes imposed on employers under the provisions of the Federal Unemployment Tax Act ("FUTA").[176] The Service collects each of these taxes.[177]

B. *Federal Insurance Contributions Act*

FICA measures the amount of wages paid with respect to employment in order to impose a tax on employees and employers.[178] FICA is composed of two elements: (1) old-age, survivor and disability insurance ("OASDI"); and (2) hospital insurance ("HI"). OASDI taxes

173. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935); *see also* Helvering v. Davis, 301 U.S. 619 (1937) (holding the SSA to be constitutional.

174. Federal Insurance Contributions Act, I.R.C. § § 3101-3128 (1986) (amended 2000) (§ 3113 repealed 1976).

175. Self-Employment Contributions Act, I.R.C. § § 1401-1403 (1986) (amended 1997).

176. Federal Unemployment Tax Act, I.R.C. § § 3301-3311 (1986) (amended 2002).

177. *Id.*

178. § 3101(a), (b); § 3111(a), (b); *see also* § 3121 (defining "wages" and "employment"). Employment is defined for FICA purposes as "any service, of whatever nature . . ." § 3121(b). An employee, not an independent contractor, must perform the service. § 3121(d) (listing several categories of employees). Tax Management Portfolio (BNA) 391-3d T.M. at A-1 (2001).

are used to fund retirement and disability benefits. HI taxes are used to provide health and medical benefits for the aged and disabled.[179]

1. Computing FICA Tax

The tax rate in effect at the time that the employee's wages are "received" is used to compute the employee portion of FICA tax. The rate in effect at the time that wages are "paid"[180] is used to compute the employer's portion of the tax. An employee 'receives' wages at the time the employer pays them to the employee. The employer 'pays' wages when they are actually or constructively paid to the employee.[181]

2. Collection and Liability for FICA Tax

Employers deduct the tax from the wages of each employee at the time of payment to collect the employee portion of the FICA tax.[182] An employer is liable for the employee portion of the tax (in addition to the employer portion of the tax) regardless of whether the tax is collected from the employee.[183] If the employer withholds less than the correct amount or fails to withhold any part of the tax, the employer is nevertheless liable to the government for the correct amount.

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179. Since 1990, the employer and employee OASDI and HI taxes have equaled 6.2% and 1.45%, respectively.

180. Federal Insurance Contributions Act, I.R.C. § § 3101, 3111 (1986) (amended 1987); *see* Algie v. RCA Global Communications, Inc., No. 89 CIV. 5471, 1995 WL 606096, at *1 (S.D.N.Y. Oct. 12, 1995).

181. Tax Management Portfolio (BNA) 391-4th T.M. at A-2 (2001).

182. Federal Insurance Contributions Act, I.R.C. § 3102(a) (1986) (amended 1994). The employer is required to collect and pay the tax in cash, even if the employee is compensated in a form other than cash. Treas. Reg. § 31.102-1(a); *see also* Rev. Rul. 81-222, 1981-2 C.B. 205 (FICA taxes on meals and lodging were deducted from the employee's cash wages). Termination of an employee does not relieve the employer of its liability to collect the tax on any wages paid subsequent to the termination. Rev. Rul. 68-492, 1968-2 C.B. 417; Rev. Rul. 71-525, 1971-2 C.B. 356; *see also* Otte v. United States, 419 U.S. 43 (1974) (trustee in bankruptcy was required to withhold FICA taxes on wages even though the employment relationship between the bankrupt employer and the employee had terminated).

183. § 3102(b). The employee is also liable for the employee portion of the tax until it is collected from him. Treas. Reg. § § 31.3102-1(c), 31.3102-1(c); *see also* Navarro v. United States, 72 A.F.T.R.2d 93-5424 (W.D. Tex. 1993) (holding Service not required to first seek payment from employer for employee's share of FICA taxes); Ford v. Troyer, 25 F. Supp. 2d 723 (E.D. La. 1998) (holding employee has private right of action against former employer alleging wrongful classification as independent contractor insofar as claims relate to failure to withhold FICA and FUTA taxes, but not for failure to withhold income taxes). *See* McDonald v. S. Farm Bureau Life Ins. Co., No. 01-15648, 2002 U.S. App. LEXIS 9110 (11th Cir. May 13, 2002) (holding FICA creates no implied private cause of action for individual to sue alleged employer to compel payment of tax).

An employer's liability for the employee portion of the Social Security tax is generally determined under §3102(b).[184]

Withholding FICA taxes forms a trust fund. The individuals within a company responsible for withholding, accounting for, and paying over the trust fund to the government can be held personally liable for the unpaid amounts under §6672.[185]

C. *Self-Employment Contributions Act*

SECA imposes a tax on the "self-employment income" of individuals.[186] As a self-employed person, an independent contractor pays for his own "social security" in the form of self-employment taxes.[187] Section 1402(b) defines "self-employment income" as "net earnings from self-employment," less wages subject to withholding.[188] Section 1402(a) defines "net earnings from self-employment," subject to certain exceptions and exclusions, as business gross income less deduc-

184. I.R.C. § 3509 (1986) (amended 1990) limits the employer's liability for collecting and paying the employee portion of the tax if the failure is due to the employer's treatment of the individual as an independent contractor. Under this exception to the general rule, the employer's liability for the employee's share of the social security tax is limited to 20% of the applicable employee tax, provided the employer has filed all information returns required of the employer in a manner consistent with the employer's treatment of the individual as an independent contractor. The employee's liability for the employee portion of the tax is not affected by the employer's liability under § 3509. Rev. Rul. 86-111, 1986-2 C.B. 176. *See also* Navarro v. United States, No. EP-92-CA-375-B, 1993 WL 291381 (W.D. Tex. June 23, 1993) (IRS not required to first seek payment from employer for employee's share of FICA taxes). Tax Management Portfolio (BNA) 391-4th T.M. at A-2 (2001).

185. *See, e.g.*, Byrd v. U.S., 631 F.2d 1158 (5th Cir. 1980).

186. SECA tax is assessed according to rates set forth in I.R.C. § 1401(a) (1986), relating to OASDI, and I.R.C. § 1401(b) (1986), relating to HI.

187. I.R.C. § 1401 (1986) (amended 1990). The self-employed rate has been 15.3% since 1989. *Id. See also* Briant v. Comm'r, 44 T.C.M. (CCH) 472 (T.C. 1982). Self-employment income subject to tax is determined by an individual's net earnings from a trade or business carried on as a sole proprietor or by a partnership of which he or she is a member. If an individual is engaged in more than one trade or business, net earnings from self-employment consist of the aggregate of the net earnings from all such trades or businesses. Treas. Reg. § 1.1402(a)-2(c) (1974). Every self-employed United States citizen and resident alien with net earnings from self-employment of $400 or more is liable for self-employment taxes, even if there is otherwise no liability to file an income tax return. I.R.C. § 6017 (1986).

188. Self-Employment Contributions Act, I.R.C. § 1402(b) (1986) (amended 1993). If, however, the net earnings from self-employment are less than $400, no tax is due. § 1402(b)(2). An individual's net earnings from self-employment is not subject to the OASDI portion of SECA tax to the extent that net earnings exceed the OASDI taxable wage base in effect for the calendar year in which the individual's taxable year begins, minus the amount of any wages paid to the individual during the taxable year. § 1402(b)(1). All net earnings from self-employment received are subject to the HI portion of SECA taxes. § 1402(b)(1) (referring to the "contribution and benefit base").

tions plus the taxpayer's distributive share of partnership income and losses.[189]

The definitions of "wages" and "employee" for SECA tax purposes exclude those parties not subject to tax—employees. A self-employed person pays an amount equal to the employee portion, plus the employer portion of employment taxes. However, the self-employed worker is allowed to deduct one-half of the SECA taxes either in computing the individual's self-employment earnings subject to SECA tax, or for purposes of arriving at his federal adjusted gross income.[190]

As discussed above, the application of FICA and SECA creates considerable tax ramifications. Application of either FICA or SECA is dependent on the issue of worker classification. In light of the significant liabilities under FICA and SECA arising out of misclassification, Congress and the Service created various forms of administrative relief. The following section discusses those relief mechanisms.

V. ADMINISTRATIVE RELIEF: SOLUTIONS FOR MISCLASSIFICATION

A. *Section 530 Relief*

Whether a worker is classified as an employee, whose employer is responsible for remitting FICA taxes to the federal government, or an independent contractor, who himself is responsible for remitting SECA taxes, has been a widely litigated issue. Congress attempted to remedy this problem through the enactment of a safe harbor relief statute, codified as §530 of the Revenue Act of 1978.[191]

The purpose of §530 is twofold: (1) it provides employers relief from the financial burden associated with the Service's re-classification of workers, including the attendant costs of litigation; and (2) it spares the Service from having to issue additional rulings and regulations on the issue.[192] An employee's compliance with certain tests

189. Section 1402(a) defines the term 'net earnings from self-employment' as: (a) gross income derived from a trade or business, less allowable deductions attributable to such trade or business; plus (b) an individual's distributive share (whether or not distributed) of the net income or loss from any trade or business carried on by a partnership of which the individual is a member. I.R.C. § 1402(a) (1986) (amended 1990). A taxpayer need not personally be active in managing or operating a trade or business to be subject to self-employment taxes. If, however, the taxpayer is not actively involved, the trade or business must have been carried out on his behalf through his agents or employees, or constitute his distributive share of income from a partnership of which he was a member. Treas. Reg. § 1.1402(a)-2(b) (1974), 1.1402(c)-1 (as amended 1968).

190. *See* I.R.C. § 164(f) (1986); § 1402(a)(12).

191. Revenue Act of 1978, Pub. L. No. 95-600, § 530, 92 Stat. 2763 (1978). Tax Management Portfolio (BNA) 391-3d T.M. at A-1 (2001).

192. H.R. REP. NO. 95-1800, at 271 (1978). Section 530's prohibition against reclassification by the Service does not affect a worker's status. It only acts to relieve the employer from the

under §530 lets the employer avoid having to demonstrate the appropriate status of its workers, either under statutory provisions or common law rules, and escape re-classification.[193]

Section 530 is strictly an employer's relief statute—it is not available to workers.[194] The number of businesses that can qualify for relief under §530 is limited. Section 530's requirements are difficult to meet. Taxpayer-employers must meet three tests in order to avoid such liability: (1) a "reasonable basis" for treating the worker as an independent contractor; (2) the filing of all required federal tax returns on a basis consistent with an independent contractor classification; and (3) treatment consistent with the treatment that took place for substantially similar positions.[195] Courts generally treat the issue of whether the requirements of §530 have been met as a question of fact.[196] Employers have the burden of proof.[197]

1. Reasonable Basis Test

An employer meets the 'reasonable basis' test for treating the worker as an independent contractor if the employer placed reasonable reliance for the action upon at least one of the following:

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effects of reclassification. In Hope Network v. United States, No. 1:98-CV-771, 2000 WL 637321 (W.D. Mich. Feb. 16, 2000), the court held that the IRS did not violate § 530(b) of the Revenue Act of 1978 by issuing private letter rulings, because § 530(b) only applies to regulations or revenue rulings, and not to private letter rulings, which may not be used or cited as precedent. *Id.* at 4. Tax Management Portfolio (BNA) 391-3d T.M. at A-1 (2001).

193. *See* Gen. Inv. Corp v. United States, 823 F.2d 337 (9th Cir. 1987).

194. Ahmed v. United States, 147 F.3d 791 (8th Cir. 1998) (holding that a university hospital's medical residents could not rely on § 530 relief provisions to seek refunds of FICA taxes withheld from their stipends).

195. The consistent treatment requirement as well as the tax return filing requirement both apply to periods beginning after 1977. In the early days of § 530, this was an important qualification. It no longer comes into play very often. Tax Management Portfolio (BNA) 391-3d T.M. at A-1-A-9 (2001).

196. *See, e.g.,* 303 W. 42nd St. Enters., Inc. v. IRS, 181 F.3d 272 (2d Cir. 1999), *rev'g and remanding* 916 F. Supp. 349 (S.D. N.Y. 1996); Burgess v. United States, 75 A.F.T.R.2d (RIA) 1641 (D. Nev. 1995); World Mart, Inc. v. United States, Nos. Civ 90-1596-PHX-EHC to CIV 90-1600-PHX-EHC, 1992 WL 495194 (D. Ariz. Dec. 15, 1992).

197. Employers must demonstrate by a preponderance of the evidence that relief under § 530 should be granted. Boles Trucking, Inc. v. United States, 77 F.3d 236 (8th Cir. 1996) (holding the burden of proof was on the employer to show, by a preponderance of the evidence, that there was a reasonable basis for treating workers as independent contractors, thus entitling the employer to § 530 relief); *accord* Dains v. IRS, 149 F.3d 1182 (6th Cir. 1998). *But see* REAG, Inc. v. United States, 801 F. Supp. 494 (W.D. Okla. 1992).

a. Decision

The employer is entitled to rely on judicial precedent, or published rulings, or a technical advice memorandum with respect to the employer, or a letter ruling issued to the employer.[198]

b. Past Audit

Employers are entitled to rely on a past Service audit of the taxpayer in which there was no assessment of employment tax deficiencies for amounts paid to individuals holding positions substantially similar to the employee's position.[199] At the commencement of an audit, the Service must provide the employer with written notice of the provisions of §530.[200] If the audit does not initially involve worker classification issues, then the Service must be given notice at the time the worker classification issue is first raised.[201]

c. Industry Custom

Employers are entitled to rely on a "long-standing," recognized practice of a "significant segment" of their industry as a reasonable basis for classification.[202] Neither the statute nor the legislative history defines "industry" for purposes of the "industry practice"[203] analysis. Under the statute, a "long-standing practice" cannot be construed as a practice that has continued for more than 10 years.[204] In other words, the Service cannot require employers to prove that a practice has lasted for more than ten years. A "significant segment"

198. Revenue Act of 1978, Pub. L. No. 95-600, § 530(a)(2)(A), 92 Stat. 2763, 2885 (1978). *See* Hosp. Res. Pers., Inc. v. United States, 68 F.3d 421 (11th Cir. 1995); Critical Care Registered Nursing, Inc. v. United States, 776 F. Supp. 1025 (E.D. Pa. 1991), *nonacq.* 1994-2 C.B. 1 (the use of letter rulings not directed to the taxpayer employer are likely to be rejected as proof of a "reasonable basis" for purposes of § 530 relief). Darrell Harris, Inc. v. United States, 770 F. Supp. 1492 (W.D. Okla. 1991) (letter ruling relied upon was not addressed to the taxpayer employer).

199. § 530(a)(2)(B), 92 Stat. 2763, 2885. *See also* Lambert's Nursery & Landscaping, Inc. v. United States, 894 F.2d 154 (5th Cir. 1990). Marlar, Inc. v. United States, 151 F.3d 962 (9th Cir. 1998), *remanded to* No. C95-729L, 1999 WL 1103010 (W.D. Wash. May 18, 1999) (granting relief to the owner of an entertainment club where, on previous audit of the taxpayer, the Service approved of the treatment of dancers as lessees, not employees).

200. H.R. REP. No. 104-737, at 13 (1996).

201. H.R. REP. No. 104-737, at 13-14.

202. §530(a)(2)(C), 92 Stat. 2763, 2886.

203. *See* Gen. Inv. Corp. v. United States, 823 F.2d 337, 340 (9th Cir. 1987) (permitting avoidance of employer tax liability for mining workers of a small mining concern on the basis of the taxpayer's comparison of his employment tax treatment of such workers with the treatment afforded such workers by other small mining concerns in the taxpayer's county).

204. H.R. REP. No. 104-737, at 13-14. Section 530 does not require a length of ten years, but precludes a court or the Service from requiring a length longer than 10 years.

of the taxpayer-employer's industry means no more than 25% of the industry.[205] What an industry standard may be and how an industry may classify certain workers are questions of fact.[206]

d. Other Reasonable Basis

If the employer is unable to rely on a previous decision, a past audit, or cannot prove his reliance on the requisite level of industry practice, the employer may obtain §530 relief "if the taxpayer can demonstrate, in some other manner, a reasonable basis for not treating the individual as an employee."[207] An additional manner of proving 'reasonable basis' is reliance on professional advice.[208]

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205. S. REP. NO. 104-281, at 26 (1996). An employer cannot be required to show more than 25% of the industry.

206. Deacon Drywall, Inc. v. United States, No. 3:CV-92-1357, 1994 WL 486872 (M.D. Pa. Mar. 24, 1994). Questions of fact generally fall into three categories: (1) geographical areas; (2) occupations; and (3) reliance by taxpayer-employers. Taxpayer-employers must do more than simply testify in order to meet their burden. *In re* McAtee, 115 B.R. 180 (N.D. Iowa 1990). § 530 requires that in order to demonstrate a reasonable basis for the tax treatment, a taxpayer-employer must prove that a "significant segment" of the industry follows a particular practice – not that the entire industry follows that practice. *Gen. Inves. Corp.*, 823 F.2d at 340. The practice in a given industry need not be uniform in order for the taxpayer to demonstrate that individuals should not be deemed employees. H.R. REP. NO. 95-1748 (1978); *see also* Tech. Adv. Mem. 86-40-004 (June 16, 1986) (requiring that any industry practice be 'legitimate'). Some courts require an employer to rely on the industry practice for the treatment of workers in order to support a 'reasonable basis' claim. W. Va. Pers. Servs., Inc. v. United States, No. 2:94-0604, 1996 WL 679643 (S.D. Wa. Va. Sept. 16, 1996). In Options for Senior Am. Corp. v. United States, 11 F. Supp. 2d 666 (D. Md. 1998), the taxpayer employer was granted summary judgment upholding its claim to § 530 relief for treating its non-skilled home health care aides as independent contractors. The taxpayer-employer surveyed twenty to thirty competitors in the District of Columbia. *Id.* at 668. 80% of the competitors stated they treated the aides as independent contractors; 10% treated them as employees; and the remaining 10% did not respond to the taxpayer-employer's survey. *Id.* The court treated the 80% as a 'significant segment' of the industry. *Id.* at 669; *accord* McClellan v. United States, 900 F. Supp. 101 (E.D. Mich. 1995).

207. Rev. Proc. 85-18, 1985-1 C.B. 518. *See also In re* Rasbury, 130 B.R. 990 (Bankr. N.D. Ala. 1991), *aff'd*, 141 B.R. 752 (N.D. Ala. 1992). H.R. REP. NO. 95-1445, at 271 (1978) (describing Congressional intent in enacting § 530).

208. In Smoky Mountain Secrets, Inc. v. United States, 910 F. Supp. 1316 (E.D. Tenn. 1995), a food company treated its telemarketers and delivery persons as independent contractors. The company treated its home office staff, its warehouse workers, its office managers, its regional managers, and its corporate officers as employees. *Id.* at 1318. The president consulted the company's CPA as well as his personal CPA concerning a then-new provision of the Code, § 3508, to determine that section's application to the company's classification of its telemarketers and delivery persons. *Id.* at 1319. The purpose of § 3508 was to ensure independent contract classification for certain 'direct sellers' and persons involved in the real estate business. *Id.* at 1321 (citing STAFF OF JOINT COMM. ON TAXATION, 97TH CONG., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982 382 (Comm. Print 1982)). Both CPAs concluded that the telemarketers and delivery persons were being properly treated as independent contractors for § 3508 purposes. *Id.* at 1321. The *Smokey Mountain* Court stated that reliance on the CPAs' advice established a 'reasonable basis' under § 530 for the independent contractor treatment accorded the workers. *Id.* at 1323. The court explained that, whether the CPAs were right or wrong, the company was entitled to rely on their advice for the reason that most taxpayers are not competent to determine whether professional

2. Tax Return Test

In order to obtain Section 530 relief, a taxpayer-employer must next pass the Tax Return Test. This test requires that all federal tax returns be filed on a basis consistent with the taxpayer's treatment of the worker as an independent contractor.[209] An employer's failure to file IRS forms 1099, reporting the payments to workers treated as independent contractors, is fatal to a claim for §530 relief.[210] It is up to the taxpayer-employer to prove that the IRS forms 1099 were filed.[211]

3. Position Test

Section 530 relief requires that, in order to obtain classification as an independent contractor, the taxpayer-employer, as well as its predecessors, has not treated any worker holding a substantially similar position as an employee.[212] This "Position Test" requires consistency in how workers are treated.[213]

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advice, such as that of an accountant or an attorney, is erroneous. *Id.* at 1324. The court further reasoned that it would be overly burdensome to require taxpayers to monitor or verify a professional's opinion since it would "nullify" the reason for seeking such advice in the first instance. *Id.* (citing United States v. Boyle, 469 U.S. 241, 251 (1985)). *But see* United States v. Arndt, 201 B.R. 853, 860 (M.D. Fla. 1996) (stating that "an accountant's advice is not the type of 'technical advice' that can serve as the basis upon which a taxpayer can reasonably rely."). In other cases, proof of a 'reasonable basis' for § 530 relief is determined based on an analysis of common law factors. *See* Rev. Rul. 82-83, 1982-1 C.B. 151; Am. Inst. of Family Relations v. United States, No. CV 72-1402-WMB, 1979 WL 1347, at *1 (C.D. Cal. Feb. 22, 1979).

209. Revenue Act of 1978, Pub. L. No. 95-600, § 530(a)(1)(B), 92 Stat. 2763, 2885.

210. Murphy v. United States IRS, No. 93-C-156-S, 1993 WL 559362, at *2 (W.D. Wis. Oct. 22, 1993). But if the taxpayer employer has filed the required returns for some periods and not for others, § 530 relief will still be available for the periods for which the required returns were filed. *In re* Bentley, 175 B.R. 652 (Bankr. E.D. Tenn. 1994).

211. Prince Cable, Inc. v. United States, No. Civ.A. 96-516 LON, 1998 WL 419979, at *6 (D. Del. Apr. 9, 1998) (finding that all the IRS has to do is deny receipt).

212. §530(a)(3), 92 Stat. 2763, 2886. The Chief Counsel's Office stated that, in addition to not treating an individual as an employee for any period, § 530 relief is only available if all federal returns required to be filed by the taxpayer with respect to the individual for the period were filed on a basis consistent with the taxpayers treatment of the individual as not being an employee. I.R.S. Field Serv. Advisory 200129008 (July 20, 2001). The requirement applies to predecessors in order to prevent evasion through the use of business reorganizations. Rev. Proc. 85-18, 1985-1 C.B. 518. *See* Smith v. United States (*In re* Smith), No. 94-01463, 1993 WL 164415 83 (Bankr. D. Haw. Jan. 28, 1999), *aff'd on other grounds*, 243 B.R. 89 (D. Haw. 1999); *In re* Super Van, Inc., 71 F.3d 877 (5th Cir. 1995).

213. In Leb's Enters., Inc. v. United States, No. 97 CV 4718, 2000 WL 139551 (N.D. Ill. Jan. 26, 2000), the court denied § 530 relief to a vehicle transportation company. The taxpayer-employer had two sets of driver-shutters. *Id.* at 1. One group worked under the taxpayer employer's contract with Illinois Bell. *Id.* The other worked under the taxpayer employer's contract with Alamo. *Id.* Most of the Illinois Bell and Alamo workers were treated as employees. *Id.* However, when a worker was assigned to some other customer's place of business, the taxpayer-employer treated those workers as independent contractors. *Id.* at 2. The taxpayer-employer argued that it treated a worker as an employee or as an independent contractor

B. *Classification Settlement Program*

The Service has established a special Classification Settlement Program ("CSP") to allow taxpayer-employers and examining agents to resolve worker classification issues.[214] Under the CSP, if an examining agent determines that the taxpayer-employer may have erroneously classified a worker as an independent contractor, the agent will determine whether the taxpayer may be eligible for relief under §530. The Service may determine that the taxpayer is eligible for a CSP settlement offer based on the agent's evaluation if the taxpayer-employer agrees to classify its workers as employees prospectively. If the taxpayer has filed all returns consistent with the treatment of the workers in issue as independent contractors (Tax Return Test), but failed to consistently treat either the workers in issue or substantially similar workers as independent contractors (Position Test), or lacks a reasonable basis for treating the workers as independent contractors (Reasonable Basis Test), the CSP offer will consist of a full employment tax assessment for the one taxable year under examination. If the taxpayer meets the Tax Return Test, and has a colorable argument that it meets the Position Test and the Reasonable Basis Test, the Service offer will include an assessment of 25% of the employment tax liability for that year. If, however, the taxpayer clearly meets all three of the tests, no assessment is made and the taxpayer may choose to continue treating its workers as independent contractors.[215]

The preceding section reviewed administrative relief provisions designed to resolve the threshold issue in implied right of action cases under FICA—worker classification. In order to conduct an effective Congressional intent analysis, as *Cort v. Ash* and *Sea Clammers* require, it is necessary to review both the scope of administrative relief and the comprehensive enforcement system discussed in *McDonald* in light of tax policy considerations and a review of the proper role of the judiciary.

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depending on that worker's duties and level of supervision. *Id.* at 4. The taxpayer-employer pointed to the way the worker's time was tracked, the various tasks a driver who was an employee might be asked to perform, and the fact that the employees were guaranteed a minimum of eight hours per day, whereas the independent contractors were paid specific rates for specific jobs, with no time guarantees. *Id.* The court ignored most of the factors, explaining that it must look at the job performed, not the relationship between the workers and the taxpayer. *Id.* The court emphasized that the workers need not perform identical job duties, just "substantially similar" job duties. *Id.* Based on cases such as *Leb's*, taxpayer-employers must prove that the duties of all similar positions are substantially the same for all similar positions.

214. The CSP was established effective March 5, 1996, for a two-year trial period, and then indefinitely extended in Rev. Proc. 98-21, 1998-15 I.R.B. 14.

215. In this latter situation, the taxpayer may, at its option, prospectively treat the workers as employees. Tax Management Portfolio (BNA) 391-3d T.M. at A-1 (2001).

VI. ANALYSIS

A. *Applying the Sea Clammers Doctrine*

There is a spectrum of possibilities as to when courts should imply a private right of action. Professor Stabile, a leading scholar in this area, points to the following "continuum":

> (1) a private right of action exists for every violation of federal law;
> (2) a private right of action impliedly exists for every violation of federal law absent contrary congressional intent;
> (3) an analysis of some set of factors . . . determines whether there is an implied cause of action;
> (4) congressional intent creates a rebuttable presumption in either direction: either a private right of action presumptively exists if there is congressional intent in favor of one, which presumption may be overcome by other factors against implication; or, in the absence of congressional intent, a presumption against the existence of an implied right of action, which presumption may be overcome by other factors mitigating in favor of implication;
> (5) no private right of action exists in the absence of clear evidence of legislative intent to create one; and
> (6) no private right of action exists unless the statute in question expressly provides one.[216]

Courts have gravitated towards the center of this spectrum, sacrificing the certainty of either end for the middle ground and choosing Congressional intent as the preeminent factor. Although they have purportedly applied the same *Cort v. Ash* analysis to FICA, the courts have generally been inconsistent in their results (effectively ruling all along the spectrum). This mixed bag of results is a product of the courts' difficulty in applying a uniform standard for determining Congressional intent—Why is determining Congressional intent so difficult?

There are a number of recognized means for determining Congressional intent regarding an implied right of action. One indication of Congressional intent is "context," or the prevailing understanding of substantive law on the part of Congress and the courts when the statute was enacted. In other words, when Congress enacted the statute, did it view it as necessary to explicitly include a right of action or did it view the courts as having the authority to imply such a right?[217] In the case of FICA, however, such an indication of intent is not very helpful

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216. Stabile, *supra* note 34, at 876.

217. Stabile, *supra* note 34, at 88-88 (citing Thompson v. Thompson, 484 U.S. 174, 180 (1988) (considering the status of custody orders under the full faith and credit doctrine at the time of passage of the Parental Kidnapping Prevention Act); California v. Sierra Club, 451 U.S. 287, 295

since the very determination of "context" in this instance is necessarily based on a subjective decision as to whether Congress viewed FICA solely as a revenue statute or as part of a broader Social Security program. Further, FICA and its attendant regulations have been amended with some frequency. In the absence of a static "context," such an analysis is of dubious value.

Another indication of Congressional intent asks whether the creation of a private right of action is necessary to effectuate Congress' goals in enacting the statute in question and whether it is consistent with Congress' purpose.[218] FICA is, by itself, solely a revenue act. Implying a private right of action to assist a taxpayer in recovering a tax that has already been paid appears to serve little purpose.

Since FICA's legislative history is silent on the matter, courts are left without any firm indication of Congressional intent, save what affirmative steps both Congress and the Service have taken to administer that statute. The *Sea Clammers* doctrine examines the nature of those affirmative steps (*e.g.*, a comprehensive enforcement system) as the best indication of Congressional intent.

Application of the *Sea Clammers* doctrine forecloses private rights of action where the existence of a comprehensive enforcement system evidences Congressional intent. When a statute contains a comprehensive remedial scheme including an integrated set of enforcement mechanisms, a court should presume that Congress deliberately omitted any additional remedies. A court should not imply any private rights of action that the statute does not specifically authorize. Such conduct clearly violates the spirit of the *Sea Clammers* doctrine and forecloses the application of Professor Stabile's "continuum".

As the *McDonald* court stated, FICA's legislative history "is completely devoid of any indication that private lawsuits . . . were even briefly contemplated by Congress."[219] Again, individually, FICA is a tax assessment statute designed to raise revenue.[220] Taxpayers have a number of remedies available to them through the Service and the Social Security Administration.[221] In addition to the remedies that the *McDonald* court described, both Congress and the Service have created administrative mechanisms designed to remedy the threshold issue of worker classification under §530 and the CSP.

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n.7 (1981); United States v. Wise, 370 U.S. 405, 411 (1962) (stating courts construe statutes with reference to the circumstances existing at the time the statute is enacted)).

218. Stabile, *supra* note 34, at 898 (citing Piper v. Chris-Craft Indus., 430 U.S. 1, 25 (1977)).

219. *See* McDonald v. S. Farm Bureau Life Ins. Co., 291 F.3d 718, 724 (11th Cir. 2002).

220. *See id.* at 723.

221. *See id.* at 725-26.

While the sheer weight and scope of remedies described in *McDonald* appear to satisfy an intuitive sense of fairness—How will courts determine whether government administration of a statute constitutes a "comprehensive" (or "elaborate" as the *Sea Clammers* court uses) enforcement system in the future? What enforcement system is sufficiently "comprehensive" or "elaborate" to satisfy the *Sea Clammers* doctrine?

Quoting *Salazar*, the *McDonald* court noted that aggrieved workers could seek adjustment of their Social Security accounts before an "ajudicatory body" under the Social Security Administration.[222] According to the *McDonald* court, this administrative adjudication mechanism provides the safeguards of an adversary hearing before an Administrative Law Judge and eventual judicial review.[223] This discussion appears to be an implicit reference on the part of the *McDonald* court to some form of procedural due process.[224] Neither the *Sea Clammers* or *McDonald* courts addressed the issue of due process directly, nor did the plaintiffs in either case.[225] However, it appears safe to assume that both the Supreme Court in *Sea Clammers* and the Court of Appeals in *McDonald* were cognizant of the continuing obligation of the government to refrain from depriving the plaintiffs in those cases of their constitutionally protected procedural due process rights. Since the courts did not see fit to address the due process issue in either case, they likely considered such requirements as being satisfied.

In determining the proper approach for ascertaining Congressional intent, one must not lose sight of important policy considerations, so as to ensure that such an approach is consistent with fundamental principles of tax law. The following section discusses the implied right of action issue in light of these principles.

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222. *See id.* at 725.

223. *McDonald*, 291 F.3d at 725. The author suggests that the Service should provide a notice to both employers and employees concerning the issue of worker classification and the various right and remedies (including administrative programs such as the CSP) available to each.

224. Both the fifth and fourteenth amendments to the U.S. Constitution prohibit governmental actions depriving "any person of life, liberty, or property without due process of law." U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. The due process clauses have a procedural aspect. They guarantee that each person must be accorded certain "process" if they are deprived of life, liberty or property.

225. A full-blown analysis of the procedural due process considerations involved in the enforcement system described in *McDonald* is beyond the scope of this article.

B. *Fairness, Efficiency & Enforceability Support Application of Sea Clammers Doctrine*

1. General Principles of Fairness, Efficiency & Enforceability

A resolution of the issue of implied rights of action based on the application of the *Sea Clammers* doctrine should also support the fundamental principles of tax law: (1) fairness; (2) economic efficiency; and (3) enforceability.[226] Divided federal courts have consistently ignored these principles through the varying application of *Cort* factors and their concomitant failure to apply the *Sea Clammers* doctrine. Taxpayers have been left in the wake of such decisions to struggle with factual analogies to circumstances in which Congressional intent supporting a private right of action was found (or absent).

2. Fairness

Fairness is viewed as a principal philosophical foundation of the Code.[227] Advocates or critics of various tax proposals often invoke the fairness principle on behalf of their cause.[228] The manner in which

226. JOEL SLEMROD & JON BAKIJA, TAXING OURSELVES: A CITIZEN'S GUIDE TO THE GREAT DEBATE OVER TAX REFORM (Mass. Inst. of Tech. Press 1996). The authors state that "[f]airness in taxation, like fairness in just about anything, is an ethical issue that involves value judgments." *Id.* at 50. Whether a tax or a method of taxation is "fair" is a never-ending debate since there is no definitive standard of fairness. Sharon C. Nantell, *Federal Tax Policy in the New Millennium: A Cultural Perspective on American Tax Policy*, 2 CHAP. L. REV. 33, 82 (1999) (stating that there is no single measure of fairness because "individual value judgment is involved . . ."); *see also* Donna M. Byrne, *Progressive Taxation Revisited*, 37 ARIZ. L. REV. 739, 739-42 (1995) (analyzing the application of fairness as a justification for the redistributive role of the progressive income tax); Douglas Holtz-Eakin, *Consumption-Based Tax Reform and the State-Local Sector: A Study for the American Tax Policy Institute*, 13 AM. J. TAX POL'Y 115, 137 (1996) (stating that "[t]ax systems may be evaluated on the basis of their fairness . . ."). With regard to principles of efficiency, economists offer divergent opinions on how taxation affects prosperity. *See* Slemrod & Bakija, *supra*, at 130-33 (discussing the cost of compliance as an additional burden). This article assumes that adding greater simplicity and objectivity to the test in the form of a single adjudicatory process (as Congress intended) will reduce the monetary outlay and time spent by taxpayers and in the administration of FICA by the Service.

227. *See, e.g.*, Mona L. Hymel, *Tax Policy and the Passive Loss Rules: Is Anybody Listening?*, 40 ARIZ. L. REV. 615, 631 (1998) (citing fairness as one of seven tax policy criteria); Nantell, *supra* note 226, at 81-82 (discussing fairness as a criteria for evaluating tax systems); Alvin Warren, *Would a Consumption Tax be Fairer Than an Income Tax?*, 89 YALE L.J. 1081 (1980); Holtz-Eakin, *supra* note 226, at 137 (asserting that tax systems may be evaluated on the basis of their fairness).

228. *See, e.g., Prepared Statement of Representative Brian Baird Before the House Committee on Ways and Means*, FED. NEWS SERVICE (Fed. Info. Sys. Corp., Washington, DC), June 23, 1999 (discussing tax fairness in the context of the federal sales tax deduction); *Testimony, Olympia J. Snowe, Senator, Senate Finance Taxation and IRS Oversight Subcommittee, Small Business Tax Proposals*, FDCH Congressional Testimony (June 5, 1997) (discussing clarification of the definition of 'independent contractor' as part of the Home-Based Business Fairness Act); Hess, David, *Cell Phone Tax Bill Clears House Panel*, Committee Markups and Votes, 106 Markup

the tax law is applied on an equal and uniform basis can be used to measure 'fairness'.[229] In theory, a tax law provision should affect similarly situated taxpayers equally.[230] Non-discrimination[231] is a fairness principle that generally pervades the law.[232] The non-discrimination principle supports parity of treatment among similarly situated taxpayers.

The current division among the federal courts on the issue of implied rights of action under FICA arguably violates the non-discrimination principle, because similarly situated taxpayers (employers and employees alike) in different federal court districts or circuits[233] have faced dramatically different outcomes[234] based on a disparate application of *Cort* and *Sea Clammers*. This effectively grants to certain taxpayers more rights than others. While some might consider the expansion of available remedies to aggrieved workers to be more 'fair,' as described in greater detail below, it is not the proper role of the courts, in this instance, to provide greater remedies than Congress intended.

H.R. 4391, National Journal Group, Inc. (May 24, 2000) (discussing principles of fairness in how to avoid circumstances where consumers might have to pay two or three taxes to different state governments resulting from interstate cellular phone calls); Peterson, Molly M., *Tax 'Fairness' Bill for Workers Aboard Ships Sails Through Panel*, Committee Markups and Votes, 106 Markup S. 893, National Journal Group, Inc. (June 15, 2000) (discussing the 'Transportation Worker Tax Fairness Act,' S. 893, which, based on fairness principles, would ensure that water vessel workers receive the same tax treatment as airline and ground transportation workers).

229. *See* SLEMROD & BAKIJA, *supra* note 226 (discussing the principle of horizontal equity).

230. *See, e.g.*, Jeffrey A. Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 AM. J. TAX POL'Y 221 (1995) (discussing proposed changes to graduated or proportionate income taxation based on principles of fairness); Patrick B. Crawford, *Analyzing Fairness Principles in Tax Policy: A Pragmatic Approach*, 76 DENV. U. L. REV. 155 (1998) (discussing divergent forms of analysis in determining the basis for 'fairness'); Carl T. Reed, *Flat Tax, Fairness and Feasibility*, 6 KAN. J.L. & PUB. POL'Y 125 (1997) (discussing issues of fairness with respect to the 'flat' tax); John F. Coverdale, *The Flat Tax Is Not a Fair Tax*, 20 SETON HALL LEGIS. J. 285 (1996); Marjorie E. Kornhauser, *Equality, Liberty, and a Fair Income Tax*, 23 FORDHAM URB. L.J. 607 (1996) (describing 'a conception of equality' with respect to the income tax). In general, principles of fairness are not subject to demonstration. Reason only permits us to generate possible, and generally plausible, hypotheses and apply principles of fairness to them. Principles of fairness are also "fuzzy" and open to criticism because of their inherently subjective nature. *See generally* Crawford, *supra*.

231. *See* Crawford, *supra* note 230 (discussing non-discrimination principles as the basis for arguments in favor of a consumption-based tax).

232. *But see* Hymel, *supra* note 227, at 615, 631 n.135 (stating that fairness may violate the tax goal of simplicity). In the present case, however, the addition of another section to the Code in the form of the proposed § 263B promotes simplicity because it provides taxpayers with a "way out" of the subjectivity and complexity of the *Wells Fargo* criteria.

233. *See supra* Part III.A-B.

234. *See supra* Part III.A-B.

3. Efficiency & Enforceability

Efficiency and enforceability are fundamental principles that should be considered when reviewing a tax law.[235] As applied to private rights of action in this context, efficiency and enforceability are two sides of the same tax policy coin. Allowing a private right of action under FICA increases the possibility for inconsistent results in employee and Service-based actions. This dual system of enforcement provides taxpayers with only anecdotal guidance on how to plan their affairs. The absence of clear criteria diminishes the predictability of tax treatment and makes compliance and planning difficult for taxpayers and the Service.

The incongruity among the courts has produced an environment in which similarly situated employers and employees obtain dramatically different results in civil litigation depending on the federal district or circuit in which they reside. Uniformity of decision-making among courts is often cited as a critical issue for the proper administration of the Code. In *Briarcliff Candy Corp. v. Commissioner*,[236] the Second Circuit declared "[t]he taxpayer, who may be exposed to interest and penalties for guessing wrong, is entitled to reasonably clear criteria or standards to let him know what his rights and duties are."[237] The same can be said for the general administration of the tax and Social Security systems in the case of employment taxes. A dual system of enforcement for employment taxes – one administrative and the other judicial – would deprive taxpayers of clear criteria. Notwithstanding the confusion among the lower federal courts, the Supreme Court's own inability to agree on the nature and scope of the *Cort v. Ash* test is a testament to the difficulties of private enforcement in this arena.

Moreover, the administration of a dual system will have a negative impact on judicial efficiency. In *Sea Clammers,* Justice Stevens admitted that "a Court that is properly concerned about the burdens imposed upon the federal judiciary . . . has been more and more reluctant to open the courthouse door to the injured citizen."[238]

Finally, the administration of two competing enforcement systems simply costs more money. Presumably, taxpayers pay more to support

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235. *See supra* note 210.

236. 475 F.2d 775 (2d Cir. 1973).

237. *Id.* at 785.

238. Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 24-25 (1981) (Stevens, J., concurring in the judgment in part and dissenting in part); *see also* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 374 (1982) ("Our approach to the task of determining whether Congress intended to authorize a private cause of action has changed significantly, much as the quality and quantity of federal legislation has undergone significant change.").

both systems than they would a single system. An administrative system that specializes in adjudicating disputes in an area in which it both regulates and possesses great expertise, would also likely produce more accurate and efficient results.

C. *Congressional Intent Has its Day*

Proponents of implied rights of action argue that when a statute is created that intends to benefit a certain class of citizens, "there is reason to believe that Congress intended to afford members of that particular class the ability to privately enforce their rights."[239] As a basis for this argument, these proponents point to the tort law maxim of *ubi jus, ibi remedium* – where there is a right there is a remedy.[240] Yet, this argument has the potential to come into conflict with the respective roles of the judiciary and the legislature under our separation of powers. The recent trend in Supreme Court litigation highlights this contrast.

Over the past decade, the Supreme Court has gravitated towards the last two points of Professor Stabile's "continuum" regarding the decision to imply a private right of action.[241] Two decisions shed light on the Court's movement – *Mertens v. Hewitt Associates*[242] *and Central Bank v. First Interstate Bank.*[243]

In *Mertens*, a class of beneficiaries of a pension plan sued the plan's actuary for failing to adjust certain calculations under the pension plan to account for early retirements.[244] The Court was faced with the question of whether a non-fiduciary may be held liable for its participation in a breach of fiduciary duty that the Employment Retirement Income Security Act (ERISA) imposes[245]—Does ERISA imply a private right of action against non-fiduciaries for active participation in a breach of fiduciary duty? In interpreting the statute, the Court found that such an implied right of action did not exist.

The Court in *Mertens* found ERISA's comprehensive enforcement scheme persuasive evidence that Congress intended it to be the sole remedial avenue.[246] Although the Court did not refer to *Sea Clam-*

239. Stabile, *supra* note 34, at 897.

240. Francine J. Rosenberger, Musick, Peeler, & Garrett v. Employers Insurance: *Will the Judicial Oak See A Judicial Forest?*, 43 CATH. U. L. REV. 987, 993 (1994).

241. *See* Gen. Inv. Corp. v. United States, 823 F.2d 337 (9th Cir. 1987).

242. 508 U.S.248 (1993).

243. 511 U.S. 164 (1994).

244. *Mertens*, 508 U.S. at 250.

245. *Id.* at 249.

246. *Id.* at 254. "We emphasize[ ] our unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong

mers, its discussion of the comprehensive nature of the statute lends great support to the denial of private rights of action where such comprehensive schemes are ingrained in statutes such as ERISA and FICA.

One other point regarding *Mertens* is worth mention. Following the Court's ruling, Congress did not amend ERISA to allow for such private rights of action against non-fiduciaries.

In *Central Bank*, a bond purchaser sued the bond's trustee for its participation in the bond underwriter's fraudulent cover-up of its failure to meet a requirement of the bond covenant.[247] The purchaser alleged that the trustee violated § 10(b) of the Securities Exchange Act of 1934 in that the trustee was "secondarily liable . . . for its conduct in aiding and abetting the fraud."[248]

In surveying the Security Exchange Act's provisions regarding express causes of action, the Court found no reason to believe that Congress intended to create a private cause of action against one who aids and abets a violation.[249] Although the Court never spoke in terms of a comprehensive scheme, its discussion of the numerous express causes of action that the 1933 and 1934 Acts provide can be analogized to *Sea Clammers*.

As stated earlier, the *Sea Clammers* court concluded that where a comprehensive enforcement system exists, courts should not invent their own private remedies.[250] The ruling in *Central Bank* is simply just another way of expressing the principle—where Congress has created a laundry list of express causes of action, courts should imply other rights.

Central Bank provides a fine illustration of the role that courts and Congress play in the debate over implied rights of action. In 1998, in a possible response to the Court's failure to recognize a cause of action for aiding and abetting a violation of §10(b), Congress amended the Securities and Exchange Act to allow for a private right of action against those aiding and abetting one in violation of the Act.[251] An

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evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Id.* (quoting Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146-147 (1985)).

247. *Central Bank*, 511 U.S. at 166-167.

248. *Id.* at 168.

249. *Id.* at 179. "From the fact that Congress did not attach private aiding and abetting liability to any of the express causes of action in the securities Acts, we can infer that Congress likely would not have attached aiding and abetting liability to § 10(b)." *Id.*

250. *See supra* note 57.

251. 15 U.S.C.S. § 78t (e) (1997) (amended 2000) ("any person that knowingly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or

aggrieved investor may now bring a private right of action under §10(b).

Although it is speculative that Congress responded specifically to the ruling in *Central Bank*, the fact that such a private right of action was added to the statute illustrates that it is Congress's role to provide remedial alternatives. Congress certainly could have provided for a private cause of action against non-fiduciaries for active participation in a fiduciary breach under ERISA, stemming from the Court's holding in *Mertens*. Yet, no such private cause of action has been enacted. Thus, *Mertens* and *Central Bank* show the proper roles the courts and Congress should, and do play in interpreting and creating private causes of action.

As the next section illustrates, the Supreme Court has acknowledged these roles, under the separation of powers doctrine, in the debate over implied rights of action.

D. *Role of the Judiciary: Judicial Restraint*

Notwithstanding the policy considerations discussed above, there are additional arguments for why courts should exercise restraint in implying rights of action.

Federal courts should play a limited role in the interpretation of federal legislation and should not perform legislative functions. As Justice Powell stated in *Cannon v. University of Chicago*,[252] "the dangers posed by judicial arrogation of the right to resolve general societal conflicts have been manifest to this Court throughout its history."[253] The federal courts must be cautious to avoid violating separation of powers principles and invading the realm of legislation.

The federal courts' failure to apply the *Sea Clammers* doctrine encourages Congress to be irresponsible;[254] "Congress is encouraged to

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regulation issued under this title, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided").

252. 441 U.S. 677 (1979).

253. *Id.* at 744 (Powell, J., dissenting).

254. Justice Powell argued in Cannon v. University of Chicago, 441 U.S. 677 (1979), that judicial creation of a right of action violated separation of powers principles. He believed that in addition to encouraging Congress to act irresponsibly, the *Cort* test "too easily may be used to deflect inquiry away from the intent of Congress, and to permit a court instead to substitute its own views as to the desirability of private enforcement." *Id.* at 740 (Powell, J., dissenting). In addition, he argued that "determining whether a private action would be consistent with the 'underlying purposes' of a legislative scheme permits a court to decide for itself what the goals of a scheme should be, and how those goals should be advanced." *Id.* (Powell, J., dissenting). Similarly, in Thompson v. Thompson, 484 U.S. 174, 192 (1988), Justice Scalia stated in his concurring opinion that it was "dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor."

shirk its constitutional obligation and leave the issue to the courts to decide. When this happens, the legislative process with its public scrutiny and participation has been bypassed, with attendant prejudice to everyone concerned."[255] The Court has made it clear that if legislation is vague or incomplete, it is Congress' responsibility to remedy it, not the Court's. In *Touche Ross & Co. v. Redington*,[256] the Court stated that it should not attempt to "improve upon the statutory scheme that Congress enacted into law."[257] Separation of powers principles preclude the federal courts from assuming legislative functions. It is not proper for the Court to create rights that Congress did not intend.

Congress's lawmaking powers are superior to those of the courts. Congress can investigate facts and accommodate different viewpoints in providing rights of action.[258] In addition, the complexity of FICA and SSA legislation requires greater reliance on Congress and its role in granting authority to the executive agencies that administer those statutes. Congress provided for a single means of resolving disputes under those statutes. Judicial creation of additional causes of action or remedies may disrupt Congressional intent. In the case of FICA and the SSA, Congress created administrative agencies to implement legislation. Congress knows how to create private rights of action explicitly when it wants to.[259] When a statute provides some remedies, courts should be "chary of reading others into it."[260] Federal courts

255. *Cannon*, 441 U.S. at 743 (Powell, J., dissenting).

256. 442 U.S. 560 (1979).

257. *Id.* at 578; *accord* Univs. Research Ass'n v. Coutu, 450 U.S. 754, 770 (1981).

258. *See* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 647 (1981) (noting that legislative bodies can provide "'the kind of investigation, examination, and study that . . . courts cannot,'" and that legislative process "'involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives.'" (quoting Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980)):

> The legislature's superior resources for fact gathering; its ability to act without awaiting an adventitious concatenation of the determined party, the right set of facts, the persuasive lawyer, and the perceptive court; its power to frame pragmatic rules departing from strict logic, and to fashion a broad new regime or to bring new facts within an existing one; its practice of changing law solely for the future in contrast to the general judicial reluctance so to proceed; and, finally, the greater assurance that a legislative solution is not likely to run counter to the popular will: all these give the legislature a position of decided advantage, if only it will use it.

Henry J. Friendly, *The Gap in Law-Making – Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 767, 791-92 (1963) (footnotes omitted).

259. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 572 (1979).

260. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985) (quoting Transamerica, 444 U.S. at 19); *see also* Northwest Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 94 n.30 (1981) ("'frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute

should be cognizant of their limited role and apply the *Sea Clammers* doctrine to preclude private rights of action under FICA.

VII. CONCLUSION

Congress allocated tax liability under FICA, in part, both to employers and employees. Allocation of that liability is dependent on an employer's facts-and-circumstances judgment as to whether their workers are employees or independent contractors. Employers will sometimes err when making this determination. In such event, Congress has provided administrative relief for not only the resolution of the worker classification issue, but the resolution of the tax ramifications of such misclassification. Misclassified workers should (and do) have remedies available to rectify the negative consequences of misclassification under FICA. Proper application of the *Sea Clammers* doctrine makes clear that those remedies do not include a private right of action. A review of the tax policy considerations and the proper role of the judiciary further demonstrates that implying a private right of action under FICA would not only contravene Congressional intent, but frustrate public policies of fairness, efficiency and enforceability.

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to subsume other remedies'") (quoting Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974)).