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Tort Immunity Revisited: What is the Present Test for Statutory Employer?

Janice M. Church*

The Louisiana Workmen's Compensation Law, Louisiana Revised Statutes 23:1061, defines the statutory employer as a principal who has contracted others to perform work "which is a part of his trade, business, or occupation."¹ A principal meeting the statutory employer test shall be liable for workmen's compensation benefits to the contractor's injured employees.² Due to the exclusivity of the compensation remedy, the statutory employer enjoys the same tort immunity that actual employers enjoy under Louisiana Revised Statutes 23:1032.³

In 1986, the supreme court restricted tort immunity by defining a three-tiered test for statutory employer known as the *Berry* test.⁴ Three years later, the legislature rejected the *Berry* test by amending Louisiana Revised Statutes 23:1061.⁵ The question on every tort practitioner's mind, given the 1989 amendment, is what must be shown to prove statutory employment.

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* Special Counsel for the Baton Rouge Firm of Bell, Cooper & Hyman. Juris Doctorate degree from the University of Illinois College of Law, graduating Order of the Coif and serving as Administrative Editor of the Law Review.

1. La. R.S. 23:1061 (Supp. 1993). The statute in pertinent part provides:

Where any person . . . undertakes to execute any work, which is a part of his trade, business, or occupation . . . for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him

2. *Id.* This secondary source of workmen's compensation coverage prevents principals acting as employers from evading workmen's compensation liability through use of an intermediary contractor. *Williams v. Shell Oil*, 677 F.2d 506, 508 (5th Cir.), *cert. denied*, 459 U.S. 1087, 103 S. Ct. 570 (1982). "To this end, coverage has been liberally construed." *Id.*

3. See 1976 La. Acts No. 147, § 1. The 1976 Amendment to La. R.S. 23:1032 (Supp. 1993) was essentially a codification of the Louisiana Supreme Court's earlier decision in *Thibodeaux v. Sun Oil Co.*, 49 So. 2d 852 (La. 1950).

4. *Berry v. Holston Well Serv.*, 488 So. 2d 934, 937-38 (La. 1986). The "two-contract" defense for statutory employer immunity is not a question addressed in the instant article and was not dealt with in *Berry*. The two-contract statutory employment defense contemplates relationships among at least three entities: a general contractor who has been hired by a third party to perform a specific task, a subcontractor hired by that general contractor, and an employee of that subcontractor. For recent cases on this aspect of statutory employment, see *Duncan v. Balcor Property Management, Inc.*, 615 So. 2d 985 (La. App. 1st Cir.), *writ denied*, 617 So. 2d 936 (1993); *Freeman v. Moss Well Serv., Inc.*, 614 So. 2d 784 (La. App. 2d Cir.), *writ denied*, 618 So. 2d 413 (1993).

5. 1989 La. Acts No. 454, § 3. See also H. Alston Johnson, *Developments in the Law: Worker's Compensation*, 50 La. L. Rev. 391, 397 (1989) (maintaining the amendment was passed to reject or severely limit *Berry*).

I. THE *BERRY* TEST

In 1986, the Louisiana Supreme Court in *Berry v. Holston Well Service*⁶ interpreted Louisiana Revised Statutes 23:1061 as requiring a three-tiered method of analysis for determining statutory employment. Under the *Berry* test, the first level of inquiry involved a determination of whether the scope of the work was specialized or nonspecialized.⁷ In making this determination, the courts were to consider "whether the contract work requires a degree of skill, training, experience, education and/or equipment not normally possessed by those outside the contract field."⁸ If the contract work was considered specialized, the inquiry ended and the principal was not a statutory employer.⁹

If the contract work was found nonspecialized, the *Berry* test required a second level of inquiry comparing the nature of the principal's trade, business, or occupation with the contract work.¹⁰ *Berry's* second tier involved an evaluation of three factors:

- (1) Whether the contract was routine, customary, regular, and predictable, rather than one that required nonrecurring or extraordinary constructions and repairs;
- (2) Whether the principal had the equipment and manpower capable of performing the contract work (i.e., contract work was handled ordinarily through the principal's employees); and
- (3) Whether the practice in the industry was to contract out this type of work, rather than have the principal's own employees do the work.¹¹

Routine, customary, and predictable work that a principal customarily did not contract out and was capable of doing with his own manpower and equipment were facts supporting statutory employment; while nonrecurring, extraordinary work customarily contracted out in the industry because the principal lacked the capability of doing the work were facts defeating statutory employment. If this balancing of multiple factors indicated facts supporting statutory employment, then the court was to proceed to the third tier.

The third tier of *Berry* required a court to determine if the principal was engaged in the work at the time of the alleged accident. "In order for any person to come within the scope of the statute, he must be engaged in the enterprise at the time of the injury."¹²

6. 488 So. 2d 934 (La. 1986).

7. *Id.* at 938.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 938-39.

In sum, parts one and three of the *Berry* test are potentially determinative of the statutory employer status.¹³ If the work was specialized *per se*, or if the defendant was not actually engaged in the relevant type of work at the time of the accident, the defendant was not a statutory employer, whereas part two was a multi-factored, fact-based analysis. *Berry*'s rigid tiered approach, requiring the principal to clear all three hurdles (nick-named the "triple play"), was short lived.¹⁴

II. THE 1989 AMENDMENT

In 1989, the Louisiana Legislature added the following language to Louisiana Revised Statutes 23:1061:

The fact that work is specialized or non-specialized, is extraordinary construction or simple maintenance, is work that is usually done by contract or by the principal's direct employee, or is routine or unpredictable, shall not prevent the work undertaken by the principal from being considered part of the principal's trade, business or occupation, regardless of whether the principal has the equipment or manpower capable of performing the work.¹⁵

In other words, considerations that the work is:

1. specialized or nonspecialized;
2. extraordinary construction or simple maintenance;
3. usually done by contract or by the principal's direct employee; or
4. routine or unpredictable;

do not *ipso facto* "prevent the work undertaken by the principal from being considered part of the principal's trade, business, or occupation."¹⁶

In reality, the legislature amended the wrong statute. Louisiana Revised Statutes 23:1032 addresses the employer's tort immunity, whereas section 1061 addresses liability for workmen's compensation benefits. However, the legislature intended something by its actions. This article examines how the courts should decide statutory employer cases, given the amendment as enacted.

To begin with, many questions are raised by the amendment's choice of words. Did the amendment simply mean that the *Berry* factors apply, but that no one factor could be singly determinative of statutory employer status? Are our courts to return to the pre-*Berry* "integral part" test? Are our courts to reevaluate the pre-*Berry* jurisprudence in fashioning a test less rigid than *Berry*?

13. Wex S. Malone & H. Alston Johnson, III, *Workers' Compensation Law and Practice* § 364, at 37, in 14 Louisiana Civil Law Treatise (2d ed. Supp. 1992).

14. *Id.* at 35-36.

15. 1989 La. Acts No. 454.

16. La. R.S. 23:1061 (Supp. 1993).

The legislature never addressed these specific questions, but apparently intended "to try and bring the law back to its posture before the *Berry* decision was made."¹⁷ Accordingly, analysis of the plain language of the statutory amendment and the applicable pre-*Berry* jurisprudence are necessary in formulating the appropriate post-amendment analysis.

In reality, the 1989 amendment's language failed to expressly state any new statutory employer test, nor did the amendment expressly state that the legislature was adopting or returning to the "integral part" test, also called the essential to business test, handed down by the Louisiana Supreme Court long before *Berry*.¹⁸ The only certainty which can be gleaned from the amendment's language was the legislature's intent to eliminate the tiered nature of the *Berry* test. The legislature's failure to affirmatively state what test should govern in lieu of *Berry* is now a common issue in Louisiana courts.¹⁹

III. THE AMBIGUOUS OR UNAMBIGUOUS LANGUAGE OF THE AMENDMENT

By failing to set forth its own test within the confines of the 1989 amendment, the legislature opened the door for the trial and appellate courts to once again determine, until the supreme court speaks, what type of evidence and pertinent facts now define whether work is within the alleged principal's trade, business, or occupation. Given the demise of *Berry* and the absence of any Louisiana Supreme Court decision interpreting the 1989 amendment, the courts must examine both the statute itself and the pre-*Berry* jurisprudence interpreting the statute to determine the appropriate test.

Louisiana Revised Statutes 23:1061 defines statutory employer as a principal contracting out work "which is a part of his trade, business, or occupation."²⁰ Years before *Berry*, the supreme court held that this language required a court to determine conclusively from the evidence of record whether the services performed by the plaintiff were part of the principal's trade, business, or occupation.²¹ For example, if the plaintiff was a cement finisher doing cement finishing work on the alleged principal's premises on the date of the accident, the defendant had to prove his trade, business, and occupation was cement

17. House Committee on Labor and Industrial Relations, May 26, 1989, at 16, discussion of House Bill No. 1431.

18. See, e.g., *Thibodeaux v. Sun Oil Co.*, 40 So. 2d 761 (La. App. 1st Cir. 1949), *aff'd*, 49 So. 2d 852 (La. 1950). See, e.g., *Stansbury v. Magnolia Petroleum Co.*, 91 So. 2d 917, 919 (La. App. 1st Cir. 1957) (calling test "essential" to business).

19. In the first circuit alone, there are writs pending in *State v. C.F. Indus.*, No. 93-CW-1100 (1st Cir. 1993, writ application pending); *Picard v. Zeit Exploration*, No. 92-CW-1950 (1st Cir. 1993) (writ pending; oral argument heard November 4, 1993).

20. La. R.S. 23:1061 (Supp. 1993).

21. *Duvalle v. Lake Kenilworth, Inc.*, 396 So. 2d 1268, 1269 (La. 1981).

finishing.²² Thus, defendants could not escape liability pre-*Berry* merely by their conclusory assertions that the work was within their business.²³

Instead, the nature of the statutory employer inquiry was always grounded in fact, as determined by the circumstances of the particular case.²⁴ The factual nature of this inquiry required many reversals over the years because district courts often granted statutory employer motions too hastily.²⁵ Any present day test that fails to include a factual inquiry would mean the courts were shifting the statutory employer defense to pure legal analysis, rather than the issue of fact it has always been.

The 1989 amendment reaffirmed that a factual inquiry was pertinent by identifying four different factual considerations, none of which control the outcome of a case as they did under *Berry*. The amendment's plain language that this factor, this factor, this factor "or" this factor "shall not prevent the work undertaken by the principal from being considered part of the principal's trade" means under any dictionary reading that no single factor, listed here in the disjunctive, shall prevent, hinder, or impede the court from considering the work as within the principal's business.²⁶ In essence, the amendment "does not . . . mean that these [*Berry*] factors are not to be considered; rather it appears to mean that no single factor (such as specialized versus nonspecialized work) may be used to defeat the defense of immunity raised by the principal."²⁷ Rather,

22. *Doty v. Union Pacific R.R.*, 613 So. 2d 1094, 1096-97 (La. App. 3d Cir.), writ denied, 619 So. 2d 547 (1993) (pre-amendment accident applying the supreme court's earlier test in *Lewis v. Exxon Corp.*, 441 So. 2d 192, 197-98 (La. 1983)). See also *Freeman v. Chevron Oil Co.*, 517 F.2d 201, 206 (5th Cir. 1975) (holding Chevron's business is producing and refining oil and gas, not plaintiff's business of installing pollution control sewerage systems).

23. *Freeman*, 517 F.2d at 201; *Lewis*, 441 So. 2d at 192; *Thompson v. South Central Bell Tel. Co.*, 411 So. 2d 26 (La. 1982).

24. *Freeman*, 517 F.2d at 209; *Rowe v. Northwestern Nat'l Ins. Co.*, 471 So. 2d 226, 228 (La. 1985); *Lewis*, 441 So. 2d at 196; *Barnes v. Sun Oil Co.*, 362 So. 2d 761, 763 (La. 1978); *Lushute v. Diesi*, 354 So. 2d 179, 183 (La. 1977).

25. See, e.g., *Pierce v. Hobart Corp.*, 939 F.2d 1305, 1310 (5th Cir. 1991) (issue of fact whether services were within principal's business); *Williams v. Shell Oil Co.*, 677 F.2d 506, 510 (5th Cir.), cert. denied, 459 U.S. 1087, 103 S. Ct. 570 (1982) (issue of fact whether repairing cooling tower was part of principal's business); *Duvalle*, 396 So. 2d at 1269 (issue of fact whether pest control services were part of apartment complex owner's business); *Berry v. Brown & Root, Inc.*, 595 So. 2d 767 (La. App. 4th Cir. 1992) (issue of fact whether electrical and instrumental work to refinery met test); *Carter v. Chevron Chemical Co.*, 593 So. 2d 942, 946 (La. App. 4th Cir.), writ denied, 596 So. 2d 211 (1992) (issue of fact whether operation of load lugger and clinker hopper was within principal's trade and business); *Fountain v. Central Louisiana Elec. Co.*, 578 So. 2d 236, 239 (La. App. 3d Cir.), writ denied, 581 So. 2d 707 (1991) (electric lineman not part of business because company had policy of contracting out type and magnitude of work involved); *Seamster v. Kerr-McGee Refinery Corp.*, 488 So. 2d 1139, 1142-43 (La. App. 2d Cir. 1986) (issue of fact whether painting of refinery processing unit was part of business of crude oil processing plant).

26. The author referred to *The American Heritage Dictionary* (2d College ed.) at 873 for "or" (a disjunctive term suggesting alternatives; a singular usage when all elements in a series connected by "or" are singular); and at 982 "prevent" (adjective; hinder, impede, avert).

27. *Johnson*, *supra* note 5, at 397.

the legislature intended to reject the rigorous tiered analysis set forth in *Berry* where factors like the specialization of the work (i.e., the first step) could be determinative of the entire inquiry without any further factual consideration.

The amendment's rejection of the *Berry* tiered approach, therefore, does not necessarily indicate a rejection of the type of factual evidence considered by the *Berry* court. To the contrary, the amendment's listing of four factual considerations demands that a fact-based inquiry be conducted in cases after the amendment.²⁸

IV. THE JURISPRUDENCE SHAPING TODAY'S STATUTORY EMPLOYER TEST

In undertaking the appropriate post-amendment factual analysis, pre-*Berry* decisions illuminate which facts should or should not constitute statutory employment. For instance, the facts that a contract exists between the principal and the independent contractor and that the plaintiff was injured on its premises were never enough for the principal to make a showing.²⁹ The same is true post-amendment. The mere existence of a contractual relationship does not mean the contractor's employees' work is done pursuant to such contract. If that were the case, the principal could always shield himself from liability by calling all the contractor's employees statutory employees. Such an interpretation would render the statute's trade, business, or occupation language superfluous. Accordingly, the existence of the contract is never determinative of the question, but merely establishes the relationship between the principal and the contractor.³⁰ Courts must look beyond the contract to additional facts when resolving statutory employment.

The jurisprudence has forged several guidelines defining which facts indicate whether work is within the principal's trade, business, or occupation.³¹ An examination of pre-*Berry* cases shows that the movant requesting immunity was required to prove that:

- a. the job being done was customarily or regularly performed by the alleged principal itself through its own employees;³²

28. *Id.*

29. *See, e.g., Williams v. Gervais F. Favrot Co.*, 499 So. 2d 623, 627 (La. App. 4th Cir. 1986), *writ denied*, 503 So. 2d 19 (1987).

30. *Id.*

31. *See Berry v. Holston Well Serv., Inc.*, 488 So. 2d 934, 938 (La. 1986) ("The jurisprudence has forged several guidelines, in no way exhaustive, which can aid a court in resolving th[e] factual issue [of what work is considered part of the principal's trade, business, or occupation] . . .").

32. *Williams v. Shell Oil Co.*, 677 F.2d 506, 509 (5th Cir.), *cert. denied*, 459 U.S. 1087, 103 S. Ct. 570 (1982); *Barrios v. Engine & Gas Compressor Serv., Inc.*, 669 F.2d 350, 354-55 (5th Cir. 1982); *Freeman v. Chevron Oil Co.*, 517 F.2d 201, 206 (5th Cir. 1975); *Duhon v. Conoco, Inc.*, 795 F. Supp. 189, 191 (W.D. La. 1992); *Kelly v. Shell Oil*, No. Civ. A. 91-1578, 1992 WL 162227 (E.D. La. Jan. 23, 1992); *Hird v. Resource Drilling, Inc.*, 514 F. Supp. 114, 117 (E.D. La. 1981); *Rowe v. Northwestern Nat'l Ins. Co.*, 471 So. 2d 226, 228 (La. 1985); *Benson v. Seagraves*, 436 So. 2d 525, 528-29 (La. 1983); *Thompson v. South Central Bell Tel. Co.*, 411 So. 2d 26, 28 (La. 1982); *Duvalle*

- b. the principal did not customarily contract with outside concerns to perform the type and magnitude of the work involved, given its own capability to do the work;³³ and
- c. the practice of the industry was not to employ independent contractors to perform the type of work being performed by the independent contractor on the accident date.³⁴

In other words, a pre-*Berry* analysis of Louisiana Revised Statutes 23:1061 required a look at multiple factors, including the specialization of the contract work and an assessment of the specific work being performed by the plaintiff on the date of the accident.³⁵

The state and federal courts applied this multi-factored approach under the old "integral part" test for at least three decades before *Berry*.³⁶ Indeed, the United States Court of Appeals for the Fifth Circuit held the "essential to business" test to be a factor, but such "test is no longer, if it ever was, the

v. Lake Kenilworth, Inc., 396 So. 2d 1268, 1269 (La. 1981). A principal's conclusory assertion that work is within its business must be scrutinized carefully, particularly where the principal's employees never perform the work. *Thompson*, 411 So. 2d at 29.

33. *LeBlanc v. Goldking Production Co.*, 706 F.2d 149, 150 (5th Cir. 1983); *Williams*, 677 F.2d at 509; *Lewis v. Exxon Corp.*, 441 So. 2d 192, 197 (La. 1983); *Duvalle*, 396 So. 2d at 1269; *Fountain v. Central Louisiana Elec. Co.*, 578 So. 2d 236, 238 (La. App. 3d Cir.), writ denied, 581 So. 2d 707 (1991).

34. *LeBlanc*, 706 F.2d at 151; *Williams*, 677 F.2d at 510; *Freeman*, 517 F.2d 201. For instance, one pre-*Berry* court summarizing various factors in rejecting the defendant's purported statutory employer proof held that:

the term "routine maintenance" is conclusory in nature rather than supported by the facts The documentation supporting the motion does not disclose sufficient facts upon which a determination can be made that maintenance work of this magnitude was customarily performed by Kerr-McGee employees so as to be considered routine maintenance or part of an ongoing maintenance program. Additionally, there are no facts to show that industry practice is to perform this specific job with the company's own employees. Furthermore, the documentation does not sufficiently explore the extent of the use of contract labor or the relationship of the contract labor with Kerr-McGee.

Seamster v. Kerr-McGee Refinery Corp., 488 So. 2d 1139, 1142-43 (La. App. 2d Cir. 1986).

35. See, e.g., *Rowe*, 471 So. 2d at 228 (plaintiff's work not determinative). The court's emphasis on evaluating the contract work, and not looking solely at the plaintiff's work, stemmed from language in *Lewis* where the supreme court extended protection beyond workmen's compensation to the worker because the plaintiff's specific task was not within the principal's trade, business, or occupation. *Lewis*, 441 So. 2d at 199.

36. See, e.g., *Williams*, 677 F.2d at 509 (all mentioned factors required under integral part test); *Freeman*, 517 F.2d at 206-09 (exploring development of usual or customary practices test throughout the 1960s and 70s); *Stansbury v. Magnolia Petroleum Co.*, 91 So. 2d 917, 919 (La. App. 1st Cir. 1957) (factors such as "workmen of similar nature," practice in industry, whether principal regularly employed like workers); *Moak v. Link-Belt Co.*, 229 So. 2d 395 (La. App. 4th Cir. 1969) (contracting out work and employer's ability to do work are factors); *Hird*, 514 F. Supp. at 116 (proof of work being done customarily by principal's employees required under integral part test). See also *supra* notes 32-34 and accompanying text.

controlling factor in the identification of a statutory employer."³⁷ The Fifth Circuit went on in a subsequent case: "Indeed, the proper test for application of La. R.S. 23:1061 is 'whether the activity done by the injured employee or his actual immediate employer is part of the usual or customary practice of the principal or others in the same operational business.'"³⁸

The pre-*Berry* jurisprudence, therefore, required the courts to ask several questions when evaluating what work is part of the defendant's trade, business, or occupation, including:

- (1) What is the business of the alleged principal?
- (2) Do those in like businesses accomplish the work with their own employees, or do they consistently engage others with special skills or equipment to do the work?
- (3) Has the alleged principal ever engaged in such an activity?
- (4) Does the alleged principal have the manpower or expertise necessary to undertake such work?
- (5) Does the alleged principal have an established practice of contracting out all such work?³⁹

In 1989, when the legislature rejected *Berry*, it failed to adopt any specific test. The proper judicial reaction to such omission is that no new test was intended and, therefore, the courts were to return to the pre-*Berry* multi-factored approach developed over several decades. Unfortunately, the uniform response of the federal courts was to skip back in time to the 1950s, ignoring countless decisions between *Thibodeaux v. Sun Oil Co.*⁴⁰ and *Berry*.

V. THE COURTS' REACTION TO THE 1989 AMENDMENT

The United States Court of Appeals for the Fifth Circuit, when deciding the retroactive or nonretroactive effect of the 1989 amendment,⁴¹ stated the most commonly quoted language concerning the 1989 amendment:

The 1989 amendment to 1061 significantly changes the definition of the statutory employment relationship. It reverses years of limited judicial applications of the statutory employer defense and returns Louisiana to

37. *Blanchard v. Engine & Gas Compressor Serv., Inc.*, 613 F.2d 65, 71 (5th Cir. 1980). See also *Freeman*, 517 F.2d at 207-09; *Cole v. Chevron Chem. Co.*, 477 F.2d 361, 365 (5th Cir. 1973).

38. *Ortego v. Union Oil Co.*, 667 F.2d 1241, 1242 (5th Cir. 1982) (quoting *Blanchard*, 613 F.2d at 71).

39. *Malone & Johnson*, *supra* note 13, § 364, at 33.

40. 49 So. 2d 852 (La. 1950).

41. The Fifth Circuit Court of Appeals held the amendment was not to be given retroactive effect. *Pierce v. Hobart Corp.*, 939 F.2d 1305 (5th Cir. 1991). Earlier federal court decisions were contrary. See *Sawyer v. Texaco Refining*, Civ. A. No. 89-2734, 1991 WL 28986 (E.D. La. 1991), *vacated*, 963 F.2d 369 (5th Cir. 1992) (unpublished opinion); *Brock v. Chevron Chemical Co.*, 750 F. Supp. 779 (E.D. La. 1990), *vacated*, 946 F.2d 1544 (5th Cir. 1991).

more expansive integral relation test. As a result, the right of an employee of a subcontractor to sue a principal in tort for a work-related injury is dramatically curtailed by the statutory employer defense.⁴²

The Fifth Circuit's adoption of the integral relation test was directly contrary to several of its earlier opinions abandoning "integral relation" for the "usual and customary practices" test.⁴³

Since then, the federal district courts have adopted the integral relation test, also known as the "essential part of business" test, when adjudicating statutory employer motions.⁴⁴ Principals always prevail under the federal courts' post-amendment analysis.⁴⁵ There appears to be no case to date where the injured employee could prevail.

Rather, a principal appears to be able to escape all liability by asserting the work had to be "essential" or "integral" to his business or the contractor and his injured employee would not have been on the principal's premises in the first place.⁴⁶ This approach reverses decades of Louisiana jurisprudence by writing the fact-sensitive analysis out of the test and rendering the court's conclusion for injured contractor's employees purely a legal one. Such an approach guarantees that the principal will never have the responsibility to assure the safety of those on its premises, creating an absolute legal immunity or *per se* presumption that was not the intention of the legislature.

The leading federal case construing the 1989 amendment is the Fifth Circuit's *Salsbury* decision.⁴⁷ *Salsbury* held that the amendment's language prohibits consideration of any of the *Berry* factors.⁴⁸ In doing so, the court rewrites the amendment's language from "shall not *prevent* the work . . . from being *considered* part of the principal's trade" to shall not "defeat statutory employer status."⁴⁹ If the legislature had intended that all the *Berry* factors not be *used* in the determination of the principal's status, then it could have written such an absolute prohibition into the statute and said the test henceforth is the

42. *Pierce*, 939 F.2d at 1309.

43. See *supra* notes 37 and 38 and accompanying text.

44. *Thompson v. Georgia Pac. Corp.*, 993 F.2d 1166, 1168 (5th Cir. 1993); *Becker v. Chevron Chemical Co.*, 983 F.2d 44, 46 (5th Cir. 1993); *Salsbury v. Hood Indus., Inc.*, 982 F.2d 912, 916 (5th Cir. 1993); *Harris v. Murphy Oil, U.S.A., Inc.*, 980 F.2d 991, 993 (5th Cir. 1992); *Duhon v. Conoco, Inc.*, 795 F. Supp. 189, 191 (W.D. La. 1992); *Savant v. James River Paper Co.*, 780 F. Supp. 393, 397 (M.D. La. 1992); *Campbell v. Texaco, Inc.*, Civ. A. No. 92-477, 1992 WL 266021 (E.D. La. 1992) (unpublished opinion); *Kelly v. Shell Oil*, Civ. A. No. 91-1578, 1992 WL 162227 (E.D. La. Jan. 23, 1992) (unpublished opinion); *Maddox v. Baker Oil Tools, Inc.*, 774 F. Supp. 419, 422 (E.D. La. 1992).

45. The principal prevailed on its motion in all the decisions cited in *supra* note 44.

46. Historically, this "essential" test led to bizarre results. See, e.g., *Foster v. Western Elec. Co.*, 258 So. 2d 153 (La. App. 2d Cir. 1972) (operating cafeteria was "essential" to large industrial plant).

47. *Salsbury*, 982 F.2d 912.

48. *Id.* at 916.

49. *Id.*

integral relation test. It did not. Rather, the amendment is written disjunctively because no single factor shall prevent or determine the court's consideration that the work may be part of the principal's trade.

Even more disturbing is the Fifth Circuit's failure to distinguish its earlier decisions that set forth the "proper" test for statutory employment as a customary and usual practices test.⁵⁰ Instead, the court cited its 1969 decision of *Arnold v. Shell Oil*,⁵¹ which set forth the essential to business test, but held that the fact that an employer (or the industry as a whole) always contracts out the work was "not controlling"⁵² in the analysis. The problem is that *Arnold* does not support, but in fact contradicts, the *Salsbury* holding. Although *Arnold* says the contracting out factor is not controlling, this factor, among others, was still a consideration under the essential to business test as far back as the 1950s for determining statutory employer status.⁵³ Without such factors, the essential to business test had no criteria for determining what work is a part of the principal's business within the meaning of Louisiana Revised Statutes 23:1061. Accordingly, the *Salsbury* court's reliance on *Arnold* to strike down factors used over three decades in adjudicating statutory employer status was misplaced.

Unlike the activity in the federal courts, there are fewer state court decisions interpreting the 1989 amendment because time has not permitted many cases to be fully adjudicated at the appellate level. Those appellate courts addressing the 1989 amendment have focused their inquiry on the amendment's nonretroactive effect, not the issue of what constitutes an appropriate post-amendment analysis.⁵⁴ Only one state appellate court has issued a reported opinion expressly applying an integral relation test. That opinion included a thought-provoking dissent that offered a singly determinative analysis to the 1989 amendments.⁵⁵ No other reported decision has directly addressed the effect of

50. See *supra* notes 37-38 and accompanying text for citation to earlier Fifth Circuit decisions.

51. 419 F.2d 43, 50 (5th Cir. 1969).

52. *Salsbury*, 982 F.2d at 917.

53. See, e.g., *Stansbury v. Magnolia Petroleum Co.*, 91 So. 2d 917, 919 (La. App. 1st Cir. 1957) (In applying the essential to business test, this court looked to factors such as: "workmen of similar nature," practice in the industry, whether principal regularly employed workers doing that type of work, i.e., welders.). See also *supra* note 36.

54. The Louisiana Supreme Court decided to pass on the issue of whether the 1989 amendment was to be applied retroactively before the effective date of January 1, 1990, in *Bowens v. General Motors Corp.*, 608 So. 2d 999, 1001 n.4 (La. 1992). The appellate courts addressing the issue have uniformly held the amendment is not retroactive. *Young v. Lyons Petroleum, Inc.*, 598 So. 2d 702 (La. App. 3d Cir.), *writ denied*, 605 So. 2d 1149 (1992); *Carter v. Chevron Chem. Co.*, 593 So. 2d 942 (La. App. 4th Cir.), *writ denied*, 596 So. 2d 211 (1992); *Frith v. American Motorists Ins. Co.*, 613 So. 2d 249 (La. App. 1st Cir.), *writ denied*, 617 So. 2d 932 (1992); *Bourgeois v. Puerto Rican Marine Management, Inc.*, 589 So. 2d 1226 (La. App. 4th Cir. 1991), *writ denied*, 592 So. 2d 1299, 1300 (1992); *Fountain v. Central Louisiana Elec. Co.*, 578 So. 2d 236 (La. App. 3d Cir.), *writ denied*, 581 So. 2d 707 (1991).

55. *Moore v. Crystal Oil Co.*, 626 So. 2d 792 (La. App. 2d Cir. 1993), *rev'd and remanded without opinion*, 93-C-3103 (La. 1994). See also *Deal v. International Paper Co.*, No. 25,549-CA, 1994 WL 51730 (La. App. 2d Cir. 1994) (unpublished following *Moore*, 626 So. 2d 792); *Hanks v*

the 1989 amendment with respect to the statute's original inquiry: What work is part of the defendant's trade, business, or occupation?

VI. WHAT REMAINS TO BE DONE?

The issue now before many state appellate courts is whether the state courts will follow the federal courts lead or follow the earlier pre-*Berry* opinions.⁵⁶ The debate here does not concern the existence of completely different tests (i.e., integral part versus a factor analysis) because the jurisprudence, as discussed above, essentially examined the same factors regardless of the test's label. The problem is that many federal court decisions recently adopting the integral part test ignore the importance of the pre-*Berry* decisions defining the criteria as to what facts showed work was "a part of" the principal's business. A few decisions have summarily mentioned some of the pre-*Berry* factors,⁵⁷ but many of the decisions were summarily rendered because the plaintiff failed to oppose the principal's motion.⁵⁸ The failure to offer competent evidence in opposition to the principal's motions reinforced the liberal granting of statutory employer motions with no efforts whatsoever to conduct a fact-based inquiry based on the post-*Thibodeaux* criteria.

Given the deficiencies and lack of criteria exemplified by the federal court decisions, it would be best for the state courts to read the statute as written. That is, immunity results when the work being performed is "a part" of the trade,

Shell Oil Co., No. 93-CA-737 (La. App. 5th Cir. Jan. 25, 1994) (unpublished) (citing dicta in *Carter*, 593 So. 2d at 945-46); *Frith*, 613 So. 2d at 251; and *Hutchins v. Hill Petroleum Co.*, 609 So. 2d 315 (La. App. 3d Cir. 1992), none of which decided the effect of the amendment. Rather, the primary focus of discussion in these cases was the retroactive or prospective scope of the amendment. These three cases concerned pre-amendment accidents and do not clarify the law since the amendment. Numerous writs are pending in other appellate courts. See, e.g., *supra* note 19.

56. See *supra* note 55 and accompanying text.

57. *Duhon v. Conoco*, 795 F. Supp. 189, 192 (W.D. La. 1992); *Kelly v. Shell Oil*, No. Civ. A. 91-1578, 1992 WL 162227 (E.D. La. Jan. 23, 1992). For instance, in *Kelly*, the Eastern District applied an "essential" test, but recognized the following pre-*Berry* factors before granting the alleged principal's motion for immunity: (1) Plaintiff made "no showing that he needed any special license or other training to perform the duties required of him." *Id.* at *4 n.3. (2) Plaintiff admits "he performed other maintenance duties for [his employer] during his employment." *Id.* And, (3) plaintiff's "deposition testimony further indicates that Shell employed maintenance workers, including boilermakers, who worked side-by-side with the [contractor's] employees." *Id.*

58. The absence of a factual examination is understandable in those cases where the plaintiff failed to offer competent evidence in opposition to the motion. See, e.g., *Maddox v. Baker Oil Tools, Inc.*, 774 F. Supp. 419, 422 (E.D. La. 1991); *Campbell v. Texaco, Inc.*, No. Civ. A. 92-477, 1992 WL 266021 (E.D. La. Sept. 29, 1992); *Savant v. James River Paper Co.*, 780 F. Supp. 393, 397 (M.D. La. 1992). The *Maddox* court specifically said "because Maddox does not dispute the essential nature of the contract work with affidavit or other competent evidence from which the Court could conclude otherwise, the Court finds on this record that the work performed by Maddox was essential, and consequently part of Exxon's 'trade, business or occupation.'" *Maddox*, 774 F. Supp. at 422. Thus, these courts could accept the defendants' unopposed affidavits as fact and rubberstamp the work as essential.

business, or occupation of the principal, rather than accepting the jurisprudence adding that the work must be an "integral" part.⁵⁹ In contrast to the federal courts, the state courts should spend less time looking at the forty-three year old decision unnecessarily adding the word "integral" to the test,⁶⁰ and more time at all the post-*Thibodeaux* decisions defining the test's criteria as to what facts are indicative of statutory employment. Only upon a thorough examination of the pre-*Berry* jurisprudence will the realization follow that a fact based analysis has and always shall guide the inquiry. Nevertheless, the uncertainty will continue until there has been a ruling on the test from Louisiana's highest court.

VII. CONCLUSION

Considering the above, a test consistent with the present language of Louisiana Revised Statutes 23:1061 and the pre-*Berry* jurisprudence would be an approach examining such facts as:

- (1) What is the business of the alleged principal?
- (2) Is the alleged principal engaging in the work in question?
- (3) Does the alleged principal have the capability (e.g., manpower, equipment, and expertise) necessary to undertake such work?
- (4) Does the alleged principal customarily contract out the work?
- (5) Is the practice in the industry to accomplish the work with your own employees or to consistently contract out the work to contractors maintaining special skills or equipment?
- (6) Is the work extraordinary or routine?
- (7) Was the plaintiff engaging in the work on the date of the accident?

Such an approach provides definite criteria, while returning courts to the factual inquiry that the statute has always necessitated. In reality, it is likely the state and federal courts will continue to go two different directions until, once again, the supreme court tidies up the mess left by the 1989 amendment.

59. Malone & Johnson, *supra* note 13, § 364, at 151 (commenting on the jurisprudential addition of an extra word, "integral," to the test).

60. *Id.* at 147 n.46 (discussing unnecessary gloss of the word "integral" added by *Thibodeaux* decision).