Hastings Business Law Journal

Volume 18
Number 1 *Winter 2021*

Article 6

Winter 2021

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ABSTRACT

The ABC test has increasingly become a tool to differentiate employees from independent contractors. Companies and counsel throughout the nation have grappled with Part B of this test, which requires a determination of the hiring entity's "usual course of business." Adjudicators have provided little guidance on how to conduct this analysis and are admittedly frustrated with this "elusive concept." Yet a thorough treatment of the analytical framework and guiding principles of Part B of the ABC Test has not been put forth.

This article fills this void in scholarship. By tracing the relevant concepts to the common law control test, and more importantly, a lesser-known framework analyzing skill and integration to determine liability, in addition to articulating the genesis and proliferation of the ABC Test within unemployment insurance legislation, this article answers a call from the judiciary to locate the origins of the ABC Test. Assessing decisions from state supreme courts and intermediate appellate bodies, this article then examines three methods courts use to determine whether work was done outside the usual course of the hiring entity's business. The principal insight of this article is that work which is in the hiring entity's usual course of business is work which provides regular aid to the business. This article concludes by analyzing two related questions within the Part B framework: (1) whether the Part B test is work-specific or worker-specific, a question of salience given the use of class actions, and (2) how to describe the hiring entity's business, a question of import due to the rise of the gig economy.

* J.D., UCLA School of Law; B.S., Industrial and Labor Relations, Cornell University. I am grateful for the support and guidance of Noah Zatz through numerous iterations of this paper. For helpful feedback and discussions, I thank Jessica Adlouni, Connor Killeen, Sarah Rahimi and Thaddeus Talbot. For on-demand editing and deft feedback, I thank my siblings. For their encouragement and immense support, I thank my parents.

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I. INTRODUCTION

> *Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing.*
>
> - *Justice Wiley Blount Rutledge*[1]

The California Supreme Court, in April of 2018, announced a new test for worker classification under the state's Wage Order laws.[2] Departing from the multi-factor tests practitioners and businesses were accustomed to, the court adopted a test which stated that a worker is presumed to be an employee of a business unless the worker is (*A*) free from the hirer's control and direction[3], (*B*) "performs work that is outside the usual course of the hiring entity's business," and (*C*) "is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity."[4] The political branches endorsed the high court's decision, codifying *Dynamex* and expanding its three-pronged test's reach to the Labor Code and the Unemployment Insurance Code, with the enactment of Assembly Bill 5.[5]

This "ABC test" did not seem as "easy as 1-2-3"[6] to many commenters, with much alarm surrounding how Part B of the ABC test will result in massive segments of the workforce being reclassified as employees.[7]

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1. NLRB v. Hearst Publ'ns, 322 U.S. 111, 121 (1944).

2. More specifically, the court stated that the new test would only apply to a subset of wage order cases, cases where the "suffer or permit to work" definition of "employ" is applicable. Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 916 (2018), reh'g denied (June 20, 2018). Presumably, in other wage order cases and in cases under the California Labor Code, the common law control test, as articulated in Borello, would have continued to apply. *See* S. G. Borello & Sons, Inc. v. Dep't of Indus. Rel., 48 Cal. 3d 341, 350-351, 354-355 (1989) (holding that the right to control is the most important consideration in determining the nature of a work relationship, while also providing additional factors, derived in part from the Restatement Second of Agency and a six-factor test from other jurisdictions, to be considered.). *But see*, *infra* note 5 and accompanying text.

3. In full, Part A of the test states "that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact." Dynamex, 4 Cal. 5th at 916-917.

4. *Id.*

5. Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted). Assembly Bill 5 ("AB 5"), among other actions, exempted certain occupations from the application of the ABC test, keeping such occupations analyzed under the common law test as articulated in Borello. Cal. Assemb. B. 5 § ii (enacted). Assembly Bill 2257 ("AB 2257"), enacted nearly a year to the day from the enactment of AB 5, revises AB 5 and provides additional exceptions. Assemb. B. 2257, 2019-2020 Leg., Reg. Sess. (Cal. 2020) (enacted).

6. The Jackson 5, ABC (Motown Records 1970).

7. An analysis conducted by the UC Berkeley Labor Center after the enactment of Assembly Bill 5, but prior to the enactment of Assembly Bill 2257, shows that for workers who are independent contractors at their main job, the ABC test applied to 64% of such workers (incl. janitors, retail workers, and childcare workers), in addition to 27% of such workers where the test applies except when strict

Particular attention has been paid to how the application of this test will affect companies in the gig economy, such as Lyft and Uber.[8]

Companies and counsel in California are not alone in confronting this three-element test. States throughout the nation have adopted the ABC test,[9] some recently and some in decades past,[10] and adjudicators have had to tackle

criteria are met (such as construction workers, hairdressers, artists, writers, and sales representatives). Many of the remaining 9% of such workers, for whom the ABC test does not apply, are real estate agents, lawyers, accountants, doctors, and dentists. SARAH THOMASON ET AL., ESTIMATING THE COVERAGE OF CALIFORNIA'S NEW AB5 LAW, CTR. FOR LAB. RSCH. AND EDUC., U.C. BERKELEY (2019), http://laborcenter.berkeley.edu/estimating-the-coverage-of-californias-new-ab-5-law/. Note that the ABC test simply applying to a worker does not make such worker an employee, but there is general consensus that the application of the test results in larger swaths of workers being classified as employees as, unlike the common law control test, the ABC test includes a presumption of employment that can only be overcome by establishing that each element of the ABC test is met (as opposed to the common law test that balances various factors). *See infra* notes 73-78 and accompanying text.

8. Two ride-hailing companies spent nearly $675,000 on unsuccessful lobbying efforts to gain a legislative carve-out from AB 5. Cheryl Miller, *Gig Companies Set Lobbying Records Amid Fight Against Landmark Labor Bill*, LAW.COM: THE RECORDER (Nov. 1, 2019) (https://www.law.com/therecorder/2019/11/01/gig-companies-set-lobbying-records-amid-fight-against-landmark-labor-bill/). Subsequently, the Attorney General of California, in conjunction with the City Attorneys of Los Angeles, San Diego and San Francisco, sued Lyft and Uber, alleging that Lyft and Uber cannot overcome the presumption of employment under AB 5 and are misclassifying drivers as independent contractors. Complaint for Injunctive Relief, Restitution and Penalties at 3-4, 8-9, People of the State of California vs. Uber Technologies, Inc. et. al., No. CGC-20-584402 (Cal. Sup. May 5, 2020). Judge Ethan Schulman granted the People's motion for a preliminary injunction, prohibiting Lyft and Uber from classifying drivers as independent contractors, in part because he reasoned that "[d]efendants drivers are part of their usual, everyday business operations, and their work falls squarely within the ordinary course of that business." Order on People's Motion for Preliminary Injunction and Related Motions at 26, 32, People of the State of California v. Uber Technologies, Inc. et. al., No. CGC-20-584402 (Cal. Sup. Aug. 10, 2020). The preliminary injunction has been stayed pending the resolution of Lyft and Uber's appeals. People of the State of California vs. Uber Technologies, Inc. et. al., No. A160706 (Cal. App. Aug. 20, 2020). Of note, Lyft and Uber, along with Doordash and Instacart, successfully funded a Nov. 2020 ballot initiative, Proposition 22, which halted the ABC test from applying to any "app-based driver," replacing it with a newly-articulated test. Cal-Access, *Campaign Finance: Yes on 22 - Save App-Based Jobs and Services*, CAL. SEC. OF STATE., http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1422181&session=2019&view=late1 (last visited Sept. 7, 2020); Cal. Proposition 22 Initiative Statute, 19-0026A1, Proposed Bus. and Prof. Code §7451, available at https://www.oag.ca.gov/system/files/initiatives/pdfs/19-0026A1%20%28App-Based%20Drivers%29.pdf; Jeong Park, *Uber, Lyft win approval of California gig worker measure*, THE SACRAMENTO BEE (Nov. 3, 2020) (https://www.sacbee.com/news/politics-government/election/article246814727.html). A California Superior Court judge has subsequently ruled Proposition 22's Section 7451 unconstitutional and the entirety of Proposition 22 as unenforceable. Order Granting Petition For Writ of Mandate at 4, 11-12, Hector Castellanos et. al., v. State of California et. al., No. RG21088725 (Cal. Sup. Aug. 20, 2021).

9. The ABC test differs slightly throughout the nation. Of note, some states have a Part B test which states "Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed." (emphasis added) 21 V.S.A. § 1301(6)(B). This article does not focus on the "outside the places of business" provisions some states have and when it mentions the "Part B" test it is solely speaking of the "outside the usual course of business" provisions states have.

10. In 1937, the Social Security Board included the ABC test within its draft unemployment compensation law and by 1942, 42 states had adopted some form of the ABC test. *See infra* notes 52-62 and accompanying text. *See* Anna Deknatel, Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC.

what constitutes a hiring entity's usual course of business in the context of a plethora of different business arrangements. Despite the prevalence of the ABC Test, adjudicators provide little guidance on *how* to evaluate whether the worker performed work that is outside the usual course of a hiring entity's business and are admittedly frustrated with this "elusive concept."[11] Academics have written extensively on the issue of worker classification, addressing the theoretical underpinnings of the issue,[12] addressing the issue in the context of particular disputes,[13] addressing conceptually similar language to that in Part B relevant to other employment law inquiries,[14] and addressing the ABC test in a descriptive or advocative manner,[15] yet a

CHANGE 53, 66 (2015) ("In the eight years from 2004 to 2012, sixteen states—including Maine twice, once regarding its trucking and courier industries and once regarding its unemployment compensation statute —have transformed the legal requirements to be an independent contractor. All of these states except two have implemented ABC tests or related formulations").

11. Appeal of Niadni Inc. 166 N.H. 256, 261 (2014) ("'Outside the usual course of the business' can be an elusive concept"); Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Lab., 125 N.J. 567, 584 (1991) ("The meaning of the phrase 'outside the usual course of business' is elusive"). Commenters have also found the phrase, "usual course of business," to be "confusingly vague." Comment, *Interpretation of Employment Relationship under Unemployment Compensation Statutes*, 36 ILL. L. REV. 873, 873 (1942). Legislators do not seem keen to provide additional guidance as well. A California Senate committee report (1) characterizes Dynamex and Part B as "Building a Mystery," (2) notes that when this test is put under scrutiny, the question of "What is a client's normal course of business?" is raised, and (3) points out that the draft AB 5 bill before the committee did not "have a general guideline for when a company's 'usual course of business' is unclear or prone to misinterpretation." Report, Cal. Assemb. B. 5, 2019–2020 Leg., Reg. Sess., Cal. Sen. Comm. on Lab., Pub. Emp. and Ret., 5, 7-8 (2019).

12. *See* Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. OF TORONTO L.J. 357 (2002); *See* Benjamin S. Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 YALE L.J. 76 (1945).

13. *See* Julia Tomassetti*, Digital Platform Work As Interactive Service Work,* 22 EMP. RTS. & EMP. POL'Y J. 1 (2018).

14. *See* Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147 (2004).

15. *See* Robert Sprague, *Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?*, 11 WM. & MARY BUS. L. REV. 733 (2020) (In part, describing the various "factors" used by courts in conducting the Part B inquiry, describing how courts have determined the Part B inquiry in various circumstances and analyzing how the ABC test would apply to platform-based workers); *See* Deknatel, Hoff-Downing, *supra* note 10 (Articulating the recent proliferation of the ABC test, identifying shared and different features within ABC tests throughout the states, and assesses how businesses and workers are faring in light of this test) ; *See* John A. Pearce II, Jonathan P. Silva, *The Future of Independent Contractors* and *Their Status as Non-Employees: Moving on from a Common Law Standard*, 14 HASTINGS BUS. L.J. 1 (2018) (Arguing that the ABC test should be used within all employment-related statutes, in conjunction with the creation of a third employment classification category, "the dependent worker".). *See* Christopher J. Cotnoir, *Employees or Independent Contractors: A Call for Revision of Maine's Unemployment Compensation "ABC Test"*, 46 ME. L. REV. 325 (1994) (Arguing as indicated in the title that the ABC test in Maine should be reformed); *See* Eric Markovits, Note, *Easy as ABC: Why the ABC Test Should Be Adopted as the Sole Test of Employee–Independent Contractor Status*, CARDOZO L. REV. (de novo 2020) (Arguing as indicated in the title that the ABC test should be the sole test for worker classification); Kai Thordarson, *AB-5 and Drive: Worker Classification in the Gig Economy*, 17 HASTINGS BUS. L.J. 137 (2021) (Describing the various tests for worker classification, including the ABC test, and related developments in California, including Assembly Bill 5).

thorough treatment of the analytical framework and guiding principles of Part B of the ABC test has yet to be put forth.

What is concerning about the lack of uniformity in the application of this prevalent legal test is its increasing significance in the jurisdictions it has taken hold. The "borderland" between employment relationships and other contractual relationships is growing. In 2015, over 15% of the workforce in the United States consisted of individuals in "alternative work arrangements" and 94% of the net jobs created in the prior decade consisted of freelance, contract, on-call or temp agency work.[16] As a result, adjudicators will increasingly be asked to issue opinions under the ABC test on a wide variety of worker engagements, and muddled and inconsistent understandings of Part B by adjudicators and counsel is a disservice to both hiring entities and workers.

This essay, focusing on how adjudicators examine the "usual course of business" test, attempts to articulate a guiding principle when conducting these inquiries. Assessing decisions from state supreme courts and intermediate appellate bodies,[17] it is made clear that there isn't a uniform inter-court method of analysis when tackling this test. The principal insight of this essay is that work which is in the usual course of business of a hiring entity is work which provides *regular aid* to the business.

This essay proceeds in five parts. Part II answers a call from the judiciary to locate the origins of the ABC test[18] by tracing the relevant concepts to the common law control test, and more importantly, a lesser-known framework analyzing skill and integration to determine liability, in addition to articulating the genesis and proliferation of the ABC Test within unemployment insurance legislation. Part III provides a deeper overview of the ABC test in light of its origins. Part IV identifies that while some courts find necessity of the work to define whether work is inside or outside the usual course of business, others use reliance on the work to be the separating line, while others embrace the *regular aid* principle (though not explicitly at times). The central insight of Part IV is that the *regular aid* principle clearly demarcates when work is within the usual course of business of a hiring entity while not being hindered by untenable distinctions which regularly plague tests that demand there be a higher dependence on the work by the employer for the work to be in the usual course of business. This article then analyzes two related inquiries that adjudicators must engage with when determining whether *work* is outside the usual course of a *hiring entity's business*. Part V examines whether the Part B test is work-specific or worker-

16. Lawrence F. Katz, Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015* (Nat'l Bureau of Econ. Rsch., Working Paper No. 22667, 2016).

17. The author has examined opinions by state supreme courts and state intermediate appellate courts in 15 states. Cases were selected through searches on Westlaw and their inclusion in American Law Reports and other secondary sources.

18. Carpet Remnant Warehouse, Inc. v. New Jersey Dep't of Lab., 125 N.J. 567, 580 (1991) ("Although the ABC test's criteria are derived from common-law principles, *see* RESTATEMENT OF AGENCY […] § 220, the actual origin of the test is unclear.").

specific, concluding that the latter is the more sound method of analysis. Part VI provides an analytical framework for describing the hiring entity's business, concluding that adjudicators, to be comprehensive and to avoid the downfalls of individual techniques, should consider (1) the undisputed facts, (2) the business's understanding, (3) customer understanding and (4) other perspectives prior to articulating the characterization of the business.

II. THE ORIGINS OF THE ABC TEST AND ITS RECOGNITION OF THE "DEPENDENT WORKER"

The strong reaction to the *Dynamex* decision from business and labor alike can be viewed in light of the legal framework it was replacing. Prior to *Dynamex*, California only had one legal framework throughout its canons of employment law. Both within the labor code and its wage orders, California used the common law control test, as articulated in *Borello* with its plethora of factors,[19] to determine if a worker was an employee or an independent contractor. *Dynamex* disrupted this order by making the ABC test the proper inquiry to determine if a worker is an independent contractor or an employee in the wage order context. The majority of states are like California in having more than one worker classification criteria.[20] Much of the confusion this creates can be eased by understanding that the term employment is malleable and generally connotes one of two things: (1) that a worker is controlled by the employer or (2) that a worker is dependent on the employer. Studying the emergence of the employee-independent contractor lexicon, the various inquiries used to determine worker classification, and their relation to the ABC test allows counsel and adjudicator alike to better understand the ABC inquiry.

A. THE SKILL & INTEGRATION ANALYSIS, THE COMMON LAW CONTROL TEST AND THE ECONOMIC REALITIES TEST

Modern-day worker classification takes its roots in the pre-industrial import of the master-servant relationship to the governance of the affairs between hirers and certain free laborers.[21] This relationship was

19. S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 48 Cal. 3d 341, 351 (1989).

20. See Anna Deknatel, Lauren Hoff-Downing, ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes, 18 U. PA. J.L. & SOC. CHANGE 53 (2015).

21. Richard R. Carlson, Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying, 22 BERKELEY J. EMP. & LAB. L. 295, 302 (2001); Marc Linder, The Employment Relationship in Anglo—American Law: A Historical Perspective, 17-18, 45-47 (1989) (available at HathiTrust) (articulating that the master-servant relationship can be traced within Anglo-American lawmaking to the enactment of the Ordinance of Labourers of 1349 and the Statute of Labourers of 1351 (together, the Statutes of Labourers), following the Black Plague, which regulated relations between hirers and free laborers. Through this lawmaking, the legislature intended certain aspects of the status of villeinage (from the feudal era), a non-contractual identity, to be imputed into the effects of the contractual relation of employment undertaken by free laborers.) This history continues to be relevant today as Anglo-American jurisprudence continued to view the master-servant relationship, as consolidated by

characterized by "the worker's dependence on the master, and the master's domination over and paternalistic interest in the worker, with rules that resembled the relationship between a husband/father and his family."[22] In contrast to the relationship of master-servant, there was also pre-industrial recognition of unattached workers who did not have a single master and were free to serve more than one client.[23] These workers, later termed "independent contractors" were considered to have an "independent calling"[24] or "distinct employment" that was not exclusive to one employer.[25] But even during pre-industrial times, the line between hired staff and individuals of independent calling was not clear and was litigated.[26]

Industrialization further complicated this picture. Many of the new relationships formed by workers and work-providers during the Industrial Revolution sat on the blurry line between master-servant and client-independent contractor relations.[27] At the same time, industrialization provided a new importance for labeling these relationships. Questions regarding an "employer's" financial liability where a third party is injured by a worker's negligence were among the chief reasons why worker classification became an inquiry of importance.[28] Under the vicarious liability doctrine of respondeat superior, a master is responsible for the negligent behavior of his servant (where the servant is working in the scope assigned by the master), but not of that of an independent contractor.[29]

Blackstone, "as grounded in semi-feudal and mercantilist statutory compulsion and protection." (See Blackstone's Commentaries, Book 1, Chapter 14.) For a brief overview of the rise of the master-servant relationship within American law, see James Gray Pope, *A Brief History of United States Labor and Employment Law*, THE OXFORD INT'L ENCYC. OF LEGAL HIST. (Stanley N. Katz ed., 2009), http://ssrn.com/abstract=2343941.

22. Carlson, supra note 21. This characterization of the master-servant relationship as one of the "master's domination" over the worker is supported by the master-servant relationship of the 14th century, after the enactment of the Statute of Labourers (see supra note 21), where a master "could use force to capture a servant who departed, or who, having been retained, never entered his service…[A masters had] rights against other masters who persuaded his servant to depart, or who, having unknowingly engaged his servant, did not give him up when required to do so." Linder supra note 18, at 46 (quoting 2 William Searle Holdsworth, A History of English Law 462 (3d ed. 1923) (available at HathiTrust)). Supporting Carlson's broader characterization that the master has a paternalistic/husband-like interest of the servant is Holdsworth's insights that, to some degree, medieval lawyers were of the opinion that a person had a "sort of proprietary interest in the maintenance" of a higher status than an individual of a lower status, giving way to analogies of the husband-wife relationship and the guardian-ward relationship being applied in interpreting the master-servant relationship under the Statute of Labourers. 2 Holdsworth supra at 463 note 1.

23. Carlson, *supra* note 21, at 303.

24. Asia, *supra* note 12, at 77.

25. Laugher v. Pointer, 5 B. & C. 547, 554-555, 108 Eng. Rep. R. 204, 207 (K. B. 1826).

26. The first reported case concerning an individual artificer (an embroiderer) turning on the status of the individual, whether servant/laborer or a person of independent calling, dates to 1374. Similar cases involved carpenters. Linder *supra* note 21, at 50.

27. Carlson, *supra* note 21, at 303.

28. *Id.* at 304.

29. "Let the master answer. This maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent." *Respondeat superior*, BLACK'S LAW DICTIONARY (2nd ed. 1910). "[T]he doctrine making an employer or principle liable for the wrong of an

To determine when a work-provider is liable vis-à-vis respondeat superior, two strains of legal thought emerged, one of which being the early common law control test, but the older and less known line of precedent is also of import. The older line focused "on [1] the relative skill and expertise of the two parties and [2] the related factor of the integration of the worker's activity into the employer's business."[30] Under this framework, it was through the analysis of these two inquiries of skill and integration would an understanding of control (and responsibility) be determined.[31]

To illustrate this lesser-known framework, one can turn to *Milligan v. Wedge*, an English case of the Victorian era. In *Milligan*, the defendant, a butcher, had hired a drover[32] to move a newly bought bullock from London's Smithfield Market to the butcher's slaughterhouse. The drover hired a boy to "drive" the bullock to the destination; it was during this drive that the bullock caused the damage that was complained of, running through a showroom and breaking five chimney pieces.[33] The court found that the defendant butcher was not responsible for the actions of the boy driving the bullock.[34] Lord Denman, Lord Chief Justice of England, reasoned that the defendant butcher was not liable as the butcher had hired "another who is recognized by the law as exercising a *distinct calling*."[35] (emphasis added) Directly after this point, Lord Denman states that the butcher may not have had the knowledge to drive the bullock;[36] which contrasts the potential lack of skill of the butcher with that of someone that is established in the business of that skill. Furthermore, Lord Denman ends his short opinion by stating "[h]ere it does not appear that the defendant attended the drover or his servant; and the mischief was done in the course, not of the butcher's business, but of the drover's."[37] To this same point, in discussion with plaintiff's counsel, Lord Denman stated that "the butcher does not, *as a regular part of his business*, employ the drover: the case is like that of a man who sends a parcel by a person carrying on the business of carrier."[38]

American adjudicators of the 19th century also saw the value in analyzing skill and integration in determining control and responsibility. In *Blake v. Ferris*, the high court of New York cited *Milligan* in opposing an expansive view of respondeat superior. The court posited that a "very common case in this country" is that of a man building a house for himself.

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employee or agent if it was committed within the scope of employment or agency." *Respondeat superior*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/legal/respondeat%20superior.

30. Linder *supra* note 21, at 134.

31. *Id.*

32. Drover: Someone whose job is moving groups of animals, especially cattle or sheep, from one place to another. *Drover,* CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/drover.

33. Milligan v. Wedge (1840) Eng. Rep. 993, 993-995.

34. *Id.*

35. *Id.* at 994.

36. *Id.*

37. *Id.*

38. *Id.* at 994 (emphasis added).

The man could hire employees, supervising and directing the employees. The court observed that in this scenario the man would be the master of his employees[39] (and so responsible to third parties of their actions). Using *Milligan*, the court showed that just as the Victorian butcher is not bound to drive his own "ox," as "he may not know how to do it," a man could contract to build the house with a person who will bring the materials and complete the building in a specific manner for the agreed to compensation.[40] The court concludes that "such a contract does not constitute the contractor the agent or servant of the employer, nor authorized him to pledge the responsibility of the employer for the conduct of servants, nor for any thing to be done in the execution of his contract."[41] Similarly, a court in Connecticut stated that to be a servant "[i]t must be strictly his employer's business that he is doing and not his own."[42]

As is now evident, this analysis of skill and integration to determine control and responsibility was eventually sidelined as judicial bodies converged their attention on one facet of the original master-servant model: "a master was liable for an act of the servant commanded by the master or committed in the course of the servant's service *controlled* by his master."[43]

Originally, the control test was simply an inquiry of the "employer's supervision or opportunity to supervise on the one hand, and the worker's independence and self-sufficiency on the other."[44] Borrowing from mathematical jargon, the factorization of the control test can be traced back to the facts that early adjudicators used to decide this control inquiry. These included (1) the opportunity to control the work-provider had, (2) the instructions given by the work-provider, (3) the duration of the relationship, and (4) the size and sophistication of the parties.[45] Other factors emerged as courts considered working relationships in light of respondeat superior and other laws which were promulgated and presented a worker classification inquiry.[46]

Of note, as evidenced above, the basic common law control test was not found but was reasoned. In answering the inquiry of whether a work-provider was vicariously liable for the negligence of its worker (respondeat superior), adjudicators, for example, did not converge on a test of the worker's dependence on the work-provider – another key characteristic of the master-servant relationship; at least one commenter has stated that the skills and

39. Blake v. Ferris, 5 N.Y. 48, 61 (1851).

40. *Id.*

41. *Id.*

42. Linder, *supra* note 21, at 162, note 82 (quoting Corbin v. American Mills, 27 Conn. 274, 279 (1858)). For a deeper analysis of the use of skill and integration in determining liability in such cases, see Linder at 134-146.

43. Carlson, *supra* note 21, at 305 (emphasis added); Linder *supra* note 21, at 143.

44. *Id.*

45. *See* Bernhauer v. Hartman Steel Co., 33 Ill. App. 491 (1889); Hilliard v. Richardson, 69 Mass. 349 (3 Gray) (1855).

46. Carlson, *supra* note 21, at 310.

integration analysis was a "proto-economic reality of dependence test (which was later adopted unknowingly by the Supreme Court in the 20th century).[47] Rather, adjudicators inquired into the work-provider's control. What was of import was if the work-provider had controlled the act that caused the injury or at the least selected the worker for the job, the work-provider was in some way responsible for the actions of their subordinate.[48] This reasoned approach to determine worker classification, and more importantly liability under the specific legal doctrine at issue, can be seen as an early use of statutory purpose to determine the reach of a doctrine.

With the emergence of social welfare and worker protection legislation, contemporary adjudicators too looked at statutory purpose as a means of understanding the scope of the employee classification at question. In 1914, Judge Learned Hand, in considering a claim under what seemed to be a statute that granted compensation to employees for work-place accidents, articulated what became known as the economic realities test, a competing test to the common law control test.[49] This test focuses on dependence as opposed to control.[50] In adopting this test to interpret the National Labor Relations Act (NLRA), the Supreme Court in *Hearst* agreed with the National Labor Relations Board's assessment that newsboys were employees under the NLRA, highlighting the Board's reasoning that the newsboys worked "*continuously and regularly*," and "*relied* upon their earnings for the support of themselves and their family," earnings that were "influenced in large measure" by the "dictates" of the publishers.[51] (emphasis added)

Congress' relationship with the economic realities test and the use of statutory purpose to determine is complicated and long, marred with (qualified) rejection.[52] What is of interest is that the economic realities test presented several other factors for analyzing worker classification, and the Supreme Court has incorporated those factors within the common law

47. Linder, *supra* note 21, at 139, 143.

48. *See* Boswell v. Laird, 8 Cal. 469, 489-490 (1857) ("The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskillful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill, or want of care of the person employed.").

49. Lehigh Valley Coal Co. v. Yensavage 218 F. 547 (2d Cir. 1914).

50. Richard R. Carlson, Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying, 22 Berkeley J. Emp. & Lab. L. 295, 304 (2001).

51. NLRB v. Hearst Publ'ns, 322 U.S. 111, 131–32 (1944), *overruled in part by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

52. While the Taft-Hartley Act presented a rebuke to the statutory purpose and economic realities doctrines that the Supreme Court had applied to the NLRA and was an endorsement of the common law test, Congress' actions or lack thereof, has left the economic realities test intact within the Fair Labor Standards Act (FLSA) framework. The Supreme Court also has made novel arguments as to why worker classification under the FLSA should not be determined using the common law test. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 325-26 (1992); *See generally* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 303 (2001).

control test.[53] What has become evident over time is that whether you are dealing with the control test or the economic realities test, determining worker classification with the plethora of factors available is more of an art then a science, making these tests unpredictable and providing uncertainty to workers and employers alike.

B. THE ABC TEST

One of the significant social welfare legislations of the early 20th century was the Social Security Act of 1935. The Act was a reaction to the unprecedented amount of unemployment that affected the nation,[54] now known as the Great Depression. The Act supported an unemployment compensation system where businesses of a certain size were to be taxed, with money raised to be used to assist workers that had become unemployed "through no fault of their own."[55] Prior to the Social Security Act, not many states had adopted unemployment compensation statutes as legislatures were worried that levying a new tax on businesses would make their state uncompetitive with neighboring states and others.[56] The Social Security Act provided incentive for states to create their own unemployment compensation pools and for employers to pay into them,[57] and the states bit. By the fall of 1937, every U.S. state, territory, and the District of Columbia had unemployment compensation laws enacted.[58] It is within states' unemployment compensation statutes that the ABC test emerged.

The ABC test was first incorporated into law in Wisconsin in 1935 on the recommendation of the Wisconsin Advisory Committee, a statutory body which advised the legislature.[59] The Wisconsin Advisory Committee had characterized the ABC test as "unique" and stated it should "be considered

53. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24 (1992).

54. Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 586 (1937).

55. *See* Appeal of Niadni, Inc., 166 N.H. 256, 263 (2014) ("The purpose of our unemployment compensation statute, RSA chapter 282–A, is to prevent the spread of unemployment and to lighten the burden on those workers who are involuntarily unemployed through no fault of their own.").

56. Charles C. Steward Mach. Co., 301 U.S. at 588 ("But if states had been holding back before the passage of the federal law, inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors.").

57. *See* Carpet Remnant Warehouse, Inc. v. New Jersey Dep't of Labor, 125 N.J. 567, 578 ("An employer could receive a credit of up to ninety percent of that tax if the employer's home state satisfied certain criteria relating to the administration of the state's unemployment compensation law and thereby was certified by the Social Security Board.").

58. Note, *Employment Relationships Within the Scope of State Unemployment Compensation Statutes*, 1 WASH. & LEE L. REV. 232, 233 n. 5 (1940).

59. Benjamin S. Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 YALE L.J. 76, 83 n. 23 (1945). Wisconsin first adopted its unemployment insurance legislation on January 28, 1932. Wisconsin was not the first state to have an unemployment insurance bill come before its legislature. That honor belongs to Massachusetts where such a bill was introduced in 1916 prior to being "killed" in committee. ROGER SHERMAN HOAR, WISCONSIN UNEMPLOYMENT INSURANCE, at vii, 1 (1934), https://babel.hathitrust.org/cgi/pt?id=uiug.30112068921706;view=1up;seq=11. Statements that the ABC test originates from Maine are probably incorrect.

apart from conceptions of employer-employee relationships existing in other fields."[60] The Committee on Legal Affairs of the Interstate Conference of Unemployment Compensation Agencies[61] recommended to stakeholders that the definition of employment (which included the ABC test) within Wisconsin's unemployment compensation act be used within other state's unemployment compensation acts "as the basis for extending their coverage beyond the master and servant relationship."[62] In 1937, the Social Security Board included the ABC test within its draft unemployment compensation law[63] and by 1942, 42 states had adopted some form of the ABC test.[64]

Notwithstanding the Wisconsin Advisory Committee's and the Interstate Conference's insights on the ABC test, at least until the early 1940s there was a significant schism between jurists regarding whether the ABC test was the legislators attempt to "codify the common law"[65] or was in fact a separate and new test.[66] Justice Wolfe of the Utah Supreme Court provided an astute assessment of why the ABC test was not synonymous with the control test and why it allowed for an expanded group of workers to benefit, stating:

> "[the respondeat superior] principle was held not applicable to the independent contractor. But the principle on which the independent contractor was differentiated from the servant, i. e., freedom from control in methods and means, later was used to make what in reality was a servant an independent contractor in form. An old servant who knew his master's wants and desires as to how things should be done might be made an independent contractor in legal form. A negro cotton picker could be given the aspect of an independent contractor. In such cases the principle of respondeat superior might still apply. Certainly such relationships could be made subject to unemployment compensation benefits. Such was the

60. Asia, *supra* note 59.

61. The Interstate Conference of Unemployment Compensation Agencies is a precursor to the National Association of State Workforce Agencies ("NASWA"). The Interstate Conference of Unemployment Compensation Agencies changed its name to Interstate Conference of Employment Security Agencies in 1939. After 61 years as the Interstate Conference of Employment Security Agencies, the organization was again rebranded as the National Association of State Workforce Agencies in 2000. *A History of the National Association of State Workforce Agencies,* NASWA (Feb. 2012), https://www.naswa.org/system/files/2021-03/naswahistory2012.pdf [https://web.archive.org/web/20180706125802/https://www.naswa.org/assets/utilities/serve.cfm?gid=bcdb456f-54c8-4570-b844-d02ce2c1cf58&dsp_meta=0].

62. Asia, *supra* note 59, at n. 21.

63. *Id.* at n. 22. A version of the draft bill with revisions from 1938 can be found online. Relevant language at pages 8 and 9. U.S. SOC. SEC. BD., BUREAU OF UNEMP. COMP., DRAFT BILL FOR STATE UNEMP. COMP. OF POOLED FUND TYPE, JANUARY 1937 EDITION WITH TENTATIVE REVISIONS (1938), [hereinafter DRAFT BILL FOR STATE UNEMP. COMP. OF POOLED FUND TYPE] https://babel.hathitrust.org/cgi/pt?id=coo.31924002220212;view=1up;seq=27.

64. Comment, *Interpretation of Employment Relationship under Unemployment Compensation Statutes*, 36 ILL. L. REV. 873, 876 n. 16 (1942) [hereinafter *Interpretation of Employment Relationship*].

65. Washington Recorder Pub. Co. v. Ernst, 199 Wash. 176, 195 (1939). For a critique of Washington Recorder Pub. Co. decision, *see* Note, *Employment Relationships Within the Scope of State Unemployment Compensation Statutes*, 1 WASH. & LEE L. REV. 232, 233 n. 5 (1940).

66. *Interpretation of Employment Relationship*, *supra* note 64, at 878 n. 16.

> purpose of requiring all of paragraphs (a), (b), and (c) to be proved before the applicant could be denied the benefit of the act.
> The most independent of independent contractors therefore are not included in the class of individuals entitled to benefits, but a class of individuals, who under strict common law concept of independent contractorship were other than employees, are entitled. We need not draw the line. It is drawn for us by the act."[67]

It is now well established that the ABC test is a distinct inquiry from that of the common law control test, but this early confusion could be blamed in part to the fact that the same lexicon is being used for worker classification under both the common law and the ABC tests: the employee-independent contractor binary. Justice Wolfe seemed to have agreed with this assessment, stating:

> "Since the act applies to a new field of law which has its own glossary and defines the relationships to which it applies, the introduction of old concepts which fitted into the conceptual pattern of tort liability carried over into this field may only be confusing. The temptations to illustrate a new range of relationships by resort to concepts applicable to an entirely different field should perhaps be resisted."[68]

What reveals itself through the study of the record is that the ABC test is not a repackaging of this control test, rather the ABC test was created to identify a category of worker which was broader than the employee category traditionally carved out by the common law control test while not encompassing the entirety of those that fall within the independent contractor category of workers. Specifically, the test is meant to identify "individuals…who are *dependent* upon a job relationship for their livelihood."[69] (emphasis added) What is now clear is that the ABC test has been a successful vehicle in identifying this broader category of workers, as many states that have the ABC test implemented alongside the common law test grapple with the reality that some workers are granted employee benefits for some purposes while being independent contractors for other purposes (under the common law test).[70]

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67. Globe Grain & Milling Co. v. Indus. Comm'n, 91 P.2d 512, 514 (Utah 1939).

68. Globe Grain & Milling Co. v. Indus. Comm'n, 97 P.2d 582 (Utah 1939).

69. U.S. BUREAU OF EMP. SEC., MANUAL OF STATE EMP. SEC. LEGIS. SUPPLEMENT: UNEMP. INS. LEGIS. POL'Y, at 5 (1947), https://babel.hathitrust.org/cgi/pt?id=umn.31951002653848m;view=1up;seq=15 (In this policy document the Social Security Administration, Bureau of Employment Security "recommends that States which have not done so, adopt the A.B.C tests for the determination of the absence of employer-employee relationships" and proclaims that "[t]hese tests are intended to assure the coverage of all individuals in "employment" who are *dependent* upon a job relationship for their livelihood." (emphasis added)).

70. The theory of a worker having some employment rights but not enjoying the full benefits of employment has been proposed by intellectuals of the modern era and has taken hold in foreign jurisdictions. *See* Seth D. Harris & Alan B. Krueger, A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker," The Hamilton Project (2015); *See* Pimlico Plumbers

III. THE APPLICATION OF THE ABC TEST GIVEN ITS ORIGINS

The ABC test achieves the identification of a broader class of worker, the dependent worker, through its mechanical inquiries. These mechanical inquiries also serve to provide predictability within its application, a sharp contrast from the common law and economic realities tests. Unlike those tests which can pose more than a handful of inquiries to determine worker classification, the ABC test boils down to four legal questions – the presumption, A, B, and C.

The ABC test is generally an exclusionary rule.[71] In most states, individuals must fall within the gamut of a broad definition of "employment" for the ABC test to become a relevant inquiry.[72] The broad definition varies from state to state. In Arkansas, for example, "[s]ervice performed by an individual for wages shall be deemed to be employment…unless and until" it is shown that the individual meets the ABC criteria.[73] Illinois has a slightly different definition of employment in the unemployment insurance context, stating that "[s]ervice performed by an individual for an employing unit…shall be deemed to be employment unless and until it is proven" that the ABC criteria is met.[74] Such broad definitions of employment have been characterized by adjudicators and commenters as creating a rebuttable presumption of employment that the putative employer has the burden to overcome.[75]

To overcome the presumption, all three of the ABC conditions need to be met. The failure to meet any one of these requirements ends the analysis and establishes that the worker was not an independent contractor under the test. The use of elements, and not factors, combined with the presumption of

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Ltd and another (Appellants) v Smith (Respondent) [2018] UKSC 29. Though note an important difference between the range of workers encompassed by the ABC test and the "independent worker" grouping Harris and Krueger propose: the former being a category of worker which encompasses the category of employee traditionally carved out by the common law test and the further category of dependent worker that would not fall into the common law employment category, and the latter being a category of worker distinct from the category of employment, sitting between the employee and independent contractor classifications. For a critique of Harris and Krueger's proposal, one can turn to Benjamin Sachs' article on the subject. *See* Benjamin Sachs, *Do We Need an "Independent Worker" Category?*, ON LABOR (Dec. 8, 2015) https://onlabor.org/do-we-need-an-independent-worker-category/.

71. In fact, the ABC test has been referred to as the "three point exclusionary statute[]." *Interpretation of Employment Relationship*, *supra* note 64, at 376-77.

72. *Id*. at 877.

73. Ark. Code Ann. § 11-10-210 (West)

74. 820 Ill. Comp. Stat. Ann. 405/212

75. *See* Great N. Constr., Inc. v. Dep't of Lab., 2016 VT 126, ¶ 26, 204 Vt. 1, 15 ("We reiterate that § 1301(6)(B) creates a presumption of employment and that the employer therefore bears the burden of production and persuasion as to all three prongs of the ABC test"); *See also* Elizabeth Wyman, *Applying the "ABC Test" to Determine Liability for Unemployment Compensation*, 19 ME. B.J. 38 (2004). Where such arguments are colorable, diligent defense counsel should look to challenge the presumption by asserting that a worker's activity does not meet the broad definition of employment under which the ABC test becomes a relevant inquiry and rebut the presumption by showing that the criteria of the ABC test is met. Those arguing for employer liability should demonstrate that the broad definition of employment (the presumption) is met prior to showing the ABC exception does not apply.

"employment" is further reason for why the ABC test is an inquiry which produces consistent results.

The elements of the ABC test were not created in a vacuum, rather they were developed, presumably by the Wisconsin Advisory Committee, with the rich history of worker classification in mind. This is evident by the language of the ABC elements and provides interested parties with a better understanding of the individual tests used to prove each element.

The A in the ABC test generally states something to the effect of "such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact."[76] What is readily apparent is that this language is the basic premise of the common law control test. As discussed above, this does not mean that the ABC test is just the codification of the common law control test. It is more colorable to state that Part A makes the common law control test one element of the ABC test. With that said, adjudicators should not consider all of the plethora of factors relevant to the contemporary common law test when doing the Part A inquiry. Of the two other elements of the ABC test, at least one was a part of the common law test[77] during the era the ABC test emerged and at least the "usual course" language in Part B is now part of the common law test.[78] It would be redundant to do the Part B and C analysis within the Part A analysis only to do it again for the individual elements. Furthermore, the fact that Part B and Part C were distinct inquiries the drafters found to be determinative and pulled out of the jurisprudence (or from the skill and integration analysis jurisprudence) while not highlighting the various other factors that may point towards control presents the argument that the drafters did not want the control test employed in Part A to be an unpredictable argument of various factors, especially given the inclusive nature of the ABC test in light of mass unemployment the nation faced during its drafting. A simpler control test may be found in the annals of employment law jurisprudence.[79] This is not the topic of this essay but is worth further study.

The C in the ABC test asks whether "such individual is customarily engaged in an independently established trade, occupation, profession, or business."[80] In other words, Part C is asking if the worker truly has an "independent calling" and is part of the group of workers that are the most independent of independent contractors.[81] Clearly, this independent calling inquiry stems, in some way, from the skills portion of the skills and

76. DRAFT BILL FOR STATE UNEMP. COMP. OF POOLED FUND TYPE, *supra* note 63, at 8.

77. Washington Recorder Pub. Co. v. Ernst, 199 Wash. 176, 186 (1939) (stating that the "customarily engaged in an independently established trade…" inquiry does not differ with the common law test).

78. S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations, 48 Cal.3d 341, 355 (1989).

79. *See generally* Gerald M. Stevens, The Test of the Employment Relation, 38 MICH. L. REV. 188 (1939).

80. DRAFT BILL FOR STATE UNEMP. COMP. OF POOLED FUND TYPE, *supra* note 63, at 8-9.

81. *Interpretation of Employment Relationship*, *supra* note 66, at 884.

integration test. As Lord Denman stated, one of the deciding factors in *Milligan* was that the defendant hired another who is recognized by the law as exercising a *distinct calling*." [82] One could understand why such an inquiry would be important to drafters of the ABC test as it insists on an analysis of whether the worker is in a position to support herself and thus is not in need of unemployment compensation. In fact, the Social Security Board commented in 1947 that while all three parts of the ABC test are important, Part C, or as they coined it, the "independent business test" is "the most relevant for the purposes of unemployment insurance." [83]

The Part B test states "such service is either outside the usual course of the business…or that such service is performed outside of all the places of business of the enterprise for which such service is performed"[84] or similar language. The usual course of business language seems to stem from the skills and integration analysis as well, being language similar to that used when analyzing integration (e.g., regular part of business).[85] More directly, the language seems to be taken from workers' compensation statutes, another worker insurance framework.[86] For example, Wisconsin's Industrial Commission statute in 1915, prior to the origination of the ABC test there, stated that an "employé" was to mean:

> "Every person in the service of another under any contract of hire, express or implied, oral or written,…but not including any person whose employment is but casual or is not in the usual course of the trade, business, profession, or occupation of his employer. (emphasis added)"[87]

In 1911, Professor John R. Commons of the University of Wisconsin had drafted the Wisconsin Industrial Commission law which housed the state's "workmen's insurance and…the accident prevention law" (colloquially workers' compensation law) within a singular administrative body.[88] Years later, Professor Commons pioneered the Wisconsin unemployment insurance law, with the legislature first considering the new social welfare reform in 1921.[89] Commons believed the genius of a properly implemented workers' compensation law was that it started with the assumption that an "employer intends to do right but does not have sufficient inducement," then provided that inducement to the employer through taxing it in proportion to its employees' lost wages due to accidents, and then

82. Milligan v. Wedge, 12 Adol. & El. 737, 740-41, 113 Eng. Rep. 993 (1840) (emphasis added); *see generally*, *supra* notes 30-42 and accompanying text.

83. MANUAL OF STATE EMP. SEC. LEGIS. SUPPLEMENT: UNEMP. INS. LEGIS. POL'Y, *supra* note 69.

84. DRAFT BILL FOR STATE UNEMP. COMP. OF POOLED FUND TYPE, *supra* note 63, at 8-9.

85. *See generally supra* notes 30-41 and accompanying text.

86. *See infra* notes 124-127 and accompanying text.

87. Holmen Creamery Ass'n v. Indus. Comm'n of Wisconsin, 167 Wis. 470, 167 N.W. 808, 808 (1918).

88. JOHN ROGERS COMMONS, MYSELF: THE AUTOBIOGRAPHY OF JOHN R. COMMONS, 142 (1963).

89. *Id.* at 147.

employed experts on safety (as opposed to criminal detectives and prosecutors to hold employers accountable for a workplace accident) to show the employer "how to make a profit by preventing accidents."[90] Commons believed the same principle could be applied to unemployment, envisioning employers being held responsible for the unemployment they created while also being able to make a profit through the hiring of employment experts.[91] This common principle is evidenced by the mirroring of workers' compensation law's "employé" definition within the Part B test.

Presently, Part A and Part C of the ABC test are relatively uncontroversial as compared to Part B. The Part B test is further discussed in the below sections. How adjudicators conduct this analysis is not uniform. This essay identifies three tests used by adjudicators to conduct this analysis, presents a critique of two of these tests, and professes that one of these tests, the Regular Aid principle, is the proper scope under which the Part B inquiry, given its origin, should be conducted.

IV. ADJUDICATOR APPLICATIONS: CONVERGING TO THE REGULAR AID UNDERSTANDING OF "USUAL COURSE OF BUSINESS"

A. WORK SUBSTANTIALITY DEMARCATING WHETHER THE WORK IS WITHIN THE USUAL COURSE OF BUSINESS

1. Necessity of the Work Demarcating Whether the Work is Within the Usual Course of Business

In determining whether work is or is not within the usual course of business of a hiring entity, some adjudicators have taken the stance that "the key to this inquiry is whether the services are necessary to the business of the employing unit or merely incidental."[92] Under this framework, which this essay refers to in shorthand as the "necessity test," only work which is necessary to the hiring entity's business is within its usual course of business. All other work, including work which "merely render[s] the place of business more pleasant,"[93] falls outside the hiring entity's usual course of business and satisfies Part B of the ABC test. It is important to note that while some courts have expressly adopted the necessity test (including variations of the abovementioned test), other adjudicators have implicitly used the test or adopted it as a "factor" in their analysis.[94] This section suggests that the

90. *Id.* at 142.

91. *Id.* at 143.

92. E-Z Movers, Inc. v. Rowell, 2016 IL App (1st) 150435, ¶ 32 (quoting L.A. McMahon Building Maintenance, Inc. v. Department of Employment Security, 2015 IL App (1st) 133227, ¶ 45; quoting Carpetland U.S.A., Inc. v. Illinois Dep't of Employment Sec., 201 Ill. 2d 351, 386 (2002)).

93. Emergency Treatment, S.C. v. Dep't of Emp. Sec., 394 Ill. App. 3d 893, 903 (2009) (quoting guidance from the Illinois Administrative Code (56 Ill. Adm. Code § 2732.200(f))).

94. *See* Sebago v. Bos. Cab Dispatch, Inc., 471 Mass. 321, 333 (2015) ("[A]nother factor is 'whether the service the individual is performing is necessary to the business of the employing unit or merely incidental.'").

necessity test (1) does not conform to the text of the ABC test, (2) is vague as to the subject of its inquiry and (3) presents a framework where adjudicators have to make untenable distinctions about what is and is not necessary work.

Illinois' ABC Test, a test that is similar to many other ABC tests throughout the nation, is found in section 212 of Illinois' Unemployment Insurance Act. The relevant part of this provision reads as follows:

> "Service performed by an individual for an employing unit, whether or not such individual employs others in connection with the performance of such services, shall be deemed to be employment unless and until it is proven in any proceeding where such issue is involved that—
> B. Such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed;"[95]

It can be observed that "necessity," "necessary," their derivatives, and their synonyms are not present in Part B of this ABC test (nor in any other ABC test). Rather, the phrase specifically used is "the usual course." If language is not in a law but is being used to apply that law, it should at the least be consistent with the law's language, so that its application can be reconciled with the text. By stating that only worker's "services [that] are necessary to the business" are within the usual course of business and "incidental" work or work which "merely render[s] the place of business more pleasant" is not within the usual course of business, supporters of the necessity test are clearly asking adjudicators to assess the *substantiality* of the work in question. Part B, on the other hand, is clearly asking adjudicators to assess the *regularity* of the work in question.[96]

By substituting a substantiality analysis for the regularity analysis, adjudicators and administrators are implicitly equating work substantiality to work regularity, but these two concepts are not identical nor do they always produce an identical result. Still, one would be remiss not to recognize that there are instances where necessary work is within the hiring entity's usual or regular course of business and not necessary work is outside the hiring entity's usual or regular course of business. For example, in *Great Northern Construction, Inc. v. Department of Labor*, the Supreme Court of Vermont held, in part, that a person specializing in historic restorations within the construction industry was providing services outside the usual course of business of a general contracting firm as his services were "not necessary to the business of general construction and contracting" nor a "key

95. 820 ILCS 405/212 (West 2000).

96. The text of Part B states "usual course of business," clearly a synonym for *regular* course of business.

component" of the hiring entity's business.[97] While the available record in this case is lacking in regards to the frequency and regularity with which Great Northern Construction hired the historic restoration specialist, it is very much plausible that proper analysis of the relevant evidence could result in a court finding that historic restoration work was not work that regularly took place within Great Northern Construction's less specialized general construction and contracting business, in effect the same result as the Vermont high court opined through a different analysis.[98]

Such instances of alignment of the analysis of work substantiality and work regularity do not mean these analytical techniques can be used interchangeably. Simply said, work that is necessary for a business does not always take place within the hiring entity's usual course of business. Furthermore, work which is not necessary to a business may happen within the hiring entity's usual course of business. Those that subscribe to the necessity test and are committed to analyzing work substantiality do not seem to acknowledge this reality. Take the example given in the Illinois Administrative Code to illustrate when a service falls outside the usual course of business of an employing entity, it states "[t]he services of a window washer engaged by an employing unit whose business is selling woolens are outside the usual course of the business of the employing unit."[99] The drafters of this portion of the Illinois Administrative Code believe window washing is outside of the usual course of the woolen sellers' business because it "merely render[s] the place of business more pleasant" or is not necessary for selling woolens.[100] If instead this example is analyzed to determine the regularity of the work conducted, one might find that the services of a window washer were within the usual course of the woolen sellers' business, especially if you posit that the worker washed the business' windows once a week as was the case in the Illinois Supreme Court decision this example is directly pulling from.[101]

97. Great N. Constr., Inc. v. Dep't of Lab., 2016 VT 126, ¶ 5, 24, 204 Vt. 1, 5, 14.

98. In fact, in appellant's brief, it is stated that the Employment Security Board (the administrative appellate body that produced the opinion the Supreme Court of Vermont reviewed in this case) found that "restoration work is not merely incidental to [GNC]'s usual course of business, but constitutes a regular, ongoing component of the work that [GNC] does for its customers." The appellant alleges the Employment Security Board erroneously came to this holding in part because it considered that appellant (Great Northern Construction) was once in the business of restoration. An adjudicator analyzing appellant's current business (and not its roots) while continuing to use the analytical framework applied by the Employment Security Board – one which asks whether the work in question is "regular" or "on-going" work for the business – could come to the conclusion that, as stated above, historic restoration work was not work that regularly took place within Great Northern Construction's less specialized general construction and contracting business. Brief of Appellant at 16, 22, Great N. Constr., Inc. v. Dep't of Lab., 2016 VT 126, ¶ 5, ¶ 24, 204 Vt. 1, 5, 14 (No. 15–417).

99. 56 Ill. Adm.Code § 2732.200(f)(1) (2001). The Administrative Code advises readers on how to apply Illinois' ABC test found in section 212 of Illinois' Unemployment Insurance Act.

100. *Id.*

101. Schatz, Pollack Woolen Co. v. Murphy, 384 Ill. 218, 221 (1943) ("[T]he washing of windows was not within the usual course of appellee's business in selling woolens to the tailoring trade. His

The window washer example can also be used to highlight a second flaw of the necessity test: there is no context explaining for what of the business work must be necessary for it to be in its usual course. That admittedly is a vague and weirdly worded sentence. Let me explain. Say the woolen business sells to consumers and the window washer cleans the windows of its storefront. [102] Ostensibly, the woolen store would want to have its windows cleaned because clean windows allow customers to more easily see items of interest in the store, leading more individuals to come into the store, and dramatically increasing the likelihood of them purchasing something. Dirty windows, what the woolen store is trying to avoid by hiring the window washer, on the other hand, may lead to consumers questioning the quality of the institution and the products it sells. If it is established that the business in this case is the retail sale of woolen items,[103] the upkeep and maintenance of the storefront could be seen as necessary to that business for the aforementioned reasons. Detractors of this analysis might say that, even if the business is characterized as the retail sale of woolen items, the cleaning of windows is not necessary for a business to sell woolens. These dueling viewpoints point to an ambiguity within the necessity test: when asking whether "services are necessary to the business,"[104] is the question whether services are necessary to the business for its *survival* or whether services are necessary to business for it *to continue having its business identity*? If the former is true, an adjudicator would more likely find window washing to be necessary to the business while if the latter is true an adjudicator would less likely find window washing to be necessary to the business. This ambiguity created by the necessity inquiry not having a subordinate clause describing the lens under which "necessary" should be viewed, which this essay refers to in shorthand as the "necessary for what" problem, allows courts to case-by-case vary their understanding of Part B of the ABC test and makes a seemingly simple phrase, "usual course of business," even more vexing.

Even if there was guidance on the context of the necessity test, an even more challenging problem remains: adjudicators have to make untenable distinctions about what is and is not necessary work under this framework. Of course, there is work that is clearly necessary to a business and work that is clearly not. The task of cooking menu items would most likely be unquestioned as necessary to the business of a restaurant. The greeting of customers would most likely be unquestioned as incidental, "merely render[ing] the place of business more pleasant,"[105] and not necessary for a supermarket. The problem comes about when considering work for which

services may have rendered the place of business more pleasant but they did not enter into any of the many activities necessary to the purchase of woolens and the resale of them to tailors.").

102. In the original case, *Schatz*, the woolen business sells to the tailoring trade. 384 Ill. at 219.

103. As discussed in a later section, describing the hiring entity's business is itself a legal exercise. *See infra* notes 136-177 and accompanying text.

104. E-Z Movers, 2016 IL App (1st) 150435, ¶ 32.

105. Emergency Treatment, S.C. v. Dep't of Emp. Sec., 394 Ill. App. 3d 893, 903 (2009) (quoting guidance from the Illinois Administrative Code (56 Ill. Adm. Code § 2732.200(f))).

there are colorable or persuasive arguments that it is necessary to the business. Cases give guidance on the line between necessary and not necessary work, but an analysis of these cases present questions on the viability of the distinctions between types of work they purport to make.

Carpetland U.S.A., Inc. v. Illinois Department of Employment Security, an opinion by the Supreme Court of Illinois that has been cited by multiple high courts throughout the nation,[106] is one such case which attempts to provide guideposts for when work is and is not necessary to a business. In *Carpetland*, the court considered, in part, whether a carpet retailer's pre-sale carpet measurers and post-sale carpet installers were respectively performing work within the carpet retailer's usual course of business.[107]

The court found that work performed by the pre-sale carpet measurers was within the carpet retailer's usual course of business, reasoning that "[c]alculating the price of goods is necessary to Carpetland's business"[108] as salespeople cannot compete the transaction without knowledge of the square yardage of carpet required (to multiply it with the purchased carpet's price per square yard).[109] While acknowledging that buyers may provide measurements with no need for measurers, the court stated that it is the employee-salesperson's responsibility to obtain this information.[110] The court then articulated that "[w]hen one's employee is assigned the responsibility for a certain task, and has the choice between performing that task himself or delegating it to another, that task is clearly within the course of business for the employer. Thus, the measurers do perform a service within Carpetland's usual course of business."[111]

Carpetland'*s* reasoning that tasks assigned to employees which an employee can delegate to another are tasks that are "clearly" within an employer's usual course of business is suspect. *Carpetland* explicitly adopted the necessity test, stating that work must be necessary to a business for the work to be in the business' usual course[112] By also stating that delegable employee tasks are "clearly" within an employer's usual course of business, the *Carpetland* court is stating that delegable employee tasks are work that is necessary to a business, giving lower courts and administrative adjudicators a guidepost on when work reaches the threshold of being a necessity for a business. The guidance is erred as not all delegable tasks given to an employee are necessary for a business. For example, the *Carpetland* court declares "[t]he washing of windows…for a

106. *See* Great N. Constr., Inc. v. Dep't of Lab., 2016 VT 126, ¶ 20, 204 Vt. 1, 12, 161; Sebago v. Bos. Cab Dispatch, Inc., 471 Mass. 321, 334–35 (2015); Mamo Transp., Inc. v. Williams, 375 Ark. 97, 102 (2008); Hickey v. Bomers, 28 A.3d 1119, 1123 (D.C. 2011).

107. Carpetland U.S.A., Inc. v. Illinois Dep't of Employment Sec., 201 Ill. 2d 351, 353-55 (2002).

108. *Id.* at 387.

109. *Id.*

110. *Id.* at 387-88.

111. *Id.* at 388.

112. *Id.* at 386.

business…incidental"[113] (not necessary), but if the business had given responsibility of washing windows to an employee who then delegated the work to a third-party, window-washing would be deemed necessary and within the usual course of business of the business under this "delegable employee tasks" test. This attempt by the *Carpetland* court to clarifying the necessity test only further complicates matters and is an example of how difficult it is to grasp when work is and is not necessary.

The *Carpetland* court came to the opposite conclusion for the work of post-sale carpet installers. The court found that the fact that three quarters of Carpetland's customers opted for post-sale carpet installation facilitated by Carpetland was simply evidence of a "successful business strategy" and not necessary to its survival as customers could locate other carpet installers, such as carpet mills that sell to the public and discount home improvement stores, to install what they purchased at Carpetland.[114] "That Carpetland may enjoy a competitive advantage because of its ability to arrange for installation by independent installers [that it can vouch for] does not make installation a part of its usual course of business,"[115] the court said.[116]

Here, the *Carpetaland* court provides another guidepost: that work which creates competitive advantages may not reach the threshold of necessary work for a business. First, this guidepost provides another example of the "necessary for what" problem. The *Carpetland* court clearly indicated the inquiry it was asking was whether services are necessary to the business for its *survival* when it stated that "[t]here is no basis in the record for the…conclusion that 'but for' the availability of installation services, Carpetland would have gone out of business."[117] But immediately prior to its statement that providing a competitive advantage does not make installation part of Carpetland's usual course of business, the court moves away from analyzing how the installers' work affects the business' survival. Rather, the court discusses how Carpetland has "expressly limit[ed] its business to the retail sale of floor coverings," how "its prices do not include installation" and how its sales agreements state that customers must separately arrange for installation.[118] By analyzing Carpetland's business identity prior to assessing its conclusion on the issue, the court seems to be actually answering the question of whether services are necessary to business for it *to continue having its business identity*. By asking one question and answering another, *Carpetland* displays one of the flaws of the necessity test.

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113. *Id.*

114. *Id.* at 386-87.

115. *Id.* at 387.

116. *Id.* at 386-87 (The Court buttressed this argument by highlighting that Carpetland had "chosen to expressly limit" its business to retail sales as its process did not include installation and that the sales agreement between Carpetland and its customers clearly stated that installation had to be arranged separately.).

117. *Id.* at 386.

118. *Id.* at 386-87.

Second, even if it were to be conceded that *Carpetland* was asking whether services are necessary to the business for its survival, the line between work which merely provides a competitive advantage and work which is necessary for survival is not easily drawn. Simply said, competitive advantages assist businesses to survive, with many competitive advantages being necessary for a business to survive. In the case of Carpetland, the fact that carpet mills (that sell to the public) and discount home improvement stores provide installation may support the conclusion that Carpetland does not need to facilitate installation to survive. It could also support the conclusion that Carpetland must facilitate installation to survive. If it is a norm for Carpetland's competitors to offer this service and Carpetland were to not, less customers would come to Carpetland and for those that do, Carpetland would be either facilitating or allowing customers being introduced to its competition that does installation (competition that would look to incentivize the customers to work with them for future carpet needs). A slow death leads to the same result as a fast one. By all practical measures it could be argued that facilitating installation is necessary for a carpet retailer, highlighting the difficulty in demarcating when work is necessary to a business.

This difficultly in pinpointing when work is necessary and when it is not, combined with the lack of clarity about the scope with which necessity should be viewed and the fact that the necessity test does not conform with the text of the ABC test presents a compelling reason for why adjudicators should look elsewhere when analyzing whether work is within a hiring entity's usual course of business.

2. Reliance on the Work Demarcating Whether the Work is Within the Usual Course of Business

Where adjudicators have not adopted the necessity test, some adjudicators still use work substantiality as a means of demarcating whether work is or is not within the usual course of a business. These adjudicators seem to look to see if the business relied on the work. Reliance is a lower standard of work substantiality than necessity. As discussed above, work that is necessary is critical for either the business' survival or for the business to retain its business identity. Work that is relied upon may be necessary work, but work could be relied upon by a business but not be necessary to it as well.

For example, in *Appeal of Niadni, Inc*., the Supreme Court of New Hampshire considered a claim by a live entertainer of past employment at a resort that consists of "a restaurant, rooms, [and] entertainment."[119] The *Niadni* court first concluded that the claimant's services "were within the resort's usual course of business because they were regularly and continuously provided at the resort."[120] This analysis comports with the

119. Appeal of Niadni, Inc., 166 N.H. 256, 257-58 (2014).
120. *Id.* at 261.

regular aid principle articulated below, but the *Niadni* court, goaded by counsel, continued their Part B analysis and deviated from the regular aid principle. The court opted to show that the live entertainer's work did not just create a "mere 'ambience'" but rather "was used to attract new business to the resort," making the work an integral part of the resort's business.[121] While the *Niadni* court did not analyze whether the live entertainer's work was necessary for the resort's survival or for the resort to continue being a resort, the passage about whether the work created a mere ambience or was something greater shows the importance the court gave to work substantiality within its analysis.

The reliance test is problematic for nearly all the reasons the necessity test is problematic. Nowhere in any of the ABC test statutes that were surveyed for this essay was there a provision stating that adjudicators determine whether work was not relied upon by the business of the hiring entity. Rather, these statutes asked something to the effect of whether the work was outside the usual course of business of the hiring entity. Additionally, demarcating when something is being relied upon by a business and when something is incidental is just another framework where adjudicators have to make untenable distinctions.

B. THE REGULAR AID PRINCIPLE: THE REGULARITY OF THE WORK DEMARCATING WHETHER THE WORK IS WITHIN THE USUAL COURSE OF BUSINESS

As alluded to throughout this paper, there is a method of analyzing whether work is outside the usual course of a business without inquiring into the substantiality of the work. This method, which focuses the regularity of the work in question, was eloquently articulated by the Supreme Court of Connecticut in *Mattatuck Museum-Mattatuck Historical Soc. v. Adm'r, Unemployment Comp. Act*. The high court stated that "[i]f…an enterprise undertakes an activity, not as an isolated instance but as a regular or continuous practice, the activity will constitute part of the enterprise's usual course of business irrespective of its substantiality in relation to the other activities engaged in by the enterprise."[122] This section suggests that this regular aid inquiry is the proper scope under which to conduct the Part B test because it conforms to the text of the Part B test and reflects the origins of the Part B[123] test while also being able to be uniformly applied without making the untenable distinctions that plague the work substantiality inquiries. This section then delves into the line-drawing issues that the regularity analysis can create.

The last and, to this author's knowledge, only academic comment to directly and solely analyze "employment in the usual course of the

121. *Id.* at 263.

122. Mattatuck Museum-Mattatuck Hist. Soc. v. Adm'r, Unemployment Comp. Act, 238 Conn. 273, 280 (1996).

123. *Supra* notes 54-70 and accompanying text.

employer's business" was an article published in the Texas Law Review in 1927.[124] That essay attempted to interpret Texas' Workmen's Compensation Act which stated in part that:

> "Employee shall mean every person in the service of another under any contract of hire, express or implied, oral or written . . . except one whose employment is not in the usual course of trade, business, profession, or occupation of his employer."[125]

In interpreting this provision which, as shown, includes the "usual course of…business" language, the commenter turns to a Pennsylvania state supreme court decision interpreting that state's worker compensation statute which used this language: "the regular course of the business of the employer."[126] The fact that insights from a case interpreting a statute that explicitly mentions the regularity of work can be used to interpret the Texas provision at issue is another example of why the terms usual course and regular course are interchangeable. At least some adjudicators from the early part of the twentieth century would agree with this assessment. For example, in 1916, the California Supreme Court interpreted the "course of business of the employer" phrase in the English Compensation Act to mean "the normal operations which form part of the ordinary business carried on, and not to include incidental and occasional operations."[127] This definition is clearly alluding to the regularity of the work at issue and not the work's substantiality.

The regular aid principle is also the superior method of adjudicating the Part B test as it allows adjudicators to more easily make decisions based on facts instead of making untenable value judgements about what does and does not meet a synthetic work substantiality threshold. Take *Bigfoot's Inc. v. Board of Review*, a Utah Supreme Court decision holding that musicians' and entertainers' performances were within a bar's usual course of business because it was "usual and customary" for the bar to have entertainment.[128] The court came to this conclusion based on facts – the bar had engaged entertainers to perform at its place of business during a fifteen month period[129] - and not speculation around how important the performances were to the bar's business. Even adjudicators in Illinois, prior to the necessity test

124. W. N. C., *Master and Servant-Workmen's Compensation-Employment in the Usual Course of the Employer's Business*, 5 TEX. L. REV. 219 (1927).

125. Workmen's Compensation Act, art. 8309, § 1, TEX. REV. CIV. STAT. (1925); W. N. C., *Master and Servant-Workmen's Compensation-Employment in the Usual Course of the Employer's Business*, 5 TEX. L. REV. 219 (1927).

126. Marsh v. Groner, 258 Pa. 473, 477 (1917); W. N. C., *Master and Servant-Workmen's Compensation-Employment in the Usual Course of the Employer's Business*, 5 TEX. L. REV. 219 (1927).

127. London & Lancashire Guarantee & Acc. Co. of Canada v. Indus. Acc. Comm'n of Cal., 173 Cal. 642, 644 (1916).

128. Bigfoot's, Inc. v. Bd. of Rev. of Indus. Comm'n of Utah, Dep't of Emp. Sec., 710 P.2d 180, 181 (Utah 1985).

129. *Id.*

gaining a stronghold in that jurisdiction,[130] used the regular aid principle. In *Yurs v. Director of Labor*, the Appellate Court of Illinois held that an organ player's music was work within the usual course of business of a funeral home because of "the frequency of the inclusion of music in the funeral services."[131] In coming to this conclusion, the court looked to the record which showed how many weeks in a year the organist's services were used and on how many occasions the organist's services were used.[132] The fact-based analysis the regular aid principle encourages is a boon for adjudicators and counsel alike as it leaves little room for misinterpretation on what must be proved for work to be within a hiring entity's usual course of business.

No test is infallible though, and a deeper analysis of regularity is in order to understand its potential conceptual line-drawing issues. Take the example of an outside accountant that does an enterprise's taxes each year in March. This being an activity that happens once a year, at least colloquially, it is a regular occurrence, but legislators likely did not intend for outside accountants doing yearly taxes to be caught in the usual course of business gambit. This raises the question: when does an activity go from being an isolated event to one of regular continuous practice? The first time the enterprise does taxes, it is an "isolated event" as surely work happening once does not count as work that is taking place within the usual course of the business. In year 2, and definitely in year 3, it could be more realistically argued that the work being done is conducted with regularity, as it is "arranged in or constituting a constant or definite pattern, especially with the same space between individual instances."[133] Of note is the precise language used in the *Mattatuck* test. It states that an activity is part of the enterprises usual course of business when it is a "regular or continuous practice."[134] This statement could theoretically be read in two ways with either the conjunctive "or" or with the disjunctive "or." Reading the language with a disjunctive "or" leaves the reader with two tests to show work is within the usual course of the business – (1) to show that it is regular practice and (2) to show that it is a continuous practice – but this reading is problematic as the term "regular" alone departs a meaning where even the most independent of independent contractors could fall within its gambit through savvy legal maneuvering.[135] Rather, reading "regular or continuous" together with

130. Carpetland, 201 Ill. 2d at 400 (There still seems to be some support of the regular aid principle in Illinois. In his separate opinion in Carpetland, Justice Freeman implicitly supported the work regularity inquiry when he stated the "evidence adduced certainly supports the view that carpet installation went hand-in-hand with wall-to-wall carpeting purchases at Carpetland, purchases which the record shows constituted the majority of Carpetland's sales.").

131. Yurs v. Dir. of Lab., Dep't of Lab., Div. of Unemployment Comp., 94 Ill. App. 2d 96, 104 (Ill. App. Ct. 1968).

132. *Id.* at 102.

133. *Regular*, LEXICO.COM, https://www.lexico.com/en/definition/regular (last visited Oct. 21, 2021).

134. Mattatuck Museum-Mattatuck Hist. Soc. v. Adm'r, Unemployment Comp. Act, 238 Conn. 273, 280 (1996).

135. *See* example in text below.

continuous being a descriptor of regular provides a more workable framework. Specifically, this reading establishes that the activity must be continuous or "marked by uninterrupted extension in…time."[136] As such, this narrows the regularity analysis in that it sets a limit as to how much space between individual instances is acceptable for the work to be regular. Let's say a plumber worked on the pipes for a bakery in 1946, 1956, 1966, 1976 and 1986. The work was done once a decade, all ten years apart. If we were to only analyze if the work was regular under its definition devoid of continuity, the plumbers work would be regular and within the usual course of the business. When the regularity analysis includes the continuity element, the work would not be considered regular and within the usual course of the business as the work cannot be said to be continuous. This of course presents further line drawing issues. In difficult cases, what is helpful is turning to the goal of the ABC test – to determine whether a worker is a dependent worker or not.[137] If the work is so regular and continuous that it shows the worker is dependent on the work, then the work is likely within the hiring entity's usual course of business. On the other hand, if the work is more like the work done by the most independent of independent contractors, like the fixing of pipes every 10 years, than the work is likely outside the hiring entity's usual course of business. With this in mind, the work of an accountant through the yearly garnering of business from an enterprise is likely not regular work of the kind to be seen as within the business' usual course as the work, while on a regular interval, is discontinuous (marked by a yearly interruption) and not indicative of a dependent worker.

Astute observers will flag that using worker dependency as a method of resolving the question of whether work is within the usual course of a hiring entity's business will create different outcomes when the frequency of work is identical yet the dependency of the worker on the work is not. For example, an accountant that works for a company one day a week and a janitor that works for the same company one day a week perform work with the same regularity as each other yet their amount of dependency on the work may be vastly different. Furthermore, even janitors that work the exact same amount of time doing janitorial work may be dependent on the work to different degrees as at the heart of the matter dependence is a characteristic that varies on a case-by-case basis. Still, disparate results for workers where their work is similar in temporal regularity but for which the workers are differently dependent on their work may not actually be an ill-conceived method of line-drawing. The practice of employment law, and more specifically, worker classification law, has been and continues to be a fact-intensive exercise. If the goal is to achieve a just and fair result, a bright-line rule for when work is or is not regular that does not take into account a worker's dependence might, depending on where said line is set, be underinclusive and exclude

136. *Continuous*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/continuous (last visited Oct. 21, 2021).

137. *Supra* note 69 and accompanying text.

dependent workers from protection and include some bonafide independent contractors within the gambit of protection.

These insights on regularity present another point of note: work can and does grow from being outside the usual course of a hiring entity's business to being within the usual course of a hiring entity's business. New work, work which is being taken up by the business for the first time, would not be within the business' usual course as there cannot be continuity or regularity with just one instance. For example, the moment after the first installer Carpetland hired did her work there is not enough work to classify installing within Carpetland's usual course of business. If the installer worked every day for a month, installation is more likely seen within Carpetland's usual course as the work is regular (and continuous). What if the installer was hired only for one month due to a sudden plethora of suburban developments springing up sending homebuilders scurrying into Carpetland? The above analysis stands, but savvy defense counsel could argue that the installer was hired for a single occurrence of work – the installation of carpet during a one-month unexpected surge in carpet demand.

Units of work and how work is described is a topic for further study. The next section presents just one aspect of how to understand the term "work" within the Part B framework. In conjunction with describing the hiring entity's business, which is discussed in a later section, these insights will help complete an analysis of whether *work* is outside the usual course of the *hiring entity's business*.

V. "WORK" / "SERVICES" – IS THE PART B INQUIRY ANALYZING THE TYPE OF WORK BEING DONE OR THE WORK THE CLAIMANTS HAVE DONE?

Until this point, this essay has largely used examples of the work in question being done only by one individual or cases where the work in question was ostensibly only being done by the workers in question. There of course may be times where those petitioning for inclusion as employees under the ABC test do not constitute all of the workers doing the type of work which the petitioning workers do. The question arises: Is the Part B inquiry analyzing the type of work being done or the work the claimants have done? The most coherent answer to this question is to hold that Part B is analyzing the regularity of the work done by the claimants and not the regularity of the work in general because (1) the latter would result in workers doing work even on a single instance employees under the test, which would be an affront to the statutory purpose of the ABC test and because (2) the other prongs of the ABC test are evidence that the inquiry is worker-specific.

Take the example of a company in the business of transporting people from one location to another that has workers doing this work around the clock, 365 days a year. Say a worker working for this company drives a

customer from point A to point B. The worker then does not do any more work for the company. Did the worker's work fall within the usual course of the hiring entity's business? If the work being analyzed is the transportation of people from one location to another as a whole and not the singular instance that the worker in question did that work, then of course the worker's work falls within the hiring entity's usual course of business as driving customers around is something the company does on a continuous basis every day. This analysis would grant employee status under the ABC test to every person that had done the work in question no matter the frequency at which they conducted the work for the company. Such a reasoning is clearly against the statutory purpose of the ABC test as it allows workers that are truly not dependent workers to benefit from employment status.

Further evidence that the work to be analyzed is the worker's work can be found by looking at the other prongs of the ABC test. Part A is not asking whether the alleged employer had the ability to exercise control of the types of workers that the worker in question falls into, rather it is an inquiry into whether the alleged employer could exercise control over the workers in question. Part C is not asking whether the work is of the type that is customarily done by members of an independently established trade or occupation, but is rather is inquiring into whether the specific worker in question is engaged in an independently established trade or occupation. Similarly, it is logical for Part B to be worker specific as well.

So when does a worker's work become within the hiring entity's usual course of business where the work is of the type of work that is done regularly for the alleged employer by other workers in aggregate? The regularity analysis articulated above still applies and analyzing the worker's dependence on the work may still be the best method of resolving difficult cases.

The aforementioned example of a company in the business of transporting people from one location to another might make readers think of Uber or Lyft, but how these businesses are described is actually a matter of art which greatly affects the outcome of the ABC test for those doing work for these companies.[138] This highlights the importance of describing the

138. For ride-hailing application companies, the question that will determine their liability is how one describes their business. If, like in Q. D.-A., Inc. v. Indiana Dep't of Workforce Dev., 96 N.E.3d 620, 627 (Ind. Ct. App. 2018), vacated, 114 N.E.3d 840 (Ind. 2019), the business is described as "an intermediary or middleman…employing people to pair its customers…with individuals who are properly licensed to do the work (Claimant and other drivers)," no understanding of "usual course" would make work done by drivers within the usual course of a ride-hailing application's business because under this characterization of the business drivers are benefiting from the intermediary firm and not providing services to it. If, like in Co. v. Indiana Dep't of Workforce Dev., 86 N.E.3d 204, 208-09 (Ind. Ct. App. 2017), the ride hailing application is described as in the business of "transport" with the reasoning that customers use these applications to get from point A to point B, then drivers would be working within the usual course of business of a ride hailing application as their work driving ride-hailing application customers is done on a continuous (regular) basis.

business when conducting the Part B inquiry. In jurisdictions using the necessity test, how the business is described facilitates the understanding of whether the work is necessary to the business. Even in jurisdictions that are, correctly, applying the regular aid principle, the description of the business becomes relevant when colorable arguments can be made that a business is an intermediary, connecting businesses (workers) to customers, with the work of the businesses falling outside of the intermediary's usual course. This argument has taken centerstage recently with the rise of the gig economy.

VI. AN ANALYTICAL FRAMEWORK FOR DESCRIBING THE HIRING ENTITY'S BUSINESS

A. ASSESSING WHO IS THE HIRING ENTITY

To understand whether work is outside the usual course of business of a hiring entity, one must first understand the identity of the ultimate subject of this inquiry: the hiring entity.[139] In many, if not most, cases, the hiring entity's identity is not at question,[140] but the advent of joint employment and complex corporate structures[141] create colorable questions about which entity's business must be analyzed. In most cases, the hiring entity will be the entity named in the lawsuit. Where the presumption of employment between the putative employer named in the lawsuit and the worker(s) is established, a burden is placed on the putative employer to show that the work was done outside the course of its business. Theoretically, where the language in the Part B test is distinguishable from that of the language creating the rebuttable presumption and where case law has not stated that such language is in fact undistinguishable, counsel has more leeway to argue that an entity not named in the lawsuit is in fact the ultimate subject of the Part B inquiry. Realistically, the Part B inquiry will be narrowed not through litigating who is the hiring entity, but rather through litigating what is the business whose usual course must be assessed.

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139. This inquiry is of importance because the identity of the hiring entity will affect how counsel can characterize the business of the hiring entity which in turn will affect whether the work was one within the business' usual course. Some states have adopted ABC rules that do not include language such as "employer" or "hiring entity" to describe the "business" in the Part B test; rather, language such as "outside the usual course of the business *for which such service is performed*" [emphasis added] is used. *See* Vt. Stat. Ann. tit. 21, § 1301(6)(B) (West); Ark. Code Ann. § 11-10-210(E) (West). This language invokes the question: who is the business "for which such service is performed?" In other words, even with the ABC test being worded in this manner, an inquiry of who is the employer/hiring entity is proper. *See* Great N. Constr., Inc. v. Dep't of Lab., 2016 VT 126, ¶ 15, 204 Vt. 1, 10 (characterizing Vermont's Part B test as saying, in part, "that the service performed by the worker is either outside the usual course of business of the *purported employer*, or…" (emphasis added)).

140. For example, if a small family-owned grocery store that hires cashiers, there is no questions that the family-owned grocery store is the hiring entity.

141. Complex corporate structures include multi-tiered franchises and the use of distinct legal entities wholly or partly owned by parent or holding companies.

B. ASSESSING THE HIRING ENTITY'S BUSINESS

Assessing the hiring entity's business is the natural prerequisite to assessing whether work falls outside of the business' usual course. To comprehensively assess the hiring entity's business, attorneys and adjudicators must answer 3 distinct inquiries. First, it must be established that there is a business to be assessed. Second, which business of the hiring entity is at question must be established. Third, the business must be described to provide a launching point to analyze whether the work was done within the business' usual course.

1. Assessing Whether a Business Exists

Where the putative employer does not have a business, there is no usual course of business for which work can be done. If "business" is defined in other sections of the act or can be defined by the context of the Part B test, said definition can be used in assessing whether the putative employer engaged in a business.[142] In most cases where Part B and/or the other sections of the act do not provide sufficient context to define business, the popular meaning of business should be used to assess whether the putative employer engaged in a business as statutes "are presumed to employ words in their popular sense."[143] Of course, where adjudicators have spoken on the issue, their definition of "business" must be considered. *Marsh v. Groner* presents the quintessential example of the distinction between when a hiring entity meets the popular definition of "business" and when it does not. A decision of the Supreme Court of Pennsylvania interpreting the state's 1915 Workmen's Compensation Act which has strikingly similar language to current day Part B tests,[144] *Marsh* presented the case of a worker suing for compensation for injuries he obtained when he fell of a scaffolding while doing plastering work for a homeowner that hired him as part of her home remodel and enlargement.[145] In analyzing whether the worker met an "indispensable condition" for recovery under the Act – "that he received his injury while engaged in the regular course of the business of his employer"[146] – the court held that the homeowner was not engaged in a business as the employment was not patronage nor was it for "profit or gain, but simply [for] her own personal gratification and comfort."[147] While the court's definition of "business" is problematic, as discussed below, the holding that a homeowner is not running a business by hiring workers to improve her

142. Marsh v. Groner, 258 Pa. 473, 477-78 (1917).

143. *Id.* at 478 (citing Cooley on Constitutional Limitations, pl. 68).

144. Section 104 of Pennsylvania's Workmen's Compensation Act of June 2, 1915 (P. L. 736) as cited in Marsh v. Groner, 258 Pa. 473, 477 (1917): "The term 'employé,' as used in this act, is declared to be synonymous with servant, and includes all natural persons who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of the business of the employer."

145. *Id*. at 476.

146. *Id.* at 477.

147. *Id.* at 478.

household is still relevant today, as is the implicit holding that an entity motivated by profit is a business.

But what of entities that do not work towards profit or monetary gain but towards the advancement of an ideology or cause, is such an entity a business or does the advancement of an ideology or cause mirror the personal gratification and comfort the homeowner was working towards by hiring help?[148] *Brookhaven Baptist Church v. W.C.A.B. (Halvorson)*, a Supreme Court of Pennsylvania decision on its workers compensation law, provides some guidance, stating that "the term business does not always connote a profit objective"[149] and holding that a church was in the business of maintaining and repairing church property.[150] The definition of business synthesized through *Brookhaven Baptist Church* would include a vast array of nonprofit hiring entities, a boon for counselors representing workers. Diligent defense counsel for such entities would look to see if the statute implementing the ABC does not have purview over these entities or find case law supporting their exclusion from analysis under the law at issue.

2. Assessing which Business of the Hiring Entity is at Issue

Justice Robert von Moschzicker made an astute observation in his dissent in *Marsh*. The majority had defined business as "the habitual or regular occupation that the party was engaged in with a view to winning a livelihood or some gain."[151] Justice von Moschzicker observed that this definition of business, in effect, changed the language of the Act from "'the regular course of the business' to 'the course of the regular business' of the employer."[152] The distinction between the regular course of business and the course of the regular business highlights two observations about an employer's business. For one, a business need not be a regular occupation. For example, private wildfire firefighting[153] is such a business that could by no means be characterized as a "regular" business as it is a service (business) reactionary only to uncontrollable natural forces ("acts of God") and criminal acts. In fact, a business need not be an occupation at all. The renting of a farm, done however sporadically, is a business even where the hiring entity's

148. These entities, such as tax-exempt non-profit organizations, may be outside the purview of the laws which implement the ABC test. When analyzing such an entity, the same research on the meaning of "business" through analysis of the text of Part B, the surrounding provisions of the statute and case law would apply to see if such entity is within the law's purview.

149. Brookhaven Baptist Church v. W.C.A.B. (Halvorson), 590 Pa. 282, 295 (2006).

150. *Id.* at 296.

151. Marsh v. Groner, 258 Pa. 473, 478 (1917).

152. *Id.* at 479.

153. Alexis Madrigal, *Kim Kardashian's Private Firefighters Expose America's Fault Lines*, THE ATLANTIC (Nov. 14, 2018) https://www.theatlantic.com/technology/archive/2018/11/kim-kardashian-kanye-west-history-private-firefighting/575887/.

"habitual or regular occupation"[154] includes dealing horses and real estate and running a livery business.[155]

Second, a hiring entity can have more than one business.[156] Side-hustles, "work performed for income supplementary to one's primary job,"[157] are increasingly being taken on by individuals.[158] Furthermore, companies continue to develop or purchase business lines complementary to existing business lines or as investments into new markets. An online advertising service provider may also be in the business of providing broadband services, smart home products, consumer hardware products, and paid content streaming, among other business lines.[159] In *Carpetland,* the carpet retailers could be characterized as having two businesses, retailing and installing, further complicating the necessity analysis. It is the business of the hiring entity that the worker provided services for which is to be analyzed under Part B, not any other business of the hiring entity.

Even within businesses, one might find businesses. This phenomenon presents the question of when a profit-generating activity becomes its own business. For example, one of Amazon's many businesses is being an online retailer, but colorable arguments could be made that its co-branded websites such as the one it had with Borders Group are businesses outside of its Amazon.com business.[160] Even within Amazon.com which has traditionally been a platform where other companies sold their goods,[161] Amazon has started to compete with these sellers by selling self-produced products.[162] Is

154. Marsh v. Groner, 258 Pa. 473, 478 (1917).

155. *See* State v. Dist. Ct. of Douglas Cnty., 138 Minn. 103, 104, 106 (1917) (in contrast of what is being professed in this essay, holding that the renting of a farm is not the employer's business where the defendant was conducting other business activities regularly).

156. Company v. Ind. Dep't of Workforce Dev., 86 N.E. 3d 204, 209-10 (2017) (stating that "the provision of transport and delivery of RVs is not just Company's usual course of business, it seems that it is its *only* course of business," implying that a business can have multiple courses of business (emphasis added)).

157. *The Origins of 'Side-Hustle',* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/words-at-play/words-were-watching-side-hustle.

158. Bill Vogrin, *A Bisexual Teacher in Red Country Has a Mission*, N.Y. TIMES (Mar. 19, 2017), https://www.nytimes.com/2017/03/19/your-money/budget-what-you-can-afford.html ("'Every millennial I know has a side hustle or two,' said Avalon, [a teacher from Colorado Springs] who does freelance design work, editing work and writing. 'I don't know anybody who has one job and makes a living at it.'").

159. This example alludes to Google. *See* Damien Davila, *Google's 6 Most Profitable Lines of Business (GOOGL)*, INVESTOPEDIA (Mar. 4, 2016), https://www.investopedia.com/articles/markets/030416/googles-6-most-profitable-lines-business-googl.asp; https://store.google.com/; https://cloud.google.com/storage/.

160. *Amazon, Borders Team Up*, CNNMONEY (Apr. 11, 2001), https://money.cnn.com/2001/04/11/companies/amazon/index.htm; Josh Sanburn, *5 Reasons Borders Went Out of Business (and What Will Take Its Place)*, TIME (July 19, 2011), http://business.time.com/2011/07/19/5-reasons-borders-went-out-of-business-and-what-will-take-its-place/.

161. *Sell on Amazon*, https://services.amazon.com/content/sell-on-amazon.htm/ref=sc_us_soa_strip?ld=SCSOAStriplogin.

162. Mike Murphy, *Amazon Owns a Whole Collection of Secret Brands*, QUARTZ (Aug 7, 2017), https://qz.com/1039381/amazon-owns-a-whole-collection-of-secret-brands/ ("Amazon has started

Amazon, the product-producing company selling on the Amazon platform, a different business from that of Amazon, the e-commerce platform? To answer this question and those like it, one must construct a much more complex definition of "business" than the one that can be constructed through the insights in *Marsh* and *Brookhaven Baptist Church*. This essay does not profess to provide an answer to this question; rather, it simply provides the question for further study. Such a study might examine how businesses are born from other businesses, how dependence on other profit-generating units might hinder a profit-generating activity from being called a business, and how branding and the creation of legal entities might determine if an activity is a business or not. The answer to this further study may be that when a profit-generating activity cannot be properly differentiated from a business, adjudicators must analyze the business as a whole. In such a situation, proponents of classifying the profit-generating activity as a standalone business might still be able to reap the benefits they had hoped to gain in litigation by strategically describing the business in a way which highlights the centrality of the profit-generating activity.

3. Describing the Hiring Entity's Business at Question

Is Uber a transportation company or an internet intermediary service? A question that has been litigated throughout the nation and around the world,[163] it highlights how describing businesses is an integral part of employment classification disputes. How a company is described can be crucial in determining worker classification as one description may lead to a different "usual course" than another.[164] Adjudicators have used a variety of techniques to describe the businesses that profess they meet the criteria of Part B. Sometimes, adjudicators use multiple factual arguments to come to a description of a business.[165] While this essay does not provide an exhaustive taxonomy of techniques used by adjudicators to describe

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cutting out the middle-man by selling self-produced items… a spokesperson confirmed the following brands are indeed Amazon's: 'Amazon has a range of brands including Amazon Basics, Happy Belly, Mama Bear, Pinzon, Presto!, Wickedly Prime, Goodthreads, Amazon Essentials, Mae, Ella Moon, Buttoned Down, The Fix and Lark & Ro.'") ; Eugene Kim, *Amazon Has Been Promoting Its Own Products at the Bottom of Competitors' Listings*, CNBC (Oct. 2, 2018), https://www.cnbc.com/2018/10/02/amazon-is-testing-a-new-feature-that-promotes-its-private-label-brands-inside-a-competitors-product-listing.html ("For example, the link under the product listing for Huggies diapers takes you to a page for Mama Bear, an Amazon-owned diaper brand. The link below a Dove body wash listing directs you to a product page for P.O.V., a personal care brand owned by Amazon.") .

163. Omri Ben-Shahar, *Are Uber Drivers Employees? The Answer Will Shape The Sharing Economy*, FORBES (Nov. 15, 2017), https://www.forbes.com/sites/omribenshahar/2017/11/15/are-uber-drivers-employees-the-answer-will-shape-the-sharing-economy/#39da68175e55.

164. I.e., The usual course of a transportation company can likely be argued to be different from an internet intermediary service.

165. Carpetland, 201 Ill. 2d at 386-87 (considering the carpet store did not include installation within its price and that "the sales agreement clearly states that installation must be arranged separately" to come to the conclusion that the carpet retailer was not also a carpet installer).

businesses or advocate for the use of a certain method to describe businesses, below one can find some prominent methods used by adjudicators.

a. Company Self-Characterization

Leah Busque, the founder of TaskRabbit, once said "No one knows your business better than you."[166] Some adjudicators have given at least some credence to this notion that "a purported employer's own definition of its business is indicative of the usual course of that business."[167] *Q. D.–A., Inc. v. Indiana Department of Workforce Development* provides a stark example of how company self-characterization used by adjudicators benefited a company. *Q. D.–A.* involved a driver claiming to be an employee of a company that paired drivers with companies to transport vehicles to dealerships and customers.[168] Relying on testimony of a Company representative about the contract which characterized the business, the court held "the evidence established that Company's business is providing brokerage services between its customers and those individuals licensed and authorized to provide drive-away services."[169] This characterization basically makes the drivers beneficiaries of the company's services instead of providers of its services, decimating any chance that they are doing work within the company's usual course.[170]

Company self-characterization does not always work in a business' favor though. For example, the high court of Maine, in *Outdoor World Corp. v. Maine Unemployment Ins. Comm'n*, posited that Outdoor World "is in the business of developing membership campgrounds and offering the sale of such memberships to the general public."[171] They lifted this definition of Outdoor World's business directly from Outdoor World's agreement with its salespeople,[172] an agreement which was ostensibly a contract of adhesion. Characterizing Outdoor World's as one which sells memberships made it easy for the court to find that salespersons were working within Outdoor World's usual course.[173]

166. Leah Busque, *Making the Leap: A Founder's To-Do List*, HUFFINGTON POST (Oct. 4, 2012), https://www.huffingtonpost.com/leah-busque/making-the-leap-a-founder_b_1936866.html.

167. Sebago v. Bos. Cab Dispatch, Inc., 471 Mass. 321, 333 (2015); Athol Daily News v. Bd. of Review of Div. of Emp. and Training, 439 Mass. 171, 179 (2003) ("In light of the fact that the News itself defines its business as 'publishing and distributing' a daily newspaper, we agree that the carriers' services are performed in 'the usual course of [the News's] business.'").

168. Q.D.-A., Inc. v. Ind. Dep't of Workforce Dev., 96 N.E.3d 620, 621 (Ind. Ct. App. 2018), vacated, 114 N.E.3d 840 (Ind. 2019).

169. *Id.* at 626-27.

170. It is notable that the administrative agency, which decided this case prior to its appeal to the Court of Appeals of Indiana and ostensibly did not rely on the company representatives testimony, held that "The employer is a provider of one-way transportation of commodities" and that the driver's work was within the usual course of the company's business. *Id.* at 626.

171. Outdoor World Corp. v. Me. Dep't of Labor, Unemployment Ins. Comm'n, 542 A.2d 369, 371 (Me. 1988).

172. *Id.*

173. *Id.*

b. Customer Understanding

Adjudicators also use customers' understanding of businesses to describe businesses. To derive customer understanding, adjudicators at times contemplate how customers perceive the services a business provides.[174] Other times, adjudicators may analyze how a business held itself out to the public.[175]

c. End Goal Theory

At least one court has considered the end goal of a business to describe it. In *In re Bourdeau Custom*, Bourdeau Custom Homes asserted that it was in the business of "custom design[ing] homes, connect[ing] customers with subcontractors, and manag[ing] the construction of the homes" and not, as a lower adjudicatory body asserted, in the business of "building and selling homes."[176] The Vermont Supreme Court agreed with the lower adjudicatory body, stating that Bourdeau was in the business of building and selling homes as "the record reflect[ed] that Bourbeau's end goal is to provide customers with a completed home."[177]

d. Issues Surrounding Business Characterization

Company self-characterization presents issues that adjudicators must be aware of when relying on this method of business characterization. Statements made when litigation is imminent or after litigation has commenced can be suspect as the business has an incentive to frame its business not as it truly sees itself but as it sees is best for litigation. Furthermore, statements made prior to imminent litigation can also be inaccurate descriptions as a company could (1) be risk-averse and be hedging against litigation when making statements and (2) be marketing themselves to a certain constituency and characterizing themselves particularly for that constituency, providing a warped view of the business. That said, a company is in a very good position to characterize itself, so adjudicators must simply be vigilant when using this technique.

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174. *See* Co. v. Ind. Dep't of Workforce Dev., 86 N.E.3d 204, 209 (Ind. Ct. App. 2017) ("Company contends that its usual course of business is not the provision of transport services, but, rather, the provision of brokerage services. While perhaps technically true, we seriously doubt that customers with RVs to transport contact Company to act as a "middle man" between them and independent haulers; they call Company to have an RV moved from point A to point B and almost certainly do not care how Company accomplishes that task. From a common-sense standpoint, the Company's business is transport, and this is the precise service that Claimant provided to Company.").

175. *See* McPherson Timberlands, Inc. v. Unemployment Ins. Comm'n, 1998 ME 177, ¶ 14, 714 A.2d 818, 822 ("Here, regardless of the descriptive language chosen, there is competent evidence in the record to support the Commission's conclusion that Withee's timber harvesting work was not outside the usual course of McPherson's timber management and marketing business. McPherson's business encompassed locating, obtaining, and selling timber at a profit. *McPherson advertised its interest in buying timber from other landowners and held itself out as a harvester and marketer of the timber*." (emphasis added)). *See also* E-Z Movers, Inc. v. Rowell 61 N.E.3d 955 (2016).

176. In re Bourbeau Custom Homes, Inc., 2017 VT 51, ¶ 26 (2017).

177. *Id.* ¶ 28.

Customer Understanding also presents issues that adjudicators must be aware of when relying on this method of business characterization. For one, customers may not be fully aware of the extent of an enterprises business. Customers generally only see the aspects of a business facing them. Customers may also have a simplistic view of the business, especially when their interactions with the business is limited.

Furthermore, adjudicators seem to arbitrarily or without written reasoning pick between company self-characterization, customer understanding and other methods of business characterization. Because of this, even adjudicators of the same judicial body seem to be coming to different characterizations of extremely similar businesses, ultimately leading to very muddled precedent. For example, as stated above, in *Q. D.–A.*, the majority, using testimony of a Company representative in interpreting the contract characterizing the business (company self-characterization), came to the conclusion that the company was a brokerage service, making drivers outside the company's usual course of business.[178] Less than six months earlier, in *Company v. Indiana Department of Workforce Development*, another panel of the Court of Appeals of Indiana, faced very similar, if not close to identical facts. Company claimed to be a brokerage service, and not a transportation and delivery service of RVs. The court, utilizing the Customer Understanding theory of business understanding, stated that it "seriously doubt[s] that customers with RVs to transport contact Company to act as a "middle man" between them and independent haulers; they call Company to have an RV moved from point A to point B and almost certainly do not care how Company accomplishes that task. From a common-sense standpoint, the Company's business is transport."[179] Of note, Judge Melissa S. May, who concurred in the *Company* decision, was also on the *Q. D.–A.* panel and provided a dissent which stated that Q. D.–A. was in the transportation business and drivers were conducting work within Q. D.–A.'s usual course of business by citing *Company* and its Customer Understanding reasoning.[180]

Adjudicators, to be comprehensive and to avoid the downfalls of individual techniques, should consider (1) the undisputed facts, (2) the business' understanding, (3) customer understanding and (4) other perspectives prior to articulating the characterization of the business and should further rationalize said characterization through the use of precedent. Other perspectives could include workers' perspectives as many times they interact with the business in a more intimate fashion than customers.

178. Q.D.-A., 96 N.E.3d at 621, 626-27.
179. Co. v. Ind. Dep't of Workforce Dev., 86 N.E. 3d 204, 209 (2017).
180. Q.D.-A., 96 N.E.3d at 621, 628.

VII. CONCLUSION

Whatever one's view on the ABC test, in recent times it has further cemented itself as a prominent tool to determine worker classification.[181] And while the furor its increased importance has generated, especially since *Dynamex*, may lead some to, at first glance, believe it to be of rough-hewn nature, a deeper look reveals a nuanced and multifaceted guide steering adjudicators and counsel through "the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing."[182] This article reveals the origins of this guide, having inspiration from a lesser-known framework analyzing skill and integration to determine liability and the common law control test, and chronicles its birth within unemployment insurance legislation. This article also articulated how to deal with a well-publicized quirk of this guide, Part B. The central insight of this article is that the *regular aid* principle clearly demarcates when work is within the usual course of business of a hiring entity while not being hindered by untenable distinctions which regularly plague tests that demand there be a higher dependence on the work by the employer for the work to be in the usual course of business. It is the hope of this author that after reading this piece, adjudicator and counsel alike will be better equipped to explore the borderlands with the sometimes-misunderstood guide, the ABC test.

181. *See supra* note 10.
182. NLRB v. Hearst Publ'ns, 322 U.S. 111, 121 (1944).

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