JULY 2009

Defense Counsel Journal

Vol. 76 • No. 3 • Pages 271-382

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Defending Against Suits Brought By Illegal Aliens

By Jerry Joe "J.J." Knauff, Jr.

I. Introduction

PIERRE LEFAUX is a citizen of Canada who illegally[1] entered the United States.[2] Pierre used a forged birth certificate and false social security card in the name of Peter Jones to obtain employment with XYZ Painting, a Texas company in the business of residential house painting. While on a job in Dallas, Pierre was injured in a fire when combustible materials ignited from a spark.

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Pierre sustained severe burns and may be unable to work for the remainder of his life. Pierre brought suit against XYZ Painting for negligence and claimed lost past and future earning capacity damages, among other damages.

This article uses Texas case law, as well as persuasive arguments from other jurisdictions, to provide insight into the following questions defense counsel should address when faced with a suit brought by an illegal alien like Pierre:

- Is Pierre entitled to recover damages for lost future earning capacity in U.S. wages?
- Are Pierre's lost earnings claims preempted by any federal or state laws?
- Are Pierre's claims barred by state law or the Unlawful Acts Doctrine?
- May evidence of Pierre's immigration status be submitted to the jury? and
- Should Pierre's expert account for his immigration status when formulating opinions?

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[1] *See* Immigration and Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1047 (1984) (stating unregistered presence in the U.S., without more, constitutes a crime); U.S. v. Roque-Villanueva, 175 F.3d 345, 346 (5th Cir. 1999) (holding same); *see also* Amy K. Myers, *What Non-Immigration Lawyers Should Know About Immigration Law*, 66 AL. LAW 437, 437 (November 2005) (stating "individuals in U.S. in one of four categories with regard to immigration status: Citizens, either through birth in U.S. or one of its territories, or through naturalization; permanent residents, immigrants who gained status of permanent residents in U.S. through family-based sponsorship, employment, diversity lottery or other means; holders of temporary visas allowing individuals to be in U.S. for limited time for specific purpose, (i.e., student visas); or undocumented aliens.").

[2] Estimates of the number of illegal immigrants living in the United States range from a low of seven million up to a high of fifteen million. *See* Hugh Alexander Fuller, *Immigration, Compensation and Preemption: the Proper Measure of Lost Future Earning Capacity Damages after* Hoffman Plastic Compounds, Inc. v. NLRB, Note, 58 BAYLOR L. REV. 985, 986 (2006); *see also* Jeffrey S. Passell, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.* 1 (Pew Hispanic Center October 2, 2008) (estimating unauthorized population at 11.9 million in March 2008), available at <http://pewhispanic.org/reports/report.php?ReportID=94> (last visited June 24, 2009).

II. Loss of Future Earning Capacity

An essential question that arises in any tort suit brought by an illegal alien[3] is whether compensatory damages for lost wages should be measured based on the plaintiff's ability to work in the United States or in his home country. While arguments and analysis regarding claim preclusion and/or preemption are less likely to apply to aliens who are employed by an employer with full knowledge of their illegal status or aliens who obtain employment from an unwitting employer without tendering any fraudulent documents,[4] a strong case may be made in many jurisdictions that workers like Pierre are not entitled to compensation based on U.S. wages.

Texas has been cited as a state in which case law provides greater protection for illegal aliens seeking compensation for lost wages based on U.S. wages.[5] Even in Texas, however, the law is unsettled on the issue of whether an illegal alien who was employed under fraudulent circumstances may recover damages for the loss of future earning capacity based on U.S. wages. Four Texas courts have reviewed the issue, but their worth is minimal since the factual scenarios provide alternative protections for these immigrants and none relied upon any authority or performed any analysis to establish such a right.

In *Hernandez v. M/V Rajaan*, a longshoreman was injured on the job.[6] The longshoreman was an illegal alien who had resided in the U.S. continuously since 1970.[7] The *M/V Rajaan* court held an illegal alien may recover lost wages in U.S. earnings unless the defendant can establish the illegal alien was about to be or would surely be deported.[8] This holding was predicated on the fact that the longshoreman could remain in the U.S. legally because the Immigration Reform and Control Act provided amnesty/citizenship status to those aliens who "entered the United States before January 1, 1982, and . . . resided

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[3] Many commentators prefer other terms such as "unauthorized worker," "foreign national," or "undocumented immigrant," to use of the term "illegal alien." However, as the California Court of Appeals in Martinez v. Regents of University of California noted:

> [As compared with the term] undocumented immigrant . . . [w]e consider the term "illegal alien" less ambiguous. Thus, under federal law, an "alien" is "any person not a citizen or national of the United States." A "national of the United States" means a U.S. citizen or a noncitizen who owes permanent allegiance to the United States. Under federal law, "immigrant" means every alien except those classified by federal law as nonimmigrant aliens. "Nonimmigrant aliens" are, in general, temporary visitors to the United States, such as diplomats and students who have no intention of abandoning their residence in a foreign country.

83 Cal. Rptr. 3d 518, 521–22 n.2 (Cal. Ct. App. 2008), *rev'd*, 198 P.3d 1 (Cal. 2008) (citations omitted). Because the fact pattern at issue relates to an "alien" who is unlawfully in the United States and has violated federal law by providing fraudulent work documents rather than to the entire class of immigrants, aliens or unauthorized workers (regardless of immigration status), the author uses the term "illegal alien" as the least ambiguous term for this class.

[4] *See* Rosa v. Partners in Progress, Inc., 868 A.2d 994, 1001 (N.H. 2005) (holding as a matter of public policy, a person responsible for an illegal alien's employment who knew of the illegal alien's status may not employ an illegal alien's potential for deportation as a bar to the illegal alien's recovery of lost United States earnings); *but see* NLRB Office of the General Counsel, *Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc.*, MEMORANDUM GC 02-06 (July 19, 2002), *available at* <http://www.lawmemo.com/nlrb/gc02-06.htm> (last visited June 24, 2009) (concluding that, even where an employer knowingly hired an undocumented worker, the employer is immune from back pay liability under the National Labor Relations Act).

[5] *See* Fuller, *supra* note 2, at 991-992.

[6] Hernandez v. M/V Rajaan, 841 F.2d 582, 585 (5th Cir. 1988).

[7] *Id.* at 588.

[8] Hernandez v. M/V Rajaan, 848 F.2d 498, 500 (5th Cir. 1988) (per curiam on rehearing).

continuously in the United States in an unlawful status since such date . . . ."[9] Further, *M/V Rajaan* was decided before the U.S. Supreme Court handed down *Hoffman Plastic*, and its holding has not been challenged post-*Hoffman*.

In *Wal-Mart Stores, Inc. v. Cordova*, the El Paso Court of Appeals, in a footnote without discussion or citation to authority, stated Texas law does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for loss of earning capacity.[10] The *Cordova* court, however, did not address whether Texas courts should allow a plaintiff's illegal status into evidence when determining lost earning capacity.[11] More importantly, the *Cordova* court did not discuss whether the lost earning capacity damages should be measured at United States wages or the wages available in the plaintiff's country of origin.[12]

In *Tyson Foods, Inc. v. Guzman*, the Tyler Court of Appeals relied on the dicta found in the footnote in *Cordova* for the proposition that Texas law does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for lost earning capacity.[13] Similarly, the Eastern District of Texas, in *Contreras v. KV Trucking, Inc.*, relied upon *Guzman* for the same proposition.[14] The facts of *Cordova* and *Guzman* are inapposite to the facts of Pierre's suit because neither case involved an illegal alien who used fraudulent documents to obtain employment. Rather, the facts in those cases merely showed each plaintiff was an illegal alien who had not committed any additional criminal offenses,[15] and counsel in these cases focused on precluding lost wages claims altogether, rather than addressing the manner in which claims should be measured. Moreover, the issue of federal preemption of lost wages claims by illegal aliens was not properly before either court because the defendants, respectively, failed to plead the affirmative defense of preemption.[16] Thus, any discussion of the application of *Hoffman Plastic* and/or federal preemption by these courts is *obiter dictum* and not controlling.[17]

Although it is improbable the statements in *Cordova, Guzman,* and *Contreras* have any precedential value, it would be difficult to dispute that an illegal alien has standing to bring suit in the United States because an illegal alien is entitled to the benefits of the Equal Protection Clause of the Fourteenth Amendment, which provides no state shall deny to any person the benefit of jurisdiction in the equal protection of the laws.[18] Just because an illegal alien has the right to bring suit, however, does not mean certain of his claims are not barred or limited by

[9] M/V Rajaan, 841 F.2d at 588 (*citing* 8 U.S.C. § 1255a(a)(2)(A)).

[10] Wal-Mart Stores, Inc. v. Cordova, 856 S.W.2d 768, 770 n. 1 (Tex. App. 1993).

[11] *See id.*

[12] *See id.*

[13] 116 S.W.3d 233, 244 (Tex. App. 2003).

[14] No. 4:04-CV-398, 2007 WL 2777518, *1 (E.D. Tex. Sep 21, 2007).

[15] *See* Guzman, 116 S.W.3d at 236-37; Cordova, 856 S.W.2d at 769.

[16] Guzman, 116 S.W.3d at 244; Contreras, 2007 WL 2777518 at *1.

[17] *See* Edwards v. Kaye, 9 S.W.3d 310, 314 (Tex. App. 1999) (holding "[d]ictum is an observation or remark made concerning some rule, principle, or application of law suggested in a particular case, which observation or remark is not necessary to the determination of the case (citation omitted). . . [and] is not binding as precedent under stare decisis"); Nichols v. Catalano, 216 S.W.3d 413, 416 (Tex. App. 2006) (holding same); *In re* Mann, 162 S.W.3d 429, 434 (Tex. App. 2005).

[18] Plyler v. Doe, 457 U.S. 202, 210 (1982); *see also* Comm. Std. Fire & Marine Co. v. Galindo, 484 S.W.2d 635, 636 (Tex. App. 1972) (holding an illegal alien "shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, [and] give evidence"). Galindo stands for the proposition that Texas generally recognizes an alien's illegal entry alone, will not bar him from receiving workers' compensation benefits where his of employment is itself legal. *Id.*

application of various laws.[19] At least one commentator has suggested that while, at first glance, the language used in *Cordova, Guzman,* and *Contreras* requires illegal immigrants be paid lost earning capacity damages at United States rates, it may be more accurate to say the issue of the proper measure of those damages has not yet been fully adjudicated.[20]

III. Federal Immigration Statutes

In 1986, Congress enacted the Immigration Reform and Control Act ("IRCA"), "a comprehensive scheme prohibiting the employment of illegal aliens in the United States."[21] IRCA defines an "unauthorized alien" as an individual who is not "lawfully admitted for permanent residence, or . . . authorized to be so employed" in the United States.[22] One of the most important parts of IRCA is an extensive employment verification system, which requires employers to verify the identity and eligibility of all new hires by examining specified documents before the new hire commences work.[23] The specified documents include a "social security account number card" or any "other documentation evidencing authorization of employment in the Unites States which the Attorney General finds, by regulation, to be acceptable."[24] It is illegal to hire any applicant who fails to provide this documentation.[25]

In addition to examining specified documents, an employer must also complete an I-9 or other similar form for every new worker.[26] The required form includes an attestation by the employee that he is authorized to work in the U.S.[27] The required form also contains an attestation by the employer that it has reviewed the employee-supplied documents and the documents appear genuine.[28] It is unlawful for an employer to continue to employ an alien once the employer knows "the alien is (or has become) an unauthorized alien with respect to such employment."[29]

Section 1324c of IRCA makes it "unlawful" for any person to "forge," "alter," "use," or "possess" any false document to obtain a benefit, such as employment.[30] Aliens who use or attempt to use documents described in Section 1324c are subject to a fine or imprisonment of not more than five years, or both.[31] 18 U.S.C. § 911 also permits

[19] *See* TEX. CIV. PRAC. & REM. CODE § 95.001, *et seq.* (exclusive remedy for suits against landowners); TEX. LAB. CODE § 408.001 (exclusive remedy for suits against employers); TEX. CIV. PRAC. & REM. CODE § 74.301 (limiting recovery against doctors); TEX. CIV. PRAC. & REM. CODE § 82.003 (stating non-manufacturing seller not liable for harm caused by product sold by seller); *see, e.g.,* Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 694-95 (Tex. 2003) (discussing limitation of suits against sovereign).

[20] *See* Fuller, *supra* note 2, at 996 n. 66.

[21] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002).

[22] 8 U.S.C. § 1324a(h)(3) (2006).

[23] Hoffman Plastic, 535 U.S. at 147-48.

[24] 8 U.S.C. § 1324a(b)(1)(C)(i)-(ii) (2006).

[25] *Id.* at § 1324a(a)(1)(B); Hoffman Plastic, 535 U.S. at 148.

[26] *Id.* at § 1324a(b).

[27] *Id.* at § 1324a(b)(2).

[28] *Id.* at § 1324a(b)(1)(A).

[29] *Id.* at § 1324a(a)(2); Mester Mfg Co. v. I.N.S., 879 F.2d 561, 567-68 (9th Cir. 1989) (upholding penalties against employer who had two week delay in terminating undocumented worker after notice of worker's status).

[30] 8 U.S.C. § 1324c(a)(1)-(5) (2006); *see also* Theodros v. Gonzales, 490 F.3d 396 (5th Cir. 2007) (holding it is a deportable offense for alien to falsely represent he was citizen of the United States in order to gain private sector employment); Villegas-Valenzuela v. I.N.S., 103 F.3d 805 (9th Cir. 1996) (holding it is a violation of the Immigration and Naturalization Service's employment eligibility verification statute for any person to show false documents in order to prove employment eligibility).

[31] 18 U.S.C. § 1546(b) (2006) (setting forth criminal penalties for using (1) "an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor, [or] (2) an identification document knowing (or having reason to know) that the

fines and imprisonment of not more than three years if a person "fraudulently and willfully represents himself to be a citizen of the United States."[32] Further, 18 U.S.C. § 1015 allows fines and imprisonment of not more than five years if a person "knowingly makes any false statement or claim that he is . . . a citizen or national of the United States, with the intent to obtain . . . any Federal or State benefit or service, or to engage unlawfully in employment in the United States."[33] Additionally, 18 U.S.C. § 1028 provides a fine and imprisonment of not more than fifteen years for anyone who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law."[34] 18 U.S.C. § 1546 provides the penalty of a fine and imprisonment up to ten years for anyone who "utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States."[35] Finally, in Texas, it is a state jail felony to obtain, possess, transfer, or use identifying information of another person without the other person's consent.[36] "Identifying information" is defined as "information that alone or in conjunction with other information identifies a person, including a person's name and social security number, date of birth, or government-issued identification number."[37]

IV. IRCA Preemption

Because the statements in cases like *Cordova, Guzman,* and *Contreras* are often dicta and cite no authority, it is prudent to look at IRCA and decisions concerning IRCA preemption to determine whether courts should apply preemption to cases involving illegal aliens who either commit illegal acts or fraudulently obtain employment. The U.S. Supreme Court and numerous federal and state courts have held an illegal alien's claims for lost earnings may be barred, or, alternatively, the lost earning capacity claim should be based on wages paid in the illegal alien's home country as opposed to wages paid in the United States.

A. Supremacy of immigration regulations

The supremacy of the Federal government's regulation of immigration is well established.[38] The Federal government's power to regulate issues relating to immigration and naturalization is so comprehensive that a state may not interfere with that regulation.[39] Where the state enactment is not at odds with the Federal mandates, the state law will not be

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document is false"); *see also* 42 U.S.C. § 408(a)(8) (206)(providing the same penalties for any person who "discloses, uses, or compels the disclosure of the social security number of any person in violation of the laws of the United States").

[32] 18 U.S.C. § 911 (2006).

[33] 18 U.S.C. § 1015(e) (2006).

[34] 18 U.S.C. § 1028(a)-(b) (2006); *see also* 42 U.S.C. § 1307(a) (2006)(making use of false social security information a misdemeanor punishable by up to $1,000 fine and imprisonment of up to one year).

[35] 18 U.S.C. § 1546(a).

[36] TEX. PENAL CODE § 32.51(b).

[37] *Id.* at § 32.51(a)(1)(A).

[38] *See* U.S. CONST. art I, § 8, cl. 4 (granting Congress authority to "establish an uniform Rule of Naturalization"); Toll v. Moreno, 458 U.S. 1, 10 (1982); Nyquist v. Mauclet, 432 U.S. 1, 10 (1977); DeCanas v. Bica, 424 U.S. 351, 354 (1976); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (holding the regulation power of Congress extends not only to admission and naturalization of aliens, but also to the "regulation of their conduct before naturalization").

[39] Nyquist, 432 U.S. at 10.

held to be preempted.[40] However, when the statute or common-law at issue is incongruous with the goals and objectives of federal legislation, there can be no other conclusion than that the statute or common-law principle is preempted by the action of Congress.[41]

B. *Hoffman Plastic Compounds, Inc. v. NLRB*

In *Hoffman Plastic Compounds, Inc. v. NLRB*, the United States Supreme Court was asked to determine whether an illegal alien was entitled to back pay for his employer's violation of the National Labor Relations Act ("NLRA").[42] In that case, Jose Castro obtained employment with Hoffman Plastic by using fraudulent documents.[43] Hoffman Plastic eventually fired Castro when he supported an effort to unionize the company.[44] The National Labor Relations Board found Hoffman's actions violated the NLRA and awarded Castro back pay even though Castro admitted he was a Mexican citizen with no authorization to be in the United States.[45] The Supreme Court reversed the award and refused to allow the Board to "award back pay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud."[46] The Court found an award of back pay "trivializes the immigration laws" and "condones and encourages future violations," and noted Castro would not have been eligible for back pay if he had been deported.[47]

C. Federal Court Treatment of Preemption of Lost Earning Claims by Illegal Aliens

There is currently a split in authority over whether *Hoffman Plastic* mandates that the IRCA preempts state tort claims. Both before and after *Hoffman Plastic*, federal courts barred claims by illegal aliens for lost earnings as preempted by IRCA. In *Del Rey Tortilleria, Inc. v. NLRB*, for example, the Seventh Circuit Court of Appeals held back pay was not available to illegal workers after the enactment of IRCA.[48] Similarly, in *Egbuna v. Time-Life Libraries, Inc.*, the Fourth Circuit Court of Appeals held an illegal alien had no cause of action for retaliation under Title VII due to his status as an unauthorized alien.[49] However, in *Madeira v. Affordable Housing, Inc.*, the Second Circuit Court of Appeals refused to extend *Hoffman Plastic* to state tort claims for lost wages in at least some instances.[50]

After *Hoffman Plastic*, in *Escobar v. Spartan Security Services, Inc.*, the United States District Court for the Southern District of Texas considered the issue of an illegal immigrant's claim for remedies under Title VII of the Civil Rights Act of 1964.[51] In that case, Enrique Escobar, a security officer employed by Spartan Security, was sexually harassed and propositioned by the company's president.[52] When he refused the advances, Escobar's hours were decreased, he was relocated, and

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[40] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 219 n. 19 (1982); Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219 (2d. Cir. 2006).
[41] *See* Hoffman Plastic, 535 U.S. at 147-149.
[42] 535 U.S. at 140-42.
[43] *Id.* at 140-41.
[44] *Id.* at 140.
[45] *Id.* at 140-41.
[46] *Id.* at 149.
[47] *Id.* at 150.

[48] *See* Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1122 (7th Cir. 1992).
[49] *See* Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 188 (4th Cir. 1998).
[50] Madeira, 469 F.3d at 227-229 (concluding New York law does not conflict with federal immigration law in allowing undocumented workers to be compensated in U.S. wages when, among other things, "it was the employer and not the worker who violated IRCA by arranging for employment . . . [and] the jury was instructed to consider the worker's removability in assessing damages").
[51] 281 F. Supp.2d 895 (S.D. Tex. 2003).
[52] *Id.* at 896.

was ultimately fired.[53] Escobar filed a claim with the Equal Employment Opportunity Commission and Spartan Security moved for summary judgment arguing the decision in *Hoffman Plastic* barred Escobar from a Title VII remedy because Escobar was an unauthorized immigrant worker.[54] The *Escobar* court disagreed that *Hoffman Plastic* precluded all remedies under Title VII; however, it applied the reasoning in *Hoffman Plastic* to hold an illegal alien is not entitled to back pay otherwise provided by Title VII.[55]

In *Ambrosi v. 1085 Park Ave. LLC*, a federal court in New York held "undocumented workers *who violate IRCA* may not recover lost wages in a personal injury action."[56] The *Ambrosi* court dismissed the plaintiff's lost wages claims because the plaintiff used fraudulent documentation to obtain employment in violation of IRCA.[57] In *Veliz v. Rental Service Corporation USA, Inc.*, a federal appeals court in Florida determined "[b]ackpay and lost wages are nearly identical; both constitute an award for work never to be performed."[58] The *Veliz* court then applied the principles of *Hoffman Plastic* to hold an undocumented worker's lost wages claims were preempted by IRCA when the worker used false identification to obtain employment.[59] In *Hernandez-Cortez v. Hernandez*, a federal appeals court in Kansas applied Kansas's unlawful conduct rule, the precedence in *Hoffman Plastic*, and 8 U.S.C. § 1324a to find an undocumented alien's tort suit for future lost earnings was preempted.[60] Finally, in *Lopez v. Superflex Ltd.*, a federal court in New York stated, in dicta, that the holding in *Hoffman Plastic* would disqualify an illegal alien from collecting punitive and compensatory damages under the Americans with Disabilities Act.[61]

D. State Court Action on Claims by Illegal Aliens

The appellate courts in California provide an example of one way in which state courts address the issue of lost earnings claims by illegal aliens. In addressing these issues, California courts perform a balancing test: if the alien establishes he has taken steps to correct his deportable condition, then he may recover damages for lost earnings in U.S. wages; however, if the alien cannot show any steps to correct his deportable condition, the alien may only recover lost future earnings in the wages of his country of origin.

The seminal California case that established the balancing test is *Rodriguez v. Kline*.[62] In that case, a California appellate court, relying on IRCA, held an illegal alien may only recover lost U.S. earnings when he can "demonstrate to the court's satisfaction that he has taken steps that will correct his deportable condition."[63] The *Rodriguez* court further held if the plaintiff cannot show he has taken steps to correct his deportable condition, "then evidence of the plaintiff's future earnings must be limited to those he could anticipate receiving in his country of lawful origin."[64]

In *Gilharry-Jones v. De Souza*, the plaintiff, an illegal immigrant from Belize, sued for lost wages arising out of an

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[53] *Id.*
[54] *Id.* at 896-97.
[55] *Id.* at 897.
[56] No. 06-CV-8163, 2008 WL 4386751, *13 (S.D.N.Y. September 25, 2008) (emphasis original). Ambrosi expressly distinguishes itself from Madeira on the particular grounds that Madeira was limited to undocumented workers who obtained employment without violating IRCA.
[57] *Id.* at *13-14.
[58] 313 F.Supp.2d 1317, 1336-37 (M.D. Fla. 2003).
[59] *Id.* at 1337.
[60] No. Civ.A. 01-1241, 2003 WL 22519678 *4-*7 (D. Kan. November 4, 2003) (not designated for publication).
[61] No. 01 CIV. 10010, 2002 WL 1941484 *2 n. 3 (S.D.N.Y. Aug. 21, 2002) (not designated for publication).
[62] 232 Cal. Rptr. 157 (Cal. Ct. App. 1986).
[63] *Id.* at 158.
[64] *Id.*

automobile accident.[65] The plaintiff brought forth evidence that she was married to a permanent resident, had children who were born in the U.S., consulted an immigration attorney, and prepared immigration documents.[66] The trial court determined the plaintiff was deportable, rejected the claims for lost U.S. wages but allowed recovery of future lost wages based on the plaintiff's prospective income in Belize.[67] The plaintiff appealed and the Second District Court of Appeals in California affirmed the judgment of the trial court.[68] The *Gilharry-Jones* court, applying the holding from *Rodriguez v. Kline*, found the steps taken were insufficient to correct the deportable condition since none of the documents had been filed and the plaintiff waited until the time of trial to make any attempts to correct her status.[69]

In addition to the foregoing California authorities, other jurisdictions provide additional guidance on how courts manage claims by illegal aliens. In *Ortiz v. Cement Products*, the Nebraska Supreme Court held an unauthorized immigrant was not entitled to vocational benefits because the purpose of such benefits is to restore workers to employment and this could not be done in light of the immigrant's "avowed intent" to remain an unauthorized worker.[70] In *Doe v. Kansas Department of Human Resources*, the Kansas Supreme Court allowed for the suspension of workers' compensation benefits to an illegal alien who was injured on the job because the worker's use of an assumed name and fake social security number to obtain employment constituted a fraudulent act.[71] In *Tarango v. State Industrial Insurance System*, the Nevada Supreme Court upheld a workers' compensation appeals officers' decision to deny vocational rehabilitation benefits to an illegal alien.[72] In that case, the Nevada Supreme Court determined IRCA preempted Nevada's worker's compensation scheme because the worker was an illegal alien who was not entitled to employment in the United States and, as such, the provision of vocational rehabilitation benefits, training, and/or modified employment would circumvent the provisions of IRCA.[73] Additionally, the Wyoming Supreme Court, in *Felix v. State ex rel. Wyoming Workers' Safety and Compensation Division*, held an illegal alien could not be included in the definition of "employee" under Wyoming's Workers' Compensation Act because such an alien is not authorized to work in the United States.[74]

In *Macedo v. J.D. Posillico, Inc.*, an appellate court in New York held a "plaintiff's violation of IRCA, by producing a false social security number in order to obtain employment, bars his claim for lost wages."[75] In *Martines v. Worley & Sons*

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[65] No. B149682, 2002 WL 1360016 *3 (Cal. Ct. App. Jun 21, 2002) (not designated for publication).
[66] *Id.* at *4-5.
[67] *Id.* at *3.
[68] *Id.* at *8.
[69] *Id.* at *5.
[70] 708 N.W.2d 610, 613 (Neb. 2005).
[71] 90 P.3d 940, 948 (Kan. 2004).
[72] 25 P.3d 175, 183 (Nev. 2001). It is important to note the issue before the Tarango court was not whether Tarango could receive workers' compensation under Nevada's laws; rather, the issue was to what extent an illegal alien could recover under the workers' compensation scheme.
[73] *Id.* at 178; *see also* Del Taco v. Workers' Comp. Appeals Bd., 94 Cal. Rptr.2d 825, 827 (Cal. Ct. App. 2000); Liberty Mut. Ins. Co. v. Workers' Compensation Appeals Bd., No. B150724 , 2002 WL 14515, at *4 (Cal. Ct. App. Jan. 4, 2002) (not designated for publication); Foodmaker, Inc. v. Workers' Compensation Appeals Bd., 78 Cal. Rptr.2d 767, 777-79 (Cal. Ct. App. 1998) (not designated for publication); *but see,* e.g., Economy Packing Co. v. Illinois Workers' Compensation Com'n, 387 Ill.App.3d 283, 292 (Ill. App. Ct. 2008) (holding that IRCA does not preempt award of workers compensation benefits).
[74] Felix v. State ex rel. Wyoming Workers' Safety and Compensation Division, 986 P.2d 161, 164 (Wyo. 1999).
[75] Macedo v. J.D. Posillico, Inc., No. 108316/06, 2008 WL 4038048 at *5 (N.Y. Sup. Ct. Aug. 13, 2008) (slip op.); *see also* Coque v. Wildflower Estates Developers, Inc., 818 N.Y.S.2d 546, 550 (N.Y. App. Div. 2006) (stating "undocumented

Construction, the Georgia Court of Appeals held an employer could suspend disability benefits to an injured worker who was released to work light duty but could not accept the employment because he was not authorized to work in the United States.[76] In *Sanchez v. Eagle Alloy, Inc.*, an appellate court in Michigan found an undocumented worker who was injured on the job was ineligible for wage-loss benefits under the state worker compensation law because the worker's use of fake documents to obtain employment constituted the commission of a crime.[77] An appellate court in Virginia, in *Rios v. Ryan, Inc. Central*, held an illegal alien is not an employee under Virginia's Workers' Compensation Act because "under [IRCA], an illegal alien cannot be employed lawfully in the United States."[78] In *Crespo v. Evergo Corp.*, the Superior Court of New Jersey was faced with determining whether an illegal alien was entitled to remedy under the state's Law Against Discrimination ("LAD") after she was terminated when she informed her superior she was pregnant.[79] The *Crespo* court determined LAD had been violated but relied on *Hoffman Plastic* to deny the plaintiff's economic and non-economic damages because same were counter to IRCA.[80]

In *Mora v. Workers Compensation Appeal Board*, the court relied on precedence set forth by the Pennsylvania Supreme Court to suspend benefits to an injured worker and found the Pennsylvania Supreme Court, in effect, held loss of earning power need not be shown because it is presumed an illegal alien cannot work in the U.S. and, as such, there can be no way to measure his earning power.[81] Interestingly, in *Mora*, the injured worker attempted to obtain disability benefits for the difference in pay he received prior to his accident and the pay he received for work obtained after his accident but the court rejected this argument and found this measure of earnings may not be used "because only employers who fail to follow the federal immigration laws can offer [an unauthorized worker] a position."[82] A California court held an unauthorized alien, fired after requesting leave to undergo surgery to treat ovarian cancer, was not entitled to remedies under the state's anti-discrimination statute because she obtained the position using false documents.[83] Similarly, in *Murillo v. Rite Stuff Foods, Inc.*, another California court concluded the unclean hands doctrine barred the wrongful discharge claims of an alien when the alien obtained and presented false identification cards to secure employment.[84]

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alien may be precluded from recovering damages for lost wages if he or she obtained employment by submitting false documentation to the employer").

[76] Martines v. Worley & Sons Construction, 628 S.E.2d 113, 114 (Ga. Ct. App. 2006); *see also* Cenvill Dev. Corp. v. Candelo, 478 So.2d 1168, 1170 (Fla. Dist. Ct. App. 1985) (holding same).

[77] Sanchez v. Eagle Alloy, Inc., 658 N.W.2d 510, 512 (Mich. Ct. App. 2003).

[78] Rios v. Ryan, Inc. Central , 542 S.E.2d 790, 792 (Va. Ct. App. 2001); *see also* Xinic v. Quick, 2005 WL 3789231 *1-*2 (Va. Cir. Ct. Nov. 14, 2005) (not designated for publication) (*citing Rios* for the proposition that an illegal alien cannot be included in the definition of "employee" under Virginia's Workers' Compensation Act without subverting IRCA and federal immigration policy).

[79] Crespo v. Evergo Corp., 841 A.2d 471 (N.J. Super. Ct. App. Div. 2004).

[80] *Id.* (cited with approval in Cicchetti v. Morris County Sheriff's Office, 947 A.2d 626, 640 n. 7 (N.J. 2008)).

[81] Mora v. Workers Compensation Appeal Board, 845 A.2d 950, 954 (Pa. Comm. Ct. 2004) (*citing* Reinforced Earth Co. v. Workers Comp. Appeal Bd., 810 A.2d 99, 108 (Pa. 2003) (holding illegal aliens are generally entitled to workers' compensation but benefits may be suspended where the alien is unable to work due to his status)).

[82] *Id.*

[83] Morejon v. Hinge, No. B162878, 2003 WL 22482036 at *9-10 (Cal. Ct. App. Nov. 21, 2003) (not designated for publication).

[84] Murillo v. Rite Stuff Foods, Inc., 77 Cal. Rptr.2d 12, 19 (Cal. Ct. App. 1998).

E. Application of Hoffman Preemption to Illegal Aliens

The issue of an illegal alien's ability to recover damages in U.S. wages for lost earning capacity will likely continue to gain ground[85] with the persistent influx of illegal immigrants into the United States.[86] In the case of Pierre LeFaux, who obtained employment by fraudulently providing documentation of a false identity, 8 U.S.C. §§ 1324a and 1324c; 18 U.S.C. §§ 911, 1015, 1028, and 1546; 42 U.S.C. §§ 408 and 1307, and the arguments provided in *Hoffman Plastic* should be used to argue for preemption of all claims for past lost earnings since Pierre was illegally in the country and obtained his employment by criminal fraud.[87] Likewise, 8 U.S.C. §§ 1324a and 1324c, 18 U.S.C. § 1546, and 42 U.S.C. § 408 and the rationale used in *Ambrosi, Veliz*, and *Hernandez-Cortez* may be applied to argue for preemption of all Pierre's claims for future lost earnings since he obtained his employment by criminal fraud, or in the alternative to require that any claims for lost wages be based on the wages of his home country.[88] As in California, defense counsel should argue that the burden be placed on Pierre to establish he has taken steps to ameliorate his immigration status in order for him to recover lost future earnings based on U.S. wages.[89]

V. Unlawful Acts Doctrine

In conjunction with a preemption defense, defense counsel should also look to the Unlawful Acts Doctrine. When an illegal alien obtains employment through fraudulent means or commits a criminal offense and is injured, Courts should bar recovery under the Unlawful Acts Doctrine. This section reviews the history of the Unlawful Acts Doctrine in Texas to demonstrate its relevance to cases brought by illegal aliens.

The Unlawful Acts Doctrine was first stated by the Supreme Court of Texas in 1888 in *Gulf, Colorado & Santa Fe Railway*

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[85] *See* Fuller, *supra* note 2, at 986 (stating "Millions [of illegal immigrants] work in America's fields (up to 1,400,000), factories (1,200,000), and construction sites (over 600,000)--some of the nation's most hazardous working environments."); *see also* Nurith C. Aizenman, *Harsh Reward for Hard Labor,* WASH. POST, Dec. 29, 2002, at C01 (stating foreign-born Latino workers are two-and-one-half times more likely to suffer fatal injuries at work than the average working citizen).

[86] *See* Passell, *supra* note 2 (estimating inflows of unauthorized immigrants averaged 800,000 a year from 2000 to 2004, and 500,000 a year from 2005 to 2008); Michael Hoefer, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2007,* Office of Immigration Statistics (Sept. 2008), *available at* <http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2007.pdf> (last visited June 24, 2009) (finding between 2000 and 2007, the unauthorized population increased 3.3 million; the annual average increase during this period was 470,000; nearly 4.2 million (35 percent) of the total unauthorized residents in 2007 entered in 2000 or later; and an estimated 7.0 million (59 percent) were from Mexico); *see also* Donald L. Barlett & James B. Steele, *Who Left the Door Open?*, TIME, March 30, 2006, at 51, 52 (stating in a single day, more than 4,000 illegal aliens will walk across the 375-mile border between Arizona and Mexico, which is the busiest unlawful gateway into the U.S.).

[87] *See* Hoffman Plastic, 535 U.S. at 149; *see also* Macedo, 2008 WL 4038048 at *7-*9 (approving partial summary judgment for defendant on plaintiff's lost wages claims where plaintiff obtained employment with fraudulent documents).

[88] *See* Ambrosi, 2008 WL 4386751 at *13-*14; Veliz, 313 F.Supp.2d at 1336-37; Hernandez-Cortez, 2003 WL 22519678 at *4-*7.

[89] *See* Rodriguez, 232 Cal. Rptr. at 158. *See also* Bonney v. San Antonio Transit Co., 325 S.W.2d 117, 121 (Tex. 1959) (reversing lost earning capacity award when plaintiff failed to introduce either amount of earnings prior to injury or monetary measure of his earning capacity); Ibrahim v. Young, 253 S.W.3d 790, 808 (Tex. App. 2008) (reversing lost wages award for lack of factually sufficient evidence); Strauss v. Continental Airlines, Inc., 67 S.W.3d 428, 436-37, 442 (Tex. App. 2002) (sustaining judgment notwithstanding verdict on past lost earnings claim).

Co. v. Johnson.[90] Under this doctrine, "a plaintiff cannot recover for his claimed injury if, at the time of the injury, he was engaged in an illegal act."[91] "Texas courts have applied this rule, along with public policy principles, to prevent a plaintiff from recovering claimed damages that arise out of his or her own illegal conduct."[92] This defense has been interpreted to mean "that if the illegal act is inextricably intertwined with the claim and the alleged damages would not have occurred but for the illegal act, the plaintiff is not entitled to recover as a matter of law."[93]

In *Fuentes v. Alecio*, Geovany Fuentes attempted to illegally enter the United States and hired Estuardo Alecio to help with entry.[94] Fuentes died from heat exhaustion after crossing the U.S. border and his family sued Alecio for negligence.[95] Alecio moved to dismiss the claims based on the Unlawful Acts Rule.[96] At the time of his death, Geovany Fuentes was in violation of 8 U.S.C. § 1325(a), which makes it illegal for an alien to "enter or attemp[t] to enter the United States at any time or place other than as designated by immigration officers,' and to 'elud[e] examination or inspection by immigration officers.'"[97] The court determined the decedent was "engaged in an illegal act at the time of his death, namely attempting to enter the United States illegally in violation of 8 U.S.C. § 1325(a).[98] The decedent's act clearly contributed to his injury because he would not have been exposed to heat exhaustion had he not illegally entered the U.S.[99] Because the decedent violated the law and was injured as a result of this violation, the *Fuentes* court granted Alecio's motion to dismiss.[100]

In *Denson v. Dallas County Credit Union*, a licensing case involving tort and contract issues, the Texas Fifth Court of Appeals affirmed a trial court's granting of summary judgment on the Unlawful Acts Doctrine because the appellant was an unlicensed car dealer.[101] In that case, the Court held "in situations where public policy concerns have led to a governmentally supervised statutory licensing scheme, courts have consistently held the unlawful and unlicensed participation in such regulated businesses cannot form the basis for recovery."[102] "To hold otherwise would allow a person to accomplish indirectly what he is prohibited from doing directly and frustrate the public policies behind the legal protections."[103] In *Denson*, the appellant argued the application of the unlawful acts defense would provide the appellee with a windfall.[104] The court agreed that a windfall might accrue but decided the public policy behind the licensing statute required the appellant to carry a dealer's license and the court would not allow the car dealer to circumvent the statute.[105] In coming to its conclusion, the Court noted "there is nothing inherently illegal about selling cars in Dallas County; however . . . the transaction of selling the cars was illegal because on the day of the transactions, appellants did not have the statutorily required license."[106]

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[90] Gulf, Colorado & Santa Fe Railway Co. v. Johnson, 71 Tex. 619, 9 S.W. 602, 603 (1888).
[91] Fuentes v. Alecio, No. C-06-425, 2006 WL 3813780 *2 (S.D. Tex. December 26, 2006) (not designated for publication) (*citing* Sharpe v. Turley, 191 S.W.3d 362, 365 (Tex. App. 2006)).
[92] Sharpe, 191 S.W.3d at 366 (*citing* Saks v. Sawtelle, Goode, Davidson & Troilo, 880 S.W.2d 466 (Tex. App. 1994); Rodriguez v. Love, 860 S.W.2d 541 (Tex. App. 1993); Dover v. Baker, Brown, Sharman & Parker, 859 S.W.2d 441 (Tex. App. 1993)).
[93] *Id.*
[94] Fuentes, 2006 WL 3813780 at *1.
[95] *Id.*
[96] *Id.*
[97] *Id.* at *3 (quoting 8 U.S.C. § 1325(a)).
[98] *Id.*

[99] *Id.*
[100] *Id.* at *4.
[101] Denson v. Dallas County Credit Union, 262 S.W.3d 846, 848 (Tex. App. Ct. 2008.).
[102] *Id.* at 854.
[103] *Id.*
[104] *Id.* at 855.
[105] *Id.*
[106] *Id.*

Under the factual scenario described in Section I, counsel may also argue that Pierre LeFaux's claims should be barred by the Unlawful Acts Doctrine. Pierre admitted to illegally entering the United States, in violation of 8 U.S.C. § 1325c(a) and to obtaining employment using fraudulent papers, in violation of 8 U.S.C. § 1324c(a)(1)-(5), 18 U.S.C. §§ 911, 1015(e), 1028(a)-(b), and 1546(a)-(b); and 42 U.S.C. §§ 408(8) and 1307(a). Pierre should not have been able to obtain employment in the United States without illegally breaching the border and utilizing fraudulent documents.[107] For citizens and authorized aliens, the act of working is not inherently illegal; however, in this case, Pierre's illegal alien status and procurement of employment through fraudulent means transformed the act of working into an illegal act because Pierre did not have the statutorily required authorization to work on the date he was injured.[108] Thus, counsel may argue that Pierre's injuries were sustained while in the commission of an illegal act and his fraud was inextricably intertwined with his injuries because he would not have been injured if he had not unlawfully obtained employment with XYZ Painting using fraudulent means, relying on the Unlawful Acts Doctrine to bar Pierre's claims.[109]

VI. Admissibility of Immigration Status at Trial

Assuming that Pierre LeFaux is entitled to make a claim for lost earning capacity and has not obtained employment by fraudulent means, trial courts should allow the illegal alien's status to be submitted to the jury. Numerous jurisdictions have been asked to determine whether a plaintiff's immigration status should be admitted to rebut claims for recovery of lost earnings.[110]

A. Admissibility of Immigration Status

In addressing questions of admissibility, Texas precedent again proves

[107] *See* Hoffman Plastic, 535 U.S. at 148. While some courts have noted that millions of illegal aliens obtain work and thus their status does not necessarily preclude them from employment, the United States District Court for the District of Kansas has addressed and rejected this argument and stated, "while many illegal aliens do find employment in the United States, this argument does not overcome § 1324a and Hoffman." Hernandez-Cortez v. Hernandez, No. Civ.A. 01-1241-JTM, 2003 WL 22519678, at *6 (D. Kan. Nov. 4, 2003).

[108] *See* 8 U.S.C. § 1324a(b)(2) (2006); § 1324c(a)(1)–(5); Denson, 262 S.W.3d at 855.

[109] Fuentes, 2006 WL 3813780, at *3 & n.7.

[110] The Texas Second Court of Appeals, for example, addressed the issue of the admissibility of the immigration status of a witness for impeachment purposes in TXI Transp. Co. v. Hughes, 224 S.W.3d 870, 896-97 (Tex. App. 2007). In that case, the driver of the defendant's company was involved in an accident. The driver testified he never lied about his citizen status in order to obtain a driver's license; however, there was evidence the driver had been arrested and pleaded guilty to an immigration violation in 2000 and did not have any valid form of identification at the time he pleaded guilty. *Id.* at 896. There was also evidence the driver filled out an application for employment with his employer in 2001 and answered "Yes" to the following question: "Do you have the legal right to work in the United States?" *Id.* The driver's company lost a jury verdict and appealed claiming the driver's immigration status was inadmissible per Rule 608(b); however, the Fort Worth Court of Appeals disagreed and affirmed the judgment. *Id.* at 896-97. *See also* Infante v. State, 25 S.W.3d 725, 727 (Tex. App. 2000) (finding no error in asking about an alien's legal status in this country); *In re* State Farm Mut. Auto. Ins. Co., 982 S.W.2d 21, 23 (Tex. App. 1998) (finding party's status as illegal alien with no Social Security number was relevant to support fraud counter-claim); U.S. v. Zimeri-Safie, 585 F.2d 1318, 1320-21 (5th Cir. 1978) (allowing jury consideration of immigration status on question of knowledge or intent and to rebut defense); Magallon v. State, No. 01-04-00718, 2005 WL 1364899 at *1-*3 (Tex. App. June 9, 2005) (determining "citizenship status is relevant to an objective determination of the ability to understand English" and to rebut defense of unknowing participation); Delacruz v. State, No. 05-03-00236, 2004 WL 330067 *1 (Tex. App. Feb. 19, 2004) (not designated for publication) (holding no error when trial court admitted evidence of appellant's immigration status); *but see* Sports-Theme Rests. of N. Tex. v. Hernandez, 2001 WL 476537, at *1 (Tex. App. May 7, 2001) (not designated for publication).

instructive in demonstrating the questions faced by courts. The Texas Rules of Evidence provide "[all] relevant evidence is admissible."[111] "Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[112]

In determining what a plaintiff could have earned had he not been injured, the jury may consider the plaintiff's stamina, age, past earnings, education, benefits, prospects for job advancement and raises, and work-life expectancy.[113] To succeed with a lost earning capacity claim, a plaintiff must present evidence the plaintiff had the capacity to work prior to the injury, and his capacity was impaired as a result of the injury.[114] A plaintiff's immigration status, which prohibits him from earning income in the United States, is relevant and admissible since it bears directly on the amount of income he could have legally earned but for the accident at issue.[115]

The Texas Fourth Court of Appeals, in *ABC Rendering of San Antonio, Inc. v. Covarrubias*, addressed the propriety of a trial court's exclusion of evidence that the plaintiff illegally entered the United States.[116] The plaintiff in *Covarrubias* sought damages for the loss of past and future earning capacity and the jury awarded $153,156.00 in such damages.[117] The plaintiff's expert established the cash value of plaintiff's lost earnings based on the probable earnings and the rate of inflation in the United States over the plaintiff's life expectancy.[118] To counter plaintiff's expert, the defendant sought to introduce evidence of the plaintiff's illegal entrance into the U.S. to establish the plaintiff was not entitled to work in the U.S.; however, the trial court excluded such evidence.[119] The court of appeals reversed and remanded the case for a new trial.[120] In so doing, the court of appeals reasoned, "the fact that plaintiff was subject to immediate deportation to a drastically lower standard of earnings would have an effect on his future earning capacity."[121] Accordingly, the *Covarrubias* court held if there is evidence "as to the anticipated future earnings of a laborer in the United States, the jury should be permitted to consider the effect of the plaintiff's illegal entry upon [these] future earnings."[122]

In order to put the issue to the jury, defense counsel may propose a jury charge instruction similar to the following instruction from *Madeira v. Affordable Housing Foundation, Inc.*:

> Plaintiff's status as an undocumented alien should not be considered by you when you deliberate on the issue of defendant's liability. However, you may conclude the Plaintiff's status is relevant to the issue of damages, specifically to the issue of lost wages which the Plaintiff is claiming. You might consider, for example, whether the Plaintiff would have been able to obtain other employment since as a matter of law, it is illegal for an employer in the United States to employ an undocumented alien, although of course it does happen that some

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[111] TEX. R. EVID. 402.
[112] TEX. R. EVID. 401 (emphasis added).
[113] *See* Border Apparel-East, Inc. v. Guadian, 868 S.W.2d 894, 897-98 (Tex. App. 1993); Pilgrim's Pride Corp. v. Smoak, 134 S.W.3d 880 (Tex. App. 2004) (health and work-life expectancy).
[114] Tagle v. Galvan, 155 S.W.3d 510, 519-20 (Tex. App. 2004.).
[115] *See* ABC Rendering of San Antonio, Inc. v. Covarrubias, 1972 Tex. App. LEXIS 2794 *1 (Tex. Civ. App. Nov. 22, 1972) (not designated for publication).
[116] *Id.*
[117] *Id.* at *5.
[118] *Id* at *17.
[119] *Id.* at *16.
[120] *Id.* at *17.
[121] *Id.*
[122] *Id.*

people violate that law.[123] If the Plaintiff did not lose any income because you conclude he would not have been able to work due to his alien status, you could not award him any damages for lost wages. You might also want to consider his status in determining the length of time he would continue to earn wages in the United States and in considering the type of employment opportunities that would be available to him. The fact that an alien is deportable does not mean deportation will actually occur, but you are allowed to take the prospect of deportation into account in your deliberations.

Finally, even if you conclude the Plaintiff would be deported at some point, you could conclude he would lose income from employment in his native country if you have a basis for making that calculation. In short, you must decide what weight, if any, to give Plaintiff's alien status just as you would any other evidence. Alien status is not relevant to items of damage other than lost earnings.[124]

Courts in other jurisdictions are in accord with the reasoning applied in *Covarrubias*. In *Balbuena v. IDR Realty LLC*, the New York Supreme Court held a jury should be allowed to consider immigration status as one factor in the jury's analysis,[125] stating that "a jury's analysis of a future wage claim proffered by an undocumented alien is similar to a claim asserted by any other injured person in that the determination must be based on all of the relevant facts and circumstances presented in the case."[126] In *Rosa v. Partners in Progress, Inc.*, the New Hampshire Supreme Court held an illegal alien's status, though irrelevant to the issue of liability, is relevant on the issue of lost earnings and although such evidence may be prejudicial, it is essential should an illegal alien wish to pursue a claim for lost earning capacity.[127] In *Salas v. Hi-Tech Erectors,* the Washington Court of Appeals court held "evidence of a party's illegal immigration status should generally be allowed when the defendant is prepared to show relevant evidence that the plaintiff, because of his status, is unlikely to remain in this country throughout the period of claimed lost future income."[128]

Like the foregoing courts, a Florida Court of Appeals found no error where the trial court allowed evidence of the plaintiff's illegal immigrant status on the limited issue of the plaintiff's claims for lost future earnings.[129] That court determined the plaintiff's "status as an illegal alien is indeed relevant to her ability to obtain lawful employment in the United States. . . . [and] relevant to the calculation

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[123] *See* Hoffman Plastic, 535 U.S. at 148 (stating IRCA makes it "impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies").

[124] Madeira, 469 F.3d at 225.

[125] Balbuena v. IDR Realty LLC, 845 N.E.2d 1246, 1259 (N.Y. 2006); *see also* Oro v. 23 East 79th St. Corp., 810 N.Y.S.2d 779, 781 (N.Y. App. Term 2005) (holding a plaintiff's "immigration status in the United States is material to [plaintiff's] lost earnings claim, and thus the defense [is] entitled to reasonable inquiry into this area."); Cano v. Mallory Mgmt., 760 N.Y.S.2d 816, 818 (N.Y. Sup. Ct. 2003) (determining plaintiff's undocumented alien status was not a bar to recovery, but rather evidence that should be presented to the jury on the issue of lost wages); Collins v. N.Y. City Health and Hosps. Corp., 607 N.Y.S.2d 387 (N.Y. App. Div. 1994) (holding length of time an illegal alien may have continued to earn U.S. wages and the likelihood of the illegal alien's potential deportation were fact issues for a jury to decide at trial); Barahona v. Trustees of Columbia Univ. in the City of N.Y., 816 N.Y.S.2d 851, 853 (N.Y. Sup. Ct. 2006).

[126] Balbuena, 845 N.E.2d at 1259.

[127] Rosa, 868 A.2d at 1002.

[128] Salas v. Hi-Tech Erectors, 177 P.3d 769, 774 (Wash. Ct. App. 2008).

[129] Villasenor v. Martinez, 991 So.2d 433, 436-37 (Fla. Dist. Ct. App. 2008).

of the wage rate on which projected future earnings should be based, in the event she prevails on her claim."[130] In *Metalworking Machinery, Inc. v. Superior Court*, an appellate court in California held the defendant was entitled to discovery on plaintiff's immigration status because "projected loss of future earnings must be based upon the wage scale and availability of employment in the country of citizenship and not upon those in the country where [plaintiff] is, allegedly, an illegal alien."[131] In *Romero v. California Highway Patrol*, a federal court in California held a plaintiff's claims for past and future wage loss make relevant the issue of the plaintiff's immigration status and work history.[132] Finally, in *Melendres v. Soales*, a Michigan appellate court stated the issue of the plaintiff's illegal alien status, while irrelevant on the question of liability, was material and relevant on the issue of determining the present value of the plaintiff's future lost earnings.[133] The *Melendres* court determined that to avoid any issues of prejudice the retrial of the case should be bifurcated with a separate damages phase where the plaintiff's immigration status would be presented to the jury.[134]

B. Equal Protection Rights of Defendants

If courts refuse to apply the reasoning of *Covarrubias* and similar cases and reject the admission of a plaintiff's immigration status in discovery and at trial, it could be argued that by so doing the courts infringed upon the defendant's equal protection and due process rights. The concern over the effect of an illegal alien being relieved of the duty to mitigate damages is reflected in the following exchange between Justice Scalia and Paul Q. Wolfson, Assistant Solicitor General for the Department of Justice, during the oral argument of *Hoffman Plastic*:

QUESTION: In most back pay situations where the employer has committed an unfair labor practice and dismisses an employee improperly, the amount he's going to be stuck with for back pay is limited by the fact that the person unlawfully fired has to mitigate. He has to find another job. If he could have gotten another job easily and doesn't do so, the employer doesn't have to pay. Now, how is this unlawful alien supposed to mitigate?

WOLFSON: Well --
QUESTION: Mitigation is quite impossible, isn't it?
WOLFSON: I'm not sure I agree with that exactly, Justice Scalia. Here's -- I wouldn't say that the undocumented alien has a duty to mitigate. I have to emphasize that the board is not --
QUESTION: He does not have a duty to mitigate?
WOLFSON: I will agree with that. I have today the board has not examined this issue in detail, but first of all, of course, anything that he does obtain in the matter of interim wages will be deducted from his backpay --
QUESTION: Oh. Oh.
WOLFSON: -- and that is quite consistent with --

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[130] *Id.* (*citing* Veliz v. Rental Serv. Corp. USA, Inc., 313 F.Supp.2d 1317 (M.D. Fla. 2003); *see also* Majilinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56 (N.Y. 2005)).
[131] Metalworking Machinery, Inc. v. Superior Ct., 138 Cal.Rptr. 369, 371 (Cal. Ct. App. 1977).
[132] Romero v. California Highway Patrol, 2007 WL 518987 at *1-*2 (N.D. Cal. Feb. 14, 2007) (not designated for publication).
[133] Melendres v. Soales, 306 N.W.2d 399, 402 (Mich. Ct. App. 1981).
[134] *Id.*; *see also* Gonzalez v. City of Franklin, 403 N.W.2d 747, 759-60 (Wis. 1987) (*citing* Melendres with approval but affirming prohibition of evidence on plaintiff's immigration status because defendant failed to request bifurcation).

QUESTION: If he unlawfully obtains another job that will be deducted?
WOLFSON: And -- yes, and that is quite consistent --
QUESTION: But if he's smart, he need not do that.
WOLFSON: Not --
QUESTION: If he's smart he'd say, how can mitigate, it's unlawful for me to get another job.
WOLFSON: Justice Scalia --
QUESTION: I can just sit home and eat chocolates and get my back pay.
WOLFSON: I don't agree that the board would have to accept such a representation. That is, the board might permissibly conclude that an undocumented alien should not be any better off than an authorized worker by virtue of his undocumented status, so if an employer could say, well, if a person with the same credentials, background, education, and so forth, would have made a job search and would have obtained employment and would have obtained thus-and-such wages, this undocumented alien worker would have --
QUESTION: Should have done so.
WOLFSON: Should have done -- or should have --
QUESTION: Should have violated the law.
WOLFSON: Or should not benefit from the fact that he is an undocumented alien and being relieved of -- and getting more back pay than the similarly situated authorized worker. Now, the board was faced with the task here of reconciling two important Federal statutory schemes, the Federal labor laws and the immigration laws, consistent –[135]

Justice Scalia went on to state, "I mean, but what you're saying is when both the employer and the employee are violating the law, we're going to -- you're asking the courts to give their benediction to this stark violation of United States law by awarding money that hasn't even been worked for. I -- it's just something courts don't do."[136] Interestingly, Justice Scalia's aversion to rewarding unlawful behavior found its way into the holding in *Hoffman Plastic*.[137]

As in *Hoffman Plastic*, proof of an attempt at mitigation is required for Pierre to recover his lost earnings. If Pierre's immigration status is not admitted, then XYZ Painting can neither offer expert testimony nor present other evidence of mitigation because to do so would be to argue to the jury that Pierre has an affirmative duty to violate the law. Defense counsel's presentation of mitigation evidence at trial would also presuppose the legality of Pierre's employment in some capacity; however, Pierre cannot be lawfully employed in any capacity due to his immigration status. Further, defense counsel can neither argue nor present mitigation evidence on Pierre's employability because defense counsel is aware Pierre is unemployable due to his illegal status. To make such argument may expose XYZ Painting's counsel to sanctions or result in violations of the Texas Disciplinary Rules by knowingly making a false statement of law or fact, using false evidence at trial, and advancing an argument that is without merit.[138] Thus, if defense is prevented from presenting

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[135] Oral Argument Transcript at 31-33, Hoffman Plastic, 535 U.S. 137 (No. 00-1595) (emphasis added).

[136] Oral Argument Transcript at 38, Hoffman Plastic, 535 U.S. 137 (No. 00-1595).

[137] *See* Hoffman Plastic, 535 U.S. at 150.

[138] *See* TEX. RULE CIV. PROC. 13 (providing sanctions for unmeritorious claims and argument); TEX. DISCIPLINARY R. PROF'L CONDUCT 3.01 (unmeritorious claims and arguments); TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a) (false statements and false evidence to tribunal); TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(5) (false evidence); TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(1) (knowingly assist in violation of the Rules); TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(3) (a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation"); TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(6) (a lawyer shall not "knowingly assist a judge . . . in conduct in violation of applicable rules of judicial conduct or other law").

evidence of Pierre's immigration status, then its equal protection rights under the Federal and State Constitutions will be implicated because XYZ Painting cannot legitimately present evidence of mitigation, and Pierre's legal disability would relieve him of the duty to mitigate damages.[139]

D. Application of *Covarrubias*

The reasoning set forth in the *Covarrubias* opinion makes sense. Jurors are regularly required "to perform such intellectually Herculean feats as establishing what actions a truly reasonable man might have taken in a given situation, fixing the appropriate price to be paid for a described amount of subjective pain and anguish, weighing in comparative balance varying degrees, and even dissimilar types."[140] For instance, jurors may weigh the testimony of a plaintiff and his medical doctors, fact witnesses, medical transcripts, and a plaintiff's pre- and post-accident lifestyle to make a determination as to a plaintiff's pain and suffering damages.[141] With regard to lost earning capacity, jurors must weigh the plaintiff's age, past earnings, education, benefits, prospects for job advancement and raises, and work-life expectancy to determine the measure of damages.[142]

Each of the foregoing elements is also important to determine the lost earning capacity of an illegal alien plaintiff. Counsel may argue that if the jury is presented with evidence of a plaintiff's immigration status, the jury will have the capacity to weigh the prospects for the plaintiff to remain in the United States or return to his country of origin, either voluntarily or involuntarily,[143] take into account the permanent or temporary nature of the plaintiff's residency, and properly weigh the true prospects for job advancement. Such a balance of the evidence allows the jury to award reasonable damages and prevents a windfall.[144] This is especially true considering the majority of non-English speaking immigrants have been demonstrated to return their country of origin within a relatively short period of time.[145] Moreover, fears of prejudice can be assuaged by bifurcating the liability and

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[139] *See* Truax v. Corrigan, 257 U.S. 312, 333 (1921) (holding "[i]mmunity granted to a class however limited, having the effect to deprive another class however limited of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class").

[140] Rodriguez, 232 Cal. Rptr. at 158.

[141] *See* Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757, 761 (Tex. 2003) (stating jurors are the sole judges of the credibility of the witnesses and the weight to be given their testimony).

[142] *See* Guadian, 868 S.W.2d at 898-99; Tagle, 155 S.W.3d at 519-20 (stating a plaintiff must present evidence the plaintiff had capacity to work prior to injury, and his capacity was impaired as a result of injury).

[143] The evidence of illegal alien migration into and out of the United States demonstrates there is a significant turnover rate and lack of stability for any particular alien. From 1925 until 2007, over 49 million illegal aliens have been removed from the United States. Office of Immigration Statistics, Yearbook of Immigration Statistics: 2007, at Table 33 (Sept. 2008), *available at* <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/table33.xls> (last visited June 24, 2009). Between 2000 and 2007, over ten million illegal aliens were removed from the United States and, in 2007, the most recent year of available statistics, almost 1 million aliens were deported. *Id.* These statistics demonstrate there is a high likelihood that any particular illegal alien will be removed from the country in the near future. Therefore, it is unlikely and wholly speculative to assume Pierre will be able to remain in the United States for the rest of his life.

[144] *See* Fuller, *supra* note 2, at 1009.

[145] One study relying on data from the Mexican Migration Project estimated the number of years the average Mexican migrant will be active in the U.S. workforce was between 6.1 and 11.1 years. *See* Dwight Steward, Amy Raub, and Jeannie Elliott, "How Long do Mexican Migrants Work in the U.S.?" (November 28, 2006) (*available at* SSRN: http://ssrn.com/abstract=949632) (last visited June 24, 2009).

damages phases of trial so that a just result may ensue.[146]

VII. Illegal Aliens and Expert Opinions

In addition to the standard calculations performed on lost wages, it would be wise for the plaintiff's experts to account for the plaintiff's illegal status when formulating opinions regarding lost earning capacity because failure to do so could be to the plaintiff's own peril.

In *Garay v. Missouri Pacific R.R. Co.*, the United States District Court for the District of Kansas was faced with determining whether an expert's opinions were reliable when the expert failed to account for a plaintiff's illegal alien status.[147] The court found the failure of plaintiff's expert to take into account the decedent's illegal status in the United States rendered his opinion as to future lost wages wholly unreliable.[148] The *Garay* court determined the decedent's immigration status could have potentially precluded altogether any future employment opportunities in the United States and would have made any such employment unlawful.[149] Plaintiff's expert testified he was not familiar with wages in Mexico, gave no weight to the fact that the decedent was a temporary worker at the time of his death, and did not consider the decedent's actual employment history in Mexico.[150] The *Garay* court determined "a projection of future wages that wholly fails to take into account such critical factors as are shown by the evidence in the case is speculative and unreliable, and must be excluded."[151]

The holding in *Garay* comports with Supreme Court precedent in *Sure-Tan, Inc., v. N.L.R.B.*,[152] and the analysis of the New Hampshire Supreme Court. In *Sure-Tan, Inc. v. N.L.R.B.*, the Supreme Court held the award of back pay to an illegal alien is "'obviously conjectural'" and "constitutes pure speculation" because of the real potential for deportation of the alien.[153] Likewise, the New Hampshire Supreme Court found "an illegal alien could, in theory, be deported at any time" and "an illegal alien's potential to remain in the country and continue to work here may be uncertain and difficult to prove."[154]

With the knowledge that a plaintiff's immigration status may be submitted to the jury, the plaintiff's expert should take into account the plaintiff's illegal status, worklife expectancy in his country of origin, and wage rates in his country of origin. The plaintiff's expert should also account for the illegal alien's worklife expectancy in the U.S. and wage rates in the U.S. The balancing of such opinions would have the effect of setting the floor of lost earnings with the plaintiff's country of origin and setting the ceiling with U.S. wage rates.[155] In turn, such expert analysis would allow the illegal alien plaintiff to recover some measure of lost earnings damages in anticipation of the jury charge instruction proposed in Section VI(A), above. Failure to complete this extra analysis may render the expert's opinions speculative and unreliable and foreclose on a plaintiff's recovery of any lost earnings damages.[156]

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[146] *See* Melendres, 306 N.W.2d at 402; Gonzalez, 403 N.W.2d at 759-60.
[147] Garay v. Missouri Pacific R.R. Co., 60 F.Supp.2d 1168, 1173 (D. Kan. 1999).
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] Sure-Tan, Inc. v. N.L.R.B., 467 U.S. 883 (1984).
[153] Sure-Tan, 467 U.S. at 901.
[154] Rosa, 868 A.2d at 1001.
[155] Such an approach is similar to the approach currently used by many economic experts who set a floor of damages for post-accident employment at minimum wage and the ceiling at the wages earned prior to the injuries.
[156] *See* Rosa, 868 A.2d at 1001.

VIII. Conclusion

Defense counsel possesses specific additional arguments when confronted with a suit brought by an employee who is an illegal alien, particularly when the plaintiff used fraudulent means to obtain employment. When, as in the case of Pierre LeFaux, a defendant is faced with a suit by an illegal alien who fraudulently obtained employment, the defendant should look to *Hoffman Plastic* to preclude an award of lost past earnings. The defendant should also look to IRCA to determine whether the illegal alien violated this Act and, if so, argue the case is therefore pre-empted. When the plaintiff was engaged in illegal acts at the time of injury, the defendant should plead the affirmative defense of the Unlawful Acts Doctrine and seek summary judgment on this issue. Finally, the defendant should also attempt to have the plaintiff's illegal status submitted to the jury on the lost wages claim and move to strike any opposing expert who fails to take into account the plaintiff's immigration status.