

UNDOCUMENTED -- NOT ILLEGAL

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Issues concerning undocumented workers and their entry into this country are presented in the national media, local media and blogosphere on a daily basis. From stories about civilian "militias" patrolling borders to houses of worship providing refuge, from "cracking down" on such immigration to a proposed amnesty for undocumented workers, such issues are front page news. With respect to tort claims and the plaintiffs' bar, 2006 was an important -- and positive -- year insofar as such issues are concerned. Most importantly, on February 21, 2006, in the case of Balbuena v. IDR Realty, LLC, 6 N.Y.3d 338, 812 N.Y.S.2d 416 (2006), the Court of Appeals confirmed that an undocumented worker (for us, never "illegal immigrant") may recover for future unearned lost wages. Before discussing the impact of that decision and the questions said decision have left unresolved, a (relatively) brief history of the relevant legislation and case law leading up to the Court of Appeals' Balbuena decision is in order.

The Federal Immigration Reform and Control Act of 1986 ("IRCA").

In 1986, Congress passed IRCA, which is codified at 8 USC 1324a *et seq.* As President Reagan confirmed at that time he signed the legislation, IRCA imposed employer sanctions intended to "remove the incentive for illegal immigration by eliminating the job opportunities which draw" such people into the United States (see Balbuena, 6 N.Y.3d at 353; 812 N.Y.S.2d at 423). IRCA created an "employment verification system" which requires an employer to verify a potential worker's identity and eligibility by examining government-issued documentation, such as a "green card" or evidence of citizenship. An employer who knowingly violates such obligations (or who subsequent to hiring of a worker learns that the worker is not authorized to work but continues to employ him), is subject to civil or criminal prosecution. Notably, under IRCA, an undocumented worker commits no crime by working without documentation; it is only the presentation of false documentation by a worker which is a crime under IRCA. See USC 1324a *et seq.*, Balbuena, 6 N.Y.3d at 353-354; 812 N.Y.S. 2d at 423.

Post IRCA pre Hoffman¹ New York Case Law.

¹ The United States Supreme Court's decision in Hoffman Plastic Compounds, Inc. v. National Labor Relations Board, 535 U.S. 137, 122 S. Ct. 1275 (2002), will be discussed in the next section of this article.

After the passage of IRCA, but without making specific reference to it, both the First and Second Departments of the Appellate Division held that undocumented workers could recover for future lost earnings. In Public Admin. Of Bronx County v. Equitable Life Ins. Society of the United States, 192 A.D.2d 325, 595 N.Y.S.2d 478 (1st Dept. 1993), which post-dated the passage of IRCA by five years, the First Department expressly rejected the contention that an undocumented worker could not recover for future lost wages and unequivocally held that an alien working illegally in the United States "should be permitted to offer evidence of any wages that [he] ... might have earned." The Court found the mere fact that the plaintiff was not legally permitted to work in the United States in no way precluded the plaintiff from recovering for wages that he might have earned, irrespective of his immigration status or status as an undocumented worker.

In Collins v. New York City Health and Hospitals Corporation, 201 A.D.2d 447, 607 N.Y.S.2d 387 (2nd Dept. 1994), the Second Department similarly held that in a tort action brought under New York state law, an undocumented worker can recover for future lost earnings. The Court noted that factors such as how long the worker might have continued

to earn wages in the United States, as well as the likelihood of potential deportation, were questions of fact to be resolved by a jury.

Some trial courts went even further. In Klapa v. O & Y Liberty Plaza Co., 168 Misc.2d 911, 645 N.Y.S.2d 281 (Sup. Ct. N.Y. Cty. 1996), the trial court not only determined that an undocumented worker could recover for future lost wages, it also barred the defendant from presenting any evidence of the plaintiff's immigration status or status as an undocumented worker. The court held that the plaintiff's status would only be relevant if the defendant could offer proof that that the plaintiff's status would impair his ability to work, such as proof of pending deportation proceedings. Klapa, 168 Misc.2d 911, 645 N.Y.S.2d 281. In Guzman v. American Ambulette Corp., (N.Y.L.J. 2-1-01), the Kings County trial court held that the defendant could not introduce any evidence concerning the plaintiff's immigration status or status as an undocumented worker absent an "offer [of] proof that deportation proceedings have either begun or in the process of beginning." The court barred the defendant "from informing the jury about plaintiff's immigration status at any point during the trial."

The Hoffman Decision.

In Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed.2d 271 (2002), the United States Supreme Court held that the National Labor Relations Board ("NLRB"), in an action brought pursuant to the National Labor Relations Act ("NLRA"), could not award backpay for unearned wages to a worker who had illegally provided false documentation in order to obtain employment.

The First and Second Department Responses to Hoffman.

Both the First and Second Departments were presented with the assertion, made by defendants, that the Hoffman decision unequivocally precluded an undocumented worker from recovering for future lost wages. The two Departments reached entirely different conclusions. In Sanango v. 200 East 16th St. Housing Corp., 15 A.D.3d 36, 788 N.Y.S.2d 314 (1st Dept. 2004), the Appellate Division, First Department held that state law, "by virtue of the Supremacy Clause (US Const., art VI, Sec 2) is subordinate to any federal policy - [and] must give way to IRCA as well." The Court found that in light of the Supreme Court's decision in Hoffman Plastic Compounds, 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed.2d 271, state tort law was preempted by IRCA which, according to the First Department, mandated that an

undocumented worker be precluded from recovering for unearned lost wages. Sanango, 15 A.D.3d 36, 788 N.Y.S.2d 314.²

In Majlinger v. Cassino Contracting Corp., 25 A.D.3d 14, 802 N.Y.S.2d 56 (2nd Dept. 2005), the Second Department rejected the First Department's analysis in Sanango. The Second Department found that "*Hoffman* must be construed narrowly" and determined that Hoffman was inapplicable where there was no evidence that the undocumented worker had submitted false documentation. The Second Department was "firmly convinced that requiring defendants to pay the same damages to all plaintiffs regardless of their immigration status not only does not interfere with, but actually advances, the immigration policy of the United states, as reflected in the applicable federal statutes." 802 N.Y.S.2d at 66. Accordingly, the Majlinger Court held a worker's undocumented status was an issue that could be considered by a jury, to the extent it was relevant to a lost wages determination (such as evidence of deportation proceedings), but did not serve to bar recovery for lost wages.

² The Sanango case settled soon after the First Department's decision. Accordingly, it is the First Department's decision in the companion case to Sanango, Balbuena v. IDR Realty, LLC, 13 A.D.3d 285, 787 N.Y.S.2d 35 (1st Dept. 2004), which was taken up to the Court of Appeals.

Although the Court of Appeals' Balbuena decision is the "last word" on this issue, we suggest that Justice Prudenti's well-reasoned and compassionate decision in Majlinger should be read (and appreciated) by the plaintiff's bar.

The Court of Appeals' Balbuena Decision.

In Balbuena, 6 N.Y.3d 338, 812 N.Y.S.2d 416, the Court of Appeals addressed the conflicting opinions of the First and Second Departments. In a 5 to 2 decision, the Court of Appeals held that the United States' Supreme Court's decision in Hoffman did not preclude an undocumented worker from recovering unearned future lost earning in an action brought under New York state law. The Court of Appeals rejected Defendants' claims that state tort recovery for unearned future wages by an undocumented worker was preempted by IRCA. The Court of Appeals held that there was no express preemption because IRCA lacks an express statement by Congress that it intended to do so by enacting IRCA; no field preemption because IRCA's legislative history "shows that the Act was not intended 'to undermine or diminish in any way labor protections in existing law'" (internal citation omitted) and no conflict preemption because the two fields are able to co-exist and

because such recovery is universally applicable and in no way geared towards, or limited to, undocumented workers. 6 N.Y.3d at 357-359, 812 N.Y.S.2d at 425-427. The Court further noted that precluding undocumented workers from making such a claim would actually provide employers with an incentive to hire undocumented workers, which would be in conflict with Congress' intentions in passing IRCA. 6 N.Y.3d at 359, 812 N.Y.S.2d at 427.

The Court also found it compelling that there was no evidence that the Balbuena or Majlinger Plaintiffs had submitted false documentation or engaged in any illegal activity in procuring their employment. The Court contrasted this with the illegal activity engaged in by the plaintiff in Hoffman. The Court found that the impermissibility of an undocumented worker's presence in this country was not sufficient to rise to the level of warranted precluding an undocumented plaintiff from maintaining a claim for unearned lost wages. 6 N.Y.3d at 360-361, 812 N.Y.S.2d at 428-429.

The Court of Appeals also rejected Defendants' claims that an undocumented Plaintiff's inability to mitigate future damages by seeking other employment in the United States should preclude such a plaintiff from recovering for

future unearned wages. The Court first noted that where the alleged injuries are so severe and permanent as to prevent the worker from working again (as was alleged in both Balbuena and Majlinger), the mitigation issue might not even arise. It then held that evidence of mitigation would be admissible in a case brought by an undocumented worker -- as it is in any other tort action -- and that immigration status could be a factor to be considered by a jury. The Court suggested that such evidence could include proof by a plaintiff that the worker had obtained, or was in the process of obtaining, authorization documents or proof from the defendant that such authorization had not been sought or that such an application had been denied.

The Consequences of Balbuena When Considering Whether to Make a Claim for Lost Wages on Behalf of an Undocumented Worker.

When considering whether or not to bring a claim for lost wages on behalf of an undocumented worker, an attorney's first step (after determining whether or not to take the case -- unless that decision would be controlled by the possibility of successfully maintaining a claim for unearned lost wages), should be to determine if the worker provided documentation in order to obtain the job. If the worker provided no such documentation, under the court of

Appeals' Balbuena decision, such a plaintiff can maintain an action for future lost wages.

If the plaintiff did produce documentation in order to obtain his job, the attorney must next determine if the documentation was genuine and rightfully used by the plaintiff. If the documentation was false or had been genuinely issued to a different individual, under Balbuena, it is likely that such a worker could not recover for unearned lost wages.³ One caveat to this: there have been many instances where an employer itself has provided the worker with false documentation (such as another's Social Security card or number) in order to obtain employment and circumvent IRCA's requirements. We have not yet found any cases dealing with this situation. It would seem that if confronted with such circumstances it would be entirely consistent with the Court of Appeals' Balbuena decision to assert that it was the employer, rather than the worker, who acted in contravention of IRCA and thus, that the injured worker should not be precluded from making a claim for unearned lost wages. In making such a claim, it would be helpful to take the deposition of a representative of the employer with knowledge of the employer's hiring

³ Although the Court of Appeals did not expressly issue such a ruling, that would seem to be the import of the Court's decision.

practices. Should such an employer refuse to answer based upon an assertion of a 5th Amendment right against self-incrimination (which would be prudent for any truthful employer who violated IRCA in hiring workers), such refusal should serve to benefit the plaintiff's right to recover for undocumented lost wages.

Another situation with which we have been confronted, but has apparently not yet been the subject of a reported decision was a client who had obtained what would be genuine authorizing documentation under IRCA by submitting false information to the issuing authority in order to obtain such documents. Under such circumstances, a plaintiff could legitimately argue that since there was no illegal conduct involved with respect to obtaining the employment at issue, it would be consistent with Balbuena to allow such a worker to recover for unearned lost wages. Of course, defendants would respond by asserting that since the serious illegal conduct of the plaintiff ultimately enabled the worker to obtain the employment at issue, it would be inconsistent with Balbuena to allow such a worker to recover for unearned lost wages.

If it appears that an undocumented worker may be able to recover for lost wages under Balbuena, the next step

should be to determine if there is any way the worker can obtain authorizing documentation under IRCA. Making such an application has the potential to be the proverbial double-edged sword, as a denial could make it harder to recover for lost wages. On the other hand, a failure to apply could place the plaintiff in the same position as if he had been denied. Timing of the application could work to the plaintiff's advantage as evidence of a pending application (that had not yet been denied) could be utilized to allow a jury to make an award to an undocumented worker for unearned lost wages.

While it is likely that defendants will argue that a pending application is too speculative to be of any evidentiary value, the existence of a pending application would nonetheless benefit the plaintiff. First, even if evidence of the pending application is found to be speculative, it should at least prevent the defendant from arguing to the jury that no application had been made. In addition, defendants often attempt to assert that the worker's status as undocumented, in and of itself, is evidence that the worker may be deported. Plaintiffs should always fight vigorously against the admission of such evidence or argument, which is far more speculative

than a plaintiff's assertion that his pending application for authorizing documents (or status) makes it likely that the worker will eventually be able to work legally in the United States.

The Second Circuit's Resolution of the Issue.

Although most cases in which lost wages are sought under New York state tort law are brought in state court, such claims are sometimes made in Federal court. In Medeira v. Affordable Housing Foundation, Inc., ___ F.3d ___ (2nd Cir., November 14, 2006), the Second Circuit rejected a Hoffman based challenge and held that an undocumented worker can recover unearned lost wages in an action brought in Federal court under New York state law. Although the Medeira Court recognized the Balbuena decision, it conducted its own independent analysis. The Medeira court rejected the employers assertion that there IRCA preempted (express, implied, "field" or conflict) such a recovery. As in Balbuena, a key factor in the Medeira case was that there was no evidence that the injured undocumented worker had engaged in illegal conduct or proffered false documentation in order to obtain employment. Thus, while the Medeira decision did not adopt Balbuena, an undocumented worker seeking to recover unearned lost wages

in a Federal court within the Second Circuit will be in substantially the same position as if he were in state court insofar as recovery for unearned lost wages are concerned.

In sum, while the right of undocumented workers to recover unearned lost wages in an action brought under New York state tort law has been confirmed by both the Court of Appeals and the Second Circuit, there are many factors that must be considered in determining both whether such a claim should be pursued and what efforts can be made to maximize the plaintiff's potential recovery.