A DEFENSE PRIMER FOR SUITS BY ILLEGAL ALIENS

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I. INTRODUCTION

Pierre LeFaux, a Canadian citizen, illegally[1] entered the United States.[2] He then 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, LeFaux was injured in a fire when combustible materials ignited from a spark. He sustained severe burns and may be unable to work for the remainder of his life. Using the alias Peter Jones, LeFaux brought suit against XYZ Painting alleging XYZ's negligence caused his injuries. He sought to recover for his loss of past and future earning capacity, among other damages.

This Article attempts to apply relevant Texas precedent and persuasive arguments from other jurisdictions to answer the following five questions: First, is LeFaux entitled to recover damages for his loss of future earning capacity in U.S. wages; second, are LeFaux's claims for lost wages preempted by any federal or state laws;[3] third, should evidence of LeFaux's

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

[2] Estimates of the number of illegal immigrants living in the United States range from seven to fifteen million. Hugh Alexander Fuller, Comment, *Immigration, Compensation and Preemption: The Proper Measure of Lost Future Earning Capacity Damages After* Hoffman Plastic Compounds, Inc. v. NLRB, 58 BAYLOR L. REV. 985, 986 (2006); *see also* Jeffrey Passel & D'Vera Cohn, Pew Hispanic Ctr., *Trends in Unauthorized Immigration* 1 (Oct. 2, 2008), *available at* http://pewhispanic.org/files/reports/94.pdf (estimating unauthorized population at 11.9 million in Mar. 2008).

[3] The arguments and analysis regarding claim preclusion or preemption likely do not apply to illegal aliens who are employed by an employer with full knowledge of their illegal status or illegal aliens who obtain employment from an unwitting employer without tendering any fraudulent documents. *See* Rosa v. Partners in Progress, Inc., 868 A.2d 994, 1001 (N.H. 2005) (holding, as a matter of public policy, that a person responsible for employing an illegal alien who

illegal status be submitted to the jury; fourth, should LeFaux's expert account for his illegal status when formulating opinions; and fifth, are LeFaux's claims barred by state law or public policy.

II. LOSS OF FUTURE EARNING CAPACITY

Texas law is unsettled on the issue of whether an illegal alien[4] may recover damages for the loss of future earning capacity based on U.S. wages. While four Texas courts have addressed the issue, those cases are of little worth because their factual scenarios are different from LeFaux's case and none of the courts relied upon any authority or performed any analysis when concluding that an illegal alien may recover damages.

In *Hernandez v. M/V Rajaan*, a longshoreman was injured on the job.[5] The longshoreman, an illegal alien, resided continuously in the United States since 1970.[6] The Fifth Circuit determined recovery of lost wages in U.S. earnings by an illegal alien was not error when the defendant did not

knows of the alien's illegal status may not use the potential that the alien may be deported as a bar to the alien's recovery of lost U.S. earnings); *accord* Coque v. Wild Flower Estates Developers, 867 N.Y.S.2d 158, 164–65 (N.Y. App. Div. 2008) (holding illegal alien's claim for lost wages not barred when employer knowingly hired alien in contravention of IRCA). *But see* Memorandum from Arthur F. Rosenfeld, Gen. Counsel, NLRB, to all regional directors, officers-in-charge, and resident officers (July 19, 2002), *available at* http://www.lawmemo.com/nlrb/gc02-06.htm (concluding that, even when an employer knowingly hires an undocumented worker, the employer is immune from backpay liability under the National Labor Relations Act).

[4] Many commentators bristle at the use of the term "illegal alien" and prefer other terms such as "unauthorized worker," "foreign national," or "undocumented immigrant." A California appeals court in *Martinez v. Regents of University of California* noted the following:

> [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 Pierre is an "alien" who is unlawfully in the United States, the author will use the term "illegal alien" in lieu of other substitute terms.

[5] 841 F.2d 582, 585 (5th Cir. 1988).

[6] *Id.* at 588.

establish the illegal alien was about to be or would surely be deported.[7] The holding, however, was predicated on the fact the longshoreman could remain in the United States because the Immigration Reform and Control Act provided amnesty or citizenship status to those aliens who "entered the United States before January 1, 1982, and . . . resided continuously in the United States in an unlawful status since such date."[8] Moreover, *Hernandez* is no longer relevant, as it was decided before the United States Supreme Court decided *Hoffman Plastic.*

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.[9] The court spent no time, effort, or analysis to support this footnote, and the determination contained in the footnote was not even a point of issue before the court. Moreover, the court did not address whether Texas courts should allow a plaintiff's illegal status into evidence when determining lost earning capacity. Additionally, the court did not discuss whether lost earning capacity damages should be measured using U.S. wages or the wages available in the plaintiff's country of origin. Finally, the facts of *Cordova* are inapposite to cases like LeFaux's because the defendant in *Cordova* attempted to use the plaintiff's status as an illegal, alone, to bar recovery.

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.[10] Similarly, in *Contreras v. KV Trucking, Inc.*, the Eastern District of Texas relied upon *Guzman* for the same proposition.[11] The facts of *Cordova* and *Guzman* are inapposite to the facts of LeFaux's suit because neither case involved an illegal alien who used fraudulent documents to obtain employment. Rather, the plaintiffs in those cases were merely illegal aliens who had not committed any additional criminal

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

[8] *See Hernandez*, 841 F.2d at 588 (citing 8 U.S.C. § 1255a(a)(2)(A) (2000)).

[9] 856 S.W.2d 768, 771 n.1 (Tex. App.—El Paso 1993, writ denied).

[10] 116 S.W.3d 233, 244 (Tex. App.—Tyler 2003, no pet.).

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

offenses.[12] Moreover, the issue of federal preemption of lost wages claims by illegal aliens was not properly either court because the defendants, respectively, failed to plead it as an affirmative defense.[13] Thus, any discussion of the application of *Hoffman Plastic* or federal preemption by these courts is obiter dictum and not controlling.[14]

Although is unlikely that the Texas courts' statements in *Cordova*, *Guzman*, and *Contreras* have any precedential value, it is difficult to dispute that an illegal alien has standing to bring suit in the United States in light of the equal protection clause. The equal protection clause of the Fourteenth Amendment provides that no state shall deny any person the benefit of jurisdiction under the equal protection of the laws.[15] However, even though an alien has the right to bring suit under the equal protection clause, some of his claims may still be barred or limited by the application of various other state laws. The application of this logic is abundant and displayed everyday in suits by legal citizens against landowners, employers, doctors, sellers of products, and the government, among others.[16] At least

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

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

[14] *See* Edwards v. Kaye, 9 S.W.3d 310, 314 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) ("Dictum 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. Dictum is not binding as precedent under stare decisis." (citation omitted)); *accord* Nichols v. Catalano, 216 S.W.3d 413, 416 (Tex. App.—San Antonio 2006, no pet.); *In re* Mann, 162 S.W.3d 429, 434 (Tex. App.—Fort Worth 2005, no pet.).

[15] *See* Plyler v. Doe, 457 U.S. 202, 210 (1982) (citing Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953)); *see also* Commercial Standard Fire & Marine Co. v. Galindo, 484 S.W.2d 635, 637 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.) (citing 42 U.S.C. § 1981 (2000) ("All persons within the jurisdiction of the United States 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 in Texas an alien's illegal entry alone will not bar him from receiving workers' compensation benefits. *Id.* at 637.

[16] *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 95.001–.004 (Vernon 2005) (stating exclusive remedy for suits against landowners); *id.* § 74.301 (limiting recovery against doctors); *id.* § 82.003 (stating non-manufacturing seller not liable for harm caused by product sold by seller); Tex. Lab. Code Ann. § 408.001 (Vernon 2006) (stating exclusive remedy for suits against employers); Tex. Fin. Code Ann. § 305.001–.008 (Vernon 2006) (providing exclusive remedies for claims of usury); Tex. Alco. Bev. Code Ann. § 2.02 (Vernon 2007) (exclusive remedy for damages for providing alcohol to person 18 years of age or older); Tex. Prop. Code Ann. § 92.260 (Vernon 2007) (exclusive remedy in suits against landlords for failure to install smoke detectors); Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 694–95 (Tex. 2003) (discussing limitation of suits against sovereign); Leonard v. Abbott, 171 S.W.3d 451, 457–58 (Tex. App.—Austin

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 U.S. rates, it may be more accurate to say the issue of the proper measure of those damages has not yet been fully adjudicated.[17]

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."[18] 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.[19] 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.[20] 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."[21] An alien who fails to present the required documentation cannot be hired.[22]

In addition to examining specified documents, an employer must also complete an I-9 or other similar form for every new worker.[23] The required form includes an attestation by the employee that he is authorized to work in the United States.[24] The required form also contains an attestation by the employer that it has reviewed the employee-supplied documents and the documents appear genuine.[25] It is unlawful for an employer to continue to

2005, pet. denied) (discussing limitation of suits by vexatious litigants); Stout v. Grand Prairie Indep. Sch. Dist., 733 S.W.2d 290, 293 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) (discussing limitation of negligence suits against teachers).

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

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

[19] 8 U.S.C. § 1324a(h)(3) (2000).

[20] *Hoffman Plastic*, 535 U.S. at 147–48.

[21] 8 U.S.C. § 1324a(b)(C)(i)–(ii) (2000).

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

[23] 8 U.S.C. § 1324a(b) (2000).

[24] *Id.* § 1324a(b)(2).

[25] *Id.* § 1324a(b)(1)(A).

employ an alien once the employer knows "the alien is (or has become) an unauthorized alien with respect to such employment."[26]

Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act in 1996 (IIRIRA).[27] "Under the Act, 'conviction,' with respect to an alien, is defined as a 'formal judgment of guilt of the alien entered by a court.'"[28] The definition also includes:

> [A]n adjudication of guilt [that] has been withheld where a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt and the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.[29]

Additionally, the Act provides:

> [A]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part [i.e., parole and/or probation].[30]

The Act applies to all convictions and sentences entered before, on, or after September 30, 1996, the date of enactment.[31]

IIRIRA defines an "aggravated felony" as:

> [A]n offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to

[26] *Id.* § 1324a(a)(2); Mester Mfg. Co. v. INS., 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).

[27] *Ex parte* Martinez Ceja**,** No. 05-00-00524-CR, 2000 WL 1052974, at *1 (Tex. App.—Dallas Aug. 1, 2000, no pet.) (not designated for publication).

[28] *Id.* at *1 (citing 8 U.S.C. § 1101(a)(48)(A)).

[29] *Id.* at *1 n.3 (citing 8 U.S.C. § 1101(a)(48)(A)).

[30] *Id.* at *1 (citing 8 U.S.C. § 1101(a)(48)(B)).

[31] *Id.* (citing Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C § 322(c), 110 Stat. 3009-546, 629 (1996)).

> document fraud) and (ii) for which the term of imprisonment is at least 12 months.[32]

8 U.S.C. § 1227 states, "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable."[33] The Act further states, "[a]n alien who is the subject of a final order for violation of section 1324c of this title is deportable."[34] Section 1324c makes it "unlawful" for any person to "forge," "alter," "use," or "possess" any false document to obtain a benefit, such as employment.[35]

Aliens who use or attempt to use documents described in section 1324c of IRCA are subject to a fine, imprisonment of not more than five years, or both.[36] 18 U.S.C. § 911 permits fines and imprisonment of not more than three years if a person "falsely and willfully represents himself to be a citizen of the United States."[37] 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."[38] 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

[32] 8 U.S.C. § 1101(a)(43)(P) (2000).

[33] *Id.* § 1227(a)(2)(A)(iii) (2000).

[34] *Id.* § 1227(a)(3)(C)(i) (2000).

[35] *See id.* § 1324c(a)(1)–(5) (2000); *see* Theodros v. Gonzales, 490 F.3d 396, 400–01 (5th Cir. 2007) (noting that it is a deportable offense for an alien to falsely represent he was a citizen of the United States in order to gain private sector employment); Villegas-Valenzuela v. INS., 103 F.3d 805, 809–10 (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).

[36] *See* 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 document is false"); *see also* 42 U.S.C. § 408(a)(8) (2000) (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").

[37] 18 U.S.C. § 911 (2000).

[38] *Id.* § 1015(e).

unlawful activity that constitutes a violation of Federal law."[39] 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".[40] 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.[41] "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."[42]

IV. IRCA AND PREEMPTION

Because the statements in *Cordova*, *Guzman*, and *Contreras* are dicta or unpersuasive, it is prudent to look at IRCA and decisions in other courts to determine whether Texas courts should apply preemption to cases involving illegal aliens who either commit illegal acts or fraudulently obtain employment. The United States Supreme Court and many federal and state courts have held an illegal alien's claims for lost earnings should 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.[43] The federal government's power to regulate issues relating to immigration and naturalization is so comprehensive that a state

[39] *Id.* § 1028(a)–(b); *see* 42 U.S.C. § 1307(a) (2000) (making use of false social security information a misdemeanor punishable by up to $1,000 fine and imprisonment of up to one year).

[40] 18 U.S.C. § 1546(a) (2006).

[41] Tex. Penal Code Ann. § 32.51(b) (Vernon 2003 & Supp. 2008).

[42] *Id.* § 32.51(a)(1)(A).

[43] *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").

may not interfere with that regulation.[44] Where the state enactment is not at odds with the federal mandates, the state law will not be preempted.[45] 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.[46]

B. Hoffman Plastic Compounds, Inc. v. NLRB

In *Hoffman Plastic Compounds, Inc. v. NLRB*, the U.S. Supreme Court determined whether an illegal alien was entitled to backpay for his employer's violation of the National Labor Relations Act (NLRA).[47] In that case, Jose Castro used fraudulent documents to obtain employment with Hoffman Plastic.[48] Hoffman Plastic eventually fired Castro when he supported an effort to unionize the company.[49] The National Labor Relations Board found Hoffman's actions violated the NLRA and awarded Castro backpay even though Castro admitted he was a Mexican citizen with no authorization to be in the United States.[50] The Supreme Court reversed the award and refused to allow the Board to "award backpay 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."[51] The Court found an award of backpay "trivializes the immigration laws" and "condones and encourages future violations," and it noted Castro would not have been eligible for backpay if he had been deported.[52]

1. Opinions of Federal Courts on Preemption of Lost Earning Claims by Illegal Aliens

Both before and after *Hoffman Plastic*, federal courts have held an illegal alien's claims for lost earnings are barred, preempted, or both by IRCA. For instance, before *Hoffman*, the Seventh Circuit Court of Appeals

[44] *Nyquist*, 432 U.S. at 10.

[45] *See* Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982); *DeCanas*, 424 U.S. at 356.

[46] *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151–52 (2002).

[47] *See id.* at 140–42.

[48] *Id.* at 140–41.

[49] *Id.* at 140.

[50] *Id.* at 140–41.

[51] *Id.* at 149.

[52] *Id.* at 150.

held backpay was not available to illegal workers after the enactment of IRCA.[53] Similarly, 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.[54]

In *Escobar v. Spartan Security Service*, 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.[55] In that case, Enrique Escobar, a security officer employed by Spartan Security, was sexually harassed and propositioned by the company's president.[56] When he refused the advances, Escobar's hours were decreased, he was relocated, and was ultimately fired.[57] 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.[58] The *Escobar* court disagreed that *Hoffman Plastic* precluded all remedies under Title VII; however, it applied the reasoning in *Hoffman Plastic* to hold that an illegal alien is not entitled to the backpay remedy provided by Title VII.[59]

In *Ambrosi v. 1085 Park Avenue LLC*, a federal court in New York held "undocumented workers *who violate IRCA* may not recover lost wages in a personal injury action."[60] The *Ambrosi* court dismissed the plaintiff's lost wages claim because the plaintiff used fraudulent documentation to obtain employment in violation of IRCA.[61] In *Veliz v. Rental Service Corp. USA*, a federal court in Florida determined "[b]ackpay and lost wages are nearly identical; both constitute an award for work never to be performed."[62] The *Veliz* court then applied the principles of *Hoffman Plastic*, holding that an undocumented worker's lost wages claim was preempted by IRCA when

[53] Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1122 (7th Cir. 1992).

[54] Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 188 (4th Cir. 1998).

[55] 281 F. Supp. 2d 895, 896 (S.D. Tex. 2003).

[56] *Id.*

[57] *Id.*

[58] *Id.* at 896–97.

[59] *Id.* at 897.

[60] No. 06-CV-8163(BSJ), 2008 WL 4386751, at *13 (S.D.N.Y. Sept. 25, 2008) (emphasis added).

[61] *Id.*

[62] 313 F. Supp. 2d 1317, 1337 (M.D. Fla. 2003).

the worker used false identification to obtain employment.[63] In *Hernandez-Cortez v. Hernandez*, a federal court in Kansas applied Kansas's unlawful conduct rule, the precedent in *Hoffman Plastic*, and 8 U.S.C. § 1324a to find an undocumented alien's tort suit for future lost earnings was precluded.[64] 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.[65]

2. Other Authorities Regarding Claims by Illegal Aliens

The appellate courts in California give some guidance on how other state courts deal with the issue of lost earnings claims by illegal aliens. The 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 efforts to correct his deportable condition, he may only recover lost future earnings in the wages of his country of origin.

The seminal California case establishing the balancing test is *Rodriguez v. Kline*.[66] 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 which will correct his deportable condition."[67] 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 citizenship."[68]

In *Gilharry-Jones v. De Souza***,** the plaintiff, an illegal immigrant from Belize, sued for lost wages arising out of an automobile accident.[69] The plaintiff brought forth evidence that she was married to a permanent

[63] *See id.*

[64] No. Civ.A. 01-1241-JTM, 2003 WL 22519678, at *4–7 (D. Kan. Nov. 4, 2003) (not designated for publication).

[65] No. 01 CIV. 10010(NRB), 2002 WL 1941484, at *2 n.3 (S.D.N.Y. Aug. 21, 2002) (not designated for publication).

[66] 232 Cal. Rptr. 157 (Cal. Ct. App. 1986).

[67] *Id.* at 158.

[68] *Id.*

[69] No. B149682, 2002 WL 1360016, at *3 (Cal. Ct. App. June 21, 2002) (not designated for publication).

resident, had children who were born in the U.S., consulted an immigration attorney, and prepared immigration documents.[70] The trial court determined the plaintiff was deportable and rejected the claims for lost U.S. wages but allowed recovery of future lost wages based on the plaintiff's prospective income in Belize.[71] The plaintiff appealed and the California Second District Court of Appeals affirmed the judgment of the trial court.[72] The *Gilharry-Jones* court applied the holding from *Rodriguez v. Kline* and 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.[73]

In addition to the foregoing California authorities, jurisdictions across the nation provide guidance on how to manage claims by illegal aliens. In *Ortiz v. Cement Products, Inc.*, 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.[74] 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.[75] 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.[76] In that case, the court determined IRCA preempted Nevada's worker's compensation scheme because Tarango was an illegal alien who was not entitled to employment in the United States and, as such, the provision of vocational rehabilitation benefits, training, or modified employment would circumvent the

[70] *Id.* at *3–4.

[71] *Id.* at *3.

[72] *Id.* at *8.

[73] *Id.* at *5.

[74] 708 N.W.2d 610, 613 (Neb. 2005).

[75] 90 P.3d 940, 948 (Kan. 2004).

[76] 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. *Id.* at 178.

provisions of IRCA.[77] 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.[78]

In *Macedo v. J.D. Posillico, Inc.*, a 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."[79] In *Martines v. Worley & Sons 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.[80] In *Sanchez v. Eagle Alloy, Inc.*, an appellate court in Michigan held 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.[81] 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."[82] 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") when she was

[77] *Id.* at 178; *see also* Del Taco v. Workers' Comp. Appeals Bd., 94 Cal. Rptr. 2d 825, 827 (Cal. Ct. App. 2000) (holding same); Liberty Mut. Ins. Co. v. Workers' Comp. Appeals Bd., No. B150724, 2002 WL 14515, at *4 (Cal. Ct. App. Jan. 4, 2002) (not designated for publication); Foodmaker, Inc. v. Workers' Comp. Appeals Bd., 78 Cal. Rptr. 2d 767, 777–79 (Cal. Ct. App. 1998) (not designated for publication).

[78] 986 P.2d 161, 164 (Wyo. 1999).

[79] No. 108316/06, 2008 WL 4038048, at *9 (N.Y. App. Div. 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 "an undocumented alien may be precluded from recovering damages for lost wages if he or she obtained employment by submitting false documentation to the employer").

[80] 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).

[81] 658 N.W.2d 510, 512 (Mich. Ct. App. 2003).

[82] 542 S.E.2d 790, 792 (Va. Ct. App. 2001); *see also* Xinic v. Quick, No. 2004-226030, 2005 WL 3789231, at *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).

terminated after informing her superior she was pregnant.[83] The *Crespo* court determined LAD had been violated but relied on *Hoffman Plastic* to deny the plaintiff's economic and non-economic damages because allowing these damages contradicted IRCA.[84]

Additionally, in *Mora v. Workers' Compensation Appeal Board*, the court relied on precedent set forth by the Pennsylvania Supreme Court to suspend benefits to an injured worker and found that 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.[85] 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."[86] A California court held that 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.[87] 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.[88]

C. Application of Hoffman and Preemption in Texas

The issue of an illegal alien's ability to recover damages for lost earning capacity has not come up very often in Texas or other jurisdictions. The

[83] 841 A.2d 471, 472 (N.J. Super. Ct. App. Div. 2004).

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

[85] 845 A.2d 950, 954 (Pa. Commw. Ct. 2004) (citing Reinforced Earth Co. v. Workers' Comp. Appeal Bd., 810 A.2d 99, 108 (Pa. 2002) (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)).

[86] *Id.*

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

[88] 77 Cal. Rptr. 2d 12, 19 (Cal. Ct. App. 1998).

issue, however, will likely continue to gain ground[89] with the persistent influx of illegal immigrants into the United States.[90]

In the case of Pierre, 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 precedent of *Hoffman Plastic* should apply to preempt any claims for past lost earnings since Pierre was illegally in the country and obtained his employment by criminal fraud.[91] 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* should be applied to preempt Pierre's claims for future lost earnings since he obtained his employment by criminal fraud.[92] Additionally, and as in California, the burden should be on Pierre to establish he has taken steps to ameliorate his immigration status in order for him to recover lost future earnings in U.S. wages.[93]

It is unlikely Pierre would be able to correct his deportable status because he committed an aggravated felony by falsifying documents to

[89] 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).

[90] Passell & Cohn, *supra* note 2, at 2 (estimating inflows of unauthorized immigrants averaged 800,000 a year from 2000 to early 2005, and 500,000 a year from 2005 to 2008); *see also* 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 Jan. 13, 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); Donald L. Barlett & James B. Steele, *Who Left the Door Open?*, TIME, Sept. 20, 2004, 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.).

[91] 535 U.S. 137, 147 (2002); *see also* Macedo v. J.D. Posillico, Inc., No. 108316/06, 2008 WL 4038048, at *7–9 (N.Y. Sup. Ct. Aug. 13, 2008) (slip op.) (approving of a partial summary judgment for defendant on plaintiff's lost wages claims where plaintiff obtained employment with fraudulent documents).

[92] Ambrosi v. 1085 Park Ave. LLC, No. 06-CV-8163(BSJ), 2008 WL 4386751, at *13 (S.D.N.Y. Sept. 25, 2008); Veliz v. Rental Serv. Corp. USA, 313 F. Supp. 2d 1317, 1337 (M.D. Fla. 2003); Hernandez-Cortez v. Hernandez, No. Civ.A. 01-1241-JTM, 2003 WL 22519678, at *4–5 (D. Kan. Nov. 4, 2003).

[93] *See* Rodriguez v. Kline, 232 Cal. Rptr. 157, 158 (Cal. Ct. App. 1986).

obtain employment.[94] Therefore, Pierre's lost wages claims should be limited to those wages he could have earned in his home country and not based on U.S. wages.[95] If, however, Pierre fails to bring forth any evidence of his home country earnings, then Pierre's lost wages claims should be barred in their entirety.[96] Ultimately, Pierre should not be rewarded "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."[97]

V. UNLAWFUL ACTS DOCTRINE

In conjunction with a preemption defense, defendants 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, Texas courts should bar recovery under the Unlawful Acts Doctrine and public policy.

The Supreme Court of Texas first stated the Unlawful Acts Doctrine in 1888 in *Gulf, Colorado & Santa Fe Railway Co. v. Johnson*.[98] 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."[99] "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."[100] This defense has been interpreted to mean that "if the illegal

[94] *See* 8 U.S.C. § 1255(c)(8) (2006); *id.* § 1324c(a)(1)–(5) (2006) (stating forging immigration documents is unlawful).

[95] *See Rodriguez*, 232 Cal. Rptr. at 157; Gilharry-Jones v. De Souza, No. B149682, 2002 WL 1360016, at *4 (Cal. Ct. App. June 21, 2002) (not designated for publication).

[96] *See* Bonney v. San Antonio Transit Co., 160 Tex. 11, 325 S.W.2d 117, 121 (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.—Eastland 2008, pet. denied) (reversing lost wages award for lack of factually sufficient evidence); Strauss v. Cont'l Airlines, Inc., 67 S.W.3d 428, 436–37, 443 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (sustaining judgment notwithstanding the verdict on past lost earnings claim).

[97] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149 (2002).

[98] 71 Tex. 619, 9 S.W. 602, 603 (1888).

[99] Fuentes v. Alecio, No. C-06-425, 2006 WL 3813780, at *2 (S.D. Tex. Dec. 26, 2006) (quoting Sharpe v. Turley, 191 S.W.3d 362, 366 (Tex. App.—Dallas 2006, pet. denied)).

[100] Sharpe v. Turley, 191 S.W.3d 362, 366 (Tex. App.—Dallas 2006, pet. denied); *see also* Saks v. Sawtelle, Goode, Davidson & Troilo, 880 S.W.2d 466, 469 (Tex. App.—San Antonio 1994, writ denied); Rodriquez v. Love, 860 S.W.2d 541, 544 (Tex. App.—El Paso 1993, no writ);

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."[101]

In *Fuentes v. Alecio*, Geovany Fuentes attempted to illegally enter the United States and hired Estuardo Alecio to help with entry.[102] Fuentes died from heat exhaustion after crossing the U.S. border and his family sued Alecio for negligence.[103] Alecio moved to dismiss the claims based on the Unlawful Acts Doctrine.[104] At the time of his death, 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.'"[105] 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).[106] 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 United States.[107] Because the decedent violated the law, and was injured as a result of this violation, the *Fuentes* court granted Alecio's motion to dismiss.[108]

In *Denson v. Dallas County Credit Union*, a licensing case involving tort and contract issues, the Dallas 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.[109] In that case, the Dallas 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

Dover v. Baker, Brown, Sharman & Parker, 859 S.W.2d 441, 450 (Tex. App.—Houston [1st Dist.] 1993, no writ).

[101] *Sharpe*, 191 S.W.3d at 366; *see also* Denson v. Dallas County Credit Union, 262 S.W.3d 846 (Tex. App.—Dallas 2008, no pet.).

[102] 2006 WL 3813780, at *1.

[103] *Id.*

[104] *Id.*

[105] *Id.* at *3 (quoting 8 U.S.C. § 1325(a) (2006)) (alterations in original).

[106] *Id.*

[107] *Id.*

[108] *Id.* at *4.

[109] 262 S.W.3d 846, 848 (Tex. App.—Dallas 2008, no pet.).

form the basis for recovery."[110] "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."[111] In *Denson*, the appellant argued the application of the unlawful acts defense would provide the appellee with a windfall.[112] The Dallas 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.[113] In coming to its conclusion, the Dallas 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."[114]

In *Dover v. Baker, Brown, Sharman & Parker*, Dover filed suit against various attorneys and accountants and their firms, seeking damages suffered in connection with advice given him by those parties.[115] Dover was convicted of tax evasion and making false tax statements.[116] Dover alleged his conviction and loss of business were the result of bad advice given to him by his attorneys and accountants; however, Dover admitted he knowingly executed false affidavits.[117] The trial court granted motions for summary judgment based upon public policy.[118] In affirming the trial court's judgment, the appellate court focused on the fact that Dover knowingly and willfully committed illegal acts and held "[Dover's] illegal conduct is not incidental to his claims; it is inextricably intertwined with those claims. Because Dover's illegal act contributed to his injury, the trial court correctly granted appellees' summary judgment on the grounds of public policy."[119]

Using the factual scenario in Part I, Pierre's claims should be barred by public policy and the Unlawful Acts Doctrine. Pierre admitted to illegally entering the United States, which is a violation of 8 U.S.C. § 1325(a). He

[110] *Id.* at 854.
[111] *Id.*
[112] *Id.* at 855.
[113] *Id.*
[114] *Id.*
[115] 859 S.W.2d 441, 445 (Tex. App.—Houston [1st Dist.] 1993, no writ).
[116] *Id.* at 444.
[117] *Id.* at 448–49.
[118] *Id.* at 451.
[119] *Id.*

also admitted to obtaining employment using fraudulent papers, which is a 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 would not have been able to obtain employment in the United States without illegally breaching the border and utilizing fraudulent documents.[120] 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.[121] Thus, 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.[122] Thus, Pierre contributed to his injury because he could not have been employed by XYZ Painting had he not violated 8 U.S.C. §§ 1324c(a)(1)–(5) and 1325(a).[123] Because he was engaged in an illegal and unlawful act at the time of his injuries, the Unlawful Acts Doctrine and public policy should bar Pierre's claims.[124]

VI. ADMISSIBILITY OF IMMIGRATION STATUS AT TRIAL

Assuming an illegal alien is entitled to make a claim for lost earning capacity and the alien has not obtained employment by fraudulent means, trial courts should allow the illegal alien's status to be submitted to the jury. Only one court in Texas has determined whether an immigrant's illegal

[120] *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 148 (2002). Some argue that millions of illegal aliens obtain work and thus their status does not necessarily preclude them from employment. A federal court in 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).

[121] *See* 8 U.S.C. § 1324a(b)(2) (2006); *id*. § 1324c(a)(1)–(5); Denson v. Dallas County Credit Union, 262 S.W.3d 846, 855 (Tex. App.—Dallas 2008, no pet.).

[122] Fuentes v. Alecio, No. C-06-425, 2006 WL 3813780, at *3 & n.7 (S.D. Tex. Dec. 26, 2006).

[123] *See id*. at *3.

[124] *See id.*

status should be admitted to the jury to determine the immigrant's loss of earning capacity.[125]

A. Texas Precedence on Admissibility of Immigration Status

The Texas Rules of Evidence provide "[a]ll relevant evidence is admissible . . . ."[126] "'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."[127]

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

[125]The Fort Worth Court of Appeals did address the issue of the admissibility of the immigration status of a witness for impeachment purposes in *TXI Transportation Co. v. Hughes*. 224 S.W.3d 870, 896–97 (Tex. App.—Fort Worth 2007, pet. granted). In that case, the driver of the defendant's company was involved in an accident. *Id.* at 880–81. The driver testified he never lied about his citizen status in order to obtain a driver's license; however, evidence showed that the driver had been arrested and pleaded guilty to an immigration violation in 2000 and that he did not have any valid form of identification at the time he plead guilty. *Id.* at 896. Additional evidence suggested 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 was hit with 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* United States v. Zimeri-Safie, 585 F.2d 1318, 1320–22 (5th Cir. 1978) (allowing jury consideration of immigration status on question of knowledge or intent and to rebut defense); Infante v. State, 25 S.W.3d 725, 727 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (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, 23–24 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (finding party's status as illegal alien with no Social Security number was relevant to support fraud counter-claim); Magallon v. State, No. 01-04-00718-CR, 2005 WL 1364899, at *1–2, 3 (Tex. App.—Houston [1st Dist.] June 9, 2005, no pet.) (mem. op., not designated for publication) (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-CR, 2004 WL 330067, at *1 (Tex. App.—Dallas Feb. 19, 2004, no pet.) (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., Inc. v. Hernandez, No. 07-99-0175-CV, 2001 WL 476537, at *1 (Tex. App.—Amarillo May 7, 2001, no pet.) (not designated for publication) (holding the court properly excluded evidence that the defendant forged Social Security documents because he was never convicted of such a crime).

[126]Tex. R. Evid. 402.

[127]Tex. R. Evid. 401.

expectancy.[128] 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.[129] 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 earned legally but for the accident at issue.[130]

The San Antonio 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.[131] 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.[132] 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.[133] To counter plaintiff's expert, the defendant sought to introduce evidence of the plaintiff's illegal entrance into the United States to establish the plaintiff was not entitled to work in the United States; however, the trial court excluded such evidence.[134] The San Antonio court reversed and remanded the case for a new trial.[135] In so doing, the court 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."[136] 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 [this] future earning capacity."[137]

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[128] *See* Pilgrim's Pride Corp. v. Smoak, 134 S.W.3d 880, 903–05 (Tex. App.—Texarkana 2004, pet. denied) (considering health and work-life expectancy); Border Apparel-E., Inc. v. Guadian, 868 S.W.2d 894, 897–98 (Tex. App.—El Paso 1993, no writ).

[129] Tagle v. Galvan, 155 S.W.3d 510, 520 (Tex. App.—San Antonio 2004, no pet.).

[130] *See* ABC Rendering of San Antonio, Inc. v. Covarrubias, No. 15085, 1972 Tex. App. LEXIS 2794, at *16–17 (Tex. Civ. App.—San Antonio Nov. 22, 1972, no writ).

[131] *Id.* at *16.

[132] *Id.* at *4.

[133] *Id.* at *17.

[134] *Id.* at *16.

[135] *Id.* at *17.

[136] *Id.*

[137] *Id.*

In order to put the issue before the jury, the defense should 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 under [the law]. 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 certain employers violate that law. If the plaintiff did not lose any income because you conclude that 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 that 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 overseas if you have a basis for making that calculation. In short, it's up to you, the jury, to 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.[138]

[138] 469 F.3d 219, 225 (2d Cir. 2006); *see also* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 148 (2002) (stating IRCA makes it "impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies").

B. Opinions of Other Courts on Admissibility of Immigration Status

Covarrubias is the only Texas case to determine whether a plaintiff's immigration status should be admitted vis-à-vis the recovery of lost earnings. Unlike Texas, however, numerous other jurisdictions have been confronted with determining whether a plaintiff's immigration status should be admitted to rebut claims for recovery of lost earnings. These other state courts are also in agreement with the reasoning of the *Covarrubias* court.

In *Balbuena v. IDR Realty LLC*, the New York Supreme Court explained that a jury should be allowed to consider immigration status as one factor in the jury's analysis.[139] That court went on to state "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."[140] In *Rosa v. Partners in Progress, Inc.*, the New Hampshire Supreme Court stated an illegal alien's status, though irrelevant to the issue of liability, is relevant on the issue of lost earnings. Thus, although such evidence may be prejudicial, it is essential should an illegal alien wish to pursue a claim for lost earning capacity.[141] In *Salas v. Hi-Tech Erectors*, a Washington 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."[142]

In *Barahona v. Trustees of Columbia University*, the court concluded the plaintiff put his immigration status at issue when he sought damages for future lost earnings, and the plaintiff's immigration status was a relevant fact for the jury to consider.[143] The court further explained 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.[144] In *Oro v. 23 East 79th Street Corp.*, the New York Supreme Court, Appellate Term, held information regarding the plaintiff's

[139] 845 N.E.2d 1246, 1259 (N.Y. 2006).

[140] *Id.*

[141] 868 A.2d 994, 1002 (N.H. 2005).

[142] 177 P.3d 769, 774 (Wash. Ct. App. 2008).

[143] 816 N.Y.S.2d 851, 853 (N.Y. Sup. Ct. 2006).

[144] *Id.*

"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."[145] In *Cano v. Mallory Management*, the court found the 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.[146] In *Collins v. New York City Health and Hospitals Corp.*, the New York Supreme Court, Appellate Division, Second Department, held the 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.[147]

Like the foregoing courts, an appellate court in Florida found no error where the trial court allowed evidence of the plaintiff's illegal immigrant status on the limited issue of the plaintiff's claim for lost future earnings.[148] 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 of the wage rate on which projected future earnings should be based, in the event she prevails on her claim."[149] 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."[150] Similarly, in *Romero v. California Highway Patrol*, a federal court in California held a plaintiff's claim for past and future wage loss make relevant the issue of the plaintiff's immigration status and work history.[151] Finally, in *Melendres v. Soales*, a Michigan appellate court stated that 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

[145] 810 N.Y.S.2d 779, 781 (N.Y. App. Term 2005).

[146] 760 N.Y.S.2d 816, 817–18 (N.Y. Sup. Ct. 2003).

[147] 607 N.Y.S.2d 387, 388 (N.Y. App. Div. 1994).

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

[149] *Id.* (citing Veliz v. Rental Serv. Corp. USA, Inc., 313 F.Supp. 2d 1317, 1337 (M.D. Fla. 2003)); *see also* Majlinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56, 68 (N.Y. App. Div. 2005).

[150] 138 Cal. Rptr. 369, 370–71 (Cal. Ct. App. 1977).

[151] No. C05-03014 MJJ, 2007 WL 518987, at *1–2 (N.D. Cal. Feb. 14, 2007).

earnings.[152] The *Melendres* court determined that to avoid any issues of prejudice the retrial of the case should be bifurcated with a separate damages phase in which the plaintiff's immigration status would be presented to the jury.[153]

C. Equal Protection Rights of XYZ Painting

If Texas courts refuse to apply *Covarrubias* and reject the admission of a plaintiff's immigration status in discovery and at trial, then the courts would be infringing upon the defendant's equal protection and due process rights.[154] The exchange during the oral argument of *Hoffman Plastic* between Justice Scalia and Paul Q. Wolfson, Assistant Solicitor General for the Department of Justice, reflects the concern over the effect of an illegal alien being relieved of the duty to mitigate damages:

> 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?
>
> MR. WOLFSON: Well—
>
> QUESTION: Mitigation is quite impossible, isn't it?
>
> MR. 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?
>
> MR. WOLFSON: I will agree with that. I have to say the board has not examined this issue in detail, but first of all,

[152] 306 N.W.2d 399, 402 (Mich. Ct. App. 1981).

[153] *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).

[154] *See* Truax v. Corrigan, 257 U.S. 312, 332–33 (1921).

of course, anything that he does obtain in the matter of interim wages will be deducted from his back pay—

QUESTION: Oh. Oh.

MR. WOLFSON: —and that is quite consistent with—

QUESTION: If he unlawfully obtains another job, that will be deducted?

MR. WOLFSON: And—yes, and that is quite consistent—

QUESTION: But if he's smart, he need not do that.

MR. WOLFSON: Not—

QUESTION: If he's smart he'd say, how can I mitigate, it's unlawful for me to get another job.

MR. WOLFSON: Justice Scalia—

QUESTION: I can just sit home and eat chocolates and get my back pay.

MR. 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.

MR. WOLFSON: Should have done—or should have—

QUESTION: Should have violated the law.

MR. 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 . . .[155]

Justice Scalia continued:

> 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.[156]

Interestingly, Justice Scalia's aversion to rewarding unlawful behavior found its way into the holding in *Hoffman Plastic*.[157]

As in *Hoffman Plastic*, 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. XYZ Painting's presentation of mitigation evidence at trial would also presuppose the legality of Pierre's employment in some capacity; however, Pierre cannot be employed lawfully in any capacity due to his immigration status. Further, XYZ Painting's counsel can neither argue nor present mitigation evidence on Pierre's employability because XYZ Painting's counsel is aware Pierre is unemployable due to his illegal status. To make such argument would expose XYZ Painting's counsel to sanctions and 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.[158] Thus, if XYZ Painting is prevented from presenting evidence of

[155] Transcript of Oral Argument at 31–33, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (No. 00-1595).

[156] *Id.* at 38.

[157] *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 150 (2002).

[158] *See* Tex. R. Civ. P. 13 (providing sanctions for unmeritorious claims and argument); Tex. Disciplinary R. Prof'l Conduct 3.01, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9) (unmeritorious claims and arguments); *id.* R. 3.03(a) (false statements and failure to disclose facts to tribunal); *id.* R. 3.03(a)(5) (false evidence); *id.* R. 8.04(a)(1) (knowingly assist in violation of the Rules); *id.* R. 8.04(a)(3) (a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation");

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.[159]

D. XYZ Painting's Affirmative Duty To Report Pierre's Status

In addition to disciplinary violations, XYZ Painting's counsel could be subject to criminal penalty by not bringing Pierre's immigration status to the court's attention. The federal statute outlawing misprision of felony provides:

> Misprision of Felony: Whoever having knowledge of the actual commission of a felony cognizable by a court of the United States conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States shall be fined not more than $500 or imprisoned not more than three years, or both.[160]

"The elements of misprision of felony are: (1) the principal committed and completed the felony alleged; (2) the defendant had full knowledge of that fact; (3) the defendant failed to notify the authorities; and (4) *the defendant took an affirmative step to conceal the crime*."[161] As Texas Supreme Court Justices Cornyn and Hecht eloquently noted:

> Taking an affirmative step to conceal a felony is an act of deceit or misrepresentation that undermines the honesty, trustworthiness, and general fitness demanded of a lawyer. Because of the position of public trust lawyers enjoy, they must meet the highest of all professional standards. As the United States Supreme Court has stated:

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id. R. 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").

[159] *See Truax*, 257 U.S. at 333 ("Immunity 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").

[160] Duncan v. Bd. Of Disciplinary Appeals, 898 S.W.2d 759, 761 (Tex. 1995) (citing 18 U.S.C. § 4).

[161] *Id*. at 763–64 (Cornyn, J., Hecht J. dissenting) (citation omitted) (emphasis original).

> Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, . . . argues recreancy to his position and office . . . . It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve.[162]

In Pierre's case, the first and second elements of misprision of a felony are established because XYZ Painting is aware Pierre committed and completed felonious acts in violation of 8 U.S.C. § 1324a(a)(1)(B), 8 U.S.C. § 1325c(a), 8 U.S.C. § 1324c(a)(1)–(5), 18 U.S.C. § 1546(a)–(b), 18 U.S.C. § 911, 18 U.S.C. § 1015, 42 U.S.C. § 408, and 42 U.S.C. § 1307.[163] If XYZ Painting's counsel did not bring this issue to the court's attention and proceeded to introduce evidence at trial on Pierre's employability and his failure to mitigate damages, then XYZ Painting would necessarily be concealing the fact a crime occurred and, thus, would establish the third and fourth elements of misprision of felony.[164] On the other hand, by bringing the issue to the court's attention, the third and fourth elements of misprision of felony will not be completed.

E. Application of Covarrubias

The *Covarrubias* opinion makes sense. Jurors are 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 . . . ."[165] 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.[166] With regard to lost earning capacity, jurors

[162] *Id*. (citing *Ex parte* Wall, 107 U.S. 265, 274 (1882)).

[163] *See id.* at 761.

[164] *See id*. at 763–64.

[165] Rodriguez v. Kline, 232 Cal. Rptr. 157, 158 (Dist. Ct. App. 1986).

[166] *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).

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.[167]

Each of the foregoing elements is also important to determine the lost earning capacity of an illegal alien plaintiff.[168] If the jury is presented with evidence of a plaintiff's immigration status, the jury may weigh the prospects for the plaintiff to return to his country of origin, either voluntarily or involuntarily,[169] take into account the permanent or temporary nature of the plaintiff's residency, and properly weigh the true prospects for job advancement.[170] Such a balance of the evidence allows the jury to award reasonable damages and prevents a windfall.[171] This is especially true considering the majority of non-English speaking immigrants will return to their country of origin within a relatively short period of time.[172] Moreover, fears of prejudice can be assuaged by bifurcating the liability and damages phases of trial so that a just result may ensue.[173]

Axiomatically, an individual cannot be compensated for an inability to work if he is not legally authorized to work in the first place. Because he

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[167] *See* Tagle v. Galvan, 155 S.W.3d 510, 519–20 (Tex. App.—San Antonio 2004, no pet.) (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); Border Apparel-E., Inc. v. Guadian, 868 S.W.2d 894, 898–99 (Tex. App.—El Paso 1993, no writ).

[168] Fuller, *supra* note 2, at 1009.

[169] *See id.* The evidence of illegal alien migration into and out of the United States demonstrates the existence of 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, 2007 YEARBOOK OF IMMIGRATION STATISTICS 91 (2008), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf. 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 that a high likelihood exists that any particular illegal alien will be removed from the country in the near future. Therefore, assuming Pierre will be able to remain in the United States for the rest of his life is simply illogical and speculative.

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

[171] *See id.*

[172] 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 & Jean Elliott, *How Long Do Mexican Migrants Work in the U.S.?* 8 (Nov. 28, 2006), *available at* http://ssrn.com/abstract=949632.

[173] *See* Gonzalez v. City of Franklin, 403 N.W.2d 747, 759–60 (Wis. 1987); Melendres v. Soales, 306 N.W.2d 399, 402 (Mich. Ct. App. 1981).

never had legal capacity to work in the U.S. prior to his injury, Pierre's lost earning capacity claim necessarily fails.[174] To preclude Pierre's immigration status from the jury, essentially denies the jury the opportunity to weigh all of the relevant facts and makes the award of lost future earning capacity wholly speculative. This is so because it permits an award predicated on wages that could not lawfully have been earned.[175] Such an outcome turns the immigration law of the United States on its ear.[176] Additionally, this outcome could violate XYZ Painting's due process and equal protection rights because it would allow recovery of lost wages even though Pierre is unable to lawfully mitigate such damages as a result of IRCA.[177]

VII. ILLEGAL IMMIGRANTS AND EXPERT OPINIONS

Even though the issues of immigration status and the award of lost earnings are unsettled in Texas, 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 expert's own peril.

In *Garay v. Missouri Pacific Railroad Co.*, the federal court in 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.[178] In that case, 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.[179] 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.[180] 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.[181] The

[174] *See* Tagle v. Galvan, 155 S.W.3d 510, 519–20 (Tex. App.—San Antonio 2004, no pet.).

[175] *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 148–49 (2002).

[176] *See id.* at 150.

[177] *See id.* at 148–49.

[178] 60 F. Supp. 2d 1168, 1173 (D. Kan. 1999).

[179] *Id.*

[180] *Id.*

[181] *Id.*

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."[182]

The holding in *Garay* comports with Supreme Court precedent and the analysis of the New Hampshire Supreme Court. In *Sure-Tan, Inc. v. NLRB*, 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.[183] 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 . . . ."[184]

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.[185] 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.[186] 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.[187] 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 Part 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.[188]

VIII. FRAUDULENT SUITS BY ILLEGAL IMMIGRANTS

The Texas Rules of Civil Procedure require every petition to state the names of the parties[189] and allow a trial court to sanction a party who files

[182] *Id.*

[183] 467 U.S. 883, 901 (1984).

[184] Rosa v. Partners in Progress, Inc., 868 A.2d 994, 1001 (N.H. 2005).

[185] *See Garay*, 60 F. Supp. 2d. at 1173.

[186] *See* Madeira v. Affordable Housing Found., Inc., 469 F.3d 219, 225 (2d Cir. 2006).

[187] 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.

[188] *See Garay*, 60 F.Supp. 2d at 1173.

[189] Tex. R. Civ. P. 79.

any fictitious pleading.[190] When an illegal alien brings suit under a false name, a defendant should move the court to dismiss the suit as a sanction.[191] Dismissal is a fair and just sanction for the illegal alien's commission of a fraud on the court.[192] No Texas jurisprudence regarding this issue exists; however, the opinions of other jurisdictions are persuasive.

In *Rodriguez v. Bollinger Gulf Repair*, the plaintiff filled-out an employment application with the defendant and provided the social security number, birth date, and name of one Carlos Rodriguez.[193] The plaintiff was subsequently injured at work and brought suit against defendant in the name of Carlos Rodriguez.[194] While suit was pending, the District Director of the Massachusetts Social Security Administration obtained information that two individuals were claiming the same Social Security number—one in Louisiana and one in Massachusetts.[195] Thereafter, the defendant deposed the real Carlos Rodriguez.[196] After the deposition, the plaintiff supplemented his interrogatory answers and provided his real name and birth date.[197] The defendant moved to dismiss the suit because of the plaintiff's use of a false name, and the trial court granted the dismissal.[198] On appeal, plaintiff's counsel argued the plaintiff's true identity did not alter any material facts surrounding the accident and injury.[199] The appellate court disagreed. It held "[b]ecause courts must be able to preserve the integrity of the judicial process, we have no hesitation in concluding that a party who files a suit under a false name and proceeds with that deception right up to trial loses the right to seek judicial relief for the claims he/she was advancing."[200]

The holding in *Bollinger Gulf* is similar to the holdings of two federal courts. In *Zocaras v. Castro*, the plaintiff filed suit using a false name and the court noted "trial is not a masquerade party nor is it a game of judicial hide-n-seek where the plaintiff may offer the defendant the added challenge

[190] Tex. R. Civ. P. 13, 215(1).

[191] *See* Rodriguez v. Bollinger Gulf Repair, 985 So. 2d 305, 308 (La. Ct. App. 2008).

[192] *See id.*

[193] *Id.* at 306.

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.* at 307.

[198] *Id.*

[199] *Id.*

[200] *Id.* at 308.

of uncovering his real name."[201] The Eleventh Circuit Court of Appeals then held "a party who files suit under a false name and proceeds with that deception right up to trial loses the right to seek judicial relief for the claims he was advancing."[202]

Like *Bollinger Gulf* and *Zocaras*, in *Dotson v. Bravo*, the plaintiff filed suit using a false name.[203] In that case, the Seventh Circuit Court of Appeals construed Federal Rule of Civil Procedure 10 to hold:

> Filing a case under a false name deliberately and without sufficient justification, certainly qualifies as flagrant contempt for the judicial process and amounts to behavior that transcends the interests of the parties in the underlying action.
>
> The instant case represents precisely the situation where one party's conduct so violates the judicial process that imposition of a harsh penalty is appropriate not only to reprimand the offender, but also to deter future parties from trampling upon the integrity of the court.[204]

Using the factual scenario in Part I, Pierre's claims should be dismissed. Like the plaintiff in *Bollinger Gulf*, Pierre fraudulently obtained employment using false documents and brought suit under a false name.[205] Pierre's use of a false name is a fraud on the court and deserves the harshest penalty—dismissal with prejudice.[206]

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[201] 465 F.3d 479, 481, 484 (11th Cir. 2006); *see also Bollinger Gulf*, 985 So. 2d at 308.

[202] *Zocaras*, 465 F.3d at 485.

[203] 321 F.3d 663, 666 (7th Cir. 2003).

[204] *See id.* at 668; *see also* Cusamano v. Sobek, No. 9:06-CV-0623 (GTS/GHL), 2009 WL 211155, at *60 (N.D.N.Y. Jan. 26, 2009) (citing *Dotson* to deny plaintiff's cross-motions as sanction for use of false name because: (i) The "public has a right to know who is using the courts;" (ii) a "defendant (who has been hauled into court by the plaintiff) 'ought not have to search for [the plaintiff' s] true identity;'" and (iii) use of a false name "tampers with the judicial machinery and subverts the integrity of the court itself"); Marcano v. Lombardi, No. Civ. 02-2666(RBK), 2005 WL 3500063, at *4 n.2 (D.N.J. Dec. 20, 2005) (not designated for publication) (approving dismissal of suit brought by plaintiff under false name).

[205] *See Bollinger Gulf*, 985 So. 2d at 306.

[206] *See id.* at 308.

IX. CONCLUSION

When, as in the case of Pierre, a defendant is faced with a suit by an illegal alien who fraudulently obtained employment, the defendant should look to the *Hoffman Plastic* case to preclude an award of lost past earnings. The defendant should also look to IRCA and IIRIRA to determine whether the illegal alien violated these Acts 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. The defendant should also attempt to have the plaintiff's illegal status submitted to the jury on the lost earnings claim and move to strike any opposing expert who failed to take into account the plaintiff's immigration status. Finally, if the plaintiff brought suit under a false name, then the defendant should move to have the suit dismissed in its entirety.