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Protecting immigrant clients from having their cases undervalued

Immigration status should not interfere with a damages' suit

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"We are a nation of immigrants. We are the children and grandchildren and great-grandchildren of the ones who wanted a better life, the driven ones, the ones who woke up at night hearing that voice telling them that life in that place called America could be better."

— Mitt Romney

It is estimated that there are eleven- to twelve-million immigrants currently residing illegally in the United States. The topics of immigration and finding a pathway to citizenship have been center stage in recent national and statewide political debate. Just this year, AB 263, SB 666 and AB 524 were passed to protect immigrant workers from abusive employers.

Despite the advances, many immigrant workers face prejudice and hostility in the communities in which they live and work. As our clients, they also face efforts to limit their ability to recover enough money to support their families and seek adequate medical care when they are injured and unable to work. These efforts come via motions in limine seeking to limit damages in these ways.

- The defense attempts to limit any past wage-loss claim to the amount your client could have earned in his "home" country from the date of the accident to the date of trial, despite the fact that your client lives in California and has never been subject to deportation proceedings; and
- The defense attempts to limit claims for future medical expenses to expenses your client would incur in his home country.

These attempts have the ancilliary effect of making potentially highly prejudicial evidence of your client's immigration status relevant when it would otherwise be properly excluded. These attempts must be defeated using sound law-and-motion practices that preserve your client's damages as well as his human dignity.

"We asked for workers. We got people instead." — Max Frisch

An immigrant is entitled to bring suit for damages

It is long settled law that a person does not need to be a citizen to have access to the courts. (See *Martinez v. Fox Valley Bus Lines* (N.D. Ill 1936) 17 F.Supp. 576.) In finding that an immigrant here illegally was not barred from pursuing a personal injury action, at least one District Court noted that Congress had never barred an "alien" whether lawfully or unlawfully within the United States, from access to the courts. On the contrary, the Civil Rights Act of 1870 provided that "[a]ll 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, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by…citizens…" (*Id*. at p. 577; codified at 42 U.S.C. 1981.)

In California, the issue of the relevancy of citizenship status was addressed in *Clemente v. State* (1986) 40 Cal.3d 202. *Clemente* considered the case of a long-term U.S. resident who was working in the U.S. without a legal visa. Clemente made a future wage-loss claim. The trial court did not allow questioning of Clemente's wife regarding his citizenship. The defense claimed this was error because his citizenship status was relevant to a determination of plaintiff's claim for future lost earnings.

The Supreme Court upheld the trial court's ruling: "We cannot say that in the instant case the trial court erred in refusing to permit questioning of plaintiff's wife regarding her husband's citizenship. Plaintiff had been gainfully employed in this country prior to his two accidents, there was no evidence that he had any intention of leaving this country and the speculation that he might at some point be deported was so remote as to make the issue of citizenship irrelevant to the damages question." (*Clemente*, *supra*, 40 Cal.3d at p. 221)

Immigration status is irrelevant to liability issues

In California, a plaintiff's immigration/citizenship status is "irrelevant to the issue of liability." (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 460 [where no loss of earnings are claimed, plaintiff's U.S. residency status was not relevant, as plaintiff's residency is not relevant to liability issues], citing, *Rodriguez v. Kline* (1986) 186 Cal.App.3d 1145, 1149.) As to issues of liability, there is no question this evidence should be excluded.

Past wage losses should be allowed at U.S. rates

The defense will try to reduce your past wage losses by seeking to have them calculated using the currency from your client's country of origin. This is almost certainly an exchange rate that disfavors your client.

First, it is worth noting the analogy in the workers' compensation context – undocumented workers are expressly entitled to workers' compensation benefits. (Lab. Code, § 3351.) An injured worker is entitled to recover those benefits "wherever he is residing, legally or illegally." (*Del Taco v. WCAB* (2000) 79 Cal.App.4th 1437, 1441.) An injured worker's legal status does not affect his right to temporary disability payments, which includes full compensation for past lost wages, payable in U.S. dollars. (*Id*., at pp. 1441-1443; Lab. Code, § 4453.)

Note, too, that courts have repeatedly expressed concern that a plaintiff's status as an immigrant is likely to arouse prejudice against the plaintiff. "[S]uch testimony, even if marginally relevant, [is] highly prejudicial." (*Clemente, supra*, 40 Cal.3d at p. 221.) The court of appeal in *Hernandez v. Paicius, supra*, 109 Cal.App.4th 452, held it was not only "entirely irrelevant" to mention the plaintiff's immigration status, but also "highly inflammatory." (*Id.* at p. 460)

The *Hernandez* court also noted that the California Legislature "felt strongly enough about the sensitive subject of immigration status" to enact several statutes limiting the use of immigration status – Labor Code section 1171.5, Civil Code section 3339, and Government Code section 7285. These are identical statutes.

> *All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.*
>
> *For purposes of enforcing state labor, employment, civil rights, and employee housing laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that this inquiry is necessary in order to comply with federal immigration law.*

"These statutes leave no room for doubt about this state's public policy with regard to the irrelevance of immigration status in enforcement of state labor, employment, civil rights, and employee housing laws." (*Hernandez, supra*, at pp. 459-460.) By analogy, your client's immigration status is irrelevant in allowing just compensation for past lost wages.

The defense may cite *Hoffman Plastic Compounds v. NLRB* (2002) 535 U.S. 137. In that case, the Supreme Court concluded that the Immigration Reform and Control Act (IRCA) (8 U.S.C. § 1324a) and the holding in *Sure-Tan, Inc. v. NLRB* (1984) 467 U.S. 883 precluded the National Labor Relations Board from awarding back pay to an undocumented worker who had been laid-off for supporting union activities. (*Hoffman, supra*. at pp. 151-152.) You should be quick to point out that the issue decided in *Hoffman* relates to a Congressional grant of power to an administrative agency. The defense will be hard-pressed to identify any California decision that extends *Hoffman* to prevent an injured person from recovering actual, past lost wages.

There are a few other cases the defense may cite, but a careful read of the cases reveals they do not deal with actual past lost wages. *Alonso v. State of California* (1975) 50 Cal.App.3d 242, 244-245 decided that an "illegal alien" was properly denied unemployment insurance benefits on the basis that he was not "available for work." *Rodriguez v. Kline* (1986) 186 Cal.App.3d 1145, 1149 dealt with the issue of whether a plaintiff who is deportable is entitled to future lost wages. The *Rodriguez* court decided that a deportable plaintiff is not available for future work and is therefore not entitled to lost *future* wages at California rates.

NB: If you face a *Rodriguez* issue regarding future lost wages, be sure to ask the court to conduct a pretrial hearing as recommended in *Rodriguez*:

> We are convinced the competing concerns expressed in *Clemente* can best be reconciled by treating any question regarding a plaintiff's citizenship or lawful place of residence as one of law, to be decided exclusively by the trial court outside the presence of the jury.

> Therefore, whenever a plaintiff whose citizenship is challenged seeks to recover for loss of future earnings, his status in this country shall be decided by the trial court as a preliminary question of law. (See Evid. Code, § 310.) At the hearing conducted thereon, the defendant will have the initial burden of producing proof that the plaintiff is an alien who is subject to deportation. If this effort is successful, then the burden will shift to the plaintiff to demonstrate to the court's satisfaction that he has taken steps which will correct his deportable condition.

(*Rodriguez, supra*, 186 Cal.App.3d 1145, 1148-49)

Note that even if your client is found to be "deportable" following a hearing under *Rodriguez*, there is no element of speculation when it comes to his past wage loss – just make sure your client remains in the state and comes to court for trial.

Future medical damages should be allowed at U.S. rates

In the U.S., a person who seeks medical care or tort compensation for pay for medical care does not need to establish their residency or citizenship status. It is not a crime for a doctor to provide medical treatment to an injured undocumented worker, nor is it a crime for the injured worker to receive care. The Emergency Medical Treatment and Active Labor Act requires hospitals to provide care to anyone needing emergency treatment regardless of citizenship. (42 U.S.C. § 1395dd; see *Brooker v. Desert Hosp. Corp*. (1991) 947 F.2d 412, 415.)

A defendant who claims the value of future medical care should be determined by the value of such care in the plaintiff's country of origin should be forced to bear the burden of proof as to whether that country's medical system can actually provide the quality of care needed. (See *Sosa v. M/V Lago Izabal* (5th Cir. 1984) 736 F.2d 1028, 1034 [trial court properly based award for past and future medical expenses on American standards because it specifically found that plaintiff would not receive adequate medical care in Mexico].)

Fair and just compensation is the goal of our justice system

There is much to be done to protect and strengthen the rights of California's workers, no matter where they were born. We must prevent the defense from reducing their responsibility solely by calling into question the immigration status of the plaintiff. To allow such reduction would frustrate tort law's objectives of "deterrence" and "compensation" (*Murillo v. Rite Stuff Foods, Inc*. (1998) 65 Cal.App.4th 833, 842-843) Strategic law-and-motion practice can preserve the dignity of the trial and the dignity of our clients.


Leary

Elinor Leary is a trial attorney at The Veen Firm. *She represents people who have been catastrophically injured. Ms. Leary has tried cases to verdict as well as reached large settlements in numerous other cases. She devotes significant time to public interest work and to mentoring students and newer attorneys. She is a member of the San Francisco Trial Lawyers Association, Consumer Attorneys of California, and The American Association for Justice. She is on the Board of Governors at the USF School of Law and on the Executive Committee of the USF Inn of Court.*


Veen

William Veen founded The Veen Firm, P.C. *as a sole practitioner in 1975, gradually developing it into a firm of talented attorneys and staff who represent severely injured workers and consumers. He is a member of the American Board of Trial Advocates and honored as the Trial Lawyer of the Year by the San Francisco Trial Lawyers Association in 2003.*