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The Limitation on Undocumented Workers' Lost Earnings After *Balbuena* and *Sanango*: Crafting a Fair and Principled Balance of Immigration Policy and New York State Labor Law § 240 Safety Goals

By Meredith R. Miller

In December 2004, in a pair of cases, the Appellate Division, First Department, held that under state labor and tort laws, injured workers who are not legally permitted to be present or employed in the United States are only entitled to receive lost earnings reflecting what they could have earned in their country of origin.¹ This article explores these First Department decisions by first discussing the federal statutory and decisional backdrop against which the cases arose. This article then provides a discussion of the First Department cases and the competing economic incentives they implicate. Finally, this article posits that a more appropriate balance of federal immigration law and New York State Labor Law § 240 policy is a rule that holds an employer (or other party) liable for an undocumented worker's lost wages only when that employer (or other party) knew or should have known of the worker's immigration status.

The Federal Backdrop: The Immigration Reform and Control Act of 1986 and *Hoffman Plastics Compounds, Inc. v. NLRB*

In 1986, Congress enacted the Immigration Reform and Control Act ("IRCA")² as a comprehensive scheme to prohibit the employment of illegal immigrants in the United States who are either (1) not lawfully present in the United States or (2) not lawfully authorized to work in the United States (collectively, "undocumented workers").³ Under this system, IRCA mandates that employers verify the identity and eligibility of all new employees by examining certain specified documentation before the employees begin to work.⁴

To enforce this scheme, the statute employs a two-prong approach that takes aim at the actions of both employer and employee.⁵ IRCA makes it illegal for an employer to knowingly hire an individual that is unauthorized to work or cannot produce the required documentation. Similarly, an employer cannot continue to employ a worker upon discovery that the worker is undocumented or unauthorized to work in the United States.⁶ IRCA also makes it a crime for a worker to tender fraudulent documentation to the employer.⁷ As a result of IRCA, it is impossible for an undocumented worker to gain employment in the United States without either the employer or the worker violating the

express prohibitions of the statute, which imposes both civil and criminal penalties.⁸

In 2002, *Hoffman Plastics Compounds, Inc. v. NLRB*⁹ raised questions concerning the enforceability of federal labor laws in light of the IRCA scheme. In *Hoffman*, Jose Castro, an undocumented worker, operated blending machines that custom-formulated chemicals for Hoffman Plastic Compounds, Inc.¹⁰ After Castro supported a union organizing campaign, Hoffman terminated Castro's employment in violation of the National Labor Relations Act ("NLRA").¹¹ To remedy the NLRA violation, the National Labor Relations Board ("NLRB"), among other things, awarded Castro back pay.¹² At the hearing to determine the amount of back pay, Castro testified that he was not lawfully entitled to be present or employed in the United States. He admitted that he gained employment with Hoffman after tendering false documentation in violation of IRCA.¹³ Thus, the issue before the U.S. Supreme Court in *Hoffman* was whether Castro was entitled to back pay under the NLRA even though his employment was illegal under IRCA.

The Supreme Court held that because Castro was never lawfully entitled to be present or employed in the United States, he had no right to back pay.¹⁴ The Court concluded that allowing the NLRB to award back pay to illegal immigrants would "run counter to policies underlying IRCA" and "unduly trench upon explicit statutory prohibitions critical to federal immigration policy."¹⁵ The Court was particularly concerned that allowing back pay under the NLRA would encourage undocumented workers to violate IRCA—namely, that it would "encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."¹⁶

The *Hoffman* Court did not have occasion to address the impact of its decision on an undocumented worker's right to back pay under state labor and tort laws.

Sanango and *Balbuena*: First Department Decisions Applying *Hoffman*

Until the recent duo of First Department decisions in *Sanango v. 200 East 16th Street Housing Corp.*¹⁷ and *Balbuena v. IDR Realty LLC*,¹⁸ no New York appellate

court had addressed whether, in light of IRCA and *Hoffman*, undocumented workers are precluded from recovering lost wages under New York labor and tort laws. In late December 2004, in this pair of cases, the Appellate Division, First Department, held that undocumented workers are not entitled to recover lost earnings damages for injuries based on wages they might have earned illegally in the United States.¹⁹ Rather than completely precluding undocumented workers from entitlement to back pay, the First Department held that they are limited to lost earnings that they would have been able to earn in their home countries.²⁰

In *Sanango*, Arcenio Sanango, an undocumented worker, was employed at a construction site when he fell from a ladder and sustained serious injuries.²¹ Sanango commenced a Labor Law § 240 action against the owner of the work site.²² The owner of the work site then commenced a third-party action for indemnification against Sanango's employer.²³ A jury awarded Sanango substantial damages for pain and suffering and medical bills, and also awarded him \$96,000 in lost earnings.²⁴ Both the owner of the work site and Sanango's employer appealed from the judgment on the jury verdict, arguing that in light of IRCA and *Hoffman*, Sanango's status as an undocumented worker barred or limited his recovery for lost earnings.²⁵ The First Department (Nardelli, J.P., Saxe, Williams, Friedman, JJ.) agreed and reversed the judgment insofar as it awarded Sanango lost wages and remanded for a new trial on the issue.²⁶

The First Department held that "an award of damages . . . based on the United States wages plaintiff might have earned unlawfully, but for his injury, would 'unduly trench upon' IRCA's federal immigration policy in substantially the same manner as . . . the NLRB back pay award in *Hoffman*."²⁷ The court stated that allowing Sanango to recover earnings he would have received only by remaining in the United States illegally would implicate the concerns expressed in *Hoffman*—namely, encouraging illegal workers to evade immigration authorities, condoning prior violations and encouraging future violations.²⁸ The court then "noted" that New York state labor and tort laws were preempted by IRCA because "even if a coequal federal statute, such as the NLRA, must, under some circumstances, give way to IRCA . . . it follows that state law . . . must give way to IRCA, as well."²⁹

Rather than completely denying Sanango any recovery of lost wages, however, the court held that Sanango could receive damages for lost earnings based on the prevailing wages in his country of origin.³⁰ The court did not provide any legal authority in support of this conclusion, though it did state that it was unaware of any federal policy that would be offended by the limitation on lost earnings.³¹ The court held that this limita-

tion should be applied whether the worker or employer acted in violation of IRCA.³²

On the same day that it issued the *Sanango* decision, a partly different First Department majority (Nardelli, J.P., Tom, Lerner, Friedman, JJ.) issued a decision in *Balbuena* summarily following *Sanango*.³³ *Balbuena* involved a similar factual scenario and, thus, raised substantially the same legal issue as *Sanango*. Gorgonio Balbuena, an undocumented worker, sought damages, including lost wages, for an injury he suffered at a work site.³⁴

Notably, the cases each arrived at the appellate court with different procedural postures. In *Balbuena*, the trial court had denied the employer's motion for partial summary judgment dismissing Balbuena's claim for lost earnings.³⁵ The First Department majority modified the trial court judgment on the law to the extent it granted the employer's motion for partial summary judgment, and dismissed the lost earnings claim insofar as Balbuena sought damages based on the wages that he might have earned illegally in the United States.³⁶ However, the *Balbuena* dissent (Ellerin, J.) disagreed with the reasoning of the *Sanango* court. The dissent would have affirmed and allowed a jury to decide whether Balbuena was entitled to lost earnings.³⁷

The *Balbuena* Dissent: The Tension of Economic Incentives to Violate IRCA

The *Balbuena* dissent would have held that IRCA does not preempt state labor law and tort remedies. The dissent noted that in passing IRCA, Congress did not demonstrate any intent to preempt state labor and employment remedies.³⁸ Moreover, the dissent believed that state law did not present an obstacle to the accomplishment of the objectives of IRCA.³⁹

The *Balbuena* dissent appeared most troubled by the policy implications of limiting injured workers' rights to lost earnings, which incidentally serves to punish the undocumented worker to the advantage of the employer.⁴⁰ The tension between the *Balbuena* dissent and the First Department majority was based largely on a fundamental disagreement as to whether employers are incentivized or encouraged to violate IRCA when workers' rights to back pay are limited.

The dissent argued that the limitation on an employer's liability for an undocumented worker's injuries encourages the employer to hire workers without examining their documentation, in violation of IRCA.⁴¹ On the other hand, according to the dissent, allowing illegal immigrants to receive lost earnings would not have any significant impact on an immigrant's decision to travel to the United States to work illegally.⁴² To this point, the dissent noted that most illegal immigrants come to the United States with hopes of

getting a job, at any wage, and often take the jobs in the United States economy with the lowest pay and highest level of danger.⁴³ Thus, the unavailability of lost earnings in a potential, future lawsuit would not likely factor into an immigrant's decision to come to the United States and obtain work illegally.⁴⁴ Instead, the dissent saw a more significant risk that the majority's decision would encourage employers to continue unscrupulous business practices that violate state labor laws and stoke the demand for illegal workers, thereby undermining the efforts of IRCA to deter employment of illegal workers.⁴⁵

The *Sanango* court criticized the dissent's concern as entirely theoretical, stating that "the potential limitation of one item of damages (lost earnings) in a future tort action is such a remote and uncertain benefit that it would not constitute a real incentive to the employment of undocumented aliens."⁴⁶ The *Sanango* court stated that any concern that employers were incentivized to violate IRCA was negated by the facts that (1) employers usually carry insurance coverage for tort liability and (2) violations of IRCA carried other criminal and civil penalties.⁴⁷ Moreover, the majority noted that any incidental benefit to the employer at the expense of the undocumented worker was a result of *Hoffman's* stated policy that undocumented workers should not be compensated for wages that could only have been earned illegally in the United States.⁴⁸ Thus, the *Sanango* court held that whether or not the First Department agreed with *Hoffman*, *Hoffman* presented a conclusion about federal immigration policy that the New York court was bound to follow.⁴⁹

***Rosa v. Partners in Progress, Inc.*: Finding a Better Balance of Immigration Policy and Labor Law § 240 Deterrence**

The *Sanango* and *Balbuena* cases raise a threshold question whether IRCA preempts New York State Labor Law § 240 remedies. The majority gave this threshold issue only summary treatment, and it appears that the dissent was correct that IRCA does not preempt Labor Law § 240 remedies.

There is a presumption that Congress does not intend to supplant state law.⁵⁰ A state law is preempted by a federal law only if there is "such actual conflict between the two schemes of regulation that both cannot stand in the same area"⁵¹ or if Congress has in some other way unambiguously declared its intention to foreclose the state law in question.⁵² There is no actual conflict between the enforcement of IRCA and Labor Law § 240 remedies. Moreover, Congress did not indicate any intent that IRCA foreclose remedies under state laws like Labor Law § 240.⁵³ For these reasons, at least one court has held that IRCA does not preempt state labor law remedies.⁵⁴

Whether or not IRCA preempts state labor and tort remedies, the First Department could have adopted a rule that more appropriately balances the competing policy concerns. Certainly, in allowing injured, undocumented workers some measure of lost earnings, the First Department recognized the unfairness of a total preclusion. However, the court could have enunciated a principled rule that both recognizes *Hoffman's* concern that the law should not encourage and condone workers' IRCA violations and better weighs the economic realities of the undocumented workforce.⁵⁵

As the *Sanango* majority and *Balbuena* dissent exemplify, there exists a tension of economic incentives to violate IRCA. On the one hand, allowing undocumented workers to recover any measure of lost wages provides a "marginal incentive" for those workers to come to the United States illegally.⁵⁶ On the other, every time an undocumented worker is denied a remedy, employers are provided another incentive to hire undocumented workers.⁵⁷

In addition, in cases that involve injured workers, there are additional, competing policy concerns of the Labor Law § 240 scheme. Labor Law § 240 aims to protect workers against work site accidents caused by hazardous conditions.⁵⁸ As the *Balbuena* dissent pointed out, undocumented workers are often willing to take the lowest paying and most dangerous jobs in the United States economy,⁵⁹ compounding the significance of Labor Law § 240 protections in this context.

The First Department's blanket limitation on injured, undocumented workers' lost earnings to what they would have been able to earn in their home countries does not fairly balance all of these concerns. It is fundamentally unfair to punish an injured worker by limiting her right to lost earnings, especially when this limitation is applicable whether the employer or the employee acted in violation of IRCA.⁶⁰ At the same time, removing the lost earnings limitation allows an undocumented worker to recover lost United States wages for work that could not be legally performed in the United States. There is also the additional deterrence function of Labor Law § 240 and common law tort remedies, which impose the threat of liability to encourage employers and others to reduce the risk of injuries to employees.⁶¹

With this deterrence principle and the competing economic incentives in mind, in *Rosa v. Partners in Progress, Inc.*,⁶² the Supreme Court of New Hampshire recently enunciated a rule that holds an employer (or other party) liable for lost wages an undocumented worker could have earned in the United States only when that employer (or other party) knew or should have known of the worker's undocumented status.⁶³ In *Rosa*, just as in *Balbuena* and *Sanango*, an undocumented worker was injured while working at a construction

site.⁶⁴ Recognizing the competing immigration policies, the tension of economic incentives to violate IRCA and the deterrence purposes of state tort law, the New Hampshire court articulated a rule that strikes an even balance between encouraging compliance with federal immigration laws and protecting some of our economy's most vulnerable workers from job site injuries.

The New Hampshire court noted that any other rule would be inconsistent with "tort deterrence principles" because:

refus[ing] to allow recovery against a person responsible for an illegal alien's employment who knew or should have known of the illegal alien's status would provide an incentive for such persons to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with sub-standard working conditions. It would allow such persons to treat illegal aliens as disposable commodities who may be replaced the moment they are damaged.⁶⁵

Moreover, the "should have known" aspect of the *Rosa* rule builds in a recognition of the economic realities of an undocumented workforce. This portion of the rule might cover the undoubtedly common situation where the labor is so inexpensive that the employer should have known that the worker was not legally entitled to be present or employed in the United States.

Finally, it should be noted that the *Rosa* rule addresses the actions of not only employers, but also contractors or site owners who do not directly employ the undocumented workers.⁶⁶ Just as the worker's direct employer, a contractor or site owner would be liable for the undocumented worker's lost earnings only if that contractor or site owner knew or should have known of the worker's immigration status. In this connection, in the *Balbuena* and *Sanango* cases, the *Rosa* rule would apply to the site owners as well as the workers' employers—that is, the owners would be liable for lost earnings only if they knew or should have known of the workers' undocumented immigration status.

In sum, should this issue arise on appeal or in the other appellate departments, the New York courts would be wise to follow the articulate lead of the New Hampshire Supreme Court.

Conclusion

Even assuming that Labor Law § 240 is preempted by IRCA, in light of the competing economic incentives under IRCA and the goals of Labor Law § 240, the New Hampshire Supreme Court appears to have struck a fair

balance in *Rosa*. New Hampshire's *Rosa* rule holds an employer (or other party) liable for an undocumented worker's United States lost earnings only when that employer (or other party) knew or should have known of the worker's immigration status. This rule recognizes the economic realities of the undocumented workforce and the deterrence function of Labor Law § 240 and, thus, provides a more appropriate balance of policies than the First Department's blanket limitation.

Endnotes

1. *Balbuena v. IDR Realty LLC*, 13 A.D.3d 285, 787 N.Y.S.2d 35 (1st Dep't 2004); *Sanango v. 200 East 16th Street Housing Corp*, 788 N.Y.S.2d 314 (1st Dep't 2004).
2. 8 U.S.C. §§ 1324a, *et seq.*
3. 8 U.S.C. § 1324a(a)(1) and (h)(3).
4. 8 U.S.C. § 1324a(b).
5. 8 U.S.C. § 1324a(a)(1) and (a)(2).
6. 8 U.S.C. § 1324a(a)(1).
7. 8 U.S.C. § 1324c.
8. 8 U.S.C. § 1324a(e)(4)(A) (employers who violate IRCA are subject to civil fines); 8 U.S.C. § 1324a(f)(1) (employers who violate IRCA may be subject to criminal prosecution); 18 U.S.C. § 1546(b) (immigrant workers who attempt to tender fraudulent documentation are subject to fines and criminal prosecution).
9. 535 U.S. 137 (2002).
10. *Id.* at 140.
11. *Id.* Hoffman violated section 8(a)(3) of the NLRA by terminating Castro to rid itself of known union supporters.
12. *Id.* at 141-142.
13. *Id.* at 141.
14. *Id.* at 149.
15. *Id.* at 151.
16. *Id.*
17. 788 N.Y.S.2d 314 (1st Dep't 2004).
18. 13 A.D.3d 285, 787 N.Y.S.2d 35 (1st Dep't 2004).
19. *Sanango*, 788 N.Y.S.2d at 316; *Balbuena*, 13 A.D.3d at 285.
20. *Id.*
21. *Sanango*, 788 N.Y.S.2d at 316.
22. *Id.* Sanango commenced the action pursuant to Labor Law § 240(1), which provides in pertinent part:
All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.
23. *Id.*
24. *Id.*
25. *Id.* The employer and owner of the site did not challenge Sanango's right to damages for pain and suffering and medical bills. The only challenge was to the award of lost earnings.

26. *Id.* at 316-317.
27. *Id.* at 319 (quoting *Hoffman*, 535 U.S. at 149).
28. *Id.* at 319 (citing *Hoffman*, 535 U.S. at 151).
29. *Id.* at 319.
30. *Id.* at 322. Other courts have imposed blanket prohibitions on undocumented workers recovering lost earnings. *See, e.g., Veliz v. Rental Service Corp. U.S.A., Inc.*, 313 F.Supp.2d 1317, 1335-1336 (M.D. Fla. 2003) (where worker tendered false documents in violation of IRCA, worker's undocumented status precluded an award of lost wages); *Majilinger v. Cassino Contracting Corp.*, 1 Misc. 3d 659, 661, 766 N.Y.S.2d 332, 333-334 (Sup. Ct., Richmond Co. 2003) (*Hoffman* decision precluded undocumented worker from receiving lost earnings).
31. *Sanango*, 788 N.Y.S.2d at 322.
32. *Id.* at 320.
33. *Balbuena*, 13 A.D.3d at 285.
34. *Id.* at 286.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 287.
39. *Id.*
40. *Id.*
41. *Id.* at 288.
42. *Id.*
43. *Id.*
44. *Id.* (citing Rebecca Smith, Amy Sugimori, Luna Yasui, *Colloquium: Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights*, 29 NYU Rev. L. & Soc. Change 597, 598-600 (2004)).
45. *Id.* (citing Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. Pa. J. Lab. & Emp. L. 497, 507 (2004)).
46. *Sanango*, 788 N.Y.S.2d at 320.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Nealy v. U.S. Healthcare HMO*, 93 N.Y.2d 209, 217 (1999).
51. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 141 (1963).
52. *See Ray v. Atlantic Ritchfield Co.*, 435 U.S. 151, 157-158 (1978).
53. *See Balbuena*, 13 A.D.3d at 288 (citing *Montero v. Immigration & Naturalization Serv.*, 124 F.3d 381, 384 (2d Cir. 1997) (quoting HR Rep. No. 99-682(I), 99th Cong., 2d Sess, at 58, reprinted in 1986 U.S. Code Cong. & Admin. News, 5649, 5662) ("[i]t is not the intention of the Committee that the employer sanction provisions of the bill to be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees. . . .")).
54. *See Jie v. Liang Tai Knitwear Co.*, 89 Cal. App.4th 654, 663, 107 Cal. Rptr. 2d 682, 690 (Cal. App. 2d. Dist. 2001) (holding that IRCA does not preempt California state law that allows employees to sue for wrongful termination based on retaliation).
55. The most significant economic reality being the fact that undocumented workers readily and abundantly obtain work in the United States. *See Madeira v. Affordable Housing Foundation, Inc.*, 315 F.Supp.2d 504, 507 (S.D.N.Y. 2004) (upholding jury verdict of lost earnings to undocumented worker who sustained injuries at work site).
56. *Singh v. Jutla*, 214 F. Supp. 2d 1056, 1062 (N.D. Cal. 2002).
57. *Id.*
58. *See, e.g., Zimmer v. Chemung County Perf. Arts*, 65 N.Y.2d 513, 520 (1985); *see also Wise v. McDonald Ave, LLC*, 297 A.D.2d 515, 516, 748 N.Y.S.2d 539, 540 (1st Dep't 2002) ("The purpose of Labor Law § 240 is to protect workers by placing the ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor.") (internal quotations and citations omitted)).
59. *Balbuena*, 13 A.D.3d at 288 (citing Smith, et al., 29 NYU Rev. L. & Soc. Change at 598-600).
60. *Sanango*, 788 N.Y.S.2d at 320.
61. *See Partridge v. Waterloo Cent. School Dist.*, 12 A.D.3d 1054, 1055, 784 N.Y.S.2d 767, 768 (4th Dep't 2004) (core objective of Labor Law § 240 is to prevent workers from falling and sustaining injuries); *Tsatsakos v. Citicorp*, 295 A.D.2d 500, 501, 744 N.Y.S.2d 475, 476 (2d Dep't 2002) (accord).
62. __ A.2d __, No. 2004-232, 2005 WL 497214 (N.H. 2005).
63. *Id.* at *5.
64. *Id.* at *1.
65. *Id.* at *5.
66. *Id.* at *6.

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For Your Information

Marjorie F. Gootnick, former Chair of the Section, is the President of the National Academy of Arbitrators for 2005-2006. She has also been reappointed to the Foreign Service Grievance Board by Secretary of State Condoleezza Rice.

Levy Ratner, P.C. announces that **Kevin Finnegan** has joined the firm as senior counsel and will chair their election law and campaign finance department.