

Your Client's Immigration Status Is Not an Issue – Don't Let the Defense Make It One

By Jeremy Pasternak and Anthony Ocegüera

On March 26, 2008, the California Appellate Court published its opinion in *Garcia v. Paramount Citrus Ass'n., Inc.* (Cal.App. 5 Dist.) 2008 WL 783574. In that premises liability case, the court reversed a jury verdict of \$1,637,226, finding that no duty of care was owed to the plaintiff. In so holding, the court found it unnecessary to address another issue which had been presented at the trial and in the briefing on appeal: does a plaintiff's status as an undocumented worker limit the recovery of future medical expenses based on the possibility that the plaintiff may be deported, and that future medical care will therefore be less expensive in the plaintiff's home country?

One way to answer this question, and the way that I would suggest plaintiffs' lawyers and the trial courts *should* answer it, is this: "It's nobody's business whether the plaintiff is a documented worker or not."

In this magazine, I have previously argued that the courts and, unfortunately, even plaintiffs' counsel, are often insufficiently protective of the privacy rights of plaintiffs, and too often defer questions of discoverability to the time of trial, turning them into questions of admissibility. Put another way: how many times have you heard a judge, or even yourself, say, "well, we'll figure that out on a *motion in limine*."

As I have also argued before in this magazine, that is not the correct approach when it comes to a plaintiff's privacy rights, not only as a simple matter of protecting your client's rights and interests, but also because the protections that exist in discovery once privacy rights are implicated are far broader than the standards for admissibility. In short, you might be able to prevent a piece of information

from being discovered in the first instance, even though it would be admissible were it to be discovered. (For a far more detailed examination of these standards, see "Your Client's Privacy Is Not a Myth," *CAOC Forum*, May 2007.)

The same approach should be taken when it comes to a client's immigration status. Any question from the defense which is designed to elicit this information – such as questions about social security numbers, nation of origin, work status, and the like – should not be responded to.

California Labor Code Section 1171.5(a) provides:

(a) 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.

(b) For purposes of enforcing state labor and employment 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 the inquiry is necessary in order to comply with federal immigration law.

The importance the California Legislature has placed on protecting the rights of workers – including undocumented workers – is evident. In fact, the language cited above appears nearly *verbatim* in three separate California code sections. (See also Civ. Code § 3339, which expressly



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extends the protections to "civil rights" cases, and Gov. Code § 7285, which similarly references housing discrimination cases.)

For the purposes of employment cases, section "b" should end the conversation: no evidence can be taken in discovery regarding immigration status. But in other cases as well, including personal injury cases, section "a" states that evidence of a plaintiff's immigration status is irrelevant. Because it is irrelevant, it cannot lead to discoverable evidence, and weighed against any relevance the defense might articulate are the privacy rights of the individual plaintiff. A bona fide assertion of privacy rights shifts the burden to a defendant to show that the information *is* – not *might be* – directly relevant to the claims. (See *Hunter Tylo v. Spelling Entertainment Group* (1997) 55 Cal.App.4th 1379, 1387; *Britt v. Superior Court* (1978) 20 Cal.3d 844, 852-853.) Obviously, the defense would not at this point have any proof regarding immigration status, or the questions presented here would be moot.

Without that proof, the requisite showing of relevance cannot be made, and the discovery should not be compelled (and certainly should not be granted by the plaintiff's counsel).

Without delving into the legislative history of the 2002 California statutes, we know that at least one court has stated they were passed in response to the Supreme Court's ruling in *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, 151. There, the court held that the NLRB cannot award back pay to undocumented aliens who were not legally authorized to work in the U.S. because it would subvert the Immigration Reform and Control Act of 1986 ("IRCA"), the Federal law which prohibits the employment of undocumented workers. (See *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057, 1073 [noting that the 2002 California statutes were a response to *Hoffman*].)

The Ninth Circuit has since held, at least in the employment context, that the 2002 California statutes are probably not preempted by federal law. (See *Incalza v. Fendi North America, Inc.* (9th Cir 2007) 479 F.3d 1005, 1010-1013; *Reyes v. Van Elk, Ltd.* (2007) 148 Cal.App.4th 604, 616.)

The California statutes might also have been in part a response to an issue that had been brewing in California since a 1998 case, *Murillo v. Rite-Stuff Foods* (1998) 65 Cal.App.4th 833. There, the California appellate court had held that an unauthorized worker was barred from pursuing lost-wage damages for wrongful termination under the equitable doctrine of "unclean hands." (*Id.* at 845.) The court's theory was that because she could not legally be employed here, the plaintiff should not be collecting damages for future lost wages. Put another way, she could not be awarded what she had no legal right to have.

It is worth noting that even then, the plaintiff in *Murillo* was allowed to pursue her sexual harassment claim on the grounds that at least as long as she "was employed, she was entitled to all the protections available under employment law." (*Id.* at 849.)

In passing the 2002 statutes, the California Legislature implicitly overturned the part of the *Murillo* holding that would disallow a future lost-wages award.

Whether the 2002 statutes were a response to *Murillo*, *Hoffman*, or something else, they were obviously passed with an eye towards employment cases. However, there is no reason to *limit* the application of these statutes only to employment cases. The first section of each statute refers to "all protections, rights, and remedies available under state law." It may require that they have been employed at some time in the state, but again, the section is not limited to "all employment protections." In addition, the second section of the statute, which includes separate and broader protections relating to discoverability of immigration information, is limited to employment law: "For purposes of enforcing state labor and employment laws" So, although the second section does by its own terms probably apply only to employment cases, at the same time it suggests that the first section is not so limited.

The Garcia Case

In *Garcia*, the plaintiff, an undocumented farm worker, suffered serious injuries when the van he and other farm workers were being transported in was rammed by a flatbed truck. (*Garcia, supra*, 2008 WL 783574 at 1.) The truck had been driving on a private farm road, adjacent to the defendant's ranch, that intersected with the public road the van was on. (*Id.*) Plaintiff sued the defendant, alleging there was a duty owed to him and others to place a warning sign on the private road alerting drivers to the approaching intersection with the public road.

The tactics employed by the defendant in this case highlight just how important defense counsel perceive the prejudice against undocumented workers to be (and they are probably right).

During trial, the trial court twice rejected defendant's attempt to attack plaintiff's case based on his status as an undocumented worker. Pursuant to competing motions, the trial court refused to allow the jury to consider Garcia's immigration status to determine the measure of future damages, ruling that (1) plaintiff's future damages claim would be based solely on evidence showing his future damages in the United States and (2) all evidence of what plaintiff's future damages would be if he returned to his country of origin would be excluded. (See *Garcia*

v. Paramount Citrus Ass'n, Appellant's Opening Brief, 2007 WL 1335143, 7-8.) Defendant also filed a motion for non-suit, where it again sought a reduction in future economic damages based on plaintiff's immigration status. (*Id.*) The trial court denied this motion. After trial, the jury returned a verdict finding appellant negligent and finding its negligence was a cause of respondent's injuries. (*Id.*) The defendant subsequently filed an appeal arguing it had no duty arising from the nonpermissive, negligent use of its property by a third party. (*Id.* at 2.)

On the basis of the plaintiff's immigration status, the defendant also made two interrelated arguments for the reduction of the \$850,000 award of future medical expenses. First, the defendant argued that to the extent state law permits an undocumented worker to recover compensatory damages measured by the future cost of living in the United States it frustrates federal immigration (including IRCA) law and is therefore preempted by federal law pursuant to *Hoffman*. (See *Garcia, supra*, 2007 WL 1335143 at 29.)

Second, the defendant argued that the trial court should have held a hearing pursuant to *Rodriguez v. Kline* (1986) 186 Cal.App.3d 1145. (*Garcia, supra*, 2007 WL 1335143 at 2-3.) In *Rodriguez*, the Second Appellate District held that an "undocumented worker injured in the United States may only recover the future lost wages that the worker could expect to earn in their country of origin." (*Rodriguez, supra*, 186 Cal.App.3d at 1147-48.)

The *Rodriguez* court further held that a plaintiff's immigration status must be decided by the trial court as a preliminary question of law and that "[a]t 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." (*Rodriguez, supra*, 186 Cal.App.3d at 1149.) If defendant 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." (*Id.*) Under *Rodriguez*, only if the court's decision in the hearing is in plaintiff's favor shall evidence relating to immigration status be excluded and computation of future lost wages in the U.S. be performed. (*Id.*)

Hence, one of the issues before the court in *Garcia* was what application this

rule had to the recovery of medical expenses, and whether it should apply *at all* in light of Labor Code § 1171.5, Civil Code § 3339, and Gov. Code § 7285.

CAOC filed an amicus brief in *Garcia*, arguing that pursuant to these sections, a plaintiff's immigration status should not limit in any way recovery of future medical expenses and that the trial court's order determining that the evidence was irrelevant and inadmissible should have been upheld.

As the CAOC brief points out, since the passage of these statutes in 2002, California courts have been steadfast in affirming that public policy requires protection of undocumented workers. CAOC noted *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 468, in which, as CAOC described it, "the trial court judge was actually ordered by the appellate court to be removed from the case because of his courtroom comments to counsel about how much citizens pay to support undocumented residents and the problems associated with them."

Of course, this was exactly what the plaintiff's counsel in *Hernandez* had feared. The plaintiff's motions in limine, based on Evidence Code §§ 350 and 352, requested "an order instructing Defendant and his counsel not to refer to, interrogate concerning, comment on, or attempt to suggest to the jury in any way, and further, to advise their witnesses not to refer to, comment on, or attempt to suggest any information regarding Plaintiff's residency status, ethnicity or country of origin." (*Hernandez, supra*, 109 Cal.App.4th at 456.) The appellate court recognized that reference to the plaintiff's residency status was not only irrelevant to the issue of liability present in *Rodriguez* (i.e., loss of future wages) but also that it was highly prejudicial. (*Hernandez, supra*, 109 Cal.App.4th at 460.) Of course, part of the problem with the type of analysis engaged in by the *Rodriguez* court, an analysis which the 2002 statutes presumably meant to avoid, is that it is one inherently tainted by bias against immigrants who, though they may not be here legally, certainly bear no blame for the injuries that have been caused them in the case before the court.

The *Hernandez* court did not expressly apply the 2002 statutes (which, it noted, had been passed subsequent to the trial in

the case). However, it did discuss them at length, and held:

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*, 109 Cal.App.4th at 460.)











The *Hernandez* court also cited the following language from *Rodriguez*:

"Evidence relating to citizenship and liability to deportation almost surely would be prejudicial to the party whose status was in question." (*Hernandez, supra*, 109 Cal.App.4th at 460; citing *Rodriguez, supra*, 186 Cal.App.3d at 1148.)

The *Hernandez* court also noted that in that case, the prejudice had been generated not just by the evidence or even by the conduct of defense counsel, but in fact had been demonstrated by the trial judge himself:


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In its lengthy discourse, the court recited a veritable litany condemning and impugning the character of undocumented immigrants, including plaintiff, who place a burden upon the taxpayers by obtaining educational, medical, housing, and other services (“yada, yada,” i.e., the list goes on) to which they are not entitled, and then add insult to injury by suing the providers, such as “the good doctor [defendant]” in order to make “a pot of [undeserved] money.” We have no difficulty concluding “the average person could well entertain doubt whether the trial judge was impartial.” *Catchpole v. Brannon*, *supra*, 36 Cal.App.4th at p. 247.

(*Hernandez*, *supra*, 109 Cal.App.4th at 461.)

Again, the conclusion of that court that prejudice results from disclosure of a plaintiff’s immigration status cannot be reasonably questioned.

Applications of the 2002 Statutes

Given that the *Garcia* court did not address the 2002 statutes at all, we must look to the employment context for guidance as to their application. Fortunately, the language to be found suggests a broad application of these protections.

In *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057, the Ninth Circuit held that based on Section 1171.5(a) and the other 2002 statutes, “California appears to have provided for a wide range of monetary remedies including some that may not be available to undocumented workers under Title VII; accordingly ... *Murillo* may no longer be good law.” (*Rivera* at 1073.)

In *Rivera*, twenty-three Latina and Southeast Asian female immigrants

employed at defendant’s factory brought a class action employment discrimination suit, alleging disparate impact discrimination based on defendant’s use of a basic job skills examination given only in English. (*Id.* at 1061.) During the deposition of one of the plaintiffs, counsel for the defendant asked where she was married and where she was born. (*Id.*) She answered that she was of Mexican ancestry, at which point her counsel instructed her not to answer any further questions pertaining to her immigration status, terminated the deposition and subsequently filed for a protective order against further questions pertaining to immigration status. (*Id.*) As is noted in the appellate court’s opinion:

Their request was predicated on the claim that – because each plaintiff had already been verified for employment at the time of hiring and because further questions pertaining to immigration status were not relevant to their claims – additional questioning would have a chilling effect on their pursuit of their workplace rights.

(*Id.* at 1061.)

The trial court’s ruling is also instructive:

With regard to each plaintiff’s immigration status, the magistrate judge barred all discovery into the matter, but did not preclude NIBCO from conducting its own independent investigation. She acknowledged that the “after-acquired” evidence doctrine could limit NIBCO’s liability in the event that it discovered that some plaintiffs were not eligible for employment, but ruled that NIBCO under the circumstances did not have a right to use the discovery process to gain that information. *Id.* at 649-51

(citing *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362-63, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995)). Allowing NIBCO to obtain such information through the discovery process, she found, would unnecessarily chill legitimate claims of undocumented workers under Title VII.

(*Rivera*, *supra*, at 1062.) The appellate court affirmed these rulings on the interlocutory appeal presented to it.

This case is an excellent example of how plaintiff’s counsel should proceed with privacy issues in general, and also when these three statutes are implicated: refuse to provide the information in discovery. As the *Rivera* court noted, the defendant could certainly attempt to gain independent confirmation of immigration status, and that information might or might not come in at trial. What it could not do was get the information directly from the plaintiffs in discovery. The practical result is, of course, that if the defendant could not get the information elsewhere, it would not be able to avail itself of whatever defenses the information might provide.

The 2002 Statutes Should Not Be Limited to Civil Rights Cases – And What to Do If a Court Disagrees

Of course, defendants will argue that the 2002 statutes are limited to employment, housing, and other civil rights cases. As set forth above, those limitations appear only in the second section of each statute, and these sections, by their terms, apply to preclude discovery of immigration status. There is therefore no reason to limit the statutes’ broader assertions of rights to

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these cases, as those rights are articulated without any limitation to the type of case. However, by that same token, the defense could argue that the *discoverability* portions of the statutes are limited to employment, housing, and other civil rights cases. Although the statutes are express in that regard, that fact does not change the well-established rule that once privacy rights are implicated a party seeking discovery of the private information must *first* show that this information is *relevant* (not “might be” or “might lead to”). Regardless of what section “b” of the 2002 statutes says about discoverability, the statutes as a whole support the notion that immigration status is a private matter.

A defendant might nevertheless argue, as the defendant in *Rodriguez* did, that the issue of potential deportation bears upon the cost of medical care, in that it might be cheaper in another country. But as CAOC’s amicus brief noted, at least one California court has held:

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 v. State of California* (1985) 40 Cal.3d 202, 221; emphasis added.)

This language is particularly important in the context of a privacy objection. Even if a showing of relevance can be made, the defendant must still demonstrate that there is a “compelling interest” in the discovery which is sufficient to override the plaintiff’s privacy rights.

California courts have generally concluded that the public interest in preserving confidential information outweighs the interest of a private litigant in obtaining the confidential information.

(*Harding Lawson Associates v. Superior Court* (1992) 10 Cal.App.4th 7, 10, citing *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 524, which addressed privacy rights in the context of personnel documents.)

In the end, you have on the one hand your client’s privacy rights (which can only be superseded by a showing of compelling interest and direct relevance) and on the other, there is the speculation of deportation which at least one court has found too remote to justify admission of unlawful residence. The balancing is not even close.

Of course, first you are going to have to object to this discovery, and that can raise some interesting issues, particularly at deposition. The fundamental problem is that you are making a privacy objection which is supported by the 2002 statute. However, if you identify the statutes, you are necessarily disclosing the very matter you are trying to protect. Obviously, if defense counsel asks, “Are you here legally?” you can cite the statutes, privacy rights, and instruct your client not to answer. However, what do you do if the question itself is not directed at immigration status, but necessarily would lead to disclosure of immigration status?

Example: in a wrongful termination case I recently handled, my client was asked at his deposition various questions about mitigation (that is, subsequent employment) and was asked why he had left a particular job. I knew he had left it because he had been picked up and detained for several weeks by the INS. The following exchange resulted:

Defense Counsel (“DC”): Why did you stop working at the [name of subsequent employer]?

Plaintiffs’ Counsel (“PC”): Can you answer that question without divulging privileged information?

Witness: No.

PC: Let me check with my client and see if I can give you an answer to that question or give you an appropriate objection.

PC: Having conferred with my client, the objections are privacy and the California Labor Code [I admit I had forgotten the Civil and Government Codes], a more specific section of which I cannot point you to, lest in doing so, I violate the privilege itself.

DC: Can you tell me outside?

PC: I’m not going to tell you at all. I’ll disclose it in camera to the Court, and the Court can make a determination.

DC: The basis of your objection is a statute in the labor code, but you are not willing to disclose that at this time?

PC: I can’t, because by its very nature, if I tell you the statute that I’m talking about, I’m disclosing the information that the statute is designed to protect. In other words, the statute says you don’t have to disclose “X.” Right? So if I tell you the number of the statute, I’ve automatically disclosed “X.”

Defense counsel was no dummy, and there is little doubt she had some inkling about what was going on. But despite a fair bit of rolling of the eyes at the deposition, counsel (who was actually very reasonable and obviously a good sport) did not bring a motion to compel.

The case settled before rulings on motions in limine, but in meet and confer on those motions, it was apparent that the other side knew what I was “hiding.” However, our approach put them in a tough spot. Because of the strict showing that must be made once a privacy objection was raised, they could have little confidence of winning a discovery motion. Had I disclosed the statute, they could have skipped right past that issue, as they would have been able to “show direct relevance” because it would be clear that what was to be discovered was immigration status. But without the statute, they could not make this showing. Nor could they give their client any kind of reasonable prediction regarding success on a discovery motion because at the end of the day, they did not even know the source of the objection they wanted the court to overrule. Hence, they had little choice but to try and address the issue on a motion in limine. The problem then was that they had no evidence of unlawful residence and would not be able to make any offer of proof, and could have little confidence in later settlement discussions that they would get immigration evidence in at trial.

This example demonstrates what plaintiffs’ counsel should remember whenever privacy rights are at issue: don’t just wait for a motion in limine. The law is far more on your side at the discovery phase, and by standing firm at that juncture, you stand a better chance of protecting your client and your case. ■