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The Tension Between the Need and Exploitation of Migrant Workers: Using MSAWPA's Legislative Intent to Find a Balanced Remedy

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THE TENSION BETWEEN THE NEED AND
EXPLOITATION OF MIGRANT WORKERS:
USING MSAWPA'S LEGISLATIVE INTENT
TO FIND A BALANCED REMEDY

*Mark J. Russo**

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“It’s one thing having them pick,” Wally said carefully. “I mean, everyone accepts them, but they’re only migrants—they’re transients. They’re supposed to move on.”¹

I. INTRODUCTION

Recently the Federal District Court for the District of Maine had the opportunity to apply the provisions of the Migrant and Seasonal Agricultural Worker Protection Act (Act).² The Act is the result of an increased tension between the need for labor in the agricultural sector and the need to protect the fundamental rights of a class of workers who are by nature particularly vulnerable. The Act’s remedial effectiveness, however, depends upon judicial interpretation. Consequently, in order for the Act to be applied effectively and advance Congressional intent, each court must study the manner in which the courts of all fifty states have interpreted the Act’s provisions. A federal statute by its very nature is an attempt to provide a common jurisdiction and remedy among the states. Uniformity of application is especially important when providing remedial protection to a class like migrant workers who roam from state to state. In its application of the Act, the Federal District Court for the District of Maine failed to perform this study.

In the past, the Maine courts appeared to be willing to broadly interpret remedial statutes that protect farm workers.³ The Federal District Court for the District of Maine, however, has veered off course and run aground in search of the “plain language” of the statute. Its decisions in the two cases discussed below demonstrate that it has lost sense of the purpose of the Act. It is looking for “bright-lines” and “black letters” where none exist. In doing so, the district court has significantly disturbed the balanced tension that the Act has created. That is, the Act offsets the agricultural industry’s increasing use of migrant labor with remedial protections for the migrant workers. Indeed, a study of the history of the Act

1. JOHN IRVING, *THE CIDER HOUSE RULES* 519 (1985).

2. 29 U.S.C §§ 1801–1872 (1997).

3. See, e.g., *Sec’y of Labor v. DeCoster Egg Farms, Inc.*, No. 80-0134 P, 1982 WL 2165 *1 (D. Me. Feb 23, 1982) (stating that it is the employer’s burden to produce records in “useable form” as required by FLSA); *State v. DeCoster*, 653 A.2d 891 (Me. 1995) (holding that the relationship between the employer and employee was one of a landlord/tenant even though the employees did not pay a rent and that employer was liable for purpose of the Civil Rights Act). It should be noted that subsequent to the Act, the state legislature has continued to vigorously pursue remedies for injuries to workers that resulted from their employers’ abuse. See, e.g., ME. REV. STAT. ANN. tit. 26 §§ 585, 586, 588 (West Supp. 2000) (the Housing Standards for Agricultural Workers defines an owner of such housing; applies standards identical to those in the MSWPA; and makes violation of the standards a civil crime); ME. REV. STAT. ANN. tit. 26 § 1404 (West Supp. 2000) (The Migrant and Immigrant Assistance).

and its common law applications reveals that the object of the Act is to protect a valuable but vulnerable class of people.⁴

It is the purpose of this Comment to explore current judicial interpretations of both the language and intent of the Act. Part II explores the legislated relationship between the federal government and farmers and reviews the history of migrant worker legislation. Part III outlines the most salient features of the Act. Part IV presents common law interpretations of the terms that the current legislation contains. In light of these interpretations, Part V analyzes the application of the Act in two recent decisions of the Federal District Court for the District of Maine. Finally, Part VI places these decisions within the context of the developing legal trends that attempt to balance the protection required by an increased migration of workers with the satisfaction of the commercial growers' incessant demand for labor. National, regional and international organizations have suggested alternatives that try to grapple with the same questions: Where does the class of migrant laborers fit in the overall legal structure of a sovereign country or state? What duties does the state owe these workers? And, what is their legal relationship to the state? Needless to say, these questions cannot be answered in the limited space of this Comment. Nevertheless, the answers to these questions give guidance to the courts as to how much discretion they may utilize in handing down remedies to victims of violations of the Act.

This Comment concludes that the recent Maine federal district cases represent an irreconcilable spike in a national and international trend to afford more protection to a vulnerable class whose resources are the object of urgent demand. However, the search for a proper remedial weight in the balance between migrant worker protection and the provision of competitive farm labor is not a new problem.

II. LOOKING BACKWARD AT AN ONCOMING TRAIN

Historically, the government has taken a protective stance toward the farming industry. First, with respect to the growers, it offered subsidies and created programs that facilitated access to national and foreign labor pools. Then, as the industry developed, it became increasingly dependent upon transient workers who were coming from beyond the immediate confines of the farm. The government found it necessary to address the needs of these agricultural laborers by establishing protective and remedial provisions that were specifically directed at the unique circumstances of the migrant worker. A study of evolving legislation shows that ready

4. See generally *Charles v. Burton*, 169 F.3d 1322 (11th Cir. 1999); *Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275 (5th Cir. 1985); *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225 (7th Cir. 1983); *Marshall v. Coastal Growers Ass'n*, 598 F.2d 521 (9th Cir. 1979).

availability of migrant labor increased a need for remedial provisions intended to compensate workers for injuries inflicted by abusive growers and labor contractors. These compensatory measures were intended to be liberal enough to effectively deter such transgressions. The Act reflects the most recent stage of a long legislative evolution.

The introduction of four acts, in 1862, initiated the continuing affair between the small-scale farmer and the United States legislature.⁵ First, the Homestead Act permitted the acquisition of as much as 160 acres of public land for one dollar and twenty-five cents "per acre for the purpose of actual settlement and cultivation," provided the farmer remained on the land for five years.⁶ Second, the Morrill Act donated what amounted to "thirty thousand acres for each senator and representative in Congress" to the independent States of the Union.⁷ The States were to sell the land in units of one hundred and sixty-acre lots for \$1.25 per acre.⁸ The proceeds were used to fund at least one agricultural college in the State to develop a class of farmers knowledgeable about the most advanced agricultural techniques.⁹ Third, the Pacific Railway Act was enacted for the purpose of creating a railroad and telegraph line from the Missouri River to the Pacific Ocean.¹⁰ Consequently, in an attempt to ensure that the graduate of the agricultural school had something to grow when he got off the train and stepped foot onto his homestead, Congress set up the Department of Agriculture "to procure, propagate, and distribute among the people new and valuable seeds and plants."¹¹ These enactments created a powerful lobbying force in Congress that wore two faces, each of which represented a distinctly different view of the farming occupation and its relation to the United States economy.¹²

A. *The Janus Face of Agriculture*

In the first seventy-five years of U.S. political history, the "Southern-Western" and "New England-Midwestern" models represented two very

5. See generally, Guadalupe T. Luna, "Agricultural Underdogs" and *International Agreements: The Legal Context of Agricultural Workers Within the Rural Economy*, 26 N.M. L. REV. 9, 20 (1996); Jim Chen, *Of Agriculture's First Disobedience and Its Fruit*, 48 VAND. L. REV. 1261, 1274 (1995).

6. Act of May 20, 1862, ch. 75, 12 Stat. 392 (codified at 43 U.S.C. §§ 218–221) (repealed 1976).

7. Act of July 2, 1862, ch. 130, 12 Stat. 503 (codified as amended at 7 U.S.C. § 301 (1988)).

8. *Id.*

9. *Id.*

10. Act of July 1, 1862, ch. 120, 12 Stat. 489.

11. Act of May 15, 1862, ch. 72, § 1, 12 Stat. 387 (codified as amended at 7 U.S.C. § 2201 (1994)).

12. Chen, *supra* note 5, at 1276.

different agricultural philosophies requiring different types of labor.¹³ The “Southern-Western” model of an agrarian economy, which promoted the production of “cash-crops for distant markets,” depended upon cheap labor for its competitive edge.¹⁴ Slave labor and the recently land-stripped migrant workers from Mexico provided that edge.¹⁵ Additionally, slavery added to the initial strength of agrarian interests because the “Framers” formula for apportioning House seats and direct taxes counted three-fifths of each state’s slave population.¹⁶ This partial counting of slaves, in turn, reinforced the agrarian interest in slavery for its political as well as economic advantage.¹⁷

Unfortunately, the subsequent abolition of slavery and eventual reapportionment case law—extolling a “one man, one vote” system of representation in lieu of one based upon acreage—failed to toll the death knell for agricultural subsidies.¹⁸ The continued presence of the Mexican migrant worker in the West/South-West region and the tenant-farmer in the South kept the system afloat.¹⁹ Furthermore, there was another agricultural image which also attracted Congressional support.

In addition to the commercial concept of agrarian economy, there has always coexisted a concept that envisions “small farms producing food crops and livestock for subsistence and local markets.”²⁰ This “New England-Midwestern” model of agrarian economy fosters an idyllic image of the struggling bucolic who labors to provide the Nation with sustenance.²¹ This “family farm” ideal intervened to protect the agricultural sector and continues today to receive government subsidies

13. *Id.* at 1278.

14. *Id.* For those lacking an agrarian background, “cash-crop” is defined as “a crop cultivated primarily for its commercial value.” *THE COMPACT OXFORD ENGLISH DICTIONARY* 218 (2d ed. 1996).

15. Chen, *supra* note 5, at 1278.

16. U.S. CONST. art. I, § 2, cl. 3 states that:

[r]epresentatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years and excluding Indians not taxed, three fifths of all other Persons.

Id.

17. Chen, *supra* note 5, at 1276.

18. *Id.* at 1278–79 (citing *Baker v. Carr*, 369 U.S. 186 (1961)) (recognizing the justiciability of constitutional challenges to apportionment under State law); *see also* *Wesberry v. Sanders*, 376 U.S. 1 (1964) (holding that apportionment of Congressional seats by population is commanded by U.S. Const., art. I, § 2, cl. 1); *Reynolds v. Sims*, 377 U.S. 533 (1964) (requiring numerically balanced representation in State legislatures as a matter of equal protection).

19. Chen, *supra* note 5, at 1279.

20. *Id.* at 1278.

21. *Id.* at 1308.

like loan preference²² and exemptions from labor standards.²³ During Reconstruction, these subsidies promoted the maintenance of black sharecroppers and migrant workers as a steady and deep pool of cheap labor.²⁴ When black sharecroppers left the fields en masse, Latin American migrants rushed in to fill the gap.²⁵

B. *The Introduction of the Migrant Worker to the U.S. Workforce*

Traditionally, agriculture has attracted immigrants of many nationalities, but these workers' ambitions to purchase land threaten the established landowners who, in turn, lobby vigorously for exclusionary immigration laws.²⁶ Protections against foreign migrant competition are also in place for the U.S. migrant workers, who predominately work in the rural southern states.²⁷ Nevertheless, the persistent shortage of unskilled cheap labor at home presents an urgent need for which the foreign migrant

22. *Id.* at 1308 n.327.

23. *See id.* at 1281 n.146 (citing 29 U.S.C. § 213(a)(6) (1988)) (excluding agricultural employees from the minimum wage and maximum hour provisions of 29 U.S.C. §§ 206–207 (1988)) and comparing 29 U.S.C. § 152(3) (1988) (excluding farm laborers from the National Labor Relations Act).

24. Chen, *supra* note 5, at 1282.

25. *Id.* at 1307.

26. *Id.* at 1321 (discussing the 1882 ban on Chinese immigration (The Chinese Exclusion Act) and later prohibition of Japanese landownership in California and elsewhere in the 1920s).

27. For an interesting and short explanation of the proper procedure to be followed by a farmer who requests foreign labor, see *Elton Orchards, Inc. v. Brennan*, 508 F.2d 493 (1st Cir. 1974) describing the necessary procedure:

[t]he Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., permits the admission of aliens to serve as temporary agricultural laborers if domestic workers are unavailable. The Act defines as a 'nonimmigrant' an alien who '... is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country ...' 8 U.S.C. § 1101(a)(15)(H)(ii).

Id. at 495.

However, to insure that all available U.S. migrant laborers be considered, the Interstate Clearance System (ICS) for recruitment of agricultural workers was established by 20 C.F.R. §§ 602.2 and 602.9, under authority of the Wagner-Peyser Act, 29 U.S.C. § 49 et seq. "The ICS is one element of a complex statutory structure designed to facilitate the employment of domestic workers for seasonal agricultural labor, and to permit the use of foreign nationals temporarily admitted to the United States to work for a specific employer if domestic workers are unavailable." *Elton Orchards*, 508 F.2d at 495. In *Elton Orchards*, Judge Coffin found that it was not discriminatory to require that a New Hampshire apple grower use laborers from Louisiana before the preferred laborers from the British West Indies because protection of domestic labor was the sinew and organ of immigration law. *See id.* at 499–500.

worker offered a ready solution.²⁸ That is, the laborer is there when you need him and gone when you do not.²⁹ As a result of a series of travesties, the Mexican laborer has presented himself as the most appropriate candidate for the task.³⁰

After the Treaty of Guadalupe-Hidalgo at the close of the United States-Mexican War, many Mexicans found themselves landless and poor.³¹ That same year the Gold Rush flooded California with money-hungry, land-grabbing prospectors who "railroaded" the indigenous Mexican population.³² Murderers and squatters went unprosecuted and taxes were raised to a level that essentially expropriated land owned by Mexican citizens.³³ Nevertheless, although there was a general disdain for Mexicans in the Southwest, after the Chinese Exclusion Act of 1882,³⁴ they were solicited as an alternative source of cheap labor.³⁵ Chinese immigrants had been the main source of labor in the development of the railroad.³⁶ Consequently, the railroad industry turned to the Mexican migrant worker to substitute for the diminished Chinese labor pool.³⁷ Then, the development of advanced irrigation techniques and the expansion of fruit and vegetable farming, particularly the sugar beet industry, pulled the migrant workers into the Mid-Western States.³⁸ Meanwhile, the bloody Mexican Revolution³⁹ displaced a large segment of Mexican citizens who flocked to the U.S. industrial sectors to such an extent that by 1928 eighty percent of the Burlington Railroad workers were Mexican.⁴⁰ This condition persisted through the Depression.⁴¹ World War II, however, brought an end

28. Chen, *supra* note 5, at 1285.

29. *Id.*

30. See generally DENIS LYNN DALY HEYCK, *BARRIOS AND BORDERLANDS: CULTURES OF LATINOS AND LATINAS IN THE UNITED STATES* (1994).

31. See *id.* at 4. The United States-Mexican War was fought between 1846-1848 and culminated in the Treaty of Guadalupe-Hidalgo. See *id.* As a result of the Treaty, the United States absorbed the former Mexican territories of California, Arizona, New Mexico and other southern lands. *Id.*

32. *Id.* at 4-5.

33. *Id.* at 5.

34. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882). The Act suspended any immigration of "Chinese laborers to the United States." *Id.* Originally it was to last for ten years. *Id.* After many extensions, however, it was finally repealed in 1943 by the Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600-601.

35. See DALY HEYCK, *supra* note 30, at 5.

36. *Id.*

37. *Id.*

38. *Id.* See also Chen, *supra* note 5, at 1285.

39. See DALY HEYCK, *supra* note 30, at 5. The revolution of 1910-1917 was spearheaded by Pancho Villa in the North and Zapata in the South.

40. *Id.* This phenomenon may have been due, in large part, to the oppressive "dust bowl" drought, the Depression, and rapidly increasing mechanization.

41. *Id.* at 6.

to the Depression and created an insatiable appetite for labor in the agricultural sector.⁴²

In 1942, the United States and México agreed to the “bracero” program to relieve the labor shortages in the farming industry.⁴³ Formed by the Farm Labor Service, the “bracero” program provided for the entrance into the U.S. of “controlled numbers of Mexican nationals” to be employed as seasonal agricultural workers.⁴⁴ The workers were to return to México when they had completed their work.⁴⁵ The program lasted until 1964 and was the conduit for the entry into the United States of five million Mexican workers who provided the U.S. agricultural community with a controlled temporary source of low cost labor.⁴⁶ The program, however, ultimately failed because of the abusive treatment inflicted on the workers by the growers.⁴⁷ Complaints by the Mexican government, the recession of 1953, and the threat of increasing numbers of Mexican immigrants led to the 1954 Operation Wetback initiative, which authorized the return to Mexico of one million Mexicans.⁴⁸

C. A Legislative Adjustment of the Balance Between Labor Supply and Labor Protection

Less than ten years after Operation Wetback, the U.S. enacted the Farm Labor Contractor Registration Act of 1963 (FLCRA).⁴⁹ That legislation attempted, among other things, to curb the abuses of Farm Labor Contractors (FLCs) who were exploiting the vulnerabilities of illegal immigrants working as migrant workers.⁵⁰ Farmers unable to find local temporary harvesters often turned to FLCs to supply foreign workers.⁵¹ The FLCs, however, capitalized on the financial, cultural and linguistic dependencies of the migrants and often subjected them to unhealthy and

42. *Id.*

43. *Id.* “Bracero” derives from the Spanish “brazo” meaning “arm.” Even today, bracero is translated as “unskilled worker” or “laborer.” See also William M. Ross, *The Road to H-2A and Beyond: An Analysis of Migrant Worker Legislation in Agribusiness*, 5 *DRAKE J. AGRIC. L.* 267, 269–70 (2000).

44. Daly Heyck, *supra* note 30, at 6.

45. *Id.*

46. *Id.*

47. *Id.* at 7 (noting that some growers “even charged rent for the trees under which the migrants slept”).

48. *Id.* See also *MY FAMILY / MI FAMILIA* (New Line Cinema 1995) for a graphic example of U.S. citizens of Hispanic descent who were swept back to Mexico in the irrational furor of the times.

49. Farm Labor Contractor Registration Act, Pub. L. No. 88-582, § 2, 78 Stat. 920 (1964) (codified as 7 U.S.C. §§ 2041 to 2055 amended in 1974, repealed by Pub. L. No. 97-470, Title V, § 523, 96 Stat. 2600 (1983)); see also Ross, *supra* note 43, at 270.

50. Ross, *supra* note 43, at 270.

51. *Id.*

unsafe conditions.⁵² The FLCRA held the FLCs liable to local and state health and safety regulations.⁵³ The FLCRA also proposed to offset by law the unequal bargaining power of all migrant workers, foreign or domestic, by imposing a mandatory registration with the Department of Labor (DOL) and a full disclosure to the migrant laborers of working conditions including housing, transportation, and wage.⁵⁴

In 1974, the FLCRA was amended to include harsher penalties and increase enforcement "by creating a cause of action for migrant workers who were deprived of their statutory rights."⁵⁵ Coverage of the FLCRA was extended to anyone who benefited from migrant workers.⁵⁶ The amendment accomplished its expanded scope by listing seven exemptions, among which were nonprofit organizations, farmers who only use migrant workers in their own operation, and the farmers' employees who might find migrant workers on "an incidental basis."⁵⁷

52. *Id.*

53. *Id.*

54. Farm Labor Contractor Registration Act of 1963, Pub. L. No. 88-582, 78 Stat. 920, 921-23 (1964). It must also be remembered that contemporaneously the migrant workers themselves were taking steps to even the playing field. See DALY HEYCK, *supra* note 30, at 7. In 1965, César Chávez organized the United Farm Workers Union in California. *Id.* His use of the boycott and fasting is thought to have been instrumental in the enactment of the California Labor Relations Act of 1975. *Id.* The California Labor Relations Act states:

It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. For this purpose this part is adopted to provide for collective-bargaining rights for agricultural employees.

Cal. Lab. Code § 1140.2 (West, 2000). On the national level in 1966, the Fair Labor Standards Act of 1938 was amended "to raise minimum wages and extend protection to agricultural employees." Ross, *supra* note 43, at 273 (citing 29 U.S.C. § 203 (1938), amended by Pub. L. No. 89-601, § 101, 80 Stat. 830 (1966)), but see generally Michael H. Leroy, "Agricultural Laborers" Continue to be Excluded from the National Labor Relations Act?, 48 EMORY L.J. 489 (1999). The amendment, however, excluded family members and daily commuters who worked on a "piece rate basis" for a period of less than thirteen weeks in "the preceding calendar year." 29 U.S.C. § 203 (1938), amended by Pub. L. No. 89-601, § 101(a), 80 Stat. 830, 830 (1966).

55. Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, § 14(a), 88 Stat. 1652, 1657 (repealed 1983).

56. Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, § 2, 88 Stat. at 1652-53.

57. *Id.* The expansion was accomplished by listing the following seven exemptions from the Act:

- (1) Any nonprofit charitable organization, public or nonprofit private educational institution, or similar organization;

Finally, as if to acknowledge the growing dependence on foreign migrants, the FLCRA was also amended to require that the information be conveyed to the worker in a language that he would understand.⁵⁸ In 1983, the Act repealed the FLCRA,⁵⁹ eliminating the need to register as FLCs and making the farm employer jointly liable with the FLC for meeting the Act's mandates.⁶⁰

III. AN ANALYSIS OF THE MSAWPA

Section 1801 of the Act paints remedial and protective purposes with broad strokes.⁶¹ The Act's objectives are threefold: "[(1)] to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; [(2)] to require farm labor contractors to register . . .; and [(3)] to assure necessary protections for migrant and seasonal agricultural workers . . ."⁶²

Section 1802 is one of the most significant sections of the Act because it defines the terms of the statute.⁶³ This Section defines an

-
- (2) Any farmer, processor, canner, ginner, packing shed operator, or nurseryman who personally engages in any such activity for the purpose of supplying migrant workers solely for his own operation;
 - (3) Any full-time or regular employee of any entity referred to in (1) or (2) above who engages in such activity solely for his employer on no more than an incidental basis;
 - (4) Any person who engages in any such activity (A) solely within a twenty-five mile intrastate radius of his permanent place of residence and (B) for not more than thirteen weeks per year;
 - (5) Any person who engages in any such activity for the purpose of obtaining migrant workers of any foreign nation for employment in the United States if the employment is subject to—
 - (A) An agreement between the United States and such foreign nation; or
 - (B) An arrangement with the government of any foreign nation under which written contracts for the employment of such workers are provided for and the enforcement thereof is provided for through the United States by an instrumentality of such foreign nation;
 - (6) Any full-time or regular employee of any person holding a certificate of registration under this Act; or
 - (7) Any common carrier or any full-time regular employee thereof engaged solely in the transportation of migrant workers.

Id.

58. Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, § 10, 88 Stat. at 1655 (1974).

59. 29 U.S.C. §§ 1801-1872 (1997).

60. Ross, *supra* note 43, at 274.

61. 29 U.S.C. § 1801.

62. *Id.*

63. 29 U.S.C. § 1802.

“agricultural employer” as “any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery . . . and . . . either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.”⁶⁴

“Agricultural employment,” in addition to retaining its previous definition pursuant to the Fair Labor Standards Act of 1938 (FLSA),⁶⁵ also includes “the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.”⁶⁶ A “migrant agricultural worker” is one who is “employed in agricultural employment of a . . . temporary nature, and who is required to be absent overnight from his permanent place of residence.”⁶⁷ It is important to note that the scope of “agricultural employment” is very broad.

In referencing the Immigration and Nationality Act, the Act implicitly accepts the definition of “agricultural work” as expressed by the Internal Revenue Code (IRC), which contains a wide variety of work not immediately identifiable with the traditional concept of “farming.”⁶⁸

64. 29 U.S.C. § 1802(2).

65. 29 U.S.C. § 203(f) provides the following:

“Agriculture” includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in § 1141(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Id.

66. 29 U.S.C. § 1802(3).

67. 29 U.S.C. § 1802(8)(A). The term does not, however, include an immediate family member of the employer or farm labor contractor. *Id.* Nor does it include “temporary nonimmigrant alien[s]” who are authorized to work in the agricultural sector pursuant to the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a):

having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in § 3121(g) of Title 26 and agriculture as defined in § 203(f) of Title 29, of a temporary or seasonal nature and 8 U.S.C. ch. 12 § 1184(c) (prescribing the procedure for importing an alien as a nonimmigrant for purposes of employment).

Id.

68. 29 U.S.C. § 1802(3) (referring to the Internal Revenue Code, 26 U.S.C. § 3121(g) for the definition of “agricultural work” and to the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H) for definition of a “temporary nonimmigrant alien who is authorized to work in agricultural employment”). 26 U.S.C. § 3121(g) states that the term

The scope of what constitutes a “farm” is equally as broad as what constitutes “farming.”⁶⁹ A “farm labor contractor” is defined as “any person . . . who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity”⁷⁰ and “farm labor contracting activity” includes “recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.”⁷¹

Section 1803 of the Act exempts those who contract farm labor solely for the benefit of their or their family’s agricultural business regardless of the legal status of the business.⁷² This Section also exempts those who are employed by an agricultural business that did not employ more than 500 man-hours for agricultural labor in any quarter of the preceding year, the “Small business exemption.”⁷³ Finally, the Section generally excludes common carriers, labor organizations, nonprofit charitable organizations, local contracting, custom poultry operations, and the like, “provided the employees of the operation are not regularly required to be away from their permanent place of residence other than during their normal working hours.”⁷⁴

thorized to work in agricultural employment”). 26 U.S.C. § 3121(g) states that the term “agricultural work” includes all services performed on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife. The Immigration & Nationality Act, 8 U.S.C. § 1101(a)(15)(H) refers to 26 U.S.C. § 3121(g) for a definition of “agricultural labor” and to 29 U.S.C. § 203(f) for a definition of “agriculture.” 29 U.S.C. § 203(f) defines “agriculture” as

includ[ing] farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or commodities . . . , the raising of livestock, bees, fur-bearing animals, or poultry, and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

29 U.S.C. § 203(f).

69. *Id.* A farm “includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.” *Id.*

70. 29 U.S.C. § 1802(7).

71. § 1802(6). On the other hand, an “agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association” cannot be a “farm labor contractor.” § 1802(7). In all cases a “person” includes “any individual, partnership, association, joint stock company, trust, cooperative, or corporation.” § 1802(9).

72. 29 U.S.C. § 1803(a)(1).

73. § 1803(a)(2) (referencing the Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a)(6)(A)).

74. § 1803(a)(3).

Sub-chapter I, §§ 1811–15,⁷⁵ of the Act provide the general requirements for a certificate of registration: issuance, determination of acceptance, expiration and renewals, and notice of change.⁷⁶ The mechanics outlined in these sections determine whether the farm labor contractor will qualify for the benefits offered by the United States Employment Services created by the Wagner-Peyser Act of 1933.⁷⁷

Subchapter II, § 1821 of the Act presents the “information and recordkeeping requirements” for the labor contractor of migrant agricultural workers. The most important of these requirements mandates written disclosure to potential employees of their duties and benefits, posting of these requirements in a language understandable to the employee and the proscription of “knowingly providing false or misleading information.”⁷⁸ Sections 1822 and 1823 list the employer’s responsibilities with respect to wage agreements and taxes, as well as safety and health protections for the workers.⁷⁹ Subchapter III applies the same requirements outlined in subchapter I to the seasonal agricultural worker.⁸⁰

Subchapter IV adds more protections for both migrant and seasonal agricultural workers.⁸¹ Sections 1841 and 1842 address two common sources of abuse—transportation safety and unauthorized contracting.⁸² Section 1841 sets out the type of “transportation subject to coverage,” the criteria for regulation, the amount of required insurance, and the effects of state workers’ compensation coverage.⁸³ Section 1842 prohibits the employment of workers supplied by a contractor without first “tak[ing] reasonable steps” to verify that the contractor is certified for the activity he is being used.⁸⁴ Finally, subchapter V provides enforcement measures.⁸⁵

These provisions offer both a potentially powerful shield against abuses and a readily available remedy for violations. Nevertheless, although a very important source for legislative protection for the rights of the migrant and seasonal workers, the Act rings hollow without judicial clarification. The following Section looks at the history of judicial interpretation and application of the Act. It presents examples of the most common circumstances under which a cause of action is brought and

75. §§ 1811–15 (excluding §1816, which was repealed on Nov. 6, 1976).

76. *Id.*

77. 29 U.S.C. § 49.

78. 29 U.S.C. § 1821.

79. §§ 1822–23.

80. §§ 1831–32.

81. §§ 1841–44.

82. §§ 1841–42.

83. § 1841.

84. § 1842.

85. §§ 1851–56, 1861–63, 1871–72.

various courts' analyses of these circumstances in applying the definitions and protective provisions of the Act.⁸⁶

IV. A COMMON LAW RENDITION OF THE MSAWPA

One commentator suggests that Congress has tacitly deferred to the common law interpretation of the Act.⁸⁷ With this in mind, it should be remembered that common law generally accepts that the requirements and protections of an Act that is remedial in nature should be construed liberally.⁸⁸ On the other hand, its exemptions should be narrowly construed.⁸⁹ These principles should guide the court at every stage of the action irrespective of the specific remedial statute or procedural rule being applied.

The basic form of review is no different than any other judicial action. Often, violations of the Act will have caused injury to a group of workers and, consequently, the plaintiffs will file for certification of a class. Regardless of whether the class is certified, the court will determine whether the basic requisite elements of the Act are met. In doing so, the court will determine whether the plaintiffs are "migrant" or "seasonal" workers "employed" in an "agricultural activity" or are independent contractors. The court will then determine whether the defendants were employers bound by the Act, whether farm labor contractors were involved, and whether the FLC qualifies as a joint employer with the farmer. The court then will apply the provisions of the Act to validate the claim or claims, and, if necessary, determine the damages. It is in the interpretation of the individual remedial provisions where the court must shift from a "business as usual" mode to that of a "protector" of the particular class of people for whom the Act was drafted. As a protector it must interpret both substantive as well as procedural laws broadly to the advantage of the vulnerable class.

86. For the purpose of clarity, when discussing the cases, the term "Act" will be applied to represent both the FLCRA and the MSAWPA. The former was the foundation for the latter and the latter was simply an extension of the remedial measures provided in the former.

87. See generally G. M. Buechlein, *What Constitutes 'Agricultural Employment' Subject to Provisions of Migrant and Seasonal Agricultural Worker Protection Act*, 91 A.L.R. 735 (1989).

88. E.g. *Charles v. Burton*, 169 F.3d 1322, 1334 (11th Cir. 1999); *Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275, 1278 (5th Cir. 1985); *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 234 (7th Cir. 1983); *Marshall v. Coastal Growers Ass'n*, 598 F.2d 521, 525 (9th Cir. 1979).

89. See generally *Flores v. Rios*, 36 F.3d 507, 510 (6th Cir. 1994); *Bracamontes v. Weyerhaeuser Co.*, 840 F.2d 271, 276 (5th Cir. 1988) (citing *Soliz v. Plunkett*, 615 F.2d 272, 275 (5th Cir. 1980)).

A. Rule 23: The Common Law Remedial Application

Courts commonly accept the class action as an appropriate means of handling cases under the Act.⁹⁰ Federal Rule of Civil Procedure number 23 allows a class action suit if certain requirements are met. The Rule 23 prerequisites of “numerosity,” “commonality,” “typicality,” and “adequacy of representation,”⁹¹ lose their apparent facial clarity. However, when viewed under the remedial nature of the Act. Generally, these prerequisites are cumulative and without them a motion for class certification will not succeed.⁹² Some interpretations assert that the Act requires only that an employee represent “others similarly situated,” and thus waive the other prerequisites.⁹³ Consequently, what exactly is required to meet the initial four criteria for certification of a class action is far from transparent when applying it to alleged violations of the Act.

In light of the remedial nature of the Act, courts have granted themselves considerable leeway in determining the degree necessary to comply with these requirements.⁹⁴ For example, in determining how many members constitute a sufficient number to represent a class, it is not necessary that a specific number be alleged or that each member’s identity be known at the time of the motion.⁹⁵ Courts have chosen to focus not on the numerical aspect of the first prerequisite, but rather on a pragmatic comparison between joinder and the inconvenience of individual lawsuits.⁹⁶

90. *E.g.*, *Montelongo v. Meese*, 803 F.2d 1341, 1350 (5th Cir. 1986); *De La Fuente*, 713 F.2d at 231.

91. FED. R. CIV. P. 23(a). The first prerequisite addresses “numerosity,” i.e., “the class is so numerous that joinder of all members is impracticable.” *Id.* Secondly, there must be “commonality,” which requires that “questions of law or fact common to the class . . . exist.” *Id.* The third requirement calls for “typicality” by mandating that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” *Id.* Finally, “the representative parties must fairly and adequately protect the interests of the class,” or in other words there must be “adequacy of representation.” *Id.*

92. *See Rodriguez by Rodriguez v. Berrybrook Farms, Inc.*, 672 F. Supp. 1009 (W.D. Mich. 1987); *Haywood v. Barnes*, 109 F.R.D. 568, 575 (E.D.N.C. 1986).

93. *Leyva v. Buley*, 125 F.R.D. 512, 514 (E.D. Wash. 1989) (referring to 29 U.S.C. §216(b)).

94. *E.g.*, *Montelongo*, 803 F.2d at 1351; *Salazar-Calderon v. Presidio Valley Farmers Ass’n*, 765 F.2d 1334, 1350 (5th Cir. 1985). *See also Haywood*, 109 F.R.D. at 575–92 (particularizing the characteristics of the threshold requirements and analyzing plaintiff’s class under such requirements).

95. *E.g.*, *Rodriguez by Rodriguez*, 672 F. Supp. at 1012; *Haywood*, 109 F.R.D. at 576.

96. *See Leyva*, 125 F.R.D. at 515; *Rodriguez by Rodriguez*, 672 F. Supp. at 1013; *Haywood*, 109 F.R.D. at 576. “The decision as to whether joinder is impracticable is essentially a subjective determination based on expediency and the inconvenience of trying individual lawsuits.” *Haywood*, 109 F.R.D. at 576–77.

“Commonality” presents the same problems as “numerosity” and the courts appear to treat it with the same breadth.⁹⁷ Commonality is based upon “a ‘common nucleus of operative facts’ regardless of whether ‘the underlying facts fluctuate over the class period and vary as to individual claimants.’”⁹⁸ Rule 23(a)(2) does not mandate that questions of law or fact be the same for each member of the class.⁹⁹ It suffices that there be but one common question out of many in order to certify the class.¹⁰⁰ That there are factual variations in the individual claims will not deny certification.¹⁰¹ In fact, the Federal District Court for the Western District of Michigan has gone so far as to propose that “common issues of law concerning the legality of defendant practices with respect to [the Act] . . . overrides any factual differences which may exist among class members with respect to those claims.”¹⁰²

In addressing the “typicality” issue, several courts maintain that a member’s claim is typical if it originates from the “same event or course of conduct” as that of the claims of the other members “and is based on the same legal theory.”¹⁰³ It is only necessary that the party have an interest in “prevailing on similar legal claims.”¹⁰⁴ Given this interest, typicality exists regardless of whether there are factual differences, for example, in the amount of damages claimed between the party and the other members of the class.¹⁰⁵ It is enough that there is a substantial similarity of legal theory, because the requirement focuses on whether the interest of one party is aligned with that of the class.¹⁰⁶

The final prerequisite is “adequacy of representation.”¹⁰⁷ The courts focus on two factors in determining whether adequate representation exists.¹⁰⁸ The first factor concerns the qualifications and skill of counsel and the second considers the “interest and involvement” of the plaintiffs.¹⁰⁹ In

97. See *Leyva*, 125 F.R.D. at 516–17; *Rodriguez by Rodriguez*, 672 F.Supp. at 1015; *Haywood*, 109 F.R.D. at 577.

98. *Haywood*, 109 F.R.D. at 577.

99. See *Leyva*, 125 F.R.D. at 514; *Rodriguez by Rodriguez*, 672 F.Supp. at 1015; *Haywood*, 109 F.R.D. at 577.

100. *Haywood*, 109 F.R.D. at 577.

101. *Id.*

102. *Rodriguez by Rodriguez*, 672 F.Supp. at 1015.

103. *Haywood*, 109 F.R.D. at 578.

104. *Id.*

105. *Id.*

106. *Id.*

107. FED. R. Civ. P. 23(a)(4).

108. *Haywood*, 109 F.R.D. at 578.

109. *Id.* at 578–79.

addition to the aforementioned prerequisites, the Rule also requires the presence of at least one of four fairness issues.¹¹⁰

Of the four possibilities, two are of particular concern.¹¹¹ Courts have looked to whether the questions presented for class determination “predominate over individual questions” and whether treating the parties as a class would be “superior to other procedures available for handling the claims.”¹¹²

In *Salazar-Calderon v. Presidio Valley Farmers Association*,¹¹³ the Fifth Circuit noted that the district court having originally denied certification, upon realizing the broad scope and size of the litigants involved, concocted an elaborate scheme that allowed consideration of plaintiffs’ damages as a whole.¹¹⁴ Initially, the district court had denied the certification on grounds that “(1) common questions of law and fact did not predominate because the plaintiffs’ claims varied with the employment conditions each faced; and (2) a class action was not necessarily the superior method for handling the controversy.”¹¹⁵ Then, realizing that each of the hundreds of plaintiffs, few of whom spoke English, would have to testify as to his or her actual injuries, the court agreed with the plaintiffs’ suggestion that it consider liquidated damages in lieu of actual damages.¹¹⁶ The court also permitted one representative chosen from the group to testify to the extent necessary for it to be able to determine the conditions of employment common to the group.¹¹⁷ In essence, the court treated the action as if it were a class action justified under the “superiority” requirement of Rule 23(b)(3) of the Federal Rules of Civil Procedure for purposes of determining damages.¹¹⁸ The Fifth Circuit found that the court had not abused its discretion in initially denying certification of the class because district courts have broad discretion in doing so.¹¹⁹ From the opposite perspective, the Circuit court also held out the possibility that a

110. FED. R. CIV. P. 23(b). The court must consider four factors in determining what is “fair and efficient.” *Id.* It must consider the “interest of the members of the class in individually controlling” their positions, “the extent and nature of any litigation concerning the controversy already commenced,” whether it is “desirable” to “concentrate the litigation [in] the particular forum,” and, generally, the overall manageability of the class action. *Id.*

111. *Id.*

112. *E.g.*, *Presidio Valley Farmers Ass’n v. Brock*, 765 F2d 1353, 1356 (5th Cir. 1985).

113. 765 F2d 1353 (5th Cir. 1985).

114. *Id.* at 1348.

115. *Id.* at 1350.

116. *Id.* at 1348.

117. *Id.*

118. *Id.* at 1350.

119. *Id.*

previously denied certification may subsequently be granted, if the district court should find that conditions warrant it.¹²⁰

Of the four requirements for “superiority,” the fourth, “manageability” stands out as the most important.¹²¹ There are many tools such as bifurcation of issues and subclassification that are available to facilitate the management of a class action.¹²² In 1990, the Ninth Circuit found that to satisfy the Act’s objectives of enforcement and deterrence, “the class action may be the ‘superior’ and only viable method.”¹²³ If it facilitates the management of the class action, it is at the court’s discretion to use tools such as converting an actual damage claim to one of liquid damages and adopting a cy-pres¹²⁴ procedure for distributing them.¹²⁵ The result is that the courts do not need to demand proof of injury from each member of the class.¹²⁶

Courts have also taken a pragmatic approach in analyzing “the basic elements of all civil claims.”¹²⁷ These “common elements” include, (1) violation of the law, (2) fact of injury, and (3) damages.¹²⁸ Many courts focus on the “efficiency of class treatment, the significance of common questions and whether class certification would result in the serious distortion of the lawsuit.”¹²⁹ Common questions need only represent a “significant aspect of the case” to justify its certification.¹³⁰

120. *Id.* at 1350–51. The Fifth Circuit, in *Presidio Valley*, a sequel case to *Salazar*, disregarded its previous deference to changing a denial for certification when warranted and found that dissimilar conditions of employment failed to meet the “predominant question” test. *Id.* at 1356.

121. See *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir. 1990); *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 233 (7th Cir. 1983); *Rodriguez by Rodriguez v. Berrybrook Farms, Inc.*, 672 F. Supp. 1009, 1015 (W.D. Mich. 1987); *Haywood v. Barnes*, 109 F.R.D. 568, 593 (E.D.N.C. 1986).

122. *E.g.*, *Rodriguez by Rodriguez*, 672 F. Supp. at 1012; *Haywood*, 109 F.R.D. at 593.

123. *Six (6) Mexican Workers*, 904 F.2d at 1306 (citing CHARLES ALAN WRIGHT, ARTHUR R. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1780 at 584 (1986)).

124. The cy-pres rule is defined as a rule for the construction of instruments in equity, by which the intention of the party is carried out *as near as may be*, when it would be impossible or illegal to give it literal effect. Thus, where a testator attempts to create a perpetuity, the court will endeavor, instead of making the devise entirely void, to explain the will in such a way as to carry out the testator’s general intention as far as the rule against perpetuities will allow. BLACK’S LAW DICTIONARY 387 (6th ed. 1990).

125. *Six (6) Mexican Workers*, 904 F.2d at 1305–06.

126. *Id. Accord Montelongo v. Meese*, 803 F.2d 1341, 1351 (5th Cir. 1986).

127. *Haywood*, 109 F.R.D. at 581; *Leyva v. Buley*, 125 F.R.D. 512, 518 (E.D. Wash. 1989).

128. *Haywood*, 109 F.R.D. at 581 n.5.

129. *Id.* at 581.

130. *Id.* at 581 (citing CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1778 (1972)).

The question of class certification does not touch upon the question of whether there is a cause of action.¹³¹ The claim must merely appear to be “more than frivolous or ‘insubstantial’” to be considered for class certification.¹³² The general tendency in determining class certification for applications involving a remedial statute such as the Act is to make every effort to certify. Thereupon, once the plaintiffs are certified as a class, the court determines whether the parties meet requisite definitions presented in the Act.

B. Common Law Remedial Application of the Act

1. Who is a Migrant Worker?

In a recent Texas case, *Castillo v. Case Farms of Ohio, Inc.*,¹³³ the district court determined the meaning of the term “migrant worker” with regard to workers who had been recruited in Texas to perform various operations in an Ohio chicken processing plant.¹³⁴ The district court traced the roots of the definition from the FLCRA of 1963, which depended upon the FLSA for its definition of “agriculture,”¹³⁵ through its subsequent amendment in 1974 intending to broaden the Act’s coverage¹³⁶ and finally to the present Act that incorporates its predecessor’s definitions.¹³⁷ The district court confirmed that “agricultural activity” is a broad term encompassing poultry processing as well a number of other activities not necessarily associated with a red barn but that do, nevertheless, meet the “plain meaning of ‘agriculture’” as defined by Webster.¹³⁸ The *Castillo* court concluded that poultry activities are covered under the definition of “agriculture” because the Act maintained the same protective provisions as the FLCRA, which in turn defined “agriculture” pursuant to § 204 of the

131. *Rodriguez by Rodriguez v. Berrybrook Farms, Inc.*, 672 F. Supp. 1009, 1017 (W.D. Mich. 1987).

132. *Id.* at 1017–18.

133. 48 F. Supp. 2d 670 (W.D. Tex. 1999).

134. *Id.* at 675 n.7.

135. *Id.* (stating that the term “Agriculture” was defined by reference to 29 U.S.C. § 203(f) and 26 U.S.C. § 3121(4)(A)).

136. *Id.* (explaining that the 1974 amendment of the FLCRA expanded the scope of agricultural employment to include “the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of an agricultural or horticultural commodity in its unmanufactured state.” 7 U.S.C. § 2042(d) (repealed)).

137. *Id.* at 676.

138. *Id.* at 676 n.8 (citation omitted). *Acord Rodriguez v. Jackson*, 1988 WL 150697 at *1 (D. Ariz. 1988).

FLSA and § 3121(g) of the IRC, both of which “include reference to production of poultry.”¹³⁹

To satisfy the “migrant” delimiter, the court evaluated the “temporary nature” of the work under an “economic reality” filter.¹⁴⁰ The court asserted that the employment relationships between grower, worker and contractor had become very complicated.¹⁴¹ Thus, objective economic factors (such as turnover, variation in labor demand, and fluctuations in crop harvesting) should determine the nature of the work, which in turn would determine the temporary nature of the workers.¹⁴² The *Castillo* court announced that, due to the remedial and protective nature of the Act, the courts should apply a broad interpretation of the term “migrant” and consider the “economic reality, not contractual levels, nor isolated facts . . . [to] determine employment.”¹⁴³ The fact that plaintiffs could have, and in some cases, did work all year-round “does not necessarily preclude [their] qualification as ‘migrant’ employees.”¹⁴⁴

In *Rodriguez v. Jackson*,¹⁴⁵ meanwhile, the Federal District Court for the District of Arizona held that, although it was not mandatory that plaintiffs live at the worksite, the fact that the site was located in a remote area and a significant distance from plaintiffs’ homes satisfied the migratory requirement.¹⁴⁶ They were, the court said, by definition “migrant workers,” because, “as a practical matter, the plaintiffs would have been unable to commute from their permanent homes to the job site.”¹⁴⁷ The Ninth Circuit went so far as to say that the definition of “migrant worker” was a “term of art, having no reference to workers with migratory ten-

139. *Castillo*, 48 F. Supp. 2d at 675 n.7. The court did not stop here in justifying its conviction that the definition of “agriculture” was broad and included “poultry activities.” Rather it threw the proverbial book at the term. It stated in footnote eight that:

Even absent such statutory language, the plain meaning of “agriculture” would encompass poultry farming. “Agriculture” is defined by Webster’s New World Dictionary of the American Language, 29 (1960), as “[t]he science and art of farming; work of cultivating the soil, producing crops, and raising livestock.” And, as the United States Court of Appeals for the Fifth Circuit has stated in reference to the [Act], “agriculture describes a broad activity”

Id. at 675 n.8 (citation omitted).

140. *Id.* at 679 (citing H.R. REP. NO. 97-885 (1982), reprinted in 1982 U.S.C.C.A.N. 4547, 4553).

141. *Id.* at 678.

142. *Id.* at 679 (citations omitted).

143. *Id.* at 678 (citing H.R. REP. NO. 97-885 (1982), reprinted in 1982 U.S.C.C.A.N. 4547, 4553).

144. *Id.* at 677. See *Soto v. McLean*, 20 F. Supp.2d 901, 907 (E.D.N.C. 1998).

145. No. 85-2492 PHX WPC, 1988 WL 150697 (D. Ariz. 1988).

146. *Id.* at *1.

147. *Id.* (citation omitted).

dencies.”¹⁴⁸ The court held that the legislative intent in drafting the Act was to “cover those excluded from the Fair Labor Standards Act.”¹⁴⁹

2. What Constitutes Employment?

After the court decides that the party or parties are “migrant” laborers employed in an agricultural activity, it looks to the issue of employment. The court must evaluate the relationship between the migrant and the party directing the work.¹⁵⁰ The court determines whether the employer is the farmer, the farm labor contractor,¹⁵¹ or both.¹⁵² In the case of corporations, the court must also decide whether the corporate entity or its officers are liable.¹⁵³ Finally, although the defendant qualifies as an employer, [s]he may be exempt.¹⁵⁴

The Act requires that the worker be “employed.”¹⁵⁵ As recent as 1999, the Eleventh Circuit, in *Charles v. Burton*, asserted that it was Congress’s intent to reject the common-law definition of employment, which is based upon limiting concepts of control and supervision.¹⁵⁶ If a person or entity “suffers or permits” individuals to work, they employ that individual.¹⁵⁷ The court further clarified that “[a]n entity ‘suffers or permits’ an individual to work if, as a matter of economic reality, the individual is dependent on the entity.”¹⁵⁸ In cases where more than one potential employer exists, the question is whether each has sufficient control over

148. *Marshall v. Coastal Growers Ass’n*, 598 F.2d 521, 524 (9th Cir. 1979).

149. *Id.* (citing Hearings on H.R. 14254. Before the Subcommittee on Agricultural Labor of the House Committee on Education and Labor, 94th Cong. 123 (1976)).

150. *See Charles v. Burton*, 169 F.3d 1322, 1328 (11th Cir. 1999); *Torres-Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997); *Elizondo v. Podgorniak*, 70 F. Supp. 2d 758, 761 (E.D. Mich. 1999); *Alviso-Medrano v. Harloff*, 868 F. Supp. 1367, 1371–1374 (M.D. Fla. 1994).

151. *See Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275, 1278–1280 (5th Cir. 1985) (referring to the MSAWPA to interpret its predecessor, the FLCRA); *Donovan v. Heringer Ranches, Inc.*, 650 F.2d 1152, 1154 (9th Cir. 1981); *Soliz v. Plunkett*, 615 F.2d 272, 274 (5th Cir. 1980); *Rodriguez by Rodriguez v. Berrybrook Farms, Inc.*, 672 F. Supp. 1009, 1018 (W.D. Mich. 1987) (explaining that agricultural employers are not within the definition of labor contractors).

152. *E.g., Charles*, 169 F.3d at 1328; *Torres-Lopez*, 111 F.3d at 639–41, 644; *Ricketts v. Vann*, 32 F.3d 71, 74 (9th Cir. 1994); *Montelongo v. Meese*, 803 F.2d 1341 (5th Cir. 1986).

153. *See, e.g., De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225 (7th Cir. 1983); *Donovan*, 650 F.2d at 1153.

154. *See Flores v. Rios*, 36 F.3d 507 (6th Cir. 1994); *Calderon v. Witvoet*, 999 F.2d 1101, 1105 (7th Cir. 1993).

155. 29 U.S.C. § 1802(8)(A).

156. *Charles*, 169 F.3d at 1328 (citing 29 U.S.C. § 203(g) (citation omitted). *Accord Antenor v. D & S Farms*, 88 F.3d 925, 929 (11th Cir. 1996) (citation omitted).

157. *Charles*, 169 F.3d at 1328.

158. *Id.* (citation omitted).

the worker to qualify as an employer.¹⁵⁹ The issue is not one of a comparison of the worker's economic dependence on the farmer with the worker's dependence on the independent contractor, whereby the party upon whom there is the least dependence may avoid the responsibilities of an employer.¹⁶⁰ "Joint employment" is the term that describes this relationship¹⁶¹ and it is precisely the recognition of such a relationship that compelled Congress to replace the FLCRA with the Act.¹⁶²

Articulating the result of many years of development by the courts, the *Burton* court offered what it considered to be the "regulatory factors as guidance in determining economic dependence, and ultimately, whether an employment relationship exists."¹⁶³ "The joint employment doctrine is a 'central foundation' of the [Act] and the 'indivisible hinge between certain important duties imposed for the protection of migrant and seasonal workers and those liable for any breach of those duties.'"¹⁶⁴ According to the *Burton* court, there are seven factors, no one of which is dispositive, that should be taken into account in finding a "joint employment" relationship.¹⁶⁵ The list essentially emphasizes the importance of the degree of control that the parties exercise over the workers.¹⁶⁶

Just as no one factor is determinative, they also are not cumulative.¹⁶⁷ Many of these same factors are used to defeat a defense that the migrant

159. *Id.*

160. *Id.*

161. *Id.*

162. Ross, *supra* note 43, at 274.

163. *Charles*, 169 F.3d at 1328–29 (citation omitted).

164. *Saintida v. Tyre*, 783 F. Supp. 1368, 1373 n.2 (S.D. Fla. 1992) (citing H.R. Rep. No. 97-885 at 6 (1982), reprinted in 1982 U.S.C.C.A.N. 4547, 4552).

165. See *Charles*, 169 F.3d at 1328–29. This list of factors includes: whether the employer has the power singly "or through the FLC, to direct, control, or supervise the workers or the work performed;" whether the employer could "hire or fire, modify the employment conditions, or determine pay rates;" "the degree of permanency and duration of the relationship of the parties" with regard to the agricultural activity; the skills required to do the job; whether the job was "an integral part of the overall business;" whether the job was done on the employer's property or at least an area that the employer fully controls; and whether the employer performs the administrative tasks usually born by employers, such as preparing and maintaining records and making required government payments, i.e., FICA taxes, workers' compensation, etc. *Id.* at 1329.

166. *Id.*

167. See *id.* at 1333–34. See also *Aimable v. Long and Scott Farms*, 20 F.3d 434, 439 (11th Cir. 1994). *Aimable* actually listed eleven factors. The first five factors were classified as "regulatory factors" set out by the Secretary of Labor in 29 C.F.R. § 500.20(h)(4)(ii) (1992) to be used as guidance in the definition of "joint employment." *Aimable*, 20 F.3d. at 440. They are: nature and degree of control; degree of supervision, direct or indirect; power to determine pay rates or method of payment; right, directly or indirectly, to hire, fire, or modify the employment conditions; and "preparation of payroll and payment of wages." *Id.* at 440–42. Two more factors are considered in the definition: ownership of property or facilities where work occurs and "performance of a specialty job within the production line integral to the business." *Id.* at 439, 444. The final four factors are to be considered

workers were actually independent contractors.¹⁶⁸ “Inherent in this expansive interpretation is the intent . . . that the terms ‘employee,’ ‘employer,’ and ‘independent contractor’ not be construed in their limiting common law sense.”¹⁶⁹ In light of this broad interpretation, a court may look to the individual circumstances of a case and place liability on the proper shoulders.

3. Determining Liability

The courts have looked beyond formalities and considered the reality of the circumstances when deciding whether a worker or farm labor contractor is an independent contractor.¹⁷⁰ In *Elizondo v. Podgorniak*,¹⁷¹ the Federal District Court for the Eastern District of Michigan considered the defense that pickle harvesters were independent contractors.¹⁷² The employer argued that the pickle harvesters signed contracts whereby they would buy the crop for twenty-percent of its worth. One condition of the contract was that the pickle harvesters use the services of the employer.¹⁷³ The court held that it was necessary to look at the “totality of circumstances [to] show [that] Plaintiffs were workers and the contract was a sham.”¹⁷⁴ The defendants had paid the workers to hoe the crops that they allegedly had purchased and then paid the workers for the number of pickles they had tagged.¹⁷⁵ Finally, the defendants would control the amount of payment to insure that it equaled the minimum wage.¹⁷⁶ These

only when determining the definition of “independent contractor.” *Id.* at 443–44. They are: investment in capital assets; opportunity for control of profit and loss; “permanency and exclusivity of employment;” and the amount of skill necessary to do the job. *Id.* at 439, 443–44.

168. *E.g.*, *Elizondo v. Podgorniak*, 70 F. Supp. 2d 758, 767 (E.D. Mich. 1999); *Soto v. McLean*, 20 F. Supp. 2d 901, 916 (E.D.N.C. 1998); *Alviso-Medrano v. Harloff*, 868 F. Supp. 1367, 1372–74 (M.D. Fla. 1994); *but see* *Donovan v. Brandel*, 736 F.2d 1114, 1120 (6th Cir. 1984) (using similar criteria to establish that pickle harvesters were independent contractors) *and* *Charles v. Burton* 857 F. Supp. 1574 (M.D. Ga. 1994) (distinguishing certain factors required for determining independent contractor status from those for “joint employment”).

169. *Saintida v. Tyre*, 783 F. Supp. 1368, 1373 n.2 (S.D. Fla. 1992).

170. *Elizondo*, 70 F. Supp. 2d at 767. *Acord, e.g.*, *Alviso-Medrano*, 868 F. Supp. 1367 (finding that two non-regulatory and two regulatory factors in favor of the plaintiffs were sufficient to find that defendant was an “employer”); *Cavazos v. Foster*, 822 F. Supp. 438, 441 (W.D. Mich. 1993).

171. 70 F. Supp. 2d 758 (E.D. Mich. 1999).

172. *Id.* at 762.

173. *Id.*

174. *Id.* at 773. The court reviewed the pertinent factors for determining employment status with respect to all four cases. *Id.* at 767. Without expressly rejecting *Brandel* the court found the holding to be an anomaly. *Id.* at 773.

175. *Id.*

176. *Id.*

facts belied the validity of the contract and pointed to an employer-employee relationship.¹⁷⁷

Moreover, in *Haywood v. Barnes*,¹⁷⁸ keeping sight of the protective purpose of the Act, a North Carolina district court went as far as to say that "even in the event the farm labor contractors were independent contractors, [it] could still conclude [that the] defendants were joint employers of the plaintiffs."¹⁷⁹ Nor does the terrain vary much when corporations are involved.¹⁸⁰ A corporation that acts as a recruiting house for a group of farmers will not be able to claim an exemption because it does not directly employ the workers and does not receive a fee for finding them.¹⁸¹ The courts reserve the right to examine the nature of membership dues and the executive make-up to determine whether the corporation controls or intends to control employment.¹⁸²

The remedial nature of the Act necessitates a broad expansion of all definitions to protect the migrant agricultural worker, even if it means piercing the corporate veil.¹⁸³ In *Rodriguez v. Carlson*, the Federal District Court for the Eastern District of Washington held that the question of "control" was dispositive in determining corporate liability for violations of the Act.¹⁸⁴ The fact that a corporation is the employer "does not preclude a finding that individual officers, agents, or employees also exercised "control" over the property and should be held accountable for compliance with health and safety standards."¹⁸⁵ The court considered the corporate officers or agents to be joint employers and subject to the obligations under the Act.¹⁸⁶

Likewise, the fact that an association that recruits and hires migrant agricultural workers has the status of a nonprofit organization does not exempt it from being a farm labor contractor pursuant to the Act.¹⁸⁷ That a company does not reap a profit does not mean it is not paid a "fee" for recruitment purposes.¹⁸⁸ Any form of consideration constitutes a fee under the Act.¹⁸⁹ The dues of the individual members of the organization served as

177. *Id.*

178. 109 F.R.D. 568 (E.D.N.C. 1986).

179. *Id.* at 585.

180. *E.g.*, Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301 (9th Cir. 1990).

181. *See* De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 234-35 (7th Cir. 1983).

182. *See id.* at 235-36.

183. *See* Rodriguez v. Carlson, 943 F.Supp. 1263, 1267 (E.D.Wash. 1996).

184. *Id.* (citation omitted).

185. *Id.*

186. *Id.* at 1268.

187. Marshall v. Coastal Growers Ass'n, 598 F.2d 521, 524 (9th Cir. 1979).

188. *Id.* at 523-24.

189. *Id.* at 524 (citing 7 U.S.C. § 2042(c)).

the fee received to recruit and hire migrant workers, therefore, qualifying the association as a farm labor contractor.¹⁹⁰

Conversely, corporations, as legal persons, are eligible for exemptions for the same reasons as individuals.¹⁹¹ In *Marshall v. Green Goddess Avocado Corp.*,¹⁹² the court reasoned that since the corporation was a legal person, when it used its employees to contract migrant farm laborers it was doing so “personally” and consequently met the exemption requirement of the Act.¹⁹³ Since *Marshall*, with an occasional exception,¹⁹⁴ the courts have appeared to tighten the scope of exemptions.¹⁹⁵

4. Exemptions

The two most commonly invoked exemptions are the “family business exemption”¹⁹⁶ and the “small business exemption.”¹⁹⁷ In 1994, the Sixth Circuit, in *Flores v. Rios*,¹⁹⁸ established a “two-step analysis” when examining a family business exemption defense.¹⁹⁹ First, courts must “identify” the type of labor contracting activities being conducted. Second, courts must conclude that the activities were being “performed exclusively by members of the farmer’s family.”²⁰⁰ The *Flores* court maintained that “any” contracting endeavors on the part of a “non-family member spoils” enjoyment of the exemption.²⁰¹ The court held that the lack of “any direct contact between the employer and migrant worker” waived the exemption.²⁰² Word of mouth qualifies as recruitment and can act to negate family status.²⁰³ The court did, however, find that the Act did

190. *Id.* Some courts have refused to find individual members of an association jointly liable. *Presidio Valley Farmers Ass’n v. Brock*, 765 F.2d 1353, 1357 (5th Cir. 1985). These decisions, however, precede the Act, which holds the FLC and growers jointly liable. *Ross*, *supra* note 43, at 274.

191. *E.g.*, *Marshall v. Green Goddess Avocado Corp.*, 615 F.2d 851 (9th Cir. 1980); *Usery v. Paramount Citrus Ass’n, Inc.*, 475 F.Supp. 700, 703–04 (C.D. Cal. 1979).

192. 615 F.2d 851 (9th Cir. 1980).

193. *Id.* at 855 (citing FLCRA § 2042(b)). Realizing the potential for abuse, however, the court cautioned that the contracting employees must be “regular” or “full-time” employees engaged on an “incidental basis” in contracting only for their employer. *Id.*

194. *Lopez v. Bruegel*, 563 F.Supp. 316, 318 (N.D. Tex. 1983).

195. *E.g.*, *Flores v. Rios*, 36 F.3d 507, 510 (6th Cir. 1994); *Calderon v. Witvoet*, 999 F.2d 1101, 1107 (7th Cir. 1993).

196. 29 U.S.C. § 1803(a)(1).

197. 29 U.S.C. § 1803(a)(2).

198. 36 F.3d 507 (6th Cir. 1994).

199. *Id.* at 510.

200. *Id.*

201. *Id.* (citations omitted).

202. *Id.* at 516.

203. *Castillo v. Case Farms of Ohio, Inc.*, 96 F.Supp. 2d 578, 599 (W.D. Tex. 1999) (citation omitted); *see also Montelongo v. Meese*, 803 F.2d 1341, 1347 (5th Cir. 1986).

not intend to deprive a family farmer of the benefit of using the local bureau of employment services.²⁰⁴ It offered that “the government’s presence in the labor market can only serve to protect workers” and thus better serve the remedial intent of the Act.²⁰⁵

Nevertheless, it should be noted that in 1993, the Federal District Court for the Western District of Michigan, in *Martinez v Hauch*,²⁰⁶ held that farmers who got referrals from the Employment Security Commission Job Service lost exemption status.²⁰⁷ The court did so on the grounds that the “Job Service forms and documents refer to the agency’s activity as ‘recruiting’”²⁰⁸ and in light of the Congressional intent to construe such exemptions narrowly, one must look to the “plain meaning” of the terms involved.²⁰⁹

The “small business exemption” applies to “[a]ny person, other than a farm labor contractor,” who did not use more than five hundred man-days of agricultural labor in any quarter of the previous year.²¹⁰ The burden of verifying the man-days worked is on the defendant.²¹¹ This provision mandates that the farm grower maintain accurate documented records of hours worked, number of employers, employee attendance, and payroll figures.²¹² Without this data, the court will presume that the exemption does not apply.²¹³ If the defendant falls within the definition of employer and does not qualify for an exemption, he bears the burden of showing that he did not violate the provisions of the Act as alleged by the migrant workers.²¹⁴ The most common claims deal with violations of the wage,²¹⁵ housing,²¹⁶ transportation,²¹⁷ and documentation or recording²¹⁸ provisions of the Act.

204. *Flores*, 36 F.3d at 513.

205. *Id.*

206. 838 F.Supp. 1209 (W.D.Mich. 1993).

207. *Id.* at 1214.

208. *Id.*

209. *Id.* at 1213.

210. 29 U.S.C. § 1803(a)(2) (referring to 29 U.S.C. § 213(a)(6)(A)).

211. *Charles v. Burton*, 857 F.Supp. 1574, 1582 (M.D. Ga. 1994) (citing *Donovan v. Williams Chem. Co.*, 682 F.2d 185, 191 (8th Cir. 1982)).

212. *See id.* at 1582–83.

213. *See id.*

214. *See Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1513–1514 (11th Cir. 1993). Although technically the plaintiff bears the initial burden of proof, when one considers the remedial purpose of the act that burden is significantly lightened.

215. *See, e.g., Antenor v. D & S Farms*, 88 F.3d 925 (11th Cir. 1996); *Calderon v. Witvoet*, 999 F.2d 1101 (7th Cir. 1993); *Donaldson v. U.S. Dept. of Labor*, 930 F.2d 339 (4th Cir. 1991).

216. *E.g., Flores v. Rios*, 36 F.3d 507 (6th Cir. 1994); *Caro-Galvan*, 993 F.2d at 1502–03; *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1303–04 (9th Cir. 1990); *Bramontes v. Weyerhaeuser Co.*, 840 F.2d 271 (5th Cir. 1988).

217. *E.g., Adams Fruit Co., Inc., v. Barrett*, 494 U.S. 638 (1990); *Charles v. Burton*, 169 F.3d 1322 (11th Cir. 1999); *Ricketts v. Vann*, 32 F.3d 71 (4th Cir. 1994).

218. *E.g., Antenor*, 88 F.3d 925 (11th Cir. 1996); *Six (6) Mexican Workers*, 904 F.2d at 1303–04.

5. Damages

A right to a private cause of action to recover actual or statutory damages exists if the violation of the Act was "intentional."²¹⁹ The courts interpret the term "intentional" such that a violator will be held liable for the natural consequences of his or her acts.²²⁰ The term is construed "to further the Act's remedial purposes."²²¹ Therefore, there need not be specific intent to violate the law.²²² Furthermore, that the defendant lacked knowledge of the Act does not preclude that he acted intentionally.²²³ Whether a defendant "intentionally" violated the Act is to be determined by the trier-of-fact.²²⁴

If the trier-of-fact finds an intentional violation of the Act, it may award either full actual damages, statutory damages up to \$ 500 per violation,²²⁵ or "other equitable relief."²²⁶ Courts have held that the Act does not require "proof of actual injury" to qualify for an award of liquidated damages.²²⁷ The statutory award may be considered as a deterrent to further abusive practices in the migrant farm labor market.²²⁸ Previously awarded compensation for back wages does not bar an award of damages under the Act.²²⁹ The court alone has the discretion of the amount of statutory damages to award.²³⁰ In 1993, for example, the Ninth Circuit, in *Martinez v. Shinn*,²³¹ laid out seven considerations when fixing damages that considered the size of awards and degree of liability.²³² The same court

219. 29 U.S.C. § 1854(c)(1).

220. See, e.g., *Bueno v. Mattner*, 829 F.2d 1380, 1386 (6th Cir. 1987); accord *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1345 (5th Cir. 1985).

221. *Bueno*, 829 F.2d at 1386 (emphasis in original) (citation omitted).

222. *Id.* at 1385-86 (citations omitted).

223. *Id.* at 1385.

224. *Escobar v. Baker*, 814 F.Supp. 1491, 1507 (W.D.Wash. 1993).

225. It should be noted that, early interpretations of the FLCRA appear to misread the statutory provision as mandating an award of no less than \$500 per violation. See, e.g., *Espinoza v. Stokely-Van Camp, Inc.*, 641 F.2d 535, 538-39 (7th Cir. 1981), *overruled by Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217, 1221 (7th Cir. 1981); *Guerrero v. Garza*, 464 F.Supp. 509, 510 (W.D.Wis. 1978).

226. 29 U.S.C. § 1854(c)(1).

227. *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir. 1990). See also *Haywood v. Barnes*, 109 F.R.D. 568, 584 (E.D.N.C. 1986).

228. *Frederick County Fruit Growers Ass'n, Inc. v. Dole*, 709 F.Supp. 242, 248 (D.C. Cir. 1989)

229. *Id.*

230. *Stewart v. Everett*, 804 F.Supp. 1494, 1499 (M.D. Fla. 1992).

231. 992 F.2d 997 (9th Cir. 1993).

232. *Id.* at 999. The court itemized the following considerations: "the amount of award to each plaintiff;" the entire award; the nature and frequency of the violations and whether they were "substantive or technical;" the degree of guilt to be assigned to the defendant; damages awarded in similar cases; the "defendants' ability to prevent future violations;" and the particular circumstances of the case at hand. *Id.* See also *Castillo v. Case Farms of Ohio*,

held that it was free to award both actual damages for some violations and statutory damages for others.²³³ The thrust in awarding damages for violations of the Act is the same as it is throughout the entire Act. Its purpose is at once remedial and deterrent.

In consideration of the foregoing interpretations of the Act, a court that does not apply the provisions of the Act liberally must be viewed as an anomaly. From the cases reviewed, there are very few courts that have chosen to burden the migrant worker with formalities and strict statutory readings. It is in this context that we review the recent decisions of the Federal District Court for the District of Maine.

V. A LOST CAUSE: STATES MISAPPLYING MSAWPA & THE EXAMPLE OF MAINE

The State of Maine is four percent the size of California²³⁴ but its problems with respect to migrant workers are, in many ways, more complicated. As recently as 1998, Benjamin Giuliani, executive director of the Maine Migrant Workers' Advocate Group, Inc. and founder of the Federation of the Mexican Community in New England, editorialized that the Maine state legislature and political body in general continue to ignore the working conditions of the migrant workers.²³⁵ It can be easily overlooked in a state whose population barely exceeds one and one quarter million people, that much of its industry from potatoes, raspberry farms, "blueberry barrens, broccoli fields, and apple orchards" to commercial forestry, depends upon migrant workers.²³⁶ As in many states, out-of-state contractors bring these workers into Maine.²³⁷ A desire to earn a wage undreamed of in their homeland, transience and oftentimes inability to speak English place these workers at the mercy of their contractors.²³⁸ Consequently, claims of abuses such as inadequate transportation, housing,

Inc., 96 F Supp. 2d 578, 630-31 (W.D. Tex. 1999); *Montelongo v. Meese*, 803 F.2d 1341, 1350 (5th Cir. 1986); *Stewart*, 804 F Supp. at 1499; *Saintida v. Tyre*, 783 F Supp. 1368, 1373 (S.D. Fla. 1992).

233. *Martinez*, 992 F.2d at 1001. See also *Saintida*, 783 F Supp. at 1377.

234. Haya El Nasser, *Immigration to Lead Population Boom in West Census Predicts Calif. Will Grow 56% by 2025*, USA TODAY, October 23, 1996, at 7A (exhibiting a computer analysis of U.S. Census Bureau by Paul Overberg).

235. Benjamin Giuliani, Editorial, *Farm Worker Safety Not Getting Comprehensive Attention It Deserves*, PORTLAND PRESS HERALD, July 30, 1998, at 11A (complaining that the "hand rake" is still widely used in the blueberry fields of Maine, years after César Chávez, by applying political pressure, had the "brazo del diablo" or short hoe banned in California).

236. See Tux Turkel, *Work in Maine's Woods Lures Wave of Migrants for Central American Recruits, The Difficult Job of Planting and Thinning Trees Here Means Both Opportunity and Risks*, PORTLAND PRESS HERALD, June 27, 1999, at 1A.

237. *Id.*

238. *Id.*

and health care have been progressively making their way to the courts.²³⁹ At first, these claims were received under a broad interpretation of the remedial intent of the statute in question.²⁴⁰

A. Background: Maine's Mood

In 1980, Richard Clark, a forty-three year old foreman of the sheep and cattle farm of DeCoster Egg Farms was butted by a ram and thrown to the ground breaking two teeth and injuring his back.²⁴¹ Clark filed an accident report describing the accident, but failed to specify any back pain.²⁴² Clark subsequently went to Florida where he was treated for back pain and filed for workmens' compensation benefits citing the incident at DeCoster's as the cause.²⁴³ DeCoster requested that benefits for Clark's back pain be denied on grounds that he had not given DeCoster notice of such pain as required by Maine law.²⁴⁴ The Workmens' Compensation Commission denied the claim for back injury and Clark filed an action in the Maine Superior Court and lost.²⁴⁵ Clark then appealed to the Maine Supreme Judicial Court.²⁴⁶ Justice Godfrey, interpreting the workmens' compensation requirements liberally, sustained the appeal on grounds that, at most, the "lack of specification of a back injury in his description . . .

239. See *id.*; see also, e.g., *Maine v. U.S. Dept. of Labor*, 770 F.2d 236 (1st Cir. 1985) (sustaining the DOL's decision not to award a grant to provide job training for migrant and seasonal workers to the highest scoring applicant on grounds that other factors had to be considered); *Ramirez v. DeCoster*, 194 F.R.D. 348 (D. Me. 2000) (denying that a group of migrant workers qualified under the MSAWPA as agricultural workers and failed to satisfy the elements of a class action); *Cortes v. Superior Forestry Serv., Inc.*, No. Civ. 99-CV-19-B, 2000 WL 760741 (D. Me. March 15, 2000) (finding that workers killed while traveling in a van supplied by their contractor for all necessary transportation and which was used for their transportation from Arkansas to Maine did not fall under the "ride sharing" exception to the state's Workmen's Compensation Act); *Estados Unidos Mexicanos v. DeCoster*, 69 F. Supp. 2d 168 (D. Me. 1999) (applying the State six-year statute of limitations in cases involving health and safety violations in lieu of the federal statute six-month statute under OSHA); *Sec'y of Labor v. DeCoster Egg Farms, Inc.*, No. 80-0134 P, 1982 WL 2165 *1 (D. Me. Feb 23, 1982) (stating that it is the employer's burden to produce records in "useable form" as required by FLSA); *State v. DeCoster*, 653 A.2d 891 (Me. 1995) (holding that the relationship between the employer and employee was one of a landlord/tenant even though the employees did not pay a rent and that employer was liable for purpose of the Civil Rights Act).

240. See, e.g., *DeCoster Egg Farms, Inc.*, No. 80-0134 P, 1982 WL 2165 *1; *DeCoster*, 653 A.2d 891; *Clark v. DeCoster Egg Farms and U. S. Fid. & Guar. Co.*, 421 A.2d 939 (Me. 1980).

241. *Clark*, 421 A.2d at 940.

242. *Id.*

243. *Id.* at 941.

244. *Id.* at 941 (citing ME. REV. STAT. ANN. tit. 39, § 63 (West 1978)).

245. *Id.* at 941.

246. *Id.* at 941.

should be characterized as an 'inaccuracy' . . . [and consequently] his written notice . . . was not invalid . . ."²⁴⁷

The *Clark* case, although not arising from a violation of the Act, exemplifies the extent to which Maine state courts would expand statutory interpretation when applying a remedial measure. Such interpretation generally will set the mood for both federal and state agencies charged with policing activity governed by remedial statutes and the state of Maine has been no exception.²⁴⁸ Nevertheless, despite the apparent aggressive efforts on the part of the state of Maine to broaden the net of protection, the district court has significantly narrowed its interpretation of the available remedial statutes.

Unlike the example set by Justice Godfrey in the *Clark* case and the subsequent actions of state agencies, where there is a question whether the Act applies, the Federal District Court for the District of Maine has chosen to read the terms of the Act narrowly.²⁴⁹ The most recent case, *Ramirez v. DeCoster*,²⁵⁰ offers a clear example of a reluctance on the part of Maine's federal district court to broaden its application of legal procedure and its definition of statutory terms when administering the law in cases involving migrant worker abuses.

247. *Id.*

248. In the last quarter century, federal and state agencies have also made obvious efforts to redress these abuses. In 1980, the U.S. DOL fined DeCoster for employing child labor and not paying overtime premium to approximately six hundred and fifty employees. *DeCoster Fined Millions a Federal Investigation Finds Dangerous and Oppressive Conditions at the Egg Farm in Turner*, PORTLAND PRESS HERALD, July 13, 1996, at 1A. Then, in June of 1988, DeCoster was fined \$46,250 for 184 violations "including knowingly hiring illegal aliens." *Id.* Later the same year, former employees charged that they were forced to live in substandard housing and forced to work overtime without compensation. *Id.* The next year, federal officials fined DeCoster for "knowingly employing and continuing to employ unauthorized workers." *Id.* In 1994, the Catholic Diocese of Maine charged that DeCoster interfered with its Hispanic workers' freedom to worship. *Id.* The following year, the Maine Supreme Judicial Court ruled that the company violated its workers' civil rights by refusing to allow visitors to meet with them in company-owned housing. *State v. DeCoster*, 653 A.2d 891, 892 (Me. 1995) (affirming a 1991 Superior Court ruling). The year 1996 brought several inspections by State officials and legislators who found substandard living conditions and fire hazards. *DeCoster Fined*, *supra*, at 1A. On July 12, 1996, the federal Occupational Safety and Health Administration fined DeCoster \$3.6 million dollars for what Labor Secretary, Robert Reich called "conditions . . . as dangerous and oppressive as any sweatshop we have seen." *Id.*

249. *E.g.*, *Cortes v. Superior Forestry Serv., Inc.*, No. CIV. 99-CV-19-B, 2000 WL 760741 (D. Me. March 15, 2000); *Ramirez v. DeCoster*, 194 F.R.D. 348 (D. Me. 2000); *but see ME Cherryfield Firm to Pay \$10,000 Fine, Migrant Blueberry Rakers Were Victims of Federal Labor Law Violation During 1998 Harvest*, BANGOR DAILY NEWS, available at 1999 WL 19808529 (reporting that the U.S. Department of Labor found Cheeryfield Foods jointly liable with FLC American Forestry for violations of MSAWPA).

250. 194 F.R.D. 348 (D. Me. 2000).

B. Ramirez v. DeCoster

In *Ramirez v. DeCoster*, DeCoster employees complained their employer “engaged in an overall pattern . . . of discrimination against workers of Mexican descent;” violated their rights under the Act with regard to both unsafe and unsanitary housing, as well as providing misleading information in the terms and conditions of employment; and breached their contract to provide free housing.²⁵¹ The plaintiffs moved for certification of their class with respect to all three claims.²⁵² DeCoster moved for summary judgment on all counts.²⁵³ Judge Hornby granted summary judgment on all but one count, individual charges of racial discrimination.²⁵⁴ Relying upon the Advisory Committee Notes for the rule governing class action suits, the court determined that the workers’ choice to seek compensatory and punitive damages in lieu of the equitable remedy of back pay precluded their representation as a class with regard to their discrimination claim.²⁵⁵

The court also reasoned that the request that DeCoster be enjoined from continuing its discriminatory practices was an insufficient remedy for those who had left its employment.²⁵⁶ Furthermore, because the plaintiffs may have been affected in “substantially different ways depending on such factors as the length and dates of employment, the type of employment, who his/her supervisor was, and the specific housing the worker lived in,” they could not be certified as a single class.²⁵⁷ In addition, the plaintiffs did not claim that each party experienced the same kind or degree of discrimination.²⁵⁸

Plaintiffs’ claims for fraud and breach of contract failed to meet the commonality and typicality requirements of the rule for certification of a class action.²⁵⁹ The court insisted that such claims were by their nature

251. *Id.* at 351–52.

252. *Id.* at 351.

253. *Id.*

254. *Id.*

255. *Id.* at 352. (citing FED. R. CIV. P. 23(b)(2), which requires that “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole” and its Advisory Committee notes state that Rule 23 (b)(2) “does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.”)

256. *Id.*

257. *Id.* at 352–53 (citation omitted).

258. *Id.* at 353 (referring to FED. R. CIV. P. 23(b)(3) that requires that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to all other available methods for the fair and efficient adjudication of the controversy”).

259. *Id.* at 355.

“fact-specific to each individual.”²⁶⁰ In addition, the court, by granting summary judgment to each claim, in essence disqualified those individuals as “proper representatives . . . if [a class] were to be certified.”²⁶¹

Finally, in a double whammy statement, the court first concluded that “processing eggs is ineligible for protection” under the Act and consequently rendered any class action regarding its violation moot.²⁶² Judge Hornby also found the workers to be neither migrant nor seasonal agricultural workers pursuant to the Act.²⁶³ In a confusing analysis, the court first assumed egg processing to be an agricultural function and the workers to be “absent overnight from [their] permanent place of residence,”²⁶⁴ two basic requirements of the Act.²⁶⁵

The court then proceeded to analyze the nature of “seasonal” work.²⁶⁶ Referring to the definition of “seasonal”²⁶⁷ and “temporary”²⁶⁸ provided by the Federal Labor Regulations and adopted by the Act, the court found that neither definition covered the workers.²⁶⁹ According to the court, it is not the intent of the workers or their decision regarding duration of employment that matters. Instead, the nature of the work itself determines the applicability of these terms.²⁷⁰ Apparently disregarding its previous assumption, the court proceeded to use the Code of Federal Regulations to deny that egg processing is an agricultural activity because it does not fall under the definition of “field work.”²⁷¹

Before leaving the subject of the Act’s applicability, Judge Hornby took a step to the side to comment that he understood what the “average layperson” might consider “migrant worker” to mean, i.e., those workers

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 356.

264. *Id.* (quoting 29 U.S.C. §1802(8)(A)).

265. 29 U.S.C. § 1802(8)(A) (“Except as provided in subparagraph (B), the term ‘migrant agricultural worker’ means an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.”).

266. *Id.*

267. 29 C.F.R. § 500.20(s)(1) (2000) states that “Labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind *exclusively performed at certain seasons or periods* of the year and which, from its nature, *may not be continuous or carried on throughout the year*. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.” *Id.* (emphasis added).

268. 29 C.F.R. § 500.20(s)(2) (2000) states that “[a] worker is employed on ‘other temporary basis’ where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, *employment, which is contemplated to continue indefinitely, is not temporary.*” *Id.* (emphasis added).

269. *Ramirez*, 194 F.R.D. at 356.

270. *Id.* at 357 n.9.

271. *Id.* at 357 (citing 29 C.F.R. § 500.20(r)(ii)).

who come from other countries to work temporarily in a strange land.²⁷² He insisted, however, that it is not his place to speak for these people, that is the job of Congress.²⁷³ Thus, the court assumed that Congress has chosen to define "migrant worker" contrary to the common sense of the "average layperson."²⁷⁴ On that point, Judge Hornby said, "the statutory language is clear and must control."²⁷⁵

Judge Hornby also insisted that the bulk of case law supports his interpretation with the exception of two cases.²⁷⁶ However, Judge Hornby then painfully stretched the Eleventh Circuit Court's broad interpretation of the statute's intent to fit his own.²⁷⁷ He excused the second case, from the Western District of Texas, that applied a broad reading of the statute as an example of letting one's emotions and sympathy override one's reason.²⁷⁸ The court, he said, could empathize with such feelings but it could only give "the protection which Congress has provided."²⁷⁹ Finally, because DeCoster's housing was available all year long, it could not qualify as a short-term lease arrangement.²⁸⁰ "[A]lthough the result is harsh," the Judge explained, "Maine law, as it currently exists, does not recognize an implied warranty [of habitability] here."²⁸¹

C. Cortes v. Superior Forestry Services, Inc

Two weeks prior to *Ramirez*, in *Cortes v. Superior Forestry Services, Inc.*,²⁸² Andreas Soriano Cortes (plaintiff) filed a negligence and wrongful death claim against a farm labor contractor, Superior Forestry, Inc.

272. *Id.* Although there may be some merit to the statement that the common conception of migrant workers is that they are strangers in a strange land working temporarily and then returning to their respective countries, it is by no means the case. The fact is that there are many migrant workers who are citizens of the United States, traveling from states such as Florida, Louisiana etc. to find agricultural work throughout the Union. For a very stark, if not bleak look at the status of migrant workers in the 1960s see Edward R. Murrow's documentary, *HARVEST OF SHAME* (CBS 1960).

273. *Ramirez*, 194 F.R.D. at 357.

274. *Id.*

275. *Id.* 29 U.S.C. §1802(8)(a) defines "migrant agricultural worker" as "an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence."

276. *Ramirez*, 194 F.R.D. at 357 (citing both *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500 (11th Cir. 1993) and *Castillo v. Case Farms of Ohio, Inc.*, 48 F. Supp. 2d 670 (W.D. Tex. 1999)).

277. *Id.* (citations omitted).

278. *Id.*

279. *Id.* at 358.

280. *Id.* at 360.

281. *Id.*

282. No. CIV. 99-CV-19-B, 2000 WL 760741, at *1 (D. Me. March 15, 2000).

(Superior).²⁸³ The plaintiff represented the estate of Lorenzo Soriano Cortes who was a passenger of Superior's van when it crashed on the way to work in Aroostook County.²⁸⁴ The Federal District Court for the District of Maine granted Superior summary judgment on grounds that plaintiff's claims were barred by the Maine Workers' Compensation Act (MWCA).²⁸⁵ The decision turned upon the use of the van.²⁸⁶ The court analyzed the applicability of a "rideshare" provision in the MWCA, which constituted an exception to workmens' compensation coverage and § 1854(d)(1) of the Act.²⁸⁷ This Section requires that, when available, "workers' compensation benefits shall be the exclusive remedy for loss . . . in the case of bodily injury or death in accordance with such State's workers' compensation law."²⁸⁸

Cortes was a Mexican migrant worker who had signed on with Superior in Tilly, Arkansas to perform "thinning" operations in the Maine woods.²⁸⁹ The van that was transporting Cortes to work when he was killed was the same van that brought him from Arkansas.²⁹⁰ It was the "sole source of transportation" for the workers and Superior bore all the expenses.²⁹¹ The driver of the van was also the crew foreman.²⁹² The plaintiff also alleged that the driver was traveling at an excessive speed.²⁹³ At the time of the crash, the van was carrying fifteen passengers.²⁹⁴

Judge Brody first dismissed any coverage under the Act pursuant to its workmens' compensation override clause.²⁹⁵ He then determined that although the "rideshare" provision "extended . . . [the] limited exception to the rule of workmens' compensation liability for employer-provided transportation to and from work," it did not apply when the vehicle also served as an "all-purpose" van.²⁹⁶ His conclusion was based in large part upon the "Maine Supreme Court's narrow construction" of the rideshare provision.²⁹⁷

283. *Id.* at *1.

284. *Id.*

285. *Id.*

286. *Id.* at *4.

287. *Id.* at *2 (citing ME. REV. STAT. ANN. tit. 39-A § 201(2) (West 2001) and 29 U.S.C. § 1854(d)(1) (1999) of the MSAWPA).

288. 29 U.S.C. § 1854(d)(1).

289. *Cortes*, 2000 WL 760741, at *1.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at *2.

295. *Id.*

296. *Id.* at *4.

297. *Id.*

D. Ramirez and Cortes Through a Common Law Filter

The decisions of both *Ramirez* and *Cortes* exemplify a struggle to understand the intent of the Act and to apply its definitions to the case at hand. However, an analysis of the Act and its terms cannot be accomplished in the vacuum of decisions by the Federal District Court for the District of Maine. A proper evaluation must include a fair sampling of all the law issuing from those States of the Union that depend upon migrant workers and must address their unique problems.

*1. Ramirez v. DeCoster**a. Side-Stepping the Remedial Intent of the Act*

In *Ramirez*, the court denied certification of the class for all the claims of racial discrimination, unsafe and unsanitary housing, and breach of contract.²⁹⁸ The court rejected claims of violations of the Act on grounds that the workers were not “migrant agricultural workers” pursuant to the Act, and consequently were not protected by it.²⁹⁹ It is important to first address the issue of whether plaintiffs met the definition of “migrant agricultural worker” before analyzing the court’s treatment of the other claims. As “migrant agricultural workers,” they are members of a protected class. In a series of very skilled judicial moves, however, the court in essence captured the remedial “queen” by refusing to recognize the plaintiffs’ status as migrant workers and opened the way to mate the issue of class certification.

Admitting that normally a court would be prone to determine class certification before studying the merits of the case, the court stated that for expediency’s sake it decided to first address defendant’s motion for summary judgment before determining class certification as to the claims regarding the Act.³⁰⁰ In doing so, the court avoided the pressure placed upon it by the liberal common law application of class certification as a preferred method for treating alleged violations of the Act. As has been said, the court first assumed that the “egg processing business” was “agricultural employment.”³⁰¹ The court also assumed that the workers were “absent overnight from [their] permanent place of residence.”³⁰² At this point the court needed to say no more. The court had defined the workers as “migrant agricultural workers” pursuant to the Act. Nevertheless, it

298. *Ramirez v. DeCoster*, 194 F.R.D. 348, 351–56 (D. Me. 2000).

299. *Id.* at 356–58.

300. *Id.* at 355.

301. *Id.* at 356.

302. *Id.*

then focused on the requirement that the workers be seasonal or temporary.³⁰³

In emphasizing the “continuous” nature of the work, the court chose to ignore the second sentence of 29 C.F.R. § 500.20(s)(1), which states that “[a] worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.”³⁰⁴ The court rejected the *Castillo* court’s interpretation that evaluated the “temporary nature” of the work under an “economic reality” filter.³⁰⁵ The *Ramirez* court felt that the judge in *Castillo* let his concern for the workers affect his interpretation of the Act.³⁰⁶ Yet in light of the majority of cases considering the remedial nature of the statute and the need to interpret its provisions liberally, it is the *Ramirez* court that got it wrong and let reason mislead it.

In arguing that pragmatic factors such as turnover, variation in labor demand and fluctuations in crop harvesting determine the nature of the work, which in turn determines its temporary nature, the *Castillo* court echoes the interpretation of many courts.³⁰⁷ To argue, as the *Ramirez* court does, that the definition must be found within a strict reading of the statute places the burden on the plaintiff and defeats the remedial purpose of the Act. The *Marshall*³⁰⁸ court’s insistence that these elements are terms of art intended to promote the remedial nature of the Act far better serves the Act’s purpose.

In contrast to the ease with which the *Ramirez* court dismissed *Castillo* as an anomaly, the strain it exerted in making *Caro-Galvan v. Curtis Richardson, Inc.* fit the mold is excruciating.³⁰⁹ The *Caro-Galvan* court steadfastly supported the *Marshall* “term of art” concept and simply held that all the facts must be taken into account in determining whether the work was temporary or seasonal.³¹⁰ The point made emphatically in *Caro-Galvan* was that it was Congressional intent to preserve the same broad protections as were originally provided in the FLCRA.³¹¹ Had the *Ramirez* court applied the “economic reality” filter to the situation at DeCoster’s Egg Farm, it could easily have found that the company relied

303. *Id.* (citation omitted).

304. 29 C.F.R. § 500.20(s)(1).

305. *Ramirez*, 194 F.R.D. at 357.

306. *Id.* at 357–58.

307. *E.g.*, *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500 (11th Cir. 1993); *Marshall v. Coastal Growers Ass’n*, 598 F.2d 521, 524 (9th Cir. 1979).

308. *Marshall v. Coastal Growers Ass’n*, 598 F.2d (9th Cir. 1979).

309. *Ramirez*, 194 F.R.D. at 357 (citation omitted).

310. *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1506–07 (11th Cir. 1993). The court accepted that “[c]ourts uniformly recognized that migrant worker was ‘a term of art, having no reference to workers with migratory tendencies.’” (citations omitted)

311. *Caro-Galvan*, 993 F.2d at 1507.

upon a continuous turnover so that it could maintain its low wage scale. The court could have imagined that workers, were in fact, rotating from various seasonal jobs and DeCoster's was but one stopover in a continuum of jobs that enabled them to work throughout the major portion of the year. When considered in this fashion, the workers in *Ramirez* are no different than the fern harvesters in *Caro-Galvan* who moved to other agricultural work when the market in ferns slowed. The burden of rebutting this presumption should be, and generally is, born by the defendant. By shifting the burden to the plaintiffs, the *Ramirez* court has only added to the already imbalanced power position favoring the defendant. It is precisely this imbalance that the Act intended to mitigate. To state, as *Ramirez* does, with a straight face that there is little case law on the appellate level to support a broad interpretation of "migrant agricultural worker" shows either a lack of interest or a docket that allows little time to research the issues properly.

b. Class Action: A Shoe-In

Once it is established that the workers were, at least with respect to the majority of case law, migrant workers, the ability to deny certification of a class for any of the claims becomes very difficult. The high deference accorded to the remedial nature of the Act should justify the application of its liberal standards to any other claims incidental to its violations. Reviewing the discrimination claim, Judge Hornby refused to certify the class on grounds that the damages sought were, for the most part, compensatory and punitive and "because individual issues predominate[d]."³¹² The court skipped over the first section of the federal rule regarding the class action that mandates the existence of numerosity, commonality, typicality and adequacy of representation.³¹³ Evidently it recognized that these critical four requirements had been met and moved directly to the "fairness" requirements of section (b) only one of which need be found to justify certification.³¹⁴ Had the court, however, performed an analysis of section (a) in light of common law interpretations when considering violations of the Act, it is inconceivable that it would not have found that all the claims met muster.

In light of the holding in *Haywood v. Barnes* that the number of claimants required should be determined based upon the "expediency and the inconvenience of trying individual lawsuits,"³¹⁵ one thousand claimants each demanding a jury trial easily clears the "numerosity" hurdle. The circumstances in *Ramirez* also meet the *Haywood* bar for "commonality" as

312. *Ramirez*, 194 F.R.D. at 351.

313. FED. R. CIV. P. 23(a).

314. FED. R. CIV. P. 23(b).

315. 109 F.R.D. 568, 575 (E.D.N.C. 1986).

representing "one common question out of many."³¹⁶ After all, the claimants alleged broad housing and sanitation abuses, as well as misrepresentation in the terms and conditions.³¹⁷ As previously discussed, typicality exists regardless of whether there are factual differences such as amount of damages and rests simply upon a similarity of legal theory. All of the *Ramirez* claimants alleged poor housing conditions and misleading terms of employment. Under *Haywood*, "typicality" existed. Finally, it is fair to assume that the firm of Friedman, Babcock & Gaythwaite, a firm very experienced in representing migrant workers, fulfilled the adequacy of representation requirement.³¹⁸

The court now only needed to find that one of the fairness issues apply. With regard to the discrimination claim, the court found that class certification was unwarranted for the following reasons: individual issues predominated; the laborers sought primarily compensatory and punitive damages; and demanded jury trials to assess them.³¹⁹ If the court, following the advisory notes, arrived at a possibly valid interpretation of Fed. R. Civ. P. 23(b)(3) with respect to the discrimination claim, the same restrictive interpretation would not have survived historical application when considering violations of the Act. *Haywood* has established that common questions must merely reflect some "significant aspect of the case."³²⁰ In *Ramirez*, that "significant aspect" is the violation of the Act's mandate that the employer provide adequate housing and properly disclose the terms and conditions of employment.³²¹

The court's second concern about the manageability of the case also runs counter to the broad and remedial position of most courts. As articulated in *Six (6) Mexican Workers v. Arizona Citrus Growers*, common law gives the court broad discretion with regard to damages and the form in which they may be awarded.³²² The *Ramirez* court could have converted the actual damage claim to one for liquid damages and then adopted some general form of disbursement.³²³ That would have afforded a unitary

316. *Id.*

317. *Ramirez*, 194 F.R.D. at 351.

318. Friedman, Babcock & Gaythwaite represented migrant workers in both the *Ramirez* and *Cortes* cases as well as the plaintiffs in *Estados Unidos Mexicanos v. DeCoster*, 59 F. Supp. 2d 120 (D. Me. 1999) and *Estados Unidos Mexicanos v. DeCoster*, 69 F. Supp. 2d 168 (D. Me. 1999).

319. *Ramirez*, 194 F.R.D. at 351.

320. *Haywood*, 109 F.R.D. at 581.

321. As an aside, one can also conclude that, with regard to the discrimination claim, it should be sufficient that claimants fell within the same racial classification without considering the various differences in injuries suffered.

322. 904 F.2d 1301, 1305-06 (9th Cir. 1990).

323. The plaintiffs did suggest that the trial be bifurcated. *Ramirez*, 194 F.R.D. at 354. They suggested that individualized damages be tried after a class action trial on liability. *Id.* There is no reason that at this point the court could not have intervened and made it's own suggestion that the damage claims be restructured to allow for a more equitable out-

form of relief that in turn would not have necessitated proof of injury from each member of the class.³²⁴ At the same time, it would mitigate the burden of expense that each member would carry if they were forced to litigate in separate jury trials. The foregoing consideration would also corroborate the fact that in such an instance, despite the court's assertion to the contrary, class action would be the "superior" method of adjudication.³²⁵

Although the court doubted the jury's ability to "weigh all of the proof within the liability stage and then apply the presumption . . . to each of [the] . . . individual workers,"³²⁶ the *Salazar-Calderon* solution seems more reasonable. The jury could have been permitted to make a general award determination and provide that the damages be disbursed equally to each member of the class. Finally, the same analysis, once applied to the discrimination claim as well, would weaken the court's argument that no justification for class certification existed. The court needed to first recognize that one of the purposes of the Act was to afford an underprivileged class a viable method of redress for injuries received as a consequence of the inequalities and vulnerabilities inherent in the class itself. Then the court was bound to facilitate the means of achieving that redress or remedy. To do otherwise flies in the face of Congressional intent and nullifies the Act's effectiveness.

To conclude, the most disappointing aspect of the court's analysis is that it did not even reach the question of class certification with regard to violations of the Act.³²⁷ It wedged itself immovably within a narrow and

come. This type of proactive measure is not uncommon in remedial suits concerning the MSAWPA and would resolve the *Ramirez* court's management concerns.

324. One might argue that if one employed this logic, a class member could recover without having been harmed. The convenience that certification of a class action would afford the class members as a whole far outweighs the risk that some members would be unduly compensated.

325. Here the objection might arise that class certification is confused with a review of the merits. It must be remembered, however, that Judge Hornby chose to review the merits as determinative whether class certification be considered.

326. *Ramirez*, 194 F.R.D. at 354.

327. *Id.* at 355. The court maintained that that although FED. R. CIV. P. 23(c)(1) mandates that the court shall make a determination as to class certification "as soon as practicable," there was ample support from other Circuits permitting it to go directly to the merits and grant summary judgment. *Ramirez*, 194 F.R.D. at 355. The damage caused to the plaintiffs case by this tactic is further evidenced by the ruling Judge Hornby made in July, 2001 with regard to an undisclosed settlement agreement reached by the parties before the original case went to trial. Prior to the initial hearing of the class action suit in *Ramirez v. Decoster*, 194 F.R.D. 348 (D. Me. 2000) (hereinafter *Ramirez I*), the parties had engaged in mediation. *Ramirez v. DeCoster*, 142 F Supp. 2d 104 (D. Me. 2001) (hereinafter *Ramirez II*). They put together a "detailed and comprehensive settlement agreement." 142 F Supp. 2d at 106. Senator Warren B. Rudman mediated the dispute in Portland, Maine. *Id.* DeCoster agreed to settle the matter for six million dollars. *Id.* at 107. In exchange the *Ramirez* class agreed to "use their best efforts to help lift" a very effective boycott which

had resulted in reaction to the allegations against DeCoster. *Id.* After the decisions handed down by Judge Hornby in the class action suit, the defendants (DeCoster) sought to take advantage of their newly enhanced negotiating position and withdraw from the former agreement on grounds that there was no “agreement to all material terms.” *Id.* at 106. The plaintiffs filed a motion to enforce with the Maine District Court. *Id.* After an evidentiary hearing held in January, 2001, Judge Hornby of the Maine District Court ruled that the agreement was enforceable. *Id.* at 106, 108.

Nevertheless, the settlement agreement was based upon a class action suit and had to be approved by the court. *Id.* (citing FED. R. CIV. P. 23(e)). In response to the defendants’ charge that the agreement did not define the class scope, Judge Hornby replied:

[a]fter all, a motion for class certification had been filed, and the entire dispute arises out of employment and housing relationships between the plaintiffs and the DeCoster defendants. The only “scope” issues possible were defining the ethnic group and the chronological years covered. It was in the defendants’ interest to have as broad a definition as possible for all the obvious reasons. Although there was some later suggestion by the plaintiffs to limit the class to plaintiffs of Mexican origin, when the defendants objected, the plaintiffs’ lawyers quickly agreed to the defendants’ definition that included all Hispanic plaintiffs.

Id. at 110. (citations omitted)

Judge Hornby, however, alluded that the real issue with regard to the class was “not to the existence of an agreement among the parties, but to whether a class action settlement is any longer possible in light of the fact that I have subsequently denied the motion to certify the class.” *Id.* at 111 n.9 (citation omitted). Judge Hornby stated that in the case of a “settlement-only class certification” the court does not have to consider “intractable management problems” that would otherwise deny class certification under FED. R. CIV. P. 23(b)(3)(D). *Id.* (quoting *Amchem Prod., Inc., v. Windsor*, 521 U.S. 591, 620 (1997).

Finally, supporting my contention that there was no barrier to class action in the initial suit, Judge Hornby stated: “My reasons for refusing to certify under 23(b)(3) were based largely upon the difficulties of managing the resulting jury trial. Those difficulties are not presented in a settlement. From all that appears, the class here meets the other requirements of the Rule.” *Id.* (citation omitted). Nevertheless, Judge Hornby left open the possibility that the settlement agreement may not be approved under FED. R. CIV. P. 23. *Id.* at 116.

Judge Hornby was given the opportunity to address that point on October 15, 2001, four months after his preliminary ruling in *Ramirez II*. *Ramirez v. DeCoster*, No. CIV. 98-186-PH, 2001 WL 1231258 *1 (D. Me. Oct. 15, 2001) [(hereinafter *Ramirez III*)]. In *Ramirez III*, to enforce the entire prior agreement, Judge Hornby was asked to “make a preliminary determination of fairness under FED. R. CIV. P. 23(e), and approve the distribution of notice to the class in preparation for a final fairness hearing on the settlement.” *Id.* at *1. The description of the settlement class is “[a]ll current and former Hispanic employees of any of the Defendants and/or their parents, subsidiaries, affiliates, partners, predecessors, successors, principals, agents and assigns who worked at the DeCoster Egg Farm between January 1, 1988 and February 21, 2000.” *Id.* DeCoster objected, insisting that performance of the settlement agreement with respect to the class is precluded by res judicata as a result of Judge Hornby’s refusal to certify the class in *Ramirez v. DeCoster*, 194 F.R.D. 348 (D.Me. 200) (*Ramirez I*). *Id.* Judge Hornby, in a tone of frustration caused by the necessity to “revisit [his] earlier Order denying class certification,” stated that a different, more “heightened attention” standard of review had to be applied with respect to certifying a class “in the settlement context,” *Id.* at *2. Settlements are meant to eliminate doubt of the outcome. *Id.* Because his MSAWPA ruling with respect to certification of a

misdirected evaluation of the definition of a “migrant worker.” To assert, as the court does, that “[t]he statutory language is clear and must control,”³²⁸ completely ignores the current of common law and contradicts the court’s own reliance on two cases to justify its interpretation.³²⁹ Essentially, the court applies the same scrutiny in reviewing measures specifically designed to be remedial, as it does to the general law of contracts.³³⁰ The court also took this same “plain wording” approach in its analysis of the *Cortes* case.

class is still subject to appeal there is doubt as to the outcome. *Id.* This doubt breathes life in to the settlement agreement with regard to the class. *Id.* In reviewing the requirements for certification of a class, Judge Hornby now found that the requirements of Federal Rules of Civil Procedure 23(a) were met, i.e., joinder was impracticable, there were common questions of both law and fact, the representative parties’ claims were typical of those of the class, and that counsel for the class was adequate. *Id.* at *2–3. Acceding that the spirit of his analysis in *Ramirez III* was inconsistent with that of *Ramirez I*, he proceeded to revisit his former rulings on commonality/typicality as well as summary judgment preclusion of the fraud and breach of contract claims. *Id.* at *3. Again, using a more liberal analysis, Judge Hornby found that these two elements did not bar certification. *Id.* at *4. He concluded that: “[i]f these conclusions are deemed inconsistent with my earlier ruling, then I overrule the earlier ruling.” *Id.* Revealing a repressed ire, Judge Hornby asserted that any mistakes made in *Ramirez I* should be taken care of in *Ramirez III* to clean up a mess caused by the “procedural nightmare” induced by the “undisclosed settlement.” *Id.* Dispensing with the required ability to manage the litigation, Judge Hornby found that the class also complies with Rule 23(b). *Id.* at *5.

Pointing out that his initial concern in *Ramirez I* was that damages would vary person to person, Judge Hornby, in *Ramirez III* conceded that “the common questions of law or fact predominate over the questions affecting only individual members.” *Id.* In striking contrast to his earlier refusal, in *Ramirez I*, to embrace the underlying remedial intent of the law, Judge Hornby admitted, in *Ramirez III*, that “[i]n the absence of a class action, it is likely that most members of the class will never have any recovery. [Consequently,] . . . class action is the superior method for fair and efficient adjudication.” *Id.* DeCoster argued in *Ramirez III* that the *Ramirez I* finding that the “class cannot be certified to the fraud and contract claims” was *res judicata* and to honor the settlement without those terms would require the court to modify the contract; something the court was not permitted to do. *Id.* at *6. In contrast to Judge Hornby’s previous insistence, in *Ramirez I*, not to go beyond the “four corners” of the Act in applying relief, in *Ramirez III*, he implied that DeCoster’s obvious attempt to circumvent the settlement terms was bad faith. *Id.* at *7. Accordingly, Judge Hornby certified the class for all the claims including fraud and contract and warned: “[i]f the Court of Appeals determines that I cannot certify the fraud and contract claims, then I will certify the class as described but without those claims and enforce the settlement agreement accordingly.” *Id.* at *8.

In summary, Judge Hornby, now apparently recognizes that his decision in *Ramirez I* subjected an already vulnerable class to further abuse by giving DeCoster fodder to invalidate a pre-trial settlement in the form of a summary judgment on the issue of class certification. To his credit, however, Judge Hornby attempts in *Ramirez III*, with an air of humility, to rectify his mistake in *Ramirez I*, i.e., he apparently has recognized the wolf beneath the wool suit.

328. *Ramirez*, 190 F.R.D. at 357.

329. *Id.* at 357–58.

330. *Id.* at 358–59.

2. *Cortes v. Superior Forestry Services, Inc.*a. *Workmens' Compensation vs. the Remedial Intent of the Act*

In 1990, the United States Supreme Court in deciding *Adams Fruit Co., Inc. v. Barrett*³³¹ held that State remedies could not supercede Federal remedies unless Congress expressly provided for such an exemption.³³² More narrowly, the Court held that Florida's state compensation remedy did not preempt an award for actual damages under § 1854 of the Act.³³³ In 1995, Congress enacted and President Clinton signed Public Law 104-49, which, in effect, reversed the narrow holding of *Adams Fruit*.³³⁴ The law is a result of concern that the *Adams Fruit* decision would adversely affect the farmers' ability to compete in a world market if they were subjected to a "dual liability [system] for their employees' workplace injuries."³³⁵ The law, however, is the product of a bipartisan effort to protect both farmer and worker.³³⁶ On the one hand, section one protects the farmer from the obligation to pay significant tort damages.³³⁷ On the other hand, section two provides for substantially increased statutory coverage if the injury is a result of specified circumstances.³³⁸ Although Congress recognized that it could not give preferential treatment to a class with regard to state workmens' compensation programs, it refused to remove the imperative remedial foundation of the Act by increasing statutory awards for abuses commonly found with regard to transportation of the migrant laborer.

The exception did not intend to eviscerate the remedial and protective measures of § 1841. Section 1841(c)(1) merely permits an employer to replace the insurance requirement of § 1841(b)(1)(C) with its workmens' compensation insurance.³³⁹ The Section expressly states that it does not exempt those circumstances that are not covered by the state's work-

331. 494 U.S. 638 (1990).

332. *Id.* at 647-49.

333. *Id.* at 650-51.

334. Monte B. Lake, *Adams Fruit Co. v. Barrett: Restoration of Workers' Compensation as the Exclusive Remedy for Workplace Injuries Under the Federal Migrant Law*, 6 SAN JOAQUIN AGRIC. L. REV. 69, 69 (1996).

335. *Id.* at 74-75.

336. *Id.* at 83.

337. *Id.* at 85 (referring to the amendment to § 504(d) of the MSAWPA).

338. *Id.* at 86-87. The maximum award for statutory damages was raised from \$500 to \$10,000 if any of four situations were present. The four fact patterns necessary are: (1) defendant knowingly allowed a driver to transport the workers under the influence of alcohol; (2) defendant had a record of prior MWSAPA motor violations; (3) defendant knowingly alters or removes a safety device required under the Act; and (4) violations of § 1841(b) (compliance to vehicular standards and regulations) when defendant is not properly registered under MSAWPA. *Id.*

339. 29 U.S.C. § 1841(c).

mens' compensation law.³⁴⁰ In such cases, the employer is to carry an additional "insurance policy or liability bond."³⁴¹ It is this fundamental concern of preserving the worker's protection while not unduly burdening the employer that the *Cortes* court severely eroded by granting summary judgment to the defendant.

b. "Business as Usual" Analysis

The *Cortes* court, consistent with the *Ramirez* court, applied a "business-as-usual" analysis of the Act with total disregard for the peculiar and unique circumstances of the migrant worker. The court based its decision on two cases, both of which dealt with a world far from the one the Act meant to protect.

The first case, *Boyce v. Potter*,³⁴² involved two painters who traveled to a worksite together and were involved in an accident.³⁴³ After the accident, both received workmens' compensation benefits. The passenger, Boyce, subsequently filed a negligence action against Potter, the driver.³⁴⁴ The court found that Boyce and Potter were "traveling employees" because travel was an "integral part of their job;" they were required to travel to various worksites without a fixed location; and their employer compensated them for their travel.³⁴⁵ Thus, the court reasoned, the greater risk exposure was an inherent characteristic of their employment.³⁴⁶ Because there was a "causal connection" between the accident and the employment, the activity was not exempted under the "ride-share" provision.³⁴⁷

In the second case, *Croteau-Robinson v. Merrill Trust/Fleet Bank*,³⁴⁸ a woman caught her shoe on a step as she descended a shuttle bus that transported her to and from a company provided parking lot and work.³⁴⁹ She had just returned from lunch.³⁵⁰ In this case, the plaintiff received money from the employer that covered the span of time from the date of injury to the date that workmens' compensation benefits would be received.³⁵¹ Upon filing for award, she was denied.³⁵² The case ended up in the Supreme Judicial Court's lap because the State Appellate Division of

340. § 1841(c)(1).

341. § 1841(c)(2).

342. 642 A.2d 1342 (Me. 1994).

343. *Id.* at 1343.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.* at 1344 (citing ME. REV. STAT. ANN. tit. 39, § 201(2) (West Supp. 1993)).

348. 669 A.2d 763 (Me. 1996).

349. *Id.* at 764.

350. *Id.*

351. *Id.*

352. *Id.*

Workmens' Compensation had ceased to exist and was replaced by the Workmens' Compensation Board, which in turn refused to review any pending cases.³⁵³ The plaintiff claimed that the summary refusal of the board to hear her appeal was a violation of her state constitutional rights of due process and equal opportunity.³⁵⁴ The court reasoned that the "ride-share" exemption did not apply to short jaunts back and forth from a parking lot to work.³⁵⁵ In this case, it must be noted that the plaintiff was seeking to be covered by workmens' compensation benefits.³⁵⁶

c. Another Look With the Act in Mind

Neither of these cases applies to the protections intended by the Act. The Congressional intent of the Act was to recognize and protect the migrant worker against those dangers to which the worker was vulnerable by the very nature of his work.³⁵⁷ Reliance upon the employer's mode of transportation is one of those inherent vulnerabilities. The amendment to the Act does not make workmens' compensation insurance the sole remedy in all cases. In *Cortes*, unlike the cases cited by the court, the workers had no alternative form of transportation. Just as an employer sponsored car-pool maintains full responsibility for the costs of the transportation, so did Superior. It must be remembered that Superior had picked up the workers in Tilley, Arkansas and had every intention of returning the workers to Tilley when they had completed their work. Although one does not think of such long distances and duration of time when imagining an average "commute," it was indeed a commute. In addition, the accident occurred when the van was transporting the workers from their temporary "home" to the worksite. These were not small jaunts to a parking lot. Nor were they "traveling employees." Migrant workers create temporary homes as they travel. For migrant workers, car-pooling is a way of life.

The Act is very specific as to what constitutes an inherent risk of employment.³⁵⁸ It is careful to exclude from its protection any transportation done in the course of employment.³⁵⁹ Riding a tractor in the course of performing farm duties is not considered under the section.³⁶⁰ On the other hand, transporting employees on a tractor from their homes to the

353. *Id.* at 764 n.2.

354. *Id.* (citing ME. REV. STAT. ANN. tit. 39, § 320 (West Supp. 1994)).

355. *Id.* at 765.

356. *Id.*

357. See *supra* notes 49–60 and accompanying text.

358. 29 U.S.C. § 1841(a)(2).

359. *Id.*

360. *Id.*

worksite is clearly covered.³⁶¹ In short, the Act takes a realistic position when it considers what activities constitute employment.

It has been said that Congress' intent is to make the workmens' compensation exclusion very narrow.³⁶² Congress intends to exclude only transportation that is "incidental" to the actual job.³⁶³ This illustrates how important it is that courts not treat circumstances surrounding migrant workers as "business-as-usual." With respect to the plight of the migrant workers, the landscape changes, the rules change, and the definition of terms change. In *Cortes*, there were several violations of the safety provisions of § 1841 that were beyond the scope of workmens' compensation insurance. By amending § 1841, Congress never intended to permit an employer to shield himself from the Act by making state workmens' compensation the sole remedy. This is inconsistent with Congress's intent as historically interpreted by the common law. It cannot be emphasized enough that Congress intended that all exceptions be interpreted narrowly because the Act is a remedial statute.³⁶⁴ Had the court reflected a moment upon its remedial obligations and looked to the intent of both the Act and the MWCA, it is difficult to accept that it would not have applied the remedy provided by the car-pool statute to the alleged flagrant violations of transportation safety.³⁶⁵ Nevertheless, in reality, it appears that the district court in Maine has refused to recognize the special nature and circumstances surrounding the life of a migrant worker. This attitude, however, not only sets it at odds with other Maine courts and legislature,³⁶⁶ but with national and international trends as well.

361. *Soto v. McLean*, 20 F.Supp. 2d 901, 911 (E.D.N.C. 1998).

362. *Id.* at 911-12.

363. *Id.*

364. *Id.* at 912.

365. One can only guess how Justice Godfrey, in light of *Clark v. DeCoster Egg Farms*, would have interpreted the statute.

366. In 1997, the Maine legislature enacted two laws that addressed the situation of migrant workers. One serves as a backup for the federal act with respect to housing standards. ME. REV. STAT. ANN. tit. 26, §§ 585 586 588 (West Supp. 2000). (The Housing Standards for Agricultural Workers defines an owner of such housing; applies standards identical to those in the MSWPA; and makes violation of the standards a civil crime). The other intends to focus special assistance on the migrant worker population of the State. ME. REV. STAT. ANN. tit. 26 § 1404 (West Supp. 2000). The Migrant and Immigrant Assistance. Outreach Project gives the Dept. of Labor the mandate to promote in coordination with employers, unions and associated groups the education of laws applicable to the migrants; facilitation of language interpretation sources and English as a second language programs; assistance "workers in obtaining services necessary to improve their health and safety and broaden their employment opportunities;" and any efforts to advocate for the redress of grievances or claims by way of providing access to legal services. Both of these laws not only recognize the need to afford special protection and remedial resources in case of abuses to the migrant worker but also take an affirmative step to attempt to ensure that they are not always vulnerable. That is, that by helping to educate the workers and

VI. SUGGESTED METHODS FOR MAINTAINING THE TENSION

A. *International Alternatives*

A need for proactive legislation with regard to migrant workers propelled a very important, although seemingly impractical international instrument to the foreground. In 1979, the United Nations General Assembly, led by Mexico, requested that an international working group draft a convention dealing with the general human rights of migrant workers in their countries of employment.³⁶⁷ This convention differs from several International Labor Organization instruments³⁶⁸ in that it also covers the migrant worker's family members.³⁶⁹ The convention, The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Convention), was finally opened for signatories in 1990.³⁷⁰ The final version exhibits a comprehensive listing of human rights specifically directed at the migrant worker and members of his family.³⁷¹ The instrument attempts to answer to what extent the standard of protection for migrant workers is to be determined by the State to which he migrates.³⁷²

There was a tremendous amount of controversy concerning the definitions of "migrant worker" and to what extent undocumented migrants were to be protected under the Convention.³⁷³ Part I (Articles 1 through 6) lays out the definition of terms.³⁷⁴ Article 1 defines the scope of the "migration process" as spanning from the point at which preparation for departure is begun to the time the migrant and his family

providing them with special resources, they will not always possess the qualities that make them vulnerable to the abuses that gave rise to a need for the Act in the first place.

367. Linda S. Bosniak, *State Sovereignty, Human Rights and the New UN Migrant Workers Convention*, 86 AM. SOC'Y INT'L L. PROC. 634, 634 (1992).

368. E.g., Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, ILO/C143 (1975) and Convention Concerning Migration for Employment, ILO/C97(1949), available at www.ilo.org. Neither one of these Conventions have been ratified by the United States.

369. Bosniak, *supra* note 367, at 634.

370. *Id.*

371. *Id.*

372. See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, 45 U.N. GAOR, 45th Sess., Supp. No. 49A, at 262, U.N. Doc. A/45/49, art. 1 (1990) (hereinafter *Int'l Migrant Workers Conv.*) The preamble of the Convention states that being fully aware of the "migration phenomenon, which involves millions of people and affects a large number of States in the international community," its intent was to "establish norms which may contribute to the harmonization of the attitudes of States through the acceptance of basic principles concerning the treatment of migrant workers and members of their families." *Id.*

373. Bosniak, *supra* note 367, at 636.

374. Int'l Conv., *supra* note 372.

return.³⁷⁵ Section one of Article 1, in its prohibition of any form of discrimination, also applies these protections to undocumented migrants.³⁷⁶ Article 2 defines a “migrant worker” as anyone who is or has been employed for any compensable “activity in a State of which he or she is not a national.”³⁷⁷ The “seasonal worker” is by definition one whose work is dependent upon the seasons.³⁷⁸ The category of “itinerant worker” is added to the list as a migrant worker who must go to another “State or States for short periods.”³⁷⁹

The Convention does not apply to State officials or representatives of international organizations.³⁸⁰ Nor does it apply to investors, refugees, students or workers employed offshore.³⁸¹ Finally, the “State of origin” is the State of which the worker is a national.³⁸² Because many of the Articles, in the aggregate, form a comprehensive listing of human rights already contained in other instruments, it can be inferred that they have been interpreted to protect the unique vulnerabilities of the migrant phenomenon.³⁸³

The Convention is very controversial and as of April 18, 2001, only sixteen States have ratified it.³⁸⁴ Twenty States must ratify the Convention before it can enter into force.³⁸⁵ Although its prospects are not good, it may become a “normative benchmark for groups working to improve the status of migrants.”³⁸⁶ The Convention may serve as a springboard for other possible alternatives to the highly unpredictable and arbitrary treatment of this special class of workers.

375. *Id.*

376. *Id.*

377. *Id.* at art. 2.

378. *Id.*

379. *Id.*

380. *Id.* at art. 3.

381. *Id.*

382. *Id.* at art. 6.

383. *Id.* Other applicable Articles include Article 10 which prohibits “degrading treatment or punishment,” *Id.* at art. 10; Article 12 which guarantees the right to religious freedom, *Id.* at art. 12; Article 25 insists upon the right to good work conditions, *Id.* at art 25; the right to social security, *Id.* at art 27; the right to emergency medical care, *Id.* at art 28; and the right to education *Id.* at art. 30.

384. Statistics are available at <http://www.unhchr.ch/tbs/doc.nsf>.

385. *Id.*

386. Bosniak, *supra* note 367, at 638.

B. National Alternatives

In some respects, there is a tendency today to turn back the clocks to the time of the “bracero” program of the 40s and 50s.³⁸⁷ Congress is reviewing the H-2A federal program that permits Mexican migrant workers to enter the U.S. for a specified period.³⁸⁸ Recent estimates calculate that there are over 800,000 illegal migrant farmers in the U.S., or 52 percent of all farm workers.³⁸⁹ The Immigration Reform and Control Act (IRCA) enacted by Congress in 1986 attempted to remedy this problem.³⁹⁰ The IRCA, for the first time, made the employment of an illegal migrant punishable by fine or incarceration.³⁹¹ On the other hand, the IRCA offered an amnesty provision.³⁹² The provision grants both legal status to undocumented workers who have been in the U.S. since 1982 and, through the Special Agricultural Workers program, permits illegal workers with perishable crop experience to apply for permanent resident status.³⁹³ A major purpose of the IRCA is to insure the legal rights of an important part of the U.S. economy, the migrant worker.³⁹⁴ It has failed, however, to stem the flow of undocumented migrants.

Despite the 1986 U.S. amnesty permitting the absorption of 1.1 million illegal Mexican migrants, Congress is currently considering an extension of that amnesty to protect the estimated 800,000 workers currently employed on U.S. farms.³⁹⁵ The purpose of the amnesty is to relieve the tensions between farmers using such labor, agencies attempting to enforce the laws that prohibit the practice of employing illegal migrants, and those complying with the tedious and burdensome “redtape” of the “guest worker program.”³⁹⁶

In 1995, Congress amended the awkward H-2 guest worker program and renamed it the H-2A program.³⁹⁷ This program is designed to facilitate the importation of foreign labor by agricultural employers in times of need.³⁹⁸ The government issues non-immigrant visas for H-2A workers after the Department of Justice (DOJ), through the Immigration and Naturalization Service (INS), approves the employer’s petition to bring in

387. Anthony DePalma, ‘A Tyrannical Situation’ Farmers Caught in Conflict Over Illegal Migrant Workers, N.Y. TIMES, Oct. 3, 2000, at C1.

388. *Id.*

389. *Id.*

390. Ross, *supra* note 43, at 275.

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

395. DePalma, *supra* note 387.

396. *Id.* See also Ross, *supra* note 43, at 276.

397. Ross, *supra* note 43, at 276.

398. *Id.*

workers.³⁹⁹ The DOJ cannot accept the application until the DOL has approved the terms of employment, e.g., wages and working conditions.⁴⁰⁰ The United States Department of Agriculture performs surveys to determine wage scales.⁴⁰¹ Because the H-2A program is designed to protect the U.S. agricultural worker as much as it is to facilitate the use of foreign migrants by United States' farmers, it creates a tension that ultimately frustrates all concerned.

In *Vega v. Nourse Farms, Inc.*,⁴⁰² the Federal District Court for the District of Massachusetts found that there was a genuine question of fact concerning an apple farm's liability for damages pursuant to both the "H-2A provisions" of the Immigration and Nationality Act of 1952 and the Act.⁴⁰³ Anticipating a labor shortage, the apple farm requested former workers from Puerto Rico to sign in at the local employment agency to accept the offer and prepare for the trip.⁴⁰⁴ At the same time, the farm applied for H-2A certification with the Employment Training Agency for approval to hire eight foreign workers.⁴⁰⁵ However, due to technical and clerical errors the Puerto Rican workers were not able to formally accept the offer until the same week that the foreign workers were arriving from Jamaica.⁴⁰⁶ Approximately a week later, the farm told the Division of Employment Training that it no longer needed the Puerto Rican Workers, some of whom had already embarked on their trip to the farm.⁴⁰⁷ In such situations the H-2A program requires that the employer hire the domestic workers for a minimum of fifty-percent of the available time.⁴⁰⁸ The court

399. *Id.* at 276-77.

400. *Id.* at 277.

401. *Id.*

402. 62 F.Supp.2d 334 (D. Mass. 1999).

403. *Id.* at 340-46 (finding that the plaintiffs had a private right of action as remedy for damages incurred due to violations of the "H2-A provision" of the INA as amended, 8 U.S.C. § 1101(a)(15)(H)(ii), § 1188 and 20 C.F.R. § 655.0 et seq. and the AWP, 29 U.S.C. §§ 1821 et seq.)

404. *Id.* at 338.

405. *Id.*

406. *Id.* at 338-39.

407. *Id.* at 339.

408. *Id.* at 335-38. The court explains that in 1986 Congress passed the Immigration Reform and Control Act which, among other things, divided H-2 workers into temporary agricultural workers (H-2A workers) and non-agricultural workers (H-2B workers). *See id.* at 335. In order to qualify for approval to use foreign workers the applicant must be able to show that it has used all available domestic workers through positive recruitment and that the employment of the foreign workers will in no way affect adversely the "wages and working conditions of workers in the United States similarly employed." *Id.* at 336. After the applicant has submitted his request a copy of it automatically goes to the interstate clearance system by way of the employer's local public employment office. *See id.* The ICS in turn searches the U.S. for potential workers to fill the positions available. *See id.* at 337. Once the H-2A workers depart their homeland any domestic workers recruited by the ICS or as a result of the "positive recruitment" of the employer are guaranteed an

found that the stipulated facts showed a violation of the IRCA with regard to the fifty-percent rule; a violation of the Act which requires that full disclosure of working terms and conditions be provided prior to the departure of the migrant worker; and various breach of contract laws.⁴⁰⁹

The H-2A program also harbors several administrative problems.⁴¹⁰ A sixty-day advance notice of needed labor causes employers to submit applications in anticipation of work that may or may not materialize.⁴¹¹ This in turn can leave migrant workers without income until work arrives.⁴¹² Finally, delays and inefficient processing of applications combined with the complexity of the program creates confusion and risk of noncompliance on the part of the applicants.⁴¹³ Suggested solutions range from a need to amend the existing immigration laws, to a complete elimination of restrictions on the flow of migrant workers within the American continents.

One attempt to rectify the problem came from Representative Richard W. Pombo who introduced H.R. 4548 on May 25, 2000.⁴¹⁴ The Bill proposed to grant an unlimited number of new "H-2C" visas to be valid

employment term equivalent to fifty-percent of the required work period. *See id.* At the same time this rule exonerates the employer "from his employment obligations to the displaced [foreign] worker." *Id.* In no case shall the employer "treat domestic workers hired under [the fifty-percent] rule less favorably than the H-2A workers. *See id.* There are only two exceptions to the fifty-percent rule: if a person "willfully and knowingly withhold[s] domestic workers" to force hire or, if certified to do so, an agricultural association chooses to transfer the workers to a different site *See id.*

409. *Id.* at 340-46.

410. Ross, *supra* note 43, at 277.

411. *Id.*

412. *Id.*

413. *Id.* In a House Report regarding the H-2A Temporary Agricultural Worker Program, a grower testified that:

[t]he current H-2A temporary agricultural worker program is not working for three principal reasons. One is the structural problems built into the program. [The Department of Labor] ignored some of the most important of the H-2A streamlining provisions of the Immigration Reform and Control Act. [Second,] the program is administered in a highly adversarial fashion. DOL regards H-2A applicants as potential, if not actual, lawbreakers and acts as though its mission is to keep employers out of the program rather than to help them use this program which Congress provided. The third reason the program is not working has to do with compliance enforcement and litigation. So-called farmworker advocates have for years strongly opposed the H-2A program. They have made both the DOL and H-2A users targets for harassment and litigation. They have attempted to accomplish in the courts what they were unable to accomplish in Congress.

H.R. REP. NO. 106-1048 (2001), 2001 WL 67919.

414. Agricultural Opportunities Act of 2000, H.R. 4548, 106th Cong. (2000).

up to ten months with a possible extension of two additional months.⁴¹⁵ The Bill also proposed creating a “central registry of American agricultural workers” under the Labor Department which would automatically make foreign workers available if there were no qualified American workers to do the job.⁴¹⁶ Nevertheless, its thrust was to protect the interests of U.S. agricultural workers and farmers, and leaves any protection of foreign migrant agricultural workers to the Act.

Vicente Fox, the President of Mexico, has proposed that Mexican workers be permitted “to cross the Rio Grande as easily as the products that make up the \$196 billion in two-way trade.”⁴¹⁷ In his view, the worker is “an asset” to be considered as a commodity to be traded freely in a free market economy.⁴¹⁸ At first glance this suggestion appears to be as radical and unworkable as the Convention; however, it starts to become more attractive as the cry for relief from the United States farmers takes on an increasingly cacophonous tone.⁴¹⁹ The U.S. farmers are listening to President Fox when he points out the absurdity of spending over \$1 billion to patrol the U.S. border with México when the U.S. businesses need the workers.⁴²⁰ It does not seem to make sense to spend money on a system that is not working.⁴²¹ The need for labor is fueling a competition that can only benefit the migrant, whether in terms of better housing designed especially for the migrant phenomenon,⁴²² or aggressive recruitment by a state governor to replace a rapidly aging workforce.⁴²³ At any rate, whatever solution surfaces will have to balance the considerations of the farmers’ needs with the enforcement of laws aimed at the protection of their workers—legal and illegal.

415. *Id.*

416. *Id.* The registry mechanism reduced the waiting period from 45 days under the H-2A program to 28 days. It also provided emergency measures to protect the needs of the grower. It still barred the hiring of illegal aliens and place its emphasis upon the protection of American workers first, American growers second and leaves any protection of the foreign migrant worker to existing remedial statutes. *See id.*

417. DePalma, *supra* note 387.

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.* The article quotes the General Accounting Office as estimating that 52% of the 1.6 million farm workers are in the U.S. illegally.

422. Julie V. Iovine, *Not Just a Roof, but Roots for a Season*, N.Y. TIMES, Oct. 26, 2000, at D1 (discussing housing designed with the migrant worker in mind as an inducement to work for a Pennsylvania fruit farmer).

423. Pam Beluck, *Short of People, Iowa Seeks to be Ellis Island of Midwest*, N.Y. TIMES, Aug. 28, 2000, at A1. (Governor Tom Vilsack of Iowa proposed setting up “immigration enterprise zones”).

VII. CONCLUSION

There has been a gradual evolution in the agricultural sector. It corresponds with the increased need for labor and the ability to access it when and where it is most effective. This need and the need to protect the labor force, if for no other reason than to guarantee its future availability, creates a tension in the law. The Act represents an attempt to maintain a balance between these two forces. To properly serve both interests, the Act must be susceptible to growth and change. When an imbalance occurs on either side of the fulcrum, Congress will be expected to react and to reestablish equilibrium. Congress, however, does not oversee nor adjudicate its laws. The judiciary interprets the laws so they can be properly enforced. To properly enforce the law, there will have to be clear judicial guidelines. These guidelines, in turn, must reflect the intent of the law. When provisions of the law are intended to be remedial, common law demands that they be interpreted broadly in a light most favorable to the protected party. A “plain reading” of the statute cannot be tolerated if it fails to serve the interest of the migrant worker.

This remedial nature will not be confined to the Act, but must flow over into the application of any other statute that may be incidental to the case at hand. In reviewing cases involving the migrant worker, it can never be business-as-usual. Rather, the spirit of the Act and international concern as reflected in the Convention should prevail and color the interpretation of all appropriate statutes that might touch on the lives of the migrant workers.

Finally, in interpreting a federal law, state and federal courts should review it within the context of the judicial opinions of all fifty states. Doing otherwise, jeopardizes the intended remedy and defeats its deterrence effect. The *Ramirez* and *Cortes* decisions stand as inexplicable variances in the law—examples of anomalies to be avoided. The enormous imbalance of power between a migrant worker and the employer demands that there be a rebuttable presumption of the defendant’s liability. To describe the workers as migratory, thereby giving one the sense that they do not belong, is terribly misleading. In a sense, they are citizens of every state they visit and will not, as Wally would have us believe, go away.