

Using Unfair Competition Law to Deter Undocumented Immigration: Examining the Broader Implications of Recent California Litigation

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Stained fingers and sunburned skin have destroyed his youthful appearance. Juan's stocky five-foot frame appears much older than that of a man in his mid-twenties. He used to enjoy the glistening southwestern sun, but now the California rays have become his nemesis. The boss man sits comfortably in his air-conditioned 4 x 4. "Pick faster, you're too slow!" The owner of the blueberry farm has a quota. No quota, no pay. Simple rules for the poor. Drenched from the pounding humidity, Juan's picking becomes more frantic in speed. He is falling behind. He needs twelve more pounds of blueberries. Those damn flies buzzing in his ears. He can't think, his thoughts lost, so far away. Yet, off in the distance, Juan swears he can see his shanty town of Vera Cruz. He hears his mother's wails and his children's cries of hunger pains. His family of eight is longing for his return. Surely, his pockets will be filled with dollars, greenbacks. It must be true! He has lost so much, his father, his youth, and now he is losing his mind. "Mexican, what is your problem?" "Why you picking so slow?"¹

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1. I have opened up my legal analysis with this interpretive account of a blueberry laborer. I have done this for a very important reason, which is to keep the focus on the human impact involved in this debate. The human laborers who work our fields, clean our cars, and landscape our homes are part and parcel to this lawsuit and other suits that could follow. This account is based on many personal interactions I have had with migrant workers. While many have been confronted with the reality that it is not

I. INTRODUCTION

His name doesn't matter. He picks blueberries, and he has a quota. He is an undocumented immigrant working for a wage that few native-born Americans will accept.² Amidst the drum-beat of anti-immigrant rhetoric and sweeping nativist sentiments,³ the human dimension of undocumented immigration almost never reaches us.⁴ There are thousands of "Juans" toiling on the farms of California. What happens to him or the count-

always greener on the other side of the fence, there are still more opportunities. Even with such hardships, the undocumented worker finds hope.

2. See generally Kari Lydersen, Guest Workers Seek Global Horizons: U.S. Company Exploits Migrant Labor, *DUST IN MY EYES*, Nov. 3, 2006, <http://dusteye.wordpress.com/2006/12/29/us-company-exploits-migrant-labor/>.

3. In this context, I refer to the current phenomenon in which the politicians and media personalities routinely exaggerate the severity of an impending disaster or threat. Politicians and media personalities are in positions of influence and have the ability to shape public opinions. Driven by their personal agendas, they routinely project a false sense of future calamity. Whether print, radio, or television, the media has been notorious in lambasting immigrants and making a case for the harm they cause in society. For example, CNN anchor Lou Dobbs has been an outspoken voice on the immigration topic, such that on his show, *Lou Dobbs Tonight*, he routinely spells out the dangers of not patrolling on the Southern U.S. borders in the segment "Broken Borders:"

Dobbs' tone on immigration is consistently alarmist; he warns his viewers (3/31/06) of Mexican immigrants who see themselves as an "army of invaders" intent upon reannexing parts of the Southwestern U.S. to Mexico, announces (11/19/03) that "illegal alien smugglers and drug traffickers are on the verge of ruining some of our national treasures," and declares (4/14/05) that "the invasion of illegal aliens is threatening the health of many Americans" through "deadly imports" of diseases like leprosy and malaria.

Fairness and Accuracy In Reporting (FAIR), *CNN Immigration Problem: Is Dobbs the Exception-or the Rule?*, April 24, 2006, <http://www.fair.org/index.php?page=2867>.

Lou Dobbs is not alone. His fellow CNN colleagues Jack Cafferty as well as radio and television host Glenn Beck have made on-air, negatively slanted comments about immigrants. *Id.* An article by the Southern Poverty Law Center notes:

A new study of media coverage shows that a large number of daily newspapers wildly exaggerated the number of volunteers who actually took part in the Minuteman Project, a vigilante "citizens' border patrol" operation that took place in southeastern Arizona over the month of April 2005.

SOUTHERN POVERTY LAW CENTER, *INTELLIGENCE REPORT: ANTI-IMMIGRATION MOVEMENT NEWSPAPERS INFLATED MINUTEMAN NUMBERS REPORT FINDS*, <http://www.splcenter.org/intel/intelreport/article.jsp?aid=635>.

4. I have done a detailed analysis of this human dimension of immigration in a forthcoming article. See Saby Ghoshray, *Is There a Human Rights Dimension to Immigration? Seeking Clarity through the Prism of Morality and Human Survival*, 84 *DEN. U. L. REV.* __ (forthcoming 2007).

less others is not the focus here. Rather, the policy issues and the legal storms brewing in this country, which emanate from these laborers' work, whether legal or illegal, form the basis of this inquiry.

I don't know what happened to "Juan" the blueberry laborer, but his story forms the focal point behind one of the most novel lawsuits recently filed in California. In August 2006, a Santa Monica-based lawyer, David Klehm, filed a suit on behalf of Global Horizons, Incorporated against Munger Brothers, LLC for alleged violations of California's state antitrust statute (the Cartwright Act),⁵ breach of contract and intentional interference with economic benefit.⁶ According to the lawsuit, AgriLabor,⁷ a division of Global Horizons, Inc., had a contract to provide farm workers to help Munger Brothers pick blueberries over a nine-week harvest period from April to June.⁸ The suit alleged that by hiring illegal immigrants, the defendant, Munger Brothers, unfairly gained an economic advantage and, in the process, hurt the plaintiff's business.⁹

5. CAL. BUS. AND PROF. CODE §§ 16720 - 16728 (Deering 2007).

6. See Complaint of the Plaintiff, Global Horizons, Inc. v. Munger Bros., LLC, 2006 CA Super. Ct. Pleadings LEXIS 923 (Cal. Super. Ct. 2006) (No. S1500CV258904) ("Complaint").

7. AgriLabor says it brings farm workers to the United States legally and pays for their airfare and housing. Workers are given H2A visas, which are issued for temporary or seasonal agricultural employment. To obtain an H2A visa, a company must show U.S. workers are not available and wages and conditions meet regional standards, according to the U.S. Citizenship and Immigration Service. Amy Taxin, *Suit Contends Illegal Pickers Undercut Firm*, ORANGE COUNTY REGISTER, Aug. 22, 2006, available at http://www.ocregister.com/ocregister/homepage/abox/article_1250390.php.

8. AgriLabor signed a contract with Munger Brothers, LLC in Delano in February to provide workers for a nine-week blueberry harvest. Under the contract, AgriLabor would receive \$14 per hour for each worker. About \$9 per hour went to the workers and the remainder went to AgriLabor for workers' transportation, housing costs, and for company profits, according to AgriLabor's attorney, David Klehm. AgriLabor was expected to provide more workers as the harvest progressed. For example, AgriLabor provided 40 workers during the first week and was expected to provide as many as 600 workers during the peak harvest. AgriLabor says its workers were picking an average of 9.5 pounds of blueberries per hour, similar to other laborers on Munger farms. Munger had set target rates for picking that rose during the harvest. For example, Munger expected workers would pick 19.2 pounds of berries per hour on the second pass of the season, according to the suit. Taxin, *supra* note 7.

9. *Id.*

The anatomy of *Global Horizons, Inc. v. Munger Bros., LLC* is important on several grounds. In the first, it is necessary to understand the legal doctrines at play. The *Global Horizons* lawsuit could very well be a harbinger of things to come.¹⁰ Klehm's focus is to use antitrust laws, which prohibit companies from conspiring to prevent competition, when dealing with immigration-related issues. Interestingly, *Global Horizons* does not contain a claim under California Business and Professions Code section 17200, California's Unfair Competition Law (UCL).¹¹ Even though *Global Horizons*, in its current form, does not explicitly invoke UCL claims, legal commentators feel UCL claims are probably the wave of the future when filing similar suits to deter the hiring of illegal immigrants.¹² This is the first

10. This lawsuit has stoked the legal interest of many as it is a precedent-setter: Legal experts said these cases could be difficult to win. 'It's clearly a novel strategy, but it may reflect desperation as well as novelty,' said Harley Shaiken, a UC-Berkeley professor who studies labor issues. Under California statutes, plaintiffs must prove that a competitor directly harmed their business. 'You have to prove intent, that real damages were suffered,' Shaiken said, and there are 'endless reasons' that a defendant could marshal against that claim. 'The suit reflects a real anger that's out there, but it's unlikely to change much on a firm-by-firm or case-by-case basis,' he said. Only Congress can change the nation's immigration laws, and 'Congress is unable to act.'

See Peter Prengaman, *Business Owners Sue Firms Accused of Hiring Illegal Aliens*, ASSOCIATED PRESS (Los Angeles), August 23, 2006, available at <http://www.alipac.us/modules.php?name=news&file=print&sid=1458>.

11. California's Unfair Competition Act, CAL BUS. AND PROF. CODE §§ 17200-17210 (Deering 2007), prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising"; such unfair competition is unlawful as to any person "who engages, has engaged, or proposes to engage" in it. See *id.* § 17203. Besides having a very expansive reach due to its liberal conceptions, the statute's uniqueness comes from its unique standing provisions, whereby a private party may bring an action for injunctive relief acting "for the interests of itself, its members or the general public." See *id.* §§ 17204 and 17204.5.

12. According to news reports, David Klehm said he will file up to 10 lawsuits in the coming months on behalf of business owners who accuse competitors of undercutting them by hiring illegal aliens willing to work for dirt-cheap wages and long hours with no overtime. He is quoted as saying, "I'm not trying to make a political statement here . . . I feel strongly about wanting to help the business owners who are having a tough time out there." According to reports, Klehm has never filed a lawsuit under California's Business & Professions Code § 17200 and is not aware of any precedent for pursuing employers of illegal aliens under UCL, but was prompted to pursue the UCL claims after hearing about problems associated with illegal immigration from doctors, hospital officials and other clients. In addition, according to UCL expert Kimberly Kralowec, "A narrowly-tailored action, alleging that one

time anyone in the country has actually contemplated using state civil law to bring legal actions against employers of illegal aliens. While most elements of Klehm's lawsuit, in its present form, will be difficult to prevail upon, UCL claims are the most likely to hold water. Therefore, this article will heavily focus on analyzing the viability of UCL claims and the policy implications of using UCLs for this purpose both nationally and in North Carolina.

Now, turning our attention to the causes of action contained in the *Global Horizons* lawsuit, the primary claim is breach of contract.¹³ Specifically, the complaint contends the grower breached its contract with the plaintiff by setting unreasonable or unattainable production requirements and only applying the requirements against the plaintiff and its workers as an excuse to terminate the contract.¹⁴ The complaint also alleges a violation of California's antitrust laws, in that other labor providers and the grower violated the laws by using cheap, undocumented workers in restraint of trade.¹⁵ Finally, *Global Horizons* alleges intentional interference with economic benefit.¹⁶ Specifically, the complaint alleges the defendant labor providers intentionally interfered with the business relationship the plaintiff had with the grower.¹⁷ The plaintiffs are seeking treble damages as to the state antitrust claim and punitive damages as to the intentional interference claim.¹⁸ As of this writing, an Amended Complaint has been filed by the plaintiff setting out substantially the same allegations. A hearing on the defendants' Motion for Demurrer is scheduled for May 1, 2007, in Kern County Superior Court. The plaintiffs' attorney has indicated more suits will follow.¹⁹

Second, *Global Horizons* is particularly important because it compels us to take a retrospective side glance as to the ambience

competitor's specific violations of law caused another competitor to suffer identifiable harm, might be the best approach." Cheryl Miller, *UCL Suits to Target Illegal Hiring*, THE RECORDER, July 7, 2006, available at <http://www.law.com/jsp/ca/PubArticleFriendlyCA.jsp?id=1152176730325>.

13. See Complaint at **5-11.

14. *Id.* at **7-8.

15. *Id.* at **10-12.

16. *Id.* at **14-17.

17. *Id.* at **16-17.

18. *Id.* at **18-19.

19. See Taxin, *supra* note 7.

that allowed for this suit to germinate. This lawsuit emanates from the current immigration debate in the U.S., an issue more contentious than ever, a debate more politicized than ever.²⁰ Sidestepping the humanistic dimension of immigration, the current debate in the U.S. centers on immigration's economic impact on native workers,²¹ security concerns,²² and, as such, produces a much-distorted view of immigration. Existing economic literature and empirical economic studies suggest the public hue and cry about losing economic advantages to immigration is without merit.²³ Yet, there persists the perception that

20. The politicization of the immigration debate is evident from the anti-immigration agendas openly exhibited by policy makers in various ordinances and zoning codes. For example, Pennsylvania passed the Illegal Immigration Relief Act. The name of the Act has a tone of concern for the illegal immigrant. However, the Act does not provide relief; rather, it mandates that all city documents be printed only in English and that landlords renting to undocumented workers be fined \$1,000. See Mary K. Brunskill, *Pennsylvania City Passes Strict Anti-Immigration Act*, July 14, 2006, available at <http://www.allheadlinenews.com/articles/7004216591>. A second example is evident in Virginia. There, officials came up with a clever way to discriminate against immigrants who live in joint family structures. Using city planning rules, the city announced the "anti-crowding ordinance," which defined the number of people in a home for it be classified as overcrowded. Further, the city defined what make-up of individuals in a relationship creates a family, and can reside together. This ordinance for example, would determine not only the number of occupants that would be considered breaking city zoning code, but would also fine violators because they were not immediate family members. To ensure the enforcement of the code, the city provided a toll-free hotline so Virginia residents could call and anonymously report overcrowding in their neighborhoods. See Stephanie McCrummen, *Anti-Crowding Law Repealed: Latinos Were Focus of Manassas Ban on Extended Families in Homes*, WASHINGTON POST, Jan. 12, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/11/AR2006011102532.html>.

21. See Saby Ghoshray, *Race, Symmetry and False Consciousness: Piercing the Veil of America's Anti-Immigration Policy*, 15 TEMP. POL. & CIV. RTS. L. REV. ___ (forthcoming 2007) (containing a lengthy discussion of this issue). There are also various sources relating to the economic impact of immigration studies. See Howard F. Chang, *Immigration Restrictions as Employment Discrimination*, 78 CHI.-KENT L. REV. 291 (2002); Rachel M. Friedberg and Jennifer Hunt, *The Impact of Immigrants on Host Country Wages, Employment and Growth*, 9 J. ECON. PERSPECTIVES 23 (1995); Julian L. Simon, *Public Expenditures on Immigrants to the United States, Past and Present*, 22 POP. & DEV. REV. 99 (1996); Scott Thurm, *Asian Immigrants Are Reshaping Silicon Valley*, WALL ST. J., June 24, 1999, at B6.

22. See generally MUZAFFAR A. CHISHTI, ET AL., *AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11* (Migration Policy Institute 2003), available at http://www.migrationpolicy.org/pubs/Americas_Challenges.pdf.

23. See *id.*

illegal aliens or foreigners are taking all the jobs from native citizens and that these same immigrants are overburdening the welfare system.²⁴ These perceptions have grown in intensity as numerous vested interest groups politicize the immigration issue.²⁵ This article suggests that the *Global Horizons* lawsuit in California exhibits yet another dimension of the anti-immigrant backlash percolating through the U.S.

In examining the scope of the *Global Horizons* lawsuit, my objective is to understand the allegations in terms of their specific legal footholds while examining the salient features, merit, and reasonableness of each allegation. Therefore, the scope of my present commentary can be divided into two parts. First, I will examine the legal theories that will likely be tested under the California's Unlawful Competition Law (UCL) in the wake of the *Global Horizons* lawsuit and dissect the anatomy of the alleged "unlawful" conduct by the defendants. In the second, I will consider whether North Carolina's Unfair Trade Practices Act²⁶ offers a similar litigation tool by examining whether a suit similar to *Global Horizons* could be brought under the North Carolina statutes governing unfair methods of competition and deceptive trade practices.

Even though UCL is not alleged in the current *Global Horizons* lawsuit, California's legal environment is ripe for supporting an "unlawful" prong claim under the UCL against employers who hire undocumented workers. This view is corroborated by both the California court system and the legal commentators. In *Progressive West Ins. Co. v. Superior Court*, the Third Appellate District opined that the "unlawful" prong claim under the UCL is sustainable where a violation of common law doctrine has occurred.²⁷ In addition, legal commentators have noted that in California's current legal environment, the "unlawful" prong

24. See *id.*

25. See sources cited *supra* note 20.

26. N.C. GEN. STAT § 75-1.1(a) (2005).

27. See *Progressive West Ins. Co. v. Superior Court* (Preciado), 135 Cal. App. 4th 263 (Cal. Ct. App. 2005).

claim of the UCL can be invoked under various scenarios.²⁸ This view has gained currency after the California Court of Appeals decision in the *Progressive West* case,²⁹ where the court engaged in lengthy discussions articulating each of the three prongs of the UCL: (1) "unfair;" (2) "fraudulent;" and (3) "unlawful."³⁰ Moreover, the Appellate Courts in California have routinely commingled plaintiffs' UCL and Cartwright Act claims, which provides another reference point, despite lack of reference to UCL violation in the present *Global Horizon* case. Klehm's future litigation most likely will be decided on broader and more established California UCL constructs. For example, in the *Wholesale Electricity* antitrust cases,³¹ California's Fourth Appellate District held that the Federal Power Act and implementing regulations of the Federal Energy Regulatory Commission preempted the plaintiffs' UCL and Cartwright Act claims.³²

This inquiry is important because the *Global Horizons* lawsuit is the first of its kind. There exists ample confusion surrounding the applicability of the various statutes and possible interpretations in eligible cases. The viability of this lawsuit goes beyond the basic economic remedy sought in this case. An element not so evident from the lawsuit is its impact on the humanistic discourse in the American immigration debate. This article will, therefore, proceed as follows. First, the legal theories and framework on which the *Global Horizons* lawsuit is expected to proceed will be presented. Since the lawsuit is still in an infant stage, my analysis will be predominantly based on news reports,³³ legal precedents established in similar litigation,³⁴ and my own personal view on the viability of the *Global Horizons*

28. See Kimberley Kralowec, *New UCL Decision: Progressive West Ins. Co. v. Superior Court*, http://www.uclpractitioner.com/2006/01/new_ucl_decisio.html (Jan. 3, 2006) (commenting on the *Progressive West* case).

29. *Id.*

30. *Progressive*, 135 Cal. App. 4th at 283-88.

31. See *Wholesale Electricity Antitrust Cases I & II*, 147 Cal. App. 4th 1293 (Cal. Ct. App. 2007).

32. See Kimberley Kralowec, *New UCL Preemption Decision: Wholesale Electricity Antitrust Cases I & II*, http://www.uclpractitioner.com/2007/03/new_ucl_preempt.html (March 2, 2007) (commentary on the *Wholesale Electricity* cases).

33. See Prengaman, *supra* note 10; Taxin, *supra* note 7.

34. Elaine S. Povich, *Blowing the Whistle on Illegal Immigrants: Tired of Waiting for Washington to Enforce Immigration Laws, Small Businesses Have Begun Taking Their*

lawsuit. As I anticipate future legal complaints³⁵ will eventually allege a number of theories and causes of action, I will present and analyze a few of these as well. I believe UCL claims will dominate the proceedings, despite California's UCL not being utilized in the *Global Horizons* case.

Next, I will explore how this California lawsuit could have a ripple effect on legal practice and the willingness of businesses to file similar suits in North Carolina. Thus, I will analyze the claim and determine whether a cause of action is available to North Carolina business owners. Business owners in many parts of the U.S., as well as in North Carolina, hire illegal immigrants. By hiring illegal immigrants at significantly lower wages, it is believed that these business owners save significant amounts of money by avoiding taxes and paying less in employee wages and benefits.³⁶ If this is indeed true, it puts the business owners that follow the law at economic disadvantage. Therefore, this article will examine whether *Global Horizons* could pave the way for similar remedies to develop within North Carolina's legal landscape. Finally, I will conclude by making general comments

Competitors to Court, CNNMONEY.COM, Jan. 24, 2007, <http://money.cnn.com/2007/01/23/magazines/fsb/immigration.fsb>.

35. It seems, should the plaintiff be unsuccessful, there will be more lawsuits to come. For example, in justifying this lawsuit, Global Horizons President Mordechai Orian said, "Competitors hiring illegal immigrants is [sic] hurting our business badly, . . . It's to the point that doing business legally isn't worth it." *US Companies Sue Competitors Who Hire Illegal Immigrants*, WORKPERMIT.COM, http://www.workpermit.com/news/2006_08_24/us/companies_sue_competitors.htm (last visited Mar. 21, 2007).

36. "Places like Denver and Boulder, Colorado offer sanctuary policies for illegals. Local companies hire illegals in front of Americans. Illegals work for cities, in fact, last week, while I stood at the capitol in Raleigh, North Carolina, illegal aliens worked for the city on the city streets. Local contractors hire illegals for construction, painting, dry wall, landscaping, pool cleaning, dish washing, motel cleaning, car washes and everything else you can imagine." Frosty Wooldridge, *Those Who Hire Illegal Aliens Cause Americans 9,125 Deaths Annually*, Aug. 14, 2006, NEWS WITH VIEWS, <http://www.newswithviews.com/Wooldridge/frosty179.htm>. It is important for this article to consider North Carolina's illegal immigration situation a little further. This monetary savings to businesses adds up when you consider the number of illegal immigrants. "There are currently 12 million illegal aliens in the United States. North Carolina has the 8th largest illegal alien population in the country estimated at 300,000." U.S. Rep Sue Myrick, Editorial, *Illegal Aliens are Hurting North Carolina*, Apr. 2006, http://www.house.gov/list/speech/nc09_myrick/illegalaliens042006.html.

on the *Global Horizons* lawsuit and noting its contribution to the ongoing immigration debate.

II. EXAMINING THE LEGAL FRAMEWORK FOR THE LAWSUIT

Although the Kern County lawsuit by *Global Horizons* is based on antitrust laws³⁷ which prohibit companies from conspiring to prevent competition, the real focus of the lawsuit is to make it difficult for businesses to compete if they hire workers illegally. Due to the reasons outlined in the previous section, the predominant legal theory that will anchor the case on behalf of the plaintiff is a UCL claim that the defendant businesses engaged in conduct satisfying the “unlawful” prong of California’s UCL by violating both federal and state laws prohibiting the hiring of undocumented workers.

Since the *Global Horizons* suit is still in its embryonic stages, there are several grey areas and it is difficult to predict a definitive trajectory of action. UCL claims could be formed on the basis of federal laws on two specific fronts. First, violations could be alleged as UCL relates to specific immigration provisions that prohibit employment of undocumented workers. Allegations could range from failure to obtain necessary documentation to failure to verify documentation regarding employment eligibility. Second, claims could be filed as UCL relates to paying wages that fail to meet the federal minimum wage.

The California state laws that could be implemented in this regard are those concerning the payment of overtime, working conditions such as rest breaks, meal breaks, etc., and, under applicable scenarios, minimum wage laws.³⁸ The legal doctrines surrounding labor laws in California are in a state of flux and

37. See Complaint at **10-14.

38. See United Employees Law Group, PC, *California State Labor Laws*, Mar. 23, 2007, LAWYERS AND SETTLEMENTS.COM http://www.lawyersandsettlements.com/case/california_labor_law (explaining that California labor law differs from federal labor law and employees are sometimes misclassified to avoid paying overtime wages); see also Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* (2000).

are not necessarily settled.³⁹ As a result, plaintiffs may find more difficulty in pursuing claims.

Outsourcing and the use of third party contractors opens up another area for the plaintiff where alleged violations could surface. Outsourcing is perhaps more significant because the phenomenon is happening at a faster rate than immigration.⁴⁰ While immigration is limited by scope and bound by the frontiers of legality, outsourcing is a living phenomenon; it is limitless in scope and extra-terrestrial to the local law, thus presenting more complexity. Given the fluid nature of the issues surrounding outsourcing and independent contractors, UCL violation claims could surface against businesses on the grounds of violations of immigration and overtime laws by entities connected with the defendant. For example, if a business uses third parties for maintenance, assembly, or service functions, there may be claims brought under UCL theories regarding the purported immigration and employment abuses of those third parties.

The state law antitrust claims are interesting because, traditionally, antitrust laws encourage efficient markets that lower costs.⁴¹ How that tradition would apply when the alleged cost

39. See Thelen Reid Brown, Raysman & Steiner LLP, *The "Penalty" v. "Wage" Controversy*, CONSTRUCTIONWEBLINKS.COM, February 20, 2006, available at http://www.constructionweblinks.com/Resources/Industry_Reports__Newsletters/Feb_20_2006/cali.html (explaining that the controversy and apparent lack of settled law is obvious when you consider that "[o]ver the last two years, more than 100 wage-and-hour class actions have been filed in California courts claiming class-wide meal-and-rest-period violations. These cases have been brought against small and large employers alike and typically seek to recover millions to tens of millions of dollars in alleged liabilities. The enormous and very real potential liabilities presented by these cases is illustrated by the recent Alameda County Superior Court jury verdict of \$172 million against Wal-Mart Stores, Inc. in a meal-and-rest-period class action.").

40. See Saby Ghoshray, *Race, Symmetry And False Consciousness: Piercing The Veil of America's Anti-Immigration Policy*, 15 TEMP. POL. & CIV. RTS. L. REV. __ (forthcoming 2007) (discussing the outsourcing phenomenon).

41. See generally RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA 1888-1992: HISTORY, RHETORIC, LAW* (2000). Antitrust laws aim to ensure the existence of competitive markets by sanctioning producers and suppliers of products and services when their conduct departs from that competitive ideal. Of course, what constitutes this ideal and what conduct betrays it have varied during the long history of antitrust law. Until the late nineteenth century, this regulatory enterprise belonged chiefly to the courts. Then, with the rise of large-scale industrial corporations, Congress entered the fray. Beginning in 1890, Congress has enacted three key antitrust statutes, the Sherman Act, the Clayton Act and the Robinson-Patman Act, each responding to a

savings result from the use of illegal aliens is not clear. Additional theories and causes of action are likely to include claims for unjust enrichment and claims for deceptive or fraudulent business practices. These are likely to center on claims that defendants' statements to the press, marketing materials, or securities disclosures misrepresented their compliance with state and federal law or failed to disclose the alleged unfair competitive advantage. Finally, it can be anticipated that some plaintiffs will attempt to leverage their prospects by bringing claims as class actions.

The legal issue in *Global Horizons* involves the identification of whether a cause of action is available to California business owners put at an alleged economic disadvantage by their competitors' alleged actions of hiring illegal immigrants. However, the actual *Global Horizons* lawsuit does not contain a UCL claim but rather makes allegations centered on three points: (1) Breach of Contract; (2) Violation of the Cartwright Act; and (3) Intentional Interference with Economic Benefits.⁴²

According to the allegations, Munger Brothers, the grower, breached the contract with the plaintiff, Global Horizons (Agri-Labor), the provider of farm labor.⁴³ The defendant allegedly breached the contract by setting unreasonable or unattainable production requirements and wrongfully applying them to the workers and against the plaintiffs in order to terminate the contract prematurely. The plaintiffs also alleged the growers, Munger Brothers along with the labor providers, AgriLabor and J & A Contractors, violated California antitrust laws by using cheap, undocumented workers in restraint of commerce.⁴⁴ Finally, the plaintiffs contend the growers' actions amount to intentional interference with economic benefits.⁴⁵

moment of heightened public anxiety about monopolistic combinations and their anti-competitive business practices.

42. Complaint at **1.

43. Complaint at **5-10.

44. CAL. BUS. AND PROF. CODE §§ 16720 - 16728 (Deering 2007).

45. *Buckaloo v. Johnson*, 122 Cal. Rptr. 745, 752 (Cal. 1975) (explaining the five distinguishable elements of intentional interference with economic benefits as: "(1) an economic relationship between [the plaintiff and some third person] containing the probability of future economic benefit to the [plaintiff], (2) knowledge by the defendant of the existence of the relationship, (3) intentional acts on the part of the

A. *Legal Theories of the Case*

Although not explicitly mentioned in this *Global Horizons* lawsuit, the case is heavily dependent on California's Unfair Competition Act,⁴⁶ an act that is mired in many legal conundrums and interpretive confusions. This begs us to examine some of the finer details and scope of the California UCL. According to California's UCL, California prohibits any "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading [advertisement]."⁴⁷ Although this particular California statute's scope is extensively expanded and contains extremely liberal and uniquely different provisions compared to contemporary state unfair competition acts, its applications could become extremely confusing. Consider the recent case in the California Supreme Court, *Kearney v. Salomon Smith Barney Inc.*, where the amicus curiae brief of the Pacific

defendant designed to disrupt the relationship, (4) actual disruption of the relationship, (5) damages to the plaintiff proximately caused by the acts of the defendant."). This is a much broader tort that is differentiable from the contractual interference tort, as established in *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 206 Cal. Rptr. 354, 360 (Cal. 1984). I would argue that the present case falls under the tort of inducing breach of contract, which has a much higher threshold, and therefore, is going to be very difficult for the plaintiff to prevail. In discussing the related tort of inducing breach of contract, the Supreme Court of California noted long back, "The act of inducing the breach must be an intentional one. If the actor had no knowledge of the existence of the contract or his actions were not intended to induce a breach, he cannot be held liable though an actual breach results from his lawful and proper acts." *Imperial Ice Co. v. Rossier*, 11 P.2d 631, 633 (Cal. 1941). In addition, there is a threshold causation requirement in order to establish the tort of intentional interference with future economic advantage. To prevail, the plaintiff needs "proof that it is reasonably probable that the lost economic advantage would have been realized but for the defendant's interference." *Youst v. Longo*, 233 Cal. Rptr. 294, 298 (1987). Analyzing the tort of interference with prospective economic advantage, the California courts in the last decades have required such a threshold determination. In *Buckaloo v. Johnson*, the California Supreme Court noted, "where we set out the five elements of the intentional form of the tort, we stated that the first element requires 'the probability of future economic benefit.'" Although varying language has been used to express this threshold requirement, the cases generally agree it must be reasonably probable that the prospective economic advantage would have been realized but for defendant's interference." *Id.* (quoting *Buckaloo*, 122 Cal. Rptr. at 752) (emphasis omitted) (internal citation omitted).

46. California's Unfair Competition Act, CAL BUS. AND PROF. CODE §§ 17200-17210 (Deering 2007).

47. *Id.* at § 17200.

Legal Foundation suggested that, the California UCL “provides the broadest right of action to the widest number of people, [and as such] the reach of the statute should be restrained in the application of California’s choice-of-law principles.”⁴⁸ Because the court did not address the concerns raised by the amicus curiae, on account of irrelevance, it kept the door open for future consideration should circumstances arise. This is important in our discussion because in the next section of this article, I analyze the applicability of the present lawsuit to North Carolina. As I mentioned earlier, the *Global Horizons* lawsuit is predominately a product of California state law. Therefore, its viability under other jurisdictions will also depend on the transferability of the legal merits into other jurisdictions.

B. *Anatomy of the Global Horizons Lawsuit*

Let us now analyze the individual elements of the case. *Global Horizons* contains a three-pronged claim. First, the plaintiff claims the grower breached its contract by setting unreasonable or unattainable production requirements and applying such requirements in an isolated manner to terminate the contract.⁴⁹ Initially, this claim should be analyzed from a purely contractual point of view. The terms of the contract explicitly set out the expectation of the defendant as follows: “The expectation of each of the laborers provided by Global Horizons, LLC is th[at] he/she will pick an acceptable amount of blueberries contingent on the number of times each blueberry plant had previously been harvested in that season”⁵⁰ For example, on the first pass, the acceptable amount of blueberries was ninety pounds per laborer for a seven hour day.⁵¹ On the second pass, laborers were expected to pick one-hundred and thirty-five pounds per seven hour day.⁵²

Pursuant to the contractual arrangement, “farm laborers . . . harvested an average of 9.5 pounds of blueberries per hour[,]” which the plaintiff contends is “the overall average for the labor-

48. *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 939 (Cal. 2006).

49. See Taxin, *supra* note 7.

50. Complaint at **6-7.

51. *Id.* at **7.

52. *Id.*

ers not provided by the [plaintiff.]”⁵³ So the case comes down to a factual determination of whether the defendant has set unreasonable or unattainable production or picking arrangements with the plaintiff. Based on the available facts, the plaintiff’s farm laborers did not meet the amount they were expected to harvest. Although they alleged their average harvest per laborer was on par with laborers sent by the other providers, determining whether it was unreasonable or unattainable requires an extensive analysis.⁵⁴ Without examining similar contractual arrangements with other providers, one cannot know for sure whether the defendant has selectively picked the plaintiff and set an unreasonable standard.

The pricing arrangement entered into between the plaintiff and the defendant also raises an issue. It is completely acceptable to enter into uneven contracts with two separate parties based on financial terms and delivery obligations that are of a potentially asymmetric nature. I would argue that the burden of proof rests with the plaintiff to show defendant’s unreasonableness at trial. Independent analysis could suggest that the expected amount of harvest as outlined in the contractual arrangements between the plaintiff and the defendant is not excessive as per existing labor contracts. By looking at the purely contractual terms of the arrangements, this allegation of breach of contract seems frivolous in nature. The lawsuit and the merit of this claim could come down to the meaning of the word “expectation.” The plaintiff is of the view that the explicit incorporation of the term “expectation” in the contractual arrangement is merely a goal for the farm laborers to attain and not a condition of performance.⁵⁵ If the defendant has terminated the contract on account of non-performance based on their interpretation of the term “expectation,” there is no reason why it would be deemed illegal on the part of the defendant.⁵⁶

53. *Id.*

54. *Id.*

55. *Id.* at **8.

56. I would argue here that the term “expectation” is a non-legal term that does not convey any meaning, as the contractually obligated parties either performed or did not perform.

The legal issue before us is to determine whether the term “expectation” signals willingness between the parties to shy away from the traditional contract paradigm to negotiate, and to take advantage of any ex-post contractual surplus.⁵⁷ This is an evolving area of contracts, where jurisdictions apply diverging standards and bargaining models.⁵⁸ Traditionally, a contract is viewed as incomplete if it contains gaps or deficiencies so severe that, in the opinion of the courts, the terms of the agreement would be legally unenforceable. This has been one of the drawbacks in dealing with deliberately incomplete contracts, as more often than not, the courts rule that the contract is too vague or too indefinite to be enforced. However, if the court relaxes the boundary condition and allows the parties to enter into a contractual situation whereby they could agree on some of the terms and leave some for future fulfillment via renegotiation, we could see the creation of contracts with a better chance of being enforceable.⁵⁹ In my view, the terms and conditions of the contract do not fall under the category of “indefinite contract para-

57. Contract surplus can be understood as the aggregate incremental gain achieved by the contracting parties as the difference between the aggregate gain by the parties in the most efficient contractual condition arrived by the renegotiation of the contractual terms and that obtained in the least efficient contractual condition. This clearly illuminates the fact that in a transactional world, negotiation and subsequent formation of optimal contracts can yield a more profitable revenue scenario. See Aaron S. Edlin & Benjamin E. Hermalin, *Contract Renegotiation and Options in Agency Problems*, 16 J.L. ECON. & ORG. 395 (2000); see also Yeon-Koo Che & Donald B. Hausch, *Cooperative Investments and the Value of Contracting*, 89 AM. ECON. REV. 125 (1999).

58. The fundamental elements of the contractual bargaining process are the existence of an offer and the corresponding acceptance of that offer. These elements are not always easily identifiable as counter-offers, cross-offers, mere invitations to treat, and the like, are just some of the potential hindrances to an enforceable contract.

59. I have examined this area of incomplete contract paradigm in an earlier work. If, in the present case, we assume that the defendant and plaintiff have initially agreed to negotiate, we should be aware of certain limitations. “First and foremost, the scenario presented requires the introduction of a ‘bargaining’ model in the legal framework of contracting. Second, the legal framework must be able to handle modification of contractual terms by mutual consent via electronic messaging. Lastly, and perhaps the most important, the scope and limitation of the incomplete contracting model has to be incorporated in the proposed framework such that legal challenges and inquiries will retain the enforceability of such contracts.” Saby Ghoshray, *Cyberspace Contracting: Embracing Incomplete Contract Paradigm in the Wake of UCITA Experience*, 11 TEX. WESLEYAN L. REV. 609, 626 (2005).

digm” where either party to the contract could modify the intermediate terms of the contract before the contract expires based on intermediate performance.⁶⁰ I would suggest the terms of the contract in this case are clear, definite and complete in nature and therefore do not leave any open areas for further interpretation.

C. Violation of Antitrust Statutes

In the *Global Horizons* suit, the plaintiff alleges the defendant providers and growers violated the state antitrust laws in using cheap, undocumented workers in restraint of trade.⁶¹ I will identify some elements of the alleged violation under the Cartwright Act and examine the applicability of these elements within the present context. Since we do not have knowledge of all facts leading to the *Global Horizons* lawsuit, other than those that have emerged through media sources and the parties’ filings, the elements that we must focus on are:

- i. a conspiracy on the part of the defendant to violate antitrust laws which could directly affect the intrastate trade;
- ii. the defendants are engaged in an illegal trust in an attempt to restrict trade or commerce and their actions have prevented or lessened the competition; and
- iii. whether the defendants have attempted to monopolize the business environment in restraint of trade.⁶²

This section will examine these elements individually under the broader violations of the Cartwright Act.⁶³ The *Global Horizons* Complaint alleges the defendant used illegal labor in violation of California’s wage and hour laws, which directly affected the plaintiff’s ability to compete in the marketplace.⁶⁴ The suit also alleges the defendants attempted to monopolize the supplies of commercial farm laborers to prevent competition in the commercial farm laborer industry.⁶⁵

60. *Id.*

61. Complaint at **10-11.

62. Complaint at **10-14.

63. CAL. BUS. AND PROF. CODE §§ 16720 - 16728 (Deering 2007).

64. Complaint at **10-11

65. Complaint at **12-13.

Aside from the workers' legal status, it is important to examine whether the defendant's actions have affected trade or commerce. Here, the Cartwright Act has been subsumed under the broader provisions of California's UCL.⁶⁶ Because the notion of unfair competition has been superimposed over the existing mechanism, it is philosophically driven by two premises: (1) while some business practices cannot be captured within specific descriptions or definitions, they impose an external cost on others and endanger effective market mechanisms and, as such, must be viewed within the broader UCL; and (2) the driving force should be whether these practices confer competitive advantages leading to a restraint of trade. Therefore, the basic premise of this analysis is as follows: for any act to be considered illegal, we must be able to determine that the act is both unfair and unlawful. Once this determination is made, the competitive advantage gained must be translated into a business advantage. The competitive advantage must be connected to a restraint of overall marketplace mechanisms and a restraint of trade in general.

External cost occurs when a business entity imposes external costs on its competition by means of sale or usage of its product, such that the purchase price does not reflect its actual cost. Under these market mechanisms, two important assumptions are necessary: and relevant to the unfair competition statute: (1) a competitive market effectively drives prices; and (2) such a market provides accurate information about the product.⁶⁷

In light of the assumptions stated above, a law and economics analysis of the alleged violation of the defendant would establish that the defendant's action has caused market prices to stay competitive. By utilizing cheap labor, the defendant is able to reduce its cost of operation and to offer its product at a cheaper price. This, in turn, forces the competition to offer similar products at competitive prices. On the other hand, if the defendant pays the higher cost of labor, it may no longer be able to influence the market by keeping the price competitive. Therefore, the

66. It has been held that UCL provides a remedy even if the underlying statute has no private right of action. *See, e.g., Stop Youth Addiction v. Lucky Stores*, 17 Cal. App. 4th 553, 561-567 (Cal. Ct. App. 1998).

67. *See sources cited supra* note 20.

defendant's utilization of cheap labor is consistent with the stated premise of antitrust laws. Additionally, the plaintiff may not be able to prevail on the issue of whether the alleged violations of the Cartwright Act resulted in the restraint of trade. But at such an embryonic stage, it is too early to make a judgment regarding the issues of conspiracy or whether an unlawful trust in restraint of trade or commerce has been created.

D. Intentional Interference to Extract Economic Benefit

The cause of action for intentional interference to extract economic benefit was brought against three of the defendants: Ayala Agricultural Services, J & A Contractors, and Does 1 to 50.⁶⁸ The plaintiff's complaint contends these three defendants knowingly interfered with the contractual relationship between the defendant, Munger Brothers, and the plaintiff, Global Horizons, to extract economic benefit. The fact pattern must be determined in several phases. First, a determination has to be made whether the defendants knew of the existing business relationship. Next, it must be proven the defendant caused sufficient interference such that premature termination of an existing contract occurred. In other words, it must be shown the defendants proximately caused actual injury to the plaintiff or to his business. It is unclear, however, whether California law also requires the plaintiff to suffer "actual injury."⁶⁹ The California Supreme Court is expected to address this issue when it decides two currently pending class-action UCL appeals where actual injury is a significant issue.⁷⁰

In California antitrust cases, proving a contract violates antitrust statutes is generally sufficient to establish a violation of California unfair competition law. Furthermore, the California

68. Complaint at **14.

69. Kimberly Kralowec, *Pending California Supreme Court Cases: UCL - Interpretation of Prop. 64*, <http://www.uclpractitioner.com/UCLAppeals.html> (last accessed April 12, 2007) (stating that the question of whether every member of a proposed class must show "injury in fact" was briefed by the parties in a pair of class-action UCL appeals currently before the California Supreme Court, *In re Tobacco II Cases*, 142 Cal. App. 4th 891 (Cal. Ct. App. 2006) and *Pfizer, Inc. v. Superior Court (Galfano)*, 141 Cal. App. 4th 290 (Cal. Ct. App. 2006)).

70. *Id.*

Supreme Court recognized, because of the similarity in the language of California's Business & Profession code section 17200 and section 45 of the Federal Trade Commission Act, it is appropriate for California courts to use federal decisions interpreting the relevant FTC provisions.⁷¹ Some may argue hiring illegal immigrants is a violation of a federal statute and thus violates federal public policy. This line of reasoning could cause the court to find it is not fair to use illegal immigrants to gain a competitive advantage over a similar business entity. However, the economic analysis regarding undocumented workers is a much broader issue, the scope of which must necessarily go beyond a basic antitrust or unfair competition analysis.⁷²

E. *Applicability of Economic Abstention Doctrine*

My view is that the Kern County Superior Court will abstain from employing the remedies available under the unfair competition law in the present case. The court may cite precedent cases where the California courts have declined to hear a claim using the "unlawful" prong of the state's unfair competition law on the basis of alleged violations of other legislative acts. In *Shamsian v. Department of Conservation*, the California Court of Appeals held that the trial court properly declined to hear a UCL "unlawful" prong claim predicated on alleged violations of the California Beverage Container Recycling and Litter Reduction Act.⁷³ Here, the court noted, "the complex statutory arrangement of requirements and incentives involving participants in the beverage container recycling scheme is to be administered and enforced by the [Department of Conservation] consistent with the Legislature's goals."⁷⁴ Therefore, the court declined "to issue restitution and disgorgement orders against the corporate defendants [as

71. *People v. Casa Blanca Convalescent Homes Inc.*, 159 Cal. App. 3d 509, 530 (Cal. Ct. App. 1984) (applying the guidelines adopted by the Federal Trade Commission and sanctioned by the U.S. Supreme Court in *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233, 244-45 n. 5 (1972)).

72. For a more detailed economic analysis of the use of undocumented workers, see Ghoshray, *supra* note 4.

73. 136 Cal. App. 4th 621, 641-42 (Cal. Ct. App. 2006); *see also* California Beverage Container Recycling and Litter Reduction Act, Cal. Pub. Res. Code § 14500 (Deering 2007).

74. *Shamsian*, 136 Cal. App. 4th at 642.

the court felt that it] would interfere with the department's administration of the act and regulation of beverage container recycling and [would] potentially risk throwing the entire complex economic arrangement out of balance."⁷⁵ The court further held that "the public's need for opportunities to recover its cash redemption value funds and to conveniently recycle its beverage containers is not so great as to warrant judicial interference in the administrative scheme designed to address those needs at this point."⁷⁶

The issue before us is to determine whether the "economic abstention" doctrine applies in the current lawsuit. Typically, the UCL "economic abstention" doctrine applies in cases involving matters of complex economic policy that are better addressed by the legislature than the judiciary.⁷⁷ Clearly, the *Global Horizons* lawsuit may potentially develop into a situation where it could become commingled with current legislative developments surrounding the issue of illegal immigration, a development in which the judiciary may not want to be a part.

Finally, while analyzing the applicability of California UCL, we have to determine whether the three prongs of the UCL are applicable in the present case. In *Progressive West Ins. Co. v. Superior Court*,⁷⁸ the Third Appellate District stated that the definition of "fraudulent" conduct is premised on "whether the public is likely to be deceived."⁷⁹ The court further clarified its position on the meaning of "unfair" by asserting that the pre-*Cel-Tech* formulation⁸⁰ of "unfair" is still the appropriate standard for determining this particular prong. Regarding the "unlawful" prong, the court determined that a violation of a common-law doctrine will support an "unlawful" claim.⁸¹ Within the rich history of California UCL precedents, there are plenty of published cases

75. *See id.* at 642.

76. *Id.*

77. *See id.* at 641-42 (quoting *Desert Healthcare Dist. v. PacifiCare, FHP, Inc.*, 94 Cal. App. 4th 781, 795-96 (Cal. Ct. App. 2001)).

78. 135 Cal. App. 4th 263, 284 (Cal. Ct. App. 2005) (quoting *Pastoria v. Nationwide Ins.*, 112 Cal. App. 4th 1490, 1498 (Cal. Ct. App. 2003)).

79. *Id.*

80. *Id.* at 285-86.

81. *Id.* at 287 (quoting *Bernardo v. Planned Parenthood Federation of America*, 115 Cal. App. 4th 322, 351 (Cal. Ct. App. 2004)).

that provide guidance in general terms, such that “any law,” including “court-made” laws, will support a UCL “unlawful” prong claim.⁸²

III. EXAMINING THE IMPACT IN NORTH CAROLINA IN THE SHADOW OF THE KERN COUNTY LAWSUIT

There is no doubt the present case filed in the Kern County Superior Court is quite unique. The publicity surrounding the case alone would have a ripple effect, in which vested interests in various states will test the merit of this lawsuit in their respective jurisdictions. There is also the perception that many business owners in North Carolina knowingly hire illegal immigrants at lower wages. This brings out a whole range of contentious issues, the most significant of which is to determine whether businesses are gaining an unfair competitive advantage over their peers.⁸³ The instant case contains a predominant anti-immigration element, and as such, would be fodder for anti-immigration organizations to sponsor lawsuits similar to the one filed in Kern County. Therefore, let us examine what impact there might be in a similar lawsuit if filed in North Carolina.

North Carolina has a typically broad unfair competition prohibition. “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.”⁸⁴ Procedurally, the statute authorizes an action at law for treble damages similar to the traditional antitrust offense, and requires business injury to sue.⁸⁵ The prevailing party may also be awarded attorney’s fees in the discretion of the court.⁸⁶ Further, the Attorney General may bring a public civil action for injunctive relief and for civil penalties.⁸⁷ In the present case, the issue before us is to determine whether the legal doctrines being utilized in the California

82. *Id.*

83. Jennifer Plotnick, *Immigration Officials to Deport Illegals Arrested in Smithfield Raid*, FAYETTEVILLE OBSERVER, Jan. 26, 2007.

84. N.C. GEN. STAT. § 75-1.1(a) (2005).

85. *Hardy v. Toler*, 211 S.E.2d 809 (N.C. Ct. App. 1975).

86. N.C. GEN. STAT. § 75-16.1 (2005).

87. N.C. GEN. STAT. §§ 75-14, 75-15.2 (2005).

lawsuit have similar potential applicability under North Carolina law.

North Carolina's "unfair trade practices" statute declares "[u]nfair methods of competition" and "unfair or deceptive acts or practices . . . in or affecting commerce" unlawful.⁸⁸ The statute is an almost verbatim copy of section 45(a)(1) of the Federal Trade Commission Act,⁸⁹ and is relied upon heavily by claimants in commercial litigation in the state.⁹⁰ A North Carolina federal judge has said that section 75-1.1 "constitutes a boilerplate claim in most every complaint based on a commercial or consumer transaction in North Carolina."⁹¹ Such rich litigation opportunities are not presented by the Federal Trade Commission Act since it affords no private cause of action.⁹² But the reasons for the heavy use of section 75-1.1 are clear. As with other provisions of Chapter 75 containing state antitrust law prohibitions, the winning plaintiff in a section 75-1.1 case automatically receives treble damages,⁹³ and, perhaps more importantly, his "duly licensed attorney" may get attorney fees.⁹⁴

The legislature, in the summer of 1996, made its first significant change to the core of Chapter 75 by enacting N.C. Gen. Stat. § 75-2.1, yet most parts of Chapter 75 remained unchanged.⁹⁵

88. N.C. GEN. STAT. § 75-1.1(a) (2005).

89. 15 U.S.C. § 45(a)(1) (2000).

90. One author has counted more than 875 state and federal decisions "involving" section 75-1.1. See NOEL L. ALLEN, NORTH CAROLINA UNFAIR BUSINESS PRACTICE § 1.01 (3d ed. 2004).

91. *Allied Distribs., Inc. v. Latrobe Brewing Co.*, 847 F. Supp. 376, 379 (E.D.N.C. 1993).

92. 15 U.S.C. § 45(a)(2) (2000).

93. N.C. GEN. STAT. § 75-16 (2005).

94. N.C. GEN. STAT. 75-16.1 (2005) (stating that "the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party" if he finds that "[t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter[s] which constitute the basis of such suit . . ."). Unlike federal antitrust actions where, pursuant to the Clayton Act, 15 U.S.C. § 15(a) (2000), attorney fees are awarded to successful plaintiffs themselves, N.C. GEN. STAT. § 75-16.1(1) "awards" the fees to the plaintiff's lawyer.

95. N.C. GEN. STAT. § 75-1 (2005) (mirroring the federal Sherman section 1 analog), N.C. GEN. STAT. § 75-1.1 (mirroring the Federal Trade Commission section 5 analog), N.C. GEN. STAT. § 75-2 (2005) (adopting the common law), N.C. GEN. STAT. § 75-4 (2005) (regulating non-competition agreements), N.C. GEN. STAT. § 75-16

Inasmuch as a federal antitrust violation amounts to an N.C. Gen. Stat. section 75-1.1 violation, conduct illegal under North Carolina's state antitrust laws may also violate section 75-1.1.⁹⁶ There would appear to be little incentive to bring a well-founded state antitrust case under section 75-1.1 as well, but some reasons for pleading both do exist. First, although section 75-16 provides private relief for any Chapter 75 antitrust offense or section 75-1.1 violation, attorney fees are available under N.C. Gen. Stat. section 75-16.1 only for section 75-1.1 violations.⁹⁷ On the other hand, attorney fees for section 75-1.1 violations are discretionary, whereas attorney fees for federal antitrust violations are mandatory.⁹⁸

A. *Elements of the Three-Pronged Test*

The elements of a claim for unfair and deceptive practices are: (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business.⁹⁹ The three-pronged test described here has some similarity with the tests described in the earlier section regarding the California UCL.

North Carolina courts have noted, "[A]n action for unfair and deceptive trade practices is a distinct action separate from fraud, breach of contract, and breach of warranty."¹⁰⁰ Since the former remedy was created partly because the latter were often ineffective, it would be illogical to require fraud, breach of contract or breach of warranty methods of measuring damages. "To rule otherwise would produce the anomalous result of recognizing that although section 75-1.1 creates a cause of action broader

(creating a private right of action for treble damages), and N.C. GEN. STAT. § 75-16.1 (2005) (permitting the award of attorneys' fees for prevailing parties) were unchanged.

96. N.C. GEN. STAT. § 75-2 (2005).

97. See N.C. GEN. STAT. § 75-16.1 (2005).

98. 15 U.S.C. § 15(a) (2000).

99. See *Furr v. Fonville Morisey Realty, Inc.*, 503 S.E.2d 401 (N.C. Ct. App. 1998); see also *In re Bozzano*, 183 B.R. 735 (Bankr. M.D.N.C. 1995); *Wysong & Miles Co. v. Employers of Wausau*, 4 F. Supp. 2d 421 (M.D.N.C. 1998); *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 507 S.E.2d 56 (N.C. Ct. App. 1998).

100. *United Virginia Bank v. Air-Lift Assocs., Inc.*, 339 S.E.2d 90, 93 (N.C. Ct. App. 1986).

than traditional common law actions, section 75-16 limits the availability of any remedy to cases where some recovery at common law would probably also lie.”¹⁰¹

B. North Carolina’s Relevant Legal Doctrines

To better comprehend the legal landscape in North Carolina under which the Unfair Competition doctrine could allow for similar lawsuits to proceed, there are multiple legal doctrines relevant to our discussion.

1. *Covenants Not to Compete and Tortious Interference with Contracts*

The North Carolina Supreme Court in *United Laboratories, Inc. v. Kuykendall*, has “not limited the applicability of section 75-1.1 to cases involving consumers only.”¹⁰² The court’s statement was in response to the defendant’s contention that the statute was inapplicable to covenants not to compete or to tortious interference with contracts.¹⁰³ Its rationale was that the unfair trade practices statute was broader and extends beyond consumer situations and business situations concerning fraudulent advertising or buyer-seller relationships.¹⁰⁴

2. *Relationship to Anti-Trust Matters*

The Unfair Competition doctrine may very well relate to Federal Anti-Trust matters as well. For example, the Fourth Circuit has stated, “proof of conduct violative of the Sherman Act is proof sufficient to establish a violation of the North Carolina Unfair Trade Practices Act.”¹⁰⁵

101. *Bernard v. Cent. Carolina Truck Sales, Inc.*, 314 S.E.2d 582, 585 (N.C. Ct. App. 1984) (quoting *Marshall v. Miller*, 276 S.E.2d 397, 402 (N.C. 1981)).

102. *United Labs., Inc. v. Kuykendall*, 370 S.E.2d 375, 389 (N.C. 1988).

103. *Id.*

104. *Id.*

105. *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 48 (4th Cir. 1983). See generally 15 U.S.C. § 1 (2000).

3. *Violations of Public Policy*

A trade practice “is generally unfair when it ‘offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious.’”¹⁰⁶ Furthermore, “[a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.”¹⁰⁷ The question of whether a particular practice is unfair or deceptive is a legal one reserved for the court.¹⁰⁸ For example, when it comes to minimum wage, there is precedent upon which alleged violations by businesses can be challenged, but whether the lawsuits will prevail is subject to diverging interpretations.¹⁰⁹

4. *Tortious Interference with Prospective Economic Advantage*

An action for tortious interference with prospective economic advantage is recognized in North Carolina.¹¹⁰ An action for tortious interference with prospective economic advantage is based on conduct by a party which prevents another party from entering into a contract with a third party.¹¹¹ In *Coleman v. Whisnant*, the North Carolina Supreme Court held:

We think the general rule prevails that unlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring breach of a contract, or in preventing the making of a contract when this is done, not in the legitimate exercise of the defendant[s] own rights, but with design to injure the plaintiff[s], or gaining some advantage at [their] expense. . . . In *Kamm v. Flink*, 113 N.J.L. 582, 99 A.L.R. 1, it was said: “Maliciously inducing a person not to enter into a contract with

106. *Process Components, Inc. v. Baltimore Aircoil Co., Inc.* 366 S.E.2d 907, 911 (N.C. Ct. App. 1988) (quoting *Johnson v. Phoenix Mut. Life Ins. Co.*, 266 S.E.2d 610, 621 (N.C. 1980)).

107. *Opsahl v. Pinehurst, Inc.*, 344 S.E.2d 68, 76 (N.C. Ct. App. 1986) (alteration in original) (quoting *Johnson*, 266 S.E.2d at 622).

108. *Martin Marietta Corp. v. Wake Stone Corp.*, 432 S.E.2d 428, 436 (N.C. Ct. App. 1993) (citing *Bolton Corp. v. T.A. Loving Co.*, 380 S.E.2d 796, 808 (N.C. Ct. App. 1989)).

109. *Amos v. Oakdale Knitting Co.*, 403 S.E.2d 565 (N.C. Ct. App. 1990).

110. *Walker v. Sloan*, 529 S.E.2d 236, 241 (N.C. Ct. App. 2000).

111. *Owens v. Pepsi Cola Bottling Co.*, 412 S.E.2d 636, 644 (N.C. 1992).

another, which he would otherwise have entered into, is actionable if damage results.” The word “malicious” used in referring to malicious interference with formation of a contract does not import ill will, but refers to an interference with design of injury to plaintiff[s] or gaining some advantage at [their] expense.¹¹²

Thus, to state a claim for wrongful interference with prospective advantage, a party must allege facts to show that the violator acted without justification in “inducing a third party to refrain from entering into a contract with them which contract would have ensued but for the interference.”¹¹³

5. *Wrongful Interference with Contractual Rights*

The North Carolina Supreme Court has held the essential elements of wrongful interference with contractual rights as follows:

First, that a valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person. *Second*, that the outsider had knowledge of the plaintiff’s contract with the third person. *Third*, that the outsider intentionally induced the third person not to perform his contract with the plaintiff. *Fourth*, that in so doing the outsider acted without justification. *Fifth*, that the outsider’s act caused the plaintiff actual damages.¹¹⁴

Although the common law action for unfair competition evolved originally to afford relief against a competitor’s misrepresentation of the source of goods or services, the term “unfair competition” now provides an array of legal actions addressing methods of competition that improperly interfere with the legitimate commercial interests of business entities in the business world. If a business hires undocumented workers and pays them less than the federally mandated wage, could this be construed as harming the legitimate business interest of competitors? This is an issue that not only resides within a complex interplay of com-

112. *Coleman v. Whisnant*, 35 S.E.2d 647, 656 (N.C. 1945) (citations omitted).

113. *Cameron v. New Hanover Mem’l Hosp., Inc.*, 293 S.E.2d 901, 917 (N.C. Ct. App. 1982) (citing *Spartan Equip. Co. v. Air Placement Equip. Co.*, 140 S.E.2d 3 (N.C. 1965)).

114. *Childress v. Abeles*, 674, 84 S.E.2d 176, 181-82 (N.C. 1954) (citations omitted).

mon law and statutory rules characteristic of contemporary business practices, but also intersects with one of today's most contentious policy issues. Whether a California-style UCL-based lawsuit against alleged illegal immigration succeeds in North Carolina depends more on the interplay of social and political values within the business competition context, and less on statutory interpretation of law.

IV. CONCLUSION

It is difficult to gauge the success of the *Global Horizons* lawsuit since the full facts of the case are yet to come into the public domain. On the surface, the case seems to center around a business entity's need to seek remedy for harm done by means of unfair competition. Yet, there is a feeling that the *Global Horizons* lawsuit is far beyond a simple business dispute or unfair competition litigation, and is rather an attempt to enforce immigration laws. If this is indeed the case, then the lawsuit could be a harbinger of things to come. Unless restrained with adequate judicial oversight, this could open the floodgates and very well be the beginning of additional lawsuits targeting illegal immigration on the grounds that competitors realize an unfair advantage from using illegal immigrants. Clearly, there exists a predominant anti-immigration sentiment that is sweeping the nation. In some parlance, there is a perception that this country's border is broken and that its immigration law enforcement is lackadaisical. This could very well be the perfect opportunity for a business to take its fight against illegal immigration to court, accusing competitors of hiring illegal workers to achieve an unfair advantage. Businesses and anti-illegal immigration groups perceive the *Global Horizons* lawsuit as an attempt to create an economic deterrent against hiring illegal employees.

When it comes to specific states, the *Global Horizons* lawsuit might not go very far within the California court system on various grounds. First and foremost, the basic premise of anti-trust violation is inconsistent with the plaintiff's view in this case. If we were to go along with the plaintiff's theory, the action of the defendants is in conformity with the business practice the antitrust law it is slated to promote: proliferation of interstate commerce by means of lowering cost and consumer-friendliness.

Secondly, based on available information, there is no theory by which the established contract can be deemed an open contract subject to modification, or for it to become an incomplete contract, amenable to intermediate modification. I would assert that, in the absence of such characteristics, it is difficult to see how the plaintiff will prevail in the current case. Finally, it will be extremely difficult to prove the requisite intent required to prevail on issues of conspiracy and interference. However, of the three causes of action alleged, this could be the only one where the Plaintiff may have an opportunity to prevail. But without additional facts, it is difficult at this stage to predict how the weight of the other allegations might influence this particular allegation of the Complaint.

Superimposing the California scenario on a possible North Carolina case, the prediction of an outcome is based purely on hypothetical fact patterns. The “unfair or deceptive” act or practice prong of section 75-1.1(a) may entice businesses in North Carolina to file lawsuits if they feel they have been harmed by companies that disregard federal laws and North Carolina public policy by hiring illegal immigrants. The problem arises when complex policy issues generally left to the legislature are commingled with litigation and the court system. When confronted with issues surrounding illegal immigration, the objectives of the legislature and those of the judiciary should never overlap, nor should one branch unduly influence the other. The issue of tortious interference with prospective economic advantage and contractual rights may offer strategic litigation opportunities on the horizon. I am not, however, optimistic that this could be used in favor of the businesses that are being destroyed by firms that undercut their competitors by hiring illegal immigrants.

The *Global Horizons* lawsuit discussed here is an innovative approach, and the potential scenarios spawned by the case represent legal doctrines and scenarios that could become part of the upcoming proceedings. The causes of action discussed here could be the beginning of unforeseen avenues that businesses might want to pursue as they attempt to overcome the perceived unfairness of illegal immigration. However, we must never allow the judiciary to become a vigilante when it comes to adjudicating significant issues of our time, such as immigration.

Policy issues, therefore, must not be litigated under the cloak of UCL laws, tortious interference with contractual relations, anti-trust statutes and the like unless policy and public sentiment are clearly separated from judicial application and interpretation of such laws.

Despite living in a global village that is more interconnected today than ever before, humanity is scattered in isolated islands of disjointed economic environments. Uneven distribution of wealth in today's world is so egregious that it begs the question of where humanity is as our civilization marches toward unprecedented technological advancement. On the other hand, politicized anxieties have taken on a new dimension as the specter of economic deprivation within the U.S. has become fodder for a vigorous anti-immigrant sentiment.

Finally, this review goes beyond the hackneyed analysis of the feasibility of a lawsuit filed more on hope than any substantive legal merits. Instead, it attempts to develop the context that could create such adversarial ambience for the immigrants that it allows us to rationalize illogical constructs under legitimate legal doctrines. The *Global Horizons* lawsuit is such an example, as it penetrates a deeper construct than the basic issue of illegal immigration and perhaps confronts us with more profound issues of racism, intolerance, and lack of humanistic viewpoint. From a judicial perspective, this is also a significant development, as the possible outcomes of the lawsuit are important for both legislation development and policy implementation, on which more research is needed. While the exploration continues, I must end on my belief in the integrity of our justice system. That integrity, I hope, will allow the judiciary to recognize the lawsuit in its inherent merit, see through the smokescreen of legal doctrines, and render just and equitable decisions for all involved.