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## Chapter 1071: Protecting All California Workers

Lori A. Ash

### *Code Sections Affected*

Civil Code § 3339 (new); Government Code § 7285 (new); Health and Safety Code § 24000 (new); Labor Code § 1171.5 (new).  
SB 1818 (Romero); 2002 STAT. Ch. 1071.

*“I am sure you are aware of the ruling by the Supreme Court of the United States that illegal immigrants do not have the same rights as U.S. citizens.”<sup>1</sup>*

### I. INTRODUCTION

All workers in the United States are vulnerable to workplace abuses—complaining about wages, working conditions, or the like often results in retaliation by the employer. Undocumented workers are particularly vulnerable;<sup>2</sup> they are paid below minimum wage and are victims of retaliation when they assert their legal rights, which can lead to deportation as well as the loss of their jobs.<sup>3</sup> The examples of such abuses are numerous, including a San Diego taco stand worker who was paid two dollars an hour for seven years,<sup>4</sup> and Pedro, a worker who was trying to unionize Perdue Farms until a supervisor overheard him and reminded Pedro that he was an undocumented worker.<sup>5</sup> Pedro got the message and ceased his unionizing activities, fearing retaliation.<sup>6</sup>

The United States has enacted many laws to protect workers. Among them is National Labor Relations Act (NLRA),<sup>7</sup> enacted in 1935 by the United States Congress to protect workers’ rights of association, self-organization, and representation.<sup>8</sup> In addition, the National Labor Relations Board (NLRB) and its

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1. See Nancy Cleeland, *Employers Test Ruling on Immigrants*, L.A. TIMES, Apr. 22, 2002, at C1 (quoting Frederick Margolin, an attorney for “the owner of a Manhattan meat market who is accused of paying his immigrant work force less than the minimum wage,” in a letter to an advocacy group warning them “not to demonstrate in front of his store”).

2. Domenico Maceri, *Illegal Rights?*, HISPANIC VISTA, June 3, 2002, available at <http://www.latino.beat.net/html/060302maceri.htm> (last visited Oct. 14, 2002) (copy on file with the *McGeorge Law Review*).

3. *Id.*

4. *Id.*

5. Alfredo Corchado & Lys Mendez, *Undocumented Workers Feel Boxed In*, DALLAS MORNING NEWS, July 14, 2002, at J1.

6. *Id.*

7. 29 U.S.C.A. §§ 151-169 (West 1998).

8. *Id.* § 151.

General Counsel are vested, by statute, with broad discretion to enforce the NLRA and to remedy unfair labor practices.<sup>9</sup>

The nation's immigration laws, like the NLRA, also have a regulatory role regarding the workplace.<sup>10</sup> The Immigration Reform and Control Act of 1984 (IRCA)<sup>11</sup> focuses new immigration control efforts on employers, by making it unlawful to employ anyone known to be an unauthorized alien.<sup>12</sup> The IRCA also requires employers to verify and document the eligibility of new hires to work in the United States and authorizes sanctions against employers who are in violation of the Act's provisions.<sup>13</sup>

There is a tension between the IRCA's goal of protecting the workplace from undocumented workers<sup>14</sup> and the NLRA's goal of protecting employees from employer abuses.<sup>15</sup> The NLRB and the judicial system have sought to ensure that labor and immigration laws operate in tandem.<sup>16</sup> They both, however, have "wrestled with the sometimes conflicting goals of protecting workers while ensuring a legal work force."<sup>17</sup> The Supreme Court, in *Sure-Tan, Inc. v. NLRB*, found that for purposes of backpay awards, undocumented workers should be deemed "unavailable for work," and thus backpay would not accrue during any period where they were not "lawfully entitled to be present and employed in the United States."<sup>18</sup> Decisions of the United States Courts of Appeals since *Sure-Tan* have been divided as to whether the NLRB may award backpay to undocumented workers.<sup>19</sup> In addition, the NLRB itself has been divided on this issue in its decisions<sup>20</sup> and in its internal communications.<sup>21</sup>

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9. *Id.* §§ 153, 160(c).

10. *I.N.S. v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 194 (1991); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984).

11. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §§ 101-407, 100 Stat. 3359 (codified in scattered sections of title 8 of the United States Code).

12. *Id.*

13. 8 U.S.C.A. § 1324(a) (West 1999).

14. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §§ 101-407, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.).

15. 29 U.S.C.A. §§ 151-69 (West 1998).

16. *Hoffman Plastic Compounds, Inc. v. NLRB*, 208 F.3d 229, 331 (D.C. Cir. 2000).

17. Cleeland, *supra* note 1.

18. *See generally Sure-Tan, Inc.*, 467 U.S. at 899 (holding that backpay would not accrue for an undocumented worker from the time in which the employer learned of the employee's illegal status).

19. *See NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 56 (2d. Cir. 1997) (holding that illegal workers could collect backpay under the NLRA). *But see Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1118 (7th Cir. 1992) (holding that illegal workers could not collect backpay under the NLRA).

20. *See Felbro, Inc.* 274 N.L.R.B. 1268, 1269 (1985) (holding that illegal workers could not be awarded backpay in light of the *Sure-Tan* decision). *But see A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408, 415 (1995) (holding that illegal workers could be awarded backpay notwithstanding the *Sure-Tan* decision).

21. *See Memorandum GC 87-8* from the Office of General Counsel, NLRB, *The Impact of the Immigration and Reform and Control Act of 1986 on Board Remedies for Undocumented Discriminatees*, 1987 WL 109409 (Oct. 27, 1988) (on file with the *McGeorge Law Review*) (stating NLRB policy that illegal workers could not be awarded backpay in light of the IRCA). *But see Memorandum GC 98-15* from the Office of General Counsel, NLRB, *Reinstatement and Backpay Remedies for Discriminatees Who May Be Undocumented Aliens*

In an attempt to balance these conflicting goals, “[i]n the late 1990s, . . . federal agencies including the [NLRB] and the Equal Employment Opportunity Commission adopted a policy that . . . [i]llegal immigrant workers would not be reinstated but would receive back pay from the time they were fired to the point at which employers learned of the employees’ illegal status.”<sup>22</sup> This policy changed, however, in March 2002, when the United States Supreme Court decided *Hoffman Plastic Compounds, Inc. v. NLRB*.<sup>23</sup>

## II. THE *HOFFMAN* DECISION

In January 1998, Hoffman Plastic Compounds, Inc., (Hoffman) a California corporation, laid off Jose Castro and three other employees for union organization efforts at the Hoffman plant where they worked.<sup>24</sup> The NLRB found that Hoffman illegally violated the rights of Castro and three others by laying them off “in order to rid itself of known union supporters” in violation of the NLRA.<sup>25</sup> Hoffman was ordered to cease further violations, post a notice regarding the order, and offer reinstatement and backpay to the four employees.<sup>26</sup>

During a subsequent hearing in front of an Administrative Law Judge (ALJ) to determine the amount of backpay owed, Castro admitted that he was never authorized to work in the United States; he presented someone else’s birth certificate to obtain a driver’s license and employment in the United States.<sup>27</sup> As a result, the ALJ held that the NLRB could not award Castro backpay nor could it order reinstatement.<sup>28</sup> The NLRB, however, later ruled that Castro was entitled to \$66,951 in backpay plus interest,<sup>29</sup> which was consistent with the NLRB policy at the time. Hoffman appealed to the Washington, D.C. Court of Appeals, which denied review and enforced the NLRB order, deferring to the administrative expertise of the NLRB on the subject.<sup>30</sup>

The Supreme Court granted certiorari, and in March 2002, the Supreme Court voted five to four that Castro’s violation of the nation’s immigration laws outweighed Hoffman’s violation of the NLRA, thus holding that Castro was not entitled to backpay regardless of when his employer learned that he was an

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In Light of Recent Board and Court Precedent, 1998 WL 1806350 (Sept. 4, 1998) (on file with the *McGeorge Law Review*) (stating NLRB policy that illegal workers could be awarded backpay notwithstanding the IRCA).

22. Cleeland, *supra* note 1.

23. See 122 S. Ct. 1275, 1284 (2002) (holding that an illegal immigrant was not entitled to backpay from the time of his illegal termination).

24. *Id.* at 1279.

25. *Id.*

26. *Id.*

27. *Hoffman Plastic Compounds, Inc.*, 314 N.L.R.B. 683, 685 (1994).

28. *Id.* at 685-6.

29. *Hoffman Plastic Compounds, Inc.*, 326 N.L.R.B. 1060 (1998).

30. *Hoffman Plastic Compounds, Inc. v. NLRB*, 208 F.3d 229 (D.C. Cir. 2000).

undocumented worker.<sup>31</sup> “Undocumented immigrants have no legal right to work in the United States.”<sup>32</sup> Therefore, according to Chief Justice William H. Rehnquist, “[i]t would ‘trivialize the immigration laws [and] also condone and encourage future violations’ if these same unlawful employees could win money awards for lost work.”<sup>33</sup>

The dissenters felt “[t]he ruling [would] undermine labor laws and encourage employers to hire illegal immigrants if they can escape the penalties for doing so.”<sup>34</sup> “‘With a wink and a nod,’ [dissenting Justice Stephen G.] Breyer [wrote], employers can hire these low-wage workers and fire them with impunity if they try to form a union.”<sup>35</sup>

The decision essentially declared that illegal immigrants should not have the same rights under the NLRA to damages, such as backpay from the time of the illegal termination, as legal workers whose rights are abused on the job. Given that “[t]he Immigration and Naturalization Service estimates that [eleven] million undocumented workers live in the United States, about half of them in California,”<sup>36</sup> the decision disenfranchised an enormous specter of the workplace, prompting the California Legislature to enact Chapter 1071 to protect as many rights as possible of these undocumented workers.<sup>37</sup>

### III. EXISTING CALIFORNIA LAW

Existing California law provides for the enforcement of minimum labor standards in employment, civil rights, and special labor relations.<sup>38</sup> Various state agencies, including the California Department of Industrial Relations<sup>39</sup> and the California Department of Fair Employment and Housing,<sup>40</sup> can remedy specific violations when an employee has suffered denial of wages due or unlawful

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31. *Hoffman Plastic Compounds, Inc.*, 122 S. Ct. at 1279-83.

32. *Id.* at 1282; David G. Savage & Nancy Cleeland, *High Court Ruling Hurts Union Goals of Immigrants*, L.A. TIMES, Mar. 28, 2002, at A20.

33. Savage & Cleeland, *supra* note 32.

34. *Hoffman Plastic Compounds, Inc.*, 122 S. Ct. at 1287 (Breyer, J., dissenting); Savage & Cleeland, *supra* note 32.

35. See Savage & Cleeland, *supra* note 32; *Hoffman Plastic Compounds, Inc.*, 122 S. Ct. at 1287 (Breyer, J., dissenting).

36. Al Knight, *Outcry over Court Decision Ignores Immigration Law*, DENVER POST, Apr. 3, 2002 at B9; Savage & Cleeland, *supra* note 32.

37. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1818, at 2 (Aug. 22, 2002) (discussing the need for Chapter 1071).

38. *Id.*

39. See Cal. Dep’t of Indus. Relations, at <http://www.dir.ca.gov> (last visited Sept. 15, 2002) (copy on file with the *McGeorge Law Review*) (stating that the Department of Industrial Relations “was established to improve working conditions for California’s wage earners . . .”).

40. See Dep’t of Fair Employment and Hous., at <http://www.dfeh.ca.gov> (last visited Sept. 15, 2002) (copy on file with the *McGeorge Law Review*) (stating that the purpose of “the Department of Fair Employment and Housing is to protect the people of California from unlawful discrimination in employment . . .”).

termination for exercising their legal rights.<sup>41</sup> Available remedies include reinstatement and backpay awards.<sup>42</sup>

#### IV. CHAPTER 1071

Attempting to limit the effects of the *Hoffman* decision, the California Legislature enacted Chapter 1071. Amending California's Labor Code,<sup>43</sup> Government Code,<sup>44</sup> Health and Safety Code,<sup>45</sup> and Civil Code,<sup>46</sup> Chapter 1071 makes legislative findings and declarations.<sup>47</sup> Specifically, these amended sections declare that all individuals who have applied for employment or who are or have been employed in California, have all of the rights, remedies, and protections of that particular California code section, regardless of immigration status, except that which is barred by federal law.<sup>48</sup> Furthermore, Chapter 1071 declares that "a person's immigration status is irrelevant to the issue of liability," unless the "immigration status . . . is necessary in order to comply with federal immigration law."<sup>49</sup> Lastly, "[t]he provisions of [Chapter 1071] are severable," in case any of its provisions are held to be invalid.<sup>50</sup>

#### V. ANALYSIS OF CHAPTER 1071

The primary purpose of Chapter 1071 is to protect all California workers, regardless of their immigration status.<sup>51</sup> Providing remedies and protections to undocumented workers, however, may prove challenging in light of the *Hoffman* decision. Despite the Supreme Court's ruling in *Hoffman*, government agencies, as well as federal and state courts, have continued to reaffirm many remedies and

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41. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1818, at 2 (Aug. 22, 2002).

42. *Id.*

43. CAL. LAB. CODE § 1171.5 (enacted by Chapter 1071).

44. CAL. GOV'T CODE § 7285 (enacted by Chapter 1071).

45. CAL. HEALTH AND SAFETY CODE § 24000 (enacted by Chapter 1071).

46. CAL. CIV. CODE § 3339 (enacted by Chapter 1071).

47. CAL. LAB. CODE § 1171.5 (enacted by Chapter 1071); CAL. GOV'T CODE § 7285 (enacted by Chapter 1071); CAL. HEALTH AND SAFETY CODE § 24000 (enacted by Chapter 1071); CAL. CIV. CODE § 3339 (enacted by Chapter 1071).

48. CAL. LAB. CODE § 1171.5(a) (enacted by Chapter 1071); CAL. GOV'T CODE § 7285(a) (enacted by Chapter 1071); CAL. HEALTH AND SAFETY CODE § 24000(a) (enacted by Chapter 1071); CAL. CIV. CODE § 3339(a) (enacted by Chapter 1071).

49. CAL. LAB. CODE § 1171.5(b) (enacted by Chapter 1071); CAL. GOV'T CODE § 7285(b) (enacted by Chapter 1071); CAL. HEALTH AND SAFETY CODE § 24000(b) (enacted by Chapter 1071); CAL. CIV. CODE § 3339(b) (enacted by Chapter 1071).

50. CAL. LAB. CODE § 1171.5(d) (enacted by Chapter 1071); CAL. GOV'T CODE § 7285(d) (enacted by Chapter 1071); CAL. HEALTH AND SAFETY CODE § 24000(d) (enacted by Chapter 1071); CAL. CIV. CODE § 3339(d) (enacted by Chapter 1071).

51. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1818, at 2 (Aug. 22, 2002) (discussing the need for Chapter 1071).

protections for these workers.<sup>52</sup> This section analyzes the actions of the courts and various government agencies following the *Hoffman* decision.<sup>53</sup> In addition, this section explores the relevance of immigration status in employment litigation<sup>54</sup> and concludes with a look at the potential for federal preemption of Chapter 1071.<sup>55</sup>

#### A. Rights, Remedies, and Protections of Undocumented Workers

Following *Hoffman*, courts throughout the United States heard cases in which defendants tried to use *Hoffman* to escape liability for violating an undocumented worker's rights. In ruling on a motion to dismiss by an employer, the Northern District of California rejected such an effort, holding that even though the worker was undocumented, that worker was entitled to bring suit for unpaid back wages for work already completed.<sup>56</sup> The court further stated that *Hoffman* only eliminated backpay as a remedy to undocumented workers from the time of the illegal termination, not unpaid wages for work already completed.<sup>57</sup> In another California case, a San Diego Superior Court judge held that a taco stand worker who was paid two dollars an hour for seven years was entitled to thirty-two thousand dollars in unpaid wages.<sup>58</sup> In both cases, the employers unsuccessfully cited the *Hoffman* decision.<sup>59</sup>

Since *Hoffman*, many government agencies have issued statements relating to their interpretation of the remaining rights, remedies, and protections available to undocumented workers. On July 19, 2002, the NLRB General Counsel's Office released a memorandum providing guidance to its regional directors in light of the *Hoffman* decision.<sup>60</sup> The memorandum states that the *Hoffman* decision reaffirmed that undocumented aliens are employees under the NLRA.<sup>61</sup> It further states that, "it is unassailable that all statutory employees, including undocumented workers, enjoy protections from unfair labor practices and the right to vote in NLRB elections without regard to their immigration status."<sup>62</sup> In

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52. See *infra* Part V.A (discussing the court rulings and agency decisions following *Hoffman*).

53. *Id.*

54. See *infra* Part V.B (discussing the court rulings since *Hoffman* relating to the relevance of immigration status to various controversies).

55. See *infra* Part V.C (discussing the possibility of federal preemption to Chapter 1071).

56. See *Singh v. Jutla*, 214 F. Supp. 2d 1056, 1060-62 (N.D. Cal. 2002) (interpreting the *Hoffman* decision).

57. *Id.* at 1060.

58. Cleeland, *supra* note 1; Maceri, *supra* note 2.

59. Cleeland, *supra* note 1; Maceri, *supra* note 2; Bob Egelko, *The Legal Whorl: State Seeks to Protect Back Pay for Undocumented Workers*, S.F. CHRON., May 26, 2002, at A7.

60. Memorandum GC 02-06 from the Office of General Counsel, NLRB, Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc., 2002 WL 1720518 (July 19, 2002) [hereinafter Memorandum GC 02-06] (on file with the *McGeorge Law Review*).

61. *Id.*

62. *Id.*

addition, California state agencies have released information emphasizing the enforceable rights of all workers.<sup>63</sup>

### B. *The Relevance of Immigration Status*

Since *Hoffman*, several courts have ruled on the relevance of immigration status to employment litigation. In *Liu v. Donna Karan International, Inc.*, the defendant sought to discover the immigration status of the plaintiffs during discovery of a class action relating to alleged violations of the Fair Labor Standards Act.<sup>64</sup> The court ruled that the discovery was irrelevant.<sup>65</sup> It further held that “the risk of injury to the plaintiffs if such information were disclosed outweighs the need for its disclosure.”<sup>66</sup> Moreover, in April 2002, Los Angeles U.S. District Court Judge A. Howard Matz, ruled that the immigration status of supermarket janitors was not relevant in a class-action suit that sought to collect minimum wage backpay for years of work.<sup>67</sup>

Furthermore, the NLRB General Counsel’s Office, in a memorandum in July 2002, stated “that an individual’s work authorization status is irrelevant to a respondent’s liability under the Act and that questions concerning that status should be left for the compliance stage of the case.”<sup>68</sup>

### C. *The Possibility of Federal Preemption*

Attempts by the State of California to enforce the rights of undocumented workers may be attacked as conflicting with federal law. California is no stranger to federal challenges to its immigration statutes. Recall the fate of California’s Proposition 187, which was passed by California voters in 1994.<sup>69</sup> Proposition 187 was “a dramatic effort to [force] undocumented aliens [out of California] and to ‘deter their entry [into California].’”<sup>70</sup> “The statute was immediately attacked as unconstitutional” and as conflicting with federal laws.<sup>71</sup> In a consolidated

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63. See Cal. Dep’t of Indus. Relations, *All California Workers Are Entitled to Workplace Protection*, at <http://www.dir.ca.gov/Qaundoc.html> (copy on file with the *McGeorge Law Review*) (stating that “[a]ll California workers—whether or not they are legally authorized to work in the United States—are protected by state laws regulating wages and working conditions”).

64. 207 F. Supp. 2d 191 (S.D.N.Y. 2002).

65. *Id.* at 192.

66. *Id.* at 193.

67. *Flores v. Albertsons, Inc.*, No. CV 01-00515 AHM (SHX), 2002 WL 1163623 (C.D. Cal. 2002).

68. Memorandum GC 02-06, *supra* note 60.

69. See Egelko, *supra* note 59 (quoting Dan Stein, the executive director of the Federation for American Immigration Reform, as stating, “‘Why would it be permissible for the state to make its own employment law, without respect to federal immigration classifications, if Proposition 187 was held unconstitutional on the same ground?’”).

70. Stanley Mailman, *California’s Proposition 187 and Its Lessons*, N.Y. L.J., Jan. 3, 1995, at 3.

71. *Id.*



action, the United States District Court in California held that federal law preempted portions of Proposition 187.<sup>72</sup>

The attack on Proposition 187 reminded California that control of immigration is exclusive to the federal government. The United States Supreme Court in a case challenging a proposition similar to Proposition 187 concluded that “the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.”<sup>73</sup>

While Chapter 1071’s purpose is to protect undocumented worker’s rights<sup>74</sup> and Proposition 187’s purpose was to discriminate against undocumented aliens,<sup>75</sup> federal immigration law and the *Hoffman* decision could preempt any attempt to provide a backpay award or its equivalent to an undocumented worker in California.<sup>76</sup> Furthermore, Chapter 1071 provides that it will enforce rights, remedies, and protections of workers in California, regardless of immigration status, except that which is barred by federal law;<sup>77</sup> federal law, however, remains unsettled on the issue of protections and remedies of undocumented aliens.<sup>78</sup>

## VI. CONCLUSION

With approximately half of the eleven million undocumented workers in the United States residing in California,<sup>79</sup> the California Legislature enacted Chapter 1071 to protect as many rights of those workers as federal law will allow. Even prior to the enactment of Chapter 1071, California courts were upholding various rights and remedies of undocumented workers.

Neither the courts nor the NLRB, however, fully understand what rights and remedies *Hoffman* prevents.<sup>80</sup> Both the courts and the NLRB have awarded backpay for wages actually earned to undocumented workers; however, neither have awarded backpay from the time of a retaliatory or illegal termination as an award for an undocumented worker.<sup>81</sup>

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72. League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997).

73. Phylar v. Doe, 457 U.S. 202, 225 (1981) (citing *De Canas v. Bica*, 424 U.S. 351 (1976)).

74. CAL. CIV. CODE § 3339 (enacted by Chapter 1071); CAL. GOV’T CODE § 7285 (enacted by Chapter 1071); CAL. HEALTH AND SAFETY CODE § 24000 (enacted by Chapter 1071); CAL. LAB. CODE § 1171.5 (enacted by Chapter 1071).

75. Mailman, *supra* note 70, at 3.

76. Egelko, *supra* note 59.

77. CAL. CIV. CODE § 3339 (enacted by Chapter 1071); CAL. GOV’T CODE § 7285 (enacted by Chapter 1071); CAL. HEALTH AND SAFETY CODE § 24000 (enacted by Chapter 1071); CAL. LAB. CODE § 1171.5 (enacted by Chapter 1071).

78. See *supra* Part V.A and Part V.B (discussing the decisions following *Hoffman*).

79. Knight, *supra* note 36; Savage & Cleeland, *supra* note 32.

80. *Supra* Part V.A and Part V.B.

81. *Id.*