
ESSAY

LIQUIDATED DAMAGES OR HUMAN TRAFFICKING? HOW A RECENT EASTERN DISTRICT OF NEW YORK DECISION COULD IMPACT THE NATIONWIDE NURSING SHORTAGE

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U.S. healthcare facilities have been recruiting foreign-educated nurses for several decades, but a recent Eastern District of New York (E.D.N.Y.) decision may drastically alter the typical recruiting strategies of healthcare employers. As the nationwide nursing shortage worsens, desperate employers have turned to countries like the Philippines, offering term contracts to guarantee nurse employees for at least two or three years under threat of exorbitant liquidated damages for early resignation. However, in September 2019, an E.D.N.Y. judge ruled not only that such liquidated damages provisions are unenforceable, but also that, when compounded with evidence of employer intent to use these damages to keep employees working, they constitute forced labor, a form of human trafficking prohibited under the Trafficking Victims Protection Act. Within weeks of this decision, a nurses' union filed a similar suit in the Northern District of New York (N.D.N.Y.). While it is unclear whether the original ruling will hold up to scrutiny, it should inspire a spate of similar lawsuits not only in the Second Circuit, but throughout the country. This Essay analyzes the original E.D.N.Y. ruling, compares it to the facts of the lawsuit filed in the N.D.N.Y. to predict the result, and finally discusses how this decision could impact the recruiting scheme that hundreds of hospitals across the country employ—an impact that could in turn have a noticeable effect on the status of the nursing shortage.

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INTRODUCTION

For the last decade, an ever-worsening nursing shortage has plagued the U.S. healthcare system.¹ To combat this problem, some healthcare facilities have begun offering “residency” contracts to new graduates of nursing programs, which commit employees to work for two or three years.² Resigning before the term is over would constitute breach of the contract, which usually stipulates a financial penalty as liquidated damages for such a breach.³ Because recent graduates struggle to compete with experienced applicants in the nursing job market, they tend to be more willing to commit to these terms.

Still more healthcare facilities offer similar contracts to foreign-educated nurses. United States hospitals have recruited nurses from abroad for over a century, primarily from the Philippines, where the United States established nursing schools while attempting to “Americanize” the former colony.⁴ These efforts increased as the United States established various immigration pathways for foreign professionals, but the need for nurses in recent years encouraged healthcare facilities to establish formal recruitment avenues for

¹ *Healthcare Trend Watch—the Nursing Shortage Is Getting Worse*, HEALTHSTREAM (Mar. 27, 2019), <https://www.healthstream.com/resources/blog/blog/2019/03/27/healthcare-trend-watch-the-nursing-shortage-is-getting-worse> [https://perma.cc/XP77-9K45].

² See Kelly Gooch, *How 5 Health Systems Are Recruiting, Retaining Nurses During an RN Shortage*, BECKER'S HOSP. REV. (Jan. 21, 2016), <https://www.beckershospitalreview.com/human-resources/how-5-health-systems-are-recruiting-retaining-nurses-during-an-rn-shortage.html> [https://perma.cc/T59P-UNVZ] (stating that Main Line Health’s “residency program for new nurses” is a way in which the hospital “works to prevent a shortage”); see also Heather Stringer, *Nurse Residencies: A New Frontier*, NURSE.COM (Feb. 9, 2016), <https://www.nurse.com/blog/2016/02/09/nurse-residencies-a-new-frontier> [https://perma.cc/AQR9-24BB] (describing residency programs generally).

³ For anecdotal evidence of the typical amounts of these liquidated damage provisions, see HayRayRN, Comment to *Advice for Breaking Nurse Residency Contract*, ALLNURSES (Jan. 29, 2018, 11:46 PM), <https://allnurses.com/advice-breaking-nurse-residency-contract-t670084> [https://perma.cc/SA36-6LY7] (valuing his damages clause at \$10,000); Vincent12, Comment to *Breaking Nurse Residency Contract*, ALLNURSES (Feb. 3, 2015, 3:27 PM), <https://allnurses.com/breaking-nurse-residency-contract-t560376> [https://perma.cc/WVX3-UVGX] (claiming that his penalty would be \$5000).

⁴ Anne Brice, *Why Are There So Many Filipino Nurses in the U.S.?*, BERKELEY NEWS (May 28, 2019), <https://news.berkeley.edu/2019/05/28/filipino-nurses-in-the-us-podcast> [https://perma.cc/W859-LJP8].

foreign-educated nurses.⁵ Recruiters commonly offer these nurses contracts for up to three years with “high breach-of-contract fees” for resigning early.⁶ United States healthcare facilities employ thousands of foreign-educated nurses, most of whom are under this type of contract.⁷ As of 2000, Filipino nurses made up about forty percent of foreign-educated nurses generally.⁸ This large representation reflects both employers’ attraction to the training available in the Philippines and an incredible financial opportunity for the nurses: salaries for nurses in the Philippines are roughly \$3300, about five percent of U.S. nursing salaries.⁹ As such, many Filipino nurses have incentive to sign contracts with excessive liquidated damages.¹⁰

Despite signing residency contracts similar to those signed by U.S. graduates, Filipino nurses are agreeing to much higher liquidated damages. Liquidated damages specified in domestic residency contracts are typically between \$5000 and \$10,000.¹¹ For foreign-educated nurses, these damages are closer to \$20,000 to \$30,000¹²—a significant portion of their typical salary of roughly \$50,000.¹³ These respective groups also see considerable variance in the strength of their economic backgrounds and social networks. Despite the likelihood that recent U.S. graduates are burdened by student loans,¹⁴ U.S. graduates of nursing programs are more likely to have the freedom to buy out their contract term by paying the liquidated damages upfront. Filipino

⁵ *Id.* These recruiting processes have faced severe criticism, with some scholars pointing out the often-exploited potential for abuse within the recruiting agencies. *See, e.g.,* Patricia M. Pittman et al., *U.S.-Based Recruitment of Foreign-Educated Nurses: Implications of an Emerging Industry*, AM. J. NURSING, JUNE 2010 at 45 (“Some FENs spoke of recruiters who charged fees for help in navigating the immigration and job placement processes and then either disappeared or never followed through.”).

⁶ Pittman et al., *supra* note 5, at 47.

⁷ *Id.* at 38, 47.

⁸ Barbara L. Brush et al., *Imported Care: Recruiting Foreign Nurses to U.S. Health Care Facilities*, 23 HEALTH AFF. 78, 79 (2004).

⁹ Nathalie Robles, *Why Filipino Nurses Are a Huge Presence in U.S. Health Care*, INQUIRER.NET (May 3, 2019, 3:43 AM), <https://usa.inquirer.net/28681/why-filipino-nurses-are-a-huge-presence-in-u-s-health-care> [<https://perma.cc/NRA6-KMSZ>].

¹⁰ It is also important to consider that, while Filipino nurses have reasonable incentive to sign the contracts on their face, oftentimes they are not aware of what exactly they sign: recruiters have either outright “denied a copy of the contract” after signing, or otherwise neglected to freely give the recruited nurses a copy unless they ask. Pittman et al., *supra* note 5, at 45.

¹¹ *See supra* note 3 and accompanying text.

¹² Patricia Pittman et al., *Immigration and Contract Problems Experienced by Foreign-Educated Nurses*, 69 MED. CARE RES. & REV. 351, 352, 358 (2012).

¹³ Brush et al., *supra* note 8, at 80–81; *see also* Pittman et al., *supra* note 5, at 43 (estimating that hourly wages for foreign-educated nurses who are employed through a staffing agency start at twenty-five dollars per hour, which translates to a salary of \$52,000).

¹⁴ The average student in the United States who graduates with debt from student loans owes \$29,800 at the time of graduation. Abigail Hess, *Here’s How Much the Average Student Loan Borrower Owes When They Graduate*, CNBC (May 20, 2019, 12:24 PM), <https://www.cnbc.com/2019/05/20/how-much-the-average-student-loan-borrower-owes-when-they-graduate.html> [<https://perma.cc/BEC7-32NX>].

nurses, who typically pursue opportunities abroad specifically because the salaries are significantly higher, are usually unable to buy out the term in this way due to a lack of support and access to resources. For example, any savings from Filipino nurses' previous \$3300 salary would not go far in the U.S. economy; familial connections would likely be in the Philippines and of little help; and loans are limited for nonresidents, not to mention prohibitively complicated to obtain.¹⁵ Aggravating these difficulties, Filipino employees are often not represented by counsel when they sign their contracts, despite lacking familiarity with U.S. contract law.¹⁶ Though recent U.S. graduates likewise may not be represented by counsel when signing their own agreements, they are afforded time and opportunity to review the contract and consult an attorney if they wish¹⁷—a luxury that abusive recruiters may prevent foreign-educated nurses from enjoying.¹⁸

The particular precariousness of the situation for foreign-educated nurses is not limited to their economic and social backgrounds; they are disadvantaged even after they begin work in the United States. While there is plenty to be said for the value of foreign-educated nurses,¹⁹ given that many foreign-educated nurses in the United States demonstrate a “knowledge deficit” regarding the U.S. healthcare system and policies,²⁰ hospitals

¹⁵ See Aliyyah Camp, *How to Get a Loan as a Nonresident in the United States*, FINDER, <https://www.finder.com/loans-for-nonresidents-in-the-us> [<https://perma.cc/T8EC-4U92>] (last updated Apr. 21, 2020) (describing several restrictions and obstacles for nonresidents wishing to obtain loans).

¹⁶ See Paguirigan v. Prompt Nursing Emp't Agency LLC, No. 17-1302, 2019 U.S. Dist. LEXIS 165587, at *25 & n.5 (E.D.N.Y. Sept. 23, 2019) (explaining that the plaintiff, a Filipino nurse who had signed a contract with liquidated damages fees of \$25,000, as well as other members of the class action, were not represented by counsel when they executed their contracts).

¹⁷ For examples of the dozens of nursing websites and blogs that advise new hires to take their time to review the terms of an offered employment contract carefully, see, for example, *Employment Contracts*, NURSING TIMES (Jan. 1, 2007), <https://www.nursingtimes.net/roles/nurse-managers/employment-contracts-01-01-2007> [<https://perma.cc/UJ8M-AXWA>]; MJB2010, Comment to *Signing a Contract for a Length of Employment Commitment?*, ALLNURSES (July 29, 2010, 5:48 PM), <https://allnurses.com/signing-contract-length-employment-commitment-t343850> [<https://perma.cc/5LTG-86MW>].

¹⁸ For example,

nurses often appeared to have little information about the recruitment and immigration processes and their rights under U.S. law. In some instances, nurses signed up for jobs at job fairs and were later uncertain about what they'd signed; some were denied a copy of the contract, while others forgot to ask for one.

Pittman et al., *supra* note 5, at 45.

¹⁹ See *Why Do Hospitals Recruit Foreign Nurses?*, CONEXUS MEDSTAFF, <https://www.conexusmedstaff.com/blog/2019/07/why-do-hospitals-recruit-foreign-nurses> [<https://perma.cc/Q2BR-7EB9>] (last visited Oct. 27, 2019) (listing benefits of hiring foreign-educated nurses to a domestic healthcare provider).

²⁰ See Lobel Lurie, *Strategic Planning for Future Delivery of Care: Onboarding Foreign-Educated Nurses*, 14 NURSE LEADER 427, 427–28 (2016) (discussing the difficulties that foreign-educated nurses face and suggesting that the United States increase investment in their education); Tyler Grote, *Why*

naturally tend to prefer nurses with experience in the U.S. healthcare system. For this reason, foreign-educated nurses often end up at the hospitals that feel the brunt of the nursing shortage and are thus severely understaffed.²¹ In such hospitals, nurses can be forced into shifts of up to thirty-six hours.²² Lack of breaks and “fatigue and malaise” can cause nurses to experience exhaustion “hangovers” and even burnout.²³ Nurses at understaffed hospitals are at increased risk of developing “musculoskeletal disorders, hypertension, and depression,” and unsafe working conditions have resulted in reports of illness or injury at an incidence rate higher than that of any profession besides law enforcement patrol officers.²⁴ Additionally, at a certain point, the impact of understaffing becomes antithetical to the purpose of healthcare providers: nursing shortages put patients at risk by increasing incidences of poor documentation, infection, and death.²⁵

The most common way for nurses to cope with these situations is to transfer to a different hospital. This is clearly easier for U.S.-educated nurses, and healthcare facilities know this; foreign-educated nurses are more likely to receive lengthier shifts and patient assignments, as their supervisors know they are essentially trapped.²⁶ In fact, some healthcare facilities have even

Foreign-Trained Nurses Can Help Solve the US' Nursing Shortage, BECKER'S HOSP. REV. (Jan. 25, 2016), <https://www.beckershospitalreview.com/human-resources/why-foreign-trained-nurses-can-help-solve-the-us-nursing-shortage.html> [<https://perma.cc/MLS7-JEQX>] (describing some obstacles faced by healthcare providers who hire foreign-trained nurses).

²¹ A group of studies on foreign-educated nurses and patient care in the United States support this observation. One study found that hospitals that employ foreign-educated nurses see a positive correlation between the population of foreign-educated nurses and patient mortality rates for the most part only in hospitals with average or “poor” staffing. Donna Felber Neff et al., *Utilization of Non-US Educated Nurses in US Hospitals: Implications for Hospital Mortality*, 25 INT'L J. FOR QUALITY HEALTH CARE 366, 366, 370 (2013). More recent studies, particularly those that highlight the general negative correlation between number of foreign-educated nurses and patient care experiences, have built on this study to suggest that higher populations of foreign-educated nurses are more likely to occur at hospitals with staffing problems. See Hayley D. Germack et al., *U.S. Hospital Employment of Foreign-Educated Nurses and Patient Experience: A Cross-Sectional Study*, J. NURSING REG., Oct. 2017, at 26, 27.

²² Kristen Fischer, *Nurses: Overworked and Understaffed on the Front Lines*, HEALTHLINE (Sept. 27, 2016), <https://www.healthline.com/health-news/nurses-overworked-understaffed-070714#1> [<https://perma.cc/A2GU-LJR4>].

²³ Michael Sainato, *Why America's Nurses Are Getting 'Hangovers' from Their Work*, GUARDIAN (Feb. 12, 2019, 6:00 AM), <https://www.theguardian.com/society/2019/feb/12/nurses-hospitals-understaffed-risks-burnout> [<https://perma.cc/ST9J-HM8V>].

²⁴ DEP'T FOR PROF. EMPS., AFL-CIO, SAFE STAFFING: CRITICAL FOR PATIENTS AND NURSES, FACT SHEET (2019), <https://dpeaflcio.org/programs-publications/issue-fact-sheets/safe-staffing-ratios-benefiting-nurses-and-patients> [<https://perma.cc/DWR5-NRSA>].

²⁵ See Sainato, *supra* note 23.

²⁶ See *Over 200 Pinoy Nurses in NY to Benefit from Court Win in Human-Trafficking Case*, ABS-CBN NEWS (Oct. 4, 2019, 11:24 PM), <https://news.abs-cbn.com/news/10/04/19/over-200-pinoy-nurses-in-ny-to-benefit-from-court-win-in-human-trafficking-case> [<https://perma.cc/73JL-PLJ7>] (noting that Filipino nurses' immigration status subjected them to harsher working conditions because employers knew that they

engaged in unjust or illegal treatment of foreign-educated nurses; at least one such facility underpaid its Filipino nurses,²⁷ knowing that the nurses' only options—to consult a lawyer or resign—were practically unavailable to them.

These manipulative practices are so widespread that they are essentially institutionalized within the U.S. healthcare system. However, that may be about to change. In late September 2019, a judge in the Eastern District of New York (E.D.N.Y.) found a healthcare facility liable under the federal Trafficking Victims Protection Act (TVPA), largely based on the \$25,000 liquidated damages provision in the contracts of its Filipino nurses.²⁸ Three weeks later, a nurses' union filed a similar claim in the Northern District of New York (N.D.N.Y.).²⁹ Given the number of nurses in similar situations, other Second Circuit districts are likely to see similar cases, especially if the N.D.N.Y. claim has an outcome similar to the E.D.N.Y. claim. These rulings are not only relevant to New York—they have the potential to impact the entire country.

This Essay first discusses the relevant facts of the E.D.N.Y. ruling in Part I. Part II analyzes the court's ruling and applies it to the claim before the N.D.N.Y. The Essay will then conclude with a discussion of the potential impact of these rulings on the foreign recruitment practices of healthcare facilities across the country.

I. THE EASTERN DISTRICT OF NEW YORK JUDGMENT

In 2006, Rose Ann Paguirigan was recruited from the Philippines to work in a New York nursing home.³⁰ After a lengthy visa approval process, Paguirigan signed a three-year contract in 2015.³¹ The contract offered salaried employment at one of several Sentosa Care nursing homes and specified liquidated damages of “up to \$25,000” if the employee resigned before the end of the three-year term.³² The latter provision also required the employee to “execute a confession of judgment for \$25,000,” which the employer could file in court if the employee left before the end of the term.³³ Paguirigan was

couldn't leave); *see also* Paguirigan v. Prompt Nursing Emp't Agency LLC, No. 17-1302, 2019 U.S. Dist. LEXIS 165587, at *51–52 (E.D.N.Y. Sept. 23, 2019) (discussing the statements of the plaintiffs that they felt trapped into working in an unsafe environment because of the high liquidated damages provision).

²⁷ Paguirigan, 2019 U.S. Dist. LEXIS 165587, at *20–22.

²⁸ *Id.* at *52–55, *61.

²⁹ Liz Young, *Nurses Union Files Federal Lawsuit Against Albany Med*, ALB. BUS. REV. (Oct. 15, 2019, 2:49 PM), <https://www.bizjournals.com/albany/news/2019/10/15/albany-med-nurses-union-federal-lawsuit.html> [<https://perma.cc/G4PH-FXZP>].

³⁰ Paguirigan v. Prompt Nursing Emp't Agency LLC, No. 17-1302, 2018 U.S. Dist. LEXIS 156331, at *3 (E.D.N.Y. Sept. 11, 2018).

³¹ *Id.* at *3–4.

³² *Id.* at *5.

³³ *Id.*

ultimately placed at Spring Creek, a Sentosa Care facility in Brooklyn, and began work in June 2015; she resigned within nine months.³⁴

Despite the fact that Paguirigan pursued this opportunity for nearly a decade,³⁵ she could no longer work under the conditions at Spring Creek. She was paid less than the salary specified in the contract³⁶ and working conditions were unexpectedly harsh. In addition to the typical issues associated with understaffing, such as burdensome shifts and resulting fatigue, Filipino nurses like Paguirigan bore the brunt of the problems, as their supervisors were aware that the liquidated damages provisions in their contracts made them less able to leave.³⁷

When Prompt Nursing, the staffing agency that controlled Paguirigan's contract, filed suit against her to enforce the liquidated damages provision in her contract, Paguirigan filed a lawsuit herself, naming the staffing agency, her employer, and all other agencies and employers involved in her recruitment as defendants.³⁸ She filed on behalf of two hundred other Filipino nurses employed at Sentosa Care facilities, accusing all defendants of inserting an unenforceable liquidated damages provision into the contract, breaching the contract, and violating the TVPA.³⁹

U.S. District Judge Nina Gershon issued her ruling on these claims on September 23, 2019, finding for Paguirigan on all of her summary judgment claims.⁴⁰ Judge Gershon started by easily disposing of the breach of contract claim:⁴¹ because this claim was based on defendants' failure to pay Paguirigan the amount specified in the contract, it was both the least contentious issue and unrelated to the other claims, which involved the liquidated damages provision.

Not only were Paguirigan's other claims more interrelated, they also represented the key, influential aspects of Judge Gershon's ruling. Judge Gershon first found that the liquidated damages provision was unenforceable.⁴² Simply put, liquidated damages will not be enforced if they are contrary to public policy, which disallows such provisions if they "do[] not serve the purpose of reasonably measuring the anticipated harm, but [are] instead punitive in nature, serving as a mere 'added spur to performance.'"⁴³ Judge Gershon additionally noted that New York construes liquidated

³⁴ *Id.* at *6–7.

³⁵ *Id.* at *3.

³⁶ *Paguirigan v. Prompt Nursing Emp't Agency LLC*, No. 17-1302, 2019 U.S. Dist. LEXIS 165587, at *13, *21 (E.D.N.Y. Sept. 23, 2019).

³⁷ *Over 200 Pinoy Nurses in NY to Benefit from Court Win in Human-Trafficking Case*, *supra* note 26.

³⁸ *Paguirigan*, 2019 U.S. Dist. LEXIS 165587, at *1, *9.

³⁹ *Id.* at *1–3.

⁴⁰ *Id.* at *60–61.

⁴¹ *Id.* at *13–22.

⁴² *Id.* at *24.

⁴³ *Id.* at *22–23 (quoting *Agerbrink v. Model Serv. LLC*, 196 F. Supp. 3d 412, 417 (S.D.N.Y. 2016)).

damages provisions “strictly,” such that where damages are “plainly disproportionate to the contemplated injury,” they will be treated as a penalty.⁴⁴ Twenty-five thousand dollars in liquidated damages would have taken Paguirigan almost nine months to pay off even if she had no other expenses such as food and housing.⁴⁵ Moreover, the court found it damning that the contract’s confession of judgment went as far as to “outright state[] that its purpose [was] to secure Employee’s performance of the Employment Term.”⁴⁶ Because the defendants failed to show expenditures related to recruiting that exceeded even \$5000, Judge Gershon found that the provision was a penalty and thus unenforceable.⁴⁷ This finding resurfaced in the consideration of the TVPA claims.

Paguirigan brought several claims under different provisions of the TVPA, but the most important claim is that the defendants violated the forced labor clause of the TVPA, which prohibits the obtaining of labor or services by means of “serious harm or threats of serious harm” or “the abuse or threatened abuse of law or legal process,” among other untoward methods.⁴⁸ The TVPA defines “serious harm” as “physical or nonphysical [harm], including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.”⁴⁹ It also defines “abuse of law or legal process” as the use of law, “whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person.”⁵⁰ Paguirigan argued that the defendants, specifically Prompt Nursing, violated the TVPA by using both threats of harm and abuse of law or legal process. This claim was based on several facts: the \$25,000 liquidated damages provision; Prompt Nursing’s previous lawsuits to enforce these provisions, which they often escalated when lower courts found the provisions unenforceable; and the filing of professional disciplinary complaints against nurses who resigned, which did not result in action against the nurses but nevertheless prompted the defendants to speak with the Suffolk County District Attorney about prosecuting them.⁵¹

⁴⁴ *Id.* at *23.

⁴⁵ *Id.* at *24.

⁴⁶ *Id.* (internal quotation marks omitted).

⁴⁷ *Id.* at *25-26, *35.

⁴⁸ 18 U.S.C. § 1589(a) (2018).

⁴⁹ *Id.* § 1589(c)(2).

⁵⁰ *Id.* § 1589(c)(1).

⁵¹ *Paguirigan*, 2019 U.S. Dist. LEXIS 165587, at *47.

As an initial matter, Judge Gershon rejected the defendants' argument that "efforts to enforce a liquidated damages provision that was valid under [another state's] law did not give rise to TVPA liability," based on the fact that she had found that the liquidated damages provision was *not* valid in New York.⁵² After rejecting several other alternative arguments from the defendants, Judge Gershon ultimately held that the defendants were liable for violation of the TVPA.⁵³ She found that the \$25,000 liquidated damages provision constituted "serious financial harm," especially given the "particular vulnerabilities" of the nurses, who were recent Filipino immigrants to the United States, underpaid but forced to work under threat of high financial penalty, and put on excessively long shifts.⁵⁴ Additionally, based on the intention stated in the confession of judgment and the history of the defendants filing lawsuits to enforce the liquidated damages, she determined that Prompt Nursing acted with the "knowledge and intent" required to find a violation of the TVPA.⁵⁵

Judge Gershon concluded the judgment by finding that the TVPA extends liability to the other defendants who either actively recruited the nurses themselves or were sufficiently part of a "joint enterprise" to constitute conspiracy under the TVPA.⁵⁶ Thus, on summary judgment, Paguirigan prevailed against the defendants on all counts.

II. THE LAWSUIT FILED IN THE NORTHERN DISTRICT OF NEW YORK

Only a few weeks after Judge Gershon decided *Paguirigan*, the New York State Nurses Association (NYSNA) nurses' union announced that it planned to file a similar lawsuit against Albany Med hospital in the N.D.N.Y.⁵⁷ Clearly inspired by *Paguirigan*, the NYSNA contends that an up to \$20,000 penalty for leaving a three-year contract, which Albany Med terms a "placement fee," constitutes forced labor.⁵⁸ Moreover, the NYSNA highlights that, according to the contract, failure to repay these fees "may constitute fraud," and Albany Med may report this failure "to the Bureau of Citizenship and Immigration

⁵² *Id.* at *48.

⁵³ *Id.* at *55–59, *61.

⁵⁴ *Id.* at *52–54.

⁵⁵ *Id.* at *55.

⁵⁶ *Id.* at *58–59.

⁵⁷ Bethany Bump, *Lawsuit: Albany Med's Filipino Nursing Program Violates Human Trafficking Law*, TIMES UNION (Oct. 14, 2019), <https://www.timesunion.com/news/article/Lawsuit-Albany-Med-s-Filipino-nursing-program-1452113.php> [<https://perma.cc/6Z7R-B2VF>].

⁵⁸ *Id.*

Services under applicable immigration fraud statutes.”⁵⁹ Like Paguirigan, the Albany Med nurses also signed a confession of judgment.⁶⁰

Dennis McKenna, the Albany Med CEO designate, publicly responded to this announcement,⁶¹ hinting at the legal strategy the hospital will employ if the lawsuit proceeds. McKenna called the lawsuit “a grotesque perversion of the original intent of the [TVPA],”⁶² and emphasized that Albany Med had never pursued legal action against nurses who resigned early,⁶³ though the complaint disputes this claim.⁶⁴ McKenna further branded the announcement and lawsuit a negotiation tactic,⁶⁵ a believable accusation in light of the recent rally over the nursing shortage at Albany Med,⁶⁶ but equally as possible as an alternative explanation: that the NYSNA waited for a favorable judgment from another court to pursue these accusations.

While it is certainly possible that the NYSNA threatened the lawsuit only as a negotiation tactic, *Paguirigan* provided a basis for similar rulings in other districts, including the N.D.N.Y. It is difficult to predict whether the N.D.N.Y. will follow the judgment of the E.D.N.Y. However, the information that the NYSNA and Albany Med have shared publicly through the media and the NYSNA complaint are enough to estimate the strength of the suit.

As an initial matter, it is worth emphasizing that *Paguirigan* was a ruling on summary judgment. In other words, on all counts, the plaintiff was able to show that there was no dispute of material fact and she was “entitled to judgment as a matter of law.”⁶⁷ While such a ruling may imply, to a certain extent, that the decision was fairly clear-cut, it is not uncommon for summary judgments to be overturned on appeal. While the N.D.N.Y. might find *Paguirigan* more persuasive, it may instead be incentivized to delay decision on this lawsuit, pending potential appeal of *Paguirigan* to the Second Circuit, which could issue a firmly binding decision on the matter.⁶⁸

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Young, *supra* note 29.

⁶⁴ Bump, *supra* note 57. See also Complaint at 7, N.Y. State Nurses Ass’n v. Albany Med. Ctr., No. 19-1265 (N.D.N.Y. Oct. 15, 2019) (stating that Albany Med has enforced the Forced Labor Penalty Provision against nurses in the Program who resigned prior to completion of their three-year term).

⁶⁵ Young, *supra* note 29.

⁶⁶ John Cropley, *Nurses Rally Over Long-Running Albany Med Contract Talks*, DAILY GAZETTE (Sept. 25, 2019), <https://dailygazette.com/article/2019/09/25/nurses-rally-over-long-running-albany-med-contract-talks> [<https://perma.cc/455K-PYCP>].

⁶⁷ Fed. R. Civ. P. 56(a).

⁶⁸ Incidentally, during the writing of this comment, the defendants did in fact file an appeal of the E.D.N.Y.’s grant of injunctive relief. Notice of Appeal on Behalf of Appellants at 1, *Paguirigan v. Prompt Nursing Emp’t Agency LLC*, No. 17-1302 (E.D.N.Y. Oct. 23, 2019). The defendants also

In any event, the NYSNA claims largely concern violation of the TVPA, which the union will have to bolster with a claim of unenforceability of the \$20,000 fee.⁶⁹ While the TVPA analysis is fairly straightforward, the unenforceability analysis may be a difficult hurdle for the NYSNA to overcome. The *Paguirigan* defendants attempted to demonstrate that they invested an amount equivalent to the \$25,000 penalty, even calling an expert witness to determine their expenditures.⁷⁰ However, Judge Gershon refused to consider the expert testimony; the expert did not base his cost analysis on his own “independent evaluation,” but on short summaries and “untested and contradicted facts provided by defense counsel,” and Judge Gershon held that this made his testimony unreliable and thus inadmissible.⁷¹ It is not clear whether Albany Med will fare better on this point. Perhaps both hospitals truly did spend a proportional amount to recruit nurses; in that case, Albany Med’s success could depend only on whether it kept clear enough records to allow a judge to easily find that the hospital invested a large enough amount of money in recruiting the nurses to warrant a possible \$20,000 fee. But perhaps neither hospital spent a proportional amount on recruitment, and the *Paguirigan* defendants argued otherwise as best as possible for any defendant; in that case, Albany Med’s result should not differ much.

If Albany Med cannot demonstrate that its costs are proportional to \$20,000, the N.D.N.Y. will likely find the provision unenforceable. While it is unclear whether the contract here also outright states the intention to compel employees to remain for the duration of the term, the amount of the fee in comparison to the nurses’ salaries would still “support[] the conclusion that this provision is ‘intended to operate as a means to compel performance.’”⁷² Additionally, the fact that the parties were of “unequal bargaining power” would almost certainly hold true here; as Judge Gershon

moved for reconsideration of the TVPA aspects of the E.D.N.Y. decision, but Judge Gershon denied the motion, and the appeal of the injunctive relief will still proceed. *Paguirigan v. Prompt Nursing Emp’t Agency LLC*, No. 17-1302, 2020 U.S. Dist. LEXIS 4837, at *2, *7 (E.D.N.Y. Jan. 9, 2020). Judge Gershon also denied the defendants’ motion for certification of an interlocutory appeal of her partial summary judgment ruling. *Paguirigan v. Prompt Nursing Emp’t Agency LLC*, No. 17-1302, 2020 U.S. Dist. LEXIS 4838, at *1-2 (E.D.N.Y. Jan. 9, 2020). Based on the filing of the appeal, there is a possibility that the N.D.N.Y. will delay the decision on this lawsuit in an effort to see if the Second Circuit will provide any guidance in either its rejection or affirmation of the E.D.N.Y.’s injunction. This is due to a possible range of outcomes of this appeal, from complete rejection of the E.D.N.Y. ruling to affirming it, such that it becomes binding on all Second Circuit district courts.

⁶⁹ Complaint, *supra* note 64, at 13. Notably, the NYSNA complaint alleges that the penalty is “disproportionate,” but does not explicitly argue that this makes the provision unenforceable on its own. *Id.* at 6–7.

⁷⁰ *Paguirigan v. Prompt Nursing Emp’t Agency LLC*, No. 17-1302, 2019 U.S. Dist. LEXIS 165587, at *27 (E.D.N.Y. Sept. 23, 2019).

⁷¹ *Id.* at *34.

⁷² *Id.* at *24 (quoting *Rattigan v. Commodore Int’l Ltd.*, 739 F. Supp. 167, 169 (S.D.N.Y. 1990)).

explained in *Paguirigan*, “New York courts are hesitant to invalidate” employment contracts that are negotiated at “arms length”—wherein the parties contract freely and independently—but because the parties were of “unequal bargaining power” in *Paguirigan*, the contract negotiation could not be considered “arms length.”⁷³

If this provision is still unenforceable in the N.D.N.Y., then Albany Med would be unable to argue that the provision is valid and thus bars a claim under the TVPA; instead, it will likely present two alternative arguments against the TVPA claims. The most obvious argument would be that the TVPA was not enacted for the purpose of punishing employers who recruit foreign-educated employees and merely want to protect their investment. Albany Med’s statements—insisting that the claim is a “grotesque perversion” of the intent of the TVPA—indicate that it is considering this argument.⁷⁴ However, given that the “fundamental purpose of [the TVPA forced labor clause] is to reach cases of servitude achieved through nonviolent coercion,”⁷⁵ it is difficult to imagine what alternative situations the forced labor clause *is* anticipating, especially when it specifically references threats of serious financial harm. Furthermore, there is a reasonable argument that it is necessary to apply the TVPA in this situation; based on how widespread this practice is and how successfully some employers have pursued legal action even when the liquidated damages are unenforceable,⁷⁶ nurses in this situation require stronger protection than simply the ability to claim that the damages are unenforceable. As the situation currently stands, the only realistic recourse for recently immigrated Filipino nurses is to challenge the enforceability of the contract provisions. While it appears that such recourse can be successful,⁷⁷ it is not enough on its own. First, an employer is not

⁷³ *Id.* at *24-25.

⁷⁴ Bump, *supra* note 57.

⁷⁵ *Paguirigan v. Prompt Nursing Emp’t Agency LLC*, 286 F. Supp. 3d 430, 439 (E.D.N.Y. 2017). Legislative history of the forced labor clause offers analogous support of the applicability of the forced labor clause to this situation. A 2007 congressional report explains the addition of the misdemeanor crime of forced labor, expressly envisioning “a scheme that creates an ongoing dependency on a recruiter such as a fee that eats up more than 1% of the [promised] total wage.” H.R. REP. NO. 110-430, pt. 1, at 54 (2007). The described situation is clearly analogous to the dependency that an employer creates by enforcing liquidated damages that constitute half the promised yearly salary, indicating that Congress intended for such practices to constitute criminal acts under the TVPA.

⁷⁶ See *Paguirigan*, 2019 U.S. Dist. LEXIS 165587, at *47-48 (discussing numerous prior attempts by defendants to enforce the penalty as well as another suit in which an employer successfully enforced a liquidated damages provision); Pittman et al., *supra* note 5, at 38 (noting that the use of this staffing model requiring nurses to sign contracts of eighteen to thirty-six months imposing “high breach-of-contract fees” continues to grow within the industry).

⁷⁷ In fact, this is exactly what happened prior to *Paguirigan*, which arose in part because Sentosa Care filed lawsuits in 2016 to enforce the liquidated damages provision at issue—despite the fact that the Nassau County Supreme Court in 2010 deemed the clause unenforceable after a Filipino nurse challenged the provision in court. *Paguirigan*, 2019 U.S. Dist. LEXIS 165587, at *47.

necessarily prevented from a contractual provision in future contracts if a nurse successfully challenges that provision; this is evident in even *Paguirigan*, in which prior history revealed that the employer continued to use and enforce a liquidated damages provision, despite a prior lower court ruling that the provision was unenforceable.⁷⁸ Protection under the TVPA means that these provisions are not just unenforceable—they are criminal. The consequences associated with a criminal charge are far greater deterrents than the consequences of finding unenforceability.⁷⁹ Second, and relatedly, contract disputes require a certain level of resources; the injured nurses would either need to hire a lawyer or find one to work pro bono. Neither option is particularly realistic given the typical lack of community ties and financial resources that recent Filipino immigrants face. However, if these provisions rise to the level of a criminal act, the injured nurses could pass their complaints to authorities and prosecutors.

Albany Med's other option is to lean on its assertion that it has never taken legal action against nurses who resigned before the end of their term.⁸⁰ In *Paguirigan*, the fact that the defendants had a history of aggressively pursuing legal action against nurses who resigned early was crucial to the TVPA analysis; it evidenced that the defendants *intended* to cause reasonable people in the nurses' position to take the threat seriously and continue working because of it.⁸¹ Absent evidence that Albany Med has pursued legal action,⁸² or that its contracts outright stated this intention, the hospital may prevail here. However, the extreme intensity of the threats in Albany Med contracts may stand in the way of its victory: the threat to report nurses for fraud in addition to the liquidated damages is severe enough, but the mention

⁷⁸ *Id.*

⁷⁹ Compare Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEGAL ANALYSIS 1, 32 (2017) (indicating that the harshest penalty for a finding of unenforceability in the residential context is that the court will issue "legal sanctions, such as court-awarded damages," and that when the risk of sanctions is low, companies in the residential context may continue to use clauses they know are unenforceable), with 18 U.S.C. § 1589(d) (2018) (indicating that violation of the TVPA can result in up to twenty years of imprisonment, fines "under this title," or both), and *id.* § 3571 (putting a cap on fines under Title 18 of up to \$250,000 for individuals and \$500,000 for organizations).

⁸⁰ The NYSNA complaint counters that "some Filipino nurses have breached the contract and were ordered to pay." Bump, *supra* note 57. However, because the details and evidence of these instances are not yet known, this Essay treats Albany Med's claims as fact, and thus assumes that it has never taken legal action against the nurses.

⁸¹ *Paguirigan*, 2019 U.S. Dist. LEXIS 165587, at *55.

⁸² Notably, Albany Med publicly insists that it has never taken legal action against nurses based on this provision, but the NYSNA complaint disputes this. Complaint, *supra* note 69, at 7; Young, *supra* note 29. Given that this is a matter for a factfinder to determine based on evidence, this comment proceeds assuming absence of evidence that Albany Med has pursued legal action.

of immigration authorities would carry disturbing implications for any employee in the nurses' position as recent immigrants.

While the *Paguirigan* defendants only threatened financial harm, the contracts that Albany Med offered Filipino nurses also threaten criminal charges and, deportation.⁸³ It is possible that Albany Med didn't file lawsuits against nurses because very few, if any, left without paying the \$20,000 fee, given that they were facing threats so severe that they didn't dare risk resigning without paying. In today's political climate, which sees frequent and indiscriminate government immigration raids⁸⁴ and attacks on the rights of even legal residents,⁸⁵ the threat of involving federal immigration is very real, very vivid, and perhaps even more coercive than a \$20,000 penalty. Further, a judge could easily conclude that the presence of these threats in the contract *all but* outright states an intention to coerce employees to remain for the contract term. To avoid this conclusion, Albany Med would have to come up with an alternative reason for including these threats. While possible, it seems unlikely that any other interpretation could be as believable as intention to coerce.

While several aspects of the Albany Med situation differ from the facts of *Paguirigan*, they should balance out to the same result. Although some facts are still unclear, those that are known highlight the similarities between the fact patterns. Just as *Paguirigan* seemingly prompted other action within weeks, if the N.D.N.Y. finds Judge Gershon's logic persuasive, it could spur a spate of similar lawsuits across the other districts in the Second Circuit. Furthermore, the N.D.N.Y. has the opportunity to indicate how narrow this ruling will be—will it treat these situations as fact-specific, or will a general ruling eventually develop? Such a ruling could potentially be so broad as to hold that all disproportionate liquidated damages in foreign-educated nurse contracts create a presumption of intent to harm in violation of the forced labor clause of the TVPA. But it doesn't end there—theoretically, any federal district court could find the *Paguirigan* ruling persuasive.

CONCLUSION: NATIONAL IMPACT

New York is far from the only state with healthcare facilities that offer these contracts to foreign-educated nurses. As discussed, the practice of

⁸³ See Bump, *supra* note 57 (explaining that one nurse recalled being informed at orientation that she would be deported if she broke her contract).

⁸⁴ See Miriam Jordan, *More Than 2,000 Migrants Were Targeted in Raids. 35 Were Arrested.*, N.Y. TIMES (July 23, 2019), <https://www.nytimes.com/2019/07/23/us/ice-raids-apprehensions.html> [<https://perma.cc/98L7-SCXP>].

⁸⁵ See Michael D. Shear et al., *Trump's Policy Could Alter the Face of the American Immigrant*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/2019/08/14/us/immigration-public-charge-welfare.html> [<https://perma.cc/Q2XQ-9RDX>].

recruiting foreign-educated nurses under contracts with high liquidated damages is widespread across the United States⁸⁶ and has prompted a fair amount of research into this process and its effects.⁸⁷ Any federal court could be inspired by the *Paguirigan* ruling as it stands,⁸⁸ but if other New York districts begin to follow suit, the ruling could take on a level of persuasiveness that impacts law across the country.

This is only possible insofar as the New York laws utilized in these opinions do not depart too drastically from other state laws. However, based on the rationale of *Paguirigan*, this concern is not problem. Judge Gershon used law specific to New York sparingly, relying on U.S. Supreme Court and federal precedent whenever possible. This is particularly true of her conclusion that liquidated damages are unenforceable if used to “spur . . . performance” and her interpretation of the TVPA, a federal statute—the two key aspects of the case.⁸⁹ It would be a simple matter for other states to adopt the reasoning; given the ruling’s detailed explanation—which, at over fifty pages, exceeds the detail necessary for a ruling on summary judgment⁹⁰—and reliance on federal law, it may have even been Judge Gershon’s intention that they do so.

If these rulings have an impact outside of New York, they have the potential to derail the entire national system of nurse recruitment by severely limiting, if not effectively prohibiting, a popular and accepted strategy to combat the nursing shortage.⁹¹ Courts in other states may not even have to rule on the matter for hospitals to take steps to protect themselves from liability. Eyes outside of New York have already turned toward the situation in Albany. During one regional nurse practitioner’s conference at the end of October in King of Prussia, Pennsylvania, the keynote speaker referenced the situation as part of her speech on human trafficking, publicizing the case to an audience of licensed pediatric nurse practitioners and nursing students.⁹² For the hospitals that use contracts with liquidated damages that are truly proportional to the hospital’s recruiting costs, records will certainly be more carefully curated. Meanwhile, for hospitals that threaten disproportionate

⁸⁶ See *supra* notes 4-9 and accompanying text.

⁸⁷ See, e.g., Brush et al., *supra* note 8, at 78; Pittman et al., *supra* note 12, at 351; Pittman et al., *supra* note 5, at 38.

⁸⁸ For a brief description of the relationship between district courts, see Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 791 (2012).

⁸⁹ *Paguirigan v. Prompt Nursing Emp’t Agency LLC*, No. 17-1302, 2019 U.S. Dist. LEXIS 165587, at *22-23, *44-55 (E.D.N.Y. Sept. 23, 2019).

⁹⁰ For a review of reasons why judges give detailed opinions, see generally Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483 (2015).

⁹¹ Brush et al., *supra* note 8, at 78-79.

⁹² Jessica Peck, Baylor Univ. Louise Herrington Sch. of Nursing, Keynote Address at the Pennsylvania Delaware Valley Chapter of the National Association of Pediatric Nurse Practitioners 2019 Annual Fall Conference: Educating Advocates for Child Health (Oct. 25, 2019).

damages, the impact will be stronger. Perhaps their response will be to lessen the contract damages to be more proportional. It is possible, however, that these hospitals stipulated upwards of \$20,000 because it actually was worth that much to have a guaranteed nurse for three years; in that case, these hospitals may decide recruiting abroad simply isn't worth it if they cannot apply a coercive penalty. From the perspective of such hospitals, *Paguirigan* (and any subsequent rulings in the same vein) effectively closes off one way in which understaffed hospitals cope with the nursing shortage.

The impact of this "closing off" will depend greatly on how many hospitals use contracts with grossly disproportionate liquidated damages. For example, contracts that impose, say, a penalty of \$8000⁹³ would likely be unaffected by *Paguirigan*, whereas contracts with penalties closer to \$15,000⁹⁴ may be in trouble, depending on what expenditures the employer can prove. However, at least one study has demonstrated a pattern of liquidated damages that has little to do with the hospital's expenditures,⁹⁵ indicating that proportionality is not the hospital's primary concern when drafting such contracts. Thus, if *Paguirigan* ends up launching a domino effect in U.S. courts, a core strategy in the nationwide system of nurse recruitment could suddenly become unavailable, thus drastically exacerbating the nursing shortage almost overnight. While the practices of the healthcare facilities at issue in the New York cases are certainly exploitative and deserving of punishment, punishing them under the TVPA may result in unintended consequences for the healthcare system across the country, which is already overburdened and understaffed.

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⁹³ See *Paguirigan*, 2019 U.S. Dist. LEXIS 165587, at *53 (explaining that the liquidated damages amount specified in the plaintiff's contract was higher than in other cases cited by the defendant).

⁹⁴ See *id.*

⁹⁵ See Pittman et al., *supra* note 12, at 358 (identifying instead a possible negative correlation between the amount of liquidated damages in the contract and the income of the country in which the nurse was educated).