RODENTS FOR ROOMMATES: LIABILITY UNDER THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT'S HOUSING PROVISION

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I. INTRODUCTION

Migrant and seasonal agricultural workers have historically been one of the most abused and impoverished workers in the United States.[1] However, the plight of migrant agricultural workers did not receive national attention until the early 1960s.[2] Migrant and seasonal workers traditionally received "low wages, long hours and poor working conditions."[3] It is estimated that in 2002, the average migrant agricultural worker earned less than $12,500, while some earned as

* J.D., Drake University Law School, 2010. The author would like to dedicate this Note to his wife Kristen, for without her love and support this would not have been possible.

1. H.R. REP. NO. 97-885, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4548.

2. *See* WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., MIGRANT AND SEASONAL AGRICULTURAL WORKERS: PROTECTIVE STATUTES 1 (2007), *available at* www.nationalaglawcenter.org/assets/crs/RL33372.pdf (attributing the popular awareness of migrant farm workers' struggles to a television program titled *Harvest of Shame* featuring Edward Murrow).

3. H.R. REP. NO. 97-885, at 1.

little as $3,000 annually.[4] When addressing the poverty of migrant agricultural workers, one court noted, "[t]he tragedy is further compounded when it is realized that the victims of this poverty are in fact the working poor, those who offer an honest day's labor, but are denied the full benefits such work should provide, which are so desperately needed to provide the most basic necessities of life."[5]

Furthermore, migrant workers are, in many cases, promised working and living conditions which are largely embellished by employers.[6] Migrant workers are transported in unsafe vehicles and furnished unsanitary housing.[7] Therefore, "careful consideration should . . . be focused on the legal requirements surrounding the relationship between the farmer and the workers."[8] The Migrant and Seasonal Agricultural Worker Protection Act provides substantial protections for migrant workers; however, the Act itself and its application has resulted in several unintended consequences.

Each year many rural agricultural communities see an influx of migrant workers to aid in the harvest season.[9] Many of these communities are ill-equipped to cater to the housing needs of the newly arriving workers.[10] This problem leaves migrant workers living in substandard, cramped housing, or worse yet—homeless.[11] Many migrant farm workers who are fortunate enough to obtain housing from their employers may not fair any better in regards to the standard of housing.[12] If employer-provided housing is unavailable, migrant workers are forced to procure their own housing in the local rental market or face homelessness.[13] It is estimated that fifty-eight percent of migrant workers obtain housing from someone other than their employer,[14] meaning there is a large num-

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4. David A. Strauss, *Farm Labor Housing: An Overview*, RURAL VOICES, Summer 2005, at 2, *available at* http://www.ruralhome.org/storage/documents/voicessummer2005.pdf.

5. Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d 1500, 1506 n.13 (11th Cir. 1993).

6. *See* H.R. REP. NO. 97-885, at 1-2.

7. *Id.* at 2.

8. Susan A. Schneider, *Notes on the Migrant and Seasonal Agricultural Worker Protection Act*, 2001 ARK. L. NOTES 57, 64.

9. JANET ABBETT, WASH. DEP'T OF CMTY. TRADE & ECON. DEV., FARMWORKER HOUSING IN WASHINGTON STATE: SAFE, DECENT AND AFFORDABLE 1 (2005), a*vailable at* http://www.cted.wa.gov/DesktopModules/CTEDPublications/CTEDPublicationsView.aspx?tabID=0&ItemID=5195&MId=870&wversion=Staging.

10. *Id.*

11. *Id.*

12. *See, e.g.*, Rodriguez v. Carlson, 943 F. Supp. 1263, 1266 (E.D. Wash. 1996).

13. *See* ABBETT, s*upra* note 9.

14. DANIEL CARROLL ET AL., U.S. DEP'T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2001-2002: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARM WORKERS 43 (2005), *available at* http://www.doleta.gov/agworker/report9/naws_rpt9.pdf.

ber of migrant workers who are left the task of obtaining shelter at each new employment location.

Who are agricultural workers? While no definitive data exists regarding how many migrant and seasonal farm workers are present in the United States, it is estimated that there are between 1.9 million and 4 million seasonal and migrant workers in the United States at any given time.[15] In 2002, it was projected that only twenty-three percent of crop-farm workers were born in the United States.[16] Of the seventy-seven percent foreign-born agricultural workers, it was estimated that fifty-three percent were unauthorized to work in the United States.[17] Overall, estimates have found that forty-two percent of farm workers are migrants.[18] The average agricultural worker is a Spanish-speaking male, around thirty-three years of age, whose highest education level completed is seventh grade.[19] It was also estimated that in 2002, fifty-eight percent of migrant agricultural workers were married and fifty-one percent had children.[20] Research shows that in 2002, fifty-seven percent of migrant workers were considered "unaccompanied," which means they were not living with at least one nuclear family member.[21] Of those migrant workers who had children, sixty-six percent were accompanied by at least one nuclear family member in 2002.[22] Seventy-one percent of married workers, without children, were accompanied by at least one family member.[23] Thus, given their age, education level, language, and the number of workers who travel with family members, migrant workers are more vulnerable to abuse than most Americans.

This Note seeks to examine the legal duty to provide certain standards of housing to migrant and seasonal agricultural workers under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). The purpose of this Note is not to examine whether migrant and seasonal workers should be entitled to cer-

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15. HOUS. ASSISTANCE COUNCIL, MIGRANT AND SEASONAL FARMWORKER HOUSING 1 (2003).

16. CARROLL ET AL., *supra* note 14, at 3.

17. *Id.* at 6.

18. Strauss, *supra* note 4 (defining migrant worker as those who "travel more than 75 miles to follow the crops"). This definition of "migrant" is not how the Migrant and Seasonal Agricultural Worker Protection Act defines "migrants," and therefore may not be a completely accurate account of all those considered migrants under the Act. 29 U.S.C. § 1802(8)(A) (2006). The statistic corresponding with the definition above is used solely as an example.

19. CARROLL ET AL., *supra* note 14, at 10, 17 (revealing that the average age for a migrant worker in 2002 was thirty-three years old and seventy-nine percent of agricultural workers were male).

20. *Id.* at 12.

21. *Id.* at 13 (defining nuclear family members as parents, spouses, and children).

22. *Id.*

23. *Id.*

tain standards of housing,[24] but rather it is to address the responsibility of individuals providing housing to migrant workers to comply with the standards established by the AWPA.[25] Additionally, this Note will not examine illegal immigration as it relates to agricultural workers. The structure of this Note begins with an examination of the background and important legislation leading up to the enactment of the AWPA. An examination of the AWPA's background will lead into a discussion of the AWPA's general provisions. The majority of this Note will focus in detail on who is liable under the housing provision of the AWPA. Lastly, this Note will examine the effect of the AWPA on agricultural worker housing and on agribusiness in general.

II. HISTORY PRIOR TO THE AWPA

Legislation to protect migrant and seasonal agricultural workers was not enacted at the federal level until the mid-1960s.[26] The Farm Labor Contractor Registration Act (FLCRA), passed in 1963,[27] presented the first major effort to provide federal protection to migrant and seasonal agricultural workers.[28] It soon became clear, however, that the FLCRA was too narrow in scope and did not provide the necessary protections for agricultural workers.

While the FLCRA afforded some safeguards for migrant agricultural workers, the Act provided few requirements related to agricultural worker housing. The FCLRA required farm labor contractors to register with the Department of Labor and disclose to farm workers certain aspects of the working environment, the wages to be paid, and the transportation to be provided.[29] Furthermore, farm labor contractors were required to disclose whether housing was provided, and if the farm labor contractor "manage[d], supervise[d], or otherwise control[led] the housing facilities," the terms and conditions of housing had to be posted.[30] While the FLCRA may have been a step toward federal protection for migrant farm workers, the Act did little to ensure any minimal standard of hous-

24. For further information, see legislative history for AWPA.

25. This Note will likewise not seek to undermine or contradict Congress' purpose for passing the AWPA or particularly its housing provision. However, this Note will examine the effectiveness of the AWPA in achieving Congress' intent behind the housing provision through continuing issues with farm worker housing.

26. *See* WHITTAKER, *supra* note 2.

27. *See* Farm Labor Contractor Registration Act of 1963, 7 U.S.C. §§ 2041-2053 (1964), *repealed by* Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872 (1983).

28. Beverly A. Clark, *The Iowa Migrant Ombudsman Project: An Innovative Response to Farm Worker Claims*, 68 N.D. L. REV. 509, 509 (1992).

29. 7 U.S.C. §§ 2043, 2045 (repealed 1983).

30. *Id.* § 2045(b)(3), (d) (repealed 1983).

ing. Over time, it became apparent that the FLCRA "was seriously flawed and did little to root out the problems which it was designed to address."[31]

One major defect of the FLCRA was its severely narrow scope. The FLCRA only regulated farm labor contractors and no one else, which was only "one aspect of the issue."[32] To further complicate the problem, the official interpretation of "farm labor contractor" under the FLCRA was vague and left open many unresolved questions.[33] Therefore, under the FLCRA, many individuals who were in direct control over the terms and conditions of agricultural worker employment and housing, such as growers, went unregulated.[34] Such a narrow scope left migrant workers vulnerable to abuses. The FLCRA did not regulate the standards or conditions of agricultural worker housing in any way. The FLCRA required that terms and conditions be posted in farm worker housing, but did not require any mandatory terms or conditions to protect agricultural workers.[35] Furthermore, the FLCRA did not require that any regulatory standards be created by the Department of Labor for farm worker housing.

Enforcement under the FLCRA was deficient if not nonexistent. Administrators from the Department of Labor testified before a House Committee in 1974, revealing the lack of enforcement under the FLCRA.[36] Most notably, there was no strict liability penalty for failure to register under FLCRA, so a farm labor contractor could only be fined for a "willful violation" in failing to register.[37] Even if a farm labor contractor was found to have met this higher standard of willfulness and was fined, the FLCRA only provided for a minimal fine of up to five hundred dollars.[38] Furthermore, from 1965 when the Act became operative until 1974, very few farm labor contractors had their registration revoked for violations under the FLCRA.[39] It soon became clear to members of Congress that the FLCRA was flawed and failed to protect farm workers.

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31. Donald B. Pedersen, *The Migrant and Seasonal Agricultural Worker Protection Act: A Preliminary Analysis*, 37 ARK. L. REV. 253, 254 (1984).

32. WHITTAKER, *supra* note 2, at 17.

33. *See* 7 U.S.C. § 2042(b) (repealed 1983) (defining farm labor contractor as "any person, who, for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports ten or more migrant workers . . . at any one time in any calendar year for interstate agricultural employment").

34. *See* Jeanne E. Varner, Note, *Picking Produce and Employees: Recent Developments in Farmworker Injustice*, 38 ARIZ. L. REV. 433, 437 (1996).

35. 7 U.S.C. § 2045(d) (repealed 1983).

36. WHITTAKER, *supra* note 2, at 19.

37. *Id.*

38. 7 U.S.C. § 2048 (repealed 1983).

39. *See* WHITTAKER, *supra* note 2, at 19 (noting that no certificates were revoked in 1974, and only three certificates were revoked in 1973).

III. THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT—GENERALLY

In 1982, the House Committee on Education and Labor conducted hearings on migrant farm workers, revealing that the abuses which the FLCRA had been passed to combat remained a problem.[40] The legislative history to the AWPA reveals that the FLCRA failed "to achieve its goal of fairness and equity for migrant workers."[41] Furthermore, Congress found the FLCRA was "largely ignored and not adequately enforced," and "[n]on-compliance by those whose activities [the FLCRA] was intended to regulate ha[d] become the rule rather than the exception."[42] The House Committee on Education and Labor concluded that the FLCRA "failed to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers and that a completely new approach must be advanced."[43] Congress' "new approach" was not enactment of more amendments to the FLCRA,[44] but the enactment of a completely new act, the AWPA, to replace it.

"[The AWPA] has remained largely unchanged since its enactment" in 1983.[45] The AWPA generally imposes requirements on those who employ migrant and seasonal workers for wages, working conditions, recordkeeping, transportation, and disclosure of terms and conditions of employment.[46] For instance, those regulated under the AWPA must disclose the place of employment, the wages to be paid, the type of activities in which the worker will be employed, the length of employment, and whether any state workers' compensation insurance is provided.[47] Additionally, the AWPA aims to protect the health and safety of workers by requiring certain standards for vehicles and vehicle insurance used in transporting migrant or seasonal workers.[48] Additionally, as discussed in further detail *infra*,[49] the AWPA requires that migrant farm worker housing meet federal

40. H.R. REP. NO. 97-885, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4547.
41. *Id.*
42. *Id.* at 2.
43. *Id.* at 3.
44. Congress did attempt to cure the defects in the 1963 version of the FLCRA by enacting amendments to the Act in 1974. However, the 1974 amendments did not cure the inherent problems of the FLCRA. *See* WHITTAKER, *supra* note 2, at 34-37.
45. *Id.* at 59 (referencing the only amendment to the AWPA in 1995 that was in response to *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990)).
46. Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872 (2006).
47. *See id*. §§ 1821, 1831.
48. *Id.* § 1841.
49. *See infra* Part IV.

and state health and safety standards.[50] The AWPA took the next step by requiring, not only that farm labor contractors register under the Act, but that each person who employs or provides housing to migrant or seasonal workers must meet certain standards of employment, housing, and vehicle safety.[51]

The AWPA broadly expanded the scope of those regulated under the FLCRA.[52] For instance, the AWPA requires regulation for two additional groups: agricultural employer and agricultural association.[53] The AWPA defines an agricultural employer as "any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker."[54] Under the FLCRA, only those persons who "recruit[ed], solicit[ed], hire[d], furnish[ed], or transport[ed] ten or more migrant workers" for a fee were regulated under the Act.[55] The AWPA casts a wide net by broadly defining "agricultural employer" in order to regulate those who went unregulated under the FLCRA.[56]

Drafters of the AWPA adopted the definition of the term "employ" found in the Fair Labor Standards Act of 1930 to further ensure that no employer or farm labor contractor went unregulated.[57] Legislative history to this provision reveals the drafters of the AWPA also intended to adopt the concept and interpretation of "joint employers."[58] The joint employers concept was adopted in the AWPA, because the legislature recognized:

> [T]he agricultural economy contains many and varied employment relationships involving a mixture of employers . . . [so the legislature] envision[ed] situations where a single employee may have the necessary employment relationship with not only one employer but simultaneously such a relationship with an employer and an independent contractor or with several employers . . . .[59]

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50. *Id.* § 1823(a).

51. *See id*. §§ 1821-1841.

52. *See, e.g., id.* § 1801. The AWPA applies to "farm labor contractor, agricultural employer, and agricultural association." *See, e.g., id.* § 1821.

53. *See id*. § 1802(1)-(2).

54. *Id.* § 1802(2).

55. 7 U.S.C. § 2042(b) (1964), *repealed by* 29 U.S.C. §§ 1801-1872 (1983).

56. 29 U.S.C § 1802(2); *see also id.* § 1802(1) (expanding those regulated by defining "agricultural association" as "any nonprofit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable State law, which recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker").

57. *See id*. § 1802(5).

58. *See* H.R. REP. NO. 97-885, at 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4553; *see also* 29 C.F.R. § 500.20(h)(4) (2010) (highlighting the distinction between farm labor contractors who are employers and those who function as independent contractors).

59. H.R. REP. NO. 97-885, at 7.

The joint employer concept, therefore, makes employers and independent contractors jointly liable under the AWPA if those individuals have a "right to control" the employment of the migrant or seasonal agricultural worker.[60]

Specifically related to agricultural worker housing, the AWPA broadly expands who is regulated beyond the old requirements of the FLCRA. For example, under the FLCRA, farm labor contractors were only regulated if they "manage[d], supervise[d], or otherwise control[led] the housing facilities" of migrant agricultural workers.[61] Therefore, under the FLCRA, persons who did not qualify as a farm labor contractor under the Act, but otherwise provided or controlled the housing of migrant agricultural workers, went unregulated. The AWPA sought to expand the regulation of agricultural worker housing by requiring that *any* "person who owns or controls a facility or real property which is used as housing for migrant agricultural workers" comply with specified health and safety standards.[62] This is much broader than what was required under the FLCRA.

A migrant agricultural worker is defined as any person who is employed in agricultural employment of a temporary nature such that he is "required to be absent overnight from his permanent place of residence."[63] Furthermore, the difference between seasonal and migrant agricultural workers under the AWPA is that a seasonal agricultural worker remains employed on a temporary basis but is "not required to be absent overnight from his permanent place of residence."[64] Therefore, in terms of housing, the protections in the AWPA only apply to migrant agricultural workers, because those workers are required to be absent from their permanent place of residence overnight.[65]

Who is not protected under the AWPA? Several exemptions exist under the definitions of migrant and seasonal agricultural worker in the AWPA. For

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60. *Id.*; *see generally* Michael H. LeRoy, *Farm Labor Contractors and Agricultural Producers as Joint Employers Under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Public Policy Analysis*, 19 BERKELEY J. EMP. & LAB. L. 175 (1998) (providing a more detailed discussion on the AWPA joint employer doctrine).

61. 7 U.S.C. § 2045(d) (1963), *repealed by* 29 U.S.C. §§ 1801-1872 (1983).

62. 29 U.S.C. § 1823(a); *see also id.* §1823(c) (stating that the Act does not apply to anyone "who, in the ordinary course of that person's business, regularly provides housing on a commercial basis to the general public and who provides housing to migrant agricultural workers of the same character and on the same or comparable terms and conditions as is provided to the general public"). This commercial housing establishment exception applies most pointedly to motel or hotel owners, who are already regulated by state and federal health and safety standards.

63. *Id*. § 1802(8)(A). *But see id*. § 1802(8)(B) (revealing exceptions to the definition in the previous subsection).

64. *Id.* § 1802(10)(A).

65. *See id*. § 1823. The housing regulations of the AWPA Section 1823 only specifically mention migrant workers. *Id.*

example, "any immediate family member of an agricultural employer or a farm labor contractor" is not considered a migrant or seasonal worker.[66] The legislative history to the AWPA reveals the House Committee on Education and Labor intended "immediate family member" to include only "a spouse, children, stepchildren, foster children, parents, stepparents, and foster parents, brothers, and sisters."[67] Furthermore, any temporary nonimmigrant alien authorized to work in the United States under an H-2A visa is also exempt from protections guaranteed to migrant and seasonal workers under the AWPA.[68] The legislative history to the AWPA provides no explanation for these specific exemptions over other possible exemptions.[69]

Criminal and civil penalties under the AWPA are more severe and provide more of a deterrent to violate than the penalties under the FLCRA. For instance, a person "who willfully and knowingly" commits a violation under the AWPA can be fined up to one thousand dollars per violation or sentenced to prison for one year, or both.[70] If a person is convicted of "any subsequent violation" of the AWPA, the person may be fined up to ten thousand dollars or sentenced to prison for up to three years, or both.[71] Furthermore, a civil penalty of up to one thousand dollars per violation may be issued against anyone who violates the AWPA or its regulations.[72] Penalties under the AWPA certainly have more of a "bite" than the five hundred dollar fine that existed under the FLCRA.[73]

In general, it is quite clear that the AWPA intended many more protections for migrant and seasonal agricultural workers than were provided by the FLCRA. The AWPA also intended to regulate many more individuals who were in control of the employment, housing, and transportation of migrant and season-

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66. *Id.* § 1802(8)(B)(i), (10)(B)(ii).

67. H.R. REP. NO. 97-885, at 8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4554.

68. 29 U.S.C. § 1802(8)(B)(ii), (10)(B)(iii); *see also* COMM'N FOR LABOR COOPERATION, GUIDE TO LABOR AND EMPLOYMENT LAWS FOR MIGRANT WORKERS IN NORTH AMERICA 1-3, *available at* http://www.naalc.org/migrant/english/pdf/guide_en.pdf (revealing that under the H-2A visa program, employers are *required* to provide housing to migrant workers at no cost and it must meet required health and safety standards; therefore, regulating employers who provide H-2A visas again under the AWPA is unnecessary).

69. *See* Jane Younglove Lapp, Comment, *The Migrant and Seasonal Agricultural Worker Protection Act: "Rumors of My Death Have Been Greatly Exaggerated,"* 3 SAN JOAQUIN AGRIC. L. REV. 173, 184 (1993) (suggesting that the reason for the H-2A visa exception for workers whose permanent residence is outside the U.S. "is in deference to the . . . Immigration Reform and Control Act of 1986").

70. 29 U.S.C. § 1851(a).

71. *Id.*

72. *Id.* § 1853(a)(1).

73. 7 U.S.C. § 2048 (1964), *repealed by* 29 U.S.C. §§ 1801-1872 (1983).

al workers. In terms of penalties, the AWPA is also much more expansive than the FLCRA.

IV. WHO IS LIABLE UNDER THE AWPA'S HOUSING PROVISIONS?

A. *Section 1823 Housing Provision*

The AWPA requires that agricultural worker housing meet specific health and safety standards.[74] Specifically, any person who "owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing."[75] In drafting this provision, the House Committee on Education and Labor recognized "the deplorable conditions in which migrant workers are often housed."[76] The Committee intended this section to "be interpreted with the *broadest possible meaning*" in order to guarantee that whoever "owns or controls the facility" housing migrant agricultural workers "is responsible for maintaining that facility" in compliance with federal and state laws and regulations.[77] For the first time, this section of the AWPA ushered in the duty to house migrant agricultural workers in compliance with federal health and safety standards.

The health and safety standards applicable to the AWPA's housing provision are found in several different places.[78] Under the AWPA regulations, substantive health and safety standards include, at a minimum, those "that provide fire prevention, an adequate and sanitary supply of water, plumbing maintenance, structurally sound construction of buildings, effective maintenance of those buildings, . . . adequate heat . . . and reasonable protections for inhabitants from insects and rodents."[79] Specifically, the United States Department of Labor decided to apply regulations made by the Occupational Safety and Health Administration (OSHA) and the Employment and Training Administration (ETA) as part of the AWPA health and safety standards.[80] Furthermore, the AWPA anticipated that a state may have further health and safety standards which go beyond

74. *See* 29 USC § 1823.
75. *Id.* § 1823(a).
76. H.R. REP. NO. 97-885, at 17 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4563.
77. *Id.* at 17-18, *reprinted in* 1982 U.S.C.C.A.N. at 4563-4564 (emphasis added).
78. *See, e.g.*, Avila v. A. Sam & Sons, 856 F. Supp. 763, 770 (W.D.N.Y. 1994).
79. 29 C.F.R. § 500.133 (2010).
80. *See id.* § 500.132; *see also* 20 C.F.R. § 654.400 (2010) (listing the Employment and Training Administration's standards for agricultural housing); 29 C.F.R. § 1910.142 (2010) (providing the Occupational Safety and Health Administration's labor camp standards).

the OSHA and ETA provisions, so providers are required to comply with state standards as well.[81]

To ensure compliance with Section 1823(a) of the AWPA, Congress required that the facility for housing migrant agricultural workers be inspected prior to its occupation.[82] In particular, the AWPA requires that a state or federal health official inspect and certify that the facility or real property meets state and federal health and safety standards.[83] The certification must then be posted prior to the time at which the facility becomes occupied.[84] Failure to obtain certification and post-certification at the housing site will result in a violation under the AWPA.

B. *Definition of "Migrant Worker"*

Many issues arise in attempting to define who is and who is not a migrant worker. The AWPA defines a "migrant agricultural worker" as "an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence."[85] However, the AWPA never defines "permanent place of residence." If a migrant worker moves to an area, how long does the worker have to live there to establish their permanent place of residence? What if, by their migratory nature, a farm worker has no permanent place of residence? Case law has dealt with these very questions.

In *Avila v. A. Sam & Sons*, the plaintiffs sued their employer under several violations of the AWPA.[86] One issue in the case was whether some of the plaintiffs qualified for migrant worker status under the statute.[87] The defendants argued that some of the plaintiffs were unable to prove the location of their permanent place of residence and therefore could not prove they were "migrant agricultural workers" covered by the Act.[88] Specifically, defendants pointed to testimony of three of the plaintiffs, who stated that they had no permanent residence "because they migrated from place to place doing seasonal agricultural work."[89]

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81. 29 U.S.C. § 1823(a) (2006).
82. *Id.* § 1823(b)(1).
83. *Id.*
84. *Id.* An exception to this is found in subsection (b)(2), whereby an owner of a facility may permit it to be occupied if the person applied to the state or federal agency for certification at least forty-five days prior to the date that the housing facility will be occupied. *Id.*
85. *Id.* § 1802(8)(A).
86. Avila v. A. Sam & Sons, 856 F. Supp. 763, 766 (W.D.N.Y. 1994).
87. *Id.* at 768-69.
88. *Id.*
89. *Id.* at 769.

The court noted that the plaintiffs in question came to New York from Florida for temporary work.[90] The court determined that the plaintiffs' permanent place of residence was in fact Florida, so they were migrant agricultural workers under the AWPA.[91] Furthermore, given that the plaintiffs in question resided in temporary housing, such as motels and labor camps, was further proof to the court that they were migrants.[92] The court noted that both the legislative history and the AWPA regulations established that a "labor camp or other temporary farm worker housing cannot be a permanent place of residence for purposes of AWPA."[93]

While the court in *Avila* may have reached the correct conclusion, the AWPA is still ambiguous on the definition of permanent residency. The regulations define permanent place of residence as "domicile or permanent home,"[94] to which "an individual intends to return."[95] As an example, the definition within the Florida Statute's Taxation and Finance Title defines "permanent residence" as a "place where a person has his or her true, fixed, and permanent home and principal establishment to which, whenever absent, he or she has the intention of returning."[96]

Obviously, given the migratory nature of migrant farm workers, they may or may not actually have a permanent place of residence. While many migrant workers may have a "home base" to which they intend to return, many likely do not.[97] The AWPA's section defining migrant workers is poorly drafted, because it does not take into account workers who clearly fall under the "migrant" classification, but nevertheless, do not have a permanent place of residence.[98] The AWPA also does not determine at what point a farm worker is no longer considered a migrant and, therefore, would not fall under the protections of the housing provision. For instance, if a migrant moves to a location temporarily but then remains there for several years, at what point is the person a resident of the new location?

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90. *Id*.
91. *Id.*
92. *Id.*
93. *Id*.
94. 29 C.F.R. § 500.20(p)(2) (2010).
95. H.R. REP. NO. 97-885, at 8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4554 (noting that "'permanent place of resident' in no circumstances shall be construed to include any person's home or residence when it is seasonal or temporary housing, such as a labor camp").
96. FLA. STAT. § 196.012(18) (2010). If this definition were used, many workers' permanent residences could potentially be outside this country.
97. Strauss, *supra* note 4 (revealing that most migrant farm workers' "home base" is in California, Texas, or Florida).
98. *See* 29 U.S.C. § 1802(8)(A) (2006).

The plaintiffs in *Caro-Galvan v. Curtis Richardson, Inc*., lived in employer owned housing year-round for a period of six years.[99] Thus, the issue was whether the plaintiffs were classified as migrant agricultural workers under the AWPA housing provisions.[100] The court, following legislative and regulatory intent, applied the AWPA broadly.[101] The court concluded that the housing which plaintiffs lived in for six years, a series of trailers owned by the employer, constituted a "labor camp" under the AWPA.[102] Important to the court was the nature of the relationship between plaintiffs' employment and housing.[103] The court found that housing falls under the AWPA regulations when it is a "condition of employment."[104] Therefore, the court concluded, "Congress intended AWPA's housing provisions to apply when the conditions on which an agricultural employer provides housing are *so closely* related to the terms or circumstances of a seasonal or temporary worker's employment that the worker is *vulnerable to exploitation by* the employer."[105] While the court in *Caro-Galvan* intended to follow the legislative history and regulations of the AWPA, the holding that plaintiffs who live in one location for six years are considered "migrants" may not reflect the actual intent behind the statute.

Caro-Galvan's holding stretches the definition of "migrant" too broadly under the AWPA. Keeping in mind the expansive legislative intent of the AWPA, it still requires a huge conclusive leap to consider workers migratory if they are employed year-round and live in the same location for six years. Even if the housing provision is meant to be applied expansively, logically there must be a point where the line is drawn. There must be some outer bounds beyond which the application of the AWPA cannot extend. Certainly not every agricultural worker should be considered a migrant worker under the AWPA. If Congress intended the AWPA to apply to a specific group of the American workforce, then the Act should apply to that group and none other. If *Caro-Galvan* does not extend beyond the definition of "migrant" under the AWPA, it should at least mark the furthest the definition can be construed.

C. *Personhood*

Under the AWPA housing provision, those who are liable for ensuring that farm worker housing meets the necessary requirements are described as

99. Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d 1500, 1509 (11th Cir. 1993).
100. *Id.* at 1504.
101. *Id.* at 1505.
102. *Id.* at 1512.
103. *Id.* at 1511.
104. *Id.*
105. *Id.* (emphasis added).

"person[s]."[106] It particularly states that "each *person* who owns or controls a facility or real property" is responsible for ensuring the housing meets state and federal health codes.[107] The AWPA defines "person" as "any individual, partnership, association, joint stock company, trust, cooperative, or corporation."[108] While the definition of personhood under the AWPA is fairly clear, case law addresses a few unanswered questions regarding application.

In *Eliserio v. Floydada Housing Authority*, the defendants were sued for allegedly violating the housing provision of the AWPA.[109] The Floydada Housing Authority argued that they were not considered a "person" under the AWPA.[110] Specifically, they argued that '"statutory language and court decisions regularly distinguish government entities that are public corporations from corporations and that nothing in the AWPA indicates that this distinction should be ignored.'"[111] The court, following congressional intent to apply the AWPA broadly, determined that the plain meaning of "corporation" in the statute included public corporations like the defendant.[112] Furthermore, the court concluded that "[t]here is no evidence in AWPA's legislative history that government entities were intended to be excluded from the Act's provisions."[113] This case represents yet another example of courts construing the AWPA broadly, in line with congressional intent, to capture as many individuals as possible in the AWPA's net of liability.

Interestingly, the defendants in *Rodriguez v. Carlson* made nearly the opposite arguments from those of the defendants in *Eliserio.*[114] The defendants, Nolan and Rebecca Carlson, argued that they should not be personally liable under the AWPA's housing provision; but rather, the corporation that they controlled should.[115] The defendants argued that they were acting as agents of Cherrystone, Inc. when they controlled the farm worker housing, and therefore the

106. 29 U.S.C. § 1823(a) (2006).
107. *Id.* (emphasis added).
108. *Id.* § 1802(9).
109. Eliserio v. Floydada Hous. Auth., 455 F. Supp. 2d 648, 648 (S.D. Tex. 2006).
110. *Id.* at 652-53.
111. *Id.* at 653. Floydada is a government-funded corporation, which receives funding from the USDA for the purpose of providing farm labor housing. *Id.* at 652. Floydada's argument, therefore, was that government-funded corporations were not liable as a "person" under the AWPA. *Id.* at 653.
112. *Id.* at 654.
113. *Id.* at 655. The court further noted that the AWPA contained several exceptions from those covered under the Act and if Congress had intended government entities to be exempt from liability, they would have been included in the listed exceptions. *Id.*
114. *See* Rodriguez v. Carlson, 943 F. Supp. 1263, 1267 (E.D. Wash. 1996).
115. *Id.*

corporation was responsible instead of the defendants personally.[116] The court concluded that "[t]he statute and the regulation make it abundantly clear that the existence of corporate ownership does not preclude a finding that individuals can be found in 'control' of a housing site" even though they were acting as agents of the corporation.[117] The court held that while the corporation may technically hold "control" over the housing by virtue of ownership, "individual officers, agents or employees [who] also exercise[] 'control' over the property . . . should be held accountable for compliance with health and safety standards."[118]

The holding in *Rodriguez* of course follows the intent of Congress to apply the AWPA expansively;[119] but is it an example of applying the AWPA too broadly? On one hand, Congress saw an expansive application of the AWPA's housing provision as the only method to ensure full protection of migrant workers. However, the wide application of liability has many unintended consequences that will be discussed in further detail.

D. *"Owns or Controls the Facility"*

Liability under the AWPA is limited to those who have the ability to exercise a certain amount of power over property used to house migrant workers. In order for a person or entity to be held liable under the AWPA, the person must "own[] or control[] a facility or real property which is used as housing for migrant agricultural workers."[120] The issue is the degree of control necessary to be held liable under the AWPA. Must an employer control the housing or is it sufficient for the employer's agents to exercise control in order to be liable under the AWPA? May an employer still be held liable under the AWPA even when the employer did not exercise any control over the property?

According to the regulations derived from the AWPA, a person:

> [I]s in "control" of a housing facility or real property, regardless of the location of such facility, if said person is in charge of or has the power or authority to oversee, manage, superintend or administer the housing facility or real property either personally or through an authorized agent or employee, irrespective of whether compensation is paid for engaging in any of the aforesaid capacities.[121]

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116. *Id.*
117. *Id.*
118. *Id.*
119. *E.g.*, *id.* at 1267-68.
120. 29 U.S.C. § 1823(a) (2006).
121. 29 C.F.R. § 500.130(c) (2010).

The regulations also say that "owning" means having a legal or equitable interest in a facility or property.[122]

Two views are represented in case law regarding the required amount of control over the housing facility to necessitate liability. One view is broad, defining "control" in a way to catch as many individuals and entities as reasonable to ensure someone is responsible and liable for the housing meeting federal and state health and safety standards.[123] As one court noted "[i]t is immediately clear that the term 'controls' is intended to include broad-ranging activities. The disjunctive phrase—'authority to oversee, manage, superintend or administer' housing—sweeps in more activities than those traditionally relegated to a landlord."[124] The second view construes "control" more narrowly, resulting in individuals who may exercise some control over some aspect of the housing facility, but nonetheless are not held liable under the AWPA.[125]

In *Castillo v. Case Farms of Ohio, Inc.*, Case Farms contracted with America's Tempcorps, Andy Cilona, and Alberto Garcia to recruit workers for their processing plant.[126] The plaintiffs in the case were two classes of workers recruited to work the 1996 and 1997 seasons.[127] Upon arrival in Ohio, plaintiffs found themselves living in substandard housing.[128] Plaintiffs described sleeping on floors in bare apartments and living with dozens of other workers.[129] "One young woman described . . . sleeping in a unfurnished, one-bathroom house with approximately seventeen other people, mostly men."[130] At trial, she described her relief that a few other male workers "allow[ed] her to sleep between them and the wall for protection."[131] Other plaintiffs described having to sleep on the stairs outside the apartment in order to escape the sewage stench.[132] Others stated that their housing had been infested with rodents and cockroaches.[133]

The issue the court dealt with was whether Case Farms exercised sufficient control over the housing to be held liable for ensuring that it met applicable

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122. *Id.* § 500.130(b).
123. *See, e.g.*, Castillo v. Case Farms of Ohio, Inc., 96 F. Supp. 2d 578, 614 (W.D. Tex. 1999).
124. *Id.*
125. *See, e.g.*, Renteria-Marin v. Ag-Mart Produce, Inc., 537 F.3d 1321, 1323 (11th Cir. 2008).
126. 96 F. Supp. 2d at 585.
127. *Id.*
128. *Id.* at 588.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*

standards.[134] Case Farms argued they were not liable, because they did not act as the landlord of the housing facilities.[135] The court first noted that more than one person or entity may be deemed to have ownership or control of a facility and could therefore be held responsible for ensuring it meets health and safety standards.[136] The court found, in regards to the 1996 plaintiffs, that Case Farms controlled the facility through its agents Alvaro Hernandez and America's Tempcorps.[137] However, regarding the 1997 plaintiffs, the court held that Case Farms did not exercise the necessary amount of control through its agent Cilona, because he negotiated only for leases and advanced money before the workers arrived.[138]

The degree to which Case Farms' agents acted in a landlord role over the workers was important to the court.[139] For instance, even though the housing was owned and operated by a landlord, Hernandez assigned the 1996 workers to each apartment often without notifying the landlord, signed receipts, signed rental agreements for workers, paid workers' security deposits, and ensured workers paid the rent.[140] America's Tempcorps likewise negotiated with the landlord, paid the security deposit and first month's rent, and even signed an agreement with the landlord in which America's Tempcorps agreed to be responsible if the landlord had difficulty with overcrowding of the units.[141] Since Hernandez and America's Tempcorps were much more involved in carrying out the duties of a landlord, Case Farms was held liable to the 1996 plaintiffs.[142]

In contrast, Cilona did act in a managerial role over the workers at the housing facility but had a much more limited role.[143] Cilona acted as a liaison between workers and the landlord.[144] Cilona located landlords who would rent to the workers, negotiated terms of the leases, and paid the first month's rent and security deposit.[145] The court found that such evidence was insufficient for control over the housing, because the actual landlord exercised much more oversight over the workers once leases were signed.[146] Therefore, the court found that Case Farms had violated the AWPA in regards to the 1996 plaintiffs and not the 1997

134. *Id.* at 613-14.
135. *Id.*
136. *Id.* at 614.
137. *Id.* at 615-16.
138. *Id.* at 618-19.
139. *Id.* at 615-19.
140. *Id.* at 615.
141. *Id.* at 616.
142. *Id.*
143. *Id.* at 618-19.
144. *Id.*
145. *Id.*
146. *Id.*

plaintiffs, basing the distinction on the extent of ongoing control its agents exercised over the workers at the housing site.[147]

In contrast, the court in *Renteria-Marin v. Ag-Mart Produce* determined that the defendant Ag-Mart did not exercise sufficient control over the property to be held liable.[148] In 2001 and 2002, Ag-Mart recruited between five hundred and six hundred workers to harvest tomatoes in Florida.[149] Ag-Mart contracted with a local motel owner to house workers near the work site, which was then arranged directly by Ag-Mart's crew leaders.[150] Crew leaders sometimes assigned five or more workers to stay in a single room.[151] They also had complete access to the rooms and aided in enforcing the rules and policies at the motels, including enforcing curfews, occupancy levels, prohibiting shoes inside the rooms to prevent dirtying the carpets, monitoring use of the hotel's gas grills outside, restricting noise, and removing trash from the rooms.[152] Some of the motels required crew leaders to sign a waiver outlining the crew leaders' responsibility for the actions of their crew members.[153]

The district court ruled that the actions of Ag-Mart's crew leaders were sufficient to constitute "control" under the AWPA.[154] The district court followed the *Castillo* analysis and applied the housing provision of the AWPA broadly.[155] It noted that Ag-Mart's involvement with farm worker housing was much more than the defendants' in *Castillo*.[156] The court noted that the crew leaders acted as "rule enforcers" and that "[l]imiting responsibility for housing conditions to those who have ultimate authority over housing is inconsistent with Congress' expressed intent that the housing provisions be broadly applied."[157] The AWPA regulations, which "specifically provide for situations of shared responsibility regarding compliance," were held to be inconsistent with limiting liability as

147. *Id.* at 615-19.

148. Renteria-Marin v. Ag-Mart Produce, Inc., 537 F.3d 1321, 1323 (11th Cir. 2008).

149. *Id.*

150. *Id.* The court ruled that Ag-Mart's crew leaders were acting as agents for Ag-Mart, so Ag-Mart could be held liable for actions taken by its agents. *Id.* at 1325-26.

151. *Id.* at 1324 (noting that the rooms at the various motels varied from two or three single beds and a shared bathroom facility, leaving many workers to sleep on the floor.) There were also no cooking or food storage facilities in the room, forcing the workers to purchase their meals for up to eighteen dollars per day. *Id.*

152. *Id.*

153. *Id.*

154. Renteria-Marin v. Ag-Mart Produce, Inc., 488 F. Supp. 2d 1197, 1213 (M.D. Fla. 2007), *rev'd*, 537 F.3d 1321 (11th Cir. 2008).

155. *Id.* at 1212 (stating that "[t]he Court finds the *Castillo* reasoning persuasive").

156. *Id.* at 1213.

157. *Id.* at 1212-13.

well.[158] The district court noted that limiting liability to those who manage the physical structure of the housing facility "would place an undue emphasis on a defendant's maintenance and repair of the building itself" and is inconsistent with the legislative history and case law.[159] The court found that "manage" and "administer," as required by the AWPA regulations, "imply decisions relating to the occupants of the housing."[160] The district court ultimately held that defendants had exercised sufficient control over the housing facility to be held liable.[161]

On appeal, the Eleventh Circuit in *Ag-Mart* concluded the crew leaders exercised control over the employees while they were at the motels, but the crew leaders did not exercise control over the motel itself.[162] The court noted that "having control over a facility . . . entails significantly more than controlling its occupants."[163] The court concluded that Ag-Mart did not exercise sufficient control over the motels to ensure they met the applicable health and safety standards, because they did not to maintain the plumbing, electrical, and fire safety equipment.[164] Ag-Mart certainly had *provided* housing by contracting with local motel owners, but the court concluded that this was not enough to impose liability under Section 1823 for failure to ensure healthy and safe facilities.[165] As providers of housing though, the court did hold Ag-Mart liable for failing to post or make available the terms and conditions of occupancy under Section 1821 of the AWPA.[166]

How can *Renteria-Marin* and *Castillo* be harmonized? *Renteria-Marin* held there was not sufficient control when Ag-Mart's crew leaders exercised much more control over the workers' housing than Case Farms' agents in *Castillo*.[167] By overruling the district court's decision, which was heavily influenced

158. *Id.* at 1212.

159. *Id.*

160. *Id.*

161. *Id.* at 1212-13 (noting that a primary factor in determining if the defendants exercised control over the facility is whether they had the authority to assign workers to specific rooms or sites).

162. Renteria-Marin v. Ag-Mart Produce, Inc., 537 F.3d 1321, 1327 (11th Cir. 2008) (noting that, in order to comply with safety and health standards, the motel needed specific remodeling and Ag-Mart had no authority to remodel the motels).

163. *Id.*

164. *Id.*

165. *Id.* at 1328-29 (specifically the court noted that if Congress wanted to impose liability under Section 1823(a) on those who merely provide or "procure" housing, Congress would have drafted the statute to reflect that intent).

166. *Id.* (emphasizing one section's specification that anyone who "provides housing" must post the housing terms and conditions as opposed to anyone who "controls a facility" must ensure health and safety shows Congress' intent for the scope of each part of the statute).

167. Renteria-Marin v. Ag-Mart Produce, Inc., 488 F. Supp. 2d 1197, 1213 (M.D. Fla. 2007).

by *Castillo*, the Eleventh Circuit's *Renteria-Marin* decision departs from the prior view of "control" under the AWPA housing provision. Case Farms' agents certainly exercised control over the workers, but they did not have sufficient control as required by the appellate court in *Renteria-Marin*.[168] One argument is that *Renteria-Marin* departs from the legislative purpose behind the AWPA's enactment.

One court noted regarding the statute's legislative history, "[The] AWPA is a remedial statute and should be construed broadly to effect its humanitarian purpose."[169] Regulations in accordance with the AWPA are broad as well. The AWPA regulations state that one controls the housing facility when they "*oversee*, *manage*, *superintend* or *administer* the housing facility."[170] Crew leaders in *Renteria-Marin* certainly superintended and oversaw the actual rooms in which workers were housed; nonetheless, they were not found to have sufficient control.[171] Whether the crew leaders oversaw or managed the entire motel complex, their actions certainly rose to the level of providing a management function over the specific worker's hotel rooms, so they should have been held jointly liable.

From *Renteria-Marin*, we can glean one major problem with the AWPA and subsequent case law. Employers are exercising control over the housing when they have a managerial role over employees in the housing facility, such as when they act as a liaison between the landlords and the workers. However, they may escape liability under the *Renteria-Marin* analysis.[172] Then, the hotel or motel owners are generally not liable under the AWPA, since they are commercial "housing" providers.[173] Therefore, if the employer is able to escape liability as a provider but not "in control" of the housing and the motel owners are exempt from liability, it leaves injured plaintiffs without a remedy. Plaintiffs, such as in *Renteria-Marin*, slip through the cracks because of judicial and legislative ingenuity.[174] An employer who locates housing, negotiates rent, negotiates terms and conditions, signs leases, is issued keys, enforces housing policies, and monitors

168. *Compare* 537 F.3d at 1327, *with* Castillo v. Case Farms of Ohio, Inc., 96 F. Supp. 2d 578, 615-19 (W.D. Tex. 1999).

169. Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d 1500, 1505 (11th Cir. 1993). Interestingly enough, the same circuit which uttered these words also decided the *Renteria-Marin* appeal.

170. 29 C.F.R. § 500.130(c) (2010) (emphasis added).

171. *Renteria-Marin*, 537 F.3d at 1324.

172. *See id.* at 1327-29.

173. 29 U.S.C. § 1823(c). (explaining that the housing provision "does not apply to any person who, in the ordinary course of that person's business, regularly provides housing on a commercial basis to the general public and who provides housing to migrant agricultural workers of the same character and on the same or comparable terms and conditions as is provided to the general public.").

174. *See* 537 F.3d at 1328.

occupancy levels certainly meets the regulatory criteria of "oversee, manage, superintend or administer" for attaching liability.[175]

This case demonstrates how employers can escape liability by housing migrant workers in facilities where they cannot make structural changes, but nonetheless can manage or supervise the worker's living situation. The district court in *Renteria-Marin* was specifically concerned that limiting the definition of control, as the Eleventh Circuit did, would allow those who otherwise "control" housing under the AWPA regulations to go unregulated.[176] This is specifically why the AWPA regulations permit the shared responsibility liability, whereby more than one individual is responsible for control over the housing facility, and they can both be held liable for ensuring the housing meets the applicable health and safety standards.[177]

How expansively should the AWPA be applied? Should it be applied so broadly as to defy logic? So broadly that it is unmanageable? So broadly that employers no longer wish to have any involvement with farm worker housing because the cost of liability under the AWPA is too high? Based upon the analysis above, narrowing the definition of control under the AWPA creates an unnecessary loophole, which undermines its intended purpose of eliminating the dangers to which migrant workers are exposed.

E. *Knowledge and Intent*

Under the AWPA, what level of knowledge is necessary to impose liability? Does the one who owns or controls the property or housing facility need to know that migrant workers are living on their property? Is it necessary for the owner or person in control of the property to intend to violate the AWPA? What if the owner of the property did not specifically authorize migrant workers to live on his property? What if a property owner leases their farm out to tenant farmers who in turn house migrant workers on the property? The court wrestled with these types of questions in *Conlan v. United States Department of Labor*.[178]

In *Conlan*, Garth Conlan received a penalty of $23,250 for violating the AWPA.[179] Conlan owned a fifteen-hundred-acre ranch in Monterey, California, which he had personally farmed before he began leasing it to tenant farmers.[180] In 1984, Mr. Conlan entered into a lease with Juan Marquez, Jr., a tenant farmer,

175. *Id.* at 1323-24; 29 C.F.R. § 500.130(c).
176. *See* Renteria-Marin v. Ag-Mart Produce, Inc., 488 F. Supp. 2d 1197, 1212 (M.D. Fla. 2007).
177. 29 C.F.R. § 500.130(a).
178. *See* Conlan v. U.S. Dep't of Labor, 76 F.3d 271 (9th Cir. 1996).
179. *Id.* at 273.
180. *Id.*

but Conlan continued to reside on the property.[181] Located on the property were several historical structures, including a duplex, a cottage where Mr. Conlan's mother spent her honeymoon, and an old railroad boxcar.[182] Juan Marquez, Jr. was given permission to stay in the duplex as long as he brought the building "up to code."[183] Marquez in turn permitted migrant workers to set up a labor camp and to live in the duplex during the farming season.[184] It was clear that Mr. Conlan did not know that his farm was being used to house migrant workers; he did know that Juan Marquez intended to use the duplex though, even if supposedly for personal use.[185] Since Juan Marquez was exempt from liability under the AWPA,[186] the question for the court was whether Conlan could be held liable under the AWPA.[187]

Under the AWPA, a landowner is strictly liable for administrative penalties under Section 1853(a) if that person committed a violation of the AWPA.[188] Conlan argued that in order for strict liability to attach the person must have acted knowingly.[189] The court reasoned that the penalty section of the AWPA does not contain a knowledge requirement, and if Congress had intended to include a knowledge requirement they would have done so, similar to other provisions in the AWPA.[190] The court concluded that the penalty section has no knowledge requirement; but Conlan must have committed a violation under the housing provision of the AWPA before the penalty section could even be triggered.[191]

In order to find liability under the housing provision, the Department of Labor interpretation requires that it be established that the person owned or controlled the property where migrant workers lived and the facility was substandard.[192] The court noted it was undisputed that the housing was substandard, and

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181. *Id.*; *see also* Petition for Writ of Certiorari, Conlan v. U.S. Dep't of Labor, 519 U.S. 980 (1996) (No. 96-201), 1996 WL 33422232, at 4-5 (revealing that the Conlan farm was ordered to be leased out when Mr. and Mrs. Conlan went through chapter 11 bankruptcy). The court had to approve the leases in order for Conlan to comply with the court order. *Id.*

182. *See* Petition for Writ of Certiorari, *supra* note 181, at 4.

183. *Conlan*, 76 F.3d at 274; *see also* Petition for Writ of Certiorari, *supra* note 181, at 5.

184. *Conlan*, 76 F.3d at 273.

185. *Id.* at 274.

186. *Id.* at 274 n.1 (explaining that Juan Marquez, Jr. was exempt from liability under the AWPA because he was classified as a "family farmer").

187. *Id.* at 273-74.

188. *Id.* at 275; *see* 29 U.S.C. § 1853(a)(1) (2006).

189. *Id.* at 274-75.

190. *Id.* (revealing that Section 1851(a) has a "willfully and knowingly" requirement for criminal penalties and Section 1854(c)(1) has a requirement that the defendant in private suits acted "intentionally" for the court to award extra damages).

191. *Id.* at 275.

192. *Id.*

that Conlan owned the duplex facility and the property where the camp was located.[193] Therefore, under the Department of Labor interpretation of the AWPA, Conlan was correctly penalized.[194] However, the court found an inherent problem with the Department of Labor interpretation. Without a "knowledge" requirement, the court noted the "liability possibilities are incredible."[195] The court concluded that a knowledge requirement is implied in the plain meaning of the statute.[196] "Section 1823(a) says 'used as housing *for* migrant agricultural workers' not 'used as housing *by* migrant agricultural workers.'"[197] Using the word "for" in the AWPA housing provision implies that the housing facility or property is "provided to the migrant agricultural workers by someone other than themselves."[198] The court held, therefore, "[w]hen one in good faith is unaware of the presence of migrant workers . . . he cannot, in the plain meaning of the phrase, be said to be using real property or a facility 'as housing *for*' migrant workers."[199] The court found that Conlan was correctly penalized in regards to the duplex because he knew, to some extent, that it would be used to house farm workers and that it was substandard.[200] The court concluded that Conlan was improperly penalized for the labor camp though, because he did not possess the required knowledge regarding the camp.[201] This case clearly represents a narrower interpretation of the AWPA's concept of liability, under which property owners or those in control of the housing need to have some form of knowledge.

V. RECENT ISSUES IN MIGRANT AGRICULTURAL WORKER HOUSING

Since the AWPA was passed more than twenty-five years ago, certain unintended consequences have occurred and reveal that many more unresolved issues remain. The AWPA is a wide reaching statute. Legislative history to the

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193. *Id.*

194. *Id.*

195. *Id.* (emphasizing by analogy: "If a migrant worker slept on a bench in a city park, the city could be penalized because the bench did not comply with applicable safety and health standards. Likewise, a person living in California who owned a vacation ranch in Montana could be penalized if migrant workers trespassed upon that person's land and set up a camp, despite his lack of knowledge of or consent to the camp. Such results are not supported by the plain language of the statute.").

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* ("Without at least actual or implied knowledge that the migrant workers were camped on his property, Conlan cannot be said to have used his real property for housing migrant workers.").

AWPA clearly identifies the statute's intended broad application.[202] Through passage of the AWPA, Congress meant to rectify the deplorable working and living conditions migrant farm workers faced.[203] As discussed before, migrant farm workers are among the most impoverished workers in the United States.[204] However, there are indications that the AWPA has the opposite effect from what Congress intended.

Given their migratory nature, it is necessary for migrant workers to obtain suitable housing upon arriving in their new location. However, the options available to migrant workers are limited, and where to live becomes "a serious and sometimes desperate matter" for migrant workers who are not provided housing by their employer.[205] They must either find housing in the local rental market, with friends or family, or face homelessness.[206] Most migrant farm workers "generally do not earn enough to afford market-rate housing" and must resort to camping illegally or sleeping in their vehicles.[207] One migrant farm worker described the problem by stating that "'[i]t is very difficult for [her] family to find housing when [they] go from [their] home in South Texas to the Panhandle to work. There are not many houses for rent for what [they] can afford . . . [a]nd six-month to one-year leases, at a minimum, are required.'"[208] The lack of housing, resulting in a lack of labor, creates a major problem for employers who stand to lose millions if adequate labor is not obtained.[209] If workers are unable to procure housing, employers should naturally step in and provide housing to migrants in order to ensure a healthy workforce and avoid such debilitating losses.

However, most employers are unable or unwilling to provide or procure housing for migrant farm workers because of the high cost of liability.[210] This was exactly the case in Coachella Valley, California, where migrant grape pickers resorted to sleeping in a parking lot because adequate housing was unavaila-

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202. H.R. REP. NO. 97-885, at 17-18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4563-64.

203. *Id.*

204. *See supra* Part I.

205. *Id.* at 2-3.

206. *Id.*

207. ABBETT, *supra* note 9.

208. Kathy Tyler, *Farm Labor Housing Summit Inspires Collaboration*, RURAL VOICES, Summer 2005, at 7, *available at* http://www.ruralhome.org/storage/documents/voicessummer2005.pdf.

209. ABBETT, *supra* note 9.

210. Ina Jaffe, *Farm Worker Housing in California: Enduring Rough Conditions, Fighting for Change*, NPR, June 11, 2003, http://www.npr.org/news/specials/housingfirst/nprstories/030607.migrant/index.html.

ble.[211] One vineyard owner, who hires over one thousand workers each harvest, used to provide free housing to his workers on his ranch.[212] He had to stop because "he found the liability . . . to be too much."[213] Thus, the effect of broad liability under the AWPA results in fewer people, especially employers, who are willing to provide housing to migrant workers.

What is the solution then? One option is for Congress and the courts to lessen the responsibility and penalties under the AWPA. However, if this were the correct solution, then the FLCRA would have proved sufficient to ensure migrant workers had access to housing which met applicable health and safety standards. As discussed earlier, less liability and lower penalties were insufficient under the FLCRA.[214]

Another solution is to require all agricultural employers to provide housing for migrant workers. This is the case in Canada, where employers are required to provide housing for migrant workers which must meet applicable health and safety standards.[215] However, this solution may prove too expensive for many employers who do not possess the resources in the form of land or capital to construct and maintain adequate housing. The result for many migrant workers may be loss of available employment opportunities as employers find it too costly to continue to hire migrant workers. There certainly is a danger in requiring that a migrant worker's employment and housing be subject to the control of their employer.[216] Especially when housing is a condition of employment, one can imagine instances in which an employer could exploit the vulnerability of his workers. For the worker, termination also means eviction.[217]

The most viable solution, one which is already in place to some degree, is the availability of funds for those who will oversee the construction of migrant housing pursuant to applicable standards and will ensure that the housing continues to meet those standards. Given the threat of liability under the AWPA, there must be some sort of incentive for individuals and groups to take on the respon-

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211. *Id.* The city in this instance actually had to put portable toilets and showers around the parking lot to assist with sanitation. *Id.*

212. *Id.*

213. *Id.*

214. *See supra* Part III (discussing the defects of the FLCRA).

215. *See* MAXWELL BREM, THE NORTH-SOUTH INST., MIGRANT WORKERS IN CANADA: A REVIEW OF THE CANADIAN SEASONAL AGRICULTURAL WORKERS PROGRAM 11 (2006), *available at* http://www.nsi-ins.ca/english/pdf/MigrantWorkers_Eng_Web.pdf.

216. *See* Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d 1500, 1511 (11th Cir. 1993). The court addresses the dangers of employer-provided housing by stating, "[i]n such a case, workers must accept the employer's housing or forgo a desperately needed job. Equally serious, however, is when the circumstances surrounding the worker's employment make it a practical necessity to accept employer provided housing." *Id.*

217. *Id.*

sibility of housing migrant workers in proper facilities. The USDA began providing funds known as Section 514 and 516 housing programs.[218] It is estimated from 1964 to 2004 that these funds were used to finance 35,000 homes for farm workers.[219] In addition to funds available through grants, USDA provides specialized loans specifically for the development of farm worker housing.[220] Those Section 514 and 516 programs are available to fund housing programs for all farm workers, not just migrants.[221] An enormous support staff is necessary to actually build the housing though, so often the funds may not go to non-profit community organizations committed to providing housing but in need of employee funds to continue functioning.[222] Instead, the Department of Labor appropriates funds for farm labor housing, which are used for hiring support staff to directly oversee the production and management of migrant worker housing.[223] Therefore, funds from the Department of Labor and USDA are both essential to the survival of non-profit migrant housing groups. These non-profit benevolent organizations take a hands-on approach to meeting migrant workers' varying needs, from emergency housing to job training and counseling for homeownership.[224] However, in the past decade, the money available to USDA's Section 514 and 516 housing programs has dwindled.[225]

It is important that local non-profit organizations continue to exist in the future to ensure that migrant workers have access to affordable, sanitary housing. Non-profit organizations, whether they be faith-based or not, are imperative to "'[p]roviding farm workers improved living conditions and an opportunity for a greater quality of life [to] help improve rural communities.'"[226] The situation for migrant farm workers has improved since the passage of the FLRCA and the AWPA; however, there is still much to be done to further that improvement. The efforts of non-profit organizations represent a shining example of what can be accomplished with dedicated resources and specific motivation. It is imperative that these efforts continue in the future, or the agricultural economy will suffer a severe lack of labor and stand to lose millions of dollars.

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218. Strauss, *supra* note 4, at 3.
219. *Id.*
220. Press Release, USDA, Veneman Dedicates Migrant/Seasonal Farmworker Housing Facility in Florida (Oct. 15, 2003), http://www.usda.gov (type "Release No. 0357-03" into the search box).
221. Strauss, *supra* note 4, at 3.
222. *Id.*
223. *Id.* at 3-4.
224. *See, e.g., id.*
225. *Id.* at 3.
226. USDA, *supra* note 220.

VI. CONCLUSION

Congress intended to have the AWPA applied expansively, which likely seemed necessary at the time it was enacted. Following Congress' intent, courts have applied the AWPA's housing provision to the furthest extent in an attempt to ensure safe housing for migrant workers. However, the condition of migrant agricultural worker housing remains as much an issue as it was when the AWPA was enacted. Instead of ensuring safe housing, the AWPA has resulted in less available housing for migrants to some extent. In the future, it is important for courts to determine where the liability boundaries of the AWPA's housing provision fall. To do otherwise will establish an unmanageable statutory interpretation of the AWPA's housing provision. Furthermore, it is important to remember the effect the AWPA's application can have on the availability of migrant housing. A balance must be struck between expansive liability and practicality to ensure the problems perceived by Congress that led to the AWPA are in fact correctly resolved. A solution must be found to make a basic human need, sanitary housing, available to some of the most impoverished workers in the United States.