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TVPRA, State Statutes Open Door for Civil Damage Claims by Human-Trafficking Victims

Coryne Levine and Pamela Lee*

Abstract: *There is not a person alive with a soul that would believe sex trafficking and other variants of modern slavery is a good thing. The individuals that perpetrate those heinous acts should be punished accordingly. In 2003, Congress opened the door for human-trafficking victims to sue for civil damages under the Trafficking Victims Protection Act of 2000 (TVPRA). Since then the TVPRA and similarly drafted state statutes have allowed for human-trafficking victims to seek civil damages against any party that has benefited from their trafficking. Given this expansive inclusion of third-party liability, more and more businesses, especially those in the hospitality industry, are ultimately the ones left to pay for the criminal acts of human traffickers. This article discusses the evolving litigation around human-trafficking claims, beginning with a broad overview of human trafficking, followed by a discussion of the legal standard behind human-trafficking civil suits and recent guidance from U.S. courts on these types of claims. The article concludes with guidance of its own on how businesses can build a foundation for their own defense while simultaneously helping prevent human-trafficking crimes from ever occurring.*

Introduction

Civil litigation for third-party claims filed under the Trafficking Victims Protection Act (TVPRA) is still relatively fresh, with about a third of these claims still in active litigation.[1] As such, there is a lack of case law to evaluate overall liability. The case law that has come out since 2019 has signaled that the TVPRA and statutes

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like it will likely have even broader ramifications than previously considered. Despite the limited precedential guidance, it is expected that this seemingly niche area of law will only continue to grow.

A plethora of nonprofit organizations and government agencies have collectively produced hundreds of available resources on how to help prevent human trafficking. Overwhelmingly, groups across the board agree that bringing awareness to human trafficking is the most foundational method to stopping human trafficking. By implementing intentional training and internal policies, businesses can not only insulate themselves from third-party claims but they can be a force for good in the fight against human trafficking.

Background

What Is Human Trafficking?

The TVPRA, which made human trafficking a federal crime in 2000, provides two different categories of human trafficking: sex trafficking and labor trafficking.

Sex trafficking is defined as "the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act, in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age."[2]

In contrast, labor trafficking is defined as "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."[3]

Key Indicators of Human Trafficking

Individuals identified as being the most vulnerable to human trafficking are those that (1) recently relocated themselves, (2) have a history of substance abuse, (3) have a history of mental health problems, or (4) have been involved in the child welfare systems as a child.[4] However, it is critical to recognize that *anyone* can become a victim of human trafficking.

The characteristics listed below point to an active human-trafficking situation that should be reported to local law enforcement or to the Human Trafficking Hotline:[5]

- living with their employer or manager,
- signs of poor hygiene,
- signs of physical abuse (i.e., bruises, cuts),
- submissive or fearful characteristics,
- inability to speak to alone,
- appeared to be monitored when interacting with others,
- answers appear to be scripted and rehearsed,
- does not have control or possession of their identifying documents,
- seen to be unpaid or paid very little,
- seen to be living in overcrowded spaces,
- never alone, and
- under 18,

The Legal Standard Behind These Civil Suits

The TVPRA was first enacted in 2000 to add forced labor, trafficking for forced labor, and sex trafficking as federal criminal offenses.[6] The TVPRA was broadened in 2003 to allow trafficking victims to recover civil damages from their traffickers in federal court.[7] In 2008, Congress again amended the TVPRA. In this latest iteration, Congress opened the door for third parties to be sued as "whoever knowingly benefits, financially or by receiving anything of value" from trafficking crimes will be liable for civil damages.[8]

The standard for beneficiary claims has been interpreted to include a large breadth of parties. For example, hotel franchisors have been held liable under the TVPRA for the actions of their franchisees.[9] Even medical professionals have been held liable under the TVPRA in recent years.[10] The number of possible defendants will likely only increase as some federal courts have acknowledged the likely possibility that the TVPRA can be successfully pursued extraterritorially, so long as the offense itself is extraterritorial.[11]

After civil damages were first allowed under the TVPRA in 2003, approximately 458 cases have been filed under the TVPRA as of 2020. Regarding all types of trafficking, approximately $255,298,993.50 have been awarded in damages either through public settlements, jury verdicts, or judicial rulings.[12] About 43.67% of the 458 cases filed have ended in public settlement.[13] The highest number of federal cases filed under the TVPRA was in 2019, wherein 88 cases were filed alleging some kind of human trafficking.[14] In comparison, only 6 cases were filed in 2004. Interestingly, almost a third of all cases that have ever been filed under the TVPRA were still ongoing as of May 1, 2021.[15]

Of the 458 cases, a majority of these civil lawsuits focused on forced labor (i.e., agricultural workers, au pairs, etc.), with only 8% of the complaints focusing on allegations of sex trafficking.[16] However, the Human Trafficking Legal Center expects that number to drastically rise as the number of cases focusing on sex trafficking accounted for approximately 60% of the cases filed under the TVPRA in both 2019 and 2020.[17] Also on the rise are suits presenting allegations of both sex trafficking and labor trafficking, rather than exclusively focusing on one.[18]

The TVPRA is not the only statute that has been cited in these suits. All 50 states have drafted and passed their own legislation that parallels the TVPRA.[19] These state renditions have provided additional opportunities, available damages, and venues for these kinds of actions. Additionally, many of these lawsuits present some cause of action under the umbrella of negligence, such as the claim for negligent infliction of emotional distress. Many of these lawsuits are also filed under the federal or local state's Racketeer Influenced and Corrupt Organizations Act (RICO). In situations where there are allegations of forced labor by an employer, the Fair Labor Standards Act (FLSA) is often alleged too. Tort-based causes of actions, like false imprisonment and negligent infliction of emotional distress, are usually presented as well.[20]

The number of causes of action available to pursue these kinds of claims will likely increase in the near future. For example, in 2022, nonprofit organizations across the world joined together to lobby and raise support for a bill called the "Establishing New Authorities for Businesses Laundering and Enabling Risks to

Security Act" (ENABLERS Act). This statute aimed to hold those who launder illicit funds that could be used to fund trafficking by requiring a broadly defined group of "financial institutions" to abide by the anti-money-laundering requirements of the Bank Secrecy Act. Per the bill, financial institutions could include professionals you would not normally think of being related to finances like law firms, marketing professionals, and sellers of antiques.[21] The bill was ultimately blocked by the U.S. Senate and never made it out of Congress.[22]

The Elimination and Tolling of Federal Statute of Limitations

In September 2022, President Biden signed the Eliminating Limits to Justice for Child Sex Abuse Victims Act into law, eliminating the statute of limitations for TVPRA civil claims brought by minors.[23] *See* 18 U.S.C. § 2255. Before this law, the statute of limitations for all TVPRA claims was ten years after the plaintiff's eighteenth birthday or ten years after the injury was discovered.[24] The law does not have a retroactive effect, and only applies to claims that have not yet expired under the previous statute of limitations for the TVPRA.[25] Essentially, anyone under the age of 28 in September 2022 will not be time-barred from filing claims under the TVPRA if they were trafficked as a child. The statute of limitations of 10 years still applies to individuals who claimed they were adults when trafficked.

Claims presented pursuant to the FLSA generally have a two-year statute of limitations (or three years for willful violations).

However, some federal courts have allowed for equitable tolling for FLSA claims where "extraordinary circumstances" exist. Equitable tolling is a doctrine wherein the court grants an extension of the statute of limitations, allowing claims previously time-barred to be pursued. In *Cruz v. Maypa*, the Fourth Circuit held that the plaintiff was entitled to file and pursue her time-barred FLSA claims as her employer had "confiscated her passport, isolated her from other people, monitored her communications, and threatened that she would be imprisoned and deported if she tried to escape."[26] The Fourth Circuit held that the plaintiff was entitled to equitable tolling as the situation was "beyond plaintiffs' control ma[king] it impossible to file the claims on time."[27] The court cautioned that equitable tolling is a "rare remedy" and only available where the plaintiff has "exercise[d] due diligence in preserving [her] legal rights."[28]

While the standard for equitable tolling is extremely difficult to reach, it can be done, especially in the context of human trafficking.

Recent Guidance from U.S. Courts

The most recent and persuasive Federal Court opinion on the TVPRA and other human trafficking claims comes from the Eleventh Circuit. In *Doe #1 v. Red Roof Inns, Inc.*, the Eleventh Circuit further elaborated on the second element of beneficiary claims under the TVPRA.

To substantiate a third-party claim, otherwise known as a beneficiary claim, under the TVPRA, the plaintiff must plausibly allege and eventually prove that the defendant "(1) knowingly benefited, (2) from taking part in a common undertaking or enterprise involving risk and potential profit, (3) that undertaking or enterprise violated the TVPRA as to the plaintiff, and (4) the defendant had constructive or actual knowledge that the undertaking or enterprise violated the TVPRA as to the plaintiff."[29] Simply put, association to sex trafficking does not equate to liability under the TVPRA, as "some participation in the sex trafficking act itself must be shown."[30]

As a matter of first impression, the Eleventh Circuit held that to prove the second of these four elements, it must be shown that a business "took part in a common undertaking or enterprise involving risk and potential profit," to be liable for third parties claims.[31] This is a departure from the previous interpretation of the second element, which had been to use the same definition of "participation in a venture" as outlined in U.S.C. § 1591, the TVPRA's criminal prohibition: "knowingly assisting, supporting, or facilitating" human trafficking.[32]

The Court explained that U.S.C. § 1591 explicitly provides that definitions of § 1591(e) be used in "this section."[33] As such, these definitions cannot give meaning to phrases outside U.S.C. § 1591.[34] Given that the civil portion of the TVPRA is governed by U.S.C.

§ 1595, "participation in a venture" for civil liability is not the same as it is for criminal liability.[35] To support this analysis, the Court pointed out that imputing the exact definition of U.S.C. § 1591 into the elements for civil liability results in a nonsensical sentence.[36]

This new interpretation increases the burden and difficulty for the plaintiffs to bring claims for civil damages, especially in regard to claims against franchisors. Even though the franchisors in *Doe #1* had "controlled the policies and standards" for franchisees, "sent inspectors to examine hotels," "monitored online reviews," and trained managers for the hotels, they did not participate in the venture as required by the TVPRA.[37] Essentially, there needs to be allegations and eventually proof that the business or franchisor did more than simply run their business. There should be actions undertaken by the business that point toward their involvement in human trafficking because "observing something is not the same as participating in it."[38]

Combating Human Trafficking Internally

The best way to insulate your business from facing third-party claims under the TVPRA and similarly drafted statutes is to ensure that there are active and consistently upheld policies that increase the overall awareness of human trafficking throughout the business. The most highly recommended way of doing this is through video or in-person trainings.

These trainings do not necessarily need to be formal curriculum-based training programs. This implemented training could be as simple as having employees watch some of the human-trafficking awareness videos produced by the Department of Homeland Security's Blue Campaign and then having the employee sign some sort of certification or log to document what they did. Nonetheless, it is recommended that employees go through an official curriculum-based training.

Twenty-two states require that hospitality-centric or transportation-focused businesses, like hotels and airports, display some kind of poster depicting the number to the National Human Trafficking Hotline.[39] The most effective posters are those with multiple translations available in Chinese, English, Korean, Russian, Spanish, Tagalog, and Vietnamese.[40] Even if your state does not require a poster on human trafficking, it is highly recommended that businesses have one on display as it will provide vital information to human-trafficking victims who see it. Also, the posters can spread human-trafficking awareness to patrons, which increases the overall vigilance for human-trafficking activities.

In addition to developing policies that spread awareness of human trafficking, there should also be protocols in place to dictate what an employee should do if he or she suspects human trafficking is occurring. Who should be notified of these suspicions? What documentation, if any, is made to report on the situation? How soon will law enforcement be involved?

It is critical that these policies and protocols be written out and feature some sort of documentation requirement. Documentation increases the likelihood of consistent implementation in the future and provides tangible evidence of a business's attempts to eliminate human trafficking from their premises.

Conclusion

The case law surrounding the TVPRA and similarly drafted statutes is still in its early stages, leaving little guidance from U.S. Courts on how to navigate claims stemming from human trafficking. However, if businesses take active and affirmative steps to prevent human trafficking on their premises and follow up with documentation, they can build a foundation for their own defense, as well as help to prevent these heinous crimes to begin with.

Notes

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1. Rebekah R. Carey, Federal Human Trafficking Civil Litigation: 2020 Data Update, Hum. Trafficking Leg. Ctr., 5 (July 2021).

2. 22 U.S.C. § 7102.

3. *Id.*

4. Nat'l Human Trafficking Hotline, Human Trafficking, https://humantraffickinghotline.org/en/human-trafficking.

5. U.S. Dep't of State, Identify and Assist a Trafficking Victim, https://www.state.gov/identify-and-assist-a-trafficking-victim/; Nat'l Human Trafficking Hotline, Recognizing the Signs, https://humantraffickinghotline.org/en/human-trafficking/recognizing-signs.

6. 22 U.S.C. § 7102 (2000).

7. 22 U.S.C. § 7102 (2003).

8. 18 U.S.C. § 1595(a).

9. *See* S.Y. v. Naples Hotel Co., 476 F. Supp. 3d 1251 (M.D. Fla. 2020); A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d 171 (E.D. Pa. 2020); S.J. v. Choice Hotels Int'l, Inc., 473 F. Supp. 3d 147 (E.D.N.Y. 2020).

10. Doe v. Dabbagh, 15-CV-10724, 2015 WL 13806540 (E.D. Mich. May 28, 2015) (psychiatrist was held liable under the TVPRA after he provided a trafficker medication later used to subdue a plaintiff).

11. Roe v. Howard, 917 F.3d 229, 242 (4th Cir. 2019) (interpreting the TVPRA similarly to how the Supreme Court interpreted the federal RICO statute in RJR Nabisco, Inc. v. European Cmty., 136 U.S. 2090, 2103 (2016)).

12. Carey, *supra* note 1, at 5.

13. *See id.* at 15-16.

14. *Id.* at 7.

15. *See id.* at 16.

16. Alexandra F. Levy, Federal Human Trafficking Civil Litigation: 15 Years of the Private Right of Action, Hum. Trafficking Leg. Ctr., 15 (Martina R. Vandenberg & Andrew B. Cherry eds., 2018).

17. *See* Carey, *supra* note 1, at 8.

18. *Id.*

19. U.S. Dep't of State, Trafficking in Persons Report 486 (2019), https://reliefweb.int/sites/reliefweb.int/files/resources/2019-Trafficking-in-Persons-Report.pdf.

20. Richard Console Jr., Legal Remedies for Sex Trafficking Victims, JDSUPRA, Jan. 27, 2023, https://www.jdsupra.com/legalnews/legal-remedies-for-sex-trafficking-5286170/.

21. ENABLERS Act, H.R. 5525, 117th Cong. § 2 (2022).

22. Gram Slattery, Anti-Corruption Groups, White House Back Money Laundering Bill in Congress, Reuters, Dec. 7, 2022, https://www.reuters.com/world/us/anti-corruption-groups-white-house-back-money-laundering-bill-congress-2022-12-07/.

23. Melissa L. Jampol, Lori A. Medley & Sierra N. Hennessy, "Eliminating Limits to Justice for Child Sex Abuse Victims Act of 2022" Abolishes Statute of Limitations for Federal Civil Causes of Action Relating to Child Sex Abuse, Volume XIII, Natl. Law Review, 207, Oct. 11, 2022.

24. *Id.*

25. *Id.*

26. Cruz v. Maypa, 773 F.3d 138, 146 (4th Cir. 2014).

27. *Id.* at 145.

28. *Id.* at 146 (quoting Chao v. Virginia Dept. of Transp., 291 F.3d 276, 283 (4th Cir. 2002).

29. Doe #1 v. Red Roof Inns, Inc., 21 F.4th 714, 726 (11th Cir. 2021).

30. *See* U.S. v. Afyare, 632 F. App'x 272 (6th Cir. 2016) (Defendants cannot be assumed to have benefited from sex trafficking just because they were part of a gang).

31. Doe #1, 21 F.4th at 724.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 720.

38. *Id.* at 727.

39. *See* U.S. Dep't of Transportation, Compendium of Human Trafficking Awareness Poster State Laws (Feb. 10, 2014).

40. Jennifer Sullivan, Multi-Language Posters Aimed at Combating Teen Prostitution, Seattle Times (Nov. 16, 2011), http://seattletimes.nwsource.com/html/localnews/2013450263_teenprostitution17m.html.