The State of Play: Defending Human Trafficking Claims in 2022

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Since this topic was last addressed at the 2021 DRI Hospitality Conference, there has been only one appellate court to address the sufficiency of claims under the Trafficking Victims Protection Reauthorization Act ("**TVPRA**"), 18 U.S.C. § 1595. In *Doe #1 v. Red Roof Inns, Inc.*, 21 F.4th 714 (11th Cir. 2021)[1], the Eleventh Circuit affirmed the district court's granting of the franchisors' motions to dismiss, finding that each of the four (4) Plaintiffs failed to plausibly allege a claim under Section 1595(a) of the TVPRA (the franchisees' motions to dismiss were denied by the district court and not at issue on appeal). In its ruling, the Court defined the elements of a TVPRA claim as follows:

> That the defendant:
>
> 1. knowingly benefitted
> 2. from participating in a venture;
> 3. that venture violated the TVPRA as to the plaintiff; and
> 4. the defendant knew or should have known that venture violated the TVPRA.

Id. at 723. The 11th Circuit's affirmation turned on the second and third elements of the Plaintiffs' claims, specifically finding that Plaintiffs did not properly allege that the franchisors participated in a venture that violated the TVPRA.

After rejecting the notion that *participation in a venture* should be defined via Section 1591(e)(4), the TVPRA's corresponding criminal prohibition, the Court interpreted the terms according to their ordinary meaning. [2] "Participate" was defined as "to take part in or share with others in common or in an association," and "venture" was described as "an undertaking or enterprise involving risk and potential profit." *Id*. at 725. Plaintiffs alleged that the venture in which all defendants participated was a "sex trafficking venture." *Id*. at 724-25. Thus, the Court set out to determine whether the plaintiffs "plausibly alleged that the

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[1] Doe #1 was actually one of four plaintiffs who filed TVPRA claims against overlapping groups of hotel defendants, including franchisors, franchisees, owner-operators, and employees. The 11th Circuit opinion applies in each of the four cases (*i.e*. Doe #1, Doe #2, Doe #3, and Doe #4, collectively, "**Plaintiffs**").

[2] The TVPRA includes provisions for criminal and civil claims, both of which include "participation in a venture" as a necessary element. The criminal provision, Section 1591, defines this term as "knowingly assisting, supporting, or facilitating a violation of subsection (a)(1)," which criminalizes commercial sex acts of minors or obtained through force or threat of force. The civil provision, Section 1595, contains no definition of the term at all. The Court determined that Section 1591's definition was limited to criminal claims and that the term "participation in a venture", as used in Section 1595, was to be interpreted per its plain and ordinary meaning.

franchisors took part in the common undertaking of sex trafficking with hotel employees, management, owners, and sex traffickers." *Id*. at 726.

The Court noted the differences in the facts asserted against the franchisees/operators and those attributed to the franchisors. The Plaintiffs alleged that the hotels participated in sex trafficking by, for example, staff working as lookouts and informing traffickers when police were present on the premises. The factual allegations related to the franchisors, however, were that the franchisors "controlled the policies and standards" of the hotels, trained managers and employees, "sent inspectors to examine" the hotels, and "monitored online reviews", all of which, Plaintiffs claimed, would have put the franchisors on notice of the sex trafficking allegedly occurring on the premises. *Id*. at 720. The Court determined that contentions that the franchisors engaged in or even oversaw the hotels' business did not suggest "that the franchisors participated in a common enterprise or undertaking with the Does' sex traffickers or others at the hotel who violated the statute." *Id*. at 727. Put differently, the business of running a hotel is not the business of sex trafficking, and Plaintiffs' allegations as to the franchisors were only that the franchisors participated in the venture of running the hotel:

> In short, to participate in a venture under Section 1595(a), a defendant must take part in a common undertaking involving risk or profit. The Does chose to frame the ventures at issue as sex trafficking ventures in their amended complaints. Yet they have provided no plausible allegations that the franchisors took part in the common undertaking of sex trafficking. Their only allegations as to the franchisors' knowledge or participation in those sex trafficking ventures are that the franchisors sent inspectors to the hotels who would have seen signs of sex trafficking and that they received reviews mentioning sex work occurring at the hotels. But observing something is not the same as participating in it.

Id.

Outside of this rather narrow holding, however, the 11th Circuit's opinion offered a few other noteworthy aspects. Perhaps most importantly, from a defense standpoint, is that the Court included the phrase "as to plaintiff" within the third and fourth elements of a civil TVPRA claim. *Id*. at 719, 723. The defense bar has seen plaintiffs' attorneys repeatedly promote the notion that sex trafficking is a widely recognized problem within the hotel industry, and they are fond of packing their complaints with pages of irrelevant descriptions related to the criminal practice and societal, and more specifically the hospitality industry's, efforts to address it. The 11th Circuit's opinion, however, should serve as a reminder to the plaintiffs' bar that, at the end of the day, their burden of proof includes two key elements: (1) the plaintiff must prove that *she/he* was trafficked at a specific hotel *and* (2) that each named defendant knew or should have known that *the named plaintiff* was trafficked at the specifically identified hotel. Based upon the 11th

Circuit's opinion, generalities as to the tragic nature of sex trafficking or even the general knowledge of sex trafficking at the hotel on different occurrences that did not involve the named plaintiff, will be insufficient to recover under 18 U.S.C. § 1595(a).

While the 11th Circuit is the only federal appeals court to clearly define a plaintiff's burden with respect to the knowledge elements of TVPRA claims in this manner, there are strong indications from district courts around the country, and outside the 11th Circuit, which support this interpretation. The U.S. District Courts for the District of Oregon[3], the Eastern District of Michigan[4], the Northern District of Texas[5], and, just last month, the Northern District of Illinois[6] have all held that a showing of knowledge (active or constructive) of sex trafficking generally was not enough, and that the TVPRA requires a plaintiff to plead sufficient facts supporting that the defendants knew or should have known of the particular sex trafficking venture *involving plaintiff* in order to survive a motion to dismiss.

It should also be mentioned that the 11th Circuit's refusal to apply Section 1591's definition of "participation in a venture" to Section 1595 is a notable blow to the hospitality industry. As the 11th Circuit noted, district courts are split on the issue. While the hope is that other circuits may take an alternative view to the 11th Circuit on this particular issue, it is more likely that we will see most circuits eventually approve application of a constructive knowledge standard to 1595 claims. The first courts to examine civil claims under the TVPRA relied on a 2016 6th Circuit decision in a criminal case to tie-in key statutory definitions from 1591(a) to civil claims under 1595.[7] But recent district court decisions have distinguished the two provisions and ruled that a constructive knowledge, or the

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[3] *A.B. v. Hilton Worldwide Holdings, Inc.*, 21 F.Supp.3d 921 (D. Ore., Sept. 8, 2020).

[4] *H.G. v. Inter-Continental Hotels Corporation*, 489 F.Supp.3d 697 (E.D. Mich., Sept. 23, 2020).

[5] *E.S. v. Best Western International, Inc.*, 510 F.Supp.3d 420 (N.D. Tex., Jan. 4, 2021).

[6] *G.G. v. Salesforce.Com, Inc.*, 2022 WL 1541408 (N.D. Ill., May 16, 2022).

[7] The Southern District of New York referenced *U.S. v. Afyare*, 632 Fed.Appx. 272 (6th Cir. 2016) in two separate cases against individuals and companies related to Harvey Weinstein, *Noble v. Weinstein*, 335 F.Supp.3d 504 (S.D. NY, Aug. 14, 2018) and *Geiss v. The Weinstein Company*, 383 F.Supp.3d 156 (S.D. NY, Apr. 17, 2019). This intermingling of terms from 1591 in an analysis of 1595 was followed by the Northern District of Georgia in the *Jane Doe* cases in 2020, but explicitly disapproved by the 11th Circuit on appeal.

"should have known" standard, while insufficient for criminal liability under 1591, is appropriate for civil claims under 1595.[8]

Outside of the 11th Circuit opinion and several district court rulings, relatively few cases, whether federal or state, have pressed forward into late stage dispositive motions, hearings, and trial. Despite this lag in meaningful discovery (whether due to COVID-19 or pending appeals), we have been able to glean from the handful of cases that have moved through discovery and are on the cusp of dispositive motions an anticipated plaintiff strategy. With respect to discovery, defendants can expect an onslaught of depositions including employees, contractors, and independent contractors retained during any relevant time period at the respective hotel, 30(b)(6) deposition(s),[9] and the identification of numerous witnesses who claim to also be victims of sex trafficking and/or prostitutes at the hotel. Fact depositions in these cases have proven to be extensive, arduous, and contentious. Indeed, a plaintiff's deposition is likely to be a back to back day affair, especially in light of the number of pending cases wherein multiple defendants have been named. Motions to extend the length of a plaintiff's deposition may be appropriate in these cases due to the volume of defendants named in the lawsuit.

Similarly, expert witness discovery will undoubtedly include the identification of multiple experts, including security and/or hospitality experts, damages experts (whether counsels, therapists, psychiatrists, or otherwise), toxicology experts, and potentially others depending on the specific facts of each case. We anticipate that the next wave of opinions to be issued at the district court level will almost certainly include *Daubert* motions to exclude expert testimony.

Moving forward, however, one thing is certain. Defendants must focus and prioritize their investigation into each specific plaintiff. Understanding the when, why, how, and where of the plaintiff's circumstances at the respective hotel, their personal background, any prior abuse, and how they found themselves in the "life" will be crucial to establishing a successful defense in either a TVPRA and/or

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[8] Judge Marbley of the Southern District of Ohio was one of the first to break from the New York cases in *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F.Supp.3d 959 (S.D. Oh., Oct. 7, 2019. The distinction was spelled out further by *A.B. v. Marriott International, Inc.*, 455 F.Supp.3d 171 (E.D. Penn., Apr. 22, 2020), and then followed by *A.B. v. Hilton Worldwide Holdings, Inc.*, 21 F.Supp.3d 921 (D. Ore., Sept. 8, 2020), *E.S. v. Best Western International, Inc.*, 510 F.Supp.3d 420 (N.D. Tex., Jan. 4, 2021), *J.B. v. G6 Hospitality, LLC*, 2021 WL 4079207 (N.D. Cal., Sept. 8, 2021), *Lundstrom v. Choice Hotels International, Inc.*, 2021 WL 5579117 (D. Colo., Nov. 30, 2021).

[9] In some cases, plaintiff's counsel have taken the depositions of a 30(b)(6) witness and then, on a separate date, noticed the same individual's deposition, only in their individual capacity as a fact witness.

similar state law claim. An excellent starting point for these investigations include criminal cases, to the extent they exist, brought against any alleged traffickers.

As pending cases progress through a lengthy legal process, counsel from both plaintiff and defense bars will be eagerly awaiting both dispositive motion rulings and potential jury verdicts. Indeed, both sides remain uncertain as to how courts and juries will perceive these cases and what facts may make a difference to each respective judge or jury pool. However, we can say with certainty that the case count for this new cottage industry has increased year after year and shows no signs of slowing down.