Liability for Trafficking of Persons

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In 2008 the United States Congress enacted 18 U.S.C. §1595, the revised civil remedies provision of the Trafficking Victims Protection Act. The Texas legislature passed similar legislation in 2009 in Chapter 98 of the Civil Practice & Remedies Code. While these civil remedy provisions were enacted over a decade ago, only recently have suits been filed under their provisions. Texas's first lawsuit was filed in late 2018.

Although they both provide civil remedies for victims of sex trafficking, the two statutes, and the manner how claims under each have been prosecuted, largely diverge at this point. With the increased interest and focus on human and sex trafficking, both nationally and internationally, plaintiff's attorneys have turned their interest towards prosecuting claims under these statutes.

This paper examines the two statutes, their similarities, differences, how they may be interpreted, and the status of the litigation they have spawned.

TRAFFICKING VICTIMS PROTECTION ACT – 18 U.S.C. §1591, *ET SEQ*

The criminal component of the Trafficking Victims Protection Act was originally enacted in 2000 and amended in 2003. It states, in part:

> **(a)** Whoever knowingly--
> **(1)** in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or
> **(2)** benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),
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> knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

18 U.S.C. §1591(a).

The provision providing for civil remedies was not created until 2008. It states, in part:

> **a)** An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

18 U.S.C. 1595(a).

I. Federal Litigation

The initial wave of litigation under the federal statute has focused on franchisors and not many cases involved franchisees or operators.

Franchisors have responded by filing Rule 12(b)(6) motions to dismiss, asserting the plaintiffs failed to state a claim upon which relief can be granted. The franchisors make three primarily arguments in seeking the dismissal of plaintiffs' claims: (1) they did not "knowingly benefit" from the plaintiff's sex trafficking; (2) they did not commit an "overt act" related to the plaintiff's trafficking; and (3) the plaintiff failed to allege sufficient facts that they, as franchisors, "knew or should have known" of the plaintiff's trafficking. Franchisors have met varying success in obtaining dismissal.

In their review of these motions, courts have stated the following are the requirements for liability under § 1595: (1) the defendant must "knowingly benefit, financially or by receiving something of value; (2) from participating in a venture; (3) that they knew or should have known has engaged in an act in violation of this chapter. *A.C. v. Red Roof Inns, Inc.*, 2020 WL 3256261, at *4 (S.D. Ohio June 16, 2020).

a. Financial Benefit

In analyzing the franchisor's first basis for dismissal, the trial courts have resoundingly rejected their argument.

In making this argument, franchisors have asserted, in some cases, that "knowing benefit" requires a "causal relationship between the rental of a hotel room and the perpetrator's sex trafficking scheme." *H.H. v. G6 Hospitality, LLC*, 2019 WL 6682152 (S.D. Ohio December 6, 2019). The *H.H.* court and others addressing similar arguments rejected that notion (at least at the pleadings stage) and have concluded the language of §1595 only requires that the defendant knowingly benefit financially, not that they be compensated "on account of" the plaintiff's sex trafficking. *Id*. at *2. That court ultimately concluded "the rental of a room constitutes a financial benefit from a relationship with the trafficker sufficient to meet this element of the § 1595(a) standard." *Id*., *quoting M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F.Supp.3d 959, 965 (S.D. Ohio 2019); *see also A.C.*, 2020 WL 3256261, at *4; *A.B. v. Marriott International, Inc.*, 455 F.Supp.3d 171, 191 (E.D. Pa. 2020); *J.C. v. Choice Hotels International, Inc.*, 2020 WL 6318707, at *4 (N.D. Ca. October 28, 2020).

b. Participating in a Venture

Defendants have also sought dismissal of plaintiff's claims on the grounds they did not allege sufficient facts that defendants participated in a venture. There have been two primary grounds in support of this argument: (1) two parties engaging in a transaction to rent a room does not amount to a scenario where the participants shared a common purpose and (2) "participation" requires and "overt act" in furtherance of the venture. *J.L. v. Best Western International, Inc.*, -- F.Supp.3d --, 2021 WL 719853, at *6 (D. Colorado February 24, 2021).

The majority of opinions addressing this issue have sided with the court in *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F.Supp.3d 959, 968 (S.D. Ohio 2019). That court rejected Wyndham's

argument that an "overt act" was required (at least at the pleading stage) to demonstrate participating in a venture. In doing so, it reasoned defendants could not rely on the definition of "participation in a venture" contained in § 1591(e)(4) because § 1591, unlike §1595, had a requirement that there be "knowing" participation. *Id*. at 969. Conversely, § 1595 only required the defendant "knew or should have known" regarding their participation in the sex trafficking venture. *Id*. To satisfy this standard, that court held, "[i]n the absence of a direct association, Plaintiff must allege at least a showing of a continuous business relationship between the trafficker and hotel such that it would appear that the trafficker and the hotels have established a pattern of conduct or could be said to have a tacit agreement." *Id*. at 970.

Although the majority of courts have employed the standard pronounced in *M.A.*, this has not foreclosed the possibility of Rule 12(b)(6) dismissal. For instance, in *S.J. v. Choice Hotels International, Inc.*, 473 F.Supp.3d 147, 154 (E.D.N.Y 2020) that court rejected the plaintiff's argument that franchisors could be liable because they were generally aware sex trafficking sometimes occurred at their franchised properties. In reaching this conclusion, it held the language of § 1595 speaks in "singular terms" by requiring "participation in *a* venture which that person … should have known *has* engaged in *an* act in violation of this chapter." *Id*. (emphasis in original). The *S.J.* court also concluded knowledge of willful blindness of sex trafficking at low budget accommodations did not satisfy the requisite scienter. Because plaintiff did not allege the defendant had the required knowledge of a specific venture, that court concluded the defendant could not be directly liable. *Id*.

Similarly, in *A.B. v. Hilton Worldwide Holdings, Inc.*, 484 F.Supp.3d 921, 938 (D. Oregon 2020), the court concluded, "[g]eneral knowledge of commercial sex activity is not sufficient under the statutory language to demonstrate defendant's participation in plaintiff's trafficking."

Two courts have, however, held an "overt act" was required to establish participation in a venture. *Noble v. Weinstein*, 335 F.Supp.3d 504 (S.D.N.Y. 2018) involved claims related to the sexual harassment committed by Harvey Weinstein. In analyzing Robert Weinstein's Rule 12(b)(6) motion to dismiss, that court concluded liability "cannot be established by association alone." *Id*. at 524. Rather, "some participation in the sex trafficking act itself must be shown." *Id*.

Relying on the holding in *Noble*, the court in *Doe I v. Red Roof Inns, Inc.*, 2020 WL 1872335, at *3 (N.D. Georgia April 13, 2020), reached the same conclusion.

So, while most courts are not requiring a plaintiff to assert a defendant engaged in an "overt act" to demonstrate "participation in a venture," there is some hope for dismissal. At least for franchisors.

c. Knew or Should Have Known.

The final criterion examined by federal courts in determining liability under §1595 is whether a defendant knew or should have known the venture was engaged in trafficking.

"Knew or should have known" is a negligence standard of constructive knowledge. *H.H. v. G6 Hospitality, LLC*, 2019 WL 6682152, at *3 (S.D. Ohio December 6, 2019). This has been

interpreted to mean that while defendants do not need to have actual knowledge of the venture, plaintiffs must, at a minimum, allege they rented rooms to people they knew or should have known were engaged in their trafficking. *B.M. v. Wyndham Hotels & Resorts, Inc.*, 2020 WL 4368214, at *5 (N.D. Ca. July 30, 2020).

To meet their pleading requirements on this element, plaintiffs make varying allegations ranging from seemingly boilerplate to very specific. Some of the allegations that seem uniform among all the pleadings include: payment with cash or prepaid debit card, refusing housekeeping service, requests for extra towels, presence of excessive amount of used condoms, and large amounts of male foot traffic to the plaintiff's room. *E.S. v. Best Western International, Inc.*, -- F.Supp.3d --, 2021 WL 37457 (N.D. Tex. January 4, 2021).

The "knew or should have known" prong is one area where franchisor defendants have had the most success is obtaining favorable rulings on Rule 12(b)(6) motions. As with "participation in a venture" there are two camps on how this issue has been decided.

The first camp, which has a more liberal view of the pleadings with respect to the franchisors is led by the opinion in *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F.Supp.3d 959 (S.D. Ohio 2019). The allegations in *M.A.* are a mix of boilerplate and specific. She asserted:

- Her trafficker requested rooms near exit doors;
- Trash cans were full of used condoms;
- She was routinely instructed to refuse housekeeping service;
- Rooms were often paid for in cash;
- The hotels failed to recognize or report her trafficking;
- She saw some of the same staff over the course of time at the hotel;
- She was routinely escorted by her trafficker in front of staff after he paid for the room in cash;
- After pleas and screams for help after being choked or beaten at the properties, the staff did nothing to help her;
- Her trafficker operated out of the same room for days or weeks at a time; and
- She was forced to see 10 "Johns" per day.

Id. at 967.

Although the *M.A.* court found the plaintiff's allegations were not sufficient to demonstrate actual knowledge, it concluded the defendants' failure to implement policies or procedures that could combat a known problem can rise to the level of willful blindness or negligence. *Id*. at 968.

Other opinions handed down by the same trial court also reached that conclusion. *See generally, H.H. v. G6 Hospitality, LLC*, 2019 WL 6682152 (S.D. Ohio December 6, 2019); *A.C. v. Red Roof Inns, Inc.*, 2020 WL 3256261 (S.D. Ohio June 16, 2020); *Doe S.W. v. Lorain-Elyria Motel, Inc.*, 2020 WL 1244192 (S.D. Ohio March 16, 2020). The court in *A.D. v. Marriott International, Inc.*, 455 F.Supp.3d 717 (E.D. Pa. 2020) also denied a Rule 12(b)(6) motion on the same reasoning.

While the *M.A.* court and its progeny concluded allegations were sufficient to establish franchisor defendants "knew or should have known" of a plaintiff's trafficking, those courts are in the minority. The majority of the courts have determined the allegations are not sufficient to support claims against franchisors.

In *S.J. v. Choice Hotels International, Inc.*, 473 F.Supp.3d 147, 151 (E.D.N.Y. 2020) the plaintiff made the following allegations:

- Staff at the two hotels had regular contact with her and her trafficker;
- The staff witnessed numerous signs of both physical abuse and sex trafficking;
- Frequent, unannounced male visitors to her room;
- Refusal of housekeeping services;
- Repeated requests for linens and towels;
- Cash payment for hotel rooms;
- Large amount of used condoms in room at checkout;
- Inappropriate attire for age; and
- She was often taken in and out of the hotel with a paper bag over her head.

The *S.J.* court rejected plaintiff's reasoning with respect to the franchisor defendants, finding it went one step too far. And to accept her reasoning would make it easier to establish liability against the franchisors that it would the actual hotels. Instead, it concluded plaintiffs must show more than an abstract awareness by franchisors to meet their pleading requirement. *Id*. at 154.

Other courts have followed *S.J.*'s lead and found general awareness of sex trafficking does not satisfy the "knew or should have known" element. *See A.D. v. Wyndham Hotels & Resorts, Inc.*, 2020 WL 8674205 (E.D. Virginia July 22, 2020); *J.B. v. G6 Hospitality, LLC*, 2020 WL 4901196 (N.D. Ca. August 20, 2020); *A.B. v. Hilton Worldwide Holdings, Inc.*, 484 F.Supp.3d 921 (D. Oregon 2020); *H.G. v. Inter-Continental Hotels Corp.*, 489 F.Supp.3d 697 (E.D. Michigan 2020); *K.B. v. Inter-Continental Hotels Corp.*, 2020 WL 8674188 (D. New Hampshire 2020); *E.S. v. Best Western International, Inc.*, -- F.Supp.3d --, 2021 WL 37457 (N.D. Tex. 2021); *J.L. v. Best Western International, Inc.*, -- F.Supp.3d --, 2021 WL 719853 (D. Colo. 2021); and *Jane Doe #9 v. Wyndham Hotels & Resorts, Inc.*, 2021 WL 1186333 (S.D. Tex. March 30, 2021).

While all of these courts determined plaintiffs' allegations were insufficient to support a claim against franchisors, almost all of them concluded the allegations would be sufficient to maintain claims against hotel franchisees or operators (this would seemingly include flag-operated hotels).

LIABILITY FOR TRAFFICKING OF PERSONS – CIVIL PRACTICE & REMEDIES CODE §98.001, *et seq*.

In 2009, following the amendment to the federal statute, the Texas legislature enacted §98.001, *et seq*. to provide a civil remedy to those who were trafficked.

I. Potential Interpretations

While §98.001, *et seq*. was modeled after the TVPA, there are substantial differences between the enabling language of the two statutes that, to an extent, may result in the federal cases not providing much guidance on interpreting Texas's iteration. Additionally, unlike the TVPA, the Texas statute provides for shareholder liability and joint and several liability.

Section 98.002(a) states:

> A defendant who engages in the trafficking of persons or who intentionally or knowingly benefits from participating in a venture that traffics another person is liable to the person trafficked, as provided by this chapter, for damages arising from the trafficking of that person by the defendant or the venture.

TEX.CIV.PRAC.&REM.CODE §98.002(a)

The statute does not provide any definitions for "knowingly," "intentionally," "participation," or "venture." The only definition it provides is for "trafficking of person," which refers to the definition used in Texas Penal Code Chapter 20A. Additionally, there are no opinions from any Texas courts of appeals interpreting the statute as a whole or these terms. Thus, it is necessary to turn elsewhere for potential interpretation of these terms.

a. Knowingly or Intentionally

Texas Penal Code 6.03(a) states, "[a] person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." Section 6.03(b) states, "[a] person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result."

In the civil context, the Texas Deceptive Trade Practices Act defines a "knowing" violation as requiring the person to have "actual awareness" of their conduct. TEX.BUS. & COMM. CODE §17.49(9). The Supreme Court of Texas has held "actual awareness" requires a person to not only know what they are doing, but to know what they are doing and make the decision to proceed. *St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank Co.*, 974 S.W.2d 51, 53-54 (Tex. 1998). The DTPA defines an "intentional" violation as requiring "actual awareness" coupled with intent for reliance by another party. TEX.BUS. & COMM. CODE §17.49(13).

b. Participate

No Texas caselaw or statute defines the term "participate." It is therefore necessary to turn to secondary sources for the plain meaning of the term. *Merriam-Webster.com* defines it as (1) to possess some of the attributes of a person, thing, or quality; (2) to take part; to have a part or share in something. www.merriam-webster.com/dictionary/participate (last visited April 9, 2021).

Thus, the plain meaning of "participate" connotes active involvement, or, as the franchisors assert in the federal court cases, an "overt act."

c. Venture

Although no Texas caselaw had interpreted the term "venture," Texas courts have defined the term "joint venture." The Supreme Court of Texas has held a "joint venture" exists if there is a community of interest in the venture, an agreement to share profits, an agreement to share losses, and a mutual right of control. *Schlumberger Tech Corp. v. Swanson*, 959 S.W.2d 171, 176 (Tex. 1997).

The criminal component of the TVPA defines "venture" as any group of two or more individuals associated in fact, whether or not a legal entity. 18 U.S.C. §1591(e)(5).

d. Potential Interpretation

Although these terms are not defined in Chapter 98, the definitions provided in other statutes, caselaw, and reference sources provides some guidance on how it may be interpreted.

Additionally, unlike 18 U.S.C. §1595, the Texas statute does not have the requirement of "knew or should have known has engaged in an act in violation of this chapter" with respect to the defendant's participation in the venture. Given the absence of this language, the liability requirements of §98.002 are more akin to 18 U.S.C. §1591 – the federal criminal provision.

18 U.S.C. §1591(a) states:

> **(a)** Whoever knowingly--
> **(1)** in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or
> **(2)** benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),
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> knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

Given the similarity between §98.002 and §1591, the interpretation of the latter should provide guidance as to the former.

In *U.S. v. Afyare*, 632 Fed.Appx. 272 (6th Cir. 2016) the Sixth Court of Appeals analyzed the requirements of §1591. In *Afyare*, the government, on appeal, advanced an interpretation of the

statute that only required someone to be a part of a venture and someone else in that venture engaged in sex trafficking. *Id*. at 285. The district court had utilized an interpretation that required the individual to knowingly benefit from participation in a sex-trafficking venture. *Id*.

The court used the analogy of a person on a soccer team that was sponsored with funds derived from sex trafficking. *Id*. Under the government's interpretation, a player on the team would be culpable if the source of the funds was not concealed and they accepted the financial benefits of being on the team. *Id*.

Noting the district court's warning that §1591 was not intended to criminalize "mere negative acquiescence," the *Afyare* court rejected the government's interpretation. Instead, it concluded §1591 "targets those who participate in sex trafficking" and not those who turn a blind eye. *Id*. It thus required the prosecution "to prove that the defendant actually participated in a *sex-trafficking venture." Id*. (emphasis in original).

The result reached in *Afyare* should provide a good framework for interpreting §98.002 given the definitions available and the similarity of the statutes.