CIVIL LITIGATION ON BEHALF OF VICTIMS *of* HUMAN TRAFFICKING

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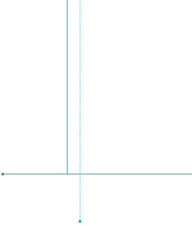

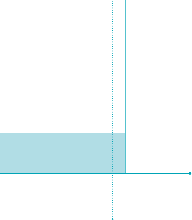

actual economic losses he or she has suffered. This generally includes lost income pursuant to 18 U.S.C. § 1593(b)(3) as well as any out of pocket losses flowing as a direct result of the trafficking crime codified at 18 U.S.C.S. § 2259(b)(3).

A victim is entitled to "the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act."[6]

A human trafficking victim's lost income or lost earning potential for purposes of restitution is calculated according to the time period in which the victim was acting under the direct control of the trafficker. There are various methods used to calculate lost earnings. The most common method is based on a minimum wage analysis under the Fair Labor Standards Act ("FLSA") or an analogous state minimum wage law. For example, a victim was entitled to restitution of approximately $917,000 based on minimum wage analysis and overtime provisions spanning nearly 20 years of exploitation.[7]

Where illegal work is involved, such as prostitution, a minimum wage analysis according to state and federal labor codes cannot be applied. In this situation, the appropriate method for calculating lost income is to determine the amount of the convicted trafficker's gross income from the trafficking victim's services. For example, when a criminal organization forced women into prostitution, the court ordered the victims restitution in the amount of $1 million based on the organization's profits.[8]

As defined under 18 U.S.C.S. § 2259(b)(3) a victim's losses include:

- A) medical services relating to physical, psychiatric, or psychological care;
- B) physical and occupational therapy or rehabilitation;
- C) necessary transportation, temporary housing, and child care expenses;
- D) lost income;
- E) attorneys' fees, as well as other costs incurred; and
- F) any other losses suffered by the victim as a proximate result of the offense.

Victims have a right to compensation for any other out-of-pocket losses they suffer as a result of a crime. In calculating a victim's losses, an advocate should communicate to the victim the utmost importance in documenting all expenses incurred. Receipts or other similar documentation is the most effective means in calculating actual losses.

Of note is 18 U.S.C. § 2259(b)(3)(F), which provides a broad catch-all phrase "any other losses suffered by the victim as a proximate result of the offense," without specification of types of losses. Therefore, an advocate should work with prosecutors to define this provision as widely as possible. For example, "other losses suffered" could include future lost wages, future medical expenses, and future employment issues due to a victim's physical or psychological impairment.

Advocates should communicate with prosecutors to establish the appropriate means for calculating the amount of restitution. The method employed to determine the amount of restitution should provide the victim with the maximum compensation possible. In addition to relief from lost earnings, advocates can index all other economic losses suffered by the victim and ensure that the totality of the losses are known to the

prosecutors. Advocates can also assist in gathering adequate proof, receipts or affidavits corroborating the victim's losses. Finally, where there is no prosecution or where direct restitution has not been paid, advocates should consider tapping into their state's crime victim's restitution fund. At least 35 states have implemented some type of victim compensation program.[9]

Keep in mind also that restitution does not preclude an award of civil damages arising out of the same events.[10]

B. H w a C a C c f e T af c e Ma He e C Ca e

Under the collateral estoppel doctrine, a guilty verdict in a criminal case may be used in a subsequent civil action to prove the facts upon which it was based.[11] Keep in mind, however, that the guilty verdict only has a collateral estoppel effect on the guilty party and those who were his or her privies at the time of the criminal proceeding.[12] Therefore, it may be difficult to argue that a guilty verdict of a trafficker has a preclusive effect on a joint employer or joint tortfeasor in the parallel civil litigation.

C. I g a -Re a ed Be e f C e Pa c a e C a P ec e C L ga

The TVPA provides that:

> [F]ederal law enforcement officials may permit an alien individual's continued presence in the United States, if after an assessment, it is determined that such individual is a victim of a severe form of trafficking and a potential witness to such trafficking, in order to effectuate prosecution of those responsible ...[13]

As a result of this provision, trafficking victims who are available to be witnesses in a criminal prosecution often receive continued presence *and* employment authorization. Furthermore, in order to be eligible for a "T" visa, an immigrant who is 18 years of age or older must comply with "any reasonable request for assistance in the ... investigation or prosecution of acts of trafficking" and show that he or she "would suffer extreme hardship involving unusual and severe harm upon removal."[14] Similar requirements apply for the "S" visa,[15] and the "U" visa.[16]

The U.S. Department of Justice ("USDOJ") has recently taken the position that human trafficking victims must be issued Notices to Appear, thereby placing the victims in removal proceedings, before an interview with U.S. Immigration and Customs Enforcement ("ICE") related to the trafficking claims can occur. The victim also must be fingerprinted and photographed by ICE. The Notice to Appear does not include an actual court date, and the victim is not detained. ICE waits to set the court date until the investigation or prosecution is completed. This policy has been roundly condemned by advocates for survivors of human trafficking,

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including the authors of this Guide, as processing for removal is likely to cause greater trauma for the survivor, and the uncertain outcome will likely dissuade many survivors from approaching law enforcement. Still, it is now imperative that attorneys discuss with their trafficked clients the potential risks associated with this policy before presenting the clients to ICE investigators. Legal advocates should also consider presenting trafficking survivors directly to trusted FBI or local law enforcement agents with whom a relationship has been cultivated, rather than to the USDOJ Civil Rights Division, as this would make it more likely—though not certain—that ICE would remain out of the picture.

Regularization of a client's immigration status will help the client's civil case. A plaintiff's immigration status generally is not admissible in a civil proceeding.[17] However, representing undocumented immigrants can be logistically tricky. For example, it may be difficult for an undocumented immigrant to travel to depositions or court appearances.

The civil litigation itself may also provide some immigration benefits. At least one judge has certified "U" visa applications in the context of a civil action brought by trafficked workers who were facing imminent removal from the United States.[18]

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If the civil action is filed before the introduction of evidence in the criminal proceeding, it is very likely that the criminal prosecutors will move to intervene in the civil case for the limited purpose of staying discovery. Where there are parallel civil and criminal actions, such motions are routinely granted.[19] Alternatively, as occurred in one trafficking case, the Court may deny the government's motion to intervene, but rule *sua sponte* to stay the civil proceedings.[20] The prosecutors generally want a stay because criminal defendants should not be able to use the more permissive civil discovery process to make an end run around restrictions on criminal discovery.[21] On the other hand, the defendants themselves may support a stay rather than having to choose between claiming Fifth Amendment privilege in civil discovery, which carries a negative inference in civil proceedings, and jeopardizing their defense in the criminal proceedings by responding to discovery.[22] The government will likely also argue this position in its brief in support of the stay.

From the plaintiff's perspective, a stay may be beneficial in several respects. First, if your client is concerned about his or her safety and has thus far maintained anonymity in both the civil and the criminal action, civil discovery may jeopardize this. For example, while you may obtain a protective order prohibiting deposition questions that may endanger your client, it is immensely difficult to assure that your client is sufficiently prepared so as to avoid revealing such information. This is particularly true if your client lacks formal education and experience with legal processes.

A stay also may be helpful if the defendants are expected to claim Fifth Amendment privilege in the civil discovery. As discussed above, though the Fifth Amendment privilege carries a negative inference in civil litigation, this inference is not helpful if you are trying to learn facts to support your claim against unindicted civil defendants. The spectre of the Fifth Amendment privilege will render much of this critical initial fact-finding

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practically impossible. Additionally, even if some civil discovery has taken place, new issues of contention will undoubtedly arise in the course of the presentation of evidence in the criminal trial. This will require a second round of discovery. This process would be stilted and duplicative, and seems unnecessary in light of the ease with which the court can relieve the burden.

Further, it is likely that you will be able to use some of the positions adopted by the criminal defendants in support of your client's civil claims. The doctrine of judicial estoppel prevents a party from using one argument in one case, and then relying on a contradictory argument to prevail in another similar case.[23] Under the same doctrine, the criminal defense will try to use any sworn testimony of your client from the civil litigation to attack your client's testimony in the criminal case.

Finally, as discussed above, collateral estoppel will likely preclude a criminal defendant who was found guilty from raising certain defenses in the civil action.

The Trafficking Victims Protection Reauthorization Act of 2003 ("TVPRA") grants a civil cause of action for violations of the Act,[24] but requires that the civil action be stayed "during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim."[25] This provision appears to create a statutory mandate that the civil action be stayed until the trial court proceedings have concluded.[26] Still, the automatic stay only applies to "any civil action filed under this section."[27]

Since the passage of the TVPRA, only one court has issued an opinion addressing the automatic stay. In *Ara v. Khan*,[28]

Second, the defendants may exhaust all of their assets on their defense against the criminal charges—or the stay may give them time to hide their assets—leaving very little to satisfy a judgment in your civil case. If you are concerned about this, you may want to consider filing a notice of *lis pendens*[31] (also called "notice of pendency") or a mechanics or construction lien[32] on the defendants' property, though these mechanisms are somewhat limited. You may also want to file a motion for an Order of Attachment[33] or for a temporary restraining order and preliminary injunction prohibiting the sale or transfer of assets.[34]

You should also be mindful of any deadlines in your court's local rules. For example, many courts require plaintiffs bringing civil Racketeer Influenced and Corrupt Organization Act ("RICO") claims to file civil RICO case statements shortly after the initial complaint is filed.[35] Some courts also require that plaintiffs file their class certification motion within a set period of time.[36] Failure to comply with these deadlines, or to obtain an extension, may constitute abandonment of certain claims. You should not assume that a stay of discovery or a stay of the civil case stays these local deadlines. If a stay has not yet been issued, make sure you request an extension of the deadlines within the allotted time period. If a stay will be or has been issued, you should request that the stay order specify that these deadlines are also stayed.

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A grand jury indictment is perhaps the best source for information that is available to the prosecution. You should also frequently review the criminal case docket.[37]

The prosecution will not volunteer some evidence to you before it is presented at trial. However, the pros-

Labor ("USDOL"), and the U.S. State Department. Every federal agency should have regulations governing requests for production of agency documents or testimony, commonly referred to as *Touhy* regulations.[40]

E. I   ac f Y   C e   P   S a e e   e C   a P   ec

Be aware that non-privileged statements your client makes, or statements you make on your client's behalf, may be used by the criminal defense if the statements are non-hearsay or fall within one of the hearsay exceptions.[41] It is best to err on the side of caution. Clients should be advised not to discuss the case with anyone not covered by one of the privileges.[42] As an attorney, you should also be circumspect in any public statements.

The most easily admissible statements are prior statements made under oath by the witness, as these statements are considered non-hearsay.[43] Therefore, if your client has provided any sworn testimony, including deposition testimony as part of the civil litigation, before the introduction of evidence at the criminal trial, the criminal defense is very likely to review the testimony with a fine-toothed comb to find any inconsistencies. Therefore, as discussed above, it benefits the criminal prosecution, and hence your client, to support a stay of the civil proceedings until the conclusion of the criminal case.

F. Ad   b   e C   Ac   f Y   C e   S a e e   Made   e C   e f e C   a l e ga

Any sworn testimony given by your client as part of the criminal proceeding (e.g., grand jury or trial testimony) most likely will be admissible in the civil litigation. Additionally, police reports—and therefore your client's statements contained in police reports—will likely be admissible under the Federal Rule of Evidence 803(8)(C) hearsay exception, unless the sources indicate lack of trustworthiness.[44] Further, there is no sweeping law enforcement or confidential informant privilege,[45] though courts recognize a law enforcement privilege under many circumstances.[46] Courts have also recognized an "informer's privilege" in cases brought by the U.S. Secretary of Labor for violations of the FLSA, allowing the USDOL to withhold information about the identities of informants.[47]

IV. ASSESSING YOUR CLIENT'S CREDIBILITY

Essentially, there are two separate questions that must be answered in assessing your client's credibility. First, as your client's attorney, you must determine the truthfulness of your client's story.[48] Second, you should assess the factors the defense will use to attack your client's credibility. Some of these factors are described below.

A. I   ac f P   C   a a d/ I   g a   -Re a ed Offe   e

Most trafficking victims committed an immigration-related offense by entering the United States without inspection, overstaying a visa, or possessing fraudulent immigration documents. Therefore, the question of

whether the defense can use these offenses to attack your client's credibility is very likely to arise in the course of the civil litigation.

Generally, specific acts are admissible to attack a witness's credibility if, at the discretion of the court, the acts are probative of untruthfulness.[49] Therefore, courts have allowed, for example, prior use of a false name,[50] and filing of false or forged tax returns[51] to prove untruthfulness. However, even if such evidence is probative of untruthfulness, the court may still refuse to admit this evidence because its probative value is substantially outweighed, *inter alia*, by the danger of unfair prejudice.[52]

Immigration-related offenses generally will not be admissible, even to the extent that they may impinge your client's credibility—though there is some dispute over this. Mechanisms to avoid the disclosure of your client's immigration status are discussed in Chapter 2, § I(C), *infra*. Still, unlike most employment law cases, in civil litigation involving victims of trafficking, the plaintiff's immigration status at the time of his or her victimization is likely to be an essential element of the plaintiff's claim. In most trafficking cases, it is one of the elements the trafficker used to compel forced labor. Therefore, it makes little sense to try to prevent this information from surfacing.

B. H w e Defe e Ma U e Y C e Be e

colorable claim of unconscionability based on the gross disparity between the amount the plaintiff received in exchange for the waiver and the wages the plaintiff was actually owed.[54]

It is worth noting, as well, that "waivers of federal remedial rights ... are not lightly to be inferred."[55] This is particularly true in the context of minimum wage and overtime claims under the FLSA. In FLSA cases, courts

stances of sex trafficked clients and the consequences of civil suits on their progress toward rehabilitation and stability. Some of these considerations are described below.

questions going to the merits to make them a fair ground for litigation, and that the balance of hardships tips decidedly in favor of the moving party.”[11]

Specifically obtaining a TRO can be difficult, and courts are even more reluctant to issue an *ex parte* TRO. A TRO is a court order that enjoins a party from engaging in a particular action. The TRO remains in effect until the court rules on your motion for a preliminary injunction, which can take a long time, depending on the weight of the court’s docket. Unless you are seeking an *ex parte* TRO, the court will hear arguments on the motion for a TRO once notice is given to the opposing party.

Generally, if you are seeking a TRO, you must also prepare a motion for an expedited hearing, where you will indicate when you expect to serve the opposing party. You will also have to draft a proposed Order to Show Cause. Usually, a party seeking a TRO will hand-deliver the motion papers to the court and will wait for the assigned judge to issue the order to show cause. The order to show cause must then be personally served (usually within the next 24-48 hours) on the opposing party. *Consult your local rules and talk to the clerk of the court before seeking a TRO.* Most courts have very specific and sometimes convoluted rules that must be followed when seeking a TRO.

C. P ec e O de

Once the litigation proceeds into discovery, defendants are likely to seek information about your client that may jeopardize your client’s security or privacy. For example, defendants may ask for your client’s immigration status, current address and employer, and for information on your client’s hometown address in his or her country of origin. In a case where security is not a concern, this type of background discovery is usually acceptable. However, where retaliation is a concern, this information can put the safety of your client and his or her family in jeopardy.

If the defendants seek this information in discovery, you should move for a protective order. The court may limit discovery where the disclosure would present a “danger of intimidation” which could “inhibit plaintiffs in pursuing their rights.”[12] In one case, the court prevented the disclosure of the plaintiffs’ addresses and employers where a member of the defendants’ family had publicly accused the immigrant workers of being

Still, you should keep in mind that you probably will not be entitled to prevent discovery of work history if you include a claim for lost wages based on an illegal termination. Defendants would argue, probably correctly, that subsequent employment would mitigate lost wages and therefore is relevant to damages.[24]

A protective order may also be appropriate where a defendant takes action designed to intimidate participants in a lawsuit. In *EEOC v. City of Joliet*,[25] the U.S. District Court for the Northern District of Illinois issued a protective order in a Title VII case preventing the defendant from requiring employees to complete I-9 forms, where this was not the defendant's practice before the litigation. The court found that "the main purpose behind this alleged new found desire to abide by the law is to effect a not-so-subtle intimidation of the intervener, plaintiffs, and all the potential class members. Such actions are meant to, and if unchecked most certainly will, chill the exercise of the employees' Title VII rights—which rights the current lawsuit was filed to safeguard."[26]

Your claim for a protective order should be bolstered by any evidence (such as the criminal indictment) of prior efforts to intimidate your client. It is even stronger if the court already allowed your client to proceed using a pseudonym. It logically follows that, if the plaintiff's identity cannot be revealed, information that would subject him or her to identification, and therefore intimidation, must also be protected from discovery.

D. P ec t g O t e

Anyone with knowledge of your client's case—witnesses, friends, family members, Good Samaritans, even social service providers—may also face intrusive discovery requests. If revealing their identifying information puts their safety in jeopardy, it may also be concealed through protective orders. However, their knowledge of the case does risk exposure to the defendants since their communications with the client do not necessarily enjoy the same privilege that exists between the attorney and client. Typically, testimony from those playing a supportive role in your client's life will help to corroborate your client's case.

While the supporting testimony of social service providers may also be to the benefit of your client's case, there is good reason to keep certain information confidential, such as written notes taken in the course of treatment that may damage your client's credibility or other information that your client simply does not want revealed. The Supreme Court has held that communications between a psychotherapist and patient in the course of treatment are privileged and therefore, protected from discovery.[27] Psychotherapist is defined as psychiatrist, psychologist, and clinical social worker. Each *must* be licensed. The Supreme Court has not determined whether this privilege extends to non-licensed social service workers. However, some lower federal courts have extended the privilege to non-licensed counselors.[28] State evidence codes and case law may differ in the application of the psychotherapist-patient privilege.

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II. INDIVIDUAL ACTIONS VERSUS CLASS ACTIONS, REPRESENTATIVE ACTIONS, AND MASS ACTIONS

A. A B ef I t d c t t C a Ac t , Re e e a t e Ac t , a d Ma Ac t t e C e t f T af c g Ca e

Most cases of trafficking are limited to a small number of victims. However, cases occasionally arise with large numbers of victims. Often, these victims are difficult to locate, are intimidated by the legal process, or the traffickers prevent them from accessing an attorney and the courts. Where there are large numbers of victims, you should consider bringing the civil litigation as a class action, a representative action, and/or a mass action.

A federal class action is brought pursuant to Federal Rule of Civil Procedure 23 ("Rule 23"). Most causes of action may be brought on behalf of a Rule 23 class, with the notable exception of the FLSA, the Age Discrimination in Employment Act ("ADEA"), and the Equal Pay Act ("EPA"). In a Rule 23 class, individuals who meet the class definition are automatically members of the class, though in Rule 23(b)(3) they may affirmatively opt out of the class. Therefore, unless a class member opts out, the class member is bound by any judgments or court decisions in the class action. In a class action, the statute of limitations is tolled for all class members when the class action Complaint is filed, but it starts to run for an individual eligible class member once the individual opts out of the action.

A representative action (frequently also referred to as a "collective action" or a "FLSA class action") is allowed only for actions brought under the FLSA, the ADEA, or the EPA. As discussed above, Rule 23 class actions are prohibited under each of these statutes. (Note that your state minimum wage, overtime, or employment discrimination laws most likely allow class actions.) In a representative action, a similarly situated employee must opt into the case by filing a consent to sue with the court. Unless a worker opts into the action, the worker is not bound by judgments or decisions of the court. However, in most cases (unless you can make an argument for equitable tolling) the statute of limitations is only tolled once the consent is filed.

A mass action is a lawsuit with multiple plaintiffs. Some include hundreds of plaintiffs. To file a mass action, you must only meet the requirements for joinder. More plaintiffs may be added later in the litigation by amending the complaint, so long as you have not passed the deadline to amend as set forth in the scheduling order. If defendants have not filed a responsive pleading to the prior complaint, or if no responsive pleading is required and no more than 20 days have passed since the prior complaint was served, you may amend the complaint as a matter of right.[29] Otherwise, you must either obtain written consent from the defendants to amend the complaint or file a motion for leave to amend.[30]

Finally, many courts allow hybrid actions, allowing a class action to proceed on claims subject to Rule 23 and a representative action for claims under the FLSA, the ADEA, or the EPA. These cases may also have mass action components.

B. C de t e F w g Q e t a Y E a a e W e t e t B g a C a Ac t a I d d a Ac t

- Does the case satisfy the requirements of Rule 23?
- Does your client want to be a class representative?
- Does your client understand the responsibilities of being a class representative and how bringing the case as a class action may impact your client's damages?
- Does your client have an understanding of the case?
- Does the defendant have the solvency to satisfy a class-wide judgment?

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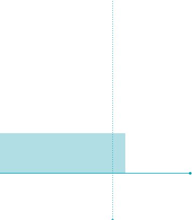

A Rule 23(b)(2) class may be certified for injunctive or declaratory relief. You may be able to construe some monetary damages, such as front or back pay, as equitable relief within the purview of a Rule 23(b)(2) class if the injunctive or declaratory relief sought predominate.[46]

In a Rule 23(b)(2) class, as compared to a Rule 23(b)(3) class, notice to class members is not required and class members need not be provided the opportunity to opt out.[47] This, of course, makes a (b)(2) class far easier to litigate than a (b)(3) class. Additionally, in a (b)(3) class, common issues must *predominate*—a requirement absent from a (b)(2) class where the common issues must merely *exist*. Still, it is hard to imagine a scenario in a trafficking case where injunctive or declaratory relief would predominate sufficiently to meet the standards set forth in either *Allison*[48] or *Robinson*.[49] Therefore, it is most likely that class certification in a trafficking case would be sought under Rule 23(b)(2) only for injunctive relief, and certification of a (b)(3) class would be sought for monetary damages.

Rule 23(b)(3) requires (1) that common issues predominate over individual claims; and (2) that class treatment is superior to other adjudication methods.[50] In a trafficking case, the most significant obstacle to (b)(3) certification is the requirement that common questions predominate. However, even within the context of a Rule 23(b)(3) class action, this should not present a problem so long as the allegations involve a common scheme.[51] However, it is important to look at the law in your jurisdiction, as the circuit courts' approach to predominance varies.

In the context of human trafficking litigation, challenges to the predominance prong will most likely arise where there are allegations of fraud because, some courts suggest, these claims require a showing of individual reliance.[52] Still, it is possible to distinguish a trafficking-related fraud class action from the fraud alleged in cases, such as *Castano*.[53] Further, as detailed in Chapter 3, § IV(B), *infra*, the U.S. Supreme Court's recent decision in *Bridge v. Phoenix Bond & Indemnity Co.*[54] holds that individual reliance is not an element of civil RICO fraud. Some courts also will not find predominance where claims for damages arising out of emotional distress and "other intangible injuries" are sought.[55] For briefing related to these issues, please contact author Werner.

D. Re e ate Act de e Fa Lab S a da d Ac

o o i io i io

The FLSA allows plaintiffs to sue on behalf of themselves and “other employees similarly situated.”[56] Plaintiffs may therefore seek court approval to bring the FLSA claims as a collective action on behalf of other workers. Procedurally, collective action certification usually occurs in two stages. Pre-certification (sometimes referred to as “conditional certification”) allows you to obtain the names and addresses of all similarly situated workers from the defendants. It also allows for the distribution of court-authorized notice.[57] Once distribution of notice begins, prospective plaintiffs will have a set amount of time to opt into the lawsuit, though the amount of time courts will allow varies.[58] As the statute of limitations in a FLSA action is only tolled once an opt-in plaintiff files the consent to sue, you should seek pre-certification of the representative class very early in the litigation. This generally is not a problem, as the burden on plaintiffs to prove that there are other similarly situated individuals is very light.[59] The second stage—final certification—usually only becomes an issue if the defendant moves to decertify the collective action. At that point, if the court finds that the opt-in claimants are similarly situated “the collective action proceeds to trial, and if they are not, the class is decertified, the claims of the opt-in plaintiffs are dismissed without prejudice, and the class representative may proceed on his or her own claims.”[60]

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Unlike a Rule 23 class action, class members who have opted into a representative action *may* be subject to discovery. However, courts typically, but not universally, allow for representative testimony,[61] reducing the burden of producing large numbers of opt-in plaintiffs for discovery. This may be particularly important in trafficking cases, where many of the opt-in plaintiffs likely live abroad.

io i w i 2 i io

An action may simultaneously be a representative action for the FLSA components and a Rule 23 class action for other causes of action, and some courts—though not all—will certify a Rule 23 class solely for state

C. Media and Public Considerations

Legal battles are fought both in the courtroom and in the court of public opinion. An effective use of the media may benefi

would tend to view cases of this nature more favorably. Additionally, the cost of distant litigation may provide a strong incentive for defendants to settle the case. Still, if you pick a "friendlier" court, the court may still entertain a motion for a change of venue based on "[t]he convenience of parties and witnesses, [and] in the interest of justice. ..."[76]

V. WHOM TO NAME AS DEFENDANTS

Trafficking schemes frequently are multi-tiered. At the "bottom" may be the smugglers. Within the smuggling network may be the recruiters in the country of origin—those involved with moving the victims across borders and within the United States. Next may be labor contractors, who often are directly responsible for putting the "severe" in severe forms of trafficking. The labor contractors may have agents who help maintain control of the victims. Next, there are the employers. In situations where there are not labor contractors involved, the employers may have direct involvement in the severe form of trafficking. However, many employers retain contractors under the often mistaken belief that these "middle men" will isolate the employers from liability for labor law violations. Employers may range in size from individual homeowners who employ trafficking victims as housekeepers, to multi-national manufacturers or retailers who hire trafficking victims in their plants. Often there are several employers. For example, a small textile manufacturer and several large clothing producers may jointly and simultaneously employ trafficking victims.

In light of these frequently complex and convoluted layers, figuring out whom to sue can be a daunting challenge. At the lower end, the smugglers may be difficult to identify and impossible to serve. Frequently, the contractors and the small employers are the actors who end up under indictment and may be the easiest to name in a lawsuit. However, these individuals may lack the solvency to satisfy a large judgment on behalf of trafficking victims.

The larger entities, though frequently overlooked in criminal prosecutions or simply unindictable due to the government's burden of proof in a criminal action, should be named in civil litigation if they are joint employers and/or joint tortfeasors. Ultimately, these larger entities may end up paying the bulk of any judgment arising from the civil litigation.

A. W a t C de Se T af c g Ca e

Aside from suing the traffickers and procurers (such as pimps, owners of escort services, saunas, and other prostitution-related businesses) in sex trade trafficking cases, you may be able to sue the purchasers of the sex (the "Johns"), to the extent you are able to identify some of them, under a number of causes of action. You may even consider suing a class of defendant purchasers if, for example, through the records of the sex trade business you are able to establish the requisites for a class. The causes of action against the traffickers, procurers, and the purchasers may include the trafficking private right of action, intentional torts, such as assault, false imprisonment, and intentional infliction of emotional distress; you may also be able to bring actions under civil RICO and the Alien Torts Claims Act. (These causes of action are discussed in detail in Chapter 3, *infra*.) Additionally, some states have passed legislation giving a person the right to sue for damages caused by being used in prostitution,[77] though the volume of litigation under these statutes has been very limited.[78] Note also

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The application of the “economic reality” test differs significantly between the circuits. Within the circuits, the test may be applied differently to different industries. The joint employment doctrine is particularly well-developed in agricultural labor — including in a recent farmworker trafficking case[85] — where the use of labor contractors is commonplace.[86]

The standard in New York is similar to most other states, but you should, of course, look at your own state's law in this respect. New York courts disregard the corporate form and find liability against an individual "'when the corporation has been so dominated by an individual or another corporation ... and its separate identity so disregarded, that it primarily transacted the dominator's business rather than its own and can be called the other's alter ego.'"[94] In order to determine whether a corporation has been so dominated, courts consider a number of factors, including:

> The intermingling of corporate and personal funds, under-capitalization of the corporation, failure to observe corporate formalities, such as the maintenance of separate books and records, failure to pay dividends, insolvency at the time of a transaction, siphoning off of funds by the dominant shareholder, and the inactivity of other officers and directors.[95]

Significantly, this doctrine allows the corporate veil to be pierced where the controlling individual so dominated the corporation as to have the power to stop the infringement of the plaintiffs' legal rights.[96]

In the context of federal labor laws, courts have adopted a standard that is even "more favorable to a party seeking to pierce the veil than the state law standard."[97] Under this broader federal standard, courts have weighed the following factors to determine whether the corporate veil should be pierced:

1) the amount of respect given by the shareholders to the separate identity of the corporation and to its formal administration,
2) the degree of injustice that recognition of the corporate form would visit upon the litigants,
3) the intent of the shareholders or incorporators to avoid civil or criminal liability,

Outside of the employment law context, the analysis is very similar to the analysis required to determine whether the corporate veil can be pierced. Courts have determined that the corporations are alter egos of each other where they have "substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership."[101]

Finally, some courts will extend liability to two or more businesses if they operate as a "joint venture."[102] A joint venture will be based on state law, and will generally require "(1) joint interest in a common business; (2) an understanding to share profits and losses; and (3) a right to joint control."[103]

C. Na g D ffe e Defe da f D ffe e Ca e f Ac

CHAPTER 3

CA E F AC, I

The Trafficking Victims Protection Act of 2000 was enacted to comprehensively combat human trafficking in the United States by strengthening criminal laws against the traffickers while providing conditional protection and benefits to the victims. It was amended in December 2003 to include a private right of action. In addition to the traffi

2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or
3) by means of the abuse or threatened abuse of law or the legal process ...[5]

"Whoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation of this chapter ...[6]

Whoever knowingly — (1) in or affecting interstate or foreign commerce ... recruits, entices, harbors, transports, provides, or obtains by any means a person; or (2) benefits, financially or by receiving anything of value, from participation in a venture ... knowing that force, fraud, or coercion ... 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 ...[7]

It should be noted that although section 1595 specifies violations of sections 1589, 1590, and 1591 as grounds for civil relief, section 1590 itself is in fact a catchall provision, incorporating all the trafficking-related violations enacted by the TVPA. The "in violation of this chapter" reference in the language of section 1590 pulls in all of Chapter 77, Title 18 of the U.S. Code ("Chapter 77"). Therefore, section 1590 appears to offer a private right of action for each and every provision of 18 U.S.C. §§ 1581 – 1594, so long as the defendant "recruits, harbors, transports, provides, or obtains" the victim. This raises a number of possible additional claims. For example, a defendant knowingly involved in the recruitment, harboring, or transporting of individuals for the purpose of placing them in forced labor or involuntary servitude could be liable under this section even if the individuals never ended up in a forced labor situation. It also arguably provides a private right of action for document theft under section 1592, or even attempt under section 1594(a). This strategy should be distinguished from the plaintiff's litigation strategy in *Cruz v. Toliver*,[8] where the court failed to find independent causes of action for sections 1581 and 1592.

The plaintiff in *Cruz* did not cross-reference to violations of sections 1581 and 1592 through a section 1590 claim. Instead, the plaintiff brought sections 1581 and 1592 claims as distinctly separate causes of action that were pled in addition to claims brought pursuant to sections 1589 and 1590. The court dismissed the sections 1581 and 1592 claims as independent causes of action. In an unpublished opinion from the Western District Court of Kentucky, the court cited *Gozlon-Peretz v. United States*,[9] to conclude that, "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." The Kentucky court reasoned that the TVPRAes of action unpublished opini10(, dge o0, fr)0Aodes a causes of action for s(

violation of section 1590 is specified in section 1595 as a ground for civil relief. Therefore, had the plaintiff cross-referenced to sections 1581 and 1592 within her section 1590 claim, the court would not have been able to dismiss the sections 1581 and 1592 claims based on statutory interpretation.

D. Sc e f C e c[11]

Perhaps most controversial in the interpretation and application of the TVPRA is the meaning of "coercion" and "serious harm," as intended by Congress in drafting the original TVPA. Guidance on the scope of these terms can be found from two sources. First, federal court opinions in criminal trafficking cases have interpreted the definitional scope of "coercion" and "serious harm" to establish violations of sections 1589, 1590, and 1591. Second, the TVPA itself and its congressional conference report elaborate on the intended meanings of "coercion" and "serious harm" for purposes of enforcement and adjudication.

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U.S. v. Calimlim[12]

In this case, a Philippine woman was forced to work as a domestic servant for a couple in Wisconsin for nineteen years. The Defendants kept the victim's passport, withheld information from her about opportunities to regularize her immigration status, and made vague threats that she might be subject to arrest, imprisonment, or deportation if she was discovered.[13] After the trial, the jury convicted the Defendants of violating the forced labor prohibitions of 18 U.S.C. § 1589(b) and (c), as well as other crimes. On appeal, the Defendants argued, *inter alia*, that the phrases "serious harm" and "threatened abuse of the legal process" in section 1589 were too vague and overbroad to pass constitutional muster. The Seventh Circuit rejected this argument and upheld the convictions. After a detailed examination of allegations against the Defendants, the court concluded that the Defendants' actions "could reasonably be viewed as a scheme to make [the victim] believe that she or her family would be harmed if she tried to leave. This is all the jury needed to convict."[14] Significantly, the court noted that:

> [W]ith reference to § 1589, after the Supreme Court ruled that a similar statute involving involuntary servitude, 18 U.S.C. § 1584, prohibited only servitude procured by threats of physical harm, ... Congress enacted § 1589. ... The language of § 1589 covers nonviolent coercion, and that is what the indictment accused the [Defendants] of doing; there was nothing arbitrary in applying the statute that way.[15]

U.S. v. Bradley[16]

U.S. v. Bradley involved workers from Jamaica trafficked to New Hampshire and forced to labor on a tree farm. A federal prosecution rendered guilty verdicts against each of the defendants for violation of section 1589, the forced labor provision of the TVPA. The defendants appealed the verdict, arguing that "forced labor" required evidence of physical force and could not be based on non-physical coercion. The First Circuit rejected the defendants' argument and affirmed the lower court's ruling. The *Bradley* court made clear that the TVPA was intended to encompass "subtle psychologi-

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12 [illegible]

13 [illegible]

14 [illegible]

15 [illegible]

16 [illegible]

cal methods of coercion."[17] The court also stated that determining the sufficiency of coercion to evidence a forced labor violation required consideration of a worker's "special vulnerabilities."[18]

U.S. v. Garcia[19]

Section 1589 of the TVPA survived a 2003 challenge in a federal district court that it was unconstitutionally "void for vagueness." In *U.S. v. Garcia*,[20] the government indicted various farm labor contractors for trafficking Mexican farm laborers to New York State and forcing them to work under threats of violence and deportation. The defendants sought to dismiss the forced labor charges against them, arguing that the TVPA's undefined nature—specifically, the terms "obtains," "threats of serious harm" and "abuse or threatened abuse of law," made it impermissibly vague.[21] The *Garcia* court rejected the claim, declaring that the statute provided the guidance necessary to overcome the vagueness challenge.[22]

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The TVPA's Purpose and Findings explicitly proclaims that crimes of involuntary servitude include those perpetrated through psychological abuse and nonviolent coercion: "Involuntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion."[23] Thus, the TVPA supersedes the restrictive definition set forth in *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court case that narrowly interpreted the definition of involuntary servitude as servitude that is brought about through the use or threatened use of physical or legal coercion. The TVPA's legislative conference report emphasized the Act's intent to "provide federal prosecutors with the tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in *Kozminski*."[24]

With the objective to expand the legal meaning of involuntary servitude to address human trafficking, the TVPA's new criminal codes are based upon a broadened version of coercion.[25]

The TVPA defines coercion as:

A) threats of serious harm to or physical restraint against any person;
B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
C) the abuse or threatened abuse of the legal process.[26]

The Act further declares that, "statutes on involuntary servitude have been.0109 Tw[(The A)14 Ac of setruedes.9cessw.8(ct

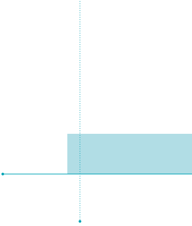
The term involuntary servitude includes a condition of servitude induced by means of:

A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or
B) the abuse or threatened abuse of the legal process.[28]

Finally, the new crime of forced labor, like the new definition of involuntary servitude, also incorporates the broadened meaning of coercion, officially expanding the forms of unfree labor prohibited pursuant to Congress' Thirteenth Amendment section 2 enforcement power.

Whoever knowingly provides or obtains the labor or services of a person:

1) by threats of serious harm to, or physical restraint against, that person or another person;
2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or
3) by means of the abuse or threatened abuse of law or the legal process ...[29]



attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.[55]

B. Bac g d

The Thirteenth Amendment and its enabling statute, 18 U.S.C. § 1584, prohibit “involuntary servitude.”[56] Unlike the Fourteenth Amendment, the Thirteenth Amendment and section 1584 apply to both state action and private conduct.[57]

Neither the Thirteenth Amendment nor section 1584 expressly provides a civil remedy for victims of involuntary servitude. However, section 1584’s provision of a criminal penalty does not preclude implication of a private cause of action for civil damages.[58] A court may imply a private right of action where Congress intended to create one by implication.[59] Courts that have implied a cause of action have generally done so when “the statute in question ... prohibited certain conduct or created federal rights in favor of private parties.”[60]

To date, the U.S. Supreme Court has yet to recognize a private cause of action for involuntary servitude under the Thirteenth Amendment.[61] Lower federal courts have been divided on the issue.[62] The Eastern District of New York in *Manliguez* recently found a private cause of action under section 1584 based on involuntary servitude, holding that the beneficiaries of section 1584’s protection are victims of a constitutionally prohibited practice; the statute is rooted in the Thirteenth Amendment, which confers the federal right to be protected from involuntary servitude; and a private cause of action would be consistent with section 1584’s legislative intent.[63] The *Manliguez* court noted that other circuits have declined to extend civil liability to cases under section 1584.[64] However, the *Manliguez* court differentiated these cases by noting that they involved claims that did not meet the definition of “involuntary servitude” established under *Kozminski*.[65] At least one court since *Manliguez*, however, has found there is no private right of action under the Thirteenth Amendment.[66]

Still, as set forth ch u47 -1.2 TDas set for32117ses ueT.&aIXm619.9.9.v h u4138

purposes of prosecution the term “involuntary servitude” means: “[a] condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.”[69] This definition includes all cases “in which the defendant holds the victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion.”[70] It should be noted, however, that evidence of other means of coercion, of poor working conditions, or of a victim’s special vulnerabilities may be relevant in determining whether the physical or legal coercion or threats could have compelled the victim to serve.[71] Furthermore, evidence of other means of coercion or poor working conditions may be used to corroborate disputed evidence.[72]

The TVPA enacted an expanded definition of “involuntary servitude” that includes labor compelled by psychological coercion.[73] Therefore, trafficked plaintiffs pleading an implied cause of action under the Thirteenth Amendment and section 1584 should encourage courts to consider the TVPA’s broader definition of “involuntary servitude.”[74] The argument could be presented as follows:

In *Kozminski*, the U.S. Supreme Court expressly limited the definition of “involuntary servitude” to the activities the Court concluded Congress intended to prohibit when the Thirteenth Amendment was passed.[75] Because “involuntary servitude” was not otherwise defined by Congress, the Court felt that it should:

> Adhere to the time-honored interpretive guideline that uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity. ... The purposes underlying the rule of lenity—to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts—are certainly served by its application in this case.[76]

Still the Court specified that its definition was only applicable “absent change by Congress.”[77]

In passing the TVPA’s broader definition of “involuntary servitude,” Congress expressly found that:

> [I]nvoluntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion. In *United States v. Kozminski*

Assemblymember Sally Lieber, the principal author of the bill, to draft legislation primarily intended to broaden trafficked persons' rights and protections.[88]

AB 22, the California Trafficking Victims Protection Act was signed into law by Governor Arnold Schwarzenegger on September 21, 2005.[89] In addition to criminalizing trafficking and providing a trafficking civil cause of action, AB 22 mandates that state and local law enforcement issue an Law Enforcement Agency Endorsement within 15 days of encountering a trafficking victim in order to expedite the provision of federally granted social services and immigration relief. AB 22 enacts a trafficking victim-caseworker "privilege" to protect communications between victims and their social services caseworkers from intrusive discovery. AB 22 also provides victims with state crime victim compensation funds and state health and human services.

The California trafficking private right of action was amended as section 52.5 of the Cal. Civil Code. Section 52.5 provides that a trafficking victim may bring a civil action for actual, compensatory and punitive damages, and injunctive relief. Among other things, section 52.5 also provides for treble damages, as well as attorney's fees, costs and expert witness fees to the prevailing plaintiff. Similar to the federal trafficking private right of action, section 52.5 also provides that a civil action "shall be stayed during the pendency" of a criminal investigation and prosecution arising out of the same set of circumstances.[90] Thus far, two civil lawsuits have been filed utilizing section 52.5. Both are pending at this time.

In order to make a claim under section 52.5 of the Cal. Civil Code, a plaintiff must be trafficked as defined by section 236.1 of the Cal. Penal Code.[91]

Section 236.1 of the Cal. Penal Code defines trafficking as the unlawful deprivation or violation of liberty of another to maintain a felony violation or obtain forced labor or services.[92] "Unlawful deprivation" may be established by showing:

- Fraud, deceit, coercion, violence, menace, threat of unlawful injury to victim or another person, or circumstances where person receiving threat reasonably believes that person would carry out threat.
- Duress, which includes knowingly destroying, concealing, removing, confiscating, or possessing any purported passport or immigration document of victim.[93]

"Forced labor or services" is defined as labor or services performed or provided by a person obtained through force, fraud, coercion, or equivalent conduct that would "reasonably overbear the will of the person."[94]

The statute of limitations for adult plaintiffs under section 52.5 of the Cal. Civil Code is five years from the date when the trafficked person was liberated from the trafficking situation. For trafficked minors, the statute of limitations is eight years from the date that the minor reaches majority age.[95]

narrow class of torts.[103] Additionally, several federal appeals courts have upheld ATCA jurisdiction based on violations on a variety of human rights norms.[104] Still, ATCA litigation has ensued with much judicial scrutiny and the role of courts in adjudicating and enforcing international law continues to be contested.

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This landmark decision determined by the Second Circuit marked the first modern case in which a court upheld ATCA jurisdiction for a suit between non-U.S. citizens for violations of the "laws of nations." The *Filartiga* court upheld jurisdiction pursuant to the ATCA over a claim by one Paraguayan citizen against another for causing the wrongful death of the former's son by torture. The court determined that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."[106]

The *Filartiga* decision has lifted the two-hundred year old ATCA from obscurity and has given optimism to foreign plaintiffs trying to acquire jurisdiction in federal courts in the United States for cases alleging human rights abuses both here and abroad.

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In *Kadic*, the United States Court of Appeals for the Second Circuit held that alien plaintiffs could bring a claim against Radovan Karadzic, a Bosnian-Serb leader. The allegations pertained to certain tortuous acts, which violated international law and were committed in Bosnia-Herzegovina by forces under Karadzic's authority. The Second Circuit broadened ATCA jurisdiction for a range of human rights violations occurring abroad committed by non-state actors, including rape, torture, genocide, slavery and slave trade, and other war crimes by a Serbian military. Most importantly, the decision solidified the view that ATCA claims can be brought against non-state actors who commit atrocities in pursuit of genocide and war crimes, or who act under color of law.

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This case was brought against Unocal Corporation by forced laborers in Burma. Originally the court dismissed this case,[109] but the plaintiffs—[illegible]

[112]

The Supreme Court in *Alvarez* recognized ATCA jurisdiction and a cause of action for a narrow class of torts. In *Alvarez*, the Court rejected an ATCA cause of action on behalf of a Mexican national who was arbitrarily arrested and kidnapped by another Mexican national collaborating with U.S. federal agents. The Court reasoned that "arbitrary arrest" did not rise to the level of an international norm that created legal obligations enforceable by federal courts. The Court reiterated vague language that an ATCA cause of action could only be brought for a "modest number of international law violations" that must be specific and definite. In determining whether an international norm is sufficiently definite to support a cause of action, courts must consider the "practical consequences" on foreign policy of allowing plaintiffs to bring the action in U.S. courts.[113] The Court also emphasized Congress' sole role in creating private rights and that Congress has never "affirmatively encouraged greater judicial creativity" regarding ATCA jurisprudence.[114]

The Court's opinion has the unique effect of bolstering an ATCA claim based on trafficking now that the TVPRA has been passed. With the TVPRA, Congress has expressed clear intent to provide a private right of action for trafficking. Thus, the availability of an ATCA claim for trafficked persons does not run the risk of creating "new rights," which the *Alvarez* Court cautioned against. Continued use of ATCA will contribute to the development of ATCA case law recognizing forced labor and other slave-like practices as binding international legal norms; it will emphasize the importance of enforcing these international norms in domestic courts.

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In this recent decision, the Second Circuit allowed an ATCA case to proceed against 50 corporate defendants and hundreds of corporate "Doe" defendants who "actively and willingly collaborated with the government of South Africa in maintaining ... apartheid."[116] Significantly, this decision found that aiding and abetting violations of customary international law could provide a basis for ATCA jurisdiction.[117]

B. Ma g a C a

In order to establish subject matter jurisdiction under the ATCA, a plaintiff must show that defendant violated a "specific, universal and obligatory" norm of international law.[118] Courts have held that the following claims satisfy this standard: torture; forced labor; slavery; prolonged arbitrary detention; crimes against humanity; genocide; disappearance; extrajudicial killing; violence against women; and cruel, inhuman, or degrading treatment.[119] However, a number of other serious violations have not met the standard, including forced transborder abduction involving a one-day detention prior to transfer of custody to government authorities.[120]

Plaintiffs hoping to establish subject matter jurisdiction based on other norms of international law must show widespread acceptance of the norm by the community of nations. Such acceptance may be demonstrated by

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reference to state practice, international treaties, the decisions of international tribunals, and the writings of international law scholars.[121]

It should be noted, though, that since international law traditionally applied only to states, there are some restrictions regarding ATCA jurisdiction in cases brought against private individuals or corporations. In such cases, the rule of international law will apply in two contexts: (1) where the rule of international law includes in its definition culpability for private individuals; or (2) where the private actor acted "under color of law."[122]

First, the ATCA applies to private actors who violate the limited category of international law violations that do not require state action. These limited violations of customary international law are known as jus cogens norms, "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted."[123] To date, courts have held this category to include war crimes, genocide, piracy, and slavery. Courts have also held that international law is violated where a private individual commits wrongs, such as rape, torture, or murder in pursuit of genocide, slavery, or violations of the laws of war.

Second, a private individual or entity may also be sued under the ATCA by acting "under color of law" in committing violations of international law norms that only apply to states. In applying this rule, courts have looked

- The "enterprise" must be a continuing unit and "separate and apart from the pattern of activity in which it engages."[147]

If you don't know which enterprise to plead, you should consider pleading several alternatively.[148]

C. Sa ute f L a

RICO does not specify a statute of limitations. However, in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, the Supreme Court applied a four-year statute of limitations.[149] The Court adopted the four-year statute of limitations period from the civil remedies provision of the Clayton Anti-Trust Act[150] as applicable to all federal civil RICO claims.[151]

D. Da age

Plaintiffs in RICO civil actions are entitled to treble damages and recovery of reasonable attorney's fees and costs.[152] Other remedies include: "ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise."[153] Any person whose business or property has been damaged as the result of proscribed racketeering activities may file a suit in federal court.[154] The U.S. Supreme Court recently rejected RICO claims in two cases because the plaintiffs' injuries lacked direct relation to the alleged RICO violation necessary to satisfy the requirement of proximate causation.[155]

In a recent decision in a tobacco liability case, one court delicately addressed the question of whether a RICO defendant can be liable for personal injuries. In dicta, the court suggested that "[i]t is not clear that personal injury damages are not recoverable under the RICO. ... A prohibition on recovery for personal injuries would not be consonant with the statutory language ..."[156]

E. RICO C a te H a T af c g C ea

Six recent decisions from five cases addressed RICO claims brought by victims of human trafficking.[157]

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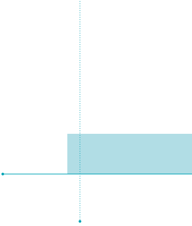
The plaintiffs in this case were H-2B visa holders from India who had paid a principal of the defendant corporation a recruitment fee between $7,000 and $20,000. When they arrived, their passports were confiscated, they were housed in poor conditions with little food, and they were threatened with punitive measures if they complained. The plaintiffs filed a lawsuit under four separate provisions of the RICO: section 1962(a), (b), (c),



The court granted the defendants' motion as to the RICO and section 1985 claims. As for the RICO claims, the court concluded that the plaintiffs had not alleged two underlying predicate acts.[170] In summary, the court conducted a detailed review of each alleged predicate act, and for each found at least one element that plaintiffs had failed to support in their complaint.[171] The RICO conspiracy claims under section 1962(d) also failed. The court found that the plaintiffs' allegation that Wal-Mart knew the plaintiffs were undocumented was not sufficient to show that Wal-Mart "agreed to the commission of the predicate acts or racketeering."[172] This should serve as a cautionary note to attorneys bringing civil RICO claims on behalf of victims of trafficking: in spite of liberal notice pleading requirements of the federal rules (with the exception of claims specified in Rule 9), courts may approach civil RICO claims with some skepticism. It may be better to "over-plead" the underlying facts, rather than risk dismissal.[173]

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> enactment of the Fair Minimum Wage Act of 2007 [enacted May 25, 2007] ... $6.55 an hour, beginning 12 months after that 60th day ... $7.25 an hour, beginning 24 months after that 60th day.[188]

Any amount paid under minimum wage will suffice for a claim of unpaid wages under the FLSA. Trafficked workers are often paid far less than federal minimum wage or are not paid at all. If the state minimum wage standard is higher, the USDOL will calculate unpaid wages according to federal and state standards, and inform the employer of their obligation under both. However, the USDOL can *only* enforce requirements under the FLSA.[189] If your state minimum wage is higher, you should consider filing with your local labor commissioner or exercising your client's private right of action, if available. You may use the FLSA claim to attain federal court jurisdiction and include a supplemental state minimum wage claim. Keep in mind that, even if the state minimum wage is higher, the *liquidated damages* provision of the FLSA may result in higher overall damages for your client if your state law does not have a similar provision.

FLSA section 7(a)(1) states that:

> [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.[190]

Trafficked workers are often forced to work far more than forty hours per week. Exceedingly high hours can amount to significant damages in unpaid overtime. Be aware that some states provide more overtime protections than given by the FLSA. For example, California increases the overtime rate to two times the minimum wage for a workday of over twelve hours.

B. Ca c a g H

Hours worked are defined as "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place."[191] Trafficked workers may be required to be "on-call" 24 hours a day without breaks or uninterrupted sleeping time. This "on call" time may constitute compensable work time.[192]

The FLSA regulations provide guidelines for calculating hours worked and include specific interpretations for rest and meal breaks, sleep time and other periods of free time.[193] In general, if sleeping time, meal periods or other periods of free time is interrupted by a call to duty, the interruption must be counted as hours worked. The following is an overview of these guidelines. Please look to the regulations for more detailed information.

Meal breaks where the employee is still required to work are compensable.[194] Break periods of less than twenty minutes are also compensable.[195]

- the credit exceeds the "reasonable cost" of the item;[206] or
- they are not deducted under the terms of a bona fide collective bargaining agreement.[207]

The following deductions might arise in trafficking cases:

Smuggling fees are the most common charge to victims of trafficking. Though no cases have directly addressed the question of smuggling fees, the FLSA unequivocally prohibits deductions for facilities furnished in violation of federal, state, or local law.[208] Because smuggling violates federal immigration laws, deductions for smuggling fees violate the FLSA to the extent that they bring the worker's wages below the minimum. Similarly, if the worker were transported in violation of federal, state, or local transportation safety laws (e.g., the worker was transported in a severely overcrowded vehicle), deductions for this transportation would also be illegal.

Additionally, a line of cases has developed in the H-2A and H-2B worker context finding inbound transportation costs to be for the benefit of the employer.[209] Therefore, courts have determined that these costs must be reimbursed to the worker during the first workweek, be.00619.

Only the actual cost of meals may be deducted from a worker's minimum wages.[218] The employer, however, need not calculate the cost of providing each meal to each individual employee, but rather may deduct the ave6t the

are several cases which suggest that if an employer fails to post notice of FLSA rights and/or promises to catch workers up in unpaid wages, the employer is estopped from later arguing statute of limitations.[227]

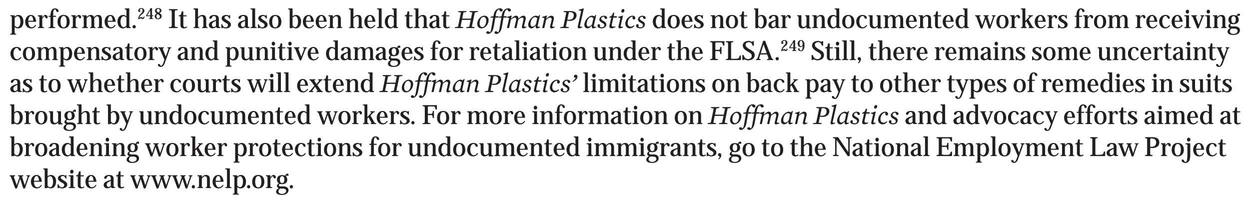
F. Da age

An employer who violates the minimum wage and maximum hours provisions of the FLSA is liable to the employee for the amount of their unpaid wages and overtime. Additionally, the employer will almost always be liable for an additional, equal amount as liquidated damages.[228]

Defendants in violation of the FLSA must also pay a plaintiff's reasonable attorney's fees in addition to any judgment awarded0 Tw[(22)-20Mg125 636.667 cm 0 0 m.23002342 Tc0 Tw[(22)-20(7)]TJ10 0 0 109331.938 568.66 145276

commerce, … *or* is employed in an enterprise engaged in commerce or in the production of goods for commerce. …"[237] The FLSA's overtime provision has an identical commerce requirement.[238]

For enterprise coverage, the enterprise must have annual gross volume "of sales made or business done" of not less than $500,000.[239] However, enterprise coverage and interstate commerce coverage are mutually exclusive. For an employer to show that it is exempt under these provisions of the Act, it must show that it is subject to *neither* interstate commerce coverage *nor* enterprise coverage.[240]



performed.[248] It has also been held that *Hoffman Plastics* does not bar undocumented workers from receiving compensatory and punitive damages for retaliation under the FLSA.[249] Still, there remains some uncertainty as to whether courts will extend *Hoffman Plastics'* limitations on back pay to other types of remedies in suits brought by undocumented workers. For more information on *Hoffman Plastics* and advocacy efforts aimed at broadening worker protections for undocumented immigrants, go to the National Employment Law Project website at www.nelp.org.

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Although forced prostitution is not covered by the FLSA since it is considered illegal employment, other types of employment and legal commercial sex work may be covered. Congress intended the FLSA to apply to "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency,

The FLSA distinguishes between live-in and non-live-in domestic workers.[255] Domestic service employees[256] who reside in the household where they are employed are entitled to the same minimum wage as domestic service employees who work only during the day. However, the FLSA contains exemptions for domestic service employees who provide “companionship services for individuals who (because of age or infirmity) are unable to care for themselves.”[257] The FLSA regulation interpreting the meaning of “domestic service employment” and therefore the extent of the exclusion includes only companionship services workers who are employed by the person they are providing services for (rather than those employed by a third party agency).[258] The Supreme Court recently held that the 29 C.F.R. § 552.109(a) FLSA regulation in the “Interpretations” section is the controlling interpretation.[259] FLSA regulation 552.109(a) states that even companionship services workers who work for third party agencies are included in “domestic service employment” and therefore exempted from the FLSA.[260]

Still, employers must pay live-in workers the applicable minimum wage rate for all hours worked.

Be sure to check your state’s wage and hour laws as many states do provide overtime relief for live-in domestic workers. For example, California provides time and a half to live-in domestic workers after nine hours worked in a workday and two times the regular pay after nine hours worked on the sixth or seventh day worked in a workweek.[261] New York and New Jersey also give some overtime protections to live-in domestic workers under state law.[262]

The FLSA regulations provide for a special interpretation of calculating hours worked for live-in domestic workers, which differs from the general rule.[263] “In determining the number of hours worked by a live-in worker, the employee and the employer may exclude, by agreement between themselves, the amount of sleeping time, meal time and other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits.”[264] A copy of this agreement can be used to establish hours worked in the absence of a contemporaneous time record, allowing employers of live-in domestic workers to be exempt from the general FLSA record-keeping requirement.[265] However, the employer must still show that this agreement reflects actual hours worked.[266] The definition of free time for live-in domestic workers is the same as the general rule.[267] “For periods of free time (other than those relating to meals and sleeping) to be excluded from hours worked, the periods must be of sufficient duration to enable

212(b) of the FLSA have added some substance to the FLSA guidelines. For example, youth under the age of 14 are not allowed to work any non-agricultural job with the exception of acting or delivering newspapers.[280]

There are specific guidelines for youth engaged in work experience and career exploration programs.[281]

Child Labor restrictions *do not* apply to:

- Youth over 14 when the work is not declared hazardous and the employment is outside school hours.[293]
- Children age 12 or 13 with consent from a parent, or who work on the same farm as a parent, provided the work is outside school hours.[294]
- Children under the age of 12 when employed by the parent or person standing in place of a parent on a farm owned by this person.
- Youth under 12 employed on a farm are exempt from minimum wage requirements outside school hours with parental consent.[295]
- Children 10 or 11 working as hand harvest laborers for no more than 8 weeks in a calendar year, subject to USDOL waiver.[296]
- There is limited protection for children under 16 for hazardous activities.[297]

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The U.S. Supreme Court has held that trainees are not employees within the meaning of the FLSA.[298]
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- Willful minimum wage and maximum hour violations — FLSA sections 6 and 7[304] — are $1,100 per violation.[305]

There is *no* private right of action for FLSA child labor violations. Therefore, any child labor violations should be reported directly to the USDOL.

J. E f ce e t f t e Fa Lab S a da d Ac t

The injured worker can bring a claim in federal district court under the FLSA, or file a complaint with the USDOL. The USDOL has its own prosecutors, called solicitors, and may institute an action on behalf of one or more employees in federal court, but only if the employer is unwilling to cooperate. If the USDOL solicitors bring an action in court on the employee's behalf, the employee'er is ij-9.8828 -1.8 Ti.276 1 s070 lS9.9(ate)11(or fi)]TJ3

Title VII violations in the human trafficking context are common, particularly in situations of sexual, racial or national origin harassment and other types of discriminatory treatment. Note that Title VII *only* applies to employers with fifteen or more employees.[311]

While discrimination in the workplace context arises in many variations, there are at least three discrete theories of proving employment discrimination. To establish a Title VII employment discrimination claim on the basis of race, color, sex, sexual orientation, national origin, age, religion, or disability, one of the following theories may apply: individual disparate treatment, systemic disparate treatment, and disparate impact.

Individual disparate treatment occurs when an employer treats an employee in a manner that differs from how other employees are treated on the basis of his or her race, color, religion, sex, or national origin. An individual disparate treatment claim must establish a *prima facie* case by demonstrating the following elements:

- the employee must be a member of a protected class;
- the employee must be either qualified for the job opening or performing satisfactorily in the job;
- an adverse action must have occurred against the employee; and
- evidence of discrimination after the employee was fired, not hired, etc., must be shown.

After the above elements have been established, the burden shifts to the employer to provide a "legitimate, non-discriminatory reason" for the adverse action. If the employer puts forth a legitimate, non-discriminatory reason, the burden shifts back to the employee. The employee must show that the employer's reason was a "pretext," which means the employer had a different, unlawful reason for its adverse action. An employee can establish a pretext through direct or indirect evidence.[312]

Mixed motive cases occur when the employer acted discriminatorily because of several motivating factors, one of which was the employee's membership in a protected class. The employee can establish a mixed motive violation by proving that race, color, religion, sex or national origin was a "motivating factor" for any employment practice.[313] However, if the employer demonstrates that it would have made the same decision without the "impermissible motivating factor," the employer can avoid reinstating the employee or paying damages.

A stray remark has been defined as an ambivalent comment. More specifically, it is a comment by someone lacking the authority to make decisions, or by a decision maker that is unrelated to the actual decision-making process. If an employer makes a single, isolated, discriminatory comment it rarely suffices to establish employment discrimination.[314]

Systemic disparate treatment arises when an employer discriminates against a worker and tends to similarly discriminate against many people who belong to the same protected class.[315] Systemic disparate treatment may occur in the following manner:

Facial discrimination cases arise when the employer has a policy or employment requirement that clearly discriminates against one group but claims that there is a legitimate reason for the policy. The legitimate reason defense can be met if the employer provides a justification for the policy or shows that the requirement is a “*bona fide* occupational qualification” or “BFOQ.” To establish this, the employer must show (1) the requirement is “reasonably necessary to the normal operation of the particular business;” and (2) without the requirement, “all or substantially all” of the excluded people would be unable to “safely and efficiently” perform the job, or dealing with people on an individual basis would be “impossible or highly impractical.”[316]

Pattern and practice cases occur when an employer has unstated policies that produce a “pattern and practice” of discrimination against a Title VII protected group within the company. Pattern and practice discrimination may be established through the use of statistical evidence illustrating a difference between the composition of the employer’s labor force and that of the “qualified relevant labor market.” Once the employee’s *prima facie* case is established, the burden shifts to the employer to provide a legitimate, non-discriminatory reason for the difference in composition between the employer’s labor force and the available labor force. If the employer meets this burden, the employee must show that the employer’s reason is a pretext.[317]

A claim of disparate impact arises when one group of people is more adversely affected by an employer’s “neutral” employment practice than others. Under disparate impact claims, it is unnecessary to show the employer’s intent to discriminate. Instead, the employee must establish that the employment practice disproportionately has an adverse impact on a protected class, at which point the burden shifts to the employer. The employer must show that the practice is required by a business necessity. However, even if business necessity is shown, the employee can prove a violation if an alternative practice exists that would achieve the employer’s business necessity while having a lesser disparate impact.[318]

Sexual harassment is a form of sex discrimination in violation of Title VII.[319] Traditionally, courts have recognized two different forms of sexual harassment: *quid pro quo* and “hostile work environment.”

Essentially, *quid pro quo* is a type of sexual harassment that involves adverse employment decisions resulting from an employee’s refusal to accept a supervisor’s demands for sexual favors or to tolerate a sexually charged work environment.[320] The plaintiff’s *prima facie* case must show that he or she suffered a “tangible job action,” which the Supreme Court has defined as “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”[321]

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A plaintiff employee can also establish Title VII liability by showing that he or she was unlawfully subjected to hostile, offensive, or intimidating behavior that is so "severe and pervasive that it alters the conditions of the plaintiff's employment and creates an abusive working environment."[322] To prove a "hostile work environment" claim, the employee plaintiff must show that he or she was subjected to conduct that was (1) based on sex,[323] (2) unwelcome,[324] and (3) sufficiently severe or pervasive to alter the condition of plaintiff employee's employment and create an abusive working environment.[325]

C. O e Ha a e Race a d/ Na a O g

Federal law requires employers to provide a work environment free of racial harassment, which may include taking positive steps to redress or abolish the intimidation of employees. Discrimination in violation of Title VII occurs where an employer fails to take reasonable action to eliminate racial harassment. An employee must show that the harassment is pervasive (more than isolated or sporadic events[326]) in order to establish a Title VII violation. Courts may look to the totality of the circumstances, the gravity of the harm, and the nature of the work environment in determining whether the harassment is sufficiently pervasive to constitute a violation. Other factors the court may consider are the relationship of the employee to the alleged perpetrator, and whether there is evidence of other hostility, such as sexual harassment, in addition to the racial harassment.

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A "hostile work environment" has specific meaning and arises when the emotional, psychological, and physical stability of minority employees is adversely impacted by the racial discrimination in the workplace. Liability based on a "hostile work environment" theory may exist without a showing of economic loss to the employee. An employee can generally establish a "hostile work environment" by showing there is a continuous or concerted pattern of harassment by co-employees that remain uninvestigated and unpunished by management.[327]

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Traditional agency principles determine employer liability for the acts of supervisory employees. Employers are strictly liable for hostile work environment harassment by supervisors.[328] There is no individual liability for supervisors under Title VII. When a non-supervisory co-worker harasses an employee, the employer's conduct is reviewed for negligence. Once an employer knows or should know of harassment by a co-worker, remedial obligations begin, and the employer is liable for the hostile work environment created by a co-worker unless it takes adequate remedial measures. Employers may also be liable for the harassment of their workers by customers, clients, or personnel of other businesses with which the employer has an official relationship. An employer will be held liable if it has acquiesced to the situation, or simply failed to exercise any control it possessed to stop the harassment. Liability is generally denied when the employer takes appropriate steps to stop the harassment.[329]

D. Re a a b E e

It is a violation of Title VII for an employer to retaliate against employees who make Title VII complaints.[330] The plaintiff employee may still be able to assert a successful claim of unlawful retaliation even if the underlying claim of discrimination is found to be without merit. The employee's conducts will likely be protected if his or her opposition was based on a "reasonable belief" that his or her employer was violating anti-discrimination laws.[331] In addition, the plaintiff (the employee complaining of discrimination) need not be a member of the protected class of people who are being discriminated against.

E. F g P ce a d S a e f L a

To assert a Title VII claim, the employee must first file a claim with the U.S. Equal Employment Opportunity Commission ("EEOC") to exhaust administrative remedies. The employee must file the discrimination claim with the EEOC within 180 days of the discriminatory act, or within 300 days if the state's antidiscrimination law proscribes a longer period.[332] In hostile work environment cases, the "continuing violation" doctrine applies. This means that the statute of limitations clock is reset with each new violation, and a charge is timely "so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period."[333] However, the U.S. Supreme Court recently held that in some disparate treatment cases (expressly not hostile work environment cases), the time period to file an EEOC charge runs from the date the first discriminatory act occurred.[334] Stated differently, "a Title VII plaintiff can only file a charge to cover discrete acts that 'occurred' within the appropriate time period."[335] Therefore, a subsequent manifestation of a discriminatory act, such as receiving a paycheck reflecting a discriminatory wage, does not necessarily become its own discriminatory act allowing for a new charging period. The *Ledbetter* decision and its progeny must be considered by any attorney examining when to file charges of discrimination with the EEOC. The employee should allege all relevant allegations of discrimination in the administrative claim otherwise such claims may be barred from a later civil complaint for failure to exhaust. The EEOC receives and investigates discrimination charges, makes reasonableness findings and may litigate on behalf of the charg-

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ing party. If the EEOC determines that there is no cause for a discrimination finding, the agency will issue a "dismissal without particularized findings" determination and the charging party should request a Right to Sue Letter, which is required before the employee can file suit against the employer in court.[336] If the EEOC finds possible discrimination, the agency will informally attempt to negotiate a settlement with the employer. The EEOC may file a civil suit on behalf of the employee if the agency is unable to successfully negotiate an agreement, or it may issue a Right to Sue Letter to the employee authorizing a civil claim to be filed in court. The employee has 90 days to file a lawsuit after receipt of the Right to Sue Letter from the EEOC.[337]

F. Da age

An employer in violation of Title VII is liable for the employee's back pay and front pay as well as compensatory and punitive damages and attorneys' fees and costs.[338] However, in trafficking contexts where the worker may have undocumented immigration status, back pay and front pay recovery may be limited.[339]

Compensatory[340] and punitive damages for disparate treatment or intentional discrimination under Title VII are awarded pursuant to the Civil Rights Act of 1991.[341] Title VII has damages "caps," which limit the amount of compensatory and punitive damages that an employee can recover.[342]

VIII. 42 U.S.C. 1981

42 U.S.C. § 1981 is an additional discrimination cause of action. Section 1981 prohibits discrimination in the making, performance, modification, and termination of contracts, including enjoyment of all benefits, privileges, ludiJ-nd costsnional s contre a,e9l as comiJ-nd costsnional s conloy

IX. KU KLUX KLAN ACT OF 1871[349]

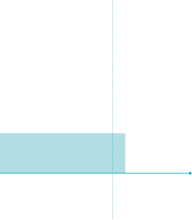
A claim may be brought under a provision of federal law emerged out of the Conspiracy Act of 1861[350] that was amended into its current form in the Ku Klux Klan Act of 1871[351] for the purpose of enforcing Fourteenth Amendment protections. It provides as follows:

> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, ... [and] ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.[352]

The U.S. Supreme Court has found that this provision allows for a private right of action.[353] What constitutes "class-based" discriminatory animus is an area of hot debate in the Courts. In the trafficking context, one court allowed a plaintiff to bring a section 1985(3) claim motivated by defendants' "desire to deprive Plaintiff [of] her rights to be free from slavery as a direct result of Plaintiff's being an alien, female, and of African decent."[354] However, another court found that "recent immigrants, including undocumented persons" was not a "class of persons" subject to the protections of this Act.[355] The Court relied on Third Circuit precedent indicating that the court should examine, *inter alia*, "the immutability of, or the person's 'responsibility' for, the particular trait."[356] The Court found that the members of the defined class bear responsibility for their status.[357]

X. INTENTIONAL TORTS AND NEGLIGENCE

Tort claims provide compensatory damages for the distress suffered by the employee, as well as punitive damages meant to punish the employer. The statute of limitations for common law torts in many states is



Intent needs to be proven. The defendant must desire or be substantially certain that the plaintiff will apprehend harm or offensive contact.[368] Furthermore, the plaintiff must actually perceive the harm or offensive contact and the apprehension perceived must be imminent.[369] Mere words alone do not suffice for an assault claim.[370]

G. Neg ge l c f E a D te

Unlike the tort of intentional infliction of emotional distress, negligent infliction of emotional distress does not require a showing of outrageous conduct as a *prima facie*

XI. CONTRACT CLAIMS

Victims of human trafficking may have contract claims for breach of written or oral contracts. The award of contract remedies precludes tort remedies in a majority of states, and therefore punitive damages regardless of the willfulness of the breach. It should be noted that contract law differs from state to state.

A. Breach of Written Contract

When there has been a written offer of employment that has been accepted by the trafficked client, and the trafficked person has not been paid the promised salary or given the promised job opportunity, a breach of a written contract is established.[381] If the offeror fails to deliver what is promised in the written contract, then the offeree may be entitled to expectation or reliance damages.

B. Breach of Oral Contract

An oral contract is very similar to an implied agreement between the traffickers and the trafficked persons. In order to establish an oral contract, it is necessary to first establish that there was an intent to offer by the traffickers, and second, that the terms of the offer are sufficiently certain and definite. However, the inability to establish that the terms of the offer were “certain” or “definite” does not in itself preclude that an oral contract has been made.[382]

C. Statute of Frauds

Generally, an oral contract is void if “by its terms [it] is not to be performed within one year.”[383] The statute of frauds bar, however, may be overcome based on the “part performance exception and the doctrine of equitable estoppel.”[384] In a trafficking case, the plaintiff defeated the defendants’ summary judgment motion based on a statute of frauds defense. The plaintiff successfully argued that, based on her alleged f/F5 1 TefTD[( )-85.1(rst establish that

1) the performance of services in good faith,
2) the acceptance of the services by the person to whom they are rendered,
3) an expectation of compensation therefore, and
4) a determination of the reasonable value of the services rendered.[400]

XIII. OTHER STATE STATUTORY CLAIMS

It is imperative to research your state statutes for additional claims that may provide relief to your trafficked client. For example, in Maryland, courts have discretionary authority to award treble damages for wage and hour violations.[401] Connecticut law gives double damages for minimum wage, late payment, and other wage violations.[402] In California, an employee may be entitled to double damages if induced to move based on a misrepresentation regarding the terms of employment.[403] In addition, under section 17200 of the California Business and Professional Code, an unlawful, unfair, or fraudulent business act or practice can be challenged in court by any member of the public that may have been deceived. Remedies include restitution and disgorgement of wrongfully gained profits.[404]

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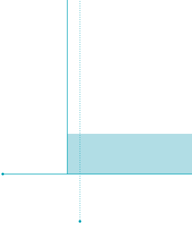
CHAPTER 4

DA AGE

I. BACKGROUND

Damages are perhaps the most important aspect of the trafficked plaintiff's case. Whether received through a settlement or jury verdict, damages represent the final object of relief that plaintiffs are seeking through the lawsuit. Obtaining damages signify closure to the civil litigation and provide traffi



rate for both general inflation and wage inflation.[3] The rationale behind this is that it achieves the same if not greater accuracy as assigning an inflation rate factor, while producing more predictable awards since juries won't be burdened with complex formulas.[4] Opponents to this method believe that the total offset method incorrectly assumes that price and wage inflation cancel each other out.[5] Therefore, the U.S. Supreme Court in *Jones & Laughlin Steel Corp. v. Pfeifer* supported the "real interest" method, identifying the following elements to calculate future wage loss to present value: (1) the amount that the employee would have earned during each year that he could have been expected to work after the injury; and (2) the appropriate discount rate, reflecting the safest available investment.[6] The Court endorsed the real interest rate as the appropriate discount rate for a damage award, a number between 1% and 3%.[7] Ultimately, the approach taken in a given case will depend on that jurisdiction's precedent and the arguments of each party's attorneys and economic experts.

Non-economic damages primarily consist of pain and suffering, intended to compensate the plaintiff for the physical pain and mental suffering he or she has suffered as a result of his or her injuries. Physical pain is defined as the sensory pain experienced by the plaintiff from his or her injuries and from treatment of those injuries. Mental suffering includes the mental anguish resulting from physical injuries as well as non-physically induced emotional distress. Examples of emotional distress include worry, grief, anxiety, depression, and despair. Emotional distress also includes psychiatric disorders resulting from the defendant's misconduct, such as Post-Traumatic Stress Disorder (PTSD). Many trafficked plaintiffs suffer from PTSD, triggered by the trauma of the trafficking experience, resulting in various symptoms, such as insomnia, memory difficulties, and feelings of fear and panic. This type of emotional harm is compensable.[8] A plaintiff may establish evidence of pain and suffering through his or her own testimony as well as through the testimony of witnesses, such as medical and mental health practitioners and experts.

Courts have tended to avoid the use of well-defined guidelines to aid jurors in calculating the amount of pain and suffering damages.[9] Some commentators have argued that the absence of clear guidelines has produced arbitrary and unpredictable awards for equally severe injuries.[10] Some courts allow attorneys to make pain and suffering award recommendations, which greatly influence juries.[11] Therefore, presenting a clear and predictable formula for calculating damages may play a key role in how much the jury awards the trafficked plaintiff.

One approach to the calculation of pain and suffering damages is the "per diem" method.[12] This method places a daily monetary amount on the plaintiff's suffering and multiplies that amount by the number of days that the plaintiff has been injured and will remain injured in the future. Some courts have rejected the per diem method, including the Supreme Court of California, which characterized this method as mere conjecture and an excessive measure of damages.[13] Analysis of prior awards in similar cases may also provide some guidance on the determination of pain and suffering damages.[14]

pain and suffering damages. Attorneys should verify whether such a cap exists in their jurisdiction and calculate damages accordingly.

B. P[illegible]e Da[illegible]age

Punitive damages are awarded to punish and deter egregious conduct.[15] Traditionally, only the most outrageous intentional conduct warranted the application of punitive damages. Now, many states have expanded the award of punitive damages for a range of misconduct. For example, in California, a plaintiff may recover punitive damages where the defendant is found "guilty of oppression, fraud, or malice, express or implied."[16] In a similar vein, Oregon allows punitive damages "to punish a willful, wanton or malicious wrongdoer and to deter that wrongdoer and others similarly situated from like conduct in the future."[17] Though states vary in their standards for punitive damages, generally all states require behavior more egregious than negligence.

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The assessment of punitive awards calls for specific procedural rules. Some courts and legislatures have increased the burden of proving punitive damages from a preponderance standard to a clear and convincing standard[18] and in some states, proof beyond a reasonable doubt.[19] Some states have also implemented bifurcated proceedings to determine whether defendants are liable for punitive damages. In a bifurcated system, there are two trial segments. Defendants must first be found to have committed a tort or other injury and the compensatory damages assessed against them. Only then is the jury to consider punitive damages.[20] Finally, many states have enacted statutory caps to limit the amount of punitive awards.

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In making recommendations for the amount of punitive damages, it is worth noting that the U.S. Supreme Court has provided certain parameters to prevent overly excessive punitive awards.[21] The *Gore* guideposts include the reprehensibility of the defendant's conduct, the ratio of punitive damages to actual and potential compensatory damages, and sanctions for comparable conduct.[22] In *State Farm Insurance Company v. Cambell,*[23] the Court specified the second factor, holding that the relationship between punitive and compensatory damages should be a single digit ratio. Thus, a punitive award nine times greater than the compensatory award may be considered excessive and an unconstitutional violation of a defendant's due process rights. Influenced by the *Gore* decision, many state courts apply the principal that punitive damages should bear a "reasonable relationship" to compensatory damages and sometimes even provide a specific ratio of punitive to compensatory damages.[24] Though the *Gore* guideposts do not provide an exact formula for ascertaining the correct amount of punitive damages, they are nonetheless helpful to gauge whether an attorney's estimate is within the scope of what is a "legitimate" award.

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In many states, including California, the defendant's wealth is also factor in determining the amount of a punitive damage award.[25] Considering the defendant's wealth facilitates achieving the optimal level of deterrence—that is, the amount of punitive damages that discourages the defendant's future wrongful conduct,

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[illegible footnotes 15–25]

while not being overly burdensome.[26] The plaintiff may have the burden of establishing the defendant's financial condition[27] and providing "the entire fi