CIVIL LITIGATION ON BEHALF OF VICTIMS *of* HUMAN TRAFFICKING

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CIVIL LITIGATION ON BEHALF OF VICTIMS
OF HUMAN TRAFFICKING

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DISCLAIMER

This manual is intended to introduce attorneys representing trafficked clients to the basic litigation tools for trafficking civil cases. However, the legal theories discussed here do not address distinctions among jurisdictions, and the content of this manual is by no means exhaustive of the laws and litigation strategies available to trafficked persons. For these reasons, this manual is not to serve as a replacement for independent research of legal claims and strategy tailored to the circumstances of a particular case.

Non-attorneys or attorneys who are not civil litigators may also benefit from this manual by familiarizing themselves with their client's options for civil relief. All those providing services to trafficked persons can inform their client that they have options for civil relief and assist their client in finding a competent attorney. However, the unauthorized rendering of legal advice, including the interpretation of these materials for a trafficking victim by individuals not licensed to practice law, should not occur under any circumstances. A civil attorney, preferably one who has previous experience with civil litigation on behalf of immigrant victims of exploitation, is in the best position to provide sound legal advice.

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PREFACE

Over the past years, economic and political conditions abroad and in the United States have caused modern-day slavery — commonly referred to as human trafficking — to thrive. From the shipyards of Mississippi to the post-Katrina reconstruction to domestic work in the Washington, D.C. suburbs to farmworkers in Colorado to massage parlors in San Francisco, trafficked people toil under unimaginably cruel conditions.

Escape means risking the security of their families and their families' homes, their immigration status, and even their lives. Still, some modern-day slaves do find the path to freedom. It is for those people — and for the men, women, and children who remain captive — that this manual is written.

Civil litigation gives power to the powerless and is a critical tool to correct deep and pervasive wrongs. This is why the Southern Poverty Law Center is bringing litigation on behalf of human trafficking survivors and encouraging other attorneys to do so as well.

We recognize that this manual will not answer all of your questions. Some of the laws protecting human trafficking survivors are new, while others are infrequently used. Therefore, the human trafficking civil litigation slate is only intermittently marked.

We hope this manual gives civil attorneys guidance as they develop the law in a way that can lead more modern-day slaves to freedom and empowerment. Nearly 145 years after the Thirteenth Amendment became part of our Constitution and abolished legal slavery, we will work to finally put an end to involuntary servitude in the United States.

Morris Dees
Southern Poverty Law Center
October 2008

CHAPTER 1
LOGISTICAL CONCERNS

I. THE "PROS" AND "CONS" OF CIVIL LITIGATION

Attorneys representing victims of trafficking have a responsibility to discuss civil litigation with their clients, and to weigh the "pros" and "cons" of a lawsuit. Absent an effort from the criminal prosecutors to seek restitution from the traffickers, litigation may provide the only means by which victims of trafficking may be "made whole," and litigation can provide forms of relief that may not be available through a restitution order. Litigation also discourages would-be-traffickers and employers hiring trafficked persons from engaging in these practices. Finally, and perhaps most importantly, civil litigation is often the only mechanism that allows a victim of human trafficking to confront the trafficker. This process can be important in the healing and empowerment of the victim.

When considering whether to file litigation on behalf of trafficking victims, attorneys and clients should consider the following factors:

- Are there potential defendants who have the resources to satisfy a judgment?
- Is your client available for discovery?
- Are the potential defendants located in the United States?
- Is your client willing to endure years of litigation?
- Are there safety concerns for your client and his or her family?
- Are there other potential plaintiffs?
- How will civil litigation impact the criminal case?
- Do you have the stamina and resources to prosecute the civil case? If not, are there firms that may be willing to co-counsel?
- Will civil litigation have any impact on your client's immigration status?
- Will the criminal prosecutors seek restitution on behalf of your client and others, and if so, what form will the restitution take?
- Are there diplomatic immunity issues?

II. FINDING HELP FROM, AND CO-COUNSELING WITH, OTHER ATTORNEYS

Attorneys considering litigation on behalf of trafficking victims are encouraged to seek the assistance of other attorneys who have experience in this area. As a first step, consult the Anti-Trafficking Litigation and Assistance Support Team ("ATLAST"), a technical assistance project launched by the authors of this manual, at http://library.lls.edu/atlast/. The ATLAST website provides access to litigation resources, advice and referrals. Please contact the authors of this manual for more information.

Attorneys with limited resources should also consider seeking *pro bono* assistance from law firms. A good place to start is the website for the ABA Standing Committee on *pro bono* and public service: www.abanet.org/legalservices/probono/home.html. The ABA has also recently created a pilot program that will specifically link *pro bono* attorneys with human trafficking cases. For more information, visit www.abanet.org/domviol/tip/. Another good resource both for volunteering *pro bono* services and for finding a pro bono attorney is www.probono.net.

III. WORKING WITH A PARALLEL CRIMINAL PROSECUTION

A. Criminal Restitution

Under the Mandatory Victim Restitution Act of 1996,[1] restitution is now mandatory in many cases. The Victims of Trafficking and Violence Protection Act of 2000 ("TVPA") enacted 18 U.S.C.S. § 1593, which provides that the court shall order convicted criminals to pay mandatory restitution "in the full amount of the victim's losses."[2] Therefore, restitution must be addressed in plea negotiations and in the court's sentencing colloquy. A criminal sentence that includes restitution may also be recorded by the victim and enforced as any other judgment. Thus, if prosecutors are aggressive about restitution, a criminal defendant pleads guilty or is convicted, and the court orders restitution, there may be no need to take the time and expense of engaging in civil litigation. On the downside, if restitution is not part of plea discussions, and the court fails to inform a criminal defendant upon accepting a sentence that restitution will be an element, then the court may not be able to impose restitution. Since prosecutors and criminal defendants are mostly focused on jail time, restitution can be forgotten to the detriment of the victim. Further, even where restitution is ordered, it frequently falls far short of what the victim could receive through civil litigation. As discussed later in this manual, significant other forms of relief may be available through a civil lawsuit that are not contemplated in a restitution order, including pain and suffering, punitive, statutory, liquidated, and treble damages. The prospect of a large attorneys' fees award stemming from civil litigation may also have a significant deterrent effect on the trafficker. Finally, the prosecutors can only seek restitution against the criminal defendant. Joint employers or tortfeasors bear none of the burden of a restitution order.

Background

Restitution is money paid by a criminal defendant as a fine or as compensation to a victim for losses resulting from the crime. Restitution does not serve as an independent civil cause of action. However, if traffickers are successfully convicted, restitution may provide a significant source of monetary recovery for the trafficking victims.

Criminal restitution, distinct from civil damages, has reached the millions of dollars in a number of cases.

- *U.S. v. Lakireddy B. Reddy*:[3] Defendant ordered to pay $2 million to four victims trafficked for restaurant work and sexual exploitation.
- *U.S. v. Kil Soo Lee*:[4] Defendant ordered to pay $1.8 million in restitution to hundreds of Vietnamese and Chinese workers in American Samoa, in addition to a 40 year prison sentence.
- *U.S. v. Cadena*:[5] Perpetrators of a trafficking ring in Florida were forced to pay $1 million in restitution to its victims.

Because restitution is not an independent civil cause of action, only the prosecutor of the criminal trafficking case may request it from the court. Thus, a lawyer or advocate representing the interests of a trafficked client should encourage prosecutors to request and pursue restitution. This may involve working with prosecutors to calculate the victim's losses in a manner that achieves the greatest monetary compensation for the victim.

Making the Claim

In the event of a successful criminal prosecution of a trafficking case, the victims are entitled to mandatory restitution from their traffickers. A complete restitution order can compensate trafficking victims, for all

1 18 U.S.C. §§ 3613(a), 3663(a) (2008).
2 18 U.S.C. § 1593(b)(1).
3 Case No. 4:00-cr-40028-CW-1 (N.D. Cal. 2000).
4 Case No. 1:01-cr-00132-SOM-BMK-1 (D. Haw. 2001).
5 Case No. 98-14015-CR-RYSKAMP (S.D. Fla. 1998).

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).

Lost Income

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]

Other Economic Losses

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.

Strategic Recommendations

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

6 18 U.S.C. § 1593(b)(3).
7 United States v. Calimlim, Case No. 04-CR-248, 2007 U.S. Dist. LEXIS 18933, at *3 (E.D. Wis. Feb. 14, 2007).
8 United States v. Cadena, Case No. 98-14015-CR-RYSKAMP (S.D. Fla. 1998).

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. How a Criminal Conviction of the Traffickers May Help the Civil Case

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. Immigration-Related Benefits of Client's Participation in the Criminal Prosecution or the Civil Litigation

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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9 For a survey of these programs, *see* D. Parent, B. Auerbach, & K. Carlson, *Compensating Crime Victims: A Summary of Policies and Practices* (National Institute of Justice 1992).

10 *See* TVPA, 18 U.S.C. § 1593 ("Notwithstanding section 3663 or 3663A, and *in addition to any other civil or criminal penalties authorized by law*, the court shall order restitution for any offense under this chapter (emphasis added)."); *see also* Appley v. West, 832 F.2d 1021, 1026 (7th Cir. 1987) (because there was no litigation of the amount of restitution awarded in the criminal action, it did not have a collateral estoppel effect on the subsequent civil action); *cf.* U.S. v. Barnette, 10 F.3d 1553, 1556 (11th Cir. 1994) ("an order of restitution is not a judicial determination of damages.").

11 For a good review of case law on this subject, *see In re* Towers Financial Corp. Noteholders Litigation, 75 F. Supp. 2d 178, 181 (S.D.N.Y. 1999).

12 *See, e.g.,* Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 327 F.3d 173, 184 (2d Cir. 2003); Pactiv Corp. v. Dow Chem. Co., 449 F.3d 1227, 1233 (Fed. Cir. 2006).

13 22 U.S.C. § 7105(c)(3) (2008). The Trafficking Victims Reauthorization Act of 2003 indicated that, in considering certification of a victim of a severe form of trafficking, the U.S. Department of Health and Human Services "shall consider statements from State and local law enforcement" indicating that the individual has been cooperating with a state-level prosecution." 22 U.S.C. § 7105(b)(1)(E)(iv). Whether this translates into continued presence for trafficking victims cooperating with state prosecutions remains unclear at the time of this update.

14 *See* Immigration & Nationality Act (INA), 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa) (2000). Immigrants under age 18 do not need to comply with the "reasonable assistance" requirement. *Id.* at § 1101(a)(15)(T)(i)(III)(bb).

15 *See id.* at § 1101(a)(15)(S)(i).

16 *See id.* at § 1101(a)(15)(U)(i)(III). The "U" visa regulations allow for a broad range of authorities investigating alleged criminal activity, including judges, to certify a petitioner's application. *See* 8 U.S.C. § 1184(p)(1).

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]

D. The Prosecutors' Position Regarding the Civil Action

Staying the Civil Action until the Conclusion of the Criminal Prosecution

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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17 *See* Chapter 2, § I(C), *infra*.

18 *See* Garcia v. Audubon Communities Management, LLC, Civ. No. 08-1291 Section "C" (5), 2008 U.S. Dist. LEXIS 31221 (E.D. La. April 15, 2008) (finding that the moving plaintiffs "provided sufficient evidence to show that they 'may be helpful at some point in the future' to an investigation regarding qualifying criminal activity.") (quoting 72 Fed. Reg. 53019).

19 *See, e.g.*, United States v. Kordel, 397 U.S. 1, 12 n.27 (1970); S.E.C. v. Credit Bancorp, Ltd., 297 F.3d 127, 141 (2d Cir. 2002) (discussing the scope of previously issued stay); Trustees of the Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mechanical, Inc., 886 F. Supp. 1134, 1138-41 (S.D.N.Y. 1995).

20 *See,* Javier H. v. Garcia-Botello, 218 F.R.D. 72 (W.D.N.Y. 2003).

21 *See, e.g., In re* Royal Ahold N.V. Sec. & ERISA Litig., 220 F.R.D. 246, 253-54 (D. Md. 2004); *Javier H.*, 218 F.R.D. at 74-75; Bureerong v. Uvawas, 167 F.R.D. 83, 87 (C.D. Cal. 1996).

22 *See, e.g., Javier H.,* 218 F.R.D. at 74-75; Twenty-First Century Corp. v. LaBianca, 801 F. Supp. 1007, 1011 (E.D.N.Y. 1992).

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] the U.S. District Court for the Eastern District of New York granted the United States' letter motion for a stay, which was apparently triggered by a scheduled Rule 34(a)(2) inspection of the defendants' home. Still, the court tempered its decision:

> ...Fairness requires that I make the instant order now so that the defendants have time to decide whether they still wish to permit the inspection. The parties are of course free to conduct the inspection, and to exchange information in other ways that would normally be required under the relevant discovery rules, on a purely voluntary basis and according to any mutually agreeable schedule. By granting the government's application I cannot and do not forbid such cooperation; instead I merely remove any spectre of judicial compulsion for as long as the stay remains in effect.[29]

Therefore, if you do not bring TVPRA claims, there is no automatic stay, although the prosecution may still intervene to attempt to stay your civil action.

There are two glaring downsides to a stay: first, defendants — particularly those who are not part of the criminal prosecution — will have ample time to manipulate their evidence. Therefore, you may want to request that a stay include an order requiring that the defendants preserve any documentary or other physical evidence pertaining to the action. In the securities litigation context, where stays are commonplace, courts frequently order that documents be preserved while a stay is in effect.[30]

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23 The U.S. Supreme Court most recently explained the judicial estoppel doctrine in New Hampshire v. Maine, 532 U.S. 742, 749 (2001). *See also* Ogden Martin Sys. of Indianapolis, Inc. v. Whiting Corp., 179 F.3d 523, 527 (7th Cir. 1999) (stating that courts will apply judicial estoppel when "(1) the later position [is] clearly inconsistent with the earlier position; (2) the facts at issue [are] the same in both cases; and (3) the party to be estopped [has] convinced the first court to adopt its position.").

24 18 U.S.C. § 1595 (2008).

25 18 U.S.C. § 1595(b)(1) (2008).

26 The automatic stay provision applies to the entire civil action, rather than just to discovery in the civil action. *Compare* 18 U.S.C. § 1595(b)(1), *with Javier H.*, 218 F.R.D. at 75-76.

27 *See* § 1595(b)(1).

28 Case No. 07 Civ. 1251, 2007 U.S. Dist. LEXIS 43170 (E.D.N.Y. June 14, 2007).

29 *Id.* at *5.

30 *See, e.g.*, Newby v. Enron, 338 F.3d 467, 469 (5th Cir. 2003).

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.

Willingness of the Prosecution to Share Evidence with Plaintiff's Counsel

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 prosecution is required to provide any exculpatory evidence, or evidence that may be used to impeach the testimony or credibility of a witness, to the criminal defense counsel with sufficient time to allow defense counsel to prepare for trial.[38] You may want to ask the prosecution to provide these materials to you, as well. Keep in mind, though, that these materials are certainly within the scope of permissible civil discovery. Therefore, once civil discovery resumes, you should not have much difficulty getting these materials through a Rule 34 request for production of documents.[39] In addition to information bearing on claims and defenses in the civil and criminal cases, prosecutors may also share information regarding the extent and identity of defendants' assets.

You may be able to get some information to support your client's civil claims if you insist on being present during the prosecution's interview of your client. Keep in mind, however, that you cannot be present during your client's grand jury testimony.

Once the criminal prosecution is over, you should be able to get some evidence through the Freedom of Information Act ("FOIA") and your state's equivalent public records law. Be sure to send FOIA requests to all agencies that were involved in the investigation, including ICE (formerly the INS), FBI, U.S. Department of

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31 *See generally* 51 Am. Jur. 2d *Lis Pendens* §§ 1-76.

32 Without taking a position as to the article's conclusion, the authors recommend Ethan Glass, *Old Statutes Never Die,* 27 Ohio N.U.L. Rev. 67 (2000) for a helpful review of states' mechanics lien laws.

33 *See* Fed. R. Civ. P. 64.

34 A sample motion for an order of attachment or a preliminary injunction is available upon request from author Werner.

35 *See, e.g.*, NDNY Local Rule 9.2 (requiring civil RICO statement to be filed within 30 days of the initial pleading alleging civil RICO claims).

36 *See, e.g.*, WDNY Local Rule 23(d) (class certification motion must be filed within 120 days of pleading alleging a class action).

37 You can access case filings from most federal courts at the PACER website: www.pacer.uscourts.gov. You must sign up for PACER, and there is a nominal fee for this service.

38 *See* Giglio v. United States, 405 U.S. 150, 153 (1972); *see also* Brady v. Maryland, 373 U.S. 83, 86-88 (1963).

39 There may be restrictions on how you use some documents stemming from the criminal prosecution, and particularly transcripts of grand jury testimony. Even if grand jury transcripts were inadvertently provided to you, you may risk criminal or civil liability if you do not inform the prosecutor that you have the transcripts — and confirm with the prosecutor that the transcripts are in the public domain — before using the transcripts in your lawsuit or providing them in discovery.

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. Impact of Your Client's Prior Statements on the Criminal Prosecution

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. Admissibility in the Civil Action of Your Client's Statements Made in the Course of the Criminal Investigation

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. Impact of Prior Criminal and/or Immigration-Related Offenses

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

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40 *See* United States ex rel. Touhy v. Ragen, 340 U.S. 462, 468 (1951); *See, e.g.*, 6 C.F.R. §§ 5.1-5.49 (U.S. Department of Homeland Security *Touhy* regulations); 29 C.F.R. §§ 70.1-70.54 (U.S. Dept. of Labor *Touhy* regulations).

41 *See generally* Fed. R. Evid. 801-804; *cf.* Fed. R. Evid. 613 (regarding examining a witness or introducing evidence concerning prior statements).

42 *See generally* Fed. R. Evid. 501; *cf.* Jaffee v. Redmond, 518 U.S. 1, 9-10 (1996) (stating that consultations with mental health professionals are generally privileged); U.S. v. Hayes, 227 F.3d 578, 585-86 (6th Cir. 2000) (there is no "dangerous patient" exception to the therapist-patient privilege). For a more detailed discussion of therapist-patient privilege, *see* Chapter 2, § I(D), *infra.*

43 Fed. R. Evid. 801(d)(1).

44 *See, e.g.*, Miller v. Field, 35 F.3d 1088, 1091 (6th Cir. 1994) (explaining when hearsay in a police report lacks trustworthiness).

45 *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 698 (1972).

46 *See, e.g., In re U.S. Dept. of Homeland Sec.*, 459 F.3d 565, 569 n.1 (5th Cir. 2006) (reviewing Circuit Court decisions supporting law enforcement privilege).

47 *See, e.g.*, Doe v. Advanced Textile Corp., 214 F.3d 1058, 1072-73 (9th Cir. 2000); Dole v. Local 1942, Int'l Bhd. of Elec. Workers, 870 F.2d 368, 375 (7th Cir. 1989); Dunlop v. Carriage Carpet Co., 548 F.2d 139, 145-46 (6th Cir. 1977).

48 *See* Fed. R. Civ. P. 11(b) (by signing and filing a document with the Court, the attorney certifies that he or she conducted a reasonable inquiry).

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. How the Defense May Use Your Client's Benefits under the TVPA to Attack Your Client's Credibility

If your client has received resettlement benefits under the TVPA, the defense will likely try to introduce evidence of these benefits to support an argument that your client fabricated his or her story in order to obtain the benefits. In the civil action, your best argument is that your client's benefits are simply not relevant. The benefits are tied to participation in the criminal action and are not at all impacted by the civil action.

V. HOW TO HANDLE A RELEASE OR WAIVER SIGNED BY YOUR CLIENT

If your client signed any kind of a waiver purporting to release the trafficker from liability, it is very unlikely that the waiver will be binding. With some exceptions, the applicability of a waiver of rights will be governed by state law. Still there are some factors that generally apply. These include:

> (1) The clarity and specificity of the release language; (2) the plaintiff's education and business experience; (3) the amount of time plaintiff had for deliberation about the release before signing it; (4) whether plaintiff knew or should have known his rights upon execution of the release; (5) whether plaintiff was encouraged to seek, or in fact received benefit of counsel; (6) whether there was an opportunity for negotiation of the terms of the Agreement; and (7) whether the consideration given in exchange for the waiver and accepted by the employee exceeds the benefits to which the employee was already entitled by contract or law.[53]

In labor exploitation cases — and particularly in human trafficking cases — many, if not all, of these factors will often lean in favor of the worker's position that the waiver is not enforceable.

A waiver also may not be valid for unconscionability. In one human trafficking case, the plaintiff had signed a waiver in exchange for some wages soon after she left the trafficking situation. The defendants filed a motion to dismiss based in part on the waiver. The Court denied the motion, finding that the plaintiff had presented a

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49 *See* Fed. R. Evid. 608(b).

50 *See, e.g.*, United States v. Ojeda, 23 F.3d 1473, 1476-77 (8th Cir. 1994); McIntyre v. Bud's Boat Rental, L.L.C., No. 02-1623, 2003 U.S. Dist. LEXIS 16487, at *4 (E.D. La. Sept. 8, 2003) (use of aliases can be used to impeach plaintiff's credibility).

51 *See* Chnapkova v. Koh, 985 F.2d 79, 82-83 (2d Cir. 1993); Chamblee v. Harris & Harris, Inc., 154 F. Supp. 2d 670, 681 (S.D.N.Y. 2001).

52 *See* Fed. R. Evid. 403; *see also* United States v. Morales-Quinones, 812 F.2d 604, 613 (10th Cir. 1987) (upholding exclusion of testimony regarding illegal entries into the U.S. not resulting in convictions).

53 *See* Torrez v. Public Service Co., 908 F.2d 687, 689-90 (10th Cir. N.M. 1990) (quoting Cirillo v. Arco Chem. Co., 862 F.2d 448, 451 (3d Cir. 1988)).

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 recognize waivers in only two circumstances: (1) waivers that are supervised as part of a USDOL enforcement action, or (2) a court-supervised settlement of a private suit for back wages.[56]

VI. LIMITATIONS ON CERTAIN TYPES OF TRAFFICKING CASES

Certain types of trafficked workers may be faced with additional limitations on the viability of their lawsuits against their traffickers. Such hindrances have appeared in cases involving trafficked domestic workers and sex workers, sometimes preventing a successful lawsuit altogether.

A. Domestic Workers

Domestic workers, who, according to reports from advocates and the USDOJ, constitute a large percentage of trafficking cases,[57] continue to lack sufficient employment and labor protections. The National Labor Relations Act ("NLRA") does not include domestic workers under its definition of "employee" and therefore, provides no protection for domestic workers from employer retaliation for striking or collective bargaining.[58] Individual domestic workers working in private homes are ineligible to assert violations of sex, race, or national origin discrimination under Title VII.[59] Live-in domestic workers are not entitled to overtime pay under the FLSA.[60] Finally, domestic workers employed by foreign diplomats cannot hold their employers accountable for workplace violations as diplomats enjoy immunity from civil, criminal, or administrative liability within the United States.[61] While an exception to immunity exists for "any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions,"[62] the Fourth Circuit ruled in *Tabion v. Mufti,*[63] that "commercial activity" includes only activities for personal profit, explicitly stating that domestic workers are not "commercial activity." Thus, pursuant to *Tabion,* domestic workers are denied claims against their diplomat employers in the civil justice system.

B. Sex Workers

To date, civil lawsuits utilizing the TVPRA on behalf of victims of sex trafficking have been few and far between.[64] There may be sound reasons for the infrequency of TVPRA lawsuits in sex trafficking cases. The authors of this manual encourage practitioners and advocates to think carefully about the fragile circum-

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54 *See* Deressa v. Gobena, No. 05 Civ. 1334, 2006 U.S. Dist. LEXIS 8659, at *6-8 (E.D. Va. Feb. 13, 2006).

55 *Torrez*, 908 F.2d at 689.

56 *See, e.g.,* Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1352-54 (11th Cir. 1982); Manning v. New York Univ., No. 98 Civ. 3300, 2001 U.S. Dist. LEXIS 12697, at *35-36 (S.D.N.Y. Aug. 21, 2001), *aff'd* 299 F.3d 156 (2d Cir. 2002); *see also* Walton v. United Consumers Club, Inc., 786 F.2d 303, 306 (7th Cir. 1986) (private settlements of FLSA suits would "allow [parties] to establish sub-minimum wages."); *cf.* Maynor v. Dow Chem. Co., Case No. G-07-0504, 2008 U.S. Dist. LEXIS 42488, *29-34 (S.D. Tex. May 28, 2008) (discussing USDOL settlements, and finding that workers did not waive their right to sue under the FLSA by accepting payment arising out of USDOL action).

57 McMahon, *supra* note 32.

58 42 U.S.C.A. 12111 § 5(a) (2001).

59 42 U.S.C.A. 12111 § 5(a) (2001). Title VII applies to employers with fifteen or more employees. Because domestic workers are frequently the sole employee in the workplace, they are excluded from Title VII protection.

60 29 U.S.C.A. §§ 213(a)(15), 213(b)(21).

61 Human Rights Watch, Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States 34-35 (2001).

62 Vienna Convention on Diplomatic Relations art. 31(c), Apr. 18, 1961, 23 U.S.T. 3227.

63 73 F.3d 535 (4th Cir. 1996).

64 Doe I v. Reddy, No. 02 Civ. 05570, 2003 U.S. Dist. LEXIS 26120, at *13 n.2, *33 & n.4, *35-36 (N.D. Cal. Aug. 4, 2003), pre-dated the TVPRA, but does serve as an example of a civil case brought on behalf of plaintiffs who were trafficked both for labor and sex.

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.

First, criminal prosecutions in sex trafficking cases are far more likely to occur than prosecutions in labor trafficking cases. The USDOJ's focus on enforcement of sex trafficking crimes is the official policy of the Bush Administration.[65] As a result, over two-thirds of federal trafficking prosecutions are cases of sex trafficking,[66] which conflicts with empirical reports from service providers who have found that sex trafficking cases comprise only one-third of their caseload.[67] The zealously pursued prosecutions of sex trafficking crimes subjects victims in these cases to severe re-traumatization. Such victims must repeatedly divulge the facts of their cases to prosecutors, investigating officers and ultimately, juries. They must face their traffickers in trial and testify against them. Their traffickers, agents within a large criminal network, can and often will utilize their networks to retaliate against victims.

Second, sex trafficking cases present unique factors that impact a potential civil lawsuit.[68] First, since a criminal prosecution is likely in a sex trafficking case, if successful, victims may receive and be satisfied with the monetary compensation received through restitution. Second, state and federal employment and labor laws, which generally provide the bulk of claims for compensatory damages in civil suits, exclude victims of forced prostitution since prostitution is not recognized as legal work. Finally, due to the clandestine nature of sex trafficking crimes, it is often much more difficult to identify defendants and locate assets.

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65 Press Release, White House Off. of the Press Secretary, Trafficking in Persons National Security Presidential Directive (Feb. 25, 2003) (describing President Bush's National Security Presidential Directive 22 (NSPD 22) which identifies trafficking as an important national security issue and emphasizes criminal enforcement against prostitution as the primary method by which to combat human trafficking). NSPD 22 is a classified document, and therefore, unavailable to the public, however, a USDOJ report cites to NSPD 22 and its efforts to implement it. *See* USDOJ, Report on Activities to Combat Human Trafficking: Fiscal Years 2001-2005, 6 (2006), *available at* www.usdoj.gov/crt/crim/trafficking_report_2006.pdf.

66 For example, in 2005, the USDOJ reported that over two-thirds of ninety-one human trafficking cases were cases of sex trafficking. U.S. Dep't of Just., Report on Activities to Combat Human Trafficking: Fiscal Years 2001-2005, 25 (2006), *available at* www.usdoj.gov/crt/crim/trafficking_report_2006.pdf.

67 For example, a recent study by the Coalition to Abolish Slavery and Trafficking reports that clients trafficked to Los Angeles are subject to exploitation in many fields, including domestic work (40%), factory work (17%), sex work (17%), restaurant work (13%), and servile marriage (13%). Kathryn McMahon and Coalition to Abolish Slavery and Trafficking, Speaking Out: Three Narratives of Women Trafficked to the United States (2002).

68 *See generally* Jennifer Nam article.

CHAPTER 2
PROCEDURE

I. PROTECTING YOUR CLIENT FROM THE TRAFFICKERS

A. The Use of Pseudonyms in the Complaint to Conceal Your Client's Identity

If you or your client is concerned that the defendants will attempt to retaliate once the defendants learn of the lawsuit, you should try to use pseudonyms in the complaint. The leading case on this subject is *Doe v. Frank*,[1] which sets forth factors the court may consider when determining whether a plaintiff may proceed anonymously.[2] In the trafficking context, one court allowed plaintiffs to proceed using pseudonyms based on the defendants' previous use of threats as alleged in a parallel criminal indictment, and because of the government's interest in protecting the identity of potential witnesses in the criminal case.[3] In another human trafficking lawsuit, the Court allowed the plaintiffs to proceed anonymously where law enforcement officers found firearms in the home of one of the traffickers, a paralegal working for the plaintiffs' counsel overheard family members of the defendants making threatening comments about the plaintiffs, and the Complaint includes "allegations of violence and coercion by the contractor defendants against the plaintiffs."[4] This was "sufficient to overcome the presumption of open judicial proceedings."[5]

The mechanics for filing a lawsuit on behalf of anonymous plaintiffs vary between the circuits, with some circuits providing little or no guidance on the subject. In the *Does I-IV v. Rodriguez* human trafficking litigation,[6] plaintiffs' counsel filed a motion to proceed anonymously before filing the Complaint, based on Tenth Circuit guidelines.[7] The motion was assigned a miscellaneous case number. Plaintiffs' counsel then referenced the motion and the miscellaneous case number in the Complaint. In the *Javier H. v. Garcia-Botello* trafficking litigation, plaintiffs' counsel filed their motion to proceed anonymously contemporaneously with the initial Complaint.[8] In other contexts, counsel has filed under seal a complaint using the plaintiff's real name, but used a pseudonym in the Complaint in the public file.[9]

B. Temporary Restraining Orders and Preliminary Injunctions

If there is an immediate risk of harm to your client, you may wish to seek a temporary restraining order ("TRO") and/or a preliminary injunction. For example, you may want to seek a TRO or preliminary injunction to prevent the defendants from contacting your client and your client's family.[10] To obtain a TRO or preliminary injunction, a plaintiff first must establish that he will suffer irreparable harm if no injunction is issued. Then, a plaintiff generally must show "(1) that he or she will suffer irreparable harm absent injunctive relief, and (2) either (a) that he or she is likely to succeed on the merits, or (b) that there are sufficiently serious

1 951 F.2d 320 (11th Cir. 1992).
2 *Id.* at 323 (citing Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981)).
3 *See Javier H.*, 211 F.R.D. 194 (W.D.N.Y. 2002).
4 *See* Does I-IV v. Rodriguez, No. 06-CV-00805-LTB, 2007 WL 684114, at *2 (D. Colo. March 2, 2007).
5 *Id.* at *3.
6 *Id.*
7 *See* W.N.J. v. Yocom, 257 F.3d 1171, 1172 (10th Cir. 2001).
8 *See Javier H.*, 211 F.R.D. at 195.
9 *See, e.g.*, EW v. N.Y. Blood Ctr., 213 F.R.D. 108, 113 (E.D.N.Y. 2003).
10 As discussed in Chapter 1, § III(D), *supra*, you may also want to seek a TRO to prevent the Defendant from transferring ownership of his or her assets.

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. Protective Orders

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 members of a terrorist "sleeper cell."[13] In that case, the court found that:

> [A]ssuming, *arguendo*, that information regarding plaintiffs' residences and places of employment could lead to evidence relevant to the defense of this action, ... any such evidence is clearly outweighed by the potential that this information may be used to harass, oppress, or intimidate the plaintiffs.[14]

The law is well developed in the area of preventing disclosure of immigration status, and there is very helpful language that can be borrowed from some decisions on this subject. One court, for example, determined that:

> [I]rrespective of whether the desperate, and illegal, effort of an indigent Mexican immigrant to work here seriously brings his character into question, it was not clearly erroneous ... to conclude that this evidence would be highly prejudicial.[15]

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11 Moore v. Consol. Edison Co. of N.Y., 409 F.3d 506, 510 (2d Cir. 2005). There is some minor variation between the circuits with regard to the requirements for a TRO or a preliminary injunction. *Compare, e.g.,* Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1201-02 (9th Cir. 2006) (same standard as 2d Cir. in *Moore*); *with* Straights & Gays for Equality v. Osseo Area Schs., 471 F.3d 908, 911 (8th Cir. 2006) (the court should consider "(1) the likelihood that the movant will succeed on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between the harm to the movant and the harm to the other party; and (4) the public interest."); *and* Sanofi-Synthelabo v. Apotex, Inc., 470 F.3d 1368, 1374 (Fed. Cir. 2006) (same).

12 Liu v. Donna Karan Int'l Inc., 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) (quoting Ansoumana v. Gristede's Operating Corp., 201 F.R.D. 81 (S.D.N.Y. 2001)).

13 Centeno-Bernuy v. Becker Farms, 219 F.R.D. 59, 61-62 (W.D.N.Y. 2003).

14 *Id.*

15 Romero v. Boyd Bros. Transp. Co., No. 93-0085-H, 1994 U.S. Dist. LEXIS 8609, at *7 (W.D. Va. June 14, 1994).

In fact, there is a plethora of case law supporting the non-discoverability of immigration status,[16] with only a few courts taking a contrary position.[17]

Defense counsel may also argue that the U.S. Supreme Court's decision *Hoffman Plastic Compounds v. NLRB*[18] makes immigration status relevant to damages. So long as your client's wage claims are for work that was performed, such a position would be misguided. Still, the impact of *Hoffman Plastics* on claims for lost future wages resulting from an illegal firing has yet to be clearly addressed by the courts. For a more detailed discussion of *Hoffman Plastics, see* Chapter 3 § V(H)*, infra.*

The argument to prevent the disclosure of your client's current employer or address is essentially the same as the argument to prevent disclosure of immigration status. You may also present the alternative argument that, if these matters are to be disclosed, they should not be disclosed to the defendants, but rather only to their counsel.[19]

With respect to information about the plaintiff's current employer, several cases are on point. In *Doe v. Handman*,[20] a plaintiff obtained a protective order protecting her present and former employers and business acquaintances from being deposed by defendants. The court noted that plaintiff had demonstrated a "legitimate personal harm" in showing that her job would be in jeopardy if her employer knew of the pendency of her case.[21] Moreover, the defendant had not met his burden of showing that depositions of these individuals would be relevant to the plaintiff's cause of action. For these reasons, the *Handman* court granted to the plaintiff the protective order requested.

In *Graham v. Casey's Gen. Stores*, the court noted that a subpoena sent to a plaintiff's current employer "could be a tool for harassment and result in difficulties for [the plaintiff] in her new job."[22] The defendant had sought through the deposition of the plaintiff's current employer information as to whether the plaintiff had filed prior lawsuits or administrative charges in connection with this new job. The court, however, quashed the defendant's subpoena, requiring the defendant to provide independent evidence that there had been any such prior lawsuits or administrative charges.[23] These cases suggest that allowing access to a current employer poses a significant risk to a plaintiff in an employment matter. Allowing a defendant to discover a plaintiff's current landlord could present similar problems.

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16 *See, e.g., In re* Reyes v. Remington Hybrid Seed Co., 814 F.2d 168, 170-71 (5th Cir. 1987), *cert. denied*, 487 U.S. 1235 (1988); Montoya v. S.C.C.P. Painting Contrs., Inc., 530 F. Supp. 2d 746, 749-50 (D. Md. 2008); Recinos-Recinos v. Express Forestry, Inc., No. 05-1355, 2006 U.S. Dist. LEXIS 2510, at *43-45 (E.D. La. Jan. 23, 2006); Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499 (W.D. Mich. 2005); Garcia-Andrade v. Madra's Cafe Corp., No. 04-71024, 2005 U.S. Dist. LEXIS 22122 (E.D. Mich. Aug. 3, 2005); *Liu*, 207 F. Supp. 2d at 191; Topo v. Dhir, 210 F.R.D. 76 (S.D.N.Y. 2002). Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F. Supp. 2d 1053, 1058 (N.D. Cal. 1998); *cf.* Samborski v. Linear Abatement Corp., No. 96 Civ. 1405, 1997 U.S. Dist. LEXIS 1337, at *3-4 (S.D.N.Y. Feb. 10, 1997) (the FLSA applies equally to documented and undocumented workers) (citing Rios v. Enter. Ass'n Steamfitters Local Union 638, 860 F.2d 1168, 1173 (2d Cir. 1988)); Mischalski v. Ford Motor Co., 935 F. Supp. 203, 204-05 (E.D.N.Y. 1996) (a plaintiff's undocumented status "is not a bar to recovery in federal court").

17 *See, e.g.,* Samborski v. Linear Abatement Corp., No. 96 Civ. 1405, 1997 U.S. Dist. LEXIS 1337, at *2-3 (S.D.N.Y. Feb. 10, 1997) ("[W]hile I am not at this point deciding whether [commission of immigration offenses is] properly admissible at trial, I do find that it may be relevant as to plaintiffs' credibility and as such is discoverable.").

18 535 U.S. 137, March 27, 2002

19 *See, e.g.*, Brown v. City of Oneonta, 160 F.R.D. 18, 21 (N.D.N.Y. 1995).

20 No. 95 Civ. 8005, 1999 U.S. Dist. LEXIS 17856, at *11-14 (S.D.N.Y. 1999).

21 *Id.* at *13.

22 206 F.R.D. 251, 256 (S.D. Ind. 2002).

23 *Id.; see also Centeno-Bernuy*, 219 F.R.D. 59, 61-62 ("to enable [defendants] to discuss plaintiffs' allegations of illegal treatment by their former landlords/employers with plaintiffs' current landlords and/or employers, is inherently intimidating"); *cf.* Conrod v. Bank of N.Y., No. 97 Civ. 6347, 1998 U.S. Dist. LEXIS 11634, at *5 (S.D.N.Y. July 30, 1998) (noting the "negative effect that disclosures of disputes with past employers can have on present employment" and sanctioning defendants for subpoenaing plaintiff's current employer without conferring with the court and plaintiff's counsel).

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. Protecting Others

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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24 *See, e.g.*, EEOC v. Woodmen of the World Life Ins. Soc'y, No. 03 Civ. 165, 2007 U.S. Dist. LEXIS 7488, at *12-16 (D. Neb. Feb. 1, 2007).

25 239 F.R.D. 490 (N.D. Ill. 2006).

26 *Id.* at 492.

27 *Jaffee*, 518 U.S. at 9-10.

28 *See* Oleszko v. State Comp. Ins. Fund, 243 F. 3d 1154, 1157 (9th Cir. 2001) (extending the psychotherapist-patient privilege to counselors at an employment assistance program who "[a]re trained as counselors, are held out as counselors ... and, like psychotherapists, their job is to extract personal and often painful information from employees in order to determine how to best assist them."); *see also* United States v. Lowe, 948 F. Supp. 97 (D. Mass. 1996) (extending privilege to rape crisis counselors). *But see* Jane Student 1 v. Williams, 206 F.R.D. 306 (S.D. Ala. 2002) (refusing to extend privilege to unlicensed counselors at a mental health center).

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

A. A Brief Introduction to Class Actions, Representative Actions, and Mass Actions in the Context of Trafficking Cases

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. Consider the Following Questions as You Evaluate Whether to Bring a Class Action or an Individual Action

- 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?

29 *See* Fed. R. Civ. P. 15(a).

30 *Id.*

- Do you have the time, and does your firm have the resources, to distribute class notice and to be class counsel?
- Is there a cap on damages under any of the statutes alleged to be violated?
- How might bringing the case as a class action impact the likelihood of settlement?
- Does Legal Services Corporation fund your program? (In which case, you cannot bring a Rule 23 class action.)
- Are there other attorneys who will be willing to co-counsel the case with you?
- How do courts in your jurisdiction approach class actions?

C. Rule 23 Class Actions

Requirements for Certification

In order for a case to be filed as a class action, the case must satisfy the numerosity, commonality, typicality, and adequacy of representation requisites of Rule 23(a).

With respect to numerosity, the unique nature of the trafficking case may allow for certification of a relatively small class because "Joinder of all members is impracticable."[31] Please consider that:

> Determination of practicability depends on all the circumstances surrounding a case, not on mere numbers. Relevant considerations include judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members.[32]

There is substantial overlap between the typicality question and the commonality question, and similar issues may arise in either context. Unlike commonality, however, which requires that all members of the class have common claims, the typicality requirement compares the claims of the *class representatives* with the claims of the remainder of the class. The most common problem with satisfying the typicality requirement arises when the class representatives lack standing to bring a claim alleged on behalf of the class,[33] or the representatives' claims are time-barred.[34]

In the trafficking context, commonality and typicality questions may arise if the class consists of many victims over several years, or if different class members performed different jobs or were housed in different locations. These scenarios should not present a problem for certification.[35] The adequacy of representation prong

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31 Fed. R. Civ. P. 23(a)(1).

32 Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993) (citations omitted); *cf.* Doe v. Charleston Area Med. Ctr., Inc., 529 F.2d 638, 645 (4th Cir. 1975) ("Where the plaintiff has demonstrated that the class of persons he or she wishes to represent exists, that they are not specifically identifiable supports rather than bars the bringing of a class action, because joinder is impracticable.").

33 *See, e.g.,* Cornett v. Donovan, 51 F.3d 894, 897 n.2 (9th Cir. 1995), *cert. denied,* 518 U.S. 1033 (1996).

34 *See, e.g.,* Piazza v. Ebsco Indus., Inc., 273 F.3d 1341, 1347 (11th Cir. 2001).

35 *See, e.g.,* Iglesias-Mendoza v. La Belle Farm, Inc., 239 F.R.D. 363, 371 (S.D.N.Y. 2007) (commonality and typicality found although class members worked with different kinds of animals, and the plaintiffs worked in feeding while other class members worked in slaughtering and packaging.); Does I v. Gap, Inc., No. 01 Civ. 0031, 2002 WL 1000073, at *2-3 (D. N. Mar. I. 2002) (in human trafficking case, although plaintiffs' experiences giving rise to the causes of action vary significantly, commonality existed because plaintiffs' injuries, "[a]lthough different, all stem from the same alleged conspiracy among the defendants …," and typicality was found on the same basis); Ansoumana v. Gristede's Operating Corp., 201 F.R.D. 81, 87 (S.D.N.Y. 2001) (class members working during different periods of time does not defeat typicality); Ramirez v. DeCoster, 203 F.R.D. 30, 36 (D. Me. 2001) (in AWPA case, class certified although "[n]ot every job or every housing unit was identical."); Rodriguez v. Carlson, 166 F.R.D. 465, 472 (E.D. Wash. 1996) (AWPA class certified "[although] there might be some variances regarding the housing conditions of the class members"); Siedman v. Am. Mobile Sys., Inc., 157 F.R.D. 354, 360-61 (E.D. Pa. 1994) (commonality found although damages differed among class members but common questions of liability predominated). Though not addressed in the class certification context, Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 332-35 (D.N.J. 2005) has an enlightening discussion of the extent to which one state's law should "[p]rovide the standard against which the sufficiency of Plaintiffs' allegations are measured" where plaintiffs worked in eight different states. The Court concluded that the legal standards for false imprisonment in New Jersey were sufficiently similar to the standards in the other seven states so as to allow plaintiffs to rely on New Jersey law. For class certification purposes, this could prove very helpful where state law class claims are brought for plaintiffs and class members in various states.

encompasses both the representation of the class by the named plaintiffs, and the quality of the legal representation provided by class counsel.[36] First and foremost, the courts will look for potential conflicts between the class representatives and the remainder of the class.[37] In trafficking cases, make sure your class representatives did not play a role in the trafficking. For example, if a class representative was used as a guard to assure that other victims did not leave a forced labor situation — even if the representative himself or herself was trafficked — the court may determine that he or she will not protect the interests of the class.

Courts may consider other factors, including those reflecting the honesty and trustworthiness of the class representative, such as a class representative's contradictory testimony.[38] This raises obvious questions for victims of trafficking, many of whom may have committed immigration offenses that a hostile court may determine impacts their credibility. Further, many trafficking victims lack formal education, which certainly will be highlighted by a party trying to resist class certification. Courts may also consider the class representatives' understanding of the case.[39] However, familiarity with the nuances of the legal theories in the case is not required.[40]

Unavailability for discovery may impact this prong.[41] In a trafficking case, the adequacy prong should not be impacted by a representative's undocumented status.[42] Still, a class representative who resides abroad and who is likely unable to lawfully enter the United States to participate in discovery *may* be deemed an inadequate representative, though there is apparently no case law directly on point. You may wish to present the importance of your client's presence in the United States as a class representative as an equity supporting your client's "T" visa application.

Finally, with respect to the adequacy of counsel, if you work for a small law office with limited resources or limited class action experience, you should consider bringing in a larger firm to co-counsel the case. In a trafficking case, you may need to distribute class notice abroad, which will require a substantial investment of resources.

Class Certification under Rule 23(b)(1)

Though rarely used as a basis for class certification, a class action may be maintained under Rule 23(b)(1) if "persecuting separate actions … would create a risk of inconsistent or varying adjudications … [which] would establish incompatible standards of conduct for the party opposing the class … "[43] In one human trafficking case, the Court certified a Rule 23(b)(1) class where plaintiffs sought to implement a monitoring program holding all defendants and various factories to the same standard of conduct.[44] Plaintiffs correctly indicated that:

> [A]bsent class action [*sic*], the defendants would be faced with potentially numerous lawsuits which could easily lead to conflicting injunctions that impose different standards of conduct, monitoring programs, and remedial rules on the various defendants.[45]

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36 *See* Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1994).

37 *See, e.g.*, Retired Chicago Police Assn. v. City of Chicago, 7 F.3d 584, 598-99 (7th Cir. 1993), *cert. denied,* 519 U.S. 932 (1996).

38 *See, e.g.*, Savino v. Computer Credit, Inc., 164 F.3d 81, 87 (2d Cir. 1998). *But see* German v. Fed. Home Loan Mortgage Corp., 168 F.R.D. 145, 154 (S.D.N.Y. 1996) (credibility is only a factor if it relates to the issues in the litigation).

39 *See, e.g.*, Darvin v. Int'l Harvester Co., 610 F. Supp. 255, 257 (S.D.N.Y. 1985).

40 *See Iglesias-Mendoza*, 239 F.R.D. at 372 ("Rule 23 requires that the named plaintiffs have adequate personal knowledge of the essential *facts* of the case. … For the legal underpinnings of their claims, [they] are entitled to rely on the expertise of their counsel."); *Gap, Inc.*, 2002 WL 1000073 at *4 (same conclusion).

41 *See* Kline v. Wolf, 702 F.2d 400, 402-03 (2d Cir. 1983) (refusal to answer discovery questions is a factor indicating inadequate representation); *see also* Federal Judicial Center, Manual for Complex Litigation (Fourth) § 21.26 (2008) (class representative must "vigorously pursue the litigation in the interests of the class, including subjecting themselves to discovery.").

42 *See* Ansoumana, 201 F.R.D. at 87.

43 Fed. R. Civ. P. 23(b)(1).

44 *See Gap, Inc.*, 2002 WL 1000073 at *5.

45 *Id.*

Class Certification under Rule 23(b)(2)

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.

Class Certification under Rule 23(b)(3)

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.

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46 *See* Robinson v. Metro N. Commuter R.R., 267 F.3d 147, 162-64 (2d Cir. 2001); *see also* Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 332 (4th Cir. 2006) ("Rule 23(b)(2) class certification is proper in the Title VII context not *because* backpay is an equitable form of relief, but because injunctive or declaratory relief predominates despite the presence of a request for back pay."); *Gap, Inc.*, 2002 WL 1000073 at *6 (Rule 23(b)(2) class certified, although it is a "close call" as to whether monetary relief is "merely incidental" to injunctive relief); *but see* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998) ("[M]onetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief.").

47 *See* Fed. R. Civ. P. 23(c)

48 *Allison*, 151 F.3d at 415.

49 *Robinson*, 267 F.3d at 162.

50 *Cf. Gap, Inc.*, 2002 WL 1000073 at *8 (superiority existed even though "30,000 class members worked in 28 different factories for numerous different departments and supervisors, at different times spanning a 13-year period.").

51 *See, e.g., Iglesias-Mendoza*, 239 F.R.D. 363, 372-73 ("[Minimum wage and overtime claims] are about the most perfect questions for class treatment. Some factual variation among the circumstances of the various class members is inevitable and does not defeat the predominance requirement."); *Gap, Inc.*, 2002 WL 1000073 at *7 (same conclusion); CV Reit, Inc. v. Levy, 144 F.R.D. 690, 699-700 (S.D. Fla. 1992) (predominance of common issues even though different misrepresentations and disclosures made over time).

52 *See, e.g.,* Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

53 *See, e.g.,* Mounce v. Wells Fargo Home Mortg., Inc., 390 B.R. 233, 248-49 (Bankr.W.D.Tex. 2008) (granting class certification for common law fraud claims).

54 128 S.Ct. 2131 (June 9, 2008).

55 *See, e.g.,* Steering Committee v. Exxon Mobil Corp., 461 F.3d 598, 602 (5th Cir. 2006).

D. Representative Actions under the Fair Labor Standards Act

Procedure for Representative Action Certification

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]

Discovery Considerations

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.

Interrelationship with Rule 23 Class Certification

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 minimum wage and/or overtime violations, while at the same time certifying a FLSA representative action.[62]

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56 FLSA, 29 U.S.C. § 216(b).

57 *See, e.g.,* Cuzco v. Orion Builders, Inc., 477 F. Supp. 2d 628, 635 (S.D.N.Y. 2007); Roebuck v. Hudson Valley Farms, Inc., 239 F. Supp. 2d 234, 240-41 (N.D.N.Y. 2002).

58 *See, e.g., Cuzco*, 477 F. Supp. 2d at 635 (nine months allowed because "[m]any of the prospective opt-in plaintiffs are transient immigrant day laborers."); *Roebuck*, 239 F. Supp. 2d at 240-41 (nine months allowed because some prospective plaintiffs are transnational migrants); *but see* Salinas-Rodriguez v. Alpha Servs., L.L.C., No. 05 Civ. 440, 2005 U.S. Dist. LEXIS 39673, at *14 (S.D. Miss. Dec. 27, 2005) (request for eight months denied as "excessive" although prospective plaintiffs reside in remote locations in Guatemala and Mexico; 180 days allowed).

59 *See Cuzco*, 477 F. Supp. 2d at 632 ("unlike class certification under Fed. R. Civ. P. 23, 'no showing of numerosity, typicality, commonality and representativeness need be made' for certification of a representative action.) (internal citation omitted).

60 *Id.*

61 *See, e.g.,* Shultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 310 (4th Cir. 2006); Falcon v. Starbucks Corp., Case No. H-05-0792 (S.D. Tex. Jan. 15, 2008); Takacs v. Hahn Auto. Corp., No. C-3-95-404, 1999 U.S. Dist. LEXIS 22146, at *4-8 (S.D. Ohio Jan. 25, 1999); Adkins v. Mid-American Growers, Inc., 143 F.R.D. 171, 174 (N.D. Ill. 1992) (stating that discovery should be done on a representative basis); *but see* Coldiron v. Pizza Hut, Inc., No. 03-05865, 2004 U.S. Dist. LEXIS 23610, at *5-6 (C.D. Cal. Oct. 25, 2004) (individualized discovery of opt-in plaintiffs allowed); Tum v. Barber Foods, Inc., No. 00-371-P-C, 2002 U.S. Dist. LEXIS 297 (D. Me. Jan. 11, 2002) (sanctioning plaintiffs for failing to respond to discovery directed at opt-ins).

62 *See* Lindsay v. Gov't Employees. Ins. Co., 448 F.3d 416 (D.C. Cir. 2006) (Rule 23 class certified for NY Labor Law claims, and representative action certified for FLSA claims); *Iglesias-Mendoza*, 239 F.R.D. at 373-75 (same); *but see* DeAsencio v. Tyson Foods, Inc., 342 F.3d 301, 311, 311-12 (3d Cir. 2003) (denying Rule 23 class certification for PA labor law claims where FLSA representative action certification was also sought, because "novel and complex issues of state law were at stake").

E. Restrictions on Recipients of Legal Services Corporation Funding

Organizations receiving Legal Services Corporation ("LSC") funding may not represent plaintiffs in a Rule 23 class action or the state equivalent.[63] However, LSC-funded programs may bring representative actions or mass actions so long as each plaintiff or opt-in plaintiff otherwise meets LSC eligibility requirements.[64]

III. WHEN TO FILE THE CIVIL ACTION

A. Statute of Limitations

Watch for Short Statute of Limitations

If you primarily practice employment law, you may not be aware that the statute of limitations on some causes of action is quite short. For example, in New York and many other states, the statute of limitations for most intentional torts is one year.[65] For some causes of action, the statute of limitations may be six months or less. There also are strict and very short time limits for filing many administrative complaints, such as U.S. Equal Employment Opportunity Commission ("EEOC") charges, which may be prerequisites for bringing suit. You should immediately determine the causes of action and their respective statutes of limitations after being retained by a trafficking victim. Failure to do so may constitute malpractice if, as a result, your client is precluded from bringing certain claims.

Equitable Tolling

If a worker is held in bondage, or even in immigration custody, he or she has a strong argument that the statute of limitations should be equitably tolled for that time period. Bondage likely constitutes just the kind of extraordinary circumstance contemplated in the equitable tolling doctrine.[66] In the trafficking context, at least two courts have found that the statute of limitations should be equitably tolled under these circumstances.[67]

You also may be able to argue that the two-year statute of limitations for FLSA actions (three years for willful violations) should be tolled if the employer failed to display a poster, as required by the FLSA, informing employees of their minimum wage and overtime rights.[68]

B. Consider the Impact on the Criminal Prosecution

If you do not need to toll a short statute of limitations, it is always best to wait to file a civil action until the conclusion of the introduction of evidence in a parallel criminal case. This way, you avoid altogether the question of whether a stay is necessary. Still, if you must file your civil action, there is no question that you are permitted to do so while the criminal action is pending.[69]

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63 *See* 45 C.F.R. § 1617.3 (2008).

64 Letter from LSC Office of Compliance and Enforcement, to Kenneth F. Boehm 8-9 (April 18, 2002) ("Congress expressly barred class actions, not representative action or other cases in which relief might be granted to more than a small group … of plaintiffs."), available upon request from author Werner. For additional LSC requirements, *see* Omnibus Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 504, 110 Stat. 1321(1996) (each plaintiff must be identified by name).

65 *See, e.g.*, N.Y. C.P.L.R. § 215 (2008).

66 *See, e.g.*, Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir. 1996) (statute of limitations on Torture Victims Protection Act is tolled while plaintiff is imprisoned or incapacitated); National Coalition Gov't of Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 360 (C.D. Cal. 1997); *cf.* Osbourne v. U.S., 164 F.2d 767 (2d Cir. 1947) (plaintiff's internment by Japan during World War II tolled the limitations period on his claim under the Jones Act against his employer for injury occurring immediately prior to his internment).

67 *See Deressa*, 2006 U.S. Dist. LEXIS 8659, at *9-14 (defendant attempted to mislead plaintiff, who relied on misrepresentation in neglecting to file charge; and defendant's actions and threats "[c]onstitute affirmative acts designed to prevent [plaintiff] from obtaining her wages or taking steps to enforce her … rights."); Topo v. Dhir, No. 01 Civ. 10881, 2003 U.S. Dist. LEXIS 21937, at *15-16 (S.D.N.Y. Dec. 3, 2003) (because employer took and held plaintiff's passport, "[s]he was unable to pursue her conversion claim before her escape from their home.").

68 *See* Chapter 3, § V(E), *infra*, for supporting cases.

69 *See* Smith v. Husband, 376 F. Supp. 2d 603, 612 (E.D. Va. 2005).

C. Media and Publicity Considerations

Legal battles are fought both in the courtroom and in the court of public opinion. An effective use of the media may benefit your client, while a less-than-circumspect approach may potentially be very damaging.[70]

IV. WHERE TO FILE THE CIVIL ACTION

A. State Court Versus Federal Court

Most trafficking cases will have both state and federal causes of action. Therefore, you will have a choice of filing your case in state or federal court. You should make your decision based on an evaluation of the forums available to you. Research the size of verdicts, the make-up of the potential jury pool, and the politics of the court in light of your client's claims, ethnicity and immigration status. Talk to experienced plaintiffs' lawyers in your area if you are not sure how to answer these questions.

B. Bankruptcy Court

When your client retains you, as soon as you know the identities of the potential defendants, you should check to see if any of them have filed for bankruptcy. Bankruptcy courts often impose a short time period during which creditors may file proofs of claim. If you miss that deadline, you may not be able to collect any money from the bankrupt debtor.

If one of the defendants is in bankruptcy or files for bankruptcy, any civil action against the debtor will usually be automatically stayed.[71] It is often helpful to have this automatic stay on the civil proceedings lifted.[72] In trafficking cases, which likely involve complex issues of federal law, your motion to lift the stay will likely be granted.[73]

You may also try to claim that your client's damages are exempt from dischargeability under section 523(a)(2) (services obtained by fraud) and/or (a)(6) (willful or malicious injury) of the U.S. Bankruptcy Code.[74]

If you are not familiar with bankruptcy procedure, you should contact a bankruptcy attorney who represents creditors. Most local bar associations have a bankruptcy section. The authors also have some limited materials regarding litigating in bankruptcy court.

C. Personal Jurisdiction/Venue

If it benefits your client, you may be able to assert personal jurisdiction over out-of-state defendants in the state where your client were recruited.[75] This may be helpful if the venue where your client was recruited

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70 *See* Chapter 1, § III(E), *supra*. For an interesting review of the ethics of an attorney's contact with the media, *see* Jonathan M. Moses, Note, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 Colum. L. Rev. 1811 (1995).

71 *See* 11 U.S.C. § 362(a). A creditor who violates the automatic stay may be subject to significant liability. *See* 11 U.S.C. § 362(k) ("an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages").

72 *See* 11 U.S.C. § 362(d).

73 *See* 28 U.S.C. § 157(d) (requiring withdrawal of the stay "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce"); *see also,* City of New York v. Exxon Corp., 932 F.2d 1020, 1026 (2d Cir. 1991) (Withdrawal is mandatory when a bankruptcy judge would be required "to engage in significant interpretation, as opposed to simple application, of federal laws apart from the bankruptcy statutes"); *In re TPI Int'l Airways*, 222 B.R. 663, 667 (S.D. Ga. 1998); *In re* Am. Body Armor & Equip. v. Clark, 155 B.R. 588, 590 (M.D. Fla. 1993); *In re White Motor Corp.*, 42 B.R. 693, 703-04 (N.D. Ohio 1984).

74 *See* 11 U.S.C. §§ 523(a)(2), (a)(6) (2004).

75 *See, e.g.,* Ochoa v. J.B. Martin & Sons Farms, Inc., 287 F.3d 1182, 1187-93 (9th Cir. 2002).

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. What to Consider in Sex Trafficking Cases

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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76 *See* 28 U.S.C. § 1404(a); *see also* Catalan v. Vermillion Ranch Ltd. P'ship, No. 06 Civ. 01043, 2007 U.S. Dist. LEXIS 567, at *10 (D. Colo. Jan. 4, 2007) (in trafficking case, defendants' motion for change of venue denied because change would "[m]erely shift the inconvenience from one party to the other."); *but see* Olvera-Morales v. Int'l Labor Mgmt. Corp., No. 02 Civ. 1589, 2006 U.S. Dist. LEXIS 17923 (N.D.N.Y. Apr. 10, 2006) (Title VII case transferred to M.D.N.C. from N.D.N.Y.).

77 *See, e.g.*, Minn. Stat. 611A.81 (2008); Fla. Stat. ch. 796.09 (2008).

78 *See, e.g.*, Balas v. Ruzzo, No. 97-82, 1997 Fla. App. LEXIS 11860, at *7 (Fla. App. 5th Oct. 10, 1997) (example of litigation utilizing Florida statute but citing to no precedent under statute).

that the potential civil rights cause of action under the federal Violence Against Women Act,[79] appears to have been eliminated by the U.S. Supreme Court's decision in *United States v. Morrison*.[80]

B. Naming the Employers

Determining who Employed the Plaintiffs

If you do not know who employed your client other than the trafficker, you may wish to engage in some immediate discovery to determine this. The trafficker himself or herself should be able to shed some light on this question, as may your client. Keep in mind, however, that many courts apply a broad definition of "employ" to actions under the FLSA, and other statutes. Therefore, just because the trafficker was not necessarily an agent of a larger entity, you should not rule out suing the larger entity. Be careful, however, to look at the definition of "employ" for all of the labor-related causes of action in your complaint. Some statutes may have a definition that is more limited than the FLSA definition.

Before applying a joint employment analysis, you should first examine whether the larger entity directly employed the trafficking victims. If the victims were direct employees of the larger entity, you may be able to extend liability to the larger entity for labor law violations *and* for torts.

Agency and Vicarious Liability: When Employers May Be Liable for the Torts of the Traffickers

A larger entity may be liable for the torts of a smaller entity (e.g., traffickers) if (1) the larger entity employs a smaller entity; (2) the smaller entity employs trafficking victims; and (3) the employment of the trafficking victims is within the scope of the smaller entity's employment to the larger entities.[81] This rests on the existence of privity between the victims and the larger entity. In other words, where an agent has the principal's express or implied authority to hire subagents (trafficking victims), there is privity between the subagents and the principal.[82] As a result, "[t]he relation of agency exists between the principal and authorized subagent. Persons employed by an agent to perform the work of a principal are employees of the principal and not the employees of the agent."[83]

Unlike joint employment issues under federal statutes, state law generally controls questions of agency. Therefore, you should look at the law on agency in the jurisdiction where you will be filing the civil action.

Labor Law Violations: Joint Employment Standards

Larger entities often incorrectly argue that, if traffickers, for example, acted outside the scope of their agency while employing the plaintiffs, the plaintiffs are necessarily precluded from impugning liability to the larger entity. However, this theory errs by conflating joint employment theory and agency theory. A worker may, as a matter of economic reality, be economically dependent on two or more entities, and therefore, be jointly employed by these entities under the FLSA and some other labor laws. A worker's relationship as an employee of a second (and less directly involved) entity exists regardless of whether the first entity is acting as an independent contractor, an agent, or both. Joint employment liability hinges solely on the *worker's* economic dependency on two or more entities, not the relationship between the putative employers.[84]

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79 42 U.S.C. § 13981(c) (2008).

80 529 U.S. 598 (2000).

81 *See Gap, Inc.*, 2002 WL 1000068 at *19-20 (in trafficking case, agency between retailer and manufacturer was properly plead); *but see* Doe I v. Gap, Inc., No. 01 Civ. 0031, 2001 WL 1842389, at *12 (D.N.Mar.I. 2001) (agency not properly pled in prior complaint in aforementioned lawsuit).

82 *See* Herrington v. Verrilli, 151 F. Supp. 2d 449, 463 (S.D.N.Y. 2001) (citing Bank of the Metropolis v. New England Bank, 47 U.S. 212 (1948)).

83 *Id.* at 463 (quoting Marra v. Katz, 347 N.Y.S.2d 143, 147 (Sup. Ct. 1973)); *cf.* Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1327-28 (5th Cir. 1985) (holding that if a farm labor contractor who recruited plaintiff farmworkers is an employee of the farmer, the farmworkers are the farmer's employees); Monville v. Williams, No. JH-84-1648, 1987 U.S. Dist. LEXIS 14488, at *13-14 (D. Md. October 8, 1987) (same); 29 C.F.R. § 500.20(h)(4) (2008) (same).

84 *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (FLSA definition of "employ" has such breadth as to "stretch[] the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles.").

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] Courts also have addressed joint employment questions in other industries.[87] A decision in *Zavala v. Wal-Mart Stores, Inc.*,[88] a lawsuit with human trafficking elements, provides perhaps the most helpful and detailed recent review of joint employment standards under the FLSA.

One should be aware that a worker might be jointly employed by multiple entities, even if the worker's employment is not concurrently with all of the entities. For example, in *Bureerong*,[89] the Court found that plaintiffs adequately stated a cause of action alleging that nine separate purchasers were employers within the meaning of the FLSA.

The Corporate Veil: Why it Does Not Matter in Some Employment Law Cases, and Otherwise How to Sue a Principal at a Corporation[90]

It is a well-established principle that "a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages."[91] This is not based on piercing the corporate veil, but rather on the employee's economic dependence on the officer, making him or her an employer. In a trafficking case, one court examined the following factors to determine that corporate officer liability under the FLSA had been adequately pled:

> The significant ownership interest of the corporate officers; their operational control of significant aspects of the corporation's day to day functions, including compensation of employees; and the fact that they personally made decisions to continue operating the business despite financial adversity and the company's inability to fulfill its statutory obligations to its employees.[92]

Some courts also have found that an officer or director of a corporation can be found personally liable for torts he or she personally commits "irrespective of whether the corporation for which he was acting was a tort-feasor or not or whether the defendant was acting in its behalf as its agent."[93] The law in this respect, however, varies significantly between the states.

Absent individual liability as an employer for claims under the FLSA and some other labor laws, or in some states for torts he or she personally commits, it may still be possible to pierce the corporate veil. The standard for piercing the corporate veil will generally be based on state law.

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85 Does v. Rodriguez, No. 06 Civ. 00805, 2007 U.S. Dist. LEXIS 15061, at *9-14 (D. Colo. Mar. 2, 2007).

86 *See, e.g., Reyes*, 495 F.3d 403, 406-410 (7th Cir. 2007); Charles v. Burton, 169 F.3d 1322, 1328-29 (11th Cir. 1999); Torres-Lopez v. May, 111 F.3d 633, 638-39 (9th Cir. 1997); Antenor v. D & S Farms, 88 F.3d 925, 937 (11th Cir. 1996); Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754 (9th Cir. 1979); Hodgson v. Griffin & Brand, Inc., 471 F.2d 235, 238 (5th Cir. 1973); Luna v. Del Monte Fresh Produce (Southeast), Case No. 06-CV-2000, 2008 U.S. Dist. LEXIS 21636, *9-20 (Mar. 18, 2008).

87 *See, e.g.,* Herman v. RSR Sec. Servs., Ltd., 172 F.3d 132, 139 (2d Cir. 1999) (security guard); *Liu*, No. 00 Civ. 4221, 2000 U.S. Dist. LEXIS 18847 (S.D.N.Y. Dec. 22, 2000) (garment factory); Grochowski v. Ajet Constr. Corp., No. 97 Civ. 6269,1999 U.S. Dist. LEXIS 13473, at *6-9 (S.D.N.Y. Sept. 1, 1999) (roofers and bricklayers); Lopez v. Silverman, 14 F. Supp. 2d 405, 413-14 (S.D.N.Y. 1998) (garment factory); Bureerong v. Uvawas, 959 F. Supp. 1231, 1236 (C.D. Cal. 1997) (garment factory).

88 393 F. Supp. 2d 295, 325-331 (D.N.J. 2005).

89 959 F. Supp. at 1233.

90 For the purpose of this discussion, we use the term "corporation" broadly. Most states have created mechanisms for business entities to limit the liability of their principals outside of the corporate forum, such as limited liability companies (LLCs) or partnerships (LLPs or LPs). Generally, this analysis will apply to principals at any such entity. *See, e.g.,* MAG Portfolio Consult, GMBH v. Merlin Biomed Group, LLC, 268 F.3d 58, 63-65 (2d Cir. 2001) (applying New York corporate veil-piercing inquiry to LLCs).

91 Yang v. ACBL Corp., 427 F. Supp. 2d 327, 343 (S.D.N.Y. 2005).

92 Does v. Rodriguez, No. 06 Civ. 00805, 2007 U.S. Dist. LEXIS 15061, at *8 (D. Colo. Mar. 2, 2007) (quoting Baystate Alternative Staffing, Inc. v. Herman, 163 F.3d 668, 677-78 (1st Cir. 1998)) (these factors are not examined by courts in all circuits); *see also* Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1281 (N.D. Okla. 2006).

93 *Id.* at 1293 (trafficking-related tort claims against corporate officer were "not merely an action to recover on a corporate debt.").

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,
4) inadequate corporate capitalization, and
5) whether the corporation is merely a sham.[98]

What to do When the Defendant Operates Multiple Corporations

Employers, and particularly those with questionable labor practices, may do business through multiple corporations. Often, some corporations will function solely as holding companies, which retain title to all or most of the employer's assets. The business owner may operate a separate corporation that nominally functions as the employer of his or her workers.

In the employment law context, courts examine whether multiple entities are so interrelated that they constitute a "single employer."[99] To determine this, Courts examine the following four factors:

1) interrelation of operations, i.e., common offices, common record keeping, shared bank accounts and equipment;
2) common management, common directors and boards;
3) centralized control of labor relations and personnel; and
4) common ownership and financial control.

None of these factors is conclusive, and all four need not be met in every case. Nevertheless, control over labor relations is a central concern.[100]

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94 Bridgestone Firestone, Inc. v. Recovery Credit Servs., Inc., 98 F.3d 13, 17-18 (2d Cir. 1996) (quoting Gartner v. Snyder, 607 F.2d 582, 586 (2d Cir. 1979)).

95 *Id.* at 18.

96 *See* Allen v. New Image Indus., Inc., No. 97 Civ. 240, 1998 U.S. Dist. LEXIS 6564, at *5 (N.D.N.Y. May 5, 1998); Int'l Controls and Measurements Corp. v. Watsco, Inc., 853 F. 585, 590 (N.D.N.Y. 1994).

97 Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry. Co., 210 F.3d 18, 25-26 (1st Cir. 2000); *see also* Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209 (2d Cir. 1987), *rev'd* on other grounds *sub nom In re* Masters Mates & Pilots Pension Plan and IRAP Litig., 957 F.2d 1020 (2d Cir. 1992).

98 Goldberg v. Colonial Metal Spinning and Stamping Co., Inc., No. 92 Civ. 3721, 1993 U.S. Dist LEXIS 12732, at *14-15 (S.D.N.Y. Sept. 2, 1993).

99 Swallows v. Barnes & Noble Book Stores, 128 F.3d 990, 993 (6th Cir. 1997); *see also Id.* at n.4 for a helpful discussion of the distinction between "joint employer" and "single employer" analysis.

100 *Id.* at 994 (internal citations omitted).

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. Naming Different Defendants for Different Causes of Action

It is entirely appropriate to name some defendants in some counts and other defendants in other counts. For example, you may name the trafficker or the direct employer for the intentional tort allegations, and the manufacturer as a joint employer for some of the labor law violations. A good way to organize the complaint is to specify with each count which defendants are included, and to include topical headings in your factual allegations.

VI. WHEN TO INCLUDE A JURY DEMAND

The general rule is that plaintiffs prefer jury trials and defendants prefer bench trials. This is because juries award far greater damages on average than do judges. However, in trafficking cases, you should weigh the likelihood of greater damages against the potential risk of bringing your case before a jury. First and foremost, you should know your judge and know your jury pool. Consider who your client is and who the defendants will be in light of the politics of the court and the biases of the community.

VII. SERVICE OF PROCESS: SERVING A FOREIGN DEFENDANT OR A DEFENDANT YOU CANNOT FIND

In trafficking cases, it is very likely that some of the defendants will be difficult to serve. Federal Rule of Civil Procedure 4(e) allows for service upon an individual within a judicial district of the United States pursuant to the laws of the state in which the action is brought, or the state in which service came into effect. Therefore, if service by mail or personal service is not successful, many states allow for a "nail and mail" or "leave and mail" option. If these methods fail or are not available, you may petition the court for an alternative means of service, which must be "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[104] The most common form of alternative service is service by publication, which generally requires that you show that (1) service is otherwise impossible (or cannot be made with due diligence); (2) it is reasonable to conclude that the defendant is likely to read the newspaper in which notice is published; and (3) the defendant is otherwise on notice that there may be a case pending against him or her.[105] In the trafficking context, one court allowed service by publication based in part on a declaration of an INS Special Agent indicating that the defendant to be served had been indicted, but remained at large and was considered a fugitive.[106] These requirements,

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101 Lihli Fashions Corp. v. NLRB, 80 F.3d 743, 748 (2d Cir. 1996) (internal citations omitted).

102 *See, e.g., Gap, Inc.*, 2001 WL 1842389 at *11 (trafficking case finding no joint venture between manufacturers and retailers) (citing Jackson v. East Bay Hosp., 246 F.3d 1248, 1261 (9th Cir. 2001) (also finding no joint venture)).

103 *Gap, Inc.*, 2001 WL 1842389 at *11.

104 S.E.C. v. Tome, 833 F.2d 1086, 1093 (2d Cir. 1987) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

105 *See, e.g.*, S.E.C. v. HGI, Inc., No. 99 Civ. 3866, 1999 U.S. Dist. LEXIS 17441, at *4 (S.D.N.Y. Nov. 5, 1999).

106 *See Javier H.*, 217 F.R.D. 308, 309 (W.D.N.Y. 2003).

however, will vary from state to state. State law will also govern the specific form of service by publication, so you will need to look this up in your jurisdiction.

A foreign defendant residing in a country that is a signatory to the Hague Convention on the Service Abroad of Judicial or Extrajudicial Documents may be served pursuant to that convention.[107] Where the Hague Convention does not apply, Fed. R. Civ. P. 4(f) sets forth alternative methods of service that may be available. The assistance of a foreign court in the service of process may also be requested through a letter rogatory,[108] though this process can be extremely slow and cumbersome.

107 *See* Fed. R. Civ. P. 4(f)(1). Information about the requirements of Hague convention can be downloaded or ordered from www.hcch.net. On request, author Werner can provide additional information regarding these requirements.

108 *See generally* 23 Am Jur 2d Depositions and Discovery § 17 (Issuance and enforcement of letter rogatory or request).

CHAPTER 3
CAUSES OF ACTION

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 trafficking civil claim, many other U.S. laws may provide civil remedies to trafficked persons. These laws, including federal and state labor and employment laws and tort laws related to forced labor conditions, are intended to protect all workers from exploitation.[1] Be sure to consult your state labor codes, constitution and other statutes for additional causes of action.

I. TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2003, 22 U.S.C. § 7101 (2004)

A. Civil Remedy for Violation of the TVPRA[2]

The TVPRA allows an individual who is a victim of a violation of sections 1589, 1590, or 1591 to bring a civil action against the alleged defendant in a district court to recover damages and reasonable attorneys fees.[3] Note that a civil action filed under section 1595 shall be stayed during the criminal action arising out of the same occurrence.[4] A section 1595 claim may be made even in the absence of a criminal investigation or prosecution.

B. Background

The TVPRA provides private rights of action for the trafficking crimes of forced labor, trafficking into servitude and sex trafficking. The TVPRA also makes human trafficking crimes predicate offenses for RICO charges and adds, "trafficking in persons" to the definition of racketeering activity. Please refer to the RICO section of this manual for more information on bringing RICO civil claims.

Since the enactment of the TVPRA, over twenty civil lawsuits have been filed utilizing this cause of action. Many of these cases have settled without trial, and some are still pending. Among the pending cases, some have been stayed by law enforcement pursuing criminal prosecutions. Other pending cases are in discovery. Finally, a few cases have not succeeded in challenging motions to dismiss the TVPRA claim, but have moved forward on other claims.

C. Making a Claim

In order to bring a viable claim under section 1595, the plaintiff must be a victim of one of three specified trafficking crimes: forced labor, trafficking into servitude, or sex trafficking.

Forced Labor

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;

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1 *See generally* Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 Hastings Women's L.J. 1 (2004) (providing further analysis of the trafficking private right of action and other causes of action utilized in trafficking civil suits).

2 18 U.S.C. § 1595 (2008).

3 18 U.S.C. § 1595(a).

4 18 U.S.C. § 1595(b)(1). *See also* Chapter 1, § III(C), *supra*.

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]

Trafficking into Servitude

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

Sex Trafficking of Children or by Force, Fraud, or Coercion

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 TVPRA specifically provided for private causes of action under sections 1589, 1590, and 1591, but omitted private causes of action for sections 1581 and 1592. Therefore, the court argued that if it had been the intent of Congress to include private causes of action for sections 1581 and 1592, it would have explicitly done so in section 1595. The court also cited older cases in other jurisdictions, which denied implied rights of action for section 1581.[10]

However, the court's conclusion in *Cruz* should not discourage litigators from bringing claims based on additional Chapter 77 violations that would be incorporated through the section 1590 "catch-all" provision. Again,

5 18 U.S.C. § 1589 (2008).
6 18 U.S.C. § 1590.
7 18 U.S.C. § 1591.
8 *See* No. 04 Civ. 231-R, 2007 U.S. Dist. Lexis 24468 at *2 (W.D. Ky. March 30, 2007).
9 498 U.S. 395, 404 (1991)
10 Weiss v. Sawyer, 28 F. Supp. 2d 1221, 1227 (W.D. Okla. 1997) (denying a private cause of action for section 1581); Dolla v. Unicast Co., 930 F. Supp. 202, 205 (E.D. Pa. 1996) (same).

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. Scope of "Coercion"[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.

Court Opinions

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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11 This section is adapted from Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting U.S. v. Kozminski and Understanding Human Trafficking*, 38 U. Tol. L. Rev. 941 (2007).

12 538 F.3d 706 (7th Cir. Aug. 15, 2008).

13 *Id.* at 709 and 713.

14 *Id.* at 713.

15 *Id.* at 712 (internal citations omitted). This conclusion is repeated later in the decision. *Id.* at 714.

16 390 F.3d 145 (1st Cir. 2004).

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]

Congressional Record

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 narrowly construed, in the absence of a definition by Congress, to exclude certain cases in which persons are held in a condition of servitude by nonviolent coercion."[27] Thus, the TVPA incorporates its description of coercion into a new definition of involuntary servitude.

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17 390 F.3d at 150-51 (discussing various interpretations of coercion under the Act).

18 *Id.* at 152-53.

19 No. 02-CR-110S-01, 2003 U.S. Dist. LEXIS 22088 (W.D.N.Y. Dec. 2, 2003).

20 *Id.* at *1-2.

21 *Id.* at *14-15, 17.

22 *Id.* at *17, 27. According to the court, section 1589, the forced labor statute enacted by the TVPA, was sufficiently definite on its face to provide fair notice to criminal defendants because it required scienter: "Since § 1589 only applies to a person who 'knowingly provides or obtains the labor or services of a person' ... the issue of notice is properly 'ameliorated.'" *Id.* at *18 (emphasis added). Additionally, the court stated that nothing in the statute encouraged indiscriminate over-enforcement by law officials: "There is nothing in § 1589 that would cause one to conclude that ...'it furnish[es] a ... tool for harsh and discriminatory enforcement ...'" *Id.* at *26 (quoting Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972)).

23 22 U.S.C. § 7101(b)(13).

24 H.R. Rep. No. 106-939, at 101 (2000).

25 *Id.*

26 22 U.S.C. § 7102(2) (2008).

27 H.R. Rep. No. 106-939, at 89 (2000).

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]

The accompanying legislative conference report instructs that Congress meant the above provisions to address the subtle methods that traffickers use to "place their victims in modern-day slavery."[30] Such subtle methods include threats to "harm ... third persons, restrain[ing] [the] victims without physical violence or injury, or [threats of] dire consequences by means other than overt violence."[31] "The term serious harm ... refers to a broad array of harms, including both physical and nonphysical."[32] Moreover, in addition to direct threats, traffickers may employ "a scheme, plan[,] or pattern," amounting to a subtler, but equally effective, form of coercion.[33] The TVPA explains that Congress intended the language of serious harm and scheme, plan, or pattern to assist prosecutors in proving forced labor violations in the absence of "physical harm or threats of force against victims."[34] Finally, in determining the degree of coercion that is criminally actionable, the TVPA instructs that courts must take into account the victim's individual circumstances, such as age and background.[35]

The TVPA's conference report illustrates subtle and non-physical methods of coercion with three examples.[36] In one scenario, the conference report states that a trafficked domestic worker suffers a threat of serious harm when a trafficker leads her to believe that "children in her care will be harmed if she leaves the home."[37] A trafficker subjects another worker to a "scheme, plan, or pattern" when the worker is caused to believe that "her family will face harms, such as banishment, starvation, or bankruptcy in their home country."[38] In a third example, individuals traffic children into forced labor by means of "nonviolent and psychological coercion" including "isolation, denial of sleep, and other punishments."[39]

28 22 U.S.C. § 7102(5).
29 18 U.S.C. § 1589.
30 H.R. Rep. No. 106-939, at 101 (2000).
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.*

E. Application of the TVPRA to Trafficking Outside the United States

The extraterritorial reach of the TVPRA was considered by the Southern District of Indiana in *Roe v. Bridgestone Corp*.[40] In that case, plaintiffs were workers in a rubber plantation in the West African country of Liberia, who brought suit for forced labor against Bridgestone and Firestone corporations and holdings. Among other claims, plaintiffs alleged violation of section 1589 and sought relief pursuant to section 1595. The defendants sought to dismiss the claim arguing that even if the conditions on the plantation in Liberia amounted to forced labor, section 1589 did not apply to labor conditions outside the United States. Finding no previous case law on the issue, the court concluded that "[s]ection 1595 [did] not provide a remedy for alleged violations of section 1589's standards that occur outside the United States."[41]

The court relied on the general presumption derived from Supreme Court precedent that "[u]nless a contrary intent appears, [congressional legislation] is meant to apply only within the territorial jurisdiction of the United States."[42] The court noted, however, one Supreme Court case that departed from this general presumption due to the "nature of the crime" legislated, as well as indications of congressional intent that inferred extraterritorial application of the statute in question.[43] Despite plaintiff's arguments that trafficking was international in dimension and that the TVPA contemplated enforcement of trafficking violations overseas, the *Bridgestone* court refused to extend section 1589 to the conditions at the Liberian plantation. The court recognized the international nature of trafficking, but contended that unless made explicit, section 1589 must be presumed to apply domestically: "The other closely related statutes addressing slavery and related practices in Chapter 77 of Title 18 show that Congress has been acquainted with the question of international reach in this context for more than 200 years. Congress knows how to legislate with extraterritorial effect in this field. It has done so expressly when it has intended to do so."[44] Thus, the plaintiff's TVPRA claim in this case did not survive the motion to dismiss.

More recently, the U.S. District Court for the District of Columbia reached a similar conclusion, referencing the *Bridgestone* decision.[45]

Despite these court opinions, the extraterritorial implementation of the TVPRA remains a viable option for attorneys representing trafficked clients in foreign countries. The TVPA's congressional record demonstrates a clear intent to execute anti-trafficking strategies abroad. Moreover, neither the language of the TVPA nor the TVPRA explicitly precludes such claims.

F. Pleading Requirements

Without making a definitive ruling on the question, one court strongly suggested that the heightened pleading requirements of Fed. R. Civ. P. 9 did not apply to claims brought under the TVPRA.[46]

G. Retroactive Applications

It should be noted that courts are unlikely to allow the new trafficking claim to be applied retroactively. There is a general presumption against retroactive application of legislation.[47] Principles of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.

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40 492 F. Supp. 2d 988 (S.D. Ind. 2007).

41 *Id.* at 999.

42 *Id.* at 1000.

43 *Id.* at 1000 (citing United States v. Bowman, 260 U.S. 94, 98 (1922).

44 *Id.* at 1002.

45 *See* Natah v. Bush, 541 F. Supp. 2d 223, 234-35 (D.D.C. Mar. 31, 2008).

46 *See* Catalan v. Vermillion Ranch Ltd. P'ship, No. 06 Civ. 01043, 2007 U.S. Dist. LEXIS 567, at *21 (D. Colo. Jan. 4, 2007).

47 *But cf.* United States v. Hudson, 299 U.S. 498, 500-01 (1937) (holding a retroactive provision in a tax statute valid because it had long been the practice of Congress to apply taxes retroactively for short periods in order to tax profits obtained while the legislation was in the process of enactment).

In *Landgraf v. USI Film Products*, the Supreme Court stated, "prospectivity remains the appropriate default rule."[48] The Court further states, "[o]ur statement in *Bowen* that 'congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result' ..." was a step in a long line of cases barring retroactivity unless it was clearly intended by Congress.[49] Therefore, only clear congressional intent allowing retroactivity, established by explicit statutory language, will overcome the presumption of prospectivity.

Although the legislative history of the original TVPA from the year 2000 indicates that a private right of action was contemplated, this civil remedy was eliminated in the final version of the bill. The 2003 TVPRA's private right of action does not expressly provide for retroactive application. Of note, however, in two actions arising out of trafficking claims pre-dating the TVPRA, courts allowed the plaintiffs to merge the TVPA's expanded definition of coercion into their claims under the Alien Tort Claims Act.[50] Yet, in another case, the court denied retroactive application of the TVPRA to events that occurred before December 19, 2003.[51] Applying the *Landgraf* test and finding no congressional intent to allow for retroactive application, the court further reasoned that retroactive application would impermissibly subject the defendant to a new legal burden of monetary liability with respect to past events.[52]

H. Statute of Limitations

The TVPRA does not specify a statute of limitations for the private right of action. Current pending legislation reauthorizing the TVPA includes an amendment to codify a ten-year statute of limitations for section 1595.

I. Damages

The TVPRA civil remedy provides for damages and reasonable attorneys' fees.

II. IMPLIED RIGHTS OF ACTION UNDER THE THIRTEENTH AMENDMENT AND ITS ENABLING STATUTE[53]

A. Thirteenth Amendment of the U.S. Constitution

> Section 1. [Slavery prohibited.]
> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."
>
> Section 2. [Power to enforce amendment.]
> "Congress shall have power to enforce this article by appropriate legislation."[54]

Sale into Involuntary Servitude

> Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an

48 Landgraf v. USI Film Prods., 511 U.S. 244, 272 (1994).

49 *Id.* (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)).

50 *See* Doe I v. Reddy, No. 02 Civ. 05570, 2003 U.S. Dist. LEXIS 26120, at *13 n.2, *33 & n.4, *35-36 (N.D. Cal. Aug. 4, 2003); Topo v. Dhir, No. 01 Civ. 10881, 2003 U.S. Dist. LEXIS 21937, at *13 (S.D.N.Y. Dec. 3, 2003). The Alien Tort Claims Act is discussed in § III, *infra*.

51 *See* Abraham v. Singh, Civ. No. 04-0044, slip op. at 13-17 (E.D. La. July 5, 2005) (available from author Werner upon request).

52 *Id.* at 16.

53 18 U.S.C. § 1584 (2008).

54 U.S. Const. amend. XIII, §§ 1-2.

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. Background

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 in Chapter 3, § I(C), *supra,* because of the broad language of section 1590, a plaintiff has a private right of action for involuntary servitude under section 1584 so long as the defendant recruited, harbored, transported, or provided the plaintiff for labor or services in violation of section 1584.[67] Of note as well, one court suggested that 42 U.S.C. § 1985(3)'s anti-conspiracy provisions provided for a private right of action under the Thirteenth Amendment and 18 U.S.C. § 1584.[68]

C. Making a Claim

To make a valid private right of action claim under section 1584 a plaintiff must demonstrate that defendant's actions fit the definition of "involuntary servitude." The U.S. Supreme Court in *Kozminski* has held that for

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55 18 U.S.C. § 1584.

56 Manliguez v. Joseph, 226 F. Supp. 2d 377, 383 (E.D.N.Y. 2002).

57 *Id.*

58 *Id.* at 383-84.

59 *Id.* at 384 (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 569 (1979)).

60 *Id.* (quoting 442 U.S. at 569).

61 *Manliguez*, 226 F. Supp. 2d at 384 n.7 (citing City of Memphis v. Greene, 451 U.S. 100, 125 (1981)).

62 *See id.* at 384 & n.8.

63 *Id.* at 384.

64 *Id.* at 384 n.8 (citing Buchanan v. City of Bolivar, 99 F.3d 1352, 1357 (6th Cir. 1996); Turner v. Unification Church, 473 F. Supp. 367, 375 (D.R.I. 1978)).

65 *Id.* at 384 n.8 (citing United States v. Kozminski, 487 U.S. 931, 952 (1988)); *see also Javier H.*, 239 F.R.D. 342, 346-47 (W.D.N.Y. 2006) (noting no potential obstacles to permitting filing of amended complaint alleging Thirteenth Amendment violations other than statute of limitations concerns).

66 *See Reddy*, 2003 U.S. Dist. LEXIS 26120, at *37-42 (does not reference the *Manliguez* decision); *see also Gap, Inc.*, 2001 WL 1842389 at *16-18 (pre-dating *Manliguez*, but with a detailed discussion denying private adjudication of Thirteenth Amendment protections).

67 *See* 18 U.S.C. § 1590.

68 *See Deressa*, 2006 U.S. Dist. LEXIS 8659, at *13-14. The Plaintiff in this action did not raise claims under the TVPRA, although the forced labor continued until 2004. *See also* § IX, *infra*.

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*, 487 U.S. 931 (1988), the Supreme Court found that section 1584 of title 18, United States Code, should be narrowly interpreted, absent a definition of involuntary servitude by Congress. As a result, that section was interpreted to criminalize only servitude that is brought about through use or threatened use of physical or legal coercion, and to exclude other conduct that can have the same purpose and effect.[78]

By creating an expanded definition of involuntary servitude in 22 U.S.C. § 7102(5), Congress fully intended to answer the invitation of the *Kozminski* Court to do just that. Therefore, as a result of Congress's action, the

69 *Kozminski*, 487 U.S. at 952.

70 *Id.*

71 *Id.*

72 *Id.*

73 22 U.S.C. § 7102(5) (2008) (defining involuntary servitude as "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").

74 *See* Kim & Hreshchyshyn, *supra* note 143, at 35 (discussing the TVPA's broader definition of involuntary servitude, which includes psychological coercion).

75 *Kozminski*, 487 U.S. at 944-53.

76 *Id.* at 952 (internal citations omitted).

77 *Id.*

78 22 U.S.C. § 7101(b)(13).

Kozminski Court's restrictive interpretation of involuntary servitude under the Thirteenth Amendment and 18 U.S.C. § 1584 is probably no longer good law.[79]

D. Statute of Limitations

Plaintiffs bringing civil claims under section 1584 must also meet the appropriate statute of limitations. Though section 1584 does not specify a statute of limitations, the Supreme Court in *North Star Steel Co. v. Thomas*[80] directs courts to borrow from the most analogous state law in the absence of a federal statute of limitations: "A look at this Court's docket in recent years will show how often federal statutes fail to provide any limitations period for the causes of action they create, leaving courts to borrow a period, generally from state law, to limit these claims."[81] The state limitations period must not, however, "'frustrate or interfere with the implementation of national policies,' ... or be at odds with the purpose or operation of federal substantive law."[82] The applicable statute of limitations may vary from state to state. Complaints must be filed in as little as one year from the alleged violation.[83] However, in New York, the appropriate statute of limitations has been found to be three years, in part because the state recognized a federal interest in providing effective remedies to civil rights violations.[84]

E. State Anti-Trafficking Provisions

Background

Nearly half of the states in the United States have constitutional provisions prohibiting slavery and involuntary servitude. The states which include slavery and involuntary servitude provisions in their constitutions include: Alabama, Arkansas, California, Colorado, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oregon, Tennessee, Utah, and Wisconsin. These provisions do not explicitly provide for a private right of action.

In 2004, the USDOJ publicly encouraged states to enact state level anti-trafficking legislation. To guide state legislatures in drafting anti-trafficking measures, the USDOJ released model anti-trafficking criminal laws.[85] One after another, individual states began to develop and codify anti-trafficking legislation. State anti-trafficking legislation ranged from sparse, focusing only on anti-trafficking criminal provisions, to lengthy omnibus bills that included new trafficking crimes, as well as attendant social services and compensation to trafficking victims. To date, 34 states have enacted anti-trafficking legislation.[86]

State Anti-Trafficking Civil Remedies

Despite the national movement toward state anti-trafficking legislation, only one state, California, has enacted a state level trafficking private right of action. This was the result of strong advocacy efforts by the California Anti-Trafficking Initiative,[87] a coalition of non-governmental organizations that closely collaborated with

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79 *See Calimlim*, 538 F.3d at 712, 714; *Bradley* 390 F.3d at 156; *cf.* Garcia v. Audubon Cmtys. Mgmt., LLC, Case No. 08-1291, 2008 U.S. Dist. LEXIS 31221, *7-8 (E.D. La. Apr. 15, 2008) (adopting the TVPA's definition of "involuntary servitude" set forth in 22 U.S.C. § 7102(5), and finding that "there is sufficient evidence for a *prima facie* showing of 'Involuntary Servitude.'"); *but cf.* United States v. Djoumessi, 538 F.3d 547, 551 (6th Cir. 2008) (in upholding an involuntary servitude conviction, applying the *Kozminski* definition without discussing the TVPA's definition)..

80 515 U.S. 29 (1995).

81 *Id.* at 33.

82 *Id.* at 34 (quoting Del Costello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 161 (1983) (quoting Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977)).

83 Cal. Civ. Proc. Code § 340 (West 2003). *See* Reese v. Wal-Mart Stores, Inc., 87 Cal. Rptr. 2d 346, 350 (Cal. Ct. App. 3d Dist. 1999) (affirming the trial court's ruling that the statute of limitations for violations of the Unruh Act in California is one year).

84 *See Javier H.*, 239 F.R.D. 342, 347 (W.D.N.Y. 2006); *Manliguez*, 226 F. Supp. 2d 377, 385-86 (E.D.N.Y. 2002) (citing Owens v. Okure, 488 U.S. 235, 249-50 (1989)).

85 Model State Anti-Trafficking Criminal Statute, www.usdoj.gov/crt/crim/model_state_law.pdf (last visited June 16, 2008).

86 *See* National Institute on State Policy on Trafficking of Women and Girls, Enacted Laws by State, www.centerwomenpolicy.org/programs/trafficking/map/statelist.cfm.

87 The California Anti-Trafficking Initiative was led by Asian Pacific Islander Legal Outreach, Coalition to Abolish Slavery and Trafficking and Lawyers' Committee for Civil Rights of San Francisco. For more information on the California TVPA, contact Kathleen Kim.

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

California Trafficking Victims Protection Act

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.

Making the Claim

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]

Statute of Limitations

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]

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88 Assemblymember Sally Lieber, Press Release – AB 22: Rare Show of Unity: Law Enforcement Leaders Join with Activists for Civil Rights and Women's Rights to Announce Governor's Signature of Comprehensive Human Trafficking Bill, http://democrats.assembly.ca.gov/members/a22/Press/p222005018.htm (last visited June 16, 2008).

89 *Id.*

90 Cal. Civ. Code § 52.5(h) (2007).

91 Cal. Civ. Code § 52.5(a).

92 Cal. Penal Code § 236.1(a) (2007).

93 Cal. Penal Code § 236.1(d).

94 Cal. Penal Code § 236.1(e).

95 Cal. Civ. Code § 52.5(c).

The statute of limitations may be tolled due to a variety of circumstances including a trafficked individual's disability, minor status, lack of knowledge, psychological trauma, cultural or linguistic isolation, inability to access victim services as well as threatening conduct from a defendant preventing a trafficked individual from bringing a civil action.[96]

Restitution

Section 52.5 provides that restitution paid by the defendant to the trafficked plaintiff should be credited toward any judgment or award resulting from a section 52.5 action.[97]

Restitution is granted pursuant to Cal. Penal Code § 1202.4(q), which was also enacted with the passage of AB 22. A convicted trafficker must pay two types of restitution: a fine that goes into the California State treasury as part of a general fund to compensate crime victims, and restitution paid directly to the particular victims of his or her particular crime.[98]

A court must order restitution to the trafficking victim according to the greater of the following:

1) the gross value of the victim's labor or services based upon the comparable value of similar services in the labor market in which the offense occurred;
2) the value of the victim's labor as guaranteed under California law; or
3) the actual income derived by defendant from the victim's labor or services; or
4) any other appropriate means to provide reparations to the victim.[99]

The first three elements of the list provide baseline formulas to ensure that the victim receives some amount of monetary relief for the exploited labor. However, because the baseline formulas are generally insufficient to calculate the totality of the harm suffered by a trafficking victim, restitution includes other appropriate means for providing reparations to the victim. This provision should be construed broadly to give it its intended effect. Important considerations in these cases might include:

- Future medical and mental health related expenses
- Future lost wages
- Difficulties in procuring and maintaining employment
- Pain and suffering
- Loss of enjoyment of life

III. THE ALIEN TORT CLAIMS ACT[100]

The Alien Tort Claims Act ("ATCA") grants federal jurisdiction for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[101]

A. Background

The statute was enacted in 1789 by the first Congress, but was rarely invoked for almost 200 years. It has reemerged in more recent years as the primary civil litigation tool for addressing human rights abuses.[102] In a recent court decision, the Supreme Court upheld ATCA jurisdiction and conferred a cause of action for a

96 Cal. Civ. Code § 52.5(d-e).
97 Cal. Civ. Code § 52.5(g).
98 Cal. Penal Code § 1202.4(a)(3); § 1202.4(e, q).
99 Cal. Penal Code § 1202.4(q) (emphasis added).
100 28 U.S.C. § 1350 (2008).
101 *Id.*
102 *See* Kim & Hreshchyshyn, *supra* note 143, at 29-34 (discussing the application of ATCA in trafficking civil suits).

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.

Filartiga v. Pena-Irala[105]

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.

Kadic v. Karadzic[107]

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.

John Doe I v. Unocal Corp.[108]

This case was brought against Unocal Corporation by forced laborers in Burma. Originally the court dismissed this case,[109] but the plaintiffs — building on the *Kadic* decision — persuaded the Ninth Circuit to reinstate a suit against Unocal for forced labor, rape, and extrajudicial killing that took place in Myanmar. Unocal did not act under color of state law, but the corporation ostensibly supplied "assistance" or "encouragement" to the offending government actors.[110] The case was reargued in July 2003 before an en banc panel of the Ninth Circuit. The court in this case had the capability of handing down a monumental decision by ruling in favor of the plaintiffs. However, the parties reached a confidential settlement in principle in December 2004.[111] *Unocal* would have been the first case in which an American-based corporation stood trial in federal court because of jurisdiction predicated on ATCA for suspected violations of international law.

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103 Sosa v. Alvarez-Machain, 542 U.S. 692, 724-25 (2004).

104 The Court, however, has passed on a number of opportunities to grant certiorari in ATCA cases. *See, e.g.*, Royal Dutch Petroleum Co. v. Wiwa, 532 U.S. 941 (2001); Kadic v. Karadzic, 518 U.S. 1005 (1996); Estate of Marcos v. Hilao, 513 U.S. 1126 (1995); Tel-Oren v. Libyan Arab Republic, 470 U.S. 1003 (1985).

105 630 F.2d 876 (2d Cir. 1980).

106 *Id.* at 878.

107 70 F.3d 232 (2d Cir. 1995).

108 395 F.3d 932 (9th Cir. 2002).

109 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

110 395 F.3d 932, 947.

111 Press Release, EarthRights International, Settlement in Principle Reached in Unocal Case (Dec. 13, 2004), *at* www.earthrights.org/legalpr/settlement_in_principle_reached_in_unocal_case.htm; *see also* Duncan Campbell, *Energy Giant Agrees Settlement With Burmese Villagers*, The Guardian, Dec. 15, 2004, *at* www.guardian.co.uk/print/0,3858,5085841-103681,00.html.

Sosa v. Alvarez-Machain[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.

Khulumani v. Barclay Nat'l Bank Ltd.[115]

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. Making a Claim

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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112 542 U.S. 692 (2004).

113 *Id.* at 732.

114 *Id.* at 728. A number of courts have since rejected ATCA claims based on the *Alvarez* Court's reasoning. *See, e.g.*, De Los Santos Mora v. New York, 524 F.3d 183 (2d Cir. 2008) (failure to inform detainee that he had the right to contact his nation's consulate); Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2d Cir. 2008) (agent orange was only secondarily, and not intentionally, harmful to humans and therefore manufacturers did not violate international norms); Taveras v. Taveraz, 477 F.3d 767 (6th Cir. Ohio 2007) (international child abduction did not give rise to ATCA claim).

115 504 F.3d 254 (2d Cir. 2007).

116 *Id.* at 258.

117 *Id.* at 260.

118 Hilao v. Estate of Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994).

119 Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (slavery, genocide, extrajudicial killing, torture); *Kadic*, 70 F.3d 232, 236, 244 (2d Cir. 1995) (genocide, war crimes, crimes against humanity); Forti v. Suarez Mason, 694 F. Supp. 707, 709-11 (N.D. Cal. 1988) [Forti II] (disappearance); Forti v. Suarez Mason, 672 F. Supp. 1531, 1541-42 (N.D. Cal. 1987) [Forti I] (prolonged arbitrary detention, summary execution); Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980) (torture).

120 *Alvarez*, 542 U.S. at 738.

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 to standards developed under 42 U.S.C. § 1983 in suits seeking to redress violations of rights protected by the U.S. Constitution. In general, a defendant has acted under "color of law" where he or she acted together with state officials or with state aid.[124]

The ATCA not only creates subject matter jurisdiction for violations of international law, but also provides a cause of action.[125] Once a plaintiff successfully pleads a valid international law violation under the ATCA, he or she may then proceed to prove his or her case based on the relevant definition under international law. Where international law does not provide the relevant rules of decision, courts have at various times applied domestic federal common law and statutory law including the TVPA, state law, or the law of the foreign nation in which the tort was committed.

In *Reddy,*[126] the court provides a helpful review of the applicability of the ATCA to human trafficking inside the United States.

In *Bridgestone*,[127] the Southern District of Indiana rejected an ATCA claim based on forced labor brought by plaintiffs who were workers on a rubber plantation in Liberia. The court agreed that a valid ATCA claim could be based on the international law violation of forced labor. However, the court concluded that the working conditions of the plaintiffs in *Bridgestone* did not meet the standard of forced labor as understood under international law. The *Bridgestone* court took a rather restrictive view on the types of conditions that amounted to forced labor. According to the court, the *Bridgestone* plaintiffs could not show that they were forced to work under "menace of penalty." The court elaborated that the *Bridgestone* plaintiffs were not actually physically confined at the work premises nor did they suffer any direct threats of non-economic harm "deliberately inflicted" to compel them to work. Thus, the court concluded that the unfortunate economic

121 For international sources giving substance to forced labor as a violation of international legal norm, please refer to the ATCA appendix.

122 *See Kadic*, 70 F.3d at 239-42, 243-44.

123 Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992) (citing the Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 332).

124 *See Kadic*, 70 F.3d at 245.

125 Flores v. S. Peru Copper Corp., 343 F.3d 140, 153-54 (2d Cir. 2003); Abebe-Jira v. Negewo, 72 F.3d 844, 847-48 (11th Cir. 1996); *Hilao*, 25 F.3d at 1475. *See also Alvarez*, 542 U.S. at 724-25.

126 2003 U.S. Dist. LEXIS 26120 at *31-37. "[A]ssertions explaining that plaintiffs were brought to the United States and forced to work involuntarily and how defendants reinforced their coercive conduct through threats, physical beatings, sexual battery, fraud and unlawful substandard working conditions" are sufficient to state a claim under the ATCA for forced labor, debt bondage, and trafficking. *Id.* at *36.

127 492 F. Supp. 2d 988 (S.D. Ind. June 26, 2007).

circumstances of the workers and their inability to choose better employment could not provide the bases for an ATCA forced labor cause of action.[128]

C. Statute of Limitations

The text of the ATCA does not specify a statute of limitations. However, in *Papa v. United States*, the Ninth Circuit found that the 10-year statute of limitations of the Torture Victims Protection Act applies to ATCA claims.[129] In the *Javier H.* human trafficking litigation, the Court also found that "It is well-established that the ten-year statute of limitations of the [Torture Victims Protection Act] applies to [the ATCA]."[130] Further, the statute of limitations may be equitably tolled while the victim is unable to bring his or her claim.[131]

D. Damages

While courts are not consistent in the method by which they determine the scope of damages, they have been consistent in allowing victims to receive both compensatory and punitive damages for infringement of the ATCA.[132]

IV. FEDERAL RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT[133]

The Federal Racketeer Influenced and Corrupt Organizations Act ("RICO") extends civil liability to any person, as defined in the act, who:

A) ... receive[s] any income derived ... from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal ... to use or invest ... any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce;[134] and/or

B) through a pattern of racketeering activity or through collection of an unlawful debt [acquires or maintains]... any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce;[135] and/or

C) [is] employed by or associated with any enterprise engaged in ... interstate or foreign commerce [and] conduct[s] or participate[s] ... in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt;[136] and/or

D) conspire[s] to violate any of [these provisions].[137]

A. Background

Congress passed RICO in 1970 as part of the Organized Crime Control Act, aimed at strengthening legal mechanisms for combating organized crime. In particular, it broadened civil and criminal remedies and created evidentiary rules tailored to admitting evidence of organized crime.

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128 *Id.* at 1018-19.

129 281 F.3d 1004, 1011-12 (9th Cir. 2002). *See also Manliguez*, 226 F. Supp. 2d 377, 386 (E.D.N.Y. 2002).

130 *Javier H.*, 239 F.R.D. 342, 346 (W.D.N.Y. 2006).

131 *See, e.g.*, Arce v. Garcia, 434 F.3d 1254, 1265 (11th Cir. Fla. 2006).

132 *See* Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994) (awarding punitive damages in the amount of $4 million for torture and false imprisonment to Haitian citizens opposing the former Haitian military rule); *see also Filartiga*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984) (awarding plaintiffs $10 million in compensatory and punitive damages for the torture and murder of a seventeen-year-old member of their family).

133 18 U.S.C. §§ 1960-1968 (2008).

134 *Id.* at § 1962(a).

135 *Id.* at § 1962(b).

136 *Id.* at § 1962(c).

137 *Id.* at § 1962(d).

B. Making a Claim

A successful RICO civil claim must be based on a "pattern" of "racketeering activity." "Racketeering activity" is defined as behavior that violates certain other laws, either enumerated federal statutes or state laws addressing specified topics and bearing specified penalties. "Pattern" requires at least two acts of racketeering activity, the last of which occurred within 10 years after the commission of a prior act of racketeering activity.[138]

The TVPRA adds human trafficking crimes as predicate offenses for RICO charges and "trafficking in persons" is now included in the definition of a racketeering activity.[139]

Other racketeering activities that qualify as criminal predicate acts for bringing a civil RICO claim in the trafficking context include:

- Mail and wire fraud
- Fraud in connection with identification documents
- Forgery or false use of passport
- Fraud and misuse of visas, permits, and other documents
- Peonage and slavery
- Activities prohibited under the Mann Act
- Importation of an alien for immoral use[140]
- Extortion (i.e., an employer threatening deportation when an employee complains about minimum wage or overtime amounts to unlawful extortion of employee's property interest in minimum wage or overtime)[141]

Keep in mind, though, that fraud claims — including predicate act fraud claims under the RICO — are not subject to the liberal notice pleading requirements of the federal rules. Rather, they must be pled with particularity in your Complaint.[142] Still, the elements of fraud that must be pled are different from common law fraud. In a recent decision clarifying the burden of proof for civil RICO mail fraud claims, the U.S. Supreme Court held that "a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations."[143] This is a significantly lighter burden than most state fraud or intentional misrepresentation claims, and may have significant implications for cases where, for example, a trafficker defrauded immigration authorities to obtain a visa for a victim and this fraud proximately causes the victim's injuries.

Many federal courts also require the filing of a detailed RICO case statement shortly after the civil RICO claims are first alleged in the pleadings.

The RICO also requires the existence of an "enterprise" through which the defendant engages in racketeering activities.[144]

An "association of fact" RICO enterprise is most common.[145] It has two key requirements:

- The defendant "person" must be separate from the "enterprise."[146]

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138 *Id.* at § 1961(5).

139 *Id.* at § 1961(1)(B).

140 *Id.* at § 1961(1)(A-C).

141 Violation of state theft or extortion criminal laws is a RICO predicate act. *Id.* at § 1961(1)(A). Practitioners should consult their state's laws on this issue.

142 *See* Fed. R. Civ. P. 9(b); Giuliano v. Fulton, 399 F.3d 381, 388-89 (1st Cir. 2005); Catalan v. Vermillion Ranch Ltd. P'ship, No. 06 Civ. 1043, 2007 U.S. Dist. LEXIS 567, at *15-21 (D. Colo. Jan. 4, 2007); *but see* Corley v. Rosewood Care Ctr., Inc., 142 F.3d 1041, 1050-51 (7th Cir. 1998) (relaxing particularity requirements of Rule 9(b) where RICO plaintiff lacks access to all facts necessary to detail claim).

143 Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. —, 128 S. Ct. 2131; 170 L. Ed. 2d 1012 (June 9, 2008).

144 18 U.S.C. § 1962(a-c).

145 *Id.* at § 1961(4).

146 *See* Bennett v. United States Trust Co. of New York, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986).

- 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. Statute of Limitations

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. Damages

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 Claims in the Human Trafficking Context

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

Abraham v. Singh[158]

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),

147 United States v. Turkette, 452 U.S. 576, 583 (1981).

148 *See, e.g., Catalan*, 2007 U.S. Dist. LEXIS 567, at *15-16; *Gap, Inc.*, 2002 WL 1000068 at *3-4.

149 483 U.S. 143, 155 (1987).

150 15 U.S.C. § 15b (2008).

151 483 U.S. at 155.

152 18 U.S.C. § 1964(c) (2008).

153 *Id.* at § 1964(a).

154 *Id.* at § 1964(c).

155 *See* Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006); Mohawk Indus. v. Williams, 547 U.S. 516 (2006) (per curiam) (judgment vacated in light of *Anza* decision).

156 Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1042 (E.D.N.Y. 2006); *but see* Berg v. First State Ins. Co., 915 F.2d 460, 464 (9th Cir. 1990) (personal injuries not compensable under RICO); Rylewicz v. Beaton Servs., Ltd., 888 F.2d 1175 (7th Cir. 1989) (same).

157 The authors provide details of these cases because they provide a helpful glimpse into the complexity of the RICO, and guidance as to how to wade through these complex issues. Of note, a seventh decision, *Javier H.*, 239 F.R.D. 342, 347-48 (W.D.N.Y. 2006), addresses civil RICO only to indicate that the four-year statute of limitations was equitably tolled for new RICO claims while discovery was stayed for the pendency of the criminal action.

158 480 F.3d 351 (5th Cir. 2007).

and (d). The U.S. District Court granted the defendants' Fed. R. Civ. P. 12(b)(6) motion, dismissing all of the plaintiffs' RICO claims.

Plaintiffs appealed to the Fifth Circuit, which reversed the district court in part. The circuit court found that the plaintiffs had adequately alleged a pattern of racketeering activity: "The Plaintiffs did not allege predicate acts 'extending over a few weeks or months and threatening no future criminal conduct.' ... Rather, they alleged that the Defendants engaged in at least a two-year scheme involving repeated international travel ..."[159] The Fifth Circuit upheld the dismissal of the section 1962(a)[160] and (b)[161] claims. However, the Fifth Circuit allowed the section 1962(c) claim to proceed. Plaintiffs had adequately claimed that the corporate principal who recruited them was a RICO person separate from the corporation, which was the RICO enterprise.[162] Similarly, the section 1962(d) claims survived, as "Plaintiffs specifically alleged that the Defendants entered into an agreement and that each agreed to commit at least two predicate acts of racketeering."[163]

Catalan v. Vermillion Ranch Ltd. P'ship[164]

In this case, the plaintiffs were Chilean cattle herders employed at the defendants' ranch with H-2A visas. Among other things, the defendants allegedly confiscated the plaintiffs' identity documents and held the plaintiffs in debt peonage, whereby at the end of each month the plaintiffs would owe more money to the defendants. The plaintiffs filed suit under the FLSA, the RICO (section 1962(c) and (d)), the TVPRA, and state law. The defendants filed a motion to dismiss several of the plaintiffs' claims, including the plaintiffs' civil RICO claims.

The court denied the defendants' motion to dismiss in all respects. With respect to the RICO claims, the plaintiffs had alternatively pled two different RICO enterprises — a wise approach where there is some uncertainty as to which enterprise satisfies the requirements of the RICO. The court found that the plaintiffs had adequately alleged an enterprise for both alternatives.[165] The court also found that the plaintiffs had presented the allegations "sounding in fraud" with sufficient particularity.[166] Still, the court leaves unresolved the question of whether RICO claims that do not sound of fraud must meet the heightened pleading requirements of Rule 9, indicating that the plaintiffs' allegations of the predicate acts of extortion and human trafficking meet either notice pleading or Rule 9 pleading requirements.[167]

Zavala v. Wal-Mart Stores, Inc.[168]

The facts underlying this lawsuit received much media attention in 2002 and 2003. According to the Complaint, the plaintiffs were undocumented immigrant janitorial workers nominally employed by contractors — and occasionally by Wal-Mart — to clean Wal-Mart stores throughout the United States for sub-lawful wages. Wal-Mart allegedly hid the workers from law enforcement, threatened the workers with deportation, and locked them into the stores for the duration of their shifts.[169] Plaintiffs filed a lawsuit alleging violations of the RICO, the FLSA, 42 U.S.C. § 1985, and common law. Defendants filed a motion to dismiss the entire Complaint.

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159 *Id.* at 356.

160 *Id.* at 357 ("conclusory allegations are insufficient to state a claim under § 1962(a).").

161 *Id.* (no causal connection shown between the injuries and the defendants' "acquisition or maintenance of an interest in the enterprise.").

162 *Id.*

163 *Id.*

164 No. 06 Civ. 01043, 2007 U.S. Dist. LEXIS 567, at *15-21 (D. Colo. Jan. 4, 2007).

165 *Id.* at *16.

166 *Id.* at *17-20.

167 *Id.* at *20-21.

168 393 F. Supp. 2d 295 (D.N.J. 2005).

169 *Id.* at 301.

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]

Doe I v. Reddy[174]

Like the *Abraham* case, these plaintiffs were also from India. They claimed:

> Defendants fraudulently induced them to come to the United States from India on false promises that they would be provided an education and employment opportunities, but then forced them to work long hours under arduous conditions for pay far below minimum wage and in violation of overtime laws, and sexually abused and physical beat them.[175]

The lawsuit alleged claims under the RICO, the FLSA, the ATCA, the Thirteenth Amendment, and state law. The defendants filed a motion to dismiss certain claims. The RICO portion of the resulting opinion is discussed here.

The Court allowed the RICO claims to proceed. In a very helpful description of the requirements of civil RICO in the context of a human trafficking case, the Court found that (1) the plaintiffs' claims for lost personal property and wages constituted an "injury to business or property" and "the fact that plaintiffs also allege personal injury as a result of defendants' racketeering actions does not extinguish plaintiffs' standing based on their economic loss alleged;"[176] (2) defendants' visa fraud conspiracy continuing from 1986 to 2000 was sufficient to show a "pattern of racketeering activity;"[177] (3) plaintiffs sufficiently pled an "association in fact" RICO enterprise that exists "separate and apart from the pattern of racketeering activities;"[178] (4) plaintiffs' "investment-injury" claims under section 1962(a) survived, as plaintiffs alleged that "defendants used the proceeds [from the racketeering activity] in order to make it more difficult for plaintiffs to assert their rights, to eliminate plaintiffs' alternatives and to secrecy of their scheme so the plaintiffs' rights would not be vindicated;"[179] (5) because plaintiffs alleged that the corporate defendants were alter egos of the individual defendants, the defendants were joint or single employers of the plaintiffs, and each defendant aided and abetted sexual abuse of the plaintiffs, the RICO conspiracy claims under section 1962(d) survived;[180] and finally (6) because plaintiffs were alleged to be "vulnerable and powerless" in the Complaint, the fact the plaintiffs may have known that they entered the United States illegally does not make plaintiffs "in equal fault" under the *in pan delicto* or unclean hands doctrine.[181]

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170 *Id.* at 303.
171 *Id.* at 305-16.
172 *Id.* at 316-17.
173 Plaintiffs' civil RICO claims were dismissed without prejudice, giving plaintiffs the opportunity to amend their complaint to remedy the deficiencies. *Id* at 303.
174 2003 U.S. Dist. LEXIS 26120, at *14-28.
175 *Id.* at *12.
176 *Id.* at *15.
177 *Id.* at *16-18.
178 *Id.* at *18-23 (conglomerate enterprise was alleged to operate restaurants, manage real estate, and perform computer work, which was distinct from the racketeering).
179 *Id.* at *23-25.
180 *Id.* at *25-26.
181 *Id.* at *26-28.

Doe(s) I v. Gap, Inc.[182]

Two decisions in this case emerging out of the plaintiffs' employment in the Northern Mariana Islands provide a detailed examination of the requirements of civil RICO, though neither provides a review of the factual allegations in the case. Both involve motions to dismiss complaints: the 2001 decision addressing the First Amended Complaint, and the 2002 decision addressing the Second Amended Complaint. The significant difference between the two complaints, and therefore between the two decisions, involves the pleading of the RICO allegations against the retailer.

The 2001 decision upheld section 1962(c) claims against the manufacturer, but dismissed these claims against the retailer, finding the "failure to act is not participation in the conduct of an enterprise," and "quality control monitoring is insufficient to give rise to the inference that the retailer defendants were directing the enterprise at some level through a pattern of racketeering activities."[183] The Court did, however, find that the plaintiffs had adequately alleged RICO conspiracy claims against the retailer defendant under section 1962(d).[184]

Conversely, the 2002 decision found that the plaintiffs had sufficiently modified the allegations in their Second Amended Complaint so as to adequately allege section 1962(c) claims against the retailer. The plaintiffs had alleged "affirmative action and participation by [all] defendants in the control and direction of the alleged enterprises."[185]

V. FAIR LABOR STANDARDS ACT[186]

The Fair Labor Standards Act ("FLSA") is designed to alleviate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[187] The minimum wage and maximum hour protections offered by the FLSA provide trafficked workers with compensatory damages as well as liquidated damages for the willful wage and hour violations that occur in the context of forced labor.

A. Substantive Protections

Minimum Wage

FLSA section 6(a) provides that:

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates … except as otherwise provided in this section … not less than … $5.85 an hour beginning on the 60th day after the date of

182 2001 WL 1842389 (motion to dismiss 1st Am. Compl., hereinafter "2001 decision"), and 2002 WL 1000068 (motion to dismiss 2d Am. Compl., hereinafter "2002 decision"). These decisions are not published in any reporter, nor are they available on LEXIS.

183 2001 decision at *9-10. The Court also found that plaintiffs adequately alleged various "single retailer–single manufacturer" enterprises, but not an enterprise consisting of all retailer defendants and all manufacturer defendants, *see id.* at *3; lost wages, employer's overcharging for food and housing, and payment of recruitment fees constituted "injury to property," but "deposits" that may not be returned are not an injury to property, *see id.* at *4-5; investment injury under § 1962(a) was not sufficiently plead, *see id.* at *5-6; and Northern Mariana Island statutory offenses, peonage, and Hobbs Act were adequately plead as predicate acts, but involuntary servitude was not, *see id.* at *6-8.

184 *Id.* at *10.

185 2002 decision at *13. The Court's 2002 decision was otherwise consistent with its 2001 decision, summarized in n.314, *supra*, with several notable exceptions: the Court found the existence of *five* new RICO enterprises, *see id.* at *6-8; plaintiffs sufficiently alleged "investment injuries" under § 1962(a) so as to survive the motion to dismiss both the § 1962(a) case in principle and the § 1962(d) conspiracy to violate § 1962(a) claim, *see id.* at *10-12; and plaintiffs adequately alleged proximate cause between the defendants' acts and the § 1962(c) injury (this question was not addressed in the 2001 decision), *see id.* at *13-14.

186 Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2008).

187 *Id.* at § 202.

> 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.

Maximum Hours and Overtime

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. Calculating Hours

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.

Breaks

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

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188 *Id.* at § 206(a) (2008).

189 *See id.* at § 216(c) (2008).

190 *See id.* at § 207(a)(1) (2008).

191 Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690-91 (1946).

192 *See* 29 C.F.R. § 785.23 (2008). For domestic workers it can be argued that spending the night with a child is working because the worker's presence is comforting to the child. There are no reported decisions on this though.

193 *Id.* at § 785.1.

194 *Id.* at § 785.19(a).

195 *Id.* at § 785.18.

Sleep

For shifts shorter than 24 consecutive hours, all hours are compensable including time spent sleeping or engaging in personal activities, if the employee is on duty during that period.[196] For shifts longer than 24 hours, up to eight hours of sleep time may be excluded from compensable hours.[197] However, interrupted sleep time can be compensated for the length of the interruption; and if sleep time is interrupted to the point where the employee is denied a reasonable night's sleep, the full eight hours can be compensated.[198]

Other Free Time

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 the employee to make effective use of that time for his or her personal purposes.[199]

C. Record Keeping

The FLSA requires that employers keep contemporaneous records of hours worked by their employees.[200] If an employer fails to maintain accurate records, the employee can provide a reasonable estimation of the hours worked. The burden then falls on the employer to affirm or deny the reasonableness of the employee's estimation by showing the exact number of hours worked by the employee.[201] Some state labor codes award the employee damages for the employer's failure to maintain records. Employers may also be subject to civil penalties for record-keeping violations and pay stub violations under state laws. However, there is no private right of action to enforce the FLSA's record-keeping provisions.

D. Deductions

A deduction only violates the FLSA if it brings the worker's hourly wages below the minimum wage, or if it cuts into the worker's overtime wages.[202] Generally, an employer who pays a worker cash wages below the minimum wage or overtime may consider certain facilities as credits towards the required wages, *unless:*

- the employee has not actually and voluntarily received the benefit (note that several circuits have held that meal deductions do not need to be voluntary);[203]
- the facilities for which the deduction is taken are furnished primarily for the benefit or convenience of the employer;[204]
- the benefit has been furnished in violation of federal, state, or local law;[205]

196 *Id.* at § 785.21.

197 *Id.* at 785.22(a). Note that "[w]here no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked." *Id.*

198 *Id.* at § 785.22(b).

199 *Id.* at § 785.15.

200 29 U.S.C. § 211(c) (2008).

201 *Anderson*, 328 U.S. at 687.

202 *See* 29 C.F.R. §§ 531.27-28 (2008).

203 *See id.* at § 531.30; *see also* David Bros. Inc. v. Marshall, 522 F. Supp. 628 (N.D. Ga. 1981). *But see* Herman v. Collis Foods, Inc., 176 F.3d 912, 918-19 (6th Cir. 1999) (USDOL regulation requiring deductions for meals to be voluntary is "no longer a viable regulation" and therefore involuntary meal deductions were proper); Davis Bros., Inc. v. Donovan, 700 F.2d 1368 (11th Cir. 1983) (same); Donovan v. Miller Props., Inc., 547 F. Supp. 785 (M.D. La. 1982), *aff'd* 711 F.2d 49 (5th Cir. 1983) (same).

204 *See* 29 C.F.R. § 531.3(d) (2008); *see also* Arriaga v. Fla. Pac. Farms, L.L.C., 305 F.3d 1228 (11th Cir. 2002).

205 *See* 29 C.F.R. § 531.31 (2008); *see also* Archie v. Grand Cent. P'ship, Inc., 86 F. Supp. 2d 262, 270 (S.D.N.Y. 2000) (finding that deductions for housing costs were not proper where they violated state administrative regulations); *but see* Castillo v. Case Farms of Ohio, Inc., 96 F. Supp. 2d 578, 638-41 (W.D. Tex. 1999) (finding that 1) deductions for substandard housing is unauthorized; but 2) deductions for housing that is paid to a third party and consented to by the employee is appropriate even if the housing is substandard).

- 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:

Inbound Transportation (Smuggling Fees)

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, because otherwise the inbound transportation costs, which the worker expended for the employer's benefit, will bring the first week's wages below the minimum.[210]

Finally, the cost of transportation from one worksite to another cannot be deducted.[211] However, the actual cost of transporting a worker from his or her home to the worksite can be deducted so long as the travel time does not constitute hours worked under the FLSA.[212] Arguably, however, charges for transportation beyond normal commuting distances are to the benefit of the employer, and therefore, should not be deducted.[213]

Housing

Generally, the reasonable cost of housing can be deducted from a worker's minimum or overtime wages. However, there are significant exceptions that might arise in the trafficking context. First, if the conditions of the housing violate federal, state, or local law, the employer cannot charge the worker for the housing if it brings the wages below the minimum.[214] Second, if the housing is furnished for the benefit of the employer, the deduction violates the FLSA.[215]

If the housing is legal and is not for the benefit of the employer, the amount of the permissible deduction is frequently disputed. The question of how to calculate the reasonableness of deductions varies between the circuits. For example, the Second Circuit allows a deduction for the "fair rental value" of the housing.[216] Other circuits have found, however, that the employer can only deduct the "actual cost" of providing the housing.[217]

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206 *See* 29 C.F.R. §§ 531.3, 531.33 (2008).

207 *See id.* at § 531.6.

208 *See id.* at § 531.31.

209 *See Arriaga*, 305 F.3d 1228; Rivera v. Brickman Group, Ltd., Case No. 05-1518, 2008 U.S. Dist. LEXIS 1167 (E.D. Pa. Jan. 7, 2008); Marshall v. Glassboro Serv. Assn., Inc., 1979 U.S. Dist. LEXIS 9053, 87 Lab. Cas. (CCH) p 33,865 (D.N.J. Oct. 19, 1979), *sum. aff'd,* 639 F.2d 774 (3d Cir. 1980), *cert. denied,* 101 S. Ct. 1757 (1981); *see also* Torreblanca v. Naas Foods, Inc., 89 Lab. Cas. (CCH) p 33,927 (N.D. Ind. 1980).

210 *See Arriaga*, 305 F.3d 1228.

211 *See* 29 C.F.R. § 531.32(c) (2008).

212 *See id.* at § 531.32(a).

213 *See Arriaga*, 305 F.3d at 1240-41.

214 *See* Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1257-8, 1279 (N.D. Okla. 2006) (trafficking case); *Case Farms*, 96 F. Supp. 2d at 638-41.

215 *See, e.g.,* Stewart v. S.U.N.Y. Maritime College, 141 Lab. Cas. (CCH) ¶ 40,166 (S.D.N.Y. Sept. 19, 2000). *But see* Soler v. G. & U., Inc., 833 F.2d 1104, 1110-11 (2d Cir. 1987) (housing furnished to migrant workers was not to the benefit of the employer).

216 *See Soler*, 833 F.2d at 1111, *later proc.,* 768 F. Supp. 452 (S.D.N.Y. 1991).

217 *See, e.g.,* Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d 1500, 1513-14 (11th Cir. 1993); Donovan v. Williams Chem. Co., 682 F.2d 185, 189 (8th Cir. 1982); Lopez v. Rodriguez, 668 F.2d 1376, 1381 (D.C. Cir. 1981).

Meals

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 average cost of providing the meals to a group of workers.[219] Obviously, deductions from wages for alcohol furnished without the proper license, and deductions for illegal drugs, both violate the FLSA.

Essential Tools and Uniforms

"Tools of the trade and other materials and services incidental to carrying on the employer's business" are for the benefit of the employer, and therefore, charges for these materials cannot be deducted from a worker's wages.[220] Likewise, an employer cannot charge a worker for the purchase[221] or rental of a uniform "where the nature of the business requires the employee to wear a uniform."[222]

FICA and Other Employment Taxes

Deductions for taxes are permitted to bring a worker's wages below the minimum if (1) the employer remits the withheld taxes to the appropriate agency, and (2) the underlying law permits the employer to deduct the taxes.[223] In the trafficking context, employers who know that their employees are using false Social Security numbers often withhold payroll taxes but do not report these withholdings to the IRS or the state taxing authority. This, of course, is a violation of the FLSA and of other federal and state laws. Likewise, some employers attempt to charge workers with the employer's portion of the payroll taxes. As this charge is illegal under federal tax law, it also violates the FLSA if it brings the worker's wages below the minimum.

Payments of Debts

As discussed above, payment of a debt incurred for an activity that violates the law, such as a smuggling fee or charges for illegal drugs, is prohibited under the FLSA. However, an employer *may* advance wages to a worker and then deduct the advance from the worker's paycheck, even if it cuts into the minimum wages.[224] However, if the employer benefits in any way, such as through a profit, kickback, or other means, the debt charge is illegal if it reduces the wages below the minimum.[225] You should also look at your state labor law, which may impose requirements on employers advancing money to workers. If the employer failed to follow a procedure dictated by state law, recuperating a debt from a worker's wages would violate the FLSA because the loan was a "facility" provided in violation of state law.

E. Statute of Limitations

Actions for non-willful violations of the FLSA must be commenced within two years after the violation occurs. Actions for willful violations of the FLSA must be commenced within 3 years after they occur.[226] Still, there

218 29 C.F.R. § 531.3(a) (2008); Field Operations Handbook, § 30.09(b) (U.S. Dep't Labor 1988); *compare* Herman v. Collis Foods, Inc., 176 F.3d 912, 920-21 (6th Cir. 1999).

219 *Herman*, 176 F.3d at 920-21 (6th Cir. 1999).

220 29 C.F.R. § 531.3(2)(i) (2008).

221 *Id.* at § 531.3(d)(2)(iii).

222 *Id.* at § 531.32(c).

223 *Id.* at § 531.38.

224 Brennan v. Veterans Cleaning Serv., Inc., 482 F.2d 1362, 1369 (5th Cir. 1973).

225 *Id.*; 29 C.F.R. § 531.35 (2008).

226 29 U.S.C. § 255 (2008).

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. Damages

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 awarded.[229] Civil penalties of up to $10,000 may be awarded in certain circumstances.[230] Injunctive relief is available to restrain violation of the minimum wages or overtime provisions of the Act, or the prohibition on engaging in transport of items produced in violation of such provisions.[231] Some circuits also allow the award of punitive damages.[232]

G. Other Protections

The FLSA prohibits an employer from firing or otherwise retaliating against an employee for exercising his or her rights under wage and hour laws.[233] An employer's improper behavior during litigation may itself also constitute a violation of the FLSA's anti-retaliation provisions.[234] An employer who violates the anti-retaliation provisions is liable for legal or equitable relief, such as employment, reinstatement, promotion, and payment of wages lost plus an additional amount as liquidated damages.[235]

The FLSA does not require severance pay, sick leave, vacations, or holidays.[236]

H. FLSA Coverage

The minimum wage provision of the FLSA provides that "[e]very employer shall pay [the minimum wage] to each of his employees who in any workweek is engaged in commerce or in the production of goods for

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227 *See, e.g.,* U.S. v. Sabhnani, Case No. 07-cr-429, 2008 U.S. Dist. LEXIS 55108, *14-15 (E.D.N.Y. June 19, 2008) (in forced labor criminal prosecution, FLSA statute of limitations equitably tolled because "not only was there no notice, but the women could not speak English. They were completely unaware of the FLSA or any of its minimum wage or overtime provisions"); *Iglesias-Mendoza*, 239 F.R.D. 363, 369 (S.D.N.Y. 2007) (in representative action, FLSA opt-in class allowed for entire six-year statute of limitations period because plaintiffs alleged there was no FLSA poster); Baba v. Grand Cent. P'ship, No. 99 Civ. 5818, 2000 U.S. Dist. LEXIS 17876 (S.D.N.Y. Dec. 7, 2000) (equitable tolling denied where there was no FLSA poster); Henchy v. City of Absecon, 148 F. Supp. 2d 435, 438-39 (D.N.J. 2001); Cisneros v. Jinny Beauty Supply Co., No. 03 C 1453, 2004 U.S. Dist. LEXIS 2094 (N.D. Ill. February 5, 2004); Cortez v. Medina's Landscaping, No. 00 C 6320, 2002 U.S. Dist. LEXIS 18831 (N.D. Ill. September 30, 2002) (defendants' failure to post the notice required tolled the limitations period until the employee acquired a general awareness of his rights under the FLSA); Kamens v. Summit Stainless, Inc., 586 F. Supp. 324 (E.D. Pa. 1984). *But see* Claeys v. Gandalf Ltd., 303 F. Supp. 2d 890 (S.D. Ohio 2004) (plaintiff failed to show that employer willfully or recklessly violated FLSA overtime requirement); *see also* Viciedo v. New Horizons Computer Learning Ctr. of Columbus, 246 F. Supp. 2d 886 (S.D. Ohio 2003) (though plaintiff did not see posting, other witness did).

228 29 U.S.C. § 216(b) (2008); *Chellen*, 446 F. Supp. 2d at 1279-81 (liquidated damages awarded in trafficking case, when defendants failed to show a reasonable and good faith belief that they were executing a "training program"); *but see* 29 C.F.R. § 790.22(b) (2008) (setting forth limited prerequisites for the court to exercise discretion in the award of liquidated damages).

229 29 C.F.R. § 790.22(d).

230 *See* 29 U.S.C. § 216(a) (2008) (penalties relating to transport of items produced in violation of the Act); *see also* 29 U.S.C. § 216(e) (2008) (penalties arising from child labor violations).

231 29 U.S.C. § 217 (2008).

232 *See* Travis v. Gary Cmty. Mental Health Ctr., 921 F.2d 108 (7th Cir. 1990) (plaintiff entitled to punitive damages under FLSA, 29 U.S.C.S. § 215(a)(3), because damages under that section were not limited). *But see* Snapp v. Unlimited Concepts, Inc., 208 F.3d 928 (11th Cir. 2000) (holding that punitive damages go beyond the statutory goal of making a plaintiff whole again, so are not available in an anti-retaliation claim).

233 29 U.S.C. § 215(a)(3) (2008).

234 *See, e.g.,* Torres v. Gristede's Operating Corp., Case No. 04 Civ. 3316, 2008 U.S. Dist. LEXIS 66066, *58-69 (S.D.N.Y. Aug. 28, 2008) (counterclaim against plaintiff violated the FLSA's anti-retaliation provisions).

235 29 U.S.C. § 216(b).

236 It can be argued that there should be a private right of action to enforce the hot goods provision of the FLSA. However, the provision has not yet been litigated yet. *See, e.g.,* Lara Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 Yale L.J. 2179, 2208-09 (1994).

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]

The FLSA affords protection to "any individual employed by an employer" who has "suffered or [is] permit[ted] to work."[241] The "economic reality" test is used to determine whether this employment relationship exists for purposes of FLSA enforcement. The test analyzes the circumstances of the whole activity to determine whether the individual is economically dependent on the supposed employer.[242] Some of the factors that may be considered in this analysis include: direct or indirect supervision of employees and direct or indirect authority to determine and modify employment terms.[243] Whether an individual meets the definition of an employee under the FLSA is not affected by factors, such as the place where the work is performed, the absence of a formal employment agreement, the time or method of payment, or whether an entity is licensed by the state or local government.[244]

While the FLSA applies to nearly every occupation and industry, special rules may modify or limit recovery in some situations. The rules that are particularly relevant to human trafficking cases are described below. An employer who claims an exemption under the FLSA has the burden of showing that it applies.[245]

Undocumented Workers

A worker's immigration status is irrelevant in determining "employment relationship" for purposes of FLSA enforcement. All workers are protected under the FLSA regardless of immigration status. Widespread misunderstanding regarding back pay recovery for undocumented workers has occurred due to *Hoffman Plastic Compounds v. NLRB*.[246] In *Hoffman Plastics*, an undocumented worker who used falsified immigration documents to secure employment attempted to assert his rights under the National Labor Relations Act, alleging that he was wrongfully terminated in retaliation for his participation in a unionization campaign. The court determined that the plaintiff was not entitled to recover for wages he would have earned had he not been fired.[247] However, *Hoffman Plastics* does not limit recovery of any unpaid wages and overtime for work already

237 29 U.S.C. § 206(a) & (b) (emphasis added).

238 *See* 29 U.S.C. § 207(a)(1).

239 *See* 29 U.S.C. § 203(s)(1)(A)(ii).

240 *See, e.g.*, 29 C.F.R. § 776.22a (referring to enterprise coverage, "any employee employed in such enterprise is subject to the provisions of the Act to the same extent as if he were individually engaged 'in commerce or in the production of goods for commerce'"); *see also* Wirtz v. Melos Constr. Corp., 408 F.2d 626, 627 (2d Cir. 1969) (explaining that the 1961 amendments to the FLSA adding enterprise coverage *expanded* coverage of the Act beyond employees who were themselves engaged in commerce).

241 29 U.S.C. at § 203(e) and (g).

242 Goldberg v. Whitaker House Coop., 366 U.S. 28, 33 (1961).

243 Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).

244 *See* Chapter 2, § V(B), *supra*, for a discussion of joint employment standards.

245 *See* Walling v. Gen. Indus. Co., 330 U.S. 545 (1947); *see also* Mitchell v. Kentucky Fin. Co., 359 U.S. 290 (1959).

246 535 U.S. 137 (2002).

247 *Id.* at 151-52.

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.

Sex Workers

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, and general well-being of workers," so the FLSA presumably covers any work, including legal commercial sex work, that violates fair hours and pay standards.[250] For example, legal sex workers, such as exotic dancers, who work immensely irregular hours without a bona fide contract that specifies overtime pay, would have an actionable claim under the FLSA.[251] However, sex workers could be exempted from FLSA coverage if their place of work is considered a "recreational center" that does not operate for more than seven months of the year.[252] Even in the absence of an FLSA claim, victims of sex trafficking have many other causes of action available to them.

Relatives

When an enterprise's only regular employees are the owner and the owner's parent, spouse, child, brother, sister, grandchildren, grandparents, and in-laws, it is not a covered enterprise or part of a covered enterprise for purposes of FLSA.[253]

While this exemption may preclude enforcement of the FLSA in cases of servile marriage or where certain family members are trafficked for forced labor, numerous other claims can be brought for both compensatory and punitive damages.[254]

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248 In *Hoffman Plastics*, the Court denied an NLRB claim for "backpay" based work not yet performed, but compensation that the plaintiff would have received had he not been wrongfully terminated. *Id.* at 148-49. This situation may be distinguished from a plaintiff who seeks "backpay" in the form of payment for labor already performed but never compensated. *See* Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499, 501-03 (W.D. Mich. 2005) (rejecting defendant's argument that *Hoffman Plastics* bars an undocumented worker's claim for backpay under FLSA based on work already performed); Flores v. Albertsons, Inc., No. CV 01-00515 AHM (SHx), 2002 U.S. Dist. LEXIS 6171, at *17-20 (C.D. Cal. Apr. 9, 2002) (same); *Liu*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002) (same); *see also* Affordable Hous. Found., Inc. v. Silva, 469 F.3d 219, 243 (2d Cir. 2006) (dicta indicating that, in FLSA claim for unpaid wages, "the immigration law violation has already occurred. The order does not itself condone that violation or continue it. It merely ensures that the employer does not take advantage of the violation by availing himself of the benefit of undocumented workers' past labor without paying for it in accordance with minimum FLSA standards.").

249 *See Chellen*, 446 F. Supp. 2d at 1277-78 ("Hoffman does not preclude an award for work actually performed…"); Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 321-25 (D.N.J. 2005) (though this human trafficking case was somewhat damaging in its rulings against plaintiffs on their RICO and 42 U.S.C. § 1985 claims, it contains perhaps some of the strongest post-*Hoffman Plastics* language supporting undocumented immigrants' rights to pursue FLSA claims); Singh v. Jutla, 214 F. Supp. 2d 1056 (N.D. Cal. 2002).

250 29 U.S.C. § 202 (2008).

251 *Id.* at § 207(f).

252 *Id.* at § 213(3)(A).

253 *Id.* at § 203(s)(2).

254 *Singh*, 214 F. Supp. 2d at 1061.

Domestic Service Workers

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

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255 Workers such as "babysitters employed on a casual basis, companions for the aged and infirm, and domestic workers who reside in their employers' households" do not enjoy protection under FLSA. 165 A.L.R. Fed. 163; *see* 29 U.S.C. § 213(b)(21) (2000).

256 "Domestic service employment refers to services of a household nature performed by an employee in or about a private home … (t)he term includes, but is not limited to, employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis." 29 C.F.R. § 552.3 (2008).

257 29 U.S.C. § 213(a)(15).

258 *See* 29 C.F.R. § 552.3.

259 Long Island Care at Home, Ltd., v. Coke, 127 S. Ct. 2339 (U.S. 2007).

260 *See* 29 C.F.R. § 552.109(a).

261 Cal. Code Regs. tit. 8, § 11150(3)(B) (2008).

262 *See, e.g.,* N.Y. Lab. Law § 651, et. seq. (2008); N.Y. Comp. Codes R. & Regs. tit.12, § 142-2.2; Topo v. Dhir, No. 01 Civ. 10881, 2004 U.S. Dist. LEXIS 4134 (S.D.N.Y. March 15, 2004).

263 Note that the "casual babysitting" exception of the FLSA domestic worker coverage is narrowly construed and is intended for teenagers and others not dependent on the income. *See, e.g., Topo*, 2004 U.S. Dist. LEXIS 4134, at *9-10.

264 29 C.F.R. § 552.102(a) (2008).

265 *Id.* at § 552.102(b).

266 *Id.*

267 *Id.* at § 552.102(a).

the employee to make effective use of the time."[268] "If the sleeping time, meal periods or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked."[269]

Proving hours worked in domestic worker cases can be difficult since it is often the employer's word against the employee's. However, your client can produce evidence of the extent of their work with witnesses or lists of tasks that the employer may have ordered your client to complete. Domestic workers who were caring for children can corroborate their work schedule with the child's daily schedule.

Farmworkers

Agricultural workers[270] are entitled to the federal minimum wage of $5.15 per hour, with some exceptions.[271] However, they are exempt from the FLSA's overtime requirements.[272] Keep in mind, however, that the FLSA definition of agriculture is fairly limited. Therefore, many packing shed workers, and any worker changing the raw, natural state of the agricultural product, *are* eligible for overtime.[273]

Further exemptions apply to agricultural workers less than 16 years of age, particularly if employed by their parents. (*See* "Children" *below*.)

Joint employment liability almost always exists when agricultural employers utilize the services of farm labor contractors. In these situations, both the grower and the contractor are responsible for complying with the FLSA.

Agricultural employers must also comply with the Migrant and Seasonal Agricultural Worker Protection Act, which provides farmworkers with additional industry-specific protections. (*See* § V, "Migrant and Seasonal Agricultural Worker Protection Act.")

Children

The FLSA provides both added protections and exemptions for children. The FLSA protects against oppressive child labor in three major areas: (1) hour regulation, (2) age limitations, and (3) regulation of hazardous occupations.[274] The FLSA provides that no producer, manufacturer, or dealer shall ship or deliver goods using oppressive child labor.[275] In addition, "no employer shall employ any oppressive child labor in commerce or in the production of goods for commerce ..."[276] "Oppressive child labor" can occur when the employer violates the minimum age or hazardous job requirements.[277] The standard can vary greatly depending on the nature of the work (agriculture, non-agriculture or a job deemed particularly hazardous like mining and manufacturing), and whether the child is working for a parent.[278] The largest exemption in child minimum age and hazardous job restrictions occurs when the child is employed by his or her parent or by a person standing in the parent's place, except in manufacturing or mining occupations. These parental exceptions are particularly loose in the agricultural context.[279] Additional regulations granted to the Secretary of Labor under section

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268 *Id.*

269 For domestic workers, it can be argued that sleeping with a child is working because the worker is giving the employer the benefit of their services by comforting or tending to the child.

270 Agricultural work is defined as work performed on a farm as an incident to or in conjunction with farming operations. *See* 29 U.S.C. § 203(f) (2008). The USDOL regulations further refine this definition. *See generally* 29 C.F.R. § 780, *et seq.* (2003).

271 The farmworker minimum wage exemptions are set forth in 29 U.S.C. § 213(a)(6) (2008).

272 29 U.S.C. § 213 (2008).

273 *See* 29 C.F.R. § 780, *et seq.* (2003).

274 29 U.S.C. §§ 203(l), 212, 213(c) (2008).

275 *Id.* at § 212.

276 *Id.* at § 212(c) (basic child labor guidelines are found in this section).

277 *Id.* at § 203(l).

278 *Id.*

279 29 C.F.R. § 570.2(a)(2) (2008); *see also* 29 U.S.C. § 213(c) (2008) (outlining particular tasks deemed unfit for youth).

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]

There is also minimum wage exception for youth. This allows an employer to pay any newly hired employee under 20 years old less than minimum wage.[282] The pay rate is set at $4.25 for the first 90 consecutive calendar days of employment.[283]

For details on required certification when employing children, *see* 29 C.F.R. § 570.5-.12.

Non-Agriculture

The minimum age standards in all occupations *except* agriculture are as follows:

- 16 years old is the general minimum age requirement.[284]
- Youth who are age 14-16 may work in occupations other than manufacturing or mining when the employment does not overlap with school hours, or otherwise interfere with the child's schooling or health and well-being.[285]
- Youth who are age 14 and 15 cannot work more than 3 hours a day or 18 hours a week when school is in session and they cannot work more than 8 hours a day and forty hours a week when school is not in session.[286]
- Youth who are age 14 and 15 can only work between 7:00 a.m. and 7:00 p.m. during the school year. The hours extend to 9:00 p.m. between June 1 and Labor Day.[287]
- When the employment is found particularly hazardous by the Secretary of Labor or detrimental to their health and well-being, the youth must be 18 or older.[288]
- Youth who are age 18 or older are not subject to any restrictions on jobs or hours.[289]

Agriculture

The minimum age requirement for children working in agriculture is generally 16 when the employment is during school hours and the job is within the school district in which the minor is living at the time.[290] There are major exceptions under agriculture that allow children younger than 12 to work when the employer is the child's parent or a person standing in place of the parent on a farm owned and operated by this person.[291] In addition, children under these circumstances are not protected against hazardous occupation as they would be in non-agricultural work. When the agricultural employment takes place outside school hours, the age limit drops to 14, though 12- and 13-year-olds may be employed with written parental consent and a child under 12 may be employed by his or her parent on a farm owned or operated by the parent or on a farm where all employees are exempt from the minimum wage provisions as per FLSA guidelines.[292]

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280 29 C.F.R. §§ 570.124-125 (2008).
281 *See id.* at § 570.35.
282 29 U.S.C. § 206(g) (2008).
283 *Id.*
284 29 C.F.R. § 570.2(a)(1) (2008).
285 *Id.* at § 570.2(a)(1)(i).
286 *Id.* at § 570.35.
287 *Id.*
288 *Id.* at § 570.2(a)(1)(ii).
289 *Id.* at § 570.2.
290 29 U.S.C. § 213(c) (2000).
291 29 C.F.R. § 570.2(b)(1)-(2) (2008).
292 *Id.*

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]

Trainees

The U.S. Supreme Court has held that trainees are not employees within the meaning of the FLSA.[298] However, it is common for employers to misclassify employees as trainees to avoid complying with the FLSA's minimum wage and overtime requirements.

The USDOL Wage and Hour Division has urged that the following factors be considered in determining whether someone is a trainee or an employee:

> The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; [t]he training is for the benefit of the trainee; [t]he trainees do not displace regular employees, but work under close observation; [t]he employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his or her operations may actually be impeded; the trainees are not necessarily entitled to a job at the completion of the training period; [t]he employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.[299]

In one human trafficking case, the Court engaged in a very detailed examination of these factors and concluded that the plaintiffs were employees, rather than trainees.[300]

I. Civil Penalties for Child Labor Violations

FLSA section 16(e)[301] specifically addresses civil penalties for violations of child labor.

- Each "oppressive child labor" violation, or violation of FLSA sections 12 or 13(c)[302] is not to exceed $11,000 per employee.[303]

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293 29 U.S.C. § 213(c) (2008).

294 *Id.*

295 29 C.F.R. § 570.2(b) (2008).

296 *Id.* at § 575.1(b)(5).

297 *See id.* at § 570.71 (listing particular jobs in agriculture considered hazardous).

298 *See* Walling v. Portland Terminal Co., 330 U.S. 148, (U.S. 1947).

299 Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026 (10th Cir. 1993) (citing Wage & Hour Manual (BNA) 91:416 (1975), but finding that this examination should be based on the totality of the circumstances, rather than the "all or nothing" approach suggested by USDOL); Archie v. Grand Cent. P'ship, 997 F. Supp. 504, 531-32 (S.D.N.Y. 1998) (similar, but referencing 1980 update of WH Manual).

300 *See* Chellen v. John Pickle Co., 334 F. Supp. 2d 1278, 1294 (N.D. Okla. 2004).

301 29 U.S.C. § 216(e) (2008).

302 *Id.* at §§ 212, 213(c).

303 The FLSA language outlining how to calculate the damages takes into consideration the available evidence of the violation in conjunction with the size of the business and gravity of harm. 29 U.S.C. § 216(e)(3) (2008); *see also* 29 C.F.R. § 579.5(a) (2008).

- 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. Enforcement of the Fair Labor Standards Act

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's right to bring a separate action under the FLSA terminates.[306]

It is important to keep in mind that the USDOL is charged with enforcing the FLSA and does not necessarily represent the interest of the worker. While the USDOL may be able to obtain a quicker judgment for the employee, a private lawsuit will give your client more control over the direction of his or her case. Be sure to check your state labor code as your state statute may provide for greater wage and hour protections than the FLSA, as well as additional remedies against employer misconduct.

VI. MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT[307]

The Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), affords significant protections to migrant and seasonal farmworkers. The AWPA imposes specific requirements for housing conditions, transportation safety and insurance, wage statements, payroll records, working arrangement enforcement, farm labor contractor registration, and disclosure of the terms and conditions of employment. Attorneys with farmworker legal services programs around the country have developed expertise in AWPA litigation. If you are representing a farmworker in a trafficking case and you are not familiar with the AWPA, please contact author Werner for a list of farmworker legal services providers in your area.

VII. TITLE VII[308]

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employers from discriminating against employees on the basis of any of the following protected categories: race, color, religion, national origin, or sex. The 1978 Pregnancy Discrimination Act amended Title VII to include pregnancy as a protected category.[309] Employers may not "fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."[310]

304 29 U.S.C. §§ 206-07 (2008).
305 *Id.* at § 216(e)(2).
306 *Id.* at § 216(b).
307 *Id.* at § 1801 *et seq.*
308 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17 (2008); Portions of this section were adapted with permission from the Legal Aid Society, Employment Law Center, Workers' Rights Clinic Employment Law Manual, 2003.
309 42 U.S.C. § 2000e(k).
310 *Id.* at § 2000e2.

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]

A. Proving Discrimination

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

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

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.

Stray Remarks

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

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:

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311 *Id.* at § 2000e.

312 McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

313 Civil Rights Act of 1991, 42 U.S.C. § 1981 (2008).

314 Price Waterhouse v. Hopkins 490 U.S. 228, 261 (1989) (distinguishing between direct evidence of discrimination and stray remarks in Justice O'Connor's concurrence).

315 *See, e.g.,* E.E.O.C. v. Sears, Robeuck & Co., 628 F. Supp. 1264, 1280 (N.D. Ill. 1986).

Facial Discrimination

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

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]

Disparate Impact

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]

B. Sexual Harassment

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."

Quid Pro Quo

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]

316 Int'l Union, United Auto., etc. v. Johnson Controls, 499 U.S. 187, 215-16 (1991).

317 Teamsters v. United States, 431 U.S. 324 (1977); EEOC v. O & G Spring & Wire Forms Specialty Co., 38 F.3d 872, 874-75 (7th Cir. 1994).

318 Griggs v. Duke Power Co., 401 U.S. 424, 431-2 (1971) (stating that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity ... [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.").

319 Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

320 Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

321 Burlington Indus., v. Ellerth, 524 U.S. 742, 761 (1998).

"Hostile Work Environment"

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. Other Harassment: Race and/or National Origin

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.

"Hostile Work Environment"

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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322 Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) (citing *Meritor Sav. Bank* at 65-69).

323 Sex-based conduct may include, but is not limited to, sexual advances, requests for sexual favors, or other verbal, visual, or physical conduct of a sexual nature. However, a sexual harassment claim based on the creation of a hostile work environment need not have anything to do with sexual advances. *See, e.g.,* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998) ("[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."); *Meritor Sav. Bank*, (So long as the harassing conduct is based on gender, it violates the law as harassment based on sex, even if the harassing conduct is not in itself sexual). Accordingly, same-sex harassment is actionable under Title VII, regardless of the harasser's sexual orientation. *Oncale*, 523 U.S. at 80 ("A trier of fact might reasonably find ... discrimination ... if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.").

324 A complainant may demonstrate that the conduct was unwelcome by showing, among other things, emotional distress, deteriorating job performance, that he or she avoided the harasser, that he or she informed friends or family of the harassment, that he or she complained to the harasser or other company representatives of the harassment, or absence of evidence showing the conduct was welcome or encouraged. The fact that sex-related conduct was 'voluntary,' in the sense that the plaintiff employee was not forced to participate against his or her will, *is not a defense* to a sexual harassment suit. *Meritor Sav. Bank*, 477 U.S. at 67-68.

325 *Id.* at 65-69. To show that the harassing conduct was severe or pervasive enough to create an abusive working environment, the plaintiff employee must meet *both* an (i) objective *and* (ii) a subjective standard. *Harris*, 510 U.S. 17,21 (1993). Under the objective standard, plaintiff employee must show that a *reasonable* woman would have considered the conduct severe or pervasive. Ellison v. Brady, 924 F.2d 872, 878 (1991) ("[A] female plaintiff states a *prima facie* case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."). Or that in consideration of the *totality of circumstances* the environment was sufficiently hostile or abusive. *Harris*, 510 U.S. at 22 (listing factors considered in the totality of circumstances test). Under the subjective standard, plaintiff employee needs to show that she *actually* found the conduct sufficiently severe or pervasive to interfere with the work environment. *Id.* The fact finder must take the plaintiff's fundamental characteristics into consideration. Conduct by employer does not need to seriously affect an employee's psychological well-being or lead the employee to suffer injury in order to be actionable under Title VII. *Harris*, 510 U.S. at 22 ("Title VII comes into play before the harassing conduct leads to a nervous breakdown. ... So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.").

326 *See, e.g., Chellen*, 434 F. Supp. 2d at 1106 (in trafficking case, hostile work environment existed where the workplace "was characterized by the severe and pervasive intimidation, ridicule and insult for the ... plaintiffs."); *but see* Pierson v. Norcliff Thayer, Inc. 605 F. Supp. 273 (E.D. Mo. 1985) (denying Title VII violation claim where there were four specific instances of racial harassment).

327 Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 41 FEP 721 (7th Cir. 1986) (finding a hostile work environment where there was insufficient remedial action in response to racial jokes told by upper management).

Employer Liability for Behavior of Supervisors, Co-Workers, and Third-Parties

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. Retaliation by Employer

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. Filing Process and Statute of Limitations

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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328 Note that the harasser must be plaintiff employee's *own* supervisor and that the employee can assert affirmative defenses to avoid liability. *Meritor Sav. Bank*, 477 U.S. 57 (1986).

329 Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978) (finding that the employer did not authorize, acquiesce to, or ratify the supervisor's discriminatory conduct and therefore, did not violate Title VII).

330 42 U.S.C. § 2000e-3(a) (2008); *see also* Miller v. Fairchild Industries, Inc., 797 F. 2d 727 (9th Cir. 1984) (discussing the *prima facie* case of retaliation under Title VII).

331 EEOC v. Crown Zellerbach Corp., 720 F. 2d 1008, 1013 (9th Cir. 1983).

332 42 U.S.C. § 2000e-5(e) (2008).

333 National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 (2002); *cf.* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. —, 127 S. Ct. 2162, 2175 (2006) (in a hostile work environment case, "the actionable wrong is the environment, not the individual acts that, taken together, create the environment.").

334 *Ledbetter*, 127 S.Ct. at 2177.

335 *Id.* at 2169 (internal citations omitted). The Court, however, distinguished between "paychecks using a discriminatory pay structure" which would create a new charging period, and "paychecks pursuant to a system that is facially nondiscriminatory and neutrally applied." *Id.* at 2174 (internal citations omitted).

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. Damages

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, terms and conditions of contractual relationships, as well as terms and conditions of employment. The statute covers discrimination only on the basis of race.[343] This, in some circumstances, may also be extended to discrimination based on national origin.[344]

Section 1981 permits recovery of unlimited compensatory and punitive damages. Furthermore, it does not have the procedural filing requirements of Title VII and has a longer statute of limitations.[345] It also allows a finding of liability against a defendant in his or her individual or personal capacity, which is not available under Title VII.[346] Still, where section 1981 claims are brought arising out of the same facts as a Title VII claim, "[t]he elements of each cause of action have been construed as identical."[347] Section 1981 also allows for attorney's fees and costs.[348]

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336 *Id.* at § 2000e-5(b).

337 It is important to check with the state version of the employment discrimination law statute because the statute of limitations in most states is often longer than that for the claims filed with the EEOC.

338 42 U.S.C. § 2000e-5(k) (2008).

339 *See* Chapter 3, § V(H), *supra* (describing the impact of *Hoffman Plastics* on FLSA coverage for undocumented workers.)

340 Compensatory damages may be available for other costs incurred as a result of the discriminatory act in addition to back pay, front pay and pre-judgment interest, such as medical expenses and emotional distress.

341 42 U.S.C. § 1981(a) (2008).

342 The maximum damage awards are: 1) 15-100 employees = $50,000; 2) 101-200 = $100,000; 3) 201-500 = $200,000; 4) 500 + employees = $300,000. *Id.* at § 1981. Please see the next section on 42 U.S.C. § 1981 for more information.

343 *Id.* at 1981(b).

344 *Chellen*, 434 F. Supp. 2d at 1104.

345 *Id.* at 1103 ("[B]ack pay and lost benefits [could be recovered] for an unlimited period of time.").

346 *Id.* at 1107.

347 *Id.* at 1103 (quoting Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1444 (10th Cir. 1988)).

348 42 U.S.C. § 1988.

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 *one year*. Since some human trafficking cases lead to successful criminal prosecutions, analogous torts may not have to be proven under the doctrine of collateral estoppel. However, the absence of a criminal trial should not deter your client from pursuing tort claims. In civil cases, the burden of proof is a preponderance of the evidence, which is a lower standard to meet than the burden of beyond a reasonable doubt in the criminal context. Please note that tort law is extremely varied depending on jurisdiction. You should consult your jurisdictions application of tort laws. The following are torts that frequently occur in human trafficking situations.

A. Intentional Infliction of Emotional Distress

Intentional Infliction of Emotional Distress ("IIED") involves:

- extreme and outrageous conduct by the defendant or the defendant's agent;

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349 *Id.* at § 1985(3).

350 Conspiracy Act of 1861, ch. 33, 12 Stat. 284 (codified as amended at 42 U.S.C. § 1985(3)).

351 Act to Enforce the Provisions of the Fourteenth Amendment, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1985(3)).

352 42 U.S.C. § 1985(3).

353 *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 268 (1993).

354 *See* Deressa v. Gobena, No. 05 Civ. 1334, 2006 U.S. Dist. LEXIS 8659, at *16-17 (E.D. Va. Feb. 13, 2006). As noted earlier, *see* Chapter 3, § II(B), *supra*, Plaintiff in this case also used § 1985(3) as a mechanism to allege a cause of action for violations of the Thirteenth Amendment and 18 U.S.C. § 1584. *Id.* at *13-14.

355 *See* Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 317-20 (D.N.J. 2005).

356 *Id.* at 319 (citing Lake v. Arnold, 112 F.3d 682, 688 (3d Cir. 1997)).

357 *See Zavala* at 319-20.

- intent to cause, or the reckless disregard of causing, emotional distress;
- severe or extreme emotional distress suffered by the plaintiff; and
- actual or proximate cause between the conduct and the distress.[358]

Most states recognize IIED without requiring the victim to suffer physical manifestations of mental distress. "Extreme and outrageous" conduct is not clearly defined, however, mere rudeness or inflammatory behavior is not sufficient.[359] The relationship between the plaintiff and the defendant is important. For example, continuous mocking or harassment by an employer toward an employee is more likely to be characterized as outrageous rather than taunting among equals.[360]

B. False Imprisonment

The following generally are elements of false imprisonment:

- nonconsensual, intentional confinement of the plaintiff;
- no lawful purpose; and
- confinement for an appreciable length of time, no matter how short (can be 15 minutes).[361]

Confinement can take several different forms: physical barriers; force or threat of immediate force against the plaintiff, his or her family, or others in plaintiff's immediate presence or property; omission when the defendant has a legal duty to act; or improper assertion of legal authority. If a physical barrier is used to restrain the plaintiff, it must surround the plaintiff in all directions so that there is no reasonable means of escape.[362]

In the trafficking context, one Court found that the plaintiff had sufficiently pled a false imprisonment claim even though the plaintiff at one point had a key to the residence while her traffickers were abroad. The Court found that the defendants' "threats of arrest and prosecution and [plaintiff's] fear of the [defendants] effectively imprisoned her on these occasions."[363] In another case, the Court found that the plaintiffs had sufficiently pled false imprisonment claims where defendant Wal-Mart allegedly locked them into their stores at night.[364] The Court also discussed — without reaching any conclusion — the question of whether threats of deportation themselves can sufficiently support a claim of false imprisonment.[365] Yet another court found that an individual defendant had falsely imprisoned the plaintiffs through a combination of physical confinement and threats.[366]

C. Assault

The following are elements of assault:

- act intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact; and
- reasonable apprehension of such injury by the plaintiff (actual contact not required).[367]

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358 *See generally* Restat 2d of Torts, § 46; Lopez v. City of Chicago, 464 F.3d 711, 720 (7th Cir. 2006).

359 *See, e.g.*, Toro v. Arnold Foods Co., Case No. 3:07-CV-1356, 2008 U.S. Dist. LEXIS 66043, *10-11 (D. Conn. Aug. 28, 2008).

360 *See, e.g.*, Patterson by Patterson v. Xerox Corp., 901 F. Supp. 274, 279 (N.D. Ill. 1995).

361 *See, e.g.*, Fermino v. Fedco, 7 Cal. 4th 701 (Cal. 1994); Lyons v. Fire Ins. Exchange, 161 Cal. App. 4th 880, 888 (Cal. App. 2d Dist. 2008). The specific elements of false imprisonment vary between states.

362 *Id.*

363 *See Deressa*, 2006 U.S. Dist. LEXIS 8659, at *14-15.

364 *See Zavala*, 393 F. Supp. 2d at 334-35.

365 *Id.* at 332-35.

366 *See Chellen*, 446 F. Supp. 2d at 1274-75, 1291 (in trafficking case, acknowledging that words and conduct inducing a plaintiff to believe that "resistance or physical attempts to escape ... would be useless and futile" are sufficient to constitute false imprisonment).

367 *See generally* Restat 2d of Torts, § 21.

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]

D. Battery

The following are elements of battery:

- the acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact; and
- an offensive [or harmful] contact with the person of the other directly or indirectly results.[371]

Battery is actionable even in trivial physical contacts so long as they are harmful or offensive and without consent.

E. Fraudulent Misrepresentation

The following are elements of fraudulent misrepresentation:

- a misrepresentation (falsity, concealment, or nondisclosure);
- defendant knew of or consciously disregarded the statement's falsity;
- defendant intended to induce the plaintiff's action in reliance on the representation;
- plaintiff reasonably relied on the representation to his or her detriment; and
- plaintiff suffered damages.[372]

The misrepresentation must be of a past or present material fact. Material fact is defined as information of importance to a reasonable person or where the defendant knows that the victim attaches importance to the fact in question. A representation that is technically true but conveyed to deceive a person constitutes a misrepresentation. A misrepresentation also occurs when the defendant has a duty to disclose but does not. In assessing the reasonableness of the plaintiff's reliance on the misrepresentation, the court will take into account his or her particular qualities as well as the circumstances surrounding the case.

If you are making claims of fraudulent misrepresentation in your Complaint, you should keep in mind the Fed. R. Civ. P. 9(b) requires that such allegations be pled with particularity.[373]

F. Negligence

Negligence is used when intention cannot be proven. It involves:

- **Duty**: a legally recognized relationship between the parties.
- **Standard of Care**: the required level of expected conduct.
- **Breach of Duty**: failure to meet the standard of care.
- **Cause-in-Fact**: plaintiff's harm must have the required nexus to the defendant's breach of duty.
- **Proximate Cause**: there are no policy reasons to relieve the defendant of liability.
- **Damages**: the plaintiff suffered a cognizable injury.[374]

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368 *See generally* Restat 2d of Torts, § 32.

369 *See generally* Restat 2d of Torts, § 24.

370 *See generally* Restat 2d of Torts, § 31.

371 *See, e.g.*, White v. Muniz, 999 P.2d 814, 816 (Colo. 2000) (quoting Restat 2d of Torts, § 13).

372 *See, e.g.*, Me. Eye Care Assocs., P.A. v. Gorman, 2008 ME 36, P12 (Me. 2008); *Chellen*, 446 F. Supp. 2d at 1290.

373 *See, e.g.*, Circle Group Internet, Inc. v. Fleishman-Hillard, Inc., 231 F. Supp. 2d 801, 803 (N.D. Ill. 2002) (citing Ackerman v. Nw. Mut. Life Ins. Co., 172 F.3d 467, 469 (7th Cir. 1999)).

374 *See* John L. Diamond et al., Understanding Torts (2d ed. 2002).

G. Negligent Infliction of Emotional Distress

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* element.[375] However, there is authority to the contrary.[376] Basically, negligent infliction of emotional distress involves:

- Defendant should have realized (and was negligent in not realizing) that his or her conduct involved an unreasonable risk of causing emotional distress.
- Distress, if it were caused, might result in illness or bodily harm.[377]
- Requirement of physical injury: Courts have disagreed on whether actionable emotional distress must be accompanied by physical injury, with some holding that observable physical symptoms are required, and others holding that they are not.[378] In some cases, claimants may be required to demonstrate that the physical injuries occurred contemporaneously with or shortly after the incidents causing emotional distress.[379]

H. Trespass to Chattel and Conversion[380]

Trespass to chattel and conversion are two different intentional torts that protect personal property from wrongful interference. In many cases both torts may be applicable.

I. Trespass to Chattel

Trespass to chattel is the intentional interference with the right of possession of personal property. The defendant's acts must either:

- intentionally damage the chattel;
- deprive the possessor of its use for a substantial period of time; or
- totally dispossess the chattel from the victim.

There is no requirement that the defendant act in bad faith or intend to interfere with the rights of others. It is sufficient that the defendant intends to damage or possess a chattel, which is properly possessed by another.

Unlike conversion, the doctrine of transferred intent has traditionally been applied to trespass to chattel.

J. Conversion

The following are elements of conversion:

- There must be an intentional exercise of dominion and control over a chattel.
- This exercise of dominion and control must so seriously interfere with the right of another to control the chattel that the defendant may rightly be required to pay the other the full value of the chattel.

Only very serious harm to the property or other serious interference with the right of control constitutes conversion. Less serious damage or interference may still be considered trespass to chattel.

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375 Abston v. Levi Strauss & Co., 684 F. Supp. 152, 157 (E.D. Tex. 1987) (applying Texas law).

376 *See* Ericson v. City of Meriden, 113 F. Supp. 2d 276, 291 (D. Conn. 2000) (applying Connecticut law) (tort arises only where it is based upon conduct of the defendant that is egregious, outrageous, or done in an inconsiderate, humiliating, or embarrassing manner).

377 Peralta v. Cendant Corp., 123 F. Supp. 2d 65, 82 (D. Conn. 2000) (applying Connecticut law).

378 Observable physical injury is required: Freeman v. Kansas State Network, Inc., 719 F. Supp. 995, 1000 (D. Kan. 1989) (applying Kansas law); physical injury is not required: Kelley v. Schlumberger Tech. Corp., 849 F.2d 41, 44 (1st Cir. 1988) (applying Louisiana law); Benedict v. Gen. Motors Corp., 859 F.2d 921 at *9-10 (6th Cir. 1988) (applying Ohio law).

379 *Freeman*, 719 F. Supp. at 1000 (applying Kansas law).

380 *See* Diamond et al. at 20-24.

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 facts, she would meet the partial performance exception because there was "a fraudulent oral promise by the defendant upon which the plaintiff justifiably relied by engaging in acts that are 'unequivocally referable' to the oral promise, resulting in substantial injury to the plaintiff."[385]

D. Breach of the Covenant of Good Faith and Fair Dealing

Within every contract, there is an implied covenant of good faith and fair dealing. This covenant is meant to allow the terms of the contract to be interpreted fairly. Therefore, what constitutes a breach of the covenant depends on the particular terms of the contract. Even though the covenant is essentially an implied contract term, courts have occasionally held that the breach of the implied covenant of good faith and fair dealing can also constitute a tort.[386] This allows for tort damages as well as contract damages.

E. Damages

Contract remedies are generally limited to compensatory damages of which the standard measure is expectation damages. Expectation damages are intended to place the victim of the breach in the position they would have been in if the promise had been performed. Future earnings or front pay may be recovered in the event of wrongful discharge and can substitute reinstatement, less any sum, which has been earned or could be earned through the plaintiff's duty to mitigate damages. As an alternative, reliance damages are based on the non-breaching party's costs and have the purpose of putting the non-breaching party back into the position they

381 *See, e.g.*, Williams v. Riverside Cmty. Corr. Corp., 846 N.E.2d 738, 745 (Ind. Ct. App. 2006).

382 *See, e.g.*, Clark v. Walker, Case No. 04 C 941, 2004 U.S. Dist. LEXIS 24046, *6-8 (N.D. Ill. Nov. 23, 2004).

383 Topo v. Dhir, No. 01 Civ. 10881, 2003 U.S. Dist. LEXIS 21937, at *10 (S.D.N.Y. Dec. 3, 2003) (quoting N.Y. Gen. Oblig. Law § 5-701).

384 *Id.* at *11.

385 *Id.*

386 *See, e.g.*, Crisci v. Sec. Ins. Co. of New Haven, 426 P.2d 173, 177-79 (Cal. 1967).

would have been in had the promise never been made.[387] For example, reliance damages can be losses incurred as a result of the worker's relocation due to the employer's false representations regarding the employment.

XII. QUASI-CONTRACT CLAIMS

Quasi-contractual obligations are imposed by the law for reasons of justice, as opposed to contractual obligations that are based on an agreement between parties.[388] Accordingly, the terms of the quasi-contractual obligation are often "determined by what equity and morality appear to require after the parties have come into conflict."[389] Quasi-contracts differ from express and implied contracts in that the former develops independent of the intention or promises of the parties and instead depends on the benefit conferred on the breaching party.[390] Quasi-contracts may give rise to rights in spite of the express refusal of a party.[391] In fact, "quasi-contract" is somewhat of a misnomer, as it is often a remedy in the form of restitution, rather than a contractual agreement.[392] Factors that are relevant to the court's determination of how to restore the parties to the *status quo* include: "the relative fault, the contractual risks assumed by the parties, any unjust enrichment or unjust impoverishment, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party."[393]

A. Unjust Enrichment

Unjust enrichment has been defined as "circumstances which give rise to the obligation of restitution, that is, the receiving and retention of property, money, or benefits which in justice and equity belong to another."[394] Under the principle of unjust enrichment, a plaintiff can recover in restitution if (1) the plaintiff has conferred a benefit on the defendant; (2) the plaintiff conferred the benefit with the expectation of being compensated for its value; (3) the plaintiff's expectation was known or should have been known to the defendant; and (4) allowing the defendant to avoid liability would unjustly enrich the defendant.[395]

In a recent farmworker trafficking case, the Court denied the defendant's motion to dismiss the plaintiffs' unjust enrichment claim.[396] Of note, the Court indicated that the defendant's claim that he paid sub-contractors for the plaintiffs' labor would not necessarily defeat an unjust enrichment claim, even if true.[397]

B. *Quantum Meruit*

Quantum meruit is a theory of recovery in the form of restitution.[398] The principle of *quantum meruit* has been defined as a "recovery in which one party to a contract sues the other, not on the contract itself, but on an implied promise to pay for so much as the party suing has done. If one party refuses to perform his part, the other may rescind and sue on a *quantum meruit*."[399] Generally, recovery in *quantum meruit* requires the following elements:

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387 ATACS Corp. v. Trans World Commc'ns, Inc., 155 F.3d 659, 669 (3d Cir. 1998) ("Where a court cannot measure lost profits with certainty, contract law protects an injured party's reliance interest by seeking to achieve the position that it would have obtained had the contract never been made, usually through the recovery of expenditures actually made in performance or in anticipation of performance.").

388 Restatement (Second) Of Contracts § 4 cmt. b (1981).

389 Arthur Linton Corbin Et Al., Corbin On Contracts § 1.20 (Matthew Bender & Co. 2004).

390 Restatement, *supra* note 556.

391 Corbin, *supra* note 557.

392 Restatement, *supra* note 556.

393 Corbin, *supra* note 557.

394 Ballentine's Law Dictionary (3d ed. 1969).

395 Eisenberg, *supra* note 493, at s. 312.

396 Does v. Rodriguez, No. 06 Civ. 00805, 2007 U.S. Dist. LEXIS 15061, at *14-16 (D. Col. Mar. 2, 2007).

397 *Id.*

398 Restatement, *supra* note 556, at § 370 cmt a.

399 The Law Dictionary (Anderson Publ'g Co. 2002).

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]

400 Topo v. Dhir, No. 01 Civ. 10881, 2003 U.S. Dist. LEXIS 21937, at *9 (S.D.N.Y. Dec. 3, 2003) (in human trafficking lawsuit, cross-motions for summary judgment denied on, *inter alia, quantum meruit* claim), Report and Recommendation *aff'd* in relevant part 2004 U.S. Dist. LEXIS 4134, at *11-12 (S.D.N.Y. Mar. 15, 2004).

401 Md. Code Ann., Lab. & Empl. §§ 3-427, 3-507 (LexisNexis 2008).

402 Conn. Gen. Stat. § 31-72 (2008).

403 Cal. Lab. Code §§ 970, 972 (Deering 2007).

404 Cal. Bus. & Prof. Code §§ 17200, 17203, 17204 (Deering 2008); Bank of the W. v. Super. Ct. of Contra Costa County, 833 P.2d 545, 553 (Cal. 1992); People v. McKale, 602 P.2d 731, 733-34 (Cal. 1979); Consumers Union of U.S., Inc. v. Fisher Dev., Inc., 257 Cal. Rptr. 151, 154-55 (Cal. Ct. App. 1989); Stoiber v. Honeychuck, 162 Cal. Rptr. 194, 206-07 (Cal. Ct. App. 1980).

CHAPTER 4
DAMAGES

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 trafficking victims with the economic resources to move toward self-sufficiency.

II. PROCEDURE

A few general procedural rules apply to damages. First, the burden of proving the trafficked plaintiff's claims in civil cases also applies to proving damages. Generally, the plaintiff must prove by a preponderance of evidence that she has suffered and will in the future suffer the losses for which he or she seeks relief. In some jurisdictions, a claim for punitive damages may require a more stringent standard.

Second, the "single judgment rule" requires a one-time recovery for each claim brought in the civil case. This rule prevents subsequent litigation for prospective harms resulting from injuries claimed in the original lawsuit. Thus, both past and anticipated future losses for injuries should be pled at the same time.

Third, the damage award may take the form of a lump sum or divided into periodic payments. Lump sum awards require that predicted future losses are folded into one damage award along with past losses. Attorneys should carefully calculate their award recommendation to account for their clients' future economic needs and upon receipt of a lump sum award, advise their clients to invest wisely to generate favorable interest rates. The technicalities of calculating future damages to present day market values are described in the section on "Compensatory Damages."

The alternative recommended by some tort reformers is a judgment requiring periodic payments. Such payments can be adjusted over time to accommodate changing facts in the amount of losses suffered by the plaintiff, such as fluctuating medical bills. There are increased administrative costs associated with resolving disputes over the amount of the periodic payments and lump sum awards are far more common.

Periodic payments may also take the form of a structured settlement. This is a voluntary agreement between parties in which the plaintiff agrees to receive periodic payments over time. The structured settlement relieves the plaintiff of the management responsibility of investing the lump sum award and diminishes the possibility that the lump sum award is exhausted within a few years. However, with a structured settlement, the plaintiff will not control the distribution of money and if administered through an annuity company, annuities may not be indexed to current inflation rates.[1]

III. TYPES OF DAMAGES

The following section focuses on compensatory and punitive damages, which comprise the majority, if not all, of the trafficked plaintiff's damage award. Other types of damages are also briefly mentioned.

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1 *See generally,* Brown & Chalidze, *Structured Settlements: An Overview,* 22 Vt. B. J. & L. Dig. 14 (1996); Yandell, *Advantages & Disadvantages of Structured Settlements,* 5 J. Legal. Econ. 71 (Fall 1995).

A. Compensatory Damages

Compensatory damages are awarded as compensation, indemnity, or restitution for harm and are meant to restore the plaintiff back to his or her position before the injury occurred. There are two types of compensatory damages: economic and non-economic, also known as special damages or general damages, respectively. Economic or special damages consist of a plaintiff's out-of-pocket losses proximately resulting from the defendant's misconduct. Economic damages are theoretically tangible monetary losses most often including medical expenses and lost earnings. Non-economic or general damages are for a plaintiff's pain and suffering, loss of enjoyment of life, and other similar intangible losses.

Compensatory: Economic Damages

Any actual losses flowing directly from the plaintiff's injury that can be tangibly quantified are recoverable as economic damages. This includes, but is not limited to, lost earnings; medical expenses for physical, psychiatric, or psychological care; physical and occupational therapy or rehabilitation; transportation; temporary housing costs; and child care expenses. To corroborate evidence of these losses, all receipts and affidavits attesting to these expenditures should be collected and recorded.

i. Lost Wages

The bulk of a trafficking victim's economic damages will consist of past and future lost wages.

The most common formula for calculating lost wages is the minimum wage and overtime standard set forth by the FLSA or the applicable state labor code. However, a prevailing wage standard may also be applied where the work involved, under normal circumstances, was entitled to a higher than minimum wage rate. For illegitimate or illegal work, such as prostitution, a court may adopt an alternative formula to compensate the victims based on the amount that the defendants profited off the forced labor or the lost income potential of the victims during the period of the forced labor.

Past wages are calculated by tabulating the hours worked and multiplying the number of hours with the wage and overtime rate. Other employer violations of federal or state labor law, such as failure to provide rest and meal breaks, accrue monetary penalties that can also be counted toward a plaintiff's actual damages.

Future wages may be awarded where the plaintiff's injury reduces his or her ability to perform his or her job, or renders him or her unemployed.[2] For trafficking victims, it can be argued that the harm of trafficking impairs the future earning potential the victims would have enjoyed had they remained in their countries of origin or had they entered the United States through appropriate channels. Thus, because of the trafficking, the victims' possibility of employment is hindered due to their unstable immigration status, and little to no social support within the United States.

ii. Calculating Future Losses

If a trafficked plaintiff is claiming future losses, whether based on lost earning power or prospective medical expenses, the calculation of such losses should be adjusted to the plaintiff's life expectancy, work life expectancy, and/or the expected duration of the plaintiff's injuries. In addition, the total amount of future losses must be discounted to present day value to factor in inflation and earned interest. Thus, the amount of future damages that a trafficked plaintiff is awarded today must comprise a lesser total dollar amount to account for prudent investing that would earn interest or appreciate in value over time.

With respect to discounting future wage loss to present day value, courts apply one of two methods: "total offset" or "real interest." The "total offset" method applies the same inflation

2 Sylvester v. Gleason, 371 N.W.2d 573, 575 (Minn.App. 1985).

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.

Compensatory: Non-Economic Damages

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] Finally, attorneys should be aware that many states have attempted to alleviate the unpredictability of damage awards through statutory reforms, such as caps on

3 Michael T. Brody, *Inflation, Productivity, and the Total Offset Method of Calculating Damages for Lost Future Earnings*, 49 U.Chi. L.Rev. 1003, 1022 (1982).
4 Kaczkowski v. Bolubasz, 421 A.2d 1027, 1038 (Pa. 1980).
5 Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 533 (1983).
6 *Id.* at 537-38.
7 *Id.* at 548.
8 Newman & Yehuda, *PTSD in Civil Litigation: Recent Scientific and Legal Developments,* 37 Jurimetrics 257 (1997).
9 Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 Cal. L.Rev. 773, 781 (1995).
10 *Id.* at 785.
11 Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases*, 6 Psychol. Pub. Pol'y & L. 712, 714 (2000).
12 *Id.* at 782.
13 Seffert v. Los Angeles Transit Lines, 364 P.2d 337, 347 (Cal. 1961).
14 James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 Yale.J. on Reg. 171, 172 (1991).

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

B. Punitive Damages

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.

Procedure

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.

Ratios

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.

Defendant's Wealth

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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15 A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L.Rev. 869, 878 (1998).

16 Cal. Civ. Code § 3294 (2008); N.D. Cent. Code § 32-03.2-11 (2008).

17 Oberg v. Honda Motor Co., Ltd., 851 P.2d 1084, 1095 (Or. 1993).

18 *See* Lee R. Russ, *Annotation, Standard of Proof as to Conduct Underlying Punitive Damage Awards — Modern Status*, 58 A.L.R. 4th 878 (1987).

19 Colo. Rev. Stat. § 13-25-127.

20 Cal. Civ. Code § 3295 (d); N.C. Gen. Stat. § 1D-30.

21 BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

22 *Id.* at 575.

23 538 U.S. 408 (2003).

24 A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L.Rev. 869, 878 (1998).

25 Kelly v. Haag, 145 Cal. App. 4th 910 (App.Ct. 2006).

while not being overly burdensome.[26] The plaintiff may have the burden of establishing the defendant's financial condition[27] and providing "the entire financial picture" of the defendant, including assets and liabilities, in order to justify a punitive award.[28] For a trafficked plaintiff, establishing the defendant's "entire financial picture" is difficult to accomplish where the wealth and debt of traffickers is hidden and unidentifiable. In other states, however, the defendant's wealth is not considered essential in the determination of a punitive award and may only be considered if the defendant appeals the punitive judgment.[29] Attorneys should therefore, consult the rules of their jurisdiction to strategize the calculation and granting of punitive awards to their trafficked clients.

Vicarious Liability for Punitive Damages

In many trafficking cases, plaintiffs seek to impose punitive damages on third party employers whose employees served as the primary agents for the trafficking violations. There are various jurisdictional approaches to this issue. Some courts allow claims for punitive damages to flow to employers for the misconduct of their employees based on a vicarious liability theory.

Other states implement a more stringent standard. For example, in California, an employer is liable for punitive damages based on the actions of an employee if "the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of other or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice." With respect to corporate employers, California law further requires that the "advance knowledge" and "conscious disregard" be on the part of the corporation's "officer, director, or managing agent."[30]

Still, other states follow the Second Restatement, which states that punitive damages can be awarded against "a master or other principal because of an act by an agent," if:

A) the principal or managerial agent authorized the doing and the manner of the act, or
B) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
C) the agent was employed in a managerial capacity and was acting in the scope of employment, or
D) the principal or a managerial agent of the principal ratified or approved the act.[31]

C. Nominal Damages

Nominal damages (e.g., $1) are symbolic damages to establish the rights of the plaintiff and/or to clarify that defendant committed the wrongful act. Nominal damages are usually awarded when the violation is established but no actual harm occurred or was proven with certainty.

D. Injunctive and Other Equitable Relief

Prohibitory injunctions order the defendant to refrain from certain activities while mandatory injunctions order the defendant to perform a particular act. Other types of equitable relief include restitutionary remedies, such as a constructive trust or equitable lien.

26 *Id.* at 914-15.
27 *Id.* at 916.
28 *Id.* at 915-17.
29 Hall v. Wal-Mart Stores, Inc., 959 P.2d 109, 112 (Utah 1998).
30 Cal. Civil Code § 3294(b).
31 Restatement (Second) of Torts, § 909 (1965).

E. Liquidated Damages

Liquidated damages are the amount predetermined by the parties to a contract as the total compensation to an injured party should the other party breach the contract. Liquidated damages may also be set by statute, as with the FLSA, to remedy a breach of that statute.

F. Statutory Damages

Some state and federal labor and civil rights statutes allow for an award of statutory damages. This is usually a fixed amount (e.g., $1,000), or a maximum amount (e.g., up to $1,000) that either is automatically awarded, or that may be awarded instead of actual damages where actual damages are difficult to quantify.

G. Pre-Judgment Interest

In several circuits, pre-judgment interest is available on back pay awards if liquidated damages are not awarded.[32] Courts differ on how to calculate prejudgment interest. Some courts base pre-judgment interest rate calculations on federal post-judgment interest rates calculated from the date the judgment is entered, "at a rate equal to the weekly average one-year constant maturity treasury yield."[33] Other courts have calculated the pre-judgment interest rate based on the prime rate from the date of injury to the date of judgment.[34] Yet other courts utilize the state pre-judgment interest rate.[35]

H. Attorneys' Fees and Costs

The costs of litigation and the prevailing party's reasonable attorneys' fees may be awarded.

IV. INSURANCE

A. Collateral Source Rule

The traditional collateral source rule provides that payments received by the plaintiff for his or her injuries, from other sources, such as health insurance, public benefits, or charity, are not admissible in a civil action to reduce the defendant's obligation to pay damages. Thus, a plaintiff is still entitled to the full amount of compensation from a liable defendant, regardless of the compensation the plaintiff may have obtained from "collateral sources." The rule is intended to prevent an unfair windfall to the defendant for the plaintiff's prudence in obtaining health insurance and/or the goodwill of charity in assisting the plaintiff's needs. Approximately half of the states have eliminated the rule or restricted its application for specific claims, mostly in the context of medical malpractice and claims against public entities. Generally, the traditional rule will apply to trafficked plaintiffs receiving benefits and donations for their injuries — such compensation will NOT offset the amount of damages assessed against the defendant. However, damages against the defendant will be offset by the defendant's payment of direct benefits to the plaintiff, intended as compensation for the plaintiff's injuries.

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32 Some appellate courts have held that pre-judgment interest for back pay awards under the FLSA is mandatory, *see* Usery v. Associated Drugs, Inc., 538 F.2d 1191, 1194 (5th Cir. 1976); McClanahan v. Mathews, 440 F.2d 320, 326 (6th Cir. 1971), or should be presumed to be appropriate, *see* Brock v. Richardson, 812 F.2d 121, 126-27 (3d Cir. 1987); Ford v. Alfaro, 785 F.2d 835, 842 (9th Cir. 1986); Donovan v. Sovereign Sec., Ltd., 726 F.2d 55, 57-58 (2d Cir. 1984); Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179, 183 (8th Cir. 1975); *cf.* Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658, 663 (4th Cir. 1969) (finding district court's denial of pre-judgment interest was not an abuse of discretion). *But see* Clougherty v. James Vernor Co., 187 F.2d 288, 293-94 (6th Cir. 1951), *cert. denied*, 342 U.S. 814 (1951) (denying pre-judgment interest).

33 28 U.S.C. § 1961 (2008). *See, e.g.,* Lefevre v. Harrison Group, Civil Action No. 95-1529, 1996 U.S. Dist. LEXIS 9483 at *3 (E.D. Pa. July 8, 1996).

34 *See, e.g.,* Cement Div., Nat'l Gypsum Co. v. City of Milwaukee, 144 F.3d 1111, 1114-15 (7th Cir. 1998) (finding the prime rate appropriate for calculation of pre-judgment interest); Donovan v. Dairy Farmers of Am., 53 F. Supp. 2d 194, 197-98 (N.D.N.Y. 1999) (awarding prejudgment interest from the date of the injury).

35 *See, e.g.,* Baker v. John Morrell & Co., 266 F. Supp. 2d 909, 949 (N.D. Iowa 2003).

B. Homeowner's Insurance as an Additional Source of Recovery

If a defendant trafficker owns a home, his or her homeowner's insurance policy may be a source of recovery for the trafficked plaintiff. Homeowner's insurance policies generally include both first-party and third-party liability provisions. These policies protect the policyholder against damage to the home, as well as injuries to third parties resulting from conduct in which the policyholder is found to be at fault. The personal liability provision in homeowner's insurance policies generally extends injuries that occur both within and outside of the home. Homeowner's insurance, in some cases, may provide up to $500,000 in coverage, providing trafficked plaintiffs with a deep pocket, protection against defendants declaring bankruptcy, and protection against defendants depleting their assets.

The key to triggering coverage of a trafficker's homeowner's insurance policy is to plead claims that are explicitly enumerated in the policy itself. The claim most often found in these policies is "negligence," providing protection for accidental injuries to third parties that occur within the home and injuries caused by the policyholder's unintentional conduct outside the home. However, some policies also protect against "false imprisonment," and "invasion of privacy." Early discovery of the trafficker's insurance policy will determine the range of claims and the extent of the trafficker's personal liability coverage.

If the policy does indeed cover a claimed injury, the trafficked plaintiff's attorney should ensure that defense counsel has provided the complaint to the insurer. It may be possible at this point to settle with the insurer within the monetary limits of the policy coverage. If a settlement cannot be reached, litigation against both the trafficker and the insurer is a possibility.

V. TAX CONSEQUENCES

Damage awards received by trafficked plaintiffs will have tax consequences. For example, damages granted for lost wages are treated as income and therefore, taxable earnings. Punitive damages are also considered taxable gross income.

The tax treatment of compensatory damages for personal injuries was traditionally separated into two categories, physical injuries and non-physical injuries. Compensatory damages for physical injuries enjoyed tax exemption pursuant to United States Revenue Code section 104 (a), while emotional distress damages received no tax benefit. However, a recent D.C. Circuit case, *Marrita Murphy and Daniel J. Leveille v. Internal Revenue Service and United States of America*,[36] held section 104 (a)(2) unconstitutional insofar as it allowed the taxation of compensatory damages for a non-physical injury that was unrelated to lost wages or earnings. The D.C. Circuit ruled that the complainant was owed the taxes that she paid on her damage award plus applicable interest. Thus, this opinion indicates some movement toward expanding tax exemption to pure emotional distress damages, which would benefit trafficked plaintiffs who suffered tremendous emotional harm, but not physical injury.

Tax rules are complex. To learn more about how tax regulations will impact the damage award in a trafficking case, it is imperative to seek the advice of a tax expert.

VI. PUBLIC BENEFITS

Depending on the amount of the damage award received by the trafficked plaintiff, government benefits he or she is receiving, such as health insurance, food stamps, and low-income housing may be affected.

36 493 F.3d 170 (2007).

In general, tort payments, including worker's compensation, are not exempt from the calculation of eligibility for government benefits unless they are codified as exempt in benefits' or other related statute. For example, tort compensation relating to federal Holocaust Reparations is exempt from the calculation of eligibility for some public benefits. A worthy pursuit for those in any state would be to lobby for the legislative codification of the refugee and government benefits of those receiving tort payments from civil human trafficking cases.

Two important features of the damage award will impact a trafficked plaintiff's eligibility for public benefits: the method of payment and the amount of damages. For example, small periodic payments of a damage award may preserve the trafficked plaintiff's eligibility for certain benefits. However, it may be in the interest of the plaintiff to receive a larger lump sum award, forego benefits for a period of time, and reapply for them when he or she is in need. To strategize the continued receipt of benefits in light of a damage award, consult public benefits attorneys. The Western Center on Law and Poverty (www.wclp.org) provides a general manual on how to approach public benefits issues.