THE MONITOR

A Quarterly Publication by Johnson Fistel, LLP • Summer 2020

When Businesses Are Exposed To Federal Sex Trafficking Liability

Until recently, sex trafficking was an underground crime and social ill. Now, however, it seems federal sex trafficking – and the laws aimed at stopping it – are more than ever in the news, and in the courts. While the allegations giving rise to Jeffrey Epstein's arrest last year, and to Ghislaine Maxwell's arrest just this July, are more obvious criminal sex trafficking cases, the law governing federal sex trafficking is much broader. Not only do victims have a right to bring a civil lawsuit against the sex traffickers, but – depending on the facts – victims may also bring claims against any person or entity who benefitted in any way from the sex trafficking. As such, hotels, transportation companies, and rental companies utilized by the perpetrators of sex trafficking are also exposed to liability.

Federal Sex Trafficking Laws

The Trafficking Victims Protection Act ("TVPA") is a federal law criminalizing the use of fraud, force, or coercion in order to recruit, entice, and solicit a person to engage in a commercial sex act. 18 U.S.C. § 1591(a)(1). A "a commercial sex act" is any act whereby anything of value is exchanged or received by any person for a sexual act. 18 U.S.C. § 1591(e)(3). The TVPA also criminalizes knowingly benefitting from participation in a venture that engages in sex trafficking. 18 U.S.C. § 1591(a)(2).

To more fully combat sex trafficking, Congress went further by expressly permitting sex trafficking lawsuits. The TVPA grants sex trafficking victims the right to bring a civil lawsuit against the perpetrator

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and/or anyone who benefits from participation in the venture if that person knew or should have known that sex trafficking was occurring. 18 U.S.C. § 1595(a). The victims, if successful, are entitled to compensatory damages, punitive damages, and their attorney fees.

"Section 1595 opened the door for liability against facilitators, who did not directly traffic the victim, but benefitted from what the facilitator should have known was a trafficking venture." *A.B. v. Marriott Int'l, Inc.*, No. 19-5770, 2020 WL 1939678, at 7 (E.D. PA Apr. 22, 2020) ("*Marriott*"). The phrase "knew or should have known" echoes a negligence standard. *M.A. v. Wyndham Hotels & Resorts, Inc.*, No. 19-849, 2019 WL 4929297 (S.D. Ohio Oct. 7, 2019) ("*M.A. v. Wyndham*"). Courts have labeled these claims against facilitators as proceeding under the "beneficiary theory."

Suing Businesses for Sex Trafficking

So, under this "beneficiary theory," when is a business exposed to federal sex trafficking liability? While this area of law is very much still developing, most federal courts agree that a plaintiff must show the defendant: (1) knowingly benefitted financially; (2) from participation in a venture; (3) it knew or should have known was engaged in sex trafficking. *Marriott* at 7.

1. The Business Must Knowingly Benefit

This element merely requires that the defendant knowingly receive a financial benefit, such as payment for rental of a hotel room. *B.M. v. Wyndham Hotels & Resorts, Inc.*, No. 20-CV-00656-BLF, 2020 WL 4368214, at 4 (N.D. Cal. July 30, 2020) ("*B.M. v. Wyndham*") [rejecting defendants' argument that "'benefit must derive directly from, and be knowingly received in exchange for, participating in a sex-trafficking venture"]. Similarly, the United States District Court for the Southern District of New York found the plaintiff adequately plead the Weinstein companies "knowingly benefited" from Harvey Weinstein's alleged sex trafficking because the companies affirmatively enabled and concealed Mr. Weinstein's predations, leading to a symbiotic relationship with mutual financial benefit. *Canosa v. Ziff*, No. 18-4115, 2019 WL 498865, at *24 (S.D.N.Y. Jan. 28, 2019).

2. The Business Must (Somehow) Participate in the Venture

In civil cases, district courts have differed in defining the phrase "participation in the venture." While Section 1591 defines "participation in a venture" to mean "knowingly assisting, supporting, or facilitating a violation" in the criminal context, the term is not defined for the purposes of a Section 1595 sex trafficking lawsuit.

Some courts have borrowed the criminal definition in Section 1591, requiring a civil defendant knowingly participate in the sex trafficking aspect of the venture, such as participating in victim recruitment. *See Noble v. Weinstein*, 335 F. Supp. 3d 504 (S.D.N.Y. 2018); *Doe 1 v. Red Roof Inns, Inc.*, No. 19-3840, 2020 WL 1872335 (N.D. Ga. Apr. 13, 2020).

Other courts have roundly refused to require a knowing participation, finding that such a requirement would void the "should have known" / "negligence language in the civil remedy," improperly borrow the definition from the criminal section, and violate rules of statutory construction. *Marriott* at 10-13; *M.A. v. Wyndham* at 7; *J.C. v. Choice Hotels Int'l, Inc.*, No. 20-CV-00155-WHO, 2020 WL 3035794, at 1, n. 1 (N.D. Cal. June 5, 2020). In *Marriott* and *M.A. v. Wyndham*, the courts found allegations that the hotel defendants repeatedly rented rooms to traffickers as sufficient participation to state a claim. Given the Congressional language in Section 1595, more courts are likely to follow Marriott's approach, *i.e.*, the plaintiff does not need to show a

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knowing participation.

3. The Business Must Know or Should Have Known

There is no "knowledge" state of mind requirement under the "beneficiary theory." Congress specifically allows a sex trafficking lawsuit against defendants who should have known about the sex trafficking venture. *Marriott* at 14. Whether a particular defendant should have known is a fact-specific, case-by-case analysis.

For example, in *M.A. v. Wyndham*, the Court found sufficient allegations that the hotel defendants knew or should have known because the sex traffickers asked for rooms near exits, rooms contained sex paraphernalia, the sex traffickers paid for rooms in cash, the victim appeared physically deteriorated, and the victim made no eye contact with hotel staff.

California is a Sex Trafficking Hub

According to the United States Department of State, the top three states with the most human trafficking activity are California, New York, and Texas. In fact, 3 of the 10 worst child sex trafficking areas in the United States are in California: San Francisco, Los Angeles, and San Diego – due to the large immigrant population and easy access to the Mexico border.

With the exception of several Harvey Weinstein cases (where plaintiffs argue the Weinstein business enterprise benefitted from his conduct), the law surrounding sex trafficking lawsuits is developing around cases against hotels - essentially, plaintiffs allege that the hotels should have known they were renting to sex traffickers and, thus, benefitting from their venture. However, any business that turns a blind eye to the problem may be liable, including, for example, rideshare businesses, transportation entities, and vacation rental applications.

Lawyers at Johnson Fistel have experience handling cases involving sex trafficking. Indeed, John J. O'Brien recently obtained a verdict of approximately $13,000,000 in damages for 22 plaintiffs, all of whom were young women who were misled in order to induce them into filming commercial sex acts. The verdict followed a lengthy 99-day trial against the individual perpetrators and an online pornography enterprise. The Court also voided the purported release agreements and copyrights, and issued a mandatory injunction prohibiting the defendants' unfair business practices. In fact, during trial, the United States Department of Justice indicted the defendants and their employees for violating the TVPA.

If you are a business and want to be sure you are limiting your potential liability under the TVPA, Johnson Fistel is available for advice. If you are the victim of sex trafficking, were tricked into filming commercial sex acts, or if you know someone who may be a victim, you should contact Johnson Fistel to discuss your rights.

$50 Million – It Pays to be a Whistleblower

The Securities and Exchange Commission (the "SEC") recently announced a nearly $50 million whistleblower award that it says it paid "to an individual who provided detailed, firsthand observations of misconduct by a company, which resulted in a successful enforcement action that returned a significant amount of money to harmed investors."

"This award marks several milestones for the whistleblower program," said Jane Norberg, Chief of the SEC's Office of the Whistleblower. "This award is the largest individual whistleblower award announced by the SEC since the inception of the program, and brings the total awarded to whistleblowers by the SEC to over $500 million, including over $100 million in this fiscal year alone. Whistleblowers have proven to be a critical tool in the enforcement arsenal to combat fraud and protect investors." Not far behind this award, the SEC paid $50 million to two individuals in 2018 and another $39 million to one individual in 2018.

The Dodd-Frank Wall Street Reform and Consumer Protection Act gives the SEC authority to reward individuals who come forward with

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high-quality original information that leads to a SEC enforcement action in which over $1,000,000 in sanctions is ordered. The range for awards is between 10% and 30% of the money collected. The Act allows the SEC to minimize the harm to investors, better preserve the integrity of the United States' capital markets, and more swiftly hold accountable those responsible for unlawful conduct.

If you believe you are aware of possible securities law violations, the lawyers at Johnson Fistel can assist you in determining whether and how to approach the SEC. By law, the SEC protects the confidentiality of whistleblowers and does not disclose information that might directly or indirectly reveal a whistleblower's identity.

Treating an applicant or employee less favorably because of his or her age is unlawful. The Age Discrimination in Employment Act (ADEA) makes it unlawful to harass or discriminate against people who are age 40 or older. While the ADEA does not protect workers under the age of 40, some states have laws that protect younger workers from age discrimination and harassment.

One study recently concluded that age discrimination goes up in recessions as some employers use the opportunity to fire experienced workers who are paid higher wages and look to replace them with lower paid, often younger, workers. Economists Gordon B. Dahl of the University of California, San Diego, and Matthew Knepper of the University of Georgia compared the number of age-discrimination complaints filed with the United States Equal Employment Opportunity Commission (the EEOC) with the unemployment rates at the same time.

"For each 1 percentage point increase in a state-industry's monthly unemployment rate, the volume of age discrimination firing and hiring

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charges increases by 4.8% and 3.4%, respectively," they found. They further concluded: "Taken together, our two analyses provide compelling evidence that age discrimination rises as labor markets deteriorate. As far as we know, this is the first direct evidence for age discrimination varying with the business cycle, both for the firing and hiring margins."

What constitutes age discrimination and harassment? The EEOC's website provides this explanation: "Harassment can include, for example, offensive or derogatory remarks about a person's age. Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that aren't very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted). The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer."

The lawyers at Johnson Fistel have extensive experience in wrongful termination and harassment claims, both sexual harassment and age discrimination. If you are a business and want to be sure you are complying with discrimination and harassment laws, please feel free to contact us for advice. If you are, or someone you know is, the victim of sexual or age discrimination or harassment, please contact us for a free consultation.

Is Rent Still Due? – Whether COVID-19 Can Be Considered a "Casualty" Even Triggering Rent Abatement in a Commercial Lease Agreement – PART 2

The spring 2020 edition of The Monitor discussed whether COVID-19 can be considered a 'casualty' event triggering rent abatement (meaning rent is not due) in a commercial lease agreement. Since then, two significant lawsuits on this issue have progressed and warrant discussion, as they both demonstrate that if landlords continued to collect full rent under threat of default, they may also be forced to refund such payments.

In May, Hart 353 North Clark LLC, an affiliate of global real estate investment management firm Heitman LLC and the landlord of Chicago based law firm Jenner & Block LLP ("Jenner & Block") sued the firm in Illinois state court claiming that the law firm was $3.7 million behind on its rent. The case is *Hart 353 North Clark LLC v. Jenner & Block LLP*, case number 2020L005476, in the Circuit Court of Cook County. The landlord alleged in the Cook County Circuit Court lawsuit that Jenner & Block failed to pay its rent for April and May and owes $3.7 million, plus late fees and interest. The subject property in dispute consists of 416,000 square feet of leased office space in the downtown Chicago tower at 353 N. Clark Street.

Later the next month, Jenner & Block LLP responded to the landlord's allegations and alleged that their Chicago landlord owes the firm $840,000 due to a rent abatement provision triggered by the COVID-19 pandemic. Jenner & Block argued in its responsive court filing that the landlord's complaint failed to attach the actual lease, which it said, "contains clear and explicit, hard-negotiated rent abatement provisions" and proves that Jenner & Block paid its landlord all amounts due. The 15-year, $185 million lease was agreed to in 2005.

Jenner & Block claimed it came to this conclusion in March, as a

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result of a "thorough, careful process," it said in its June court filing, stressing that the firm had not used at least 89% of its office space since March 16, dropping from 579 in-office workers to a skeleton crew of 12 employees on average. "Jenner & Block negotiated the abatement provisions in 2005 to cover any unforeseen event, such as a pandemic, that could result in Jenner & Block's inability to use and occupy its space in the normal course of business as reasonably determined by Jenner & Block," the firm said.

In support of the firm's June response, Jenner & Block attached a declaration from a real estate developer the firm claimed was the lead negotiator "across the table" from Jenner & Block when the lease was agreed to in 2005. This real estate professional declared, "I believe that ... Jenner & Block is not obligated to pay rent for the material amount of space that it has reasonably determined it cannot use as it intended in the normal course of business as a result of the COVID-19 pandemic... I believe the current pandemic is the very type of disruptive event to which Jenner & Block was referring in lease negotiations and for which Jenner & Block sought and received protection, in the form of rent abatement."

The second notable COVID-19 rent abate action was recently filed by the law firm Simpson Thacher & Bartlett LLP ("STB") against its New York City landlord (VBGO 425 Lexington LLC) on July 27. The case is *Simpson Thacher & Bartlett LLP v. VBGO 425 Lexington LLC* in the Supreme Court of the State of New York, County of New York. In its suit, STB alleged that its lease for office space at 425 Lexington Avenue in Manhattan included a provision for "force majeure" events and that the COVID-19 pandemic closures met this criteria, entitling the firm to rent abatement.

"With this action, STB seeks to hold [VBGO] to the express terms of the parties' contract, enforce tenant's negotiated rights to rent abatement, and secure the economic benefits for which STB bargained when it entered into the lease," the firm wrote in its complaint which seeks $8 million. Specifically, STB alleged that the lease agreement included a provision for "force majeure" events, which covers major events such as fires, strikes and "governmental preemption" due to "public emergency." Moreover, the law firm alleged that if such an event forced the firm to vacate a significant portion of the space for 60 consecutive days or more, the lease agreement entitled STB to rent abatement.

STB argued that the state of New York's decision to shut down nonessential businesses in March due to the COVID-19 pandemic qualified as a force majeure event under the terms of the lease. Although restrictions have since been somewhat eased, the firm alleged it has still been unable to use the office space.

While the outcome of both of these high profile COVID-19 rent abatement cases remains uncertain, it is clear that large law firms believe they have valid claims for rent abatement - pursuant to force majeure clauses in their leases – against their landlords and have filed suits or counterclaims to preserve their rights.

Upcoming Lead Plaintiff Deadlines

Johnson Fistel is investigating many potential cases arising under the federal securities laws. If you would like more information, or if you wish to participate in an action, please contact us as soon as possible to ensure that your rights are fully protected. Listed below are matters that the firm is investigating and the applicable deadlines for filing a motion with the court to be appointed as a "lead plaintiff" under the Private Securities Litigation Reform Act of 1995.

Company	Deadline
Brookdale Senior Living, Inc.	08/24/2020
PlayAGS, Inc.	08/24/2020
Cheetah Mobile, Inc.	08/24/2020
Mylan N.V.	08/25/2020
Ideanomics, Inc.	08/27/2020
Kingold Jewelry, Inc.	08/28/2020
Kirkland Lake Gold Ltd.	08/28/2020
Pilgrim's Pride Corporation	09/04/2020
GEO Group, Inc.	09/07/2020
Wirecard AG	09/08/2020
J2 Global, Inc.	09/08/2020
Bayer Aktiengesellschaft	09/14/2020
Deutsche Bank Aktiengesellschaft	09/14/2020
Verrica Pharmaceuticals Inc.	09/14/2020
McDermott International, Inc.	09/16/2020

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Company	Deadline
Energy Recovery, Inc.	09/21/2020
Insperity, Inc.	09/21/2020
Tufin Software Technologies Ltd.	09/21/2020
Guidewire Software, Inc.	09/23/2020
Wins Finance Holdings Inc.	09/23/2020
FirstEnergy Corp.	09/28/2020
Intel Corporation	09/28/2020
Proshares Ultra Bloomberg Crude Oil	09/28/2020
Velocity Financial	09/28/2020
Airbus SE	10/05/2020
MEI Pharma, Inc.	10/09/2020
Eastman Kodak Company	10/13/2020
Cabot Oil & Gas Corporation	10/13/2020

Portfolio Monitor

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Johnson Fistel was founded on the following five core values: trust, hard work, determination, integrity, and excellence in everything we do. Our interests are aligned with those of our clients — their success determines our own. We embrace and embody those ideals in everything we do. Whether we're pursuing damages for or against a billion-dollar corporation or we're challenging a small transaction, Johnson Fistel devotes the necessary resources to secure the best result possible.

We believe we are only as good as our people, and Johnson Fistel recruits only the best, brightest, and most determined candidates possible. Our lawyers include those who started their training by working for esteemed judges in both state and federal courts, and have also worked at the largest law firms in the world. We pride ourselves on providing the same level of service with a greater level of efficiency. As a result, we have developed the reputation for delivering big-firm results with the efficiency and personal touch of a small firm.

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