

Insurance Coverage for Trafficking Victims Protection Reauthorization Act Claims

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The Trafficking Victims Protection Reauthorization Act (TVPRA) provides a civil cause of action against entities that perpetrate or “benefit” from human trafficking, including involuntary servitude, forced labor and sex trafficking. Since its original enactment and subsequent reauthorizations, hundreds of TVPRA cases have been filed around the country, and the number of new filings has steadily increased year over year. In recent years, plaintiffs have sought to expand liability by turning their focus from domestic servitude cases to targeting agriculture, hospitality, transportation and technology companies, alleging expansive “ventures” and violations of the statute both here and abroad. The hospitality industry, in particular, has been the focus of numerous claims alleging that hotels, motels and vacation rental properties have been used for and benefited from sex trafficking. Companies reliant on foreign labor have also been implicated in a number of suits brought by workers and children seeking compensation for forced labor and involuntary servitude.

By their nature, TVPRA claims often involve complicated facts, difficult evidentiary issues and unresolved legal questions, which make such claims costly to defend. Sympathetic plaintiffs and dramatic allegations can also create significant liability for corporate defendants. With the increasing risk created by TVPRA, corporate risk managers and in-house counsel need to ensure that appropriate insurance coverage is in place to provide for defense and indemnity against this liability. Corporate policyholders should also consider and be familiar with what insurance coverage is already available through existing commercial general liability insurance. Even where insurers have included exclusions for “assault and battery” or “abuse and molestation” in their policies, corporate insureds should carefully consider what allegations in a TVPRA lawsuit may nonetheless trigger an insurer’s duty to defend and indemnify against liability, as explained in more detail below.

The Trafficking Victims Protection Reauthorization Act

Although the Trafficking Victims Protection Act was originally passed in 2000, the reauthorization adding a civil cause of action was not enacted until 2003. The subsequent 2008 reauthorization further expanded the statute to address additional trafficking offenses and permitted claims against the “beneficiaries” of such offenses.¹ Since then, TVPRA has been reauthorized in 2013, 2015, 2017 and 2018. As currently framed, 18 U.S.C. § 1595(a) provides that “[a]n individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (***or whoever knowingly benefits, or attempts or conspires to benefit, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter***) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.” (emphasis added). 18 U.S.C. § 2255 also authorizes a claim for damages for specific violations relating to forced labor (18 U.S.C. § 1589), peonage, slavery, involuntary servitude, or forced labor (15 U.S.C. § 1590), or sex trafficking of children or by force, fraud, or coercion (18 U.S.C. § 1591).

Relying on this language, plaintiffs have filed hundreds of lawsuits alleging that private companies have benefitted from human trafficking violations and are liable for damages. Particularly in the

hospitality industry, lawsuits have alleged that hotel owners, franchisees and franchisors have harbored persons and benefited from participating in a “venture,” “in reckless disregard of the fact, that means of force, threats of force, fraud, coercion . . ., or any combination of such means will be used to cause the person to engage in a commercial sex act . . .” for purposes of 18 U.S.C. § 1595(a)(1), (2). Other industries, including agriculture, transportation, financial services, and technology, among others, have been implicated in similar claims alleging the same and other violations of TVPRA.

For purposes of Section 1591, a “venture” is broadly defined as “any group of two or more individuals associated in fact, whether or not a legal entity.”² In other contexts, a venture may require more than participation in an arms-length transaction, including “common purpose, shared profits and risk, or control.” Although, in this area, and with respect to questions of extraterritorial application, the law on TVPRA liability is still developing.

General Liability Coverage For “Bodily Injury” & “Personal & Advertising Injury”

Most commercial general liability (“CGL”) policies are written on forms issued by Insurance Services Office, Inc. (“ISO”). The standard ISO CGL policy includes two principal insuring agreements. First, the insurer promises to pay sums the insured becomes legally obligated to pay as damages because of “bodily injury” and “property damage” caused by an “occurrence” or accident within the coverage territory during the policy period. Second, the insurer promises to pay sums the insured becomes legally obligated to pay as damages because of “personal and advertising injury” caused by an offense arising out of the insured’s business committed in the coverage territory during the policy period. For purposes of this second coverage, “personal and advertising injury” may include the following “offenses”: a. false arrest, detention or imprisonment; b. malicious prosecution; c. the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; d. oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services; e. oral or written publication, in any manner, of material that violates a person’s right of privacy; f. the use of another’s advertising idea in your “advertisement”; or g. infringing upon another’s copyright, trade dress or slogan in your “advertisement”. For both insuring agreements, the ISO CGL form provides that the insurer has a right and duty to defend “suits” seeking damages for either (1) “bodily injury” or “property damage”; or (2) “personal and advertising injury,” to which the insurance applies.

Once there is a suit seeking damages because of “bodily injury” or “personal and advertising injury,” the insurer has the burden to demonstrate that an exclusion eliminates any potential for covered damages in a settlement or judgment against the insured. In the context of TVPRA litigation, insurers may assert that otherwise covered “bodily injury” is excluded if (1) such injury was “expected or intended from the standpoint of the insured”; or (2) sustained by an “employee” in the course and scope of his or her employment for the insured. Alternatively, the insurer may assert that “personal and advertising injury” is excluded if such injury was caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict “personal and advertising injury.”

Still other policies may contain endorsed and manuscripted exclusions addressing “abuse” or “assault and battery,” which, depending on the relevant terms and definitions, may be argued by an insurer as applicable to an underlying TVPRA lawsuit.

Analysis & Authority

As a general proposition, when a corporate insured is seeking either defense or indemnity from a CGL insurer for an underlying TVPRA lawsuit, details—including what may appear to be minor nuances in allegations and policy terms—are important. Generally, the CGL insurer's duty to defend will depend on the factual "allegations" (as opposed to the claims or causes of action) made against the insured, which are to be liberally construed in favor of the duty to defend. In contrast, the actual "facts" giving rise to the insured's liability control the determination of the CGL insurer's duty to indemnify.

TVPRA claims often include complex facts, which may trigger more than one insuring agreement in a CGL policy. Suits against hospitality companies, for example, may involve both allegations of physical injury to persons, triggering a CGL policy's coverage for "bodily injury," but also allegations of confinement and captivity triggering the CGL policy's coverage for "personal and advertising injury," including the offense of "false imprisonment."

Section 1591 of TVPRA imposes liability on anyone who knowingly "advertises" a person or benefits from participation in a venture that has engaged in advertising a person, knowing that means of force, fraud, or coercion will be used to cause the person to engage in a commercial sex act.³ Allegations of such conduct can trigger the CGL policy's coverage for "oral or written publication, in any manner, of material that slanders or libels a person" within the definition of "personal and advertising injury."

Because the TVPRA's civil remedy is framed in terms of attempts to benefit from participation in a venture that the defendant insured "should have known" has engaged in a violation of TVPRA,⁴ a TVPRA lawsuit does not implicitly trigger an exclusion for injuries "expected or intended by the insured."⁵ By the same token, TVPRA claims are not per se excluded by provisions denying coverage for injuries caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury."⁶ This is particularly true where the allegations in an underlying TVPRA suit do not track the precise elements of the statutory claim. It is not enough for the insurer to assert that the "act" was knowingly committed unless the resulting "injury" was also intended. If, liberally construed, any single allegation against the insured creates the potential for liability that is covered and not excluded by the subject CGL policy, the insurer is obligated to defend and potentially indemnify the defendant insured.

For example, in *Starr Indemnity Liability Company v. Choice Hotels International, Inc.*, 2021 U.S. Dist. LEXIS 112980, at *12-13, 16-17 (S.D.N.Y. Jun. 16, 2021), a federal district court found that a general liability insurer had a duty to defend underlying TVPRA claims, over the insurer's assertion that coverage was precluded by an "Abuse or Molestation Exclusion." Specifically, the court reasoned that (1) "allegations attributing knowledge and participation to [the insured] Choice are brought alongside allegations that the traffickers concealed [underlying plaintiff] B.H.'s presence and the assertion that Choice 'should have known' of the trafficking activities;"⁷ and (2) "allegations referencing false imprisonment fall outside the Abuse or Molestation Exclusion."⁸

As a further illustration, "[i]n contrast to rape, which necessarily involves a battery, a kidnapping does not necessarily involve the intentional use of force and/or violence upon the person of another."⁹ Accordingly, a policy's assault and battery exclusion may not entirely preclude coverage for underlying allegations involving both sexual assault and kidnapping, as the Louisiana Supreme Court found in *Ledbetter*.

In short, with all of the complexity and risk associated with defending against TVPRA litigation, corporate insureds should not be compelled to undertake the defense and ultimate liability for such claims without the benefit of insurance coverage. When facing TVPRA litigation, corporate policyholders should carefully consider what coverage may be available under a CGL policy's coverage for both "bodily injury" and "personal and advertising injury." And even where the CGL policy may include standardized or endorsed exclusions for "abuse" or "assault," corporate insureds should not presume that such exclusions are a complete bar to coverage for TVPRA liability.

If you have any questions about insurance coverage for TVPRA litigation or about insurance recovery in general, please contact one of Haynes Boone's Insurance Recovery Practice Group partners listed below.

¹ Alexandra F. Levy, [Federal Human Trafficking Civil Litigation: 15 Years of the Private Right of Action](#), The Human Trafficking Legal Center (December 2018)

² 18 U.S.C. § 1591(e)(6).

³ 18 U.S.C. § 1591(a) ("Whoever knowingly—(1) ... recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).")

⁴ 18 U.S.C. § 1595(a) ("An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, or attempts or conspires to benefit, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.").

⁵ See, e.g., *Otra, LLC v. Am. Safety Indem. Co.*, 2020 U.S. Dist. LEXIS 217933, at *21 (holding that an "expected or insured injury" exclusion did not preclude a duty to defend because "the FAC here includes allegations of negligent conduct from which the Court cannot infer an injurious intent as a matter of law.").

⁶ See, e.g., *Ricchio v. Bijal, Inc.*, 424 F. Supp. 3d 182, 192 (D. Mass. 2019) (finding a duty to defend underlying TVPRA allegations because "[i]t is possible for a defendant to be civilly liable without having violated any of the criminal portions of the TVPA, because the statute permits recovery under a civil standard even in the absence of proof of intentional conduct.").

⁷ *Choice Hotels Int'l, Inc.*, 2021 U.S. Dist. LEXIS 112980, at *24.

⁸ *Id.* at *26; see also *Mesa Underwriters Specialty Ins. Co. v. Khamlai Lodging*, 2022 U.S. Dist. LEXIS 70936, at *15-16 (D. Ga. Apr. 18, 2022) (finding a duty to defend underlying sex trafficking claims because "the Court finds that there is a set of facts in which these allegations fall outside of the Policy's assault and battery exclusion").

⁹ *Ledbetter v. Concord Gen. Corp.*, 655 So.3d 1166, 1170 (La. 1996).