



SEXUAL ABUSE LITIGATION & COVERAGE CONFERENCE

NEW YORK CITY BAR ASSOCIATION | OCTOBER 17, 2024

HUMAN TRAFFICKING LITIGATION



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ANTI-HUMAN TRAFFICKING LITIGATION

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Introduction to Topics

- Historical context of anti-trafficking litigation
- Statutes giving rise to liability
- Impact of technology on trafficking
- Nature of claims being addressed by insurance claims adjusters
- Steps being taken by the hospitality industry
- Working with experts to understand liability and damages
- Victim advocacy and support: understanding trauma

NATIONAL HUMAN TRAFFICKING HOTLINE DATA REPORT

Report: 1/1/2021 – 12/31/2021

OVERVIEW OF INCOMING SIGNALS

*The following information is based on incoming signals to the National Human Trafficking Hotline from January 1, 2021 – December 31, 2021 about human trafficking cases and issues related to human trafficking in the United States and U.S. territories. Signals can take the form of **phone calls, text, Webchat¹, online tip reports², or emails**. Signals to the Hotline regarding topics unrelated to human trafficking are considered non-substantive and are not summarized in this report. In 2021, the National Human Trafficking Hotline received a total of 51,073 substantive³ phone calls, text, Webchats, emails, or online tip reports nationwide.*



32,709 Phone



11,256 Text



3,490 Online Tips



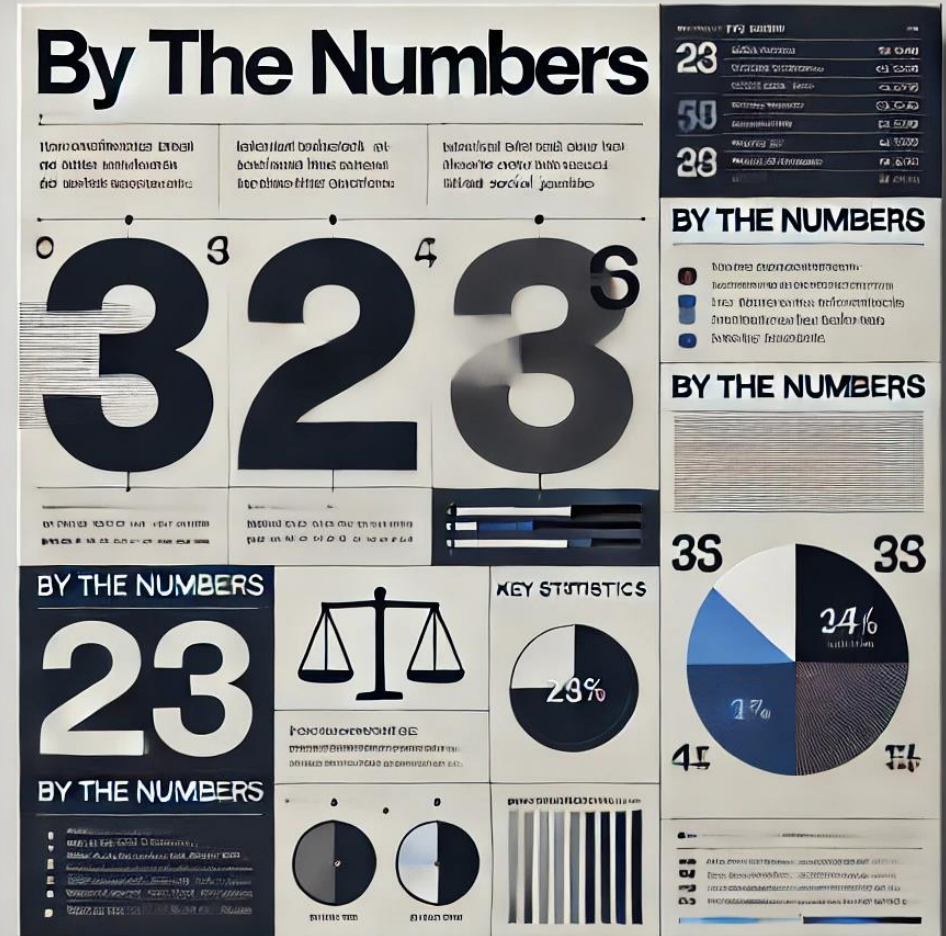
2,802 Emails



816 Webchat

By the Numbers

- 27,600,000
People exploited in forced labor globally
- 3,300,000
Children trapped in forced labor
- 44-60%
Cases facilitated by family members in US
- Age 13
Average age of recruitment for child trafficking
- 0.45%
Trafficking cases involving kidnapping



Misconception: Trafficking only involves *sexual* exploitation



Agriculture



Domestic Work



Manufacturing



Construction

Sexual Exploitation



Sexual Servitude



Escort Services



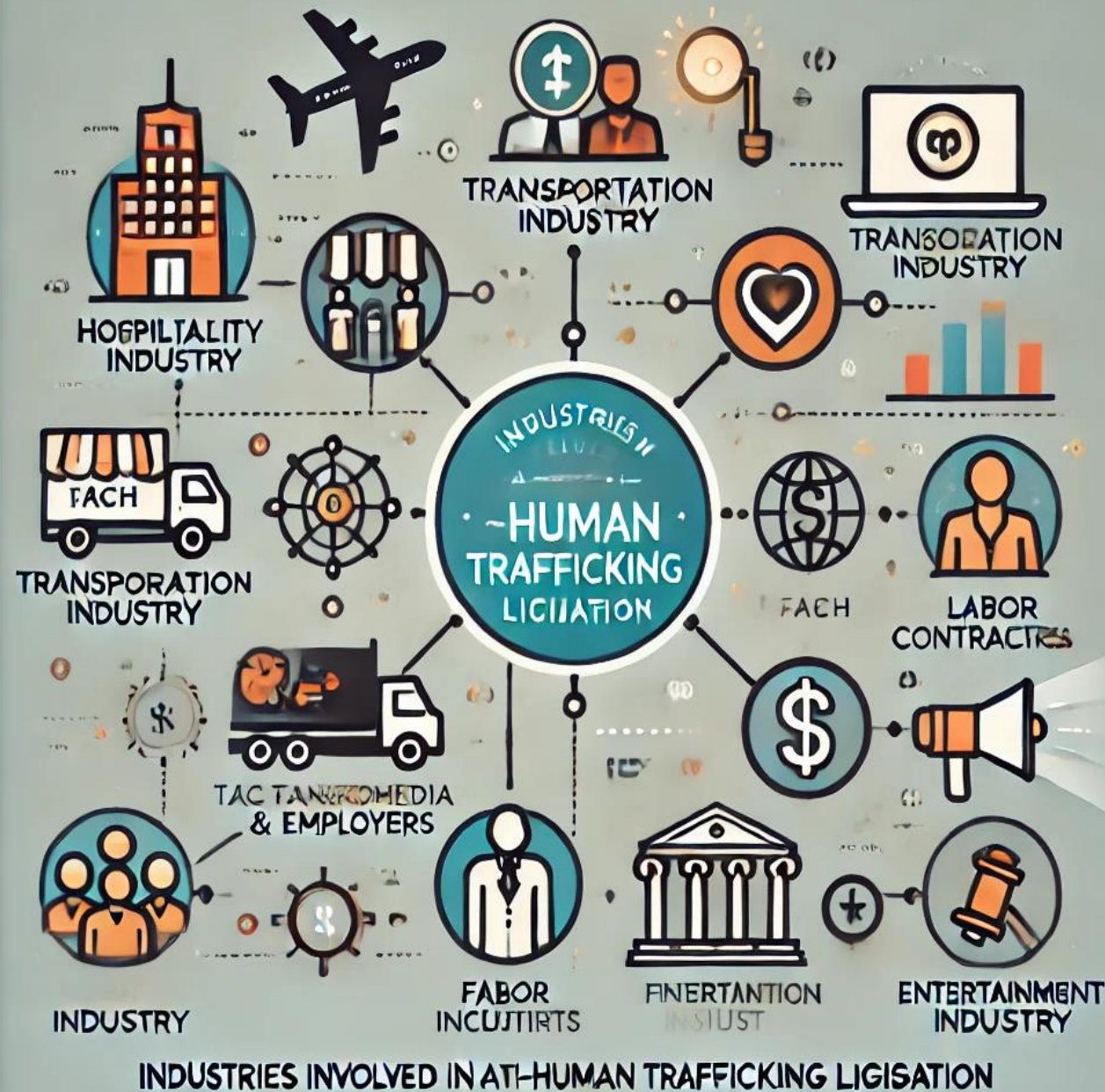
Child Marriage



Street Work

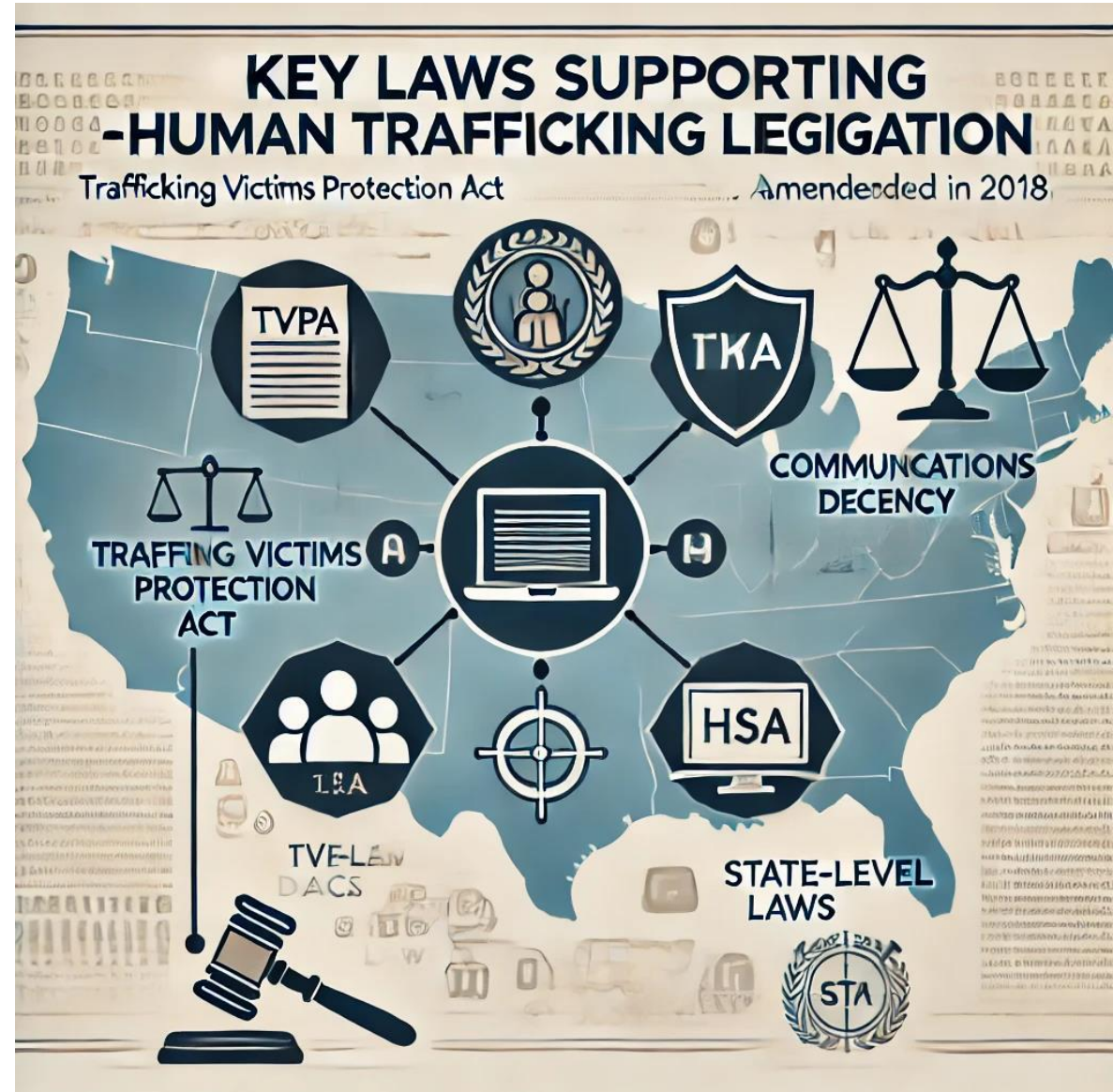
Evolution of Trafficking Litigation

- Criminal cases against perpetrators – no recourse to survivors
- Expansion to include civil suits against third parties
 - Hospitality
 - Tech and social media platforms
 - Labor contractors and employers
 - Financial institutions
 - Entertainment industry



Enabling Legislation

- **Trafficking Victims Protection Act (TVPA):**
 - Since 2003, 18 USC 1581 has provided victims of sex trafficking a civil remedy against perpetrators of criminal sex trafficking.
 - Liability extended to those who financially benefit from participation in a venture that they know or should know engages in criminal sex activity
- **Communications Decency Act (amended in 2018):**
 - Allows legislation against online platforms that knowingly facilitate sex trafficking or are complicit in the exploitation through their sites.
- **State-level laws**
 - State human trafficking laws with civil remedies
 - Third party beneficiary liability laws

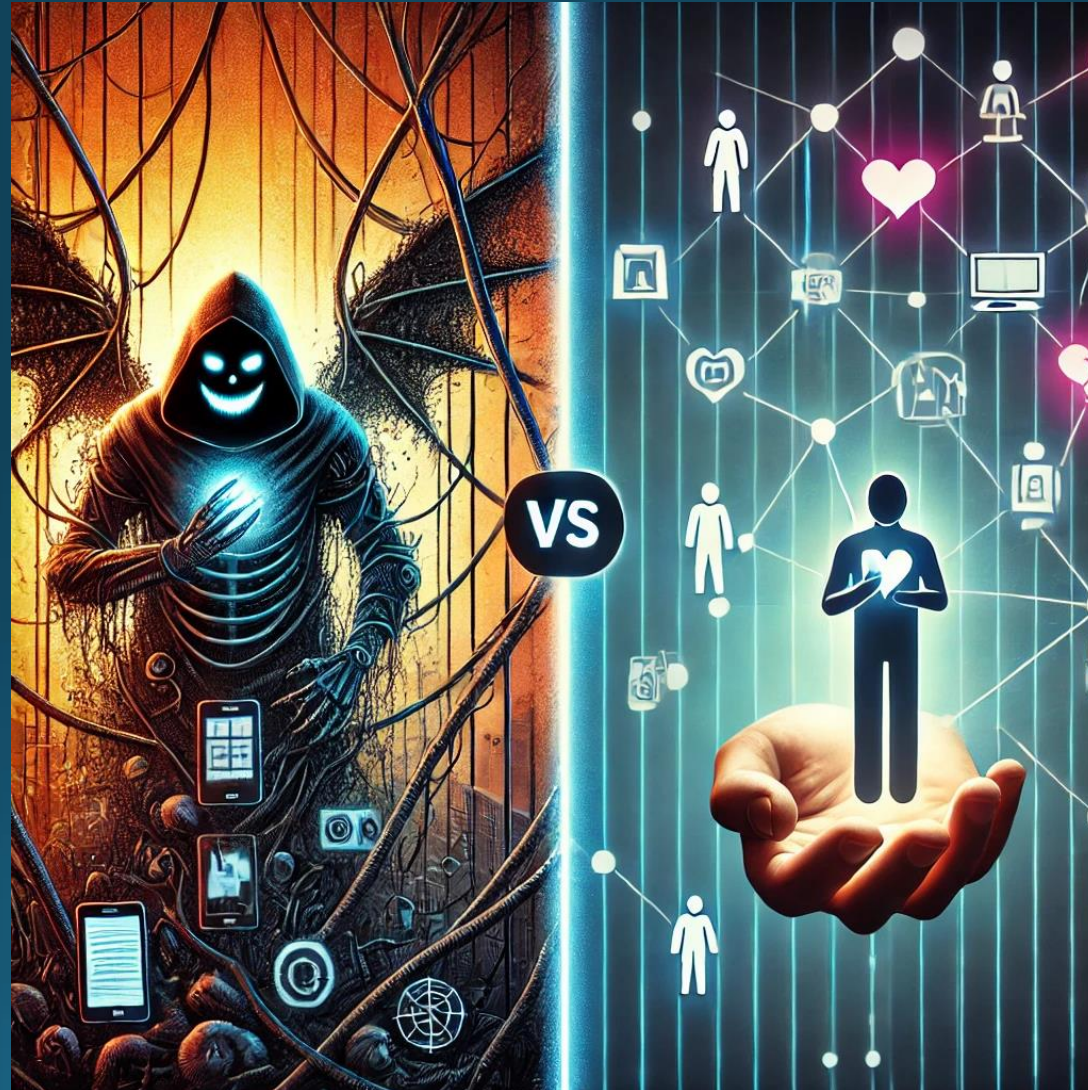


The Hospitality Defendant

- 75 to 90% trafficking complaints
- Theories of liability
 - Negligence – failure identify and intervene in high-risk signs situations
 - Premises Liability
 - Liability under the TVPA:
 - That Defendants derived financial benefit from facilitating sex trafficking by providing a venue where traffickers could exploit victims
 - That defendants had the knowledge and opportunity to prevent the harm experienced as the result of continuous sexual exploitation.



Technology In Trafficking



Trafficking & Technology

- Traffickers often use social media and other platforms to recruit and exploit victims
- Tech companies invariably defend civil trafficking suits based on Section 230.
- Survivor/Advocacy groups leverage social media to support survivors



TVPRA + FOSTA (online context)

- Independent liability for both direct trafficking and benefiting from trafficking
- Multiple knowledge standards (as to action + victim's status/situation)
- Lowered burden of proof for children (adults = "force, fraud, or coercion")
- Civil cause of action (18 U.S.C. 1595)
- *Parens patriae* actions for state attorneys general
- Does FOSTA (2018) substantively change the elements for survivors of tech-enabled trafficking?
- Is image-based sexual abuse trafficking?

Direct Trafficking – 18 U.S.C. § 1591(a)(1)

Whoever knowingly--

... recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; ...

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 ..., 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

Benefiting from Trafficking – 18 U.S.C. § 1591(a)(2)

Whoever knowingly--

... **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 ..., 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

Allow States and Survivors to Fight Online Sex Trafficking Act of 2018 (FOSTA/SESTA)

- Responds to *Doe v. Backpage.com* (1st Cir. 2016) holding that Section 230 of the Communications Decency Act precludes civil TVPRA suit against online platform.
- Amends the CDA to clarify that there is no immunity for civil suits for online trafficking
- The Ninth Circuit FOSTA narrowly in *Does 1-9 v. Reddit* (2022). More to come on FOSTA as other circuit consider it.

Section 230 of the CDA

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230 (C)(1)

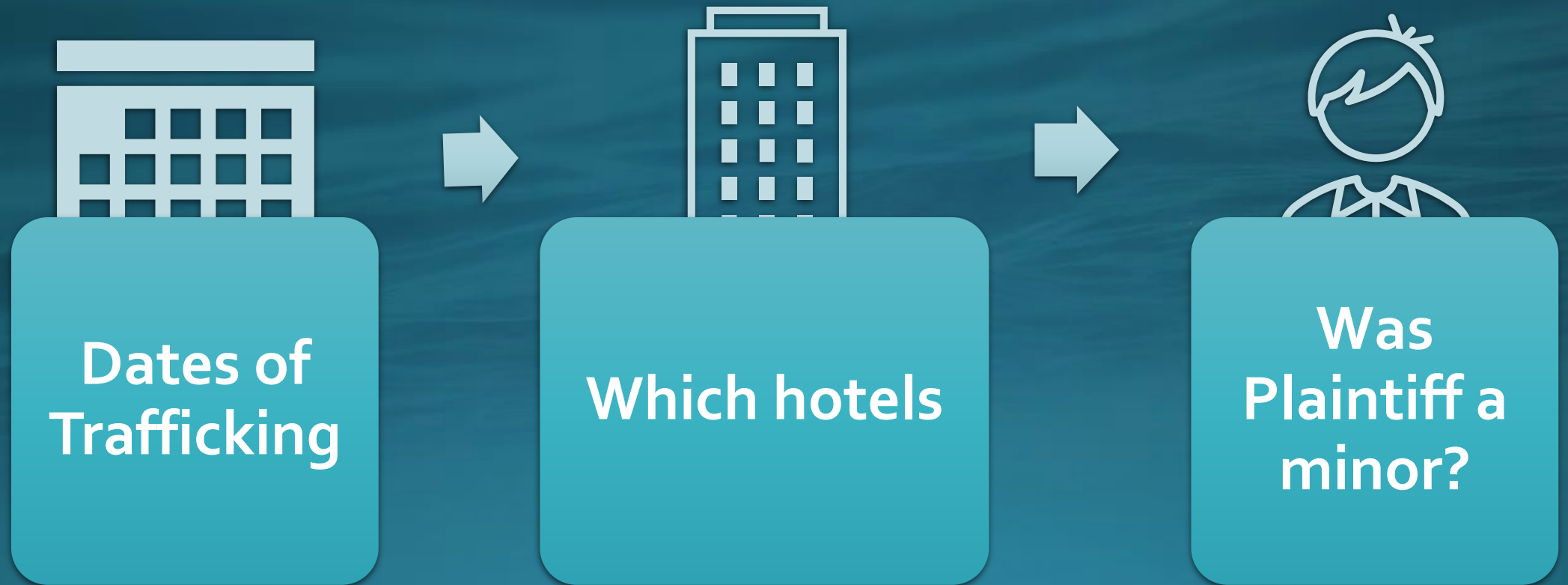
Amicus Brief of the United States

Under the principles articulated above, the *Backpage.com* decision was erroneous. The plaintiffs did not seek to treat Backpage.com as the publisher or speaker of the ads through which others carried out sex trafficking. Rather, they sought to hold the operator liable for its own policies and platform-design choices that facilitated sex trafficking. Where a website operator's conduct in furthering unlawful activities goes well beyond failing to block or remove objectionable third-party content from its platform, holding the operator liable does not "treat" it "as the publisher or speaker of" the third-party posts.³

Claim Handler's Perspective

Deborah Rosenthal, Nationwide E&S

Initial Review of Complaint



Other Insurer Involvement

- Sharing Defense



Tenders from
franchisors

Franchise
Agreements

Indemnification Issues

Protective Orders

Only people entitled to know
Plaintiff's identity:



The Court



Parties to the action



Parties' counsel



Person authorized by the
written order of the court
specific to that person

- Construed Liberally to Protect the Victims of Human Trafficking

Protective Order

B. Access to a Designating Party's information marked "CONFIDENTIAL" shall be limited to, and only to, the following persons:

1. The Parties to the litigation – including the current employees, officers, and representatives of the Parties as needed to litigate any claims or defenses;
2. Former employees, officers, and representatives of the Parties who execute the Acknowledgment and Agreement to Be Bound attached to this Protective Order as Exhibit A;
3. Current and former contractors of the Designating Party who execute the Acknowledgment and Agreement to Be Bound attached to this Protective Order as Exhibit A;
4. Insurers for any of the Parties who execute the Acknowledgment and Agreement to Be Bound attached to this Protective Order as Exhibit A who may provide coverage in connection with claims asserted in a particular case;

9. Any Expert, outside consultant, or investigator retained by Outside Counsel of Record specifically in connection with this Action and who have signed the Acknowledgment & Agreement to Be Bound attached to this Protective Order attached to this Protective Order as Exhibit A;
10. A person identified in the document marked "CONFIDENTIAL" as an author, source, addressee, or recipient of the communication or document, or who already has a copy of the document marked "CONFIDENTIAL";
11. Professional Vendors who have signed the Acknowledgment & Agreement to Be Bound attached to this Protective Order as Exhibit A;

13. In the course of a deposition, any Non-Party deponent and such Non-Party deponent's counsel may be shown Confidential Information if the Non-Party deponent and the Non-Party deponent's counsel first execute the Acknowledgment & Agreement to Be Bound attached to this Protective Order as Exhibit A, provided that any such Non-Party deponent and his or her counsel may not retain any documents containing Confidential Information following the deposition; and

Protective Orders Impact

Can't speak with potential witnesses without signed acknowledgement

Goal of orders is appropriate

Impact of the orders is chilling our ability to evaluate/resolve claims

Witnesses not willing to sign acknowledgements

Witnesses won't speak with defense counsel

Impacts retention vendors

Protective Orders- continued

- Can't verify information received from Plaintiff's counsel
- Can't conduct meaningful investigation for evaluation
- 20% of info we would have on other types of liability claims
- Hinders all sides' ability to move the claim along
- Makes litigation last longer

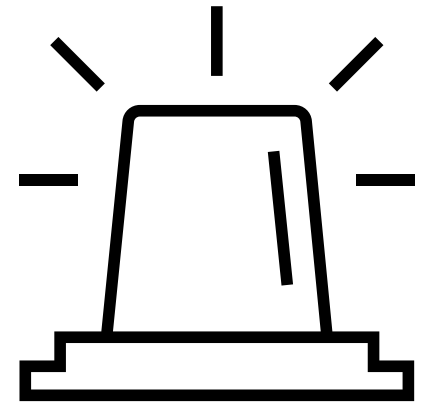
Investigation - Limited

- Info from Insured
- Folio/Stay Records
- Security Companies



Prior crime at the hotel property

Law Enforcement



Plaintiff's Written Discovery



- Interrogatories but can't validate info
- Can't talk to friends, family, employers

Evaluating liability and damages

- Difficult because of protective orders
- Limited information – liability and damages
- ADR opportunities

Working with Experts

- Human Trafficking Expert Consultant Network
 - Through United States Department of State
 - <https://www.state.gov/humantrafficking-survivor-leadership/>
- Hospitality experts – compliance or deviation from standard of care
- Psychological experts – Impacts of trauma
- Human Trafficking Experts – methods and networks used
- Law Enforcement Experts – identification of red flags

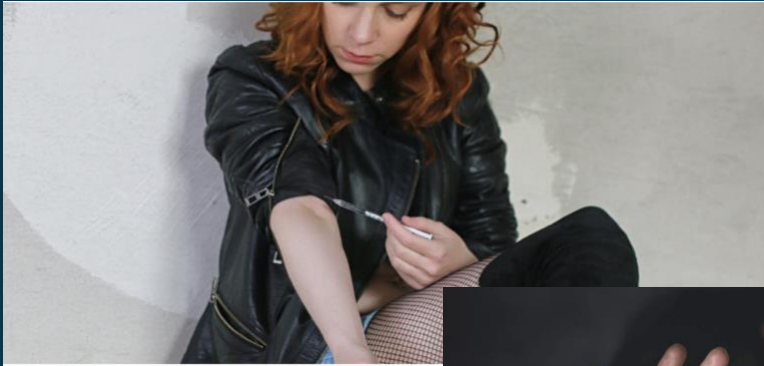


Particular Concerns Representing Trafficking Survivors

- Complex Trauma and PTSD: Many trafficking survivors experience complex post-traumatic stress disorder (C-PTSD)
- Shame and Guilt
- Difficulty Trusting Others
- Memory Fragmentation
- Fear of Retaliation
- Re-traumatization During Legal Proceedings
- Empowerment and Agency



Impact of Trauma on Child Trafficking – Polyvictimization



Addiction



Injuries from violence



Forced
Pregnancies



Chronic Health Conditions:

- Somatic symptoms
- Impaired sensorimotor development
- Hand-eye coordination

Psychological Impact



- Struggles regulations emotions and impulses
- Attentional difficulties
- Dissociation
- Negative self-perception
- Attachment disorders (inability to trust)
- Difficulty creating and maintaining boundaries, solation
- Inability to express empathy



CHANGE the conversation.
Preventing and Healing Child Sexual Abuse



- Solutions include trained professionals, safe environment, realistic expectations, reassurance, patience
- Trauma-informed and survivor-centered approaches.

Victim Advocacy and Support

- Useful resources
 - National Human Trafficking Hotline – 888-373-7888
 - Change the Conversation -- changetheconversation.org
 - PACT -- wearepact.org
 - The Resiliency Group -- resiliencygroup.org
 - Survivors Advisory Board -- resiliencygroup.org
 - RAINN -- resiliencygroup.org/
 - SAFE – Arizona Anti-Trafficking Network -- aatn.org/safe
 - Polaris Project -- polarisproject.org
 - Children's Justice Campaign – enoughabuse.org





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