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# Update

## Exploring Civil Remedies for Child Trafficking Victims: Class Action Litigation and Our Capacity to Reduce Demand

By Sallie Pullman, J.D.<sup>1</sup>

First Amended Complaint. 10, 30, Dkt. No. 23, *M.A. v. Village Voice Media Golding, LLC*: That in 2009 and 2010 Plaintiff M.A., a minor, while being a fourteen year old run-away child, was being sexually trafficked by Latasha Jewell McFarland, an adult, who has pled guilty to criminal charges and has been sentenced relating to the allegations herein and has admitted to the following facts in open court which are stated as facts hereinafter: she photographed minor M.A. displaying private body parts in sexual pornographic poses; she posted this child pornography on defendants' website, [backpage.com](http:// backpage.com) in advertisements seeking payment for sex; she paid [backpage.com](http:// backpage.com) for these sex ad postings; she reposted ads; she transported minor M.A. for the purposes of multiple sexual liaisons for money with adult male customers obtained through defendants' website; she collected money for minor M.A.'s sexual services from these customers; and she purchased goods to facilitate these sexual services.

By posting explicit nude photographs of Plaintiff, M.A., a minor in an advertisement which advertised her services as an escort for sex on [backpage.com](http:// backpage.com), Defendants facilitated child trafficking and aided and abetted McFarland in the crime exploitation of children and child pornography and in violating each criminal statute and United States Treaty Optional Protocol herein alleged, in that: Defendants had a strong suspicion that the aforementioned crimes were being committed yet was so indifferent that they failed to investigate for fear of what it would learn; Defendants has a desire that these posters accomplished [sic] their nefarious illegal prostitution activities so that the posters would return to the website and pay for more posting and defendants continued to maintain their website as a participant in these illegal transactions.<sup>2</sup>

**M**inor M.A.'s story is not unusual for child trafficking victims: she ran away from home and was manipulated by an adult who, rather than help her, promised her money, held her captive and sold her for

sex to other adults.<sup>3</sup> In the United States, the average age for a girl to be trafficked for sex the first time is 12-14,<sup>4</sup> and it is estimated that between 100,000 and 300,000 American children are victims of trafficking year.<sup>5</sup> More than 50% of do-

mestic trafficking victims are runaway youth.<sup>6</sup> What is unusual about the story of minor M.A. is that she is the first minor victim of domestic sex trafficking to bring a civil lawsuit under the William Wilberforce Trafficking Victim's Protection Reauthorization Act of 2008 ("TVPRA") against a third-party corporate entity alleging that it benefitted financially from her exploitation and seeking damages for her injuries.<sup>7</sup> In filing a lawsuit against backpage.com and their corporate parent, Village Voice Media Holdings, L.L.C., minor M.A. is leading the charge to change corporate behavior and attitudes about child trafficking through civil litigation. With her lawsuit, she is sending a strong message that corporations or others that turn a blind eye to trafficking while profiting from the exploitation of children must be held accountable. Civil litigation can be used against both traffickers and third parties to reduce the demand for the commercial sexual exploitation of children by making it too expensive from both a reputational and financial perspective to risk participating in this crime.

In 2008 reforms to the federal Trafficking Victims Protection Act expanded significantly the civil remedies available to trafficking victims.<sup>8</sup> Before those changes in the law minor survivors had little recourse to recover damages for their injuries at the hands of traffickers, pedophile purchasers, or complicit traffickers, including corporations, which benefit from the sexual exploitation of these children.<sup>9</sup> This article explores some of the civil options available to minor victims, discusses how civil claims of multiple victims may be joined into a single class action to have greater impact, and explains how civil lawsuits by victims can be a strong weapon in the fight against child trafficking without interfering with criminal prosecutions of traffickers.<sup>10</sup>

### **Why civil litigation?**

Civil lawsuits offer a broader reach and remedy for child-trafficking victims than criminal proceedings. Unlike criminal prosecutions, which are initiated by the state and for the interest of the state, in a civil lawsuit the decision to file a lawsuit is the victim's choice. In a civil lawsuit the child victim is represented by an attorney who is ethically obligated to protect the child's interests above all else. But, for victims one of the most important benefits of a civil litigation is that it provides them with an opportunity to confront their traffickers.<sup>11</sup> The litigation process in itself can be a healing process for many trafficking victims.<sup>12</sup>

There are other benefits to civil litigation. In successful criminal prosecutions for trafficking, a victim is entitled to mandatory restitution.<sup>13</sup> Restitution, however, does not contemplate future expenses and civil litigation may be the only way to make victims whole.<sup>14</sup> In addition, in circumstances where there is no criminal prosecution, a victim can still bring a civil lawsuit, which employs a lower burden of proof.<sup>15</sup> Finally, civil litigation can serve as a deterrent to would-be traffickers by increasing the financial repercussions for the crime.<sup>16</sup>

### **Who is subject to TVPRA's civil liability provision?**

The TVPRA's civil remedy can be used to hold traffickers, purchasers and complicit traffickers accountable to their victims. The TVPRA permits any individual who is "a victim of a violation" of the statute to bring a civil lawsuit against both the "perpetrator" and "whoever knowingly benefits, 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 the statute.<sup>17</sup> Prior to this change in the law, victims could only bring a civil claim against their traffickers.<sup>18</sup> The expansion of the TVPRA's civil remedy provision means that survivors can seek damages from not only direct violators of the federal law—the trafficker and the pedophile purchaser—but also from persons that are complicit traffickers, those third-parties, corporations or individuals that "benefit" from the commercial sexual exploitation of children.<sup>19</sup>

Whether a "person" benefitted from trafficking by receiving "anything of value" is not limited to situations in which a complicit trafficker gets a financial or monetary gain. Rather, the TVPRA employs broad language and attaches civil liability to *any* person that gets a "thing of value" as a result of the trafficking.<sup>20</sup> In other statutes that use similar terms a thing of value has included being given illicit materials or pornographic images, being provided business opportunities, and even gaining access to file-sharing websites that contain illicit images of children.<sup>21</sup>

Of equal significance perhaps is that the TVPRA does not require direct knowledge on the part of complicit traffickers.<sup>22</sup> Rather, potential civil liability attaches at a lower threshold, requiring only that a complicit trafficker who received a benefit "should have known" that children were being trafficked.<sup>23</sup>

## **Does the TVPRA permit class action litigation?**

Where multiple child-survivors identify the same bad actors—*i.e.*, a pedophile, a particular business such as a hotel, a car services or an on-line content provider—that benefitted from their exploitation, their claims can be consolidated into a single, civil lawsuit using a representative plaintiff. Rule 23 of the Federal Rules of Civil Procedure permits the claims of multiple victims that were injured by the same perpetrator or complicit trafficker to be joined and resolved en masse in a single class action.<sup>24</sup> The representative plaintiff can file a lawsuit on behalf of all child-survivors that have been exploited similarly by the same defendants. The representative plaintiff would then request that the court to allow him or her to seek damages on behalf of all children that were victimized by the same defendants by certifying a class.<sup>25</sup>

Notably, the issue of whether a lawsuit should proceed on a class basis is resolved before the merits of the underlying claims are decided. If a class is certified, and the representative plaintiff's claims against the defendant fail, so will the claims of all absent class members that do not opt out of the class.<sup>26</sup> But, if the representative plaintiff's civil claims are successful, damages will be awarded to each class member, resolving all similar claims against the defendants in a single civil action.<sup>27</sup>

If the court does not permit a representative plaintiff to pursue the civil claims on behalf of a class, the representative plaintiff will still be able to proceed with his or her civil claims on an individual basis.<sup>28</sup> In addition, the absent class members will not lose their rights to bring individual lawsuits if no class is certified or if they choose not to participate in the class case.<sup>29</sup> This is because when a class action lawsuit is filed, the limitations period for the claims of putative class members stops running until after a decision about class certification decision is made by the court. Only after class certification is denied, will the limitations period for the claims of absent class members begin to run again. As a consequence, if a court denies class certification, members of the class other than the representative plaintiff are still free to initiate their own individual lawsuits against the defendants.<sup>30</sup>

Proceeding on a class basis can lower the risk of re-traumatization for the victims who are class members. This is because class litigation focuses on the facts and circumstances of the representative plaintiff and whether that representative can demonstrate that the same bad actors did the same things to other persons like them during the same time period. The particulars of each minor's

exploitation would not need necessarily have to be repeated or testified about in order for a class action lawsuit to be successful. And, because class action litigation inevitably invites greater damages awards and implicates defendants in a broader pattern and practice of bad acts, those who traffick children may find that the financial and reputational risks too great to continue participating in the commercial, sexual exploitation of children.

## **Will a civil lawsuit interfere with a criminal prosecution of traffickers?**

The TVPRA provides specific protections for criminal prosecutions of traffickers when there is a potential for a civil claim. First, the statute provides a 10-year limitation period for bringing a civil lawsuit.<sup>31</sup> This means that there is ample time to wait to initiate a civil lawsuit until after the conclusion of any criminal proceeding. Second, in the event that a civil lawsuit is filed when a criminal action against a trafficker is pending, the TVPRA requires that an automatic stay be entered in the civil lawsuit.<sup>32</sup> Under the TVPRA, a "'a criminal action' includes investigation and prosecution and is pending until final adjudication in the trial court," meaning that a TVPRA civil case will never be simultaneous to a criminal proceeding involving crimes against the same child victim.<sup>33</sup> Civil practitioners, however, should seek an order that all evidence be preserved in conjunction with the implementation of any stay.<sup>34</sup>

In sum, although largely underutilized to date, civil litigation can be a strong tool to help children who are victims or trafficking and to deter the trafficking of children.

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<sup>2</sup> First Amended Complaint ¶¶ 10, 30, Dkt. No. 23, *M.A. v Village Voice Media Goldings, LLC*, Case No. 4:10-CV-1740 TCM (Dec. 07, 2010).

<sup>3</sup> "Woman Admits Prostituting 13 Year Old Runaway," (Sept. 1, 2010) available at [http://www.stltoday.com/news/local/crime-and-courts/article\\_802012c8-b606-11df-94b6-00127992bc8b.html](http://www.stltoday.com/news/local/crime-and-courts/article_802012c8-b606-11df-94b6-00127992bc8b.html) (last verified Mar. 18, 2011).

<sup>4</sup> Richard J. Estes and Neil Weiner, "The Commercial Sexual Exploitation of Children In the U. S., Canada and Mexico," University of Pennsylvania, February 2002 available at <http://www.covenanthouse.org/homeless-youth/human-trafficking> (last verified Mar. 18, 2011).

<sup>5</sup> The National Report of Domestic Minor Sex Trafficking: America's Prostituted Children, p. 4, Shared Hope International (May 2009).

<sup>6</sup> *Supra*, n. 3.

<sup>7</sup> *Supra*, n. 1.

<sup>8</sup> Codified as section 7101 of the Trafficking Victims Protection Act (TVPA), 22 U.S.C. § 7101, *et seq.*

<sup>9</sup> *Id.*

<sup>10</sup> This article addresses only class actions under Rule 23 of the Federal Rules of Civil Procedure. It does not address various state class action rules or "mass action" litigation, which is a suit "in which monetary relief claims of more than 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs'



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#### UPDATE CHILD ABUSE MANUAL DUE OUT SUMMER 2012

Summer 2012 Publication of the 4th Edition of the Investigation and Prosecution of Child Abuse manual! Expanded to include issues related to civil child protection, commercial sexual exploitation, domestic minor sex trafficking and emerging investigative, legal and medical issues in the field of child maltreatment.

This project was supported by Grant No. 2010-CI-FX-K008 awarded by the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

- claims involve common questions of law or fact.” 28 U.S.C. § 1332(d)(11)(B)(i).
- <sup>11</sup> Daniel Werner and Kathleen Kim, “Civil Litigation on Behalf of Victims of Human Trafficking,” pp.1, 10 (3d ed. Oct. 13, 2008).
- <sup>12</sup> *Id.*
- <sup>13</sup> 18 U.S.C. § 1593.
- <sup>14</sup> *Supra*, n. 10 at p. 1.
- <sup>15</sup> See e.g., *Heller v. Doe by Doe*, 509 U.S. 312, 338 (1993) (“It is no coincidence that difficult issues in civil cases are not subject to proof beyond a reasonable doubt and that even the most garden variety elements in criminal cases are not to be satisfied by a preponderance of evidence.”) (O’Connor, J., dissenting).
- <sup>16</sup> *Supra*, n. 10 at p. 1.
- <sup>17</sup> 18 U.S.C. § 1595(a) (2010).
- <sup>18</sup> See 18 U.S.C. § 1595(a) (2007).
- <sup>19</sup> See 1 U.S.C. § 1 (2010) (“In determining the meaning of any Act of Congress, unless context indicates otherwise . . . the word [ ] ‘person’ . . . include[s] corporations . . . as well as individuals . . .”).
- <sup>20</sup> 18 U.S.C. § 1595(a) (2010).
- <sup>21</sup> See *United States v. Griffin*, 482 F.3d 1008, 1013 (8th Cir. 2007) (finding receipt of a thing of value triggering sentencing enhancement “applies to a defendant who downloads and shares child pornography files via internet peer-to-peer file-sharing network, as these networks exist—as the name ‘file-sharing’ suggests for users to share, swap, barter or trade files between one another”); *United States v. Bastian*, 650 F. Supp. 2d 849, 861 (N.D. Ia. 2009) (finding that a thing of value “means anything of valuable consideration [including] the bartering of child pornographic material”); *United States v. McVey*, 476 F. Supp. 2d 560, 563 (E.D.Va. 2007) (finding that installing and using child pornography file-sharing supported a finding that defendant was in “receipt of a thing of value, namely, other child pornography”).
- <sup>22</sup> See 18 U.S.C. § 1595(a) (2010).
- <sup>23</sup> *Id.*
- <sup>24</sup> See Fed. R. Civ. P. 23(a)-(b); see also *Supra* n. 9 at pp. 16-19.
- <sup>25</sup> Fed. R. Civ. P. 23(b)(3); Fed. R. Civ. P. 23(g).
- <sup>26</sup> See *Eisen v. Carlisle and Jacqueline*, 391 F.2d 555, 560 (2d Cir. 1968) (finding that “[class] actions will result in judgments binding on the entire group of individuals found by the court to be members of the class”).
- <sup>27</sup> *Id.*
- <sup>28</sup> See *American Pipe & Const. Co. v. Utah*, 94 S. Ct. 756, 414 U.S. 538, (1974) (claims of absent class members preserved by filing of class action); *Arctic Slope Native Association, Ltd. v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009) (finding that class action tolling principles require that the limitations period be suspended during the pendency of the class action proceedings for all putative class members who would have been parties had the suit been permitted to continue as a class action).
- <sup>29</sup> See *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 354, 103 S. Ct. 2392, 76 L.Ed.2d 628 (1983) (stating that, upon denial of class certification, “class members may choose to file their own suits or to intervene as plaintiffs in the pending action”); *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1391 (11th Cir.1998) (noting that, when a motion for class certification is denied, absent class members are required to file their own suit or join the action as individual plaintiffs in order to preserve their claims); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 n. 25 (4th Cir.2006) (“Rule 23(b)(3) protects these rights [of absent class members to recover money damages and class members who want individualized evaluation of their claim for money damages] by requiring notice and the opportunity to opt-out”); *Sarasota Oil Co. v. Greyhound Leasing & Financial Corp.*, 483 F.2d 450, 452 (10th Cir.1973) (“One of the primary purposes of the notice requirement is to afford an opportunity for (b)(3) class members to avoid being bound by a class action judgment and to permit them to litigate their own claims”).
- <sup>30</sup> *Id.*, *supra*, n. 26.
- <sup>31</sup> See 18 U.S.C. § 1595(c) (“No action may be maintained under this section unless it is commenced not later than 10 years after the cause of action arose.”).
- <sup>32</sup> See 18 U.S.C. § 1595(b)(1) (“Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is a victim.”).
- <sup>33</sup> 18 U.S.C. § 1595(b)(2).
- <sup>34</sup> *Supra*, n. 10 at pp. 5-7.