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**MAKING A DECLARATION: THE RISE OF
DECLARATORY JUDGMENT ACTIONS AND
THE INSURER AS REGULATOR IN THE
FIGHT TO END SEX TRAFFICKING IN THE
HOTEL INDUSTRY**

*Lori N. Ross**

“Let it not be said that I was silent when they needed me.”

– William Wilberforce

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INTRODUCTION

“Ground zero” for sex and labor trafficking.¹ A “hotbed” for sex trafficking activity.² This is not what one would normally think of when referring to hotel establishments across the country. However, media stories, reports, and lawsuits are increasingly exposing this alarming reality about our nation’s hotels.³ Many children, women, and men are being forced into sex trafficking at hotels and lodging establishments across the country.⁴ In response to this disheartening reality, a number of states have passed laws that currently allow for victims to hold hotels civilly liable for sex trafficking under a “facilitator” or “beneficiary” liability theory.⁵ These state statutes are modeled after § 1595 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA),⁶ which provides for civil liability for “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 [sex trafficking].”⁷ Additionally, many states have enacted laws that mandate that anti-trafficking training and protocols be implemented at hotels and motels

1. Michael Joe Murphy, *Hotel-Motel Sex Trafficking—Florida Is Ripe for a Crackdown*, ORLANDO SENTINEL (Feb. 8, 2018), <https://www.orlandosentinel.com/opinion/os-fla-motel-hotel-human-trafficking-crackdown-bills-20180208-story.html>.

2. Monika, *Sleep Tight: What Hotels Are Doing to Fight Human Trafficking*, INTERNATIONELLE (Jan. 12, 2018), <http://www.internationale.org/hotels-against-trafficking/> (“Labor trafficking, sex trafficking . . . human trafficking. All of which can be found in the hotel industry. In an industry worth over \$150 billion, it’s no surprise that the anonymity of hotels provides a hotbed . . . of trafficking activity.” (first omission in original)); Plaintiff’s Original Petition at 56, *Jane Doe #1 v. Backpage.com*, No. 2018-04501 (Tex. Dist. Ct. Jan. 23, 2018) (“In a recent Blue Campaign bulletin, the Department of Homeland Security outlines that traffickers have long used the hotel industry as a hotbed for human trafficking and has recommended policies and procedures that the industry can take to help prevent human trafficking and the sexual exploitation of minors.”).

3. See sources cited *supra* note 2.

4. See *Hotline Statistics*, NAT’L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/states> (last visited Feb. 21, 2021) (data current through Dec. 31, 2019).

5. See Lori Nazry Ross, *See No Evil: A Look at Florida’s Legislative Response to Holding Hotels Civilly Liable for “Turning a Blind Eye” to the Sex Trafficking Monster Hiding Behind Closed Doors*, 22 N.Y.U. J. LEGIS. & PUB. POL’Y 375, 390–99 (2020); see, e.g., 18 PA. CONS. STAT. AND CONS. STAT. ANN. § 3051(a)(2)(i) (West, Westlaw through 2020 Reg. Sess. Act 95); TEX. CIV. PRAC. & REM. CODE ANN. § 98.002 (West, Westlaw through the end of the 2019 Reg. Sess. of the 86th Leg.); ALA. CODE § 13A-6-157 (West, Westlaw through Act 2020-206).

6. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended in various sections of 6 U.S.C., 8 U.S.C., 18 U.S.C., 22 U.S.C., and 42 U.S.C.).

7. 18 U.S.C. § 1595(a) (2018); see Ross, *supra* note 5, at 390.

for their employees.⁸ As a result of the federal and state statutes allowing for civil liability against hotels under a “beneficiary liability” theory, there has been a surge in the United States of beneficiary liability lawsuits being filed by sex trafficking victims against hotels.⁹ As the number of these types of suits has rapidly increased in the last few years, with a particular uptick in 2019,¹⁰ there has also been an increase in related declaratory judgment actions being brought by insurers against their hotel insureds.¹¹ These insurers are asking courts to find that the insurer does not have a duty to defend or indemnify in the underlying sex trafficking beneficiary liability suits based on certain policy exclusions.¹² Recently, the Third Circuit Court of Appeals, in *Nautilus Insurance Co. v. Motel Management Services, Inc.*,¹³ affirmed a 2018 decision by a Pennsylvania federal district court ruling that the assault and battery exclusion at issue in the case barred coverage for the claims in the underlying sex trafficking beneficiary liability action against the

8. CONN. GEN. STAT. ANN. § 17a-106g (West, Westlaw through the 2020 Reg. Sess., the 2020 July Spec. Sess., and the 2020 Sept. Spec. Sess.); MINN. STAT. § 157.177 (West, Westlaw from the 2020 Reg. Sess. and 1st through 7th Spec. Sess.); CAL. GOV'T CODE § 12950.3 (Deering 2021); N.Y. GEN. BUS. LAW § 206-f (McKinney, Westlaw through L. 2020, ch. 1 to 387); FLA. STAT. ANN. § 509.096(1)(a) (West, Westlaw through Ch. 184 of the 2020 2d Reg. Sess. of the 26th Leg.).

9. Corinne Ramey, *Lawsuits Accuse Big Hotel Chains of Allowing Sex Trafficking*, WALL ST. J. (Mar. 4, 2020), <https://www.wsj.com/articles/lawsuits-accuse-big-hotel-chains-of-allowing-sex-trafficking-11583317800>; see, e.g., Complaint, M.B. v. Roosevelt Inn LLC, No. 170300712 (Pa. Ct. C.P. Mar. 10, 2017); Plaintiff's Original Petition, Jane Doe #1 v. Backpage.com, No. 2018-04501 (Tex. Dist. Ct. Jan. 23, 2018); Notice of Removal, K.R. v. Backpage.com, No. 1:17-cv-00299 (M.D. Ala. May 5, 2017); Complaint, M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959 (S.D. Ohio 2019) (No. 2:19-cv-00849); Complaint, H.H. v. G6 Hosp. LLC, No. 2:19-cv-00755 (S.D. Ohio Mar. 3, 2019); Complaint, B.M. v. Wyndham Hotels & Resorts, Inc., No. 5:20-cv-00656 (N.D. Cal. Jan. 29, 2020); Complaint, J.L. v. Best Western Int'l, Inc., No. 1:19-cv-03713 (D. Colo. Dec. 30, 2019).

10. See, e.g., cases cited *supra* note 9.

11. See Emily Adams & Shubhra Mashelkar, *Human Trafficking Lawsuits and the Hotel Industry*, HOTEL BUS. (Aug. 11, 2020), <https://www.hotelbusiness.com/human-trafficking-lawsuits-and-the-hotel-industry/#:~:text=In%202019%20alone%2C%20no%20less,in%20connection%20with%20human%20trafficking>; see, e.g., *Nautilus Ins. Co. v. Motel Mgmt. Servs., Inc.* (*Nautilus I*), 320 F. Supp. 3d 636 (E.D. Pa. 2018), *aff'd*, 781 F. App'x. 57 (3d Cir. 2019); *Ricchio v. Bijal, Inc.* (*Peerless*), 424 F. Supp. 3d 182 (D. Mass. 2019); Complaint, *Atain Specialty Ins. Co. v. Varahi Hotel, LLC*, No. 1:20-cv-01582-WMR (N.D. Ga. Apr. 13, 2020) [hereinafter *Atain Complaint*]; *Starr Indem. & Liab. Co. v. Choice Hotels Int'l, Inc.*, No. 1:20-cv-03172-PKC (S.D.N.Y. Apr. 21, 2020) [hereinafter *Starr Complaint*].

12. Cf. Adams & Mashelkar, *supra* note 11 (as liability lawsuits continue to increase, it follows that there is also an increase in these hotels' insurance companies filing declaratory judgements to avoid defending the hotels and to avoid being held liable).

13. 781 F. App'x. 57 (3d Cir. 2019).

hotel defendants, thus relinquishing the insurer's duty to defend and indemnify the hotel insured.¹⁴

Following *Nautilus*, in November of 2019, a federal district court in Massachusetts came to a different conclusion in *Ricchio v. Bijal, Inc.*¹⁵ (“*Peerless*”) holding that the insurer in that case did in fact have a duty to defend its hotel insured in the sex trafficking beneficiary liability lawsuit filed against the hotel by an alleged trafficking victim.¹⁶ The court reasoned that a “criminal acts” exclusion did not preclude the possibility of liability coverage.¹⁷

Nautilus and *Peerless* appear to be the first two decisions addressing this critical coverage issue. Thus, an examination of these opinions, the arguments made by the parties, and the policy exclusions at issue may provide guidance as to how courts will handle this crucial issue moving forward.

This Article posits that insurers, by way of their declaratory judgment actions, can serve as a regulator for hotels in the fight against sex trafficking. Insurance law scholars have argued that insurance companies are increasingly serving as “corporate regulators.”¹⁸ Moreover, “insurance institutions act as risk regulators and regulate so many aspects of an . . . organization's relationships in society.”¹⁹ Accordingly, insurance companies can use their risk management tools to impact how a corporation complies with laws and heighten their commitment to corporate social responsibility.²⁰ Exclusions to coverage are one type of risk management tool that can be used to incentivize corporations to reduce risks.²¹ In fact, some scholars have reasoned that risk management tools such as policy exclusions decrease “moral hazard”—the concept that an insured will relax the care he or she takes in safeguarding his or her property as a result of having insurance, because the insured knows that the loss will be

14. *Id.* at 61.

15. 424 F. Supp. 3d 182 (D. Mass. 2019).

16. *Id.* at 195.

17. *See id.*

18. Shauhin A. Talesh, *Insurance Companies as Corporate Regulators: The Good, the Bad, and the Ugly*, 66 DEPAUL L. REV. 463, 465 (2017).

19. *Id.*

20. *See id.* at 466.

21. Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 199 (2012).

covered entirely or partly by the insurer.²² Exclusions allow the responsibility of particular policy losses to rest solely with insureds, which can lead to them stepping up their preventive efforts to reduce risks.²³ It is my contention that the threat of hotels not being provided insurance coverage due to policy exclusions, and thus having to exclusively bear defense costs and potentially huge damage awards, will likely decrease the chance of moral hazard by hotels and motivate them to institute anti-trafficking preventative measures to end the grave reality of sex trafficking in the hotel environment.

I have previously argued the importance of creating legal and financial repercussions for the hotel industry through exposure to sex trafficking beneficiary liability suits and how that exposure can serve as an incentive for hotels implementing anti-trafficking training measures to educate their workers on the warning indicia of trafficking and proper reporting procedures.²⁴

This Article builds on that argument and contends that just as litigation exposure for hotels facing actions by sex trafficking victims can serve as an impetus for corporate responsibility in helping to eliminate the evils of sex trafficking, so can the risk of not being provided a defense or indemnification by an insurer promote a sense of corporate responsibility amongst hotels, and ultimately prompt change. Even if courts ultimately find, however, that insurers have to defend and indemnify hotel insureds, insurers can still serve as regulators in the fight to end sex trafficking in the hotel industry by employing other risk management tools such as auditing, training, and educational services.

Part I of this Article begins with an overview of the pervasiveness of sex trafficking at hotels, the federal Trafficking Victims Protection Act (TVPA),²⁵ and the TVRPA. Part II discusses the emergence of recent sex trafficking beneficiary litigation against hotels under 18 U.S.C. § 1595(a) of the TVPRA. Part III analyzes the role of the insurer as a regulator in the fight to end sex trafficking at hotels. Part

22. See *id.* at 199, 209 (acknowledging that insurance coverage can destroy incentives for care with insureds in certain circumstances and the use of exclusions can thwart this potential).

23. George L. Priest, *A Principled Approach Toward Insurance Law: The Economics of Insurance and the Current Restatement Project*, 24 GEO. MASON L. REV. 635, 648 (2017).

24. Ross, *supra* note 5, at 380.

25. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in various sections of 8 U.S.C., 18 U.S.C., 20 U.S.C., 22 U.S.C., 27 U.S.C., 28 U.S.C., and 42 U.S.C.).

IV proceeds by examining the ground-breaking *Nautilus* and *Peerless* decisions, the first of these declaratory judgment actions where courts have ruled on exclusions for coverage in sex trafficking beneficiary liability claims against hotels. This Part of the Article seeks to serve as an informative tool, providing guidance on the potential issues before courts hearing these actions and the stance that other courts may take in the future. Part IV concludes by discussing the rise of other declaratory judgment actions following *Nautilus* and *Peerless*, the implications that *Nautilus* and *Peerless* may have on other emerging declaratory actions, and the possibility of insurers using additional risk management tools to help end sex trafficking in the hotel industry.

I. SEX TRAFFICKING AND HOTELS, THE TVPA, AND TVPRA

A. *An Overview of the Pervasiveness of Sex Trafficking at Hotels*

Within the first six months of 2019, the National Human Trafficking Hotline had received 3,266 reports of sex trafficking.²⁶ Sex and labor trafficking is reportedly a \$150 billion criminal enterprise, with two-thirds of that estimated amount derived from sex trafficking.²⁷ Unfortunately, hotels, motels, and other lodging establishments frequently become attractive venues for traffickers because of the anonymity and privacy that they provide.²⁸ They are also attractive locales for traffickers to “house their operations” because they afford them the ability to pay in cash for hotel rooms and not have to maintain a separate building, with associated upkeep costs, for their criminal enterprises.²⁹

Over a ten-year period, ranging from 2007 to 2017, the National Human Trafficking Hotline received 3,596 reports of human trafficking cases involving hotels and motels.³⁰ In fact, “[s]eventy-five

26. *Hotline Statistics*, *supra* note 4 (data as of June 31, 2019).

27. See *ILO Says Forced Labour Generates Annual Profits of US\$ 150 Billion*, INT’L LAB. ORG. (May 20, 2014), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_243201/lang-en/index.htm.

28. *Human Trafficking and the Hospitality Industry*, DEP’T OF HOMELAND SEC., <https://www.dhs.gov/blue-campaign/hospitalityindustry> (last visited Feb. 21, 2021).

29. Ross, *supra* note 5, at 385.

30. BRITTANY ANTHONY ET AL., POLARIS, ON-RAMPS, INTERSECTIONS, AND EXIT ROUTES: A ROADMAP FOR SYSTEMS AND INDUSTRIES TO PREVENT AND DISRUPT HUMAN TRAFFICKING 67 (2018), <https://polarisproject.org/wp-content/uploads/2018/08/A-Roadmap-for-Systems-and-Industries-to-Prevent-and-Disrupt-Human-Trafficking.pdf>.

percent of human trafficking victims reported that they had come into contact with a hotel at some point while being trafficked.”³¹

Although trafficking can occur in low-priced motels situated in high-crime areas of a city or town, “[h]uman traffickers operate in every category and across every price point of the lodging industry, from the cheapest to the most luxurious.”³² Nevertheless, inside the confines of these high-priced hotels and economy-level motels and inns, the indicia of sex trafficking remain the same.³³

Such indicators include payment for rooms in cash or pre-paid cards; extended stays with few possessions; requests for rooms overlooking a parking lot; presence of excessive drugs, alcohol, and/or sex paraphernalia; excessive foot traffic in/out of hotel room; and frequent requests for new linens, towels, and restocking of the refrigerator.³⁴

Sex trafficking victims often exhibit signs of being afraid or anxious and demonstrate submissive behavior.³⁵ Other signs that a victim might exhibit include inappropriate dress in light of the weather, hygiene issues, sleep deprivation, malnourishment, and a lack of control of personal belongings such as money, cell phones, or identification cards.³⁶ Traffickers may also attempt to restrict or control a victim’s mobility and communications with others, as well as try to conceal his or her whereabouts.³⁷ Hotel employees are uniquely positioned to detect these indicia of trafficking because they closely interface with hotel guests and regularly enter their rooms for servicing and cleaning.³⁸ However, many hotel employees lack awareness and training and thus are not aware of what to look for.³⁹

Notably, the recent emergence of sex trafficking cases filed by victims against hotels under a beneficiary liability theory highlight many of these very indicators within the allegations of the

31. Ross, *supra* note 5, 385–86; ANTHONY ET AL., *supra* note 30.

32. *Human Trafficking: What Business Owners Need to Know*, FLA. REST. & LODGING, Fall 2018, at 20.

33. See ANTHONY ET AL., *supra* note 30.

34. Ross, *supra* note 5, at 386; Recommendation Brochure by Polaris, Human Trafficking and the Hotel Industry (2019), <https://polarisproject.org/wp-content/uploads/2019/09/human-trafficking-hotel-industry-recommendations.pdf> [hereinafter Human Trafficking Brochure] [<https://perma.cc/8WB8-7UMA>].

35. Ross, *supra* note 5, at 386; Human Trafficking Brochure, *supra* note 34.

36. Ross, *supra* note 5, at 386; Human Trafficking Brochure, *supra* note 34.

37. Ross, *supra* note 5, at 386; Human Trafficking Brochure, *supra* note 34.

38. ANTHONY ET AL., *supra* note 30.

39. Ross, *supra* note 5, at 413; Human Trafficking Brochure, *supra* note 34.

complaints.⁴⁰ Generally, these complaints allege that the hotels knew or should have known that the victim was being subjected to sex trafficking on its premises due to the presence of these indicia, yet failed to report the trafficking to law enforcement or do anything to stop it.⁴¹

B. The Trafficking Victims Protection Act and The Trafficking Victims Protection Reauthorization Act of 2008

In 2000, recognizing that there was no comprehensive law in the United States that penalized trafficking offenses, Congress enacted the TVPA.⁴² With the enactment of the TVPA, Congress created new trafficking crimes and enhanced penalties that could be imposed for already-existing involuntary servitude crimes.⁴³ Following its enactment in 2000, the TVPA was reauthorized in 2003, 2005, 2008, and 2013, with each reauthorization supplementing the Act or certain specific provisions of the Act.⁴⁴ Of these reauthorizations, the most

40. See, e.g., Complaint at 6–7, *M.B. v. Roosevelt Inn LLC*, No. 170300712 (Pa. Ct. C.P. Mar. 10, 2017); Plaintiff’s Original Petition at 56, *Jane Doe #1 v. Backpage.com*, No. 2018-04501 (Tex. Dist. Ct. Jan. 23, 2018); Notice of Removal at 19, *K.R. v. Backpage.com*, No. 1:17-cv-00299 (M.D. Ala. May 5, 2017); Complaint at 18–19, *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959 (S.D. Ohio 2019) (No. 2:19-cv-00849); Complaint at 14, *H.H. v. G6 Hosp. LLC*, No. 2:19-cv-00755 (S.D. Ohio Mar. 3, 2019); Complaint at 44–45, *B.M. v. Wyndham Hotels & Resorts, Inc.*, No. 5:20-cv-00656 (N.D. Cal. Jan. 29, 2020); Complaint at 32–34, *J.L. v. Best Western Int’l, Inc.*, No. 1:19-cv-03713 (D. Colo. Dec. 30, 2019).

41. See *supra* note 10.

42. Gallant Fish, *No Rest for the Wicked: Civil Liability Against Hotels in Cases of Sex Trafficking*, 23 *BUFF. HUM. RTS. L. REV.* 119, 120 (2016–2017). Congress explained that prior to the TVPA, there was no all-encompassing law in the United States that penalized the array of offenses “involved in the trafficking scheme.” 22 U.S.C. § 7101(b)(14)–(15) (2018). It reads:

Existing legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved. No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme. Instead, even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment. . . .

In the United States, the seriousness of this crime and its components is not reflected in current sentencing guidelines, resulting in weak penalties for convicted traffickers.

43. Fish, *supra* note 42, at 136; see 22 U.S.C. § 7101(b)(13)–(15).

44. Fish, *supra* note 42, at 137; see also William M. Sullivan, Jr. et al., *Human Trafficking Raises Corporate Liability Concerns for the Hospitality Industry*, *PILLSBURY* (Feb. 5, 2018), <https://www.pillsburylaw.com/en/news-and-insights/human-trafficking-raises-corporate-liability-concerns-for-the-hospitality-industry.html> (“Enacted in 2000 and subsequently revised in 2003, 2005, 2008 and 2013, the TVPA is intended to combat trafficking in persons, especially into the sex trade, slavery and involuntary servitude.”).

significant with regard to the issue of potential liability against hotels were the 2003 and 2008 reauthorizations.⁴⁵

The 2003 reauthorization created a civil remedy for trafficking victims, allowing them to sue in federal court and recover damages and attorney fees.⁴⁶ Five years later, Congress expanded these civil-remedy provisions with the passage of the TVPRA.⁴⁷ In the 2008 reauthorization, Congress created 18 U.S.C. section 1595(a), allowing for beneficiary liability.⁴⁸ Under this provision, an individual or entity that does not directly traffic a victim can be held liable for “knowingly benefit[ing], 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.”⁴⁹

Many states have enacted similar statutes modeled after the TVPRA.⁵⁰ For example, Pennsylvania, Texas, Michigan, and Alabama have implemented laws that potentially hold hotels civilly liable under a beneficiary liability theory if a sex trafficking victim is subjected to trafficking on their premises.⁵¹

II. THE EMERGENCE OF RECENT SEX TRAFFICKING BENEFICIARY LIABILITY ACTIONS AGAINST HOTELS UNDER § 1595(A)

Over the past few years, there has been a steady increase in the beneficiary liability-type claims being filed against hotels by sex trafficking victims pursuant to both state and federal laws.⁵² Some of the first cases emerged in states like Pennsylvania, Texas, and Alabama.⁵³ Within the last year, the number of recorded cases

45. See Fish, *supra* note 42, at 137–38; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(4), 117 Stat. 2875.

46. See Fish, *supra* note 42, at 137; Trafficking Victims Protection Reauthorization Act of 2003 § 4(a)(4).

47. Fish, *supra* note 42, at 138.

48. *Id.*; see 18 U.S.C. § 1595(a) (2018).

49. Fish, *supra* note 42, at 138; 18 U.S.C. § 1595(a).

50. Fish, *supra* note 42, at 142; see, e.g., ALA. CODE § 13A-6-157 (West, Westlaw through Act 2020-206); MICH. COMP. LAWS ANN. § 752.983 (West, Westlaw through P.A. 2020, No. 260, of the 2020 Reg. Sess., 100th Leg.); 18 PA. CONS. STAT. AND CONS. STAT. ANN. § 3051(a)(2)(i) (West, Westlaw through 2020 Reg. Sess. Act 95); TEX. CIV. PRAC. & REM. CODE ANN. § 98.002 (West, Westlaw through the end of the 2019 Reg. Sess. of the 86th Leg.).

51. Fish, *supra* note 42, at 142; see, e.g., ALA. CODE § 13A-6-157; MICH. COMP. LAWS ANN. § 752.983; 18 PA. CONS. STAT. AND CONS. STAT. ANN. § 3051(a)(2)(i); TEX. CIV. PRAC. & REM. CODE ANN. § 98.002.

52. See cases *supra* note 9.

53. See cases *supra* note 9.

involving civil liability claims brought against hotels under federal law, specifically pursuant to § 1595, has rapidly increased.⁵⁴

In 2019, “a loosely organized group of plaintiffs’ lawyers . . . began searching for victims [subjected to sex trafficking at hotels] through advocacy-group referrals and online advertising, leading to a steady stream of lawsuits.”⁵⁵ Many of these beneficiary liability claims are in the infancy stage of litigation and accuse some of the best-known hotels in the United States of ignoring sex trafficking occurring on their premises.⁵⁶ At the time of this writing, over forty lawsuits had been filed in federal courts pursuant to § 1595 under a beneficiary liability theory.⁵⁷ For example, in early December 2019, a New York law firm filed a landmark legal action in a federal court in Columbus, Ohio, against twelve major hotel chains.⁵⁸ The action was filed on behalf of thirteen women—“many of whom were minors when they said the trafficking occurred”—alleging that they were subjected to sex trafficking at the hotels’ properties.⁵⁹ “The filing marked the first time the hotel industry . . . faced action as a group. The case drew together 13 separate actions that had been filed in places such as Ohio, Massachusetts, Georgia, Texas, and New York.”⁶⁰

Although many beneficiary liability suits have been filed against hotels pursuant to § 1595 since 2019, *Ricchio v. McLean*,⁶¹ a 2017 First Circuit Court of Appeals opinion, appears to be the first recorded opinion involving one of these claims.⁶² In that decision, the court of

54. See, e.g., Complaint at 20, *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959 (S.D. Ohio 2019) (No. 2:19-cv-00849); Complaint at 3, *H.H. v. G6 Hosp. LLC*, No. 2:19-cv-00755 (S.D. Ohio Mar. 3, 2019); Complaint at 2, *B.M. v. Wyndham Hotels & Resorts, Inc.*, No. 5:20-cv-00656 (N.D. Cal. Jan. 29, 2020); Complaint at 2, *J.L. v. Best Western Int’l, Inc.*, No. 1:19-cv-03713 (D. Colo. Dec. 30, 2019).

55. See Ramey, *supra* note 9.

56. See *id.*

57. See *id.*

58. Matthew Lavietes, *Top Hotels Sued for ‘Industry-Wide Failures’ to Prevent U.S. Sex Trafficking*, THOMSON REUTERS FOUND. NEWS (Dec. 10, 2019, 4:49 PM), <https://news.trust.org/item/20191210020007-hruah/> (the lawyers sought to consolidate thirteen existing cases in the district court of Ohio).

59. *Id.*

60. *Id.*

61. 853 F.3d 553 (1st Cir. 2017). The First Circuit has remanded the case back to the district court. See *Peerless*, 424 F. Supp. 3d 182, 195 (D. Mass. 2019).

62. *Id.* at 556. Plaintiff Ricchio filed her original beneficiary liability lawsuit in the United States District Court for Massachusetts in October 2015. Complaint at 1, *Peerless*, No. 1:15-cv-13519 (D. Mass. 2019) [hereinafter *Peerless* Complaint]. The district court granted the hotel defendants’ motion to dismiss the complaint in 2016. Order of Feb. 16, 2016 Grating Motion to Dismiss, *Peerless*, No. 1:15-cv-13519 (D. Mass. 2019). After a denial of the plaintiff’s motion to

appeals reversed the lower court's granting of the defendant hotel's motion to dismiss the sex trafficking victim's complaint against the hotel and its owners.⁶³ The complaint alleged that the hotel defendants knowingly allowed the trafficker to use the hotel's rooms to force the minor victim to engage in commercial sex acts.⁶⁴ In reversing the lower court, the First Circuit reasoned that the profits received from the room rentals could establish the "knowingly benefit[ing]" standard under § 1595 and consequently held that the victim had stated sufficient facts in her complaint regarding the hotel's liability under § 1595.⁶⁵

Subsequent to *Ricchio*, two actions were filed in an Ohio federal district court in March and October 2019 involving beneficiary liability claims brought against hotels under § 1595.⁶⁶ In October of 2019, the United States District Court for the Southern District of Ohio, in *M.A. v. Wyndham Hotels & Resorts, Inc.*,⁶⁷ denied motions to dismiss filed by several hotel chain operators in an action brought by a sex trafficking victim alleging that the trafficking occurred at numerous hotels such as Days Inn by Wyndham, Comfort Inn, and Crowne Plaza.⁶⁸ The victim alleged that the hotel defendants knew or should have known that her trafficking was taking place on their properties due to the many indicators that she was being trafficked, and thus the defendants were liable under a beneficiary liability theory pursuant to the § 1595 of the TVPRA.⁶⁹

The *M.A. v. Wyndham* court relied heavily on the *Ricchio* opinion in denying the hotels' motions to dismiss.⁷⁰ The court applied a three-part test in analyzing whether the victim had stated a claim for beneficiary liability under § 1595(a): "(1) the person or entity must 'knowingly benefit[], financially or by receiving anything of value,' (2) from participating in a venture, (3) that the 'person knew or should

reconsider, the district court's order was appealed. Notice Appeal, *Peerless*, No. 1:15-cv-13519 (D. Mass. 2019).

63. *Ricchio*, 853 F.3d at 556.

64. *Id.*

65. *Id.* at 556–57.

66. See *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959, 963 (S.D. Ohio 2019); *H.H. v. G6 Hosp., LLC*, No. 2:19-cv-00755, 2019 WL 6682152, at *1 (S.D. Ohio Dec. 6, 2019).

67. 425 F. Supp. 3d 959, 974 (S.D. Ohio 2019).

68. *Id.* at 962.

69. *Id.* at 964–65.

70. See *id.* at 966–70.

have known has engaged in an act in violation of this chapter.”⁷¹ With this framework established, the court concluded that the victim had sufficiently stated facts to support each element of a beneficiary liability claim under § 1595.⁷² Just two months later, this same federal district court denied motions to dismiss filed by other hotel defendants, including Wyndham, on the same basis.⁷³ In this second action, *H.H. v. G6 Hospitality*,⁷⁴ the victim filed an action alleging beneficiary liability against the hotels under § 1595 asserting that the hotels were aware that sex trafficking was taking place on their premises, failed to prevent it, and knew or should have known that the victim was being trafficked due to indicia of trafficking, including the housekeeping staff discovering “her chained up in the bathroom” but ignoring her cries for help.⁷⁵ Relying on the “extensive analysis” provided in its previous decision in *M.A. v. Wyndham*⁷⁶ and based on the same reasoning, the court held that the victim had alleged sufficient facts to state a claim to relief under § 1595.⁷⁷ These cases are representative of numerous cases currently being filed all over the country.⁷⁸ According to one attorney representing victims in sex trafficking beneficiary liability litigation,

[a]bout 1,500 victims of human trafficking have retained lawyers in the various lawsuits and as many as 7,000 are expected over time A settlement could run into the billions of dollars . . . because of the size of the problem and the evidence that hotels have long known of the trafficking.⁷⁹

Some experts have argued that the hotel industry needs to feel the negative consequences—both legal and financial—of allowing trafficking to occur on their premises or failing to have monitoring

71. *Id.* at 964 (alteration in original) (quoting 18 U.S.C. § 1595(a) (2018)).

72. *See id.* at 965–71.

73. *H.H. v. G6 Hosp., LLC*, No. 2:19-cv-00755, 2019 WL 6682152, at *1 (S.D. Ohio Dec. 6, 2019).

74. No. 2:19-cv-00755, 2019 WL 6682152 (S.D. Ohio Dec. 6, 2019).

75. *Id.* at *1.

76. *Id.* at *2. “In its October 7, 2019 Opinion and Order in *MA v. Wyndham Hotel & Resorts, Inc.*, this Court undertook an extensive analysis in a related case of the Trafficking Victims Protection Reauthorization Act (“TVPRA”) and its application to civil liability of hotel defendants for sex trafficking.” *Id.*

77. *See id.* at *2–5.

78. *See Ramey, supra* note 9; Lavietes, *supra* note 58.

79. *Lawsuits Allege Hotel Chains Ignored Human Trafficking*, USA TODAY (Dec. 19, 2019, 8:28 AM), <https://www.usatoday.com/story/travel/hotels/2019/12/19/lawsuits-allege-hotel-chains-ignored-human-trafficking/2696622001/>.

protocols in place to detect trafficking.⁸⁰ Human trafficking scholar Louise Shelley has noted how corporations have previously engaged in business reform efforts to take a stance against other criminal conduct such as drug trafficking, which came in part as a result of negative financial, legal, and reputational consequences faced by those companies.⁸¹ Conversely, however, those same reform efforts have not been replicated by companies such as hotels who facilitate human trafficking.⁸²

Since hotels have failed to be diligent in their efforts against trafficking, additional financial measures must be taken to address these deficiencies and promote change in the hotel industry.⁸³ Thus, it is my contention that the risk of not being provided a defense or indemnification by an insurer will undoubtedly serve as a negative financial consequence for a hotel's failure to implement and/or adhere to anti-trafficking measures.

Insurance companies have in fact begun filing declaratory actions to disclaim their duty to defend and indemnify hotels and hotel management companies.⁸⁴ Filing these declaratory actions and seeking to exclude coverage will allow insurers to play a regulatory role in the fight to end sex trafficking at our nation's hotels.

III. INSURANCE AS A REGULATOR IN THE FIGHT AGAINST SEX TRAFFICKING AT HOTELS

Proactively engaging in anti-human trafficking compliance is . . . necessary from both corporate social responsibility and risk management perspectives. Indeed, not only is it an effective way to play a significant role in the fight against exploitation, but it also reduces business risk by mitigating a company's exposure to potential corporate liability.⁸⁵

80. Ross, *supra* note 5, at 408–11; see Fish, *supra* note 42, at 133–34.

81. Fish, *supra* note 42, at 134 n.111 (discussing LOUISE SHELLEY, HUMAN TRAFFICKING: A GLOBAL PERSPECTIVE (2010)).

82. *Id.*

83. *Id.* at 134 n.110.

84. See *supra* note 11; see Larry P. Schiffer, *Exclusion Relieves Insurer of Duty to Defend in Sex Trafficking Case*, NAT'L L. REV. (July 23, 2019), <https://www.natlawreview.com/article/exclusion-relieves-insurer-duty-to-defend-sex-trafficking-case>. “In the mundane world of insurance, sex trafficking has become a coverage issue for insurance companies when faced with an insured[] [hotel's] request to defend and indemnify against sex trafficking claims.” *Id.*

85. Sullivan et al., *supra* note 44.

Insurance law scholars have argued that insurance serves a regulatory function and that “insurers are increasingly acting as corporate regulators.”⁸⁶ “[I]nsurance institutions act as risk regulators and regulate so many aspects of an . . . organization’s relationships in society.”⁸⁷ Insurers, thus, can use their risk management tools to impact a corporation’s compliance with laws and corporate social responsibility.⁸⁸

Further, “[a]n insurance policy . . . is a social institution that affects risk management [and] deterrence.”⁸⁹ Through the essential functions of risk reduction and risk management, insurance arrangements utilize tools such as deductibles and exclusions to incentivize private parties to reduce risks.⁹⁰ Risk management tools such as exclusions of coverage present one mechanism to reduce “moral hazard”⁹¹—the concept that “a person carrying insurance, knowing of the insurance coverage, might take more risks than one who does not carry insurance.”⁹² Stated another way, “moral hazard” refers to the “effect of insurance in causing the insured to relax the care he or she takes to safeguard his or her property because the loss will be borne in whole or part by the insurance company.”⁹³

Because coverage exclusions directly allocate losses to policyholders, they can have beneficial effects on controlling moral hazard.⁹⁴ Exclusions can place the burden of particular policy losses exclusively on policyholders, which in turn can lead to policyholders increasing their preventive efforts to reduce or eliminate the risks.⁹⁵

Accordingly, the prospect of not being provided insurance coverage due to policy exclusions, and thus having to bear the defense costs and potentially huge damage awards alone, will likely decrease the chance of moral hazard by hotels—that is, reduce the chance of them failing to put forth diligent efforts in implementing anti-

86. Talesh, *supra* note 18, at 465.

87. *Id.*

88. *See id.* at 466.

89. Leo P. Martinez, *A Unified Theory of Insurance Risk*, 74 U. PITT. L. REV. 713, 722 (2013).

90. Ben-Shahar & Logue, *supra* note 21, at 199.

91. *See* Talesh, *supra* note 18, at 471.

92. DAVID P. LEONARD, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: SELECTED RULES OF LIMITED ADMISSIBILITY* § 6.2.1 (3d ed. 2019).

93. 44 AM. JUR. 2D *Insurance* § 1198, Westlaw (database updated May 2021).

94. *Id.*

95. Priest, *supra* note 23, at 648.

trafficking preventative measures to help end the pervasiveness of sex trafficking occurring in hotels.

An example of the regulatory impact that insurance companies can have on insureds by using risk management tools such as excluding coverage can be seen in sexual abuse claims against the Catholic Church.⁹⁶ “[A]fter 1987 [insurance companies] began to refuse coverage for [clergy sexual] abuse and for failing to screen, train, or supervise priests.”⁹⁷ Even when insurers began offering this coverage, many of the policies were subject to numerous conditions which effectively resulted in nominal coverage to the churches.⁹⁸

For example, some policies might have included coverage exclusions for claims involving a “previously identified perpetrator” or an exclusion for incidents of abuse that occurred prior to a certain date.⁹⁹ As a result of the conditions that were attached to these sexual misconduct/abuse policies, the coverage afforded was often not adequate to pay the monetary damages.¹⁰⁰ Hence, these religious institutions have often had the responsibility of paying these judgments themselves.¹⁰¹

In instances where insurance coverage was granted, insurers insisted that policies and procedures were implemented that would help curtail incidents of clergy sexual misconduct.¹⁰² Consequently, the Catholic Church began to place a greater emphasis on reform efforts and implementation of preventative policies to end clergy sexual abuse, including personnel screening and the creation of strict guidelines for dealing with children.¹⁰³ Accordingly, liability

96. See Alana Bartley, Note, *The Liability Insurance Regulation of Religious Institutions After the Catholic Church Sexual Abuse Scandal*, 16 CONN. INS. L.J. 505 (2010).

97. Angela C. Carmella, *Catholic Institutions in Court: The Religion Clauses and Political-Legal Compromise*, 120 W. VA. L. REV. 1, 46 (2017); Bartley, *supra* note 96, at 532 (noting that in the early 1990s, insurers began providing coverage for clergy sexual abuse, following a period of time where such abuse was completely excluded from coverage).

98. Bartley, *supra* note 96, at 532.

99. *Id.*

100. *Id.*

101. *Id.* at 533.

102. *Id.*

103. *Id.* at 534.

[T]he resulting lawsuits by the victims caused the liability insurance carriers of religious institutions to craft conditions and exceptions to policies, and placed the majority of the liability for the acts of clergy sexual misconduct in the hands of the religious institutions. Religious institutions, like the Catholic Church, . . . prompted either by liability insurance companies or on their own accord, were forced to make drastic policy changes to avoid the resulting liability from lawsuits of clergy sexual abuse victims. *Id.*

insurance companies in their regulatory roles “incentivized religious institutions to implement policies to curb clergy sexual misconduct.”¹⁰⁴

Applying these concepts to the sex trafficking beneficiary liability suits being filed against hotels, insurers are now in a position to have a regulatory impact on the sexual abuse of trafficking victims occurring in hotels by way of excluding coverage for these types of claims.

IV. THE RISING TIDE OF DECLARATORY JUDGMENT ACTIONS AND THE ASSERTATION OF COVERAGE EXCLUSIONS

A. *Ground-Breaking Actions: Nautilus and Peerless*

*Nautilus Insurance Co. v. Motel Management Services, Inc.*¹⁰⁵ is the first recorded decision where an insurer did in fact seek to disclaim its duty to defend and indemnify the hotel operator in a sex trafficking beneficiary liability suit based on a policy exclusion.¹⁰⁶ In May 2018, the United States District Court for the Eastern District of Pennsylvania held that because the negligence claims alleged by the plaintiff in the underlying sex trafficking beneficiary liability action arose from negligent conduct contributing to an assault and battery, they were barred by the insurer’s “All Assault or Battery” exclusion in the general commercial liability policy.¹⁰⁷ The court further noted that the claims were barred because providing coverage would be against Pennsylvania public policy.¹⁰⁸ The district court’s ruling was appealed and was later upheld by the Third Circuit Court of Appeals.¹⁰⁹

Conversely, in *Peerless*, a federal district court in Massachusetts in 2019 came to a different conclusion and held that the insurer in that case did in fact have a duty to defend its hotel insured in the underlying sex trafficking beneficiary liability claim.¹¹⁰ The court concluded that

104. *Id.*

105. *See Nautilus Ins. Co. v. Motel Mgmt. Servs., Inc. (Nautilus II)*, 781 F. App’x. 57 (3d Cir. 2019).

106. *Id.* at 57.

107. *Nautilus I*, 320 F. Supp. 3d 636, 643 (E.D. Pa. 2018), *aff’d*, 781 F. App’x. 57 (3d Cir. 2019).

108. *Id.*

109. *See Nautilus II*, 781 F. App’x at 61.

110. *Peerless*, 424 F. Supp. 3d 182, 195 (D. Mass. 2019).

a criminal acts exclusion did not preclude coverage.¹¹¹ The court further reasoned that the allegations against the hotel defendants, which alleged that they engaged in intentional criminal conduct violating the TVPA, did not preclude an interpretation that the complaint included lesser allegations of negligent conduct pursuant to the TVPRA.¹¹² Thus, the allegations of the underlying complaint met the state's duty to defend standard, requiring only a "general allegation" susceptible to a possibility of liability insurance coverage.¹¹³

Since *Nautilus* and *Peerless* are seminal cases addressing this vital coverage issue, an examination of arguments by the insurers and the hotel insureds in these cases, and the policy exclusions at issue, may be instructive and may provide guidance as to how courts will handle this critical issue going forward. If courts find, as the *Nautilus* court did, that coverage is barred based on applicable exclusions, the reality of facing million-dollar awards without the "safety net" of insurance coverage should incentivize hotels to effect meaningful change in ending sex trafficking on their premises.

1. *Nautilus Insurance Co. v. Motel Management Services, Inc.*

Nautilus stems from an underlying action by E.B., a minor, who sued Motel Management Services, Inc. (MMS) and the motel operators in state court alleging that she was subjected to sex trafficking in violation of Pennsylvania's Human Trafficking Law.¹¹⁴ The victim also alleged that she was held at gun point, coerced to participate in sex acts with traffickers, and was subjected to physical harm.¹¹⁵ The complaint further avers that MMS "facilitated her exploitation by knowingly renting rooms at its motel to the traffickers . . . failed to intervene or to report the traffickers' illegal conduct; and . . . financially profited from E.B.'s exploitation."¹¹⁶

In response to the victim's lawsuit, *Nautilus* filed a declaratory judgment action and asserted that it was exempted from its duty to defend and indemnify MMS in the suit by E.B. because of the "assault

111. *Id.* at 189–95.

112. *Id.* at 195.

113. *Id.*

114. *Nautilus II*, 781 F. App'x at 58; see 18 PA. CONS. STAT. AND CONS. STAT. ANN. § 3011 (West, Westlaw through 2021 Reg. Sess. Act 14).

115. *Nautilus II*, 781 F. App'x at 58.

116. *Id.*

and battery” exclusion in MMS’s insurance policy which excluded claims arising out of an assault or battery, “including a failure to prevent or suppress an assault or battery.”¹¹⁷ Nautilus ultimately filed a motion for judgment on the pleadings and the district court granted Nautilus’s motion, “declaring that Nautilus had no duty to defend and indemnify MMS because E.B.’s claims in the underlying action arose from facts alleging negligent failure to prevent an assault or battery and therefore were not covered by the insurance policy.”¹¹⁸

Following the district court granting Nautilus’s motion for judgment on the pleadings, MMS appealed the court’s decision to the Third Circuit Court of Appeals.¹¹⁹ In its brief, MMS argued that it was entitled to coverage under its policy with Nautilus because Nautilus had a duty to provide coverage for claims of negligence and E.B. had filed the action alleging MMS was negligent “with regard to human trafficking violations.”¹²⁰ Thus, the face of the complaint did not implicate any of the exceptions listed in the policy that Nautilus contended were applicable.¹²¹

The relevant policy exclusion at issue in the case stated:

[R]egardless of culpability or intent of any person, . . . there is no coverage for “bodily injury” or “personal and advertising injury” arising out of any: (1) actual or alleged assault or battery; (2) physical altercation; or (3) any act or omission in connection with the prevention or suppression of such acts. It applies regardless of whether such actual or alleged damages are caused by an employee, patron or any other person. The exclusion applies to all causes of action arising out of any assault, battery, or physical altercation including allegations of any act, error, or omission relating to such an assault, battery, or physical altercation. It also applies to any claim arising out of any act or omission in connection with the prevention or suppression of an assault, battery or physical altercation, including failure to provide adequate

117. *Id.* at 59.

118. *Id.*

119. *Id.* at 58.

120. Brief of Appellant at 10, *Nautilus II*, 781 F. App’x. 57 (3d Cir. 2019) (No. 18-2290), WL 4146264, at *10 [hereinafter MMS’s Brief].

121. *Id.* at 10–11.

security, negligent hiring, placement, training, or supervision.¹²²

In reminding the court that it was limited to considering “the four corners of the underlying Complaint as well as the four corners of the insurance contract” when determining the coverage issue, MMS also argued that the court had the duty to accept the factual allegations of the underlying complaint “as true and liberally construe[] . . . [them] in favor of the insured.”¹²³ MMS argued that the facts stated in the complaint, as well as the *claim for damages*, have to be compared to the insurance policy when determining whether an insured has a duty to defend and provide coverage.¹²⁴ To that end, MMS argued that E.B.’s complaint never sought *damages* from the insured for harm suffered as a result of an assault and/or rape but rather her complaint seeks damages for negligence.¹²⁵

MMS proceeded by discussing that E.B.’s allegations “stem[] from human trafficking negligence” and that nowhere in her complaint does E.B. allege that “MMS participated in the sex acts alleged” or “had any direct involvement with any sex trafficker or handler.”¹²⁶ Additionally, MMS argued that “based upon the definition [of human trafficking, it is not] required that a victim of human trafficking suffer assaultive conduct or rape.”¹²⁷

MMS directed the Third Circuit to examine the specific language of the policy which provides that the listed exclusions are applicable when the injuries allegedly suffered “arise out of” actual assault or battery or alleged assault or battery.¹²⁸ MMS referenced the Third Circuit’s decision in a previous unpublished opinion¹²⁹ where it reversed a summary judgment order on the basis that it could not “be determined as a matter of law [from the allegations of the complaint]

122. Brief of Appellee at 14–15, *Nautilus II*, 781 F. App’x 57 (3d Cir. 2019) (No. 18-2290) (citations omitted) [hereinafter *Nautilus’s Brief*].

123. MMS’s Brief, *supra* note 120, at 10–11.

124. *See id.* at 11. The brief cites *Donegal Mutual Insurance Co. v. Baumhammers*, 938 A.2d 286, 290 (Pa. 2007), which held that “[a]n insurer’s duty to defend an action against the insured is measured, in the first instance, by the allegations in the plaintiff’s pleadings. . . . In determining the duty to defend, the complaint claiming *damages* must be compared to the policy and a determination made as to whether, if the allegations are sustained, the insurer would be required to pay resulting judgment.” *Id.* (alteration in original) (emphasis added).

125. MMS’s Brief, *supra* note 120, at 10–11.

126. *Id.* at 14–15.

127. *Id.*

128. *Id.* at 20.

129. *Id.* (quoting *Essex Ins. Co. v. Starlight Mgmt. Co.*, 198 F. App’x 179 (3d Cir. 2006)).

that the [victim's] injuries 'arise out of' assault and/or battery."¹³⁰ Relying on this finding, MMS argued that the court's own precedent required it to make a determination as to whether the damages sought by E.B. in her complaint "ar[o]se out of" an assault or battery.¹³¹ MMS contended that the court could not conclude this because E.B.'s allegations "arise from" her being a human trafficking victim, which does not equate with her being a victim of assault or battery.¹³² Hence, MMS concluded that the exceptions proscribed in the policy are "simply not implicated by the conduct alleged in this case."¹³³ Accordingly, MMS urged the court to hold that the listed exclusions in Nautilus's policy were inapplicable and require the insurer to provide coverage to MMS because there was in fact a *possibility* that the allegations fell within the policy's coverage.¹³⁴

In response to MMS arguments, the court stated that its decision regarding whether Nautilus has a duty to defend MMS is limited to an examination of the four corners of the complaint and how it aligns with the actual terms of the insurance contract.¹³⁵ The court urged that there were no exceptions to the "four corners" rule, "even if the insurer knows or should know that the allegations in the complaint are untrue."¹³⁶

In ascertaining Nautilus's duty to provide coverage and defend under the policy, the court highlighted the following policy language:

The exclusion provides that Nautilus "will have no duty to defend or indemnify any insured in any action or proceeding alleging damages arising out of any assault or battery," regardless of culpability, intent, or relationship of the perpetrator of the assault or battery to the insured, or whether the damages occurred at premises owned or operated by the insured. The assault and battery exclusion specifically omits from the policy's coverage "[a]ll causes of action arising out of any assault or battery" or "any act, error, or omission relating to such an assault or battery."¹³⁷

130. *Id.* (second alteration in original).

131. *Id.*

132. *Id.*

133. *Id.* at 20–21.

134. *Id.*

135. *Nautilus II*, 781 F. App'x 57, 59 (3d Cir. 2019).

136. *Id.*

137. *Id.* at 60.

The court noted that “but for” causation was the standard for interpreting the “arising out of” language; thus, if “an assault or battery was a ‘but for’ cause of the plaintiff’s injuries, the assault and battery exclusion will apply to allegations that the insured’s negligence contributed to the injuries.”¹³⁸ The court expounded on this point and reasoned that an insurer will only have a duty to defend when the allegations in the complaint assert that the insured’s negligence directly led to the plaintiff’s injuries.¹³⁹

Based on this principle, the Third Circuit concluded that all of the alleged injuries in E.B.’s underlying complaint were “the result of exploitation and assault by traffickers and customers with whom E.B. engaged in commercial sex acts.”¹⁴⁰ Hence, the court held that “the assault and battery were the ‘but for’ causes of the injuries E.B. claims.”¹⁴¹ The court went on to explain that at no time in her complaint did she allege that MMS’s negligence was the direct cause of her injuries or caused her any separate harm; instead, E.B. averred that MMS failed to intervene or report the actions of the sex traffickers and financially benefited from the abuse she endured.¹⁴² The court concluded the opinion by holding that Nautilus’s assault and battery exclusion “unambiguously bars coverage for E.B.’s claims” because the policy language “encompasses claims arising both from an assault or battery and from a failure to prevent or suppress an assault and battery.”¹⁴³

MMS also challenged Nautilus’s public policy argument that insuring against intentional tort claims or claims involving criminal misconduct is against public policy.¹⁴⁴ Nautilus argued that offering coverage to the hotel for such a claim would be against Pennsylvania

138. *Id.*

139. *Id.* In holding this, the court relied on two Pennsylvania Superior Court opinions to support its reasoning: *Acceptance Insurance Co. v. Seybert*, 757 A.2d 380, 383 (Pa. Super. Ct. 2000) and *QBE Insurance Corp. v. M & S Landis Corp.*, 915 A.2d 1222, 1229 (Pa. Super. Ct. 2007). In *Seybert*, the court found that there was no duty to defend where insured bar’s negligence in serving alcohol to visibly intoxicated men who subsequently attacked plaintiff in underlying action was merely a contributing factor and not a direct cause of plaintiff’s injuries. *Seybert*, 757 A.2d at 383. In *QBE*, the court found that an insurer had a duty to defend a nightclub that negligently trained staff who restrained a patron because the negligence of the nightclub and its staff directly caused plaintiff’s injuries. *QBE*, 915 A.2d at 1229.

140. *Nautilus II*, 781 F. App’x at 60.

141. *Id.*

142. *Id.*

143. *Id.*

144. MMS’s Brief, *supra* note 120, at 21.

public policy, as the complaint alleged knowing involvement of criminal acts.¹⁴⁵ Specifically, it asserted that the complaint alleged that the hotel was in violation of Pennsylvania’s Human Trafficking Law “by harboring her, failing to report alleged human trafficking and involuntary sexual servitude to the authorities” despite knowing of the trafficking, and knowingly profiting financially as a result of the minor’s involuntary servitude.¹⁴⁶ Because the Pennsylvania legislature had pronounced that this conduct was criminal, and thus against public policy, there was no expectation that insurers would defend or indemnify their insureds who fall into these situations.¹⁴⁷

In response, MMS argued that its agents never engaged in an intentional tort nor did E.B.’s complaint or Nautilus aver that MMS engaged in an intentional tort.¹⁴⁸ Thus, the district court’s rationale could only hold relevance if MMS participated in criminal misconduct.¹⁴⁹ In noting that it is a regular practice for insurance companies to provide coverage to insureds when third parties commit a crime, MMS acknowledged that coverage is typically barred when the insured commits the crime.¹⁵⁰ However, it disputed that it engaged in any criminal conduct and criticized the district court for providing “limited analysis” on this point by simply stating that “financially benefitting from human sex trafficking is criminalized under the Pennsylvania Human Trafficking Law . . . [t]hus public policy precludes coverage.”¹⁵¹

MMS asserted that “financially benefitting” from sex trafficking has not been criminalized in Pennsylvania.¹⁵² MMS further rebutted the district court by stating that “[i]f this Court actually review[ed] 18 Pa. C.S. Section 3011(a)(2), there is a *mens rea* aspect to the crime. A party must *knowingly* benefit financially to have committed a crime.”¹⁵³ Additionally, MMS argued that E.B.’s complaint also alleged that MMS violated Pennsylvania’s sex trafficking statute by

145. Nautilus’s Brief, *supra* note 122, at 20.

146. *Id.* at 8.

147. *Id.* at 6.

148. MMS’s Brief, *supra* note 120, at 22.

149. *Id.*

150. *Id.*

151. *Id.* (quoting *Nautilus I*, 320 F. Supp. 3d 636, 643 (E.D. Pa. 2018), *aff’d*, 781 F. App’x. 57 (3d Cir. 2019)).

152. *Id.* (citing 18 PA. CONS. STAT. AND CONS. STAT. ANN. § 3011 (West, Westlaw through 2021 Reg. Sess. Act 14)).

153. *Id.*

“‘harboring’ E.B. which caused or permitted her to engage in commercial sex acts” but that section also contains a “knowing” requirement.¹⁵⁴ Specifically, MMS contended that pursuant to section 3011(a)(1), a person commits a crime if he “recruits, entices, solicits, harbors, transports, provides, obtains or maintains an individual [and] the *person knows or recklessly disregards* that the individual will be subject to involuntary servitude.”¹⁵⁵ Based on this provision, MMS reasoned that since the scope of E.B.’s allegations could lead to a finding that MMS acted negligently while not finding that MMS possessed the requisite knowledge to have committed a crime under section 3011(a)(1), public policy did not bar coverage.¹⁵⁶

The Third Circuit never addressed either parties’ public policy arguments but rather held that since the allegations of the complaint triggered the assault and battery exclusion and thus precluded coverage, there was no need to address whether public policy would also bar coverage for the intentional torts and criminal misconduct that E.B. pled in her complaint.¹⁵⁷

2. *Peerless*

In November 2019, four months after the Third Circuit’s decision in *Nautilus*, a federal district court in Massachusetts held that an insurer, Peerless Indemnity Insurance Company, did have a duty to defend a motel that was accused of financially benefitting from the sex trafficking of a victim at its insured’s motel.¹⁵⁸ In the underlying action, the victim alleged that she was kidnapped by the trafficker, one of the named defendants, in 2011 and brought to the Shangri-La motel in Massachusetts, owned by Bijal, Inc.¹⁵⁹ The complaint further alleged that other co-defendants in the underlying action, the Patels, lived and were employed at the motel during the time that the victim was held captive by her trafficker, where she was repeatedly raped, abused, and told that she would be forced to perform commercial sex acts.¹⁶⁰ The victim alleged that the Patels were aware of her trafficking

154. *Id.*

155. *Id.* at 22–23.

156. *Id.* at 23.

157. *Nautilus II*, 781 F. App’x 57, 60 (3d Cir. 2019). The Third Circuit rendered its decision in an unpublished brief opinion on July 22, 2019.

158. *Peerless*, 424 F. Supp. 3d 182, 195 (D. Mass. 2019); Schiffer, *supra* note 84.

159. Peerless Complaint, *supra* note 62, at 1–2.

160. *Id.*

and financially profited from it.¹⁶¹ Specifically, the complaint asserts that the insured motel and the Patels violated the TVRPA by financially benefitting from the sex trafficker's conduct at the motel by way of its receipt of rent payments for the rooms where the trafficking occurred.¹⁶²

Peerless had issued two insurance policies to the insured motel that were at issue in the declaratory judgment action—a general liability policy and an umbrella policy.¹⁶³ Two types of coverage were provided under the general liability policy, “Coverage A” and “Coverage B.”¹⁶⁴ Under “Coverage A,” “Bodily Injury and Property Damage Liability,” Peerless agreed to pay for damages due to “bodily injury.”¹⁶⁵ One key exclusion provided under Coverage A was “Exclusion (o), entitled ‘Personal and Advertising Injury,’” which excluded coverage for “‘bodily injury’ arising out of ‘personal and advertising injury.’”¹⁶⁶ This section defined “personal and advertising injury” as “injury, including consequential ‘bodily injury,’ arising out of one or more” of a list of “offenses,” which included false imprisonment.¹⁶⁷

“Coverage B,” “Personal and Advertising Injury,” provided coverage for personal and advertising injury but listed numerous categories of exclusions.¹⁶⁸ Of particular importance was “Exclusion (d),” “Criminal Acts,” which stated that the policy did not apply to “[p]ersonal and advertising injury” arising out of a criminal act committed by or at the direction of the insured.”¹⁶⁹

Peerless argued in its brief to the district court that all of the victim's claims were barred under exclusion (o) of Coverage A, which

161. *Id.* at 6, 14.

162. *Id.*

163. *Peerless*, 424 F. Supp. 3d at 187.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* In addition to the general liability policy, the motel had an umbrella policy that provided that Peerless would pay “those sums in excess of the ‘retained limit’ that the insured becomes legally obligated to pay damages because of ‘bodily injury.’” *Id.* Further, the umbrella policy provided coverage for “[p]ersonal and advertising injury” caused by an ‘offense’ arising out of [the insured’s] business.” *Id.* at 188. (alterations in original). Akin to the general liability policy, the umbrella policy also included numerous categories of exclusions. Particularly, “Exclusion (s),” “Personal and Advertising Injury,” stated that the umbrella policy was inapplicable to “personal and advertising injury . . . [a]rising out of a criminal act committed by or at the direction of any insured.” *Id.*

excluded coverage for “bodily injury” arising out of false imprisonment.¹⁷⁰ The victim countered this argument in her brief, asserting that the source of her personal injury was the trafficker’s “act of trafficking her for labor and sex”—not her false imprisonment.¹⁷¹ The court rejected this argument, however, and noted that the victim failed to provide anything “to suggest why her alleged injuries should be understood as ‘arising out’ of her trafficking but not out of her imprisonment.”¹⁷²

The district court in its opinion noted other Massachusetts precedent that reasoned that the phrase “arising out of” should have a broad interpretation that requires a “‘sufficiently close relationship’ or a ‘reasonably apparent’ causal connection between the injury and relevant event.”¹⁷³ Accordingly, the district court held that it would “construe the phrase ‘arising out of’ to have its typical meaning under Massachusetts law. . . . [which] leads . . . to the conclusion that [the victim’s] injuries arose out of her false imprisonment” and were thus excluded under Coverage A.¹⁷⁴

As to Coverage B, which provided coverage for “personal injury” “caused by an offense arising out of [the insured’s] business,” Peerless argued that the victim’s injuries were also barred based on certain exclusions.¹⁷⁵ Peerless’s main argument was that the victim’s claims were barred by exclusion (d) of Coverage B, which precludes coverage for “personal injury” “arising out of criminal acts committed by or at the direction of the insured.”¹⁷⁶ More specifically, Peerless argued that

170. *Id.* at 189–90.

171. *Id.*

172. *Id.* at 190.

173. *Id.* (quoting *AIG Prop. Cas. Co. v. Cosby*, 892 F.3d 25, 28 (1st Cir. 2018)).

174. *Id.* at 191.

175. *Id.* at 192.

176. *Id.* In examining the first two issues, the court stated:

First—and somewhat inconsistently—Peerless contends that Ricchio’s injuries do not amount to a personal injury because they are “based upon alleged violations of the TVPA,” and the TVPA “does not constitute a ‘personal . . . injury.’” It is not entirely clear what Peerless means by that. The relevant question is whether Ricchio’s injuries—which she alleges were caused by violations of the TVPA—constitute a personal injury. Because the definition of personal injury under the policy includes injuries arising out of false imprisonment, and because Ricchio’s injuries at least in part arose out of her false imprisonment, the answer to that question is yes.

Id.

As to the second argument, the court continued:

Second, Peerless contends that Ricchio’s injuries were not caused by an offense “arising out” of Bijal’s business, because Bijal is not “in the business of human trafficking.” The trafficking that allegedly took place here, however, encompassed multiple acts, including

the injuries suffered by the victim were caused by the Patels' criminal violations of the TVPA and, thus, were barred by exclusion (d).¹⁷⁷

In response, the victim argued that exclusion (d) was inapplicable because she alleged in the complaint that the motel and Patels financially benefitted from the trafficker's crime—a *civil* violation of the TVPRA.¹⁷⁸ Thus, exclusion (d) did not apply because it required the *criminal* act be committed *by or at the direction of* defendants.¹⁷⁹

Examining the provisions of the Acts, the court found that each of the TVPA's criminal provisions had a "*mens rea* requirement of knowing or reckless conduct by the accused."¹⁸⁰ Conversely, the court noted that the TVPRA's civil provisions did not have the same requirement and only required that a person "knowingly benefit[, . . . from participation in a venture which that person *knew or should have known* has engaged in an act in violation" of the Act to be held liable.¹⁸¹ The court further noted that the "knew or should have known" language "echoes common language used in describing an objective standard of negligence."¹⁸² Hence, the district court concluded that it was feasible for a defendant to be civilly liable without having committed any criminal violations under the Act because it allows a victim to recover under a civil standard even where there is no proof of intentional conduct.¹⁸³

the Patels' [hotel managers] alleged agreement to continue renting a room to McLean [trafficker], providing him with the privacy he needed to perform the abuse. And it is clear that the act of renting a room to McLean satisfies the "two-prong test" used by Massachusetts courts to "determin[e]" whether "an activity" that caused an injury "ar[ose] out of . . . [an] insured's business." That test, as the name suggests, requires asking two questions: (1) whether the activity is "one in which the insured regularly engages as a means of livelihood," and (2) whether "the purpose of the activity [is] be to obtain monetary gain." Here, the complaint clearly alleges that defendants regularly rented out rooms to overnight guests, and that they did so for the purpose of making money. Indeed, providing rooms for money is surely the core function of Bijal's business as a motel. Accordingly, Ricchio has shown that her alleged injuries were caused, at least in part, by an offense arising out of Bijal's business.

Id. (quoting Preferred Mut. Ins. Co. v. Vt. Mut. Ins. Co., 32 N.E. 3d 336, 341 (Mass. App. Ct. 2015)).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 193 (citing 18 U.S.C. §§ 1589(a); 1590(a); 1591(a); 1594(a-b); 1593A (2018)).

181. *Id.*

182. *Id.* (citing M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 966 (S.D. Ohio 2019) (allowing plaintiff to pursue liability claims under the TVPRA against two hotels and finding that the statute "invokes a negligence standard")).

183. *Id.* at 194.

The court then turned to the question of whether the victim's allegations in the complaint were "reasonably susceptible" to a 'possibility' of insurance liability under the coverage."¹⁸⁴ The "reasonably susceptible" standard had been discussed earlier in the opinion where the court explained that in order for the duty to defend to be triggered, the allegations in the underlying complaint need only be "reasonably susceptible of an interpretation that they state or adumbrate a claim covered by the policy terms."¹⁸⁵ The court further noted that there was "no requirement that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage."¹⁸⁶

With this standard as the backdrop, the court examined the claims asserted by the victim in the complaint against the motel and the Patels under 18 U.S.C. § 1595(a), which essentially alleged *intentional* violations of the Act.¹⁸⁷

The court concluded that although all the claims were "cast in terms of intentional, not negligent, conduct," the allegations only had to establish generally a "possibility that the liability claim falls within the insurance coverage."¹⁸⁸ The court concluded that although the victim's claims allege that the Patels engaged in criminal conduct, the complaint is "reasonably susceptible" to an interpretation finding only negligence."¹⁸⁹ "The fact that the complaint alleges intentional conduct does not preclude an interpretation that it also includes lesser allegations of negligent conduct. That approach accords with the

184. *Id.*

185. *Id.* at 188 (quoting *Liberty Mut. Ins. Co. v. SCA Servs., Inc.*, 588 N.E.2d 1346, 1347 (Mass. 1992)).

186. *Id.* (quoting *Billings v. Com. Ins. Co.*, 936 N.E.2d 408, 414 (Mass. 2010)).

187. *Id.* at 194. For example, two of the claims alleged against the motel and the Patels were that they

"knowingly benefitted from participat[ing] in [the trafficker's] venture, knowing or in reckless disregard of the fact that the venture was engaged in the providing or obtaining of [the victim's] labor or services by means of . . . force . . ." in violation of 18 U.S.C. 1589. . . . [And] "knowingly harbored and maintained [the victim] at [the motel] and benefitted from her labor and services, knowing or in reckless disregard of the fact that means of force, fraud, [and] coercion . . . would be used to force [the victim] to engage in commercial sex acts," "knowingly benefitted from participation in [the trafficker's] venture, knowing or in reckless disregard of the fact that means of force . . . would be used to cause . . . [the victim] to engage in a commercial sex act," and "aided and abetted [the trafficker]," all in violation of 18 U.S.C. 1591.

Id.

188. *Id.* at 194–95 (quoting *Billings*, 936 N.E.2d at 414).

189. *Id.* at 195.

Massachusetts duty to defend standard that requires only a ‘general allegation’ susceptible to a ‘possibility’ of liability insurance coverage.”¹⁹⁰ Hence, the court held that the victim’s claims were “reasonably susceptible to a possibility of insurance liability under Coverage B” and Peerless had a duty to defend the motel under the policy.¹⁹¹

B. *The Implications of Nautilus and Peerless*

Since *Nautilus* and *Peerless*, there has been an uptick in the number of related declaratory judgment actions being filed. Less than one year after the Pennsylvania federal district court’s opinion in *Nautilus*, another insurer filed a similar declaratory judgment action against its hotel insured and hotel management company arguing that it did not have a duty to defend or indemnify the hotel insured against a sex trafficking beneficiary liability suit.¹⁹² *Samsung Fire and Marine Insurance Co., v. UFVS Management Co.*, filed in the same Pennsylvania district court as *Nautilus*, stemmed from three underlying sex trafficking beneficiary liability actions against the management company, hotel insured, Roosevelt Inn, and hotel managers/owners.¹⁹³ Samsung is seeking a declaration from the court that it does not owe the hotel defendants a duty to defend or indemnify against the underlying actions, asserting the following arguments and policy exclusions:

190. *Id.*

191. *Id.* Additionally, in noting that Peerless had a duty to defend, the court reasoned it did not express any view on whether Peerless also had a duty to indemnify which “is determined under a different standard.” *Id.* “[T]he issue of indemnification must await the completing of trial or settlement.” *Id.* (quoting *AIG Prop. Cas. Co. v. Green*, 217 F. Supp. 3d 415, 425 (D. Mass. 2016)). There is “a meaningful difference between an insurer’s duty to defend . . . and a duty to indemnify.” *Id.* at 188. (quoting *Wilkinson v. Citation Ins. Co.*, 856 N.E.2d 829, 836 (Mass. 2006)). Unlike the duty to indemnify, which “arises only after the insured’s liability has been established,” “[t]he duty to defend arises in situations involving . . . actual litigation by a third party, a context in which time is of the essence, and in which cost and complexity can compound each passing day.” *Id.* at 195 (quoting *Wilkinson*, 856 N.E.2d at 836). “Accordingly, the issue of whether Peerless has a duty to defend the Patels and Bijal is ripe for adjudication.” *Id.* at 188. The court also concluded that Peerless had a duty to defend the motel under the umbrella liability policy. *See id.* at 195 (explaining that “personal and advertising injury” damages are covered under the umbrella policy and that no exclusions listed in that policy barred coverage).

192. Complaint at 1, 3–4, *Samsung Fire and Marine Ins. Co., v. UFVS Mgmt. Co.*, No. 2:18-cv-04365-CDJ (E.D. Pa. Oct. 10, 2018) [hereinafter *Samsung Complaint*].

193. Plaintiff *Samsung Fire & Marine Ins. Co. (U.S. Branch)*’s Memorandum of Law in Support of Its Motion for Judgment on the Pleadings at 1–6, *Samsung*, No. 2:18-cv-04365-CDJ (E.D. Pa. Aug. 30, 2019) [hereinafter *Samsung*’s Memo iso Motion for Judgment on the Pleadings].

First and foremost, public policy bars coverage for the allegations of sex trafficking asserted in the Underlying Actions. Furthermore, there is no coverage for such claims as the Plaintiff's claimed injuries were not the result of an "occurrence" as required by the Samsung Policies because such injuries were not an "accident," were not fortuitous, and were the known and expected consequence of the Roosevelt Defendants' actions. Coverage is also excluded under the "expected or intended" injury exclusion in the Samsung Policies. In addition, although the Roosevelt Defendants claim that the underlying Plaintiffs' claims are for "personal and advertising injury," the Underlying Actions do not include claims of false arrest, detention or imprisonment or any other type of "personal and advertising injury" as defined by the Samsung Policies.¹⁹⁴

The *Samsung* declaratory judgment action is still ongoing.

In addition to *Samsung*, other similar declaratory judgment actions have emerged since *Nautilus* and *Peerless*.¹⁹⁵ In April 2020, two declaratory actions were initiated by insurers in federal district courts in New York and Georgia in response to sex trafficking beneficiary liability actions filed against hotel insureds.¹⁹⁶

*Atain Specialty Insurance Co. v. Varahi Hotel, LLC*¹⁹⁷ was filed in a Georgia federal district court based on an underlying action by a sex trafficking victim alleging beneficiary liability against Varahi Hotel.¹⁹⁸ In the underlying lawsuit, the plaintiff averred that "various hotel managers and owners, including Varahi, were involved in and/or benefited from sex-trafficking at their hotels."¹⁹⁹

Atain's declaratory judgment action asserted that Varahi Hotels was not entitled to a defense or indemnification pursuant to various policy exclusions.²⁰⁰ Atain alleged that it "has no obligation to defend and/or indemnify Varahi for any liability arising out of the Underlying

194. *Id.* at 2. Samsung also argued that "since Roosevelt Motor Inn, Inc. is not an Insured under the Samsung Policies that are at issue in this lawsuit, Samsung is not obligated to defend or indemnify Roosevelt Motor Inn, Inc. in the Underlying Actions." *Id.*

195. *See, e.g.,* Atain Complaint, *supra* note 11, at 1; Starr Complaint, *supra* note 11, at 1.

196. Atain Complaint, *supra* note 11, at 1; Starr Complaint, *supra* note 11, at 1.

197. Atain Complaint, *supra* note 11, at 1.

198. *Id.* at 10.

199. *Id.*

200. *See generally id.* at 1.

Lawsuit,” as the policy’s “Physical-Sexual Abuse,” “Criminal Acts,” “Injury on Normally Occupied Premises,” “Knowing Violation of Rights of Another,” and “Known Injury or Damage” exclusions all bar coverage.²⁰¹ Additionally, Atain alleged that the sex trafficking claims against Varahi did not constitute an “occurrence,” and thus were also precluded by an “Expected or Intended Injury” exclusion.²⁰² The *Atain* declaratory action was settled in January 2021.

Approximately a week after the filing of *Atain*, Starr Indemnity & Liability filed a declaratory action in a New York federal district court in the matter of *Starr Indemnity & Liability Co. v. Choice Hotels International, Inc.*,²⁰³ based on an underlying action by a sex trafficking victim alleging beneficiary liability against Choice Hotels and other hotel defendants.²⁰⁴

In its declaratory judgment action, Starr asserted that Choice Hotels is not entitled to a defense or indemnity in connection with the underlying sex trafficking lawsuit due to the “abuse or molestation exclusion” in the applicable insurance policies.²⁰⁵ Starr’s declaratory judgment action is in its infancy stage and thus is still pending before the New York federal district court. Going forward, it will be interesting to see how courts rule in these declaratory judgment matters. In examining the policy exclusions at issue in the *Nautilus* and *Peerless* decisions and those at issue in the *Samsung*, *Atain*, and *Starr Indemnity* actions, there appear to be common exclusions being raised by insurers as the basis for their arguments that coverage is barred.²⁰⁶ Of the cases discussed, *Nautilus* is the only insurer that raised an “assault and battery exclusion” as the basis for its position that it did not owe a duty to defend or indemnify.²⁰⁷ It also argued that providing coverage was against Pennsylvania public policy,²⁰⁸ which insurer *Samsung* asserted as well in its declaratory judgment action.²⁰⁹

201. *Id.* at 13–15.

202. *Id.* at 14–15. *Atain* also asserted in the complaint that Varahi was not a Named Insured or additional Insured under the applicable policy. *Id.* at 11.

203. Starr Complaint, *supra* note 11, at 1.

204. *Id.* at 4.

205. *Id.* at 5.

206. See Complaint, *Nautilus II*, 781 F. App’x 57 (3d Cir. 2019) (No. 2:17-CV-04491) [hereinafter *Nautilus* Complaint]; *Peerless* Complaint, *supra* note 62, at 1; *Atain* Complaint, *supra* note 11, at 1; *Samsung* Complaint, *supra* note 192, at 1; Starr Complaint, *supra* note 11, at 1.

207. See *Nautilus* Complaint, *supra* note 206, at 9–10.

208. See *id.* at 11.

209. See *Samsung*’s Memo iso Motion for Judgment on the Pleadings, *supra* note 193, at 2.

Other common exclusions raised in these cases included the “personal and advertising injury,” “criminal acts,” and “expected or intended injury,” as well as “physical-sexual abuse” or “abuse or molestation” exclusions.²¹⁰ Finally, the argument that the alleged sex trafficking activities at the hotels are excluded from coverage because they do not constitute “an occurrence” under the applicable policies appears to be a common assertion being made by insurers.²¹¹

So, with the myriad of exclusions being raised, the question arises: how will these courts and others rule on this critical coverage issue? Will their decisions align with the Third Circuit’s decision in *Nautilus* and conclude that applicable policy exclusions, and potentially public policy, bar coverage to hotels in these sex trafficking beneficiary liability claims, or will they hold in a manner similar to the *Peerless* court, finding that exclusions asserted by the insurer do not bar coverage and the insurer owes a defense, and potentially indemnification, to the hotel insured?

Based on the similarity in the exclusions at issue in *Samsung* and *Nautilus* and the fact that the *Samsung* case is before the same district court as *Nautilus*, some predictions can be made as to the possible outcome in *Samsung*. Similar to the insurer in *Nautilus*, Samsung’s declaratory judgment complaint also raises a public policy argument as the basis for why the court should find that it does not have a duty to defend or indemnify the hotel insureds.²¹² Like *Nautilus*, Samsung argues that since the victim’s complaint alleges criminal violations of trafficking, Pennsylvania public policy precludes coverage.²¹³ Specifically, Samsung’s complaint alleges that the allegations of the underlying action aver that the hotel defendants “harbored, maintained and financially profited” from the victim’s trafficking and knowingly rented rooms and provided other services to persons engaged in sex trafficking, all in violation of the Pennsylvania Human Trafficking Law.²¹⁴ The complaint goes on to allege that Pennsylvania’s Human Trafficking Law “represents a declaration of Pennsylvania public policy that harboring, maintaining and financially profiting from commercial sex trafficking is a criminal act.”²¹⁵ Thus, as *Nautilus*

210. See sources cited *supra* note 206.

211. See *Nautilus* Complaint, *supra* note 206, at 11–12; *Atain* Complaint, *supra* note 11, at 12.

212. *Samsung* Complaint, *supra* note 192, at 7–8.

213. *Id.*

214. *Id.*

215. *Id.* at 8.

argued, it would be against public policy for Samsung to indemnify the hotel insureds who have allegedly engaged in criminal conduct in violation of Pennsylvania's Human Trafficking Law.²¹⁶

As discussed, the Third Circuit in its *Nautilus* decision did not address any of the public policy arguments raised by the parties.²¹⁷ Instead, it held that since the assault and battery exclusion precluded coverage, there was no need to address whether public policy would also bar coverage for the intentional torts and criminal misconduct that the plaintiff plead in her complaint.²¹⁸

The district court's holding in *Nautilus*, however, is instructive as to what the *Samsung* court may conclude regarding Samsung's public policy argument. Reasoning that it was against Pennsylvania public policy law to "insure against claims for intentional torts or criminal acts," the district court in *Nautilus* held that "financially benefitting" from sex trafficking is a criminal offense under Pennsylvania's trafficking law and thus public policy barred coverage.²¹⁹ Accordingly, because the allegations in the underlying sex trafficking suit against the hotel defendants in *Samsung* allege that they "financially profited" from the victim's sex trafficking,²²⁰ it is likely that the *Samsung* court, following the district court's holding in *Nautilus*, will also find that Pennsylvania public policy bars insurance coverage to the hotel insureds.

The *Peerless* decision may also bear some weight on how the *Atain* court rules on the criminal acts exclusion being raised by the insurer and its applicability to the sex trafficking victim's claims in the underlying suit. Although the *Atain* declaratory action is in its infancy, if the federal district court hearing the case ultimately aligns its decision with the *Peerless* court's holding, *Atain*'s argument that Exclusion (d), "Criminal Acts" precludes coverage to the hotel insureds will likely fail. The *Atain* General Commercial Liability policy contains virtually the same provisions and exclusions that were at issue in *Peerless*.²²¹ As was the case in *Peerless*, Coverage B of the

216. *Id.*

217. *See Nautilus II*, 781 F. App'x 57, 60 n.5 (3d Cir. 2019).

218. *Id.*

219. *Nautilus I*, 320 F. Supp. 3d 636, 643 (E.D. Pa. 2018), *aff'd*, 781 F. App'x 57 (3d Cir. 2019).

220. *See Samsung Complaint*, *supra* note 192, at 7–8.

221. *Compare Atain Complaint*, *supra* note 11, at 5–10, *with Peerless*, 424 F. Supp. 3d 182, 187–88 (D. Mass. 2019).

applicable policy, “Personal and Advertising Injury Liability,” provided coverage for damages caused by an offense arising out of the hotel insured’s business.²²² However, Exclusion (d), “Criminal Acts,” excluded coverage for any personal injury “arising out of a criminal act committed by or at the direction of the insured.”²²³ *Peerless* attempted to rely on the criminal acts exclusion to argue that since the victim’s injuries were a result of the hotel managers’ criminal violations of the TVPA, the victim’s claims were not covered by the policy.²²⁴ In rejecting this argument, the *Peerless* court analyzed some of the provisions of the TVPRA and reasoned that the Act allowed a victim to recover civilly under § 1595(a) when the person or entity *knew or should have known* that the trafficker was in violation of the Act, thus allowing for liability under a negligence standard.²²⁵ Hence, the court found that although the victim couched her sex trafficking allegations against the hotel managers in language asserting that they committed intentional criminal misconduct, there was a possibility that the complaint was “‘reasonably susceptible’ to an interpretation finding only negligence” and that a defendant could be civilly liable without having committed any criminal acts under the TVPA.²²⁶ Accordingly, the court held that the criminal acts exclusion would not bar coverage if the hotel insureds’ *negligent conduct* facilitated the sex trafficking.²²⁷

Because *Atain* and *Peerless* address the same criminal acts exclusion, it is possible that the *Atain* court may rely on the *Peerless* court’s analysis to guide its decision on whether this exclusion precludes coverage for the hotel. If the *Atain* court adopts the *Peerless* court’s reasoning, *Atain*’s argument that Exclusion (d) bars coverage will likely be unsuccessful, and *Atain* will have to convince the court that some other exclusion applies in order to relinquish the duty to defend and indemnify the hotel insured.

As is apparent from the sampling of cases discussed in this section, insurers are raising a variety of exclusions in their declaratory

222. *Atain* Complaint, *supra* note 11, at 8.

223. *Id.*

224. *Peerless*, 424 F. Supp. 3d at 192.

225. *Id.* at 193–94.

226. *Id.* at 195.

227. *Id.*

actions.²²⁸ Coverage decisions by courts will therefore be determined on a case-to-case basis, examining the exclusions being asserted by the insurer and the factual allegations made in the underlying sex trafficking beneficiary liability suits against hotel insureds. If more courts align their rulings with the *Nautilus* decision and find that coverage is barred by applicable exclusions in these declaratory actions, the reality of not being afforded coverage, and paying the costs of defense and potentially millions of dollars in damages, will add a further layer of legal and financial consequences for hotels' liability. This reality should incentivize hotels to implement preventative measures and protocols to curtail and hopefully ultimately end the proliferation of sex trafficking on their premises.

C. An Alternative to Exclusions: Other Risk Management Tools That Can Have a Regulatory Impact

Even if courts decide, however, that insurers have to provide hotels defense and indemnification in underlying sex trafficking lawsuits, insurers can still serve as regulators—impacting hotel anti-trafficking prevention efforts—by employing other risk management tools such as auditing, training, and educational services.

The cyber liability insurance industry exemplifies this form of regulation. In the cyber liability insurance context, insurers not only pool and transfer an insured's risk to the insurer and provide defense and indemnification, but they also provide risk management services that proactively impact how a corporation responds to a data breach, for example.²²⁹ Cybersecurity risks relate to things such as “loss exposure associated with the use of electronic equipment, computers, information technology, and virtual reality” and reflect some of the greatest emerging threats to corporations and consumers.²³⁰ Many corporations do not feel that they are adequately prepared for cybersecurity risks and feel like they do not properly allocate funds, training, or resources to protect consumers' electronic data from

228. See sources cited *supra* note 206. For example, the “abuse and molestation” exclusion raised in the *Starr* declaratory judgment action was not raised by either of the insurance companies in *Nautilus* and *Peerless*. *Starr* Complaint, *supra* note 11, at 3. Thus, because *Nautilus* and *Peerless* dealt with different exclusions, they do not provide much guidance for how the New York district court may rule on the coverage issue.

229. *Talesh*, *supra* note 18, at 475.

230. *Id.* at 474.

privacy breaches.²³¹ In response, cyber insurers, acting as compliance regulators, utilize their risk management services to help organizations prevent data breaches from occurring, as well as assist them in identifying breaches and developing proper responses if they do occur.²³²

For example, some of the risk management or prevention services that cyber insurers offer include auditing cyber security practices and performing “cyber health checks.”²³³ Following these audits and checks, corporations are rated, and insurers offer security and privacy recommendations.²³⁴ “Insurers then ‘scan’ hidden risks on public-facing infrastructures, provide a detailed view of a company’s vulnerability status, and prioritize vulnerabilities.”²³⁵ At this stage, the insurance company or a third-party vendor examines whether existing firewalls, web and email servers are effective and, if not, identify ways to alleviate any vulnerabilities.²³⁶

In addition to assessing risk and providing auditing services, cyber insurers also regulate corporations’ decision-making process and overall corporate behavior by supplying enhanced services such as comprehensive written materials that advise them on how to detect and prevent data breaches.²³⁷ These materials can be in the form of “cyber news and blogs, best-practices checklists, monthly newsletters, articles and whitepapers . . . webinars, and legal summaries.”²³⁸ Additionally, insurers provide corporations access to websites operated by the insurer that provide resources on proper training of staff, identification of loss exposure, and evolving compliance issues and laws.²³⁹

Risk prevention tools such as those described serve an essential regulatory role on corporations.²⁴⁰ The scans and cyber health checks can be utilized as a precondition to determine if a corporation will be eligible for cyber insurance.²⁴¹ Consequently, corporations who are

231. *Id.*

232. *Id.* at 475–76.

233. *Id.* at 478.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 479.

238. *Id.* at 479–80.

239. *Id.* at 480.

240. *Id.* at 479.

241. *Id.*

interested in securing cyber insurance become more diligent in their cyber practices and ensuring they have prevention tools in place.²⁴² This in turn, increases the likelihood that insurers will lower premiums.²⁴³

In line with cyber insurers, hotel insurers should consider implementing similar risk management strategies to promote change in corporate behavior amongst hotels. For instance, hotel insurers could provide “auditing” services to determine what, if any, anti-trafficking measures or protocols are in place at a hotel and assess their efficacy. After this assessment, insurers could work with hotels to make sure that proper anti-trafficking training is being presented to managers and staff that promotes awareness, detection, and reporting procedures to authorities.

Additionally, insurers can regularly provide written materials to hotel insureds to support workplace training measures, such as newsletters, blogs, and legal updates highlighting the legal consequences of not implementing and maintaining proper anti-trafficking training and prevention protocols.

Although some hotels have voluntarily created and implemented initiatives to fight against sex trafficking in their establishments,²⁴⁴ many have not. Insurers can therefore aid in these efforts by soliciting third-party vendors, including leading anti-trafficking organizations,²⁴⁵ to provide this essential training.²⁴⁶ Many states, in fact, have recently mandated that hotels provide anti-trafficking training.²⁴⁷ Thus, hotel insurers, like cyber insurers, can act as

242. *Id.*

243. *Id.*

244. Giovanna L. C. Cavagnaro, *Sex Trafficking: The Hospitality Industry’s Role and Responsibility* 12–

13 (May 2007) (B.S. thesis, Cornell University), <https://ecommons.cornell.edu/handle/1813/7132>; *cf. About, THE CODE*, <https://www.thecode.org/about/> (last visited Feb. 21, 2021).

245. *See* Susan Haigh, *Hotel Employees Get Training to Spot Human Trafficking*, SKIFT (June 25, 2017, 10:30 AM), <https://skift.com/2017/06/25/HOTEL-EMPLOYEES-GET-TRAINING-TO-SPOT-HUMAN-TRAFFICKING/>. Anti-trafficking organizations Polaris and ECPAT-USA have worked with Marriott, for example, in creating curriculum that is used by Marriott to train its employees. *Id.*

246. *See* Talesh, *supra* note 18, at 148.

247. *See* CONN. GEN. STAT. ANN. § 17a-106g (West, Westlaw through the 2020 Reg. Sess., the 2020 July Spec. Sess., and the 2020 Sept. Spec. Sess.); MINN. STAT. § 157.177 (West, Westlaw from the 2020 Reg. Sess. and 1st through 7th Spec. Sess.); CAL. GOV’T CODE § 12950.3 (Deering 2021); N.Y. GEN. BUS. LAW § 206-f (McKinney, Westlaw through L. 2020, ch. 1 to 387); FLA. STAT. ANN. § 509.096(1)(a) (West, Westlaw through Ch. 184 of the 2020 2d Reg. Sess. of the 26th Leg.).

compliance regulators by helping to ensure that anti-trafficking trainings occur and are done timely in accordance with applicable state laws. As an incentive for those that do have proper training and protocols in place, insurance carriers could consider offering premium reductions to hotel insureds.

By taking these measures, insurers will be leveraging other risk management strategies—in addition to coverage exclusions—to induce hotels' active participation in eradicating sex trafficking in the hotel industry.

CONCLUSION

Meaningful change can start with hotels committing to anti-trafficking training measures and protocols that will help their workers have greater awareness of trafficking indicators and, in turn, be more vigilant in reporting suspicious activity. The increased potential of insurers taking a stance that they will not defend or indemnify hotel insureds faced with these claims, and the regulatory impact that that stance imposes, should serve as an additional catalyst for hotels to implement anti-trafficking measures. Even if courts find that insurers have to defend and indemnify hotel insureds, insurers can still serve as regulators by utilizing other risk management tools such as auditing, training, and educational services to help interdict the burgeoning sex trafficking problem that exists at our nation's hotels.