

Publications

Washington Case Turns on Application of Federal CDA Immunity

Related Attorneys

Whitney C. Gibson

AUTHORED ARTICLE | 9.9.2015

Last week, the Washington Supreme Court handed down a favorable ruling in a case turning on the application of the federal Communications Decency Act of 1996 (CDA) – favorable, that is, for those seeking to hold websites accountable for certain harm arising out of content published on their sites.

In a 6-3 ruling, the top Washington court found that the plaintiffs in *J.S. v. Village Voice Media Holdings* – allegedly raped by individuals who responded to Backpage.com advertisements – pleaded a case withstanding the defendants’ motion to dismiss. The defendants, including the parent companies of Backpage, moved to dismiss based on immunity under the CDA, 47 U.S.C. § 230.

Accordingly, the Washington Supreme Court affirmed the trial court’s denial of the motion to dismiss and remanded the case for further proceedings.

Communications Decency Act

As previously mentioned on our blog, section 230(c)(1) of the CDA states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” In other words, federal law protects most websites from being held liable for third party-provided content.

The CDA is the reason many parties – including the victims of false and defamatory content published online – try and fail to hold websites accountable for the harm caused to them online.

The problem is less about trying to hold Yelp or Twitter responsible for a false review or harmful tweet, for example; but rather, the real difficulty lies in the fact that the immunity that has arisen from the CDA allows websites to establish policies that provide no protections for the many victims of their users’ content.

For instance, we have mentioned – perhaps ad nauseam – how [Ripoff Report is set up such that business and individuals can be defamed on the website](#), yet there is little-to-no recourse for the subjects of those posts (including the inability to have the posts deleted). And it is well-documented how difficult (and generally unwise) it is to attempt to [litigate against TheDirty.com](#).

All of which is to say that the Washington court's holding was a rare one in favor of the plaintiffs in a CDA-related case.

J.S. v. Village Voice Media Holdings

In the pending Washington case, the plaintiffs are attempting to hold the defendants (hereinafter referred to collectively as “Backpage”) accountable for helping to develop the illegal content published on the website that allegedly has led to the sex trafficking of minors. The plaintiffs were allegedly featured in ads posted to Backpage.com in compliance with Backpage's content requirements.

Backpage moved to dismiss the plaintiffs' several state law claims on the basis of immunity under the federal CDA, arguing the website was not the content provider. The plaintiffs contended Backpage's rules were “designed to help pimps develop advertisements that can evade the unwanted attention of law enforcement, while still conveying the illegal message.”

The Washington Supreme Court (required to accept the allegations of the plaintiffs' complaint as true at this stage of the proceedings) concluded that the plaintiffs alleged facts – if proved true – that would demonstrate Backpage acted beyond simply maintaining neutral policies limiting or altogether prohibiting certain content, including that:

- “Backpage.com ... has intentionally developed its website to require information that allows and encourages ... illegal trade to occur through its website, including the illegal trafficking of underage girls,”
- “Backpage.com has developed content requirements that it knows will allow pimps and prostitutes to evade law enforcement,”
- “Backpage.com knows that the foregoing content requirements are a fraud and a ruse that is aimed at helping pimps, prostitutes, and Backpage.com evade law enforcement by giving the [false] appearance that Backpage.com does not allow sex trafficking on its website,”
- “the content requirements are nothing more than a method developed by Backpage.com to allow pimps, prostitutes, and Backpage.com to evade law enforcement for illegal sex trafficking, including the trafficking of minors for sex,”
- “Backpage's “content requirements are specifically designed to control the nature and context of those advertisements so that pimps can continue to use Backpage.com to traffic in sex, including the trafficking of children, and so Backpage.com can continue to profit from those advertisements,” and
- “Backpage has a “substantial role in creating the content and context of the advertisements on its website.”

As stated in the majority opinion, the case comes down to whether Backpage simply hosted the ads in question (protected by CDA immunity) or if they contributed to developing the ads (not protected by CDA immunity). Therefore, on remand, the plaintiffs will need to prove the factual allegations from the complaint and demonstrate that Backpage was at least partially responsible and, therefore, not entitled to CDA immunity.

While this case is far from over, the Washington Supreme Court's Sept. 3 opinion signals a potential step forward for the opponents of certain websites claiming immunity under the CDA.

For more information, contact Whitney Gibson at 855.542.9192 or wcgibson@vorys.com. Read more about the practice at <http://www.defamationremovalattorneys.com> and follow @WhitneyCGibson on Twitter.