

March 24, 2016

First Circuit Interprets Communications Decency Act Expansively, Holding That Lawsuit Alleging That Website Facilitated Sex Trafficking Was Properly Dismissed

On March 14, 2016, the First Circuit, in *Doe v. Backpage.com, LLC*,¹ broadly interpreted the Communications Decency Act (“CDA”), 47 U.S.C. § 230, to preclude claims brought against a website under the federal Trafficking Victims Protection Reauthorization Act of 2008, among other statutes. A key provision of the CDA, 47 U.S.C. § 230(c)(i), states that “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.” While acknowledging that the case was “hard in the sense that the law requires that we, like the court below, deny relief to plaintiffs whose circumstances evoke outrage,”² the First Circuit nevertheless made it clear that even claims alleging that a website was designed to facilitate illegal conduct are precluded by the CDA since such claims “necessarily treat the website as a publisher or speaker of content provided by third parties.”³ The First Circuit thus reaffirmed the principle “that a website operator’s decisions in structuring its website” are “publisher functions” entitled to broad protection under section § 230(c)(1) of the CDA.⁴

Background

Backpage.com (“Backpage”) is a website that provides a platform for classified advertising online, allowing its users to post advertisements in a wide range of categories, including “Adult Entertainment.” The “Adult Entertainment” section on Backpage’s website includes an “Escorts” subcategory. In 2014, three young women brought suit pseudonymously, alleging that they were the victims of sex trafficking accomplished, in part, through the posting of advertisements relating to them on Backpage’s “Escorts” section while they were still minors. These women alleged that they were the subjects of hundreds of posts on Backpage, which typically included their pictures and text using coded terminology to make it clear to potential “customers” that they were minors. They further alleged that they were raped hundreds of times as a result of being “advertised” on Backpage. As a result, the plaintiffs alleged that Backpage had engaged in sex trafficking of minors as defined by the federal Trafficking Victims Protection Reauthorization Act of

¹ No. 15-1724, 2016 WL 963848 (1st Cir. Mar. 14, 2016).

² Op. at 3.

³ Op. at 19.

⁴ *Id.*

2008, 18 U.S.C. §§ 1591 & 1595, and the Massachusetts Anti-Human Trafficking and Victim Protection Act of 2010, Mass. Gen. Laws ch. 265, § 50(a).

More specifically, plaintiffs alleged that Backpage made several intentional decisions to design its website in order to facilitate sex trafficking. They alleged, for example, that among other things, Backpage: (i) selectively removed certain posts from the “Escorts” section, including posts made by victims support groups and law enforcement “sting” operations; (ii) did not require advertisers to provide identifying information, phone number or e-mail verification and allowed the use of anonymous payment methods; and (iii) removed metadata from pictures posted in advertisements making it difficult to tell where and when the pictures were taken. Backpage allegedly profited handsomely from this by charging a fee to post advertisements in its “Adult Entertainment” section (even though no fee was charged for posting in other sections of the website) and by selling sponsored advertisements in its “Escorts” section at an even higher rate.

First Circuit Decision

In a decision written by Judge Bruce Selya, joined by Judge David Barron and retired Supreme Court Justice David Souter, the First Circuit affirmed the District Court’s ruling dismissing the complaint in its entirety.⁵

The First Circuit began by discussing the legislative intent behind the CDA, explaining that the CDA was passed by Congress in response to court cases in which internet service providers had been held liable for defamatory statements posted by third-parties, rather than by the internet service providers themselves. To avoid imposing an undue burden on internet companies and to encourage “the continued development of the internet with minimal regulatory interference,” the CDA “shields website operators from being treated as the publisher or speaker of material posted by users of the site, which means that lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial function—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”⁶ Accordingly, the First Circuit observed that there has been near-universal agreement that the CDA’s protections should “not be construed grudgingly. . . . This preference for broad construction recognizes that websites that display third-party content may have an infinite number of users generating an enormous amount of potentially harmful content, and holding website operators liable for that content would have an obvious chilling effect in light of the difficulty of screening posts for potential issues.”⁷

⁵ *Doe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015) (Stearns, J.).

⁶ Op. at 10-11 (quotations omitted).

⁷ *Id.*

Turning to the case at hand, the Court explained that the parties did not dispute that Backpage is a “provider . . . of an interactive computer service” or that the sex trafficking claims were based on “information provided by another information content provider,” namely certain of Backpage’s users. Accordingly, the only question was whether the plaintiffs’ claims treated Backpage “as the publisher or speaker” of the contents of advertisements posted on its website. The First Circuit concluded that they did.

First, the Court rejected the plaintiffs’ arguments that certain choices Backpage made regarding how the site functioned—such as giving advertisers the option to anonymize their e-mail address and stripping metadata from photographs uploaded to Backpage—are distinguishable from traditional publishing or editorial functions. Rather, the First Circuit concluded that “the ‘publisher or speaker’ language of section 230(c)(1) extends to the formulation of precisely [these] sort of website policies and practices.”⁸ Relying on an earlier decision in which it held that CDA immunity “applies not only for the service provider’s decisions with respect to [a] posting, but also for its inherent decisions about how to treat postings generally,”⁹ the Court held that all of the plaintiffs’ claims “address the structure and operation of the Backpage website, that is, Backpage’s decisions about how to treat postings,” which “are part and parcel of the overall design and operation of the website.”¹⁰ Because the website’s features “reflect choices about what content can appear on the website and in what form,” they are “editorial choices that fall within the purview of the traditional publisher functions” and are protected by the CDA.¹¹

Second, the Court rejected the plaintiffs’ argument that they were entitled to discovery. The Plaintiffs cited 47 U.S.C. § 230(c)(2), which provides that decisions made by internet service providers to block or remove content cannot serve as the basis for liability so long as they are made in good faith, arguing that the question of whether Backpage had in fact acted in good faith was a question of fact. The First Circuit explained, however, that “section 230(c)(2) provides a set of independent protections for websites” separate and apart from the protections provided by § 230(c)(1).¹²

Finally, the Court explained that the plaintiffs’ claims were not saved by the operation of 47 U.S.C. § 230(e)(1), which provides that no part of the CDA “shall be construed to impair the enforcement of . . . any . . . Federal criminal statute.” Although the Trafficking Victims Protection Reauthorization Act of 2008 does provide for criminal penalties, the First Circuit explained that this was not relevant to the plaintiffs’

⁸ *Id.* at 14-15.

⁹ *Universal Commc’ns Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007).

¹⁰ *Op.* at 15-16.

¹¹ *Id.* at 16.

¹² *Id.* at 20.

civil cause of action.¹³ Rather, the First Circuit held that the CDA “quite clearly” indicates that § 230(e)(1) “is limited to criminal prosecutions,” even where, as here, a criminal statute also provided for a private civil right of action.¹⁴

Analysis

The First Circuit’s decision may be most significant for what it did not say rather than what it does say—namely, discuss or distinguish the Ninth Circuit’s decision in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*.¹⁵ In *Fair Housing Council*, the Ninth Circuit held that an online roommate matching service was not entitled to protection under the CDA because it “designed its search and email systems to limit the listings available to subscribers based on sex, sexual orientation and presence of children” in violation of the federal Fair Housing Act.¹⁶ The First Circuit’s omission of *Fair Housing Council* likely was intentional, since the Ninth Circuit’s decision in *Fair Housing Council* was discussed extensively by the District Court below, which described it as “one of the few sentinels denying section 230 immunity left standing among some 300 cases . . . that have decided the issue.”¹⁷

Regardless of this (probably intentional) omission on the part of the First Circuit, *Backpage.com* can certainly be read as rejecting the imposition of limitations on the CDA’s protections in *Fair Housing Council*. For example, while *Fair Housing Council* explained that a party could be held liable “for the predictable consequences of creating a website designed to solicit and enforce housing preferences that are alleged to be illegal,”¹⁸ the *Backpage.com* court expressly disagrees, holding that “claims that a website facilitates illegal conduct through its posting rules necessarily treat the website as a publisher or speaker of content and, thus, are precluded by section 230(c)(1).”¹⁹ And although the First Circuit recognized the possibility that “a website conceivably might display a degree of involvement sufficient to render its operator both a publisher and a participant” in an illegal venture, it found that simply designing a website in a questionable manner did not “achieve this duality.”²⁰ Instead, the First Circuit suggested that a website operator would satisfy this standard only by means of behavior entirely unrelated to

¹³ Compare 18 U.S.C. § 1591(b) (setting forth criminal punishments), with 18 U.S.C. § 1595 (creating private civil right of action).

¹⁴ Op. at 22.

¹⁵ 521 F.3d 1157 (9th Cir. 2008).

¹⁶ *Id.* at 1169.

¹⁷ 104 F. Supp. 3d at 156-57.

¹⁸ 521 F.3d at 1170.

¹⁹ Op. at 19.

²⁰ *Id.* at 17-18.

designing the website, such as if “the website operator [had] helped to procure the underaged youths who were being trafficked.”²¹

In contrast with *Fair Housing Council*, the First Circuit soundly rejected the plaintiffs’ “core argument” that Backpage was not entitled to CDA protection because it had “tailored its website to make sex trafficking easier.”²² The Court concluded by explaining that “Congress did not sound an uncertain trumpet when it enacted the CDA, and it chose to grant broad protections to internet publishers.”²³ Thus, even “showing that a website operates through a meretricious business model”—such as facilitating the victimization of underage young women through sex trafficking—“is not enough to strip away” the protections afforded by the CDA.²⁴ Given the specific nature of the facts alleged in the case, including sex trafficking of minors, which, as noted above, the Court conceded “evoke outrage,”²⁵ the First Circuit has provided a powerful new tool for defendants to use in order to argue that their actions in designing and running an internet service provider fall within the CDA’s ambit, regardless of any contentions being made concerning the propriety or illegality of the actions taken by the website’s users.

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²¹ Op. at 17-18.

²² Op. at 37.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 3.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Roberta A. Kaplan
212-373-3086
rkaplan@paulweiss.com

Lynn B. Bayard
212-373-3054
lbayard@paulweiss.com

Associate Michael L. Nadler contributed to this client alert.