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IN THIS ISSUE

The scope of online immunity remains unclear in the aftermath of the Supreme Court's decision in January 2017 to deny the petition for certiorari in [Doe v. Backpage.com](#). The decision sidestepped an opportunity to address a circuit split regarding the scope of the Communications Decency Act and effectively upheld a First Circuit ruling granting immunity to a website accused of facilitating sex trafficking. Since then, at least two high-profile lawsuits have been filed seeking to define the outer limits of online immunity.

***Doe v. Backpage.com* and its Aftermath: Continued Uncertainty and New Litigation in the Wake of the Supreme Court's Denial of Certiorari**

ABOUT THE AUTHOR



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Enacted in 1996, at a time when e-commerce was in its infancy, the Communications Decency Act (CDA) was the first notable attempt by the United States Congress to regulate pornographic material on the Internet. Section 230 of the CDA was added protect online service providers and users from actions based on the content of third parties, stating in part 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."¹ In short, CDA 230 was designed to shield internet service providers (ISPs) that host user-generated content from liability for the illicit and defamatory posts of third parties. With this grant of immunity, websites like Facebook and Twitter are generally not held accountable for threats or defamation posted by their users. The immunity protects ISPs if the claim would treat them as either the speaker or the publisher of the statements.

In recent years, many lawsuits have sought to determine and clarify the scope of this immunity. One area that has come under recent scrutiny is a split between the First Circuit and the Ninth Circuit over the implication of this immunity when the ISP is itself accused of wrongdoing in connection with third party illicit activities. Because the petition for certiorari in *Doe v. Backpage.com* was not taken up by the

Supreme Court, inconsistency in the application of online immunity will persist.

The First Circuit's Position and the Petition for Certiorari

In *Doe v. Backpage.com LLC*,² two minors brought claims against a website that hosted adult-content advertisements, alleging the website had engaged in the sex trafficking of minors, violating both state and federal laws. Through advertisements posted on the site, these women were trafficked across the Northeast and sexually exploited by their abusers. The defendant website Backpage.com did not post the advertisements, and the victims did not make this accusation. Instead, the plaintiffs alleged that Backpage.com had actively structured itself to facilitate trafficking in that it "tailored its posting requirements to make sex trafficking easier."³

The First Circuit, however, affirmed the dismissal of the claims against Backpage.com, ruling that the immunity granted by CDA 230 was very broad.⁴ According to the court, because third party content was an essential component of all the plaintiffs' claims, immunity necessarily applied.⁵ Indeed, the court noted that "[s]ince the appellants were trafficked by means of these advertisements, there would be no harm to them but for the content of the postings."⁶ Accordingly, the First Circuit

¹ 47 U.S.C. 230©)(1).

² 817 F.3d 12 (1st Cir. 2016).

³ *Id.* at 16.

⁴ *Id.* at 19.

⁵ *Id.* at 21.

⁶ *Id.* at 19-20.

held “claims that a website facilitates illegal conduct through its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by Section 230(c)(1).”⁷

Following the First Circuit’s decision, the plaintiffs filed a petition for a writ of certiorari to the United States Supreme Court, directly criticizing the First Circuit for following a “chain of causation” theory regarding the scope of liability that put it directly at odds with most other courts.⁸ The plaintiffs attacked the court’s ruling that “‘information provided by another’ linked the chain of causation that led to petitioner’s injuries,” thus implicating immunity.⁹ The plaintiffs urged an alternative application of the CDA whereby online immunity is limited to “neutral intermediaries,” namely, ISPs which merely host the illicit conduct rather than actively participate in it.¹⁰ Plaintiff in essence urged the Supreme Court to adopt a framework more in line with the Ninth Circuit and to ensure the Act is not used to immunize “website owners and operators...from civil liability whenever online content created by a third party was a part of the chain of causation leading to the plaintiff’s injury—even if there are plausible allegations that the website owner and operator’s own criminal conduct contributed to her injury.”¹¹

⁷ *Id.* at 20.

⁸ Petition for Writ of Certiorari, *Jane Doe, et al., v. Backpage.com LLC, et al.* (No. 16-276) (Aug. 31, 2016), available at <http://www.scotusblog.com/wp-content/uploads/2016/09/16-276-cert-petition.pdf>.

⁹ *Id.* at 11.

¹⁰ *Id.* at 12.

The Ninth Circuit’s Approach

In their petition for certiorari, plaintiffs argued that the Ninth Circuit, home to Silicon Valley, has the “most-developed jurisprudence”¹² regarding online immunity and had recently decided a case involving this same issues as the *Backpage.com* case . In *Doe v. Internet Brands, Inc.*,¹³ the plaintiff alleged that two men had used an Internet Brands-operated website to lure their victims (including the plaintiffs) to fake modeling auditions, where the victims were then drugged, raped, and videotaped.¹⁴ The plaintiff did not accuse Internet Brands of complicity in the actual rapes, but rather alleged that the ISP knew that these perpetrators had infiltrated the company’s website for such purposes and “did not warn [the plaintiff] or the website’s other users.”¹⁵ In response, Internet Brands submitted a motion to dismiss, arguing that immunity under the Act applied.

The Ninth Circuit disagreed. The court held that “the essential question...is whether plaintiff’s failure to warn cause of action ‘inherently requires the court to treat’ Internet Brands ‘as a publisher or speaker’ of information provided by another information content provider.”¹⁶ The Ninth Circuit ruled that the plaintiff did “not seek to hold Internet Brands liable as a ‘publisher

¹¹ *Id.* at 11.

¹² Petition for Writ of Certiorari, *supra*, at 13.

¹³ 824 F.3d 846 (9th Cir. 2016)

¹⁴ *Id.* at 848.

¹⁵ *Id.*

¹⁶ *Id.* at 850 (citing *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100-02 (9th Cir. 2009).

or speaker' of content someone posted" on the website.¹⁷ As such, the immunity that is guaranteed by the Act is not implicated by this type of claim. In the Ninth Circuit, failure to warn as a claim is completely separate from the type of actions the CDA sought to protect.

Lack of Resolution of Circuit Split Foments Additional Litigation

With the Supreme Court declining to address the circuit split and determine the boundaries of CDA immunity, the door remains open for further litigation seeking to hold ISPs liable where they act as more than passive conduits. Less than a month after the U.S. Supreme Court let the First Circuit's decision stand, famed litigator David Boies sued Backpage.com in Arizona and Florida on behalf of groups alleging the company conspired to facilitate child sex trafficking. The new complaints allege Backpage.com and related defendants knowingly created online content designed to facilitate sex trafficking and deliberately obscured evidence of criminal behavior to ensure that they continue to profit from the exploitation of children for sex.¹⁸

With each lawsuit containing over 40 pages of allegations detailing Backpage.com's criminal enterprise, it is clear that Mr. Boies, who is working pro bono, is passionate about his cause and is gearing up for a big fight. It remains to be seen whether he will succeed

where others have failed, and the Supreme Court may once again be asked to decide the outcome. In the meantime, the scope of online immunity and its far-reaching implications for e-commerce in general hang in the balance.

¹⁷ *Id.* at 851.

¹⁸ United States District Court, District of Arizona Civ. Act. No. 17-cv-399; United States District Court, Middle District of Arizona Civ. Act. No. 17-cv-218

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