NEW YORK COURT OF APPEALS ROUNDUP

INTERNET SERVICE PROVIDER IMMUNITY, CHALLENGE TO INSURER TRANSACTION

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Two particularly important cases were decided by the Court of Appeals last month, in both of which the Court was divided. In *Shiamili v. The Real Estate Group of New York Inc.*, the Court held (4-3) that blog operators alleged to have not only displayed an anonymous posting but also to have moved it to a more prominent area of the blog under mocking headlines and added a doctored photograph with the caption "King of the Token Jews" were immune from claims of defamation and unfair competition by disparagement under the Communications Decency Act. In *ABN AMRO Bank, N.V. v. MBIA Inc.*, the Court held (5-2) that policyholders affected by a series of transactions that allegedly left an insurer undercapitalized could challenge the transactions in a suit against the company under the Debtor and Creditor Law and common law, and were not confined to bringing an Article 78 proceeding against the Insurance Superintendent who approved the transactions as their only avenue for relief.

Communications Decency Act

The Court of Appeals has issued its first decision applying the federal Communications Decency Act, 47 U.S.C. §230 (CDA). It is an important decision. In its 4-3 opinion in *Shiamili v. The Real Estate Group of New York Inc.*, the deeply divided Court affirmed dismissal of claims for defamation and unfair competition by disparagement against website operators it deemed immune from such claims under the CDA.

The parties to the case are competitors in the apartment sales and rental business in New York City. Defendants also operated an online "blog" devoted to the New York

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City real estate industry.[1] Plaintiff accused the defendants of administering and choosing material for public display via the blog. Plaintiff further alleged that an unknown visitor to the blog wrote and posted defamatory comments about it using a pseudonym. Those comments suggested that the plaintiff mistreated employees and were racist and anti-Semitic, and referred to one of the plaintiff's agents as a "token Jew." The defendants, according to the complaint, moved the defamatory comments to a more prominent location on the blog, drafted mocking headlines for the comments, and added a doctored traditional image of Jesus Christ with plaintiff's face superimposed, adjacent to which were plaintiff's name and the words "King of the Token Jews." It was further alleged that, using a pseudonym, one of the defendants posted a comment on the blog that tried to encourage the pseudonymous author of the original defamatory remarks to write more about the plaintiff, although the original author did not take the bait.

The matter called upon the Court to apply Section 230(c)(1) of the CDA. It provides that "[n]o 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." The Court recognized that with respect to their blog, defendants were providers of an "interactive computer service" within the meaning of the CDA and, as such, typically would be entitled to CDA immunity from claims such as libel or disparagement with respect to information provided by "another information content provider"—here, the pseudonymous third party who posted the original defamatory comments on the blog.

The principal issue considered by the Court revolved around whether the actions of the defendants, in moving the defamatory comments to a more prominent position on the blog where more visitors would see them, adding mocking headlines and displaying the doctored image with the phrase "King of the Token Jews," transformed the defendants from protected service providers into actual "information content provider[s]" not protected by Section 230(c)(1). As the majority opinion, authored by Judge Carmen Beauchamp Ciparick, put it, the appeal turned on "whether, taking the facts alleged in the complaint as true, the defamatory statements were 'provided by another information content provider'."

The majority adopted what it labeled the "national consensus" on the broad scope of the protections afforded by Section 230(c)(1) "as generally immunizing internet service providers from liability for third-party content wherever such liability depends on characterizing the provider as a 'publisher or speaker' of objectionable material." In the majority's view, the defendants did nothing more than exercise "a publisher's traditional editorial functions" and, thus, were immunized from liability by the CDA (quoting *Zeran v. America Online Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).[2]

The dissent viewed the same factual allegations in a totally different light. Chief Judge Jonathan Lippman, writing for the dissent in which Judges Eugene F. Pigott Jr. and Theodore T. Jones joined, viewed the complaint as alleging that the defendants "abused their power as website publishers to promote and amplify defamation targeted at a business competitor." His opinion suggested that the majority has recast the plaintiff's allegations in "muted form" simply to provide the coverage of CDA immunity for the website operator. The dissent concluded that the facts, as alleged, evidenced "a business's complicity in defaming a direct competitor" and, thus, were "sufficiently stated and…outside the scope of CDA immunity." According to the dissenters, "[d]ismissing this action on the pleadings is not required by the letter of the law and does not honor its spirit."

If one reads between the lines, the dissenters seemed uncomfortable with dismissing the action in the absence of any discovery to clarify factual allegations over which reasonable jurists differed so widely. The dissent appears to believe that one reasonable view of the factual allegations is that the defendants' conduct was a calculated effort to "promote and amplify defamation" targeting a competitor. Under such circumstances, in the dissent's view, the complaint should survive a motion to dismiss and discovery should proceed to develop the facts.

Implications

The implications of the majority decision can be seen as alarming.

Both the majority and dissenting opinions acknowledge that the very purpose of the immunities provided by the CDA, as Congress made clear in the statute itself, was to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." (quoting 47 U.S.C. §230(b)(2)). Such a goal is, of course, most laudable, as is the objective of protecting well-established First Amendment protections for anonymous speech.[3]

Such protections, however, are not absolute. As recently noted in the First Amendment Law Review:

> "[T]he right to speak anonymously…is not absolute." It does not always cover defamatory speech. And when people choose to use potentially defamatory language on the internet, either anonymously or pseudonymously, this First Amendment right of anonymous speech collides with a plaintiff's right to seek damages for false accusations leveled against him or her.[4]

Courts have struggled for more than a decade with how best to balance First Amendment protections for anonymous speech against remedies for defamatory remarks that can be published to the world anonymously (and pseudonymously) via

the Internet.[5] During these years, it has become increasingly easy (and more common) for those who wish to use the Internet to, for example, destroy the reputations of rivals and imagined enemies, entirely anonymously and without risk of being identified and held accountable.

Technologically, it is no longer difficult to post defamatory comments on blogs or other websites in ways that make the identity of the posting party incapable of detection. There are many free or subscription-based services designed to wipe away electronic "footprints" of online activities. Additionally, even many youngsters today know how to manipulate so-called anonymous proxy servers (often in foreign jurisdictions) that keep no logs or other potentially identifying information. Even at the most basic level, today's average mobile computer users know how to walk into one of countless coffee houses or other businesses that offer free, unsecure wi-fi Internet access, post anonymous comments on the Web using the shop's Internet access and walk out leaving no reasonably effective way for a victim of online defamation to later identify the author of those remarks.

A person's or entity's reputation or the integrity of a product can be destroyed in a virtual moment with online publication of false, defamatory accusations in this brave new world where online videos and Web pages suddenly "go viral" and are viewed by millions overnight. The ease with which it can be done in ways that ensure that the original author cannot be identified and held accountable means that extreme care and attention must be paid to claims brought against blog and website operators who facilitate and even encourage such misconduct, so that the robust and understandable immunity afforded under the CDA is not applied over-broadly in cases in which a reasonable reading of the allegations supports an inference of the operator's complicity in defaming another—particularly a direct competitor.

It simply is not good for the State of New York to be perceived—rightly or wrongly—as a place that is hospitable to those who maliciously libel and can feel secure in their anonymity. The *Shiamili* decision by the Court may unfortunately have that effect in the minds of some.

Insurer Transaction Challenge

ABN AMRO Bank, N.V. v. MBIA Inc. posed the following question: When the Superintendent of the State Insurance Department approves a series of transactions among affiliated insurance companies after considering whether they may have an adverse effect upon policyholders and determining that they do not leave the insurer at issue undercapitalized, are affected policyholders precluded from challenging the transactions other than by an Article 78 proceeding asserting an abuse of discretion on

the part of the Superintendent? The Court answered that question in the negative. (The authors' firm represented two amici that supported plaintiffs' position.)

MBIA Insurance issued "financial guarantee insurance," contracting to pay policyholders in the event that an obligor under an instrument covered by the insurance policy defaulted. By the end of 2008, the company's portfolio contained policies with $786.7 billion in face value, approximately two-thirds of which covered municipal bonds and one-third of which covered structured-finance products, including mortgage-backed securities.

In December 2008, MBIA Insurance submitted an ex parte application to the Superintendent seeking approval of a series of transactions (collectively, the "Transformation") pursuant to which the municipal bond insurance business would be segregated into a separate company from MBIA Insurance, which would retain the structured-finance products business. Policyholders and other members of the public were not given notice of the proposed Transformation and an opportunity to be heard, a fact that seems to have played a significant role in the Court's decision.

The Superintendent made the requisite findings to either approve or "not disapprove" (hereafter, "approve") each of the transactions comprising the Transformation, including finding that MBIA Insurance would be left with "sufficient surplus to support its obligations and underwritings." By letter dated Feb. 17, 2009, the Superintendent approved the Transformation, retroactive to Jan. 1 of that year. The next day, MBIA Insurance and the Superintendent issued separate announcements of the Transformation. Despite the Superintendent's conclusion as to the surplus sufficiency, Moody's downgraded MBIA Insurance's credit rating.

Plaintiffs, financial institutions that held financial guarantee insurance for structured transactions, brought an action in the Supreme Court, New York County, asserting claims for fraudulent conveyance under Sections 273, 274 and 276 of the Debtor and Creditor Law, breach of contract and abuse of the corporate form. After defendants filed a motion to dismiss on the basis, inter alia, that the Superintendent's decision could only be challenged in an Article 78 proceeding, plaintiffs commenced such a proceeding, as well.

The Supreme Court denied the motion to dismiss the plenary action. The Appellate Division, First Department, reversed (3-2), finding that the plenary action constituted an impermissible "collateral attack" on the Superintendent's approval of the Transformation, and further that the complaint's common law causes of action failed to state a claim. The Court of Appeals reversed in an opinion by Judge Ciparick.[6]

Defendants' position that plaintiffs were barred from making a "collateral" attack on the Superintendent's approval, "taken to its logical conclusion, would preempt plaintiffs'…claims," the Court observed. The majority agreed that the Legislature has the power to confer exclusive jurisdiction upon an agency in connection with a statutory regulatory program. However, it found no indication of such an intent in the language, structure or legislative history of the Insurance Law. This was especially the case because the statute did not require the Superintendent to provide (and he did not provide) policyholders with notice and the opportunity to be heard concerning the proposed Transformation, as one would expect if those affected by transactions were being stripped of their statutory and common law rights to challenge allegedly fraudulent transactions.

Moreover, the Court stated, the claims asserted by plaintiffs could not be adjudicated by the Superintendent. Nor could they be raised in an Article 78 proceeding, which defendants maintained was the sole available avenue of attack upon the Superintendent's determination. Due to the absence of express or implied preemption of these statutory and common law causes of action under the Insurance Law, plaintiffs could not be precluded from pursuing their claims.

The dissenting opinion by Judge Susan Phillips Read, in which Judge Victoria A. Graffeo joined, argued that the Legislature did intend to preempt plaintiffs from attacking the Superintendent's decision by anything other than an Article 78 proceeding. It asserted that the factual issues raised by the complaint—principally that the Transformation left MBIA Insurance insufficiently capitalized—had been resolved in the Insurance Department's approval process, leaving "no daylight between the causes of action asserted by plaintiffs and the substance of the Superintendent's review."

Endnotes:

1. Comments on a "blog," short for "Web log," include those written by anonymous and pseudonymous visitors.

2. The Court also noted in passing that courts, including the U.S. Court of Appeals for the Ninth Circuit, recently have held that even if a website operator is not the author of allegedly defamatory material posted to its website, "a website operator may still contribute to the content's illegality and thus be liable as a developer" of the content (quoting *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1171 (9th Cir. 2008)). However, under the majority's view, the facts as alleged did not rise to the level contemplated by the Ninth Circuit standard and, thus, did not convert the website operator from a protected service provider to an unprotected "information content provider."

3. See generally *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("an author's decision to remain anonymous…is an aspect of the freedom of speech protected by the First Amendment").

4. Jones, Jonathan D., "Cybersmears and John Doe: How Far Should First Amendment Protection of Anonymous Speakers Extend?" 7 First Amend. L. Rev. 421, 424 (2008-2009).

5. Compare *In re Subpoena Duces Tecum to America Online Inc.*, No. 40570, 52 Va. Cir. 26 (Va. Cir. Ct. Jan. 31, 2000) (applying "good faith" standard in suit intended to unmask pseudonymous online author), rev'd on other grounds sub nom, *America Online Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350 (Va. 2001) with *Dendrite International Inc. v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) (applying "balancing test" in analogous circumstances) and with *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) (rejecting the balancing test and substituting a "summary judgment standard" for balancing First Amendment anonymous speech protections against the right to seek redress for online defamation). See generally "Cybersmears and John Doe," supra, n.3, at 425-30.

6. The complaint in the plenary action also asserted a claim for unjust enrichment. The Supreme Court denied the motion to dismiss in its entirety. In the Appellate Division, the dissent agreed with the majority that plaintiffs had failed to state a claim of unjust enrichment. The Court of Appeals affirmed this aspect of the First Department's decision.