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**COMMUNICATIONS DECENCY ACT**

The Fourth Circuit Court of Appeals' December ruling in *Nemet Chevrolet Ltd. v. ConsumerAffairs.com*—which held that the operator of a consumer gripe site was immune from liability for postings under Section 230 of the Communications Decency Act—is not only the latest development in CDA § 230 case law, but also may indicate a burgeoning trend in how Section 230 is applied to online media. The authors survey the history of Section 230's application to interactive websites, and discuss how *Nemet* could change the litigation landscape.

## Fourth Circuit Augments Protections for Online Intermediaries Under CDA § 230

BY PATRICK CAROME, SAMIR JAIN, AND JUDY COLEMAN

The substantial legal protections that online intermediaries enjoy under Section 230 of the federal Communications Decency Act, 47 U.S.C. § 230, recently gained some additional heft from the decision of the U.S. Court of Appeals for the Fourth Circuit in *Nemet Chevrolet Ltd. v. ConsumerAffairs.com Inc.*, 591 F.3d 250 (Dec. 29, 2009). This decision, which affirmed dismissal of a defamation suit against a website that collects and disseminates consumer complaints, is the first appellate ruling to explore the interaction between (1) Section 230's broad immunity from liability for third-party content and (2) the stricter pleading standard for lawsuits in federal court that the Supreme Court articulated last year in *Ashcroft v. Iqbal*.

According to the *Nemet* decision, Section 230, in combination with the new *Iqbal* pleading standard, requires federal courts to dismiss lawsuits that aim to hold operators of interactive computer services such as online forums liable for unlawful content unless the plaintiff's complaint affirmatively alleges specific facts to show the operator itself participated in the actual creation or development of the particular content claimed to be unlawful. In other words, to avoid dismissal at the threshold, the plaintiff's complaint must allege in detail why Section 230 immunity does *not* bar the claim.

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### Basic Contours of Section 230 Immunity

Since its enactment as part of the Communications Decency Act in 1996, Section 230 has served as a bulwark protecting internet service providers and others who provide platforms for online communications from lawsuits based on unlawful content that originates with third parties. As reflected in the statute's preamble and recognized in subsequent case law, Congress passed Section 230 both to promote the development of the internet and other online media by shielding service providers from what could otherwise be crushing burdens of litigation and liability, and to encourage voluntary *self*-regulation on the part of service providers.

The statute's key operative provision, § 230(c)(1), states 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 infor-

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mation content provider.'' Thirteen years ago, in the landmark case of *Zeran v. America Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997), the Fourth Circuit held that this provision ''plainly immunizes service providers like AOL from liability for information that originates with third parties.'' Courts across the Nation have consistently followed *Zeran* and its broad reading of the protections that Section 230 affords service providers.

An important issue that can arise in cases involving § 230(c)(1) immunity is whether the allegedly unlawful information at issue originated entirely from a third party, or whether the service provider itself was somehow involved in the creation or development of that content. Section 230(c)(1) affords protection only with respect to ''information provided by *another* information content provider,'' and the statute defines ''information content provider'' as ''any person or entity that is responsible, in whole or in part, for the creation or development'' of online information. Based on this statutory language, courts have held that § 230(c)(1) does not immunize service providers from liability arising from unlawful content if the service provider itself participated in the actual creation or development of that specific content.

Usually, the distinction between third-party content and content that was created or developed at least partly by the service provider is not hard to draw. Thus, when a user submits a harassing posting to an online bulletin board (as in *Zeran*), or submits an illegal advertisement for display on a classified service such as craigslist, or makes unlawful statements in an internet chatroom, it is readily apparent that the content at issue originated from a third party and that the intermediary's defense under § 230(c)(1) is intact. Harder cases arguably arise, however, where the online intermediary provides customized frameworks or tools to assist users in formulating online content. Even in those circumstances, however, courts have found that the immunity defense remains available absent a demonstration that the service provider directly caused its users to create and submit unlawful content.

That was illustrated, for example, in the Ninth Circuit's en banc decision in *Fair Housing Council v. Roommates.com LLC*, 521 F.3d 1157 (9th Cir. 2008). In that case, the court held that § 230(c)(1) protected the operator of a roommate-matching website from claims regarding illegal statements contained in users' open-ended, narrative descriptions of their roommate preferences, but not from claims regarding illegal statements that inevitably resulted from users' responses to multiple-choice questions that the website required all posters to answer. Other cases that have looked hard at the line Section 230 draws between third-party content and jointly-developed content include *Carafano v. Metrosplash*, 339 F.3d 1119 (9th Cir. 2003) (holding that the operator of an online dating website was not liable for a fake profile derived from user's responses to multiple-choice questions posed by website), and *Blumenthal v. Drudge*, 922 F. Supp. 44, 51 (D.D.C. 1998) (finding no liability ''even where [online service providers] have an active, [or] aggressive role in making available content prepared by others'').

As discussed below, the issue decided in *Nemet* is how far a plaintiff must go, at the outset of any lawsuit that seeks to hold the operator of an online forum liable for the dissemination of unlawful content, to allege facts showing the defendant forfeited the protection of Section 230 by participating in the creation and development of that content.

## Supreme Court's New Pleading Standard

Seven months before the Fourth Circuit's *Nemet* ruling, the Supreme Court issued its decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), which has been widely heralded as establishing, for all civil cases in federal courts, a new standard for evaluating whether a plaintiff's complaint should be dismissed at the outset. On a 5-4 vote, the Supreme Court ruled in *Iqbal* that a plaintiff's constitutional claims against several senior government officials were fatally deficient, and had to be dismissed, because his complaint failed to ''contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.' '' 129 S.Ct. at 1949 (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)).

The *Iqbal* standard requires plaintiffs to plead, at the outset of any suit in federal court, not only a possible claim for relief, but also a *plausible* one. To do so, a plaintiff must make factual allegations that affirmatively *support* the claim for relief; it is not enough for the facts alleged to be merely ''consistent'' with the plaintiff's theory. 129 S.Ct. at 1950. *Iqbal* leaves it to the district court to ''draw[ ] on judicial experience and common sense'' to determine whether the facts set forth in a complaint ''nudge'' the plaintiff's claim over the line between possibility and plausibility. *Id.* at 1950-1951 (quoting *Twombly*, 550 U.S. at 570). In making this assessment, district courts are to focus on (and assume the truth of) only the allegations in the plaintiff's complaint for which specific supporting facts are set forth, and to disregard ''threadbare recitals of the elements of a cause of action'' and ''legal conclusion[s] couched as a factual allegation[s].'' *Id.* at 1949-1950.

The *Nemet* case represented the first occasion for a federal court of appeals to assess what the new *Iqbal* pleading standard requires of a plaintiff who sues a website operator for injuries that allegedly were caused by information disseminated via the website.

## Facts and Analysis of *Nemet* Case

ConsumerAffairs.Com Inc. operates a website that invites and encourages its users to post complaints about products and services that other companies offer to the consuming public. Nemet Chevrolet Ltd. is a New York-based car dealership that found itself the subject of various negative reviews posted on this site. As with other businesses reviewed by its users, ConsumerAffairs organized these postings in one location on the site. It also provided its own overview of the postings' contents, including the following statement: ''The Nemet complaints pretty well cover the territory–-everything from *prices* engraved in sand to *advertising* that overlooks certain crucial elements.''

Claiming that twenty of these postings were false and harmful to its reputation, Nemet Chevrolet and its owner (collectively, ''Nemet'') sued ConsumerAffairs in the federal district court for the Eastern District of Virginia. Nemet asserted claims for defamation and tortious interference with business expectancy.

ConsumerAffairs immediately moved to dismiss Nemet's initial complaint based on Section 230 immunity. The district court granted that motion, holding that it was evident on the face of Nemet's complaint that the allegedly false postings had been authored by third par-

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ties. Although Nemet sought to avoid dismissal based on its unelaborated allegation that ConsumerAffairs had ''participated in the preparation and publication'' of its users' postings, the district court ruled that Nemet ''failed to sufficiently or substantively allege that Defendant participated in the creation or development of the website content at issue in this claim.'' *Nemet Chevrolet Ltd. v. Consumeraffairs.com Inc.*, Case No. 1:08cv254 (GBL) (E.D. Va. June 6, 2008).

Thereafter, Nemet sought, and the district court granted, leave for Nemet to file an amended complaint advancing the same claims. This amended complaint included new factual allegations that were obviously aimed at overcoming ConsumerAffairs' immunity defense by trying to tie the website operator to the creation and development of the twenty challenged postings. ConsumerAffairs again immediately moved to dismiss based on § 230(c)(1), and the district court again granted the motion. It was this dismissal of Nemet's amended complaint that the Fourth Circuit reviewed and ultimately affirmed.

The Fourth Circuit framed the issue to be decided on appeal as follows: ''We must determine, in a post-*Iqbal* context, whether the facts pled by Nemet, as to the application of CDA immunity, make its claim that Consumeraffairs.com is an information content provider merely possible or whether Nemet has nudged that claim 'across the line from conceivable to plausible.' '' 591 F.3d at 256 (quoting *Twombly*, 550 U.S. at 570). The court of appeals then evaluated, in turn, each of Nemet's new factual theories, and in each instance concluded that even Nemet's expanded factual allegations failed to rise to the level of plausibility.

*First*, Nemet's amended pleading alleged that ConsumerAffairs had become an ''information content provider'' with respect to each of the twenty challenged consumer complaints by ''soliciting the complaint,'' ''steering the complaint into a specific category designed to attract attention by consumer class action lawyers,'' and ''promising the consumer that[, by posting on the site,] she could obtain some financial recovery by joining a class action lawsuit.'' 591 F.3d at 256. The Fourth Circuit rejected this so-called ''structure and design'' theory because, even accepting these allegations as true, they did not make it *plausible* that ConsumerAffairs had specifically sought out consumer complaints that were false and defamatory. The court said Nemet's allegations on this point were ''fundamentally distinguishable'' from the facts that the Ninth Circuit had deemed sufficient to overcome the § 230(c)(1) defense in *Roommates.com*, where the plaintiff had shown that the website essentially *required* users to post illegal content. Nemet's amended complaint, by contrast, merely alleged that ConsumerAffairs.com had designed its website to elicit colorable class action claims—a completely legal purpose. 591 F.3d at 257.

*Second*, Nemet alleged, again for each of the twenty consumer postings at issue, that ConsumerAffairs had ''participated in the preparation of'' the posting's content by ''contacting the consumer to ask questions about the complaint and to help her draft or revise her complaint.'' *Id.* at 256. The Fourth Circuit found these allegations to be deficient as well. It held that Nemet's ''bare allegation'' about ConsumerAffairs having ''contacted the consumers to ask some unknown question,'' even if true, ''proves nothing as to Nemet's claim that ConsumerAffairs.com is an information content provider.'' *Id.* at 258.

The Fourth Circuit similarly held that Nemet's allegations that ConsumerAffairs had ''revise[d] or redraft[ed]'' each of the challenged postings ''fare no better.'' Because Nemet had failed to plead ''what ConsumerAffairs.com ostensibly revised or redrafted or how such affected the post,'' the court deemed these allegations to be ''both threadbare and conclusory,'' and therefore not compliant with the new *Iqbal* pleading standard. The Fourth Circuit also pointed out that Section 230, as construed in *Zeran*, specifically ''forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.'' Nemet's failure to ''plead facts to show any alleged drafting or revision by ConsumerAffairs.com was something more than a website operator performs as part of its traditional editorial function'' further doomed Nemet's effort to circumvent Section 230 immunity. *Id.* at 258.

*Third*, Nemet alleged that for eight of the twenty challenged postings, it was unable, after investigation, to match the information contained in the posting with anyone who had been a Nemet customer. On this basis, Nemet's amended complaint asserted that ConsumerAffairs itself must have fabricated these consumer complaints. Specifically, as to each of these eight postings, Nemet's amended complaint alleged:

> Because Plaintiffs cannot confirm that the [customer] complaint . . . was even created by a Nemet Motors Customer based on the date, model of car, and first name, Plaintiffs believe that the complaint . . . was fabricated by the Defendant for the purpose of attracting other consumer complaints.

*Id.* at 258. The amended complaint also included other factual allegations that, according to Nemet, supported this fabrication hypothesis, including (1) that Nemet has an excellent reputation; (2) that none of these eight complaints had been reported to the local Department of Consumer Affairs; (3) that ConsumerAffairs' sole source of income is advertising and this advertising is tied to webpage content; and (4) that some posts on the website appeared online after their listed creation date.

The majority of the three-judge panel in *Nemet* (Circuit Judges Agee and King) ruled that these ''fabrication'' allegations also failed, under the *Iqbal* pleading standard, to save Nemet's amended complaint from dismissal based on § 230(c)(1). The majority held, in particular, that Nemet's asserted belief that ConsumerAffairs itself must have fabricated the postings because Nemet could not match them with prior customers was ''pure speculation and a conclusory allegation of an element of the immunity claim.'' *Id.* at 259. The majority also reasoned that each of the other facts that Nemet set forth as supposed indicia that ConsumerAffairs itself may have secretly authored the postings and presented them as authentic consumer complaints were all either irrelevant or fully consistent with much less nefarious scenarios than that posited by Nemet. *Id.* at 258-260. On this point, the third member of the panel, Judge Jones, a federal district court judge sitting by designation, dissented, indicating he would have let the case proceed past the pleading stage with respect to the eight allegedly ''fabricated'' postings. *Id.* at 260-262.

In the end, therefore, the Fourth Circuit upheld dismissal of Nemet's defamation and tortious interference

claims in their entirety. Quoting from *Iqbal*, the court's opinion summarized its ruling as follows:

> Nemet's well-pled allegations allow us to infer no more than ''the mere possibility'' that Consumeraffairs.com was responsible for the creation or development of the allegedly defamatory content at issue. Nemet has thus failed to nudge its claims that Consumeraffairs.com is an information content provider for any of the twenty posts across the line from the ''conceivable to the plausible. . . . As a result, Consumeraffairs.com is entitled to § 230 immunity and the district court did not err by granting the motion to dismiss.

*Id.* at 260.

## The *Nemet* Decision's Broader Impact

It may take some time before the significance of the *Nemet* decision can be fully assessed. At least within the Fourth Circuit, the decision resolves any uncertainty regarding a potentially significant procedural question: Whether Section 230 immunity may properly be raised in a motion to dismiss filed at the outset of the case. Some other courts had previously suggested in dicta that Section 230 is an ''affirmative defense'' that plaintiffs need not anticipate or confront in their initial court filings and that defendants must introduce into the case through their own pleadings. *See Doe v. GTE*, 347 F.3d 655, 660 (7th Cir. 2003); *Curran v. Amazon.com*, No. 07-0354, 2008 WL 472433, at *12 (S.D. W.Va. Feb. 19, 2008) (citing *Doe* but overruled implicitly by *Nemet*). Indeed, the initial version of the Ninth Circuit's recent decision in *Barnes v. Yahoo!*, 565 F.3d 560 (9th Cir. May 20, 2009), expressly held that defendants should not be permitted to raise the Section 230 defense by way of a motion to dismiss. (Following Yahoo!'s request for reconsideration, the *Barnes* court reissued its decision after deleting all discussion of this point. *See* 570 F.3d 1096 (9th Cir. June 22, 2009).) *Nemet* obviously stands for the opposite view.

More broadly, the *Nemet* decision should generally make it even easier for online intermediaries to use Section 230 immunity to shut down these sorts of lawsuits quickly and at the very outset, before the expense and burden of litigation, including discovery and the like, can exact a substantial toll. Under the *Nemet* approach, it is the plaintiff's burden to explain in the complaint why the lawsuit is *not* barred by Section 230. In essence, this makes avoidance of Section 230 immunity yet another element of the claim that the plaintiff must plead at the outset of the case, with all the specificity and support required by *Iqbal*.

For operators of online media, this is a positive development that builds upon more than a decade of consistently favorable case law construing Section 230. If followed by other courts, the *Nemet* approach will likely reduce the frequency of lawsuits that seek to hold online service providers liable for content that originated with third parties, and enable service providers to escape more quickly, and with less expense, from the actions that are filed.

All this appears consistent with Congress's main objective in enacting Section 230 in the first place, which was to avoid the ''obvious chilling effect'' that the ''specter of tort liability'' would otherwise pose to interactive computer service providers given the ''prolific'' nature of speech on the Internet. *Zeran*, 129 F. 3d at 331. As the *Nemet* court recognized, to achieve this objective, it is important ''to resolve the question of § 230 immunity at the earliest possible stage of the case'' so as to ''protect websites not only from 'ultimate liability,' but also from 'having to fight costly and protracted legal battles.' '' 591 F.3d at 255 (quoting *Roommates.com*).

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