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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

An Outlier In Online Speech Decisions

Law360, New York (February 05, 2014, 11:05 AM ET) -- A recent decision of Virginia's intermediate appellate court cuts against a prevailing trend in the protection of anonymous free speech. In Yelp Inc. v. Hadeed Carpet Cleaning Inc., No. 0116-13-4 (Va. Ct. App. Jan. 7, 2014), the Virginia Court of Appeals held that Yelp was required to identify seven users who criticized a carpet-cleaning service in online reviews.

User-driven websites such as Yelp typically are not required to divulge user information in response to discovery requests in litigation. Courts have outlined strict standards for unmasking users' identities, often citing the First Amendment right to anonymous free speech. Although certain speech, like defamation, is not protected by the First Amendment, courts have been wary of "new breed" defamation lawsuits that, in the view of those courts, are designed to silence anonymous speakers rather than redress a substantive injury.

The Hadeed Carpet decision diverges from these strict standards. In its opening brief, Yelp contended that the posts should be protected by the First Amendment because the anonymous commenters' claims could be true and therefore would not be defamatory. The Virginia court disagreed, and found that a lower court had correctly followed a state statute, Virginia Code § 8.01-407.1, providing a subpoena procedure for unmasking anonymous Internet users. Pursuant to this statute, the carpet service had offered declaration evidence that it could not match the online criticisms to actual customers, and stated that it suspected that the comments were made by competitors.

Under the statute, a plaintiff must demonstrate a "legitimate, good faith basis to contend" that anonymous content is tortious. No other state has enacted a statute like Virginia's unmasking statute, and courts in most other jurisdictions require evidence of all essential facts that suffice to prove the elements of a defamation claim before unmasking anonymous users.[1] By virtue of this unique statute, the Hadeed Carpet holding exists as an outlier on the national landscape.

Courts nationwide have coalesced around a benchmark standard commonly known as the Dendrite-Cahill test to balance a person's right to speak anonymously on the Internet against another person's right to protect his or her reputation. The Dendrite-Cahill test requires a plaintiff who seeks to unmask anonymous users to (1) provide sufficient notice to the anonymous posters that they are the subject of an application to disclose their identity; (2) identify the exact statements, which purportedly constitute actionable speech; and (3) provide the court with sufficient evidence to establish a prima facie case. Thereafter, the court must balance the defendant's First Amendment right against the strength of the prima facie case presented.[2]

The Virginia statute has similar requirements. It requires adequate notice to the anonymous

commenter, and like Dendrite-Cahill, the Virginia statute calls for the court to weigh the parties' respective rights. The Virginia statute, however, tips the scale in favor of the party seeking to protect its reputation. The statute does not require plaintiffs to present a prima facie case of all required facts to prove the anonymous commenter committed defamation or some other tort.

Rather, the statute requires only that the plaintiff demonstrate a "legitimate, good faith basis to contend" that the anonymous content is tortious. This "good-faith" test eases a plaintiff's evidentiary burden when compared with the Dendrite-Cahill standard, and increases the likelihood that a plaintiff will ultimately be able to unmask an anonymous commenter.

The Dendrite-Cahill standard and similar approaches have proven to be an obstacle to defamation plaintiffs obtaining the identity of anonymous posters. Both the Dendrite and Cahill courts declined to unmask an anonymous Internet commenter,[3] and few courts have ordered that the identity of a commenter be revealed.[4] Because a perception among Internet users that a company does not adequately protect user anonymity could pose a threat, companies like Yelp have litigated to protect their users from defamation claims. The decision in Hadeed Carpet represents the other side of the coin: It protects individuals' and companies' pecuniary and proprietary interests against defamatory online speech.

Some plaintiffs' attorneys are already claiming that the Hadeed Carpet ruling reflects a new willingness by courts to force companies to reveal user information. In effect, these attorneys anticipate "new breed" defamation suits becoming the norm. That conclusion, however, seems hasty. The Hadeed Carpet decision likely will have to withstand further appellate challenges before the Virginia Supreme Court, and potentially before the United States Supreme Court.

Regardless of whether or not Hadeed Carpet remains good law, there is little reason to think that its logic will be adopted by courts in other jurisdictions that do not have statutes similar to Virginia's unmasking statute. Courts continue to carefully scrutinize requests to discover anonymous Internet commenters' identities, and give significant deference to commenters' constitutional right to speak anonymously. Furthermore, the United State Supreme Court has stated that the First Amendment protects a person's right to speak anonymously and that those protections fully extend to speech on the Internet.[5] Thus the decision likely does not signal the start of a shift in national jurisprudence; rather, it is only the first test of a novel state statute.

—By Rich Assmus, John Nadolenco and Maximillian Del Rey, Mayer Brown LLP

Rich Assmus is a partner in Mayer Brown's Chicago office. John Nadolenco is a partner and Maximillian Del Rey is an associate in the firm's Los Angeles office.

[1] See, e.g., SaleHoo Grp., Ltd. v. ABC Co., 722 F. Supp. 2d 1210 (W.D. Wash. 2010); USA Techs., Inc. v. Doe, 713 F. Supp. 2d 901 (N.D. Cal. 2010); Doe v. Cahill, 884 A.2d 451 (Del. 2005); Dendrite Int'l, Inc. v. Doe, 775 A.2d 756 (N.J Super. Ct. App. Div. 2001).

[2] Doe v. Cahill, 884 A.2d 451 (Del. 2005); Dendrite Int'l, Inc. v. Doe, 775 A.2d 756 (N.J Super. Ct. App. Div. 2001).

[3] See Dendrite, 775 A.2d at 771-72; Cahill, 884 A.2d at 467-68.

[4] Compare SaleHoo Grp., Ltd., 722 F. Supp. 2d at 1218; USA Techs, Inc., 713 F. Supp. 2d at 909; Sinclair v. TubeSockTedD, 596 F. Supp. 2d 128, 133-34 (D.D.C. 2009) (dismissing complaint) with Maxon v. Ottawa Publishing Co., 929 N.E.2d 666, 673 (Ill. App. Ct. 2010) ; Cohen v. Google, Inc., 887 N.Y.S. 2d 424, 427-28 (N.Y. Sup. Ct. 2009) (petition granted).

[5] Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997).
