Washington Supreme Court Rules Sex Trafficking Victims Can Sue Backpage.com

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Sex trafficking is a form of modern slavery.[1] In the U.S. alone, it is estimated that more than 100,000 children are trafficked for sex each year. Most of these children are U.S. citizens.[2]

Like many enterprises, sex trafficking has evolved onto the internet. In large part due to websites like www.backpage.com, online sex trafficking has reached epidemic proportions. Through the use of thinly veiled code words and scant censorship, the escort ads on www.backpage.com offer abundant opportunities to purchase sex, including sex with underage girls and boys (look at the pictures), in every major city in America. Perhaps even more alarming, www.backpage.com, which controls the bulk of the online market, generates an estimated *$30 million* per year selling "advertisement space" in its escort section and has faced zero legal repercussions.

The business is rather straightforward. In this case, Village Voice Media, a distinguished newspaper publisher, created an online marketplace—www.backpage.com—where traffickers could post sex advertisements and solicit customers in the website's "escorts" section. Village Voice Media provided various "posting rules" and "content requirements," but otherwise remained "hands off" in the actual drafting of the ads. The website publisher claims backpage.com is a legitimate online classifieds website, and that the "posting rules" and "content requirements" were part of a system to prevent sex trafficking, but even a cursory review of the website shows that is clearly not the case.

In fact, without having done any discovery, we know Backpage utilizes a number of strategies to encourage and assist sex trafficking, including sex trafficking of minors. For instance, the website accepts prepaid (untraceable) credit cards and does not require a person to provide photo identification before they are advertised on backpage.com's escort section, even though Village Voice Media requires such proof for its offline publications, such as the Seattle Weekly. How can this giant newspaper publisher make millions of dollars per year openly selling flesh online and yet be immune from liability?

Three years ago we started seeking answers to this question. We initiated suit in Pierce County Superior Court on behalf of three young girls against Village Voice Media, its subsidiaries, as well as one of the sex traffickers, a Washington resident, Baruti Hopson. Two of our clients had just finished *seventh* grade when they ran away from home and were found by Hopson and the other traffickers. In exchange for food and shelter, the young girls were forced to have sex with *hundreds* of men. The traffickers utilized backpage.com to sell these girls over and over

[1] Human trafficking is the second largest and fastest growing criminal industry in the world, generating $32 billion per year for the criminal underworld. The U.S. State Department estimates that 27 million persons worldwide are victims of human trafficking, including labor and sex trafficking.

[2] The Justice Department has found that 83% of sex trafficking victims identified by task forces in the United States were U.S. citizens.

again. They traffickers were eventually prosecuted and sent to prison, but the owners of www.backpage.com continued operating its "escort" website with apparent impunity.

In our complaint, we alleged that Village Voice Media created a criminal marketplace for sex, generating over $20 million per year selling "escort" ads on www.backpage.com. We also alleged that Village Voice "developed" these unlawful ads through "posting rules" and "content restrictions" that were, in actuality, intended to instruct sex traffickers how to draft prostitution ads to best avoid detection, including detection by law enforcement. These posting rules and restrictions were removed from the website almost immediately after we filed suit.

Instead of answering the Complaint and responding to our initial discovery requests, Village Voice removed the case to federal court. We spent three months litigating jurisdiction, and eventually prevailed in remanding the case back to state court due to the lack of complete diversity jurisdiction (remember, we sued one of the Washington resident pimps).

Once back in state court, in April 2013, Village Voice Media filed a CR 12(b)(6) motion, claiming it was immune from suit under a federal statute, 42 U.S.C. § 230(c)(1), known as the Communications Decency Act ("CDA"). Village Voice successfully argued similar motions in federal courts around the country, and appeared extremely confident that the CDA would absolve it of liability in this case.

Passed in the mid-1990s, the CDA was passed by Congress to promote the growth of the internet by providing immunity for websites for content that they did not "create" or "develop." Typically, the law immunizes websites from suits arising out of (1) content provided by third parties, which the website did not help create or develop, or (2) good faith efforts taken by the website to edit or remove offensive content.

The language of what is now called the CDA was originally an amendment to the Telecommunications Act of 1996. The bill amended the Communications Act of 1943 and significantly altered American telecommunication law by deregulating the broadcasting market in order to "create competitive markets" in the telecommunication arena.

The CDA originally contained anti-indecency and anti-obscenity provisions, and provided criminal liability for a person who:

> "knowingly (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[3]

[3] Pub. L. No. 104-104; 110 Stat. 56 (1996); Conference Report, Telecommunications Act of 1996, House of Representatives, 104th Congress, 2nd session, H. Rept. 104-458, http://www.gpo.gov/fdsys/pkg/CRPT-104hrpt458/pdf/CRPT-104hrpt458.pdf.

In addition, it added criminal liability for the "transmission of materials" that were "obscene or indecent" to persons that were known to be less than eighteen years of age.[4]

In 1997, the U.S. Supreme Court struck down these criminal provisions in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). The Court concluded that "[a]lthough the Government has an interest in protecting children from potentially harmful materials," the anti-indecency and anti-obscenity provisions of the CDA posed an unacceptable burden on adult speech: "[t]he CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech."

Today, a separate provision is all that that remains of the Communications Decency Act, titled *Protection for private blocking and screening of offensive material*. It reads in pertinent part:

> (c) Protection for "Good Samaritan" blocking and screening of offensive material
> (1) Treatment of publisher or speaker
> No provider or user of an interactive computer services shall be treated as the publisher or speaker of any information provided by another information content provider.
> (2) Civil Liability
> No provider or user of an interactive computer service shall be held liable on account of—
> (A)Any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
> (B)Any action taken to enable or make available to information content providers or others the technical means to restrict access to materials described in paragraph (1).

Taken together, section (c)(1) and (2) provide nearly complete immunity for Internet Service Providers ("ISP") insofar as they publish content provided by others. The first part, (c)(1), clarifies that an ISP is not a publisher or speaker with respect to information posted by others on its site. Thus, it cannot be held liable as an editor of the content of others' specific postings under libel laws or other torts that may be committed by those who post material on the site.[5] The second part, (c)(2)(A) and (B) immunizes ISPs if they exercise editorial action with respect to content posted on their site, when the action is "voluntarily taken in good faith" to restrict access to offensive material.

Some of you may recall, in 2012, the federal court relied on the CDA to preempt and negate Washington State's newly enacted criminal offense—"advertising commercial sexual abuse of a minor"—which was passed, in large part, to prevent online sex trafficking of minors:

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[4] *Id.*

[5] This provision was added in reaction to *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 N.Y. Misc. LEXIS 229, 1995 WL 323710, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. May 24, 1995), which held Prodigy Services liable as a publisher for material published on its site: "Court holds that Epstein acted as Prodigy's agent for the purposes of the acts and omissions alleged in the complaint." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 3445, 3453 (9th Cir. 2008) (en banc).

> A person commits the offense of advertising commercial sexual abuse of a minor if he or she knowingly publishes, disseminates, or displays, or causes directly or indirectly, to be published, disseminated, or displayed, any advertisement for a commercial sex act, which is to take place in the state of Washington and that includes the depiction of a minor.[6]

Backpage.com sought and obtained a Temporary Restraining Order and a Preliminary Injunction against Washington State, in part due to the state law preemption section of the CDA.[7] In granting the Preliminary Injunction against enforcement of Washington's law, the court found that SB 6251 "conflicts with and is therefore preempted by the [CDA] of 1996" under §230 (e)(3). "SB 6251 is inconsistent with Section 230 because it criminalizes the 'knowing' publication, dissemination, or display of specified content. In doing so, it creates an incentive for online service providers not to monitor the content that passes through its channels."[8] The court also found that SB 6251 ran afoul of sections (c)(1) and (c)(2)(A), and that the CDA provided complete immunity for websites like Backpage.[9]

Similar to the manner in which courts have applied the CDA in the criminal context, courts have broadly applied the CDA to protect ISPs from civil liability in claims of defamation and libel,[10] false information,[11] negligence and even most allegations of racial or sexual discrimination.[12] In doing so, courts have created near-blanket immunity for websites, so long as the unlawful content at issue was posted by a third-party user.

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[6] ESSB 6251, 62d Leg. (WA. 2012).

[7] *See Backpage.com v. McKenna*, No. C12-954-RSM (W.D. Wash. June 4, 2012) (granting Plaintiffs' Motions for Preliminary Injunction).

[8] *Id*.

[9] The court also ruled that the Washington act's strict liability for publishing unprotected speech was unconstitutionally vague and overbroad and thereby chilled protected speech in violation of the First Amendment. Rather bizarre, the court also held that Washington SB 6251 was unconstitutional under the Commerce Clause because it supposedly regulated and imposed a heavy burden on commercial conduct that occurs wholly outside the state of Washington, such as a person in another state posting an advertisement offering a commercial sex.

[10] *See, e.g., Carafano v. Metrosplash.com*, 339 F. 3d 119 (9th Cir. 2003), where an internet service provider dating site that posted a false profile was found immune; *Zeran V. AOL*, 129 F.3d 327 (4th Cir.1997), where AOL was found immune even where it was accused of unreasonably delayed in removing defamatory messages, etc.

[11] *See, e.g., Goddard v. Google, Inc.*, C. 08-2738 JF (PTV), 2008 WL 5245490, (N.C. Cal. Dec. 17, 2008), where the internet provider was found to be immune under the CDA against allegations of money laundering and fraud; *Ben Ezra, Weinstein & Co. v. Am. Online*, 206 F.3d 980, 984-985 (10th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000).

[12] *See, e.g., Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F. 39 666 (7th Cir. 2008), where Craigslist was held immune against allegations involving postings of third parties that contained discriminatory statements. *But see, Fair Hous. Council of San Fernando Valley*, LLC, 521 F.3d at 1157, where a California District Court did not find immunity under the CDA when discrimination was charged with respect to profiles created by the user based on a series of questions developed by the internet service provider. "Roommate requires each subscriber to disclose his sex, sexual orientation and whether he would bring children to a household . . . . A website operator can be both a service provider and a content provider . . . . But as to content that it creates itself, or is 'responsible, in whole or in part' for creating or developing, the website is also a content provider. Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content." *Id.* at 1161-63.

Despite the dearth of supportive case law, and the presence of two federal district court opinions granting Backpage's 12(B)(6) motion in similar cases, we felt our case involved facts that would require the court to deny CDA immunity, especially under Washington's liberal notice pleading and high burden of proof at the CR 12(B)(6) phase.

We relied heavily on the Ninth Circuit's landmark CDA decision, *Fair Housing Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157 (9th Cir. 2008), where the Court took a much broader view of what it means to "create" or "develop" content online. In this *en banc* decision, the Court rejected www.roommates.com's reliance on the federal law for immunity because the website had taken various steps to elicit unlawful content from its users through "drop down" menus which contained preferences that violated federal housing laws. For example, someone posting an advertisement for an apartment in San Francisco was required to choose whether the apartment was open to people of a particular race, ethnicity, or sexual orientation. Accordingly, the Ninth Circuit concluded that the owner of roommates.com was a "co-developer" of the unlawful (i.e. discriminatory) content posted by its users.

The Court stressed that if a website is responsible "in whole or in part" for the "creation" or "development" of unlawful content, then it is not entitled to immunity. Importantly, the Court held that "a website helps to 'develop' unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct." It also warned websites that they can be held liable for "encouraging" unlawful content: "If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune."

Citing *Roommates.com*, we argued, that Backpage created a *criminal* marketplace, purposely designed and managed to *encourage*, facilitate, and profit from sex trafficking, not only through *creation* of the website, but also through *development* of the unlawful ads through its phony "posting rules" and "content restrictions." In other words, this was not the case where a legitimate website was acting as a "passive conduit" of information, such as Facebook, Amazon, Yahoo, and the like.[13] Rather, Backpage was actively and purposely involved in ongoing criminal activity, and thus, could not seek shelter under the CDA.

At the trial level, Judge Susan Serko of Pierce County Superior Court agreed, and denied Backpage's CR 12(B)(6) motion. However, given the unique and dispositive federal immunity issue, she certified the case for immediate interlocutory review, which was granted by the Court of Appeals. The Court of Appeals then certified the appeal to the Washington Supreme Court *sua sponte*.

In October 2014, we argued the case before the Washington State Supreme Court in front of a packed house with support from the public and anti-trafficking advocacy group. Recently, on

[13] If you have ever wondered why it can be difficult to get websites to remove content, even when you can show it is clearly defamatory or inappropriate, it is because the CDA provides immunity. However, one exception is where the website "promises" to take down the material, but fails to do so. In that case, the plaintiff may bypass CDA immunity through breach of contract claims and promissory estoppel. *See Barnes v. Yahoo, Inc.*, 570 F.3d 1096 (9th Cir. 2005). Most websites are likely aware of this liability exposure, and therefore may be less inclined to "agree" to take action to remove content.

September 3, 2015, the Court issued its 6-3 opinion upholding Judge Serko's ruling and denying CDA immunity at the CR 12(B)(6) phase. To our knowledge, this is the first such ruling against Backpage nationwide.

Writing for the majority, Justice Steven C. Gonzalez noted that the girls "have been the repeated victims of horrific acts committed in the shadows of the law," and that "[t]hey brought this suit in part to bring light to some of those shadows: to show how children are bought and sold for sexual services online on Backpage.com in advertisements that, they allege, the defendants help develop."

The Court concluded that it was appropriate to allow the case to continue given the girls' allegations that Backpage.com knowingly helped develop an online marketplace for sex trafficking and then helped sex traffickers develop the content of their advertisements. According to the majority opinion, "[t]his case turns on whether Backpage merely hosted the advertisements that featured J.S., in which case Backpage is protected by CDA immunity, or whether Backpage also helped develop the content of those advertisements, in which case Backpage is not protected by CDA immunity."

Now, we await Backpage's next move—likely a petition for writ of certiorari to the United States Supreme Court. Backpage has 90 days to file its petition. We expect the U.S. Supreme Court to make a decision on whether to grant cert within six months from the time the petition is filed—hopefully by June 2016.

While we believe our clients will continue to prevail in the civil courts, and we welcome the U.S. Supreme Court to review our Supreme Court's well-reasoned decision, it is equally important that Congress update 42 U.S.C. § 230 so online businesses like www.backpage.com can no longer try to use it as a shield. We encourage you to write to Congress and urge them to take action. We also urge you to get involved locally. Groups such as Seattle Against Slavery, WARN, Washington Engage, and others are doing tremendous work on the ground to support victims and bring awareness to these "horrific acts committed in the shadows of the law."