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PERSPECTIVE

Immune, or not immune? That is Craigslist's question

By Daniel Rozansky, Cristy Jonelis and Karine Akopchikyan

Internet service providers, such as Twitter, Facebook and Craigslist, are no strangers to lawsuits arising out of third-party content published on their websites. When faced with such lawsuits, ISPs routinely seek to avail themselves of the protections afforded by the Communications Decency Act, which generally immunizes ISPs against liability arising from third-party content. In particular, Section 230 of the CDA 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 information content provider.” 47 U.S.C. Section 230(c) (1). However, two recent bills that amended Section 230 — the Fight Online Sex Trafficking Act and Stop Enabling Sex Traffickers Act (aka “FOSTA-SESTA”) — have forced courts to reanalyze the scope of the CDA’s protections where allegations of sex trafficking are at issue.

By way of background, FOSTA-SESTA was enacted in response to *Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016). In that case, the plaintiffs, three minor victims of sex trafficking, alleged that they were raped over a thousand times as a result of advertisements traffickers placed on Backpage’s classified advertisements webpage. The plaintiffs alleged specific ways in which Backpage’s rules governing advertisements were designed to encourage sex trafficking. According to the plaintiffs, Backpage took concerted efforts to distract others from its role in sex trafficking, including by making false and misleading representations to the National Center for Missing and Exploited Children and law enforcement about its efforts to combat sex trafficking. Nevertheless, the district court ruled, and the 1st U.S. Circuit Court of Appeals affirmed, that Section 230 provided Backpage civil immunity from the plaintiffs’ claims. The 1st Circuit opined that if victims of sex trafficking wished to bring civil suits against ISPs that “tailor [their] website[s] to make sex trafficking easier,” then “the remedy is through legislation” — that is, amending Section 230 — “not through litigation.”

Approximately two years later, Congress passed FOSTA-SESTA, which was intended “to narrow Section 230’s scope and provide prosecutors with new tools to combat the sex trafficking of both

minors and adults.” *Woodhull Freedom Found. v. United States*, 948 F.3d 363, 368 (D.C. Cir. 2020). FOSTA-SESTA amended the CDA by adding Section 230(e) (5), which provides in relevant part that Section 230 shall not be “construed to impair or limit” the ability to assert federal civil actions under Section 1595 of the Trafficking Victims Protection Reauthorization Act or state or federal criminal actions. Stated differently, in light of FOSTA-SESTA, ISPs can no longer invoke Section 230 to immunize themselves against federal civil actions under Section 1595 and state and federal criminal actions.

Nevertheless, in August 2020, in *J. B. v. G6 Hospitality, LLC*, 19-CV- 07848-HSG (N.D. Cal. Aug. 20, 2020), the Northern District of California held that even after the enactment of FOSTA-SESTA, the CDA continues to protect ISPs from liability for state civil claims of sex trafficking. The minor plaintiff in that case filed a civil lawsuit against Craigslist (alongside various owners of motels and others), alleging that she was the victim of child sex trafficking and “advertised for sale” on Craigslist’s “Casual Encounters” webpage. The plaintiff contended that Craigslist should have known that these advertisements involved child sex trafficking because they displayed racy photographs of her — a minor. Based on these allegations, the plaintiff asserted the following state civil claims against Craigslist: participation in sex trafficking venture under the California’s Child Trafficking Victims Protection Act, negligence per se and civil conspiracy. Because the plaintiff’s allegations were based on third-party content published on Craigslist’s website, Craigslist sought immunity under the CDA. Accordingly, Judge Haywood S. Gilliam, Jr. was re-

quired to analyze whether FOSTA-SESTA served to exclude Craigslist’s immunity under the Section 230 for Plaintiff’s state civil claims based on allegations of sex trafficking.

Judge Gilliam ultimately ruled in favor of Craigslist, holding that Craigslist was protected against state civil claims of sex trafficking under the CDA. In reaching its conclusion, the court first determined that Craigslist was generally immune from liability under Section 230 because (i) Craigslist was an ISP; (ii) the plaintiff sought to treat Craigslist as a “publisher or speaker,” as she alleged that Craigslist “advertised” her and benefited from the advertisements; and (iii) the advertisements soliciting sex by the plaintiff were posted by someone other than Craigslist — that is, by the plaintiff herself.

The court next analyzed whether the plaintiff’s state civil claims of sex trafficking crimes fell within the ambit of FOSTA-SESTA’s amendment to the CDA. In analyzing the issue, the court noted that the plain language of Section 230(e)(5) did not exempt civil state claims. Instead, Section 230(e)(5) expressly exempts federal civil actions under Section 1595 and state and federal criminal actions from immunity.

The court rejected the plaintiff’s attempt to rely on the legislative history and purpose behind FOSTA-SESTA. Specifically, the plaintiff argued that the House Committee Report (discussing an earlier version of the CDA) stated that the amendment to Section 230 sought to “clarify” that the CDA does not prohibit claims of “Federal and State criminal and civil law.” The court found that such commentary failed to indicate that “Congress was concerned specifically with permitting civil claims under state

law” and instead, the report actually “focuse[d] on criminal accountability at the state level.”

Accordingly, the court granted Craigslist’s motion to dismiss the plaintiff’s civil state law claims alleging sex trafficking without leave to amend. Notably, the plaintiff also alleged a Section 1595 claim against Craigslist which indisputably was not subject to the protection of Section 230 as a result of the plain language of FOSTA-SESTA. Nevertheless, the court granted Craigslist’s motion to dismiss the plaintiff’s Section 1595 based on insufficient factual allegations, though the plaintiff was granted leave to amend.

To be clear, *G6 Hospitality* is not the first time Craigslist has been sued for sex-trafficking related claims. Rather, Craigslist has been subject to “numerous child-solicitation” cases stemming from its “Casual Encounters” webpage. *Stoltz v. Commonwealth*, 297 Va. 529, 530, cert. denied sub nom. *Stoltz v. Virginia*, 140 S. Ct. 653 (2019). It thus comes as no surprise that shortly after FOSTA-SESTA was passed, Craigslist took down its “Casual Encounters” and similar webpages. See *Green v. Commonwealth*, 2017-CA-000663-MR (Ky. Ct. App. Oct. 5, 2018); see also Samantha Cole, “Craigslist Just Nuked Its Personal Ads Section Because of a Sex-Trafficking Bill,” Vice Media (March 23, 2018). Nevertheless, because FOSTA-SESTA applies retroactively, Craigslist and other classified advertisement websites can expect to see additional lawsuits. Though the plaintiff may appeal this decision to the 9th Circuit, ISPs in the meantime will likely rely on the court’s holding in *G6 Hospitality* — that is, that the CDA immunizes ISPs against state civil claims of sex trafficking — in hopes of remaining under the umbrella of the CDA’s protection. ■

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