

Solidifying Immunity For Interactive Computer Service Providers Under the Communications Decency Act



By Eric Sinrod,

StubHub and eBay have just scored a victory in an Oregon class action, furthering immunity for interactive computer service providers under the Communications Decency Act.

In the case *Sharon Fehrs v. Stubhub, Inc., and eBay, Inc.*, the plaintiff alleged that she wanted to attend a performance by Bruce Springsteen and his E-Street Band at the Rose Garden Arena in Portland, Oregon on March 28, 2008. Notwithstanding repeated efforts, the plaintiff was unable to procure tickets through the official ticket outlet, according to her complaint.

Her complaint alleges, however, that Stubhub, a subsidiary of eBay, "offered for sale on its Web site" tickets to this performance, and that the tickets offered were at prices greatly exceeding the price at which the tickets had been offered on the official site. The plaintiff alleged that many others were similarly situated - they could not purchase tickets through the official site, and were faced with the prospect of buying tickets greatly in excess of official prices.

The plaintiff contended that the "sale" of tickets by StubHub and eBay violated a Portland City Code that prohibits the sale of tickets for events at municipally-owned facilities such as the Rose Garden Arena at a price greater than the retail ticket price.

StubHub and eBay moved to dismiss the plaintiff's complaint on various grounds. One of the arguments was that StubHub and eBay are immune from liability under the safe harbor provision of Section 230 of the Communications Decency Act.

Section 230 provides: "No provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider." In essence, the argument was that Congress, pursuant to Section 230, specifically intended to immunize website operators such as StubHub and eBay, from claims seeking to hold them responsible for the actions of third-parties who use their websites (ticket sellers in this case).

StubHub and eBay noted that Section 230 expressly preempts any inconsistent state or local law that could make a website responsible for the actions of third-parties on their website. Thus, even if the Portland City Code potentially otherwise could make StubHub and eBay responsible for the wrongful ticket sales of others (which is not clear), Section 230 nevertheless would preempt and prevent the enforcement of such a local law as against StubHub and eBay.

StubHub described itself in the case as a ticket marketplace, where third-parties can buy and sell tickets. eBay described itself as an online marketplace where sellers can list items for sale and buyers can purchase items, such as tickets.

StubHub and eBay expressed that they do not "own" or "sell" the tickets listed. Instead, they simply provide the underlying technology forming the online venues where third-parties list for sale, search for, buy and sell tickets. It is in this context that Section 230 immunity comes into play, StubHub and eBay argued, as to the activities of others in selling tickets above official prices on their websites.

StubHub and eBay took pains to point out that Congress enacted Section 230 to "encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce." Indeed, they specifically noted that Congress stated in the "Findings" portion of Section 230 that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."

They also highlighted that the stated of policy of Congress underlying Section 230 was "to promote the continued development of the Internet and other interactive computer services and other interactive media," and "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."

On this record, the court did not have difficulty accepting the persuasive arguments of StubHub and eBay. The court specifically granted the particular motion to dismiss, finding that "plaintiff's claims are barred by the federal Communications Decency Act . . . , which immunizes the defendants from liability claims against providers of an interactive computer service as publishers or speakers of information provided by another information content provider."

This is just one in a line of cases in which eBay has blazed the trail of immunity for interactive computer service providers under the CDA. And the beat goes on.

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