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## Fourth Circuit Affirms CDA Immunity For Consumer Review Website

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**In December, citing the Communications Decency Act, 47 U.S.C. § 230 (the "CDA"), the Fourth Circuit upheld dismissal of defamation and related claims against a consumer review website featuring consumer posts regarding an automobile dealership. *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, Case No. 08-2097 (4th Cir., December 29, 2009).**

*Nemet Chevrolet* applies the heightened Rule 8 pleading standard recently articulated by the U.S. Supreme Court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), to reject allegations that ConsumerAffairs.com was responsible for the website posts. In addition, *Nemet Chevrolet* highlights that where a website operator does not encourage illegal content and confines its editorial activities to those of a traditional website operator, courts are more likely to accord it immunity from suit under the CDA.

### Background

Nemet Chevrolet, an automobile dealership and its owner ("Nemet"), filed a lawsuit against ConsumerAffairs.com, Inc. ("ConsumerAffairs.com"). Nemet sought to hold ConsumerAffairs.com liable for defamation and related claims based upon consumer reviews regarding Nemet posted on ConsumerAffairs.com's website.

ConsumerAffairs.com moved, under Fed. R. Civ. P. 12(b)(6), to dismiss the suit as barred by the CDA, which precludes liability for "interactive computer service providers," such as websites and other online services, based upon online information created by others. The CDA provides that its protections are unavailable to defendants shown to be "information content providers," which CDA

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Section 230(f)(3) defines as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or another other interactive computer service.” The district court dismissed the complaint based upon the CDA, and Nemet appealed.

#### **Fourth Circuit’s Analysis of Plaintiff’s Allegations**

On appeal, Nemet asserted that two sets of its allegations showed that ConsumerAffairs.com was an “information content provider.” Nemet first argued that ConsumerAffairs.com lost the CDA’s immunity by:

soliciting the [consumer] complaint, steering the complaint into a specific category designed to attract attention by class action lawyers, contacting the consumer to ask questions about the complaint and to help her draft or revise her complaint, and promising the consumer that she could obtain some financial recovery by joining a class action lawsuit.

Based upon the foregoing language (the “Development Paragraph”), Nemet argued that it had pled facts sufficient to show that ConsumerAffairs.com was responsible for creation or development of the defamatory information due to (i) the “structure and design” of ConsumerAffairs.com’s website, and (ii) ConsumerAffairs.com’s participation in preparation of the alleged consumer complaints.

To support its “structure and design” arguments, Nemet cited the Ninth Circuit’s decision in *Fair Housing Council v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc), which found the CDA’s protections to be unavailable to a rental housing website because the website encouraged users to submit racial preferences and used such preferences in violation of the Fair Housing Act. In essence, Nemet argued that ConsumerAffairs.com, similar to the website defendant in *Roommates.com*, could not take shelter behind the CDA because it created or developed the content of the defamatory posts through its website structure or design.

The Fourth Circuit found *Roommates.com* readily distinguishable. In contrast to the website structure and design in *Roommates.com*, which encouraged users to input illegal housing preferences, Nemet’s Development Paragraph merely stated that ConsumerAffairs.com had designed its website to gather information related to class action lawsuits – an entirely lawful

activity. Therefore, the fact that ConsumerAffairs.com's website "solicit[ed] the . . . complaint" and "steer[ed] the complaint into a specific category designed to attract attention by class action lawyers" did not cause the website to lose the CDA's protections.

Nemet also argued that the Development Paragraph pled sufficient facts to overcome the CDA because it alleged that ConsumerAffairs.com contacted "the consumer to ask questions about the complaint and to help her draft or revise her complaint." The Fourth Circuit noted that Nemet's allegation was devoid of information as to how a website operator who contacts a potential user with questions develops or creates the content. Further, also absent from the allegation was any information as to what ConsumerAffairs.com had actually revised in the posts. Given this lack of supporting facts, the court considered these allegations "threadbare and conclusory" and therefore insufficient to state a claim under the Supreme Court's 2009 *Iqbal* pleading standard.

Critically, in finding the Development Paragraph insufficient to overcome the CDA's immunities, the Fourth Circuit relied upon its decision in *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), in which the court had found that Congress's enactment of Section 230's immunity protected traditional website editorial and self-regulatory functions. Because the Development Paragraph contained no allegation that purported revisions were *more* than a traditional website function, the court found that Nemet had omitted an element necessary to show that ConsumerAffairs.com had lost the CDA's protections.

In addition to its reliance on the Development Paragraph, Nemet argued that the CDA's immunity was not available to ConsumerAffairs.com because Nemet alleged that 8 of 20 posts were fabricated by ConsumerAffairs.com. Termed the "Fabrication Paragraph" by the court, Nemet essentially alleged that ConsumerAffairs.com must have fabricated eight of the defamatory posts because Nemet was unable to confirm the underlying author, which Nemet claimed it had been able to do with the remaining posts at issue.

The Fourth Circuit skeptically noted that the Fabrication Paragraph was based solely on Nemet's *own* records. For the court, several circumstances other than ConsumerAffairs.com's fabrication could explain why Nemet was unable to identify the author of the posts.

The court also was not persuaded that fabrication made any more sense based upon Nemet's assertions of its high-quality reputation, ConsumerAffairs.com's need to attract Internet visitors, and purported discrepancies in the posts. Given these logical flaws, the court found that the Fabrication Paragraph had been inserted merely to satisfy the CDA's definition of an "information content provider." Accordingly, the Fourth Circuit, citing the heightened pleading standard in *Iqbal*, found that the fabrication allegations did not show that ConsumerAffairs.com was an information content provider, stating that Rule 8 requires " 'more than conclusions' to 'unlock the doors of discovery for a plaintiff.' "

### **Conclusion**

The decision in *Nemet Chevrolet* provides two important lessons for businesses and others considering whether claims for defamatory website content can survive a motion to dismiss. First, if a plaintiff's allegations do not include facts showing changes to allegedly defamatory content beyond traditional website editorial changes, *Nemet Chevrolet* emphasizes that a complaint must allege that the structure or design of a website requires or encourages illegal content. Second, the more stringent *Iqbal* pleading standard is highly relevant to any allegations of creation or development of website content; i.e., conclusory allegations that closely track the definition of an information content provider under the CDA, without providing supporting facts, are less likely to survive a motion to dismiss under a post-*Iqbal* standard.

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