

## ADDITIONAL DEVELOPMENTS—CYBERLAW

### *BARRETT V. ROSENTHAL*

*9 Cal. Rptr. 3d 142 (Ct. App.), cert. granted,*

*12 Cal. Rptr. 3d 48 (2004)*

A California court of appeals ruled that an individual may not claim immunity from civil liability for reposting a third party's defamatory message on a newsgroup under the Communications Decency Act's service provider exception, found at 47 U.S.C. § 230.

Plaintiffs Barrett and Polevoy are physicians primarily engaged in combating the promotion and use of "alternative" healthcare practices. In their writings, they attack products, services, and theories that are marketed with claims that are false, unsubstantiated, and/or illegal. Defendant Rosenthal directs the Humantics Foundation for Women and participates in two alternative medicine newsgroups. During a two-year period, the defendant allegedly posted 10,900 messages to newsgroups, among which one or both of the plaintiffs allegedly were mentioned in more than two hundred. The plaintiffs claim these messages were intended to injure their reputations. Among the messages at issue was a reposting of a statement made by a third party, Bolen, alleging that Polevoy had engaged in criminal activity—specifically, stalking women.

Appellants commenced civil action for damages against Rosenthal and others, claiming libel, liber per se, and conspiracy. The trial court found Rosenthal immune from liability for the reposting of Bolen's message under the Communications Decency Act (CDA) §230, interpreting the statute as protecting her from liability even if the republished charge that the doctor had engaged in criminal conduct was false and defamatory.

The court of appeals reversed. The appellate court ruled that the CDA was not intended to abrogate common law liability for knowingly redistributing false statements on the Internet. Therefore, the CDA safe harbor provision does not confer immunity upon a distributor who both (1) publishes on the Internet alleged defamatory content that originates from a third party; and (2) has knowledge of the alleged defamatory nature of the content. The court remanded the issue of the defendants' liability for the posting about Polevoy under California's anti-SLAPP statute (CAL. CIV. PROC. CODE § 425.16) absent the immunity shield.

The California Supreme Court has granted certiorari, requesting special briefing on two questions: (1) the meaning of the term "user" under 47 U.S.C. § 230; and (2) whether it matters, for purposes of the issue presented in the case, whether a user engaged in passive or active conduct.

(This case may not be cited.)