Litigation Alert:

Seventh Circuit Provides an Assist to Internet Content Providers in *Pippen v. NBCUniversal*

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On August 21, 2013, the Seventh Circuit in *Pippen v. NBCUniversal Media, LLC, et al.* (Case No. 12-3294) affirmed the Northern District of Illinois' dismissal of Scottie Pippen's defamation lawsuit against a number of media and Internet companies, including NBC Universal Media LLC, CBS Interactive Inc., Mint Software Inc.[1], Evolve Media Corporation, and Investing Answers Inc. Chief Judge Easterbrook's opinion, written on behalf of a panel that also included Circuit Judges Posner and Williams, reaffirmed the actual malice standard for public figures such as Scottie Pippen.

More important to providers of Internet content, the Seventh Circuit ruled that allegedly defamatory statements published on the Internet are subject to the single-publication rule. Judge Easterbrook's decision means that Internet publishers are subject to the same standard as the traditional media, and can be held liable for only the first publication of a given statement. It also means that refusing to take down content after notice will not be considered a new publication or separate tort.

Background

Former NBA basketball player Scottie Pippen, of Chicago Bulls fame, filed this lawsuit in the Northern District of Illinois alleging defamation and other related claims. Pippen's claims arose from a number of media reports published on the Internet that claimed or suggested that Pippen had filed for bankruptcy when he had not. The district court dismissed Pippen's defamation claim on two independent grounds. *See Pippen v. NBCUniversal*, Case No.: 11-cv-8834 (Aug. 2, 2012). First, the Court found that Pippen failed to adequately plead a claim for defamation because statements regarding bankruptcy do not fall into one of the *per se* categories of defamation recognized by Illinois and because Pippen failed to plead special damages sufficient to support a defamation *per quod* claim. Second, because Pippen is a public figure, he must allege that the defendants acted with actual malice but failed to do so.

The district court dismissed the case with prejudice after reviewing a proposed second amended complaint and finding that Pippen failed to correct the fatal deficiencies in his claims. Pippen appealed.

Defamation *Per Se* and Defamation *Per Quod*

In affirming dismissal of Pippen's defamation claim, the Court reviewed whether Pippen pleaded a claim for either defamation *per se* or defamation *per quod*. Defamation *per se* is a species of defamation that imputes liability for statements that are so damaging to the subject's reputation that they are actionable without proof of injury.

The Seventh Circuit reviewed the five categories of defamation *per se* recognized in Illinois and found that statements regarding bankruptcy neither "suggest that the subject can't perform his job because of lack of ability or want of integrity" nor do they "prejudice the subject in the pursuit of his trade or profession" — the only two categories that arguably applied to Pippen. Chief Judge Easterbrook distinguished Pippen's case from one in which a company willfully defaulted on a credit agreement, noting that a reader might reasonably thing twice about doing business with a company that shirks its contractual obligations, but that "[a] similar taint does not attach to the reputation of people who go bankrupt." Indeed the Court acknowledged that there are many innocent reasons that lead to financial distress. Finally, the Court found that reports of personal bankruptcy would not impugn Pippen's job performance because Pippen's post-retirement employability is derived from his prior stardom and basketball knowledge, not his financial prudence of investment savvy.

Actual Malice and the Single-Publication Rule

As a well settled matter of law, public figures, like Pippen, must show that defendants published the defamatory statements with actual malice. Meaning that the defendants "either knew the statements to

[1]The authors of this Litigation Alert represented Mint Software Inc. throughout this litigation.

be false or were recklessly indifferent to whether they are true or false." The Seventh Circuit found that Pippen's allegations that the media defendants failed to investigate the truth of their claims was insufficient as a matter of law to establish a reckless disregard for the truth.

The Seventh Circuit took the opportunity to explore a novel theory raised by Pippen regarding liability for Internet publications. Pippen argued that online publishing is inherently different from its "old-media counterparts" because there are fewer logistical hurdles involved in correcting false statements. Whereas a print publisher would need to hunt down every physical copy of the publication, Internet publishers can alter their sites with relative ease. Therefore, it was Pippen's position that every day that an unaltered defamatory statement remains online after a publisher learns of its falsity constitutes an actionable re-publication — suggesting actual malice on the part of the publisher.

Under existing Supreme Court precedent, actual malice cannot be inferred from a publisher's failure to retract a statement once it learns it to be false. Further, Illinois has also adopted the Uniform Single Publication Act, 740 ILCS 165/1, which codifies the single-publication rule and provides that a claim for relief for defamation is complete at the time of first publication; later circulation of the original publication does not trigger claims. This law provides protection from repeated litigation arising from a single, but mass produced, defamatory publication. To prevail on his theory, Pippen argued that the single-publication rule does not apply to statements made on the Internet.

Because Illinois courts had not yet addressed the question of whether the single-publication rule applies to Internet publications, the Seventh Circuit undertook a review of related decisions in other jurisdictions in an effort to predict how Illinois' highest court would answer the question. The Seventh Circuit expressed concern that excluding the Internet from the single-publication rule "would eviscerate the statute of limitations and expose online publishers to potentially limitless liability." Given the Internet's greater reach, the Court cited an "even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants." Although the Seventh Circuit acknowledged that there may be circumstances under which content on the Internet is republished, passively maintaining a website is not enough. Therefore, the court held that publications on the Internet are generally subject to the single-publication rule.

Takeaways

The Seventh Circuit's opinion in *Pippen* is a significant win for any individual or company that publishes online content. Although this case primarily addresses the application of Illinois law, the widespread adoption of the single-publication rule and the Seventh Circuit's expansive review of authority from other jurisdictions suggest that this case will carry significant weight throughout the United States.

This case reinforces that the law provides Internet content providers with the same protections as their old-media colleagues and predecessors with respect to defamation. Although Internet content providers can still be liable for their defamatory statements, that liability is limited to the initial publication. Perhaps more importantly, this ruling provides predictability for Internet content providers by clarifying that the passive maintenance of a website does not trigger fresh claims. This means that false statements posted to the Internet will be subject to a clear and definite statute of limitations period triggered by the initial publication. Given the short statute of limitation period for defamation actions in many states (*e.g.*, California's one year period under Cal. Code. Civ. Proc. § 340(c)), Internet content providers need not be concerned with potential liability unexpectedly arising from old publications.

Moreover, this case demonstrates that when dealing with a public figure, First Amendment protections are alive and well. Public figures seeking to challenge inaccuracies in online reporting must still meet the constitutional actual malice standard and show that the publisher knew the statements to be false at the time of publication or was recklessly indifferent to whether they were true or false.

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