

Appellate Court in D.C. Protects Anonymous Speech

Digital Media and Data Privacy Law Blog

on 08.19.2009

Posted in Defamation

The District of Columbia Court of Appeals, the highest court for cases arising in the District of Columbia, continued the recent trend of requiring defamation plaintiffs to meet an elevated legal standard when they serve a subpoena seeking the identity of an anonymous speaker. Like Maryland's highest court, the District of Columbia appellate court held that a plaintiff must proffer sufficient evidence to survive summary judgment before a motion to compel will be granted.

The D.C. case, *Solers, Inc. v. John Doe*, was brought by Solers, a software company, alleging that Doe had defamed the company and tortiously interfered with prospective business opportunities by submitting an anonymous complaint against Solers to a software industry group. In the anonymous complaint submitted to the Software & Information Industry Association, Doe alleged that Solers was using pirated software. SIIA investigated the charge but ultimately took no legal action against the company.

Solers filed suit against Doe and served a subpoena on the SIIA seeking his identity. SIIA moved to quash the subpoena, and a D.C. superior court ultimately quashed the subpoena, holding that the complaint would not survive a motion to dismiss and therefore Doe's rights outweighed those of the company.

The Court of Appeals, like the Maryland Court of Appeals, engaged in an exhaustive review of the various standards that have been applied to defamation plaintiffs seeking the identity of an anonymous commenter. As we have reported throughout the year, the clear trend is to protect anonymous speakers unless the plaintiff meets some elevated standard.

The D.C. court adopted the test outlined in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), with some slight revisions. The D.C. court held that a court faced with a subpoena seeking the identity of an anonymous speaker must:

- (1) ensure that the plaintiff has adequately pleaded the elements of the defamation claim, (2) require reasonable efforts to notify the anonymous defendant that the complaint has been filed and the subpoena has been served, (3) delay further action for a reasonable time to allow the defendant an opportunity to file a motion to quash, (4) require the plaintiff to proffer evidence creating a genuine issue of material fact on each element of the claim that is *within its control*, and

(5) determine that the information sought is important to enable the plaintiff to proceed with his lawsuit.

The court was careful to emphasize the "within its control" language in the fourth element, pointing out that the plaintiff should not be required to satisfy elements of the claim "dependent upon knowing the identity of the anonymous speaker." In contrast to the Maryland Court of Appeals, however, the D.C. court did not require any First Amendment balancing test as a final step to the analysis, judging that to be unnecessary in light of the first five steps.

Applying this test, the court remanded the case to allow Solers an opportunity to present additional evidence supporting its claim of defamation.