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Corporations' Liability Shield Under the CDA


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In *Word of God Fellowship v. Vimeo*, No. 15460, 2022 WL 839409 (1st Dep't March 22, 2022), the First Department dismissed claims of breach of contract and unjust enrichment, holding that an Internet service provider's good faith decision to remove content that it considers objectionable is immune from liability under §230(c)(1) of the Communications Decency Act. As the First Department noted, "[i]f service providers had to justify those decisions in court, or if plaintiffs could circumvent immunity through unsupported accusations of bad faith, section 230 would be a dead letter. This is as true for commercial users as for any other plaintiff." Id.

Plaintiff Daystar Television Network, self-described as "an evangelical Christian-based television network," alleged that defendant Vimeo, a video hosting, sharing and services platform, improperly removed from its platform five videos streamed by Daystar and hosted on Vimeo's platform. Among the thousands of videos that Daystar uploaded to defendant's platform were five videos claiming a causal link between vaccines and childhood autism. On July 17, 2020, Vimeo wrote to Daystar that these videos violated Vimeo's Acceptable Use Policy which prohibits "any content" that "makes false or misleading claims about vaccination safety," and asked Daystar to remove those videos. When Daystar did not remove the videos, Vimeo did so itself. Daystar then commenced the action, asserting claims of breach of contract and unjust enrichment and seeking rescission and damages.

As the First Department noted, "[i]f service providers had to justify those decisions in court, or if plaintiffs could circumvent immunity through unsupported accusations of bad faith, section 230 would be a dead letter. This is as true for commercial users as for any other plaintiff."

The Supreme Court, New York County, granted Vimeo's motion to dismiss, holding that Vimeo's decision to remove the five vaccine-related videos based on its posted "Content Restrictions" was cloaked with immunity under §230 of the Communications Decency Act. See *Word of God Fellowship v. Vimeo*, No. 653735/2020, 2021 WL 483954, at *2 (Sup. Ct. N.Y. Cnty. Feb. 5, 2021). The court explained that §230(c)(2) of the Communications Decency Act immunizes providers like Vimeo in cases such as this one, stating that: "No provider … of an interactive computer service shall be held liable on account of … any action

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voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." Id. at *1. The court held that even if Vimeo were not protected by the federal immunity statute, Daystar had failed to state a claim for breach of contract because "Vimeo acted in good faith when it determined, consistent with the generally accepted view, that it was misleading to suggest that vaccines cause autism, and Vimeo's decision to remove the five videos was in accordance with its Terms of Service." Id. at *2.

The First Department affirmed the dismissal of the complaint, reasoning that "if service providers had to justify [their decisions to remove content that they consider objectionable] in court, or if plaintiffs could circumvent immunity through unsupported accusations of bad faith, section 230 would be a dead letter." *Word of God Fellowship*, 2022 WL 839409. The First Department rejected plaintiff's argument that the contents of the videos could not be classified as "otherwise objectionable," because they did not make "false or misleading" claims and that Vimeo acted in bad faith because it did not consult a medical professional prior to removing them. See id. The court explained that the Communications Decency Act provides absolute discretion to the provider and "whether content is objectionable is a subjective determination that is reserved to the service provider." Id. The court also highlighted that good faith does not require that the material be reviewed by an expert, noting that "such a requirement would increase the costs of removing content and would significantly interfere with a service provider's decisions as a publisher." Id. "Both consequences would be fundamentally at odds with the purpose of section 230(c)(2) [which was] enacted 'to keep government interference in the medium to a minimum' and 'to encourage service providers to self-regulate the dissemination of offensive material over their services.'" Id. (internal citations omitted).

The First Department's holding is consistent with "[b]oth state and federal courts around the country … [that] have interpreted Section 230 immunity broadly, so as to effectuate Congress's policy choice … not to deter harmful online speech through the … route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." *Shiamili v. Real Est. Grp. of New York*, 17 N.Y.3d 281, 288 (2011). The crux of the statute seems to be that it "does not require that the material actually be objectionable; rather, it affords protection for blocking material 'that the provider or user considers to be' objectionable." *Domen v. Vimeo*, 433 F. Supp. 3d 592, 603-04 (S.D.N.Y. 2020), aff'd on other grounds, 2021 WL 4352312 (2d Cir. Sept. 24, 2021).

At a first glance, the First Department's ruling, and the similar decisions mentioned above, seem fairly straightforward under the statute's language, and perhaps even evoke a feeling of relief and sense of fairness stemming from the idea that Internet service providers are empowered by Congress to halt misinformation. However, a closer look at the entirety of §230(c) may chill that comforting feeling. As discussed, §230(c)(2) allows platforms to police their sites for harmful content without however imposing a requirement that they remove anything, and it protects them from liability if they choose not to. At the same time, §230(c)(1), protects platforms from legal liability relating to harmful content posted on their sites by third parties. And the First Department's decision

emphasizes that whether content is "objectionable" is determined subjectively. The desired effects of the two sections seem to be in conflict. Congress enacted §230(c)(2) in 1995, in order to encourage Internet service providers to police their content, while §230(c)(1) ensures that the provider is protected from liability if it does not. This tension is starting to find its way into decisions that nonetheless feel constrained by the statutory text.

For example, the supreme court of Texas, in a June 2021 decision, held that Facebook is not shielded by §230(c)(1) for sex-trafficking recruitment that occurs on its platform. See *In re Facebook*, 625 S.W.3d 80 (Tex. 2021), cert. denied sub nom. *Doe v. Facebook*, 142 S. Ct. 1087 (2022). After a lengthy discussion on the purpose and reach of §230, the court concluded: "We do not understand Section 230 to 'create a lawless no-man's-land on the Internet." Id. at 83. "Holding Internet platforms accountable for the words or actions of their users is one thing, and the federal precedent uniformly dictates that Section 230 does not allow it. Holding Internet platforms accountable for their own misdeeds is quite another thing. This is particularly the case for human trafficking." Id. Therefore, the court concluded that the human trafficking claims under §98.002 of the Civil Practice and Remedies Code may proceed and Facebook could not be protected from liability under §230(c)(1). However, the court dismissed plaintiffs' claims for negligence, negligent undertaking, gross negligence, and products liability holding that they could not survive the broad shield of immunity that §230 affords providers. Nonetheless, there is a glimpse of the court's uneasiness with that result in its conclusory observations:

> "[S]ection 230 is no model of clarity, and there is ample room for disagreement about its scope. Despite the statutory text's indeterminacy, the uniform view of federal courts interpreting this federal statute requires dismissal of claims alleging that interactive websites like Facebook should do more to protect their users from the malicious or objectionable activity of other users … . The United States Supreme Court—or better yet, Congress—may soon resolve the burgeoning debate about whether the federal courts have thus far correctly interpreted section 230 to bar such claims … . We are not interpreting section 230 on a clean slate, and we will not put the Texas court system at odds with the overwhelming federal precedent supporting dismissal of the plaintiffs' common-law claims."
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> Id. at 84.

Thus, it appears that courts are starting to notice the inherent conflict of §230(c)'s two provisions and at least some have expressed unease with the results of a mighty Internet service provider holding both the carrot and the stick, especially considering the significant and increasing amount of influence that such platforms exert. Whether the Supreme Court, or Congress, will be pushed to action by the courts' observations and the public's undeniable concern over this issue remains to be seen.