SECTION 230 IMMUNITY PROTECTS YELP FROM INJUNCTION ORDER TO REMOVE DEFAMATORY POSTS

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U.S. Social Media Law Alert

In a long-awaited decision, the California Supreme Court ruled this week that Yelp cannot be forced to remove a review posted on its website. *Hassell v. Bird*, 2018 WL 3213933 (Cal. Sup. Ct. July 2, 2018). [1] Both the superior court and Court of Appeal had ordered Yelp — a nonparty — to remove reviews that were determined by the court to be defamatory. The plurality decision, penned by Chief Justice Cantil-Sakauye, reversed, holding that Yelp was protected against this sort of "removal order" by the Communications Decency Act of 1996 (47 U.S.C. § 230 ("Section 230")).

This decision is critical to all websites — media sites, review sites — and all online platforms, like social media platforms. In fact, the decision affects all websites and platforms that display user-generated content ("UGC") (information provided by third-party users). Section 230 provides immunity from liability for providers and users of an "interactive computer service" who publish UGC.

The Supreme Court's decision in *Hassell v. Bird* upholds the integrity of Section 230 and allows operators of websites, other internet players, and their lawyers to breathe a sigh of relief:

> The Court of Appeal erred in regarding the order to Yelp as beyond the scope of section 230. That court reasoned that the judicial command to purge the challenged reviews does not impose liability on Yelp. But as explained below, the Court of Appeal adopted too narrow a construction of section 230. **In directing Yelp to remove the challenged reviews from its website, the removal order improperly treats Yelp as "the publisher or speaker of . . . information provided by another information content provider." (§ 230(c)(1).) The order therefore must be revised to comply with section 230.** [2]

The decision recognizes that an injunction such as the removal order in this case improperly interferes with Yelp's editorial functions and its discretion, which are protected by Section 230. [3] While it is unclear what the long-term effects of this ruling will be because of how the justices voted (3 plurality; 1 concurring; 3 dissent), the decision is being touted as a big win for Yelp and for Section 230 itself.

Because internet websites or platforms such as Yelp may still voluntarily comply with takedown requests, this decision does not mean that the removal of defamatory information from a website is impossible. However, we should expect that any lawsuit involving a request for a removal order against a nonparty interactive computer service will be met with fierce resistance and perhaps a litany of amicus briefing. Victims of internet defamation

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may still request removal from the websites or platforms — who may comply voluntarily. And victims may also seek removal by the individual creating the defamatory content at issue. Section 230 does not in any way restrict injunctions against posting defamatory content, which are directed at the author, not the website.

What this ruling stands for is the proposition that Section 230 protects editorial decisions made by an interactive computer service such as Yelp.

A full grasp of the importance of this decision requires an understanding of the facts and nuances of this case, and an understanding of Section 230.

FACTS AND PROCEDURE

The case arises from a client who came to be unhappy with her attorney and posted several unfavorable reviews of that attorney on Yelp. [4] Ava Bird ("Bird") hired Dawn Hassell ("Hassell") to represent her in a personal injury matter six years ago, in the summer of 2012. By September of that same year, following what is described as some communication difficulties and the conclusion that Bird was displeased with the firm's client service, Hassell withdrew from the representation.

In January 2013, a one-star review appeared on Yelp, which stated, among other things:

> STEER CLEAR OF THIS LAW FIRM! and research around to find a law firm with a proven track record of success, a good work ethic, competence and long term client satisfaction. there are many in the bay area and with some diligent smart interviewing, you can find a competent attorney, but this wont be one of them. [5]

Hassell believed Bird to be the author of this review and wrote a letter requesting that Bird revise or remove the review, which Hassell contended was defamatory. Hassell threatened to file a legal action against Bird if she did not comply with this demand. Bird did not, and in February 2013, a second one-star review appeared online, which Hassell also believed to be authored by Bird.

In April 2013, Hassell and her law firm filed a lawsuit against Bird in San Francisco Superior Court seeking damages and "injunctive relief prohibiting Defendant Ava Bird from continuing to defame plaintiffs as complained of herein, and requiring Defendant Ava Bird to remove each and every defamatory review published by her about plaintiffs, from Yelp.com and from anywhere else they appear on the internet." [6] Yelp was not named as a defendant in the lawsuit.

Shortly after the lawsuit was filed, the January 2013 review was updated to include the following:

> dawn hassell has filed a lawsuit against me over this review i posted on yelp! she has tried to threaten, bully, intimidate, harrass me into removing the review! [7]

Bird never appeared to defend herself in the case. After an evidentiary hearing, in January 2014, the court entered a default judgment in favor of plaintiffs for damages and costs, and also ordering Bird to remove the

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defamatory reviews from Yelp and from wherever else they may reside online, and enjoining Bird from publishing any such reviews online. The order also stated: "Yelp.com is ordered to remove all reviews posted by AVA BIRD … and any subsequent comments of these reviewers within 7 days of the date of the court's order." [8] Yelp was served with a copy of the order.

Yelp immediately raised some perceived deficiencies with the judgment and removal order with the Court and stated its position that it would not remove the subject reviews. Thereafter, Yelp's in-house counsel filed a motion to set aside and vacate the judgment. Yelp argued that the order violated the company's due process rights and was barred by Section 230, and exceeded the scope of relief requested in the underlying complaint.

The superior court denied Yelp's motion; Yelp appealed that denial, citing the due process violation and Section 230 immunity. [9] The Court of Appeal rejected both arguments, first finding that no due process violation existed in allowing the injunction to run against Yelp, and second finding that Section 230 did not prohibit a directive that Yelp remove the challenged reviews. The Court of Appeal affirmed the superior court's order that denied Yelp's motion to set aside and vacate the judgment, instructing the superior court to modify the order so as to compel Yelp only to remove the three reviews at issue. [10] Yelp filed an appeal of that decision, renewing its constitutional and statutory arguments.

SECTION 230

Section 230 is part of the Communications Decency Act of 1996, which was enacted as Title V of the Telecommunications Act of 1996 (Pub.L. No. 104-104, 110 Stat. 56). Congress enacted Section 230 to achieve two goals. First, Congress wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce. [11] Second, Congress sought to "encourage interactive computer services and users of such services to self-police the Internet for obscenity and other offensive material." [12] The "plain language" of Section 230 "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." [13]

Courts addressing Section 230 have recognized that Congress intended the immunity to be construed broadly. [14] To qualify for Section 230 immunity, "three elements must be met:

1. The defendant must be a provider or user of an "interactive computer service";
2. "the asserted claims must treat the defendant as a publisher or speaker of information"; and
3. "the challenged communication must be information provided by another information content provider." [15]

"Once CDA immunity applies, providers are immune from 'any' claim arising out of content originating from a third party, regardless of the theory underlying the cause of action." [16]

The plurality noted plaintiffs' apparent attempt to circumvent Section 230, noting that "Yelp could have promptly sought and received section 230 immunity had plaintiffs originally named it as a defendant in this case" and that immunity "would have shielded Yelp from the injunctive relief that plaintiffs seek." [17] In its analysis, the Supreme Court isolated the relevant inquiry as follows:

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> The question here is whether a different result should obtain because plaintiffs made the tactical decision not to name Yelp as a defendant. Put another way, we must decide whether plaintiffs' litigation strategy allows them to accomplish indirectly what Congress has clearly forbidden them to achieve directly. We believe the answer is no.

The decision recognizes that plaintiffs' action treated Yelp as "the publisher or speaker of … information provided by another information content provider." [18] In ruling against plaintiffs, the Court clarifies not only that "Yelp is entitled to immunity under the statute" but that "Plaintiffs' attempted end-run around section 230 fails." [19]

The Court's analysis also includes a discussion about the potential burdens on and disruptions to internet websites and platforms:

> An injunction like the removal order plaintiffs obtained can impose substantial burdens on an internet intermediary. Even if it would be mechanically simple to implement such an order, compliance still could interfere with and undermine the viability of an online platform.

Recognizing the consequences that could result if Yelp was denied Section 230 immunity, the Supreme Court concluded that in light of Congress's designs concerning Section 230 and in particular the statutory language, "Yelp is inherently being treated as the publisher of the challenged reviews, and it has not engaged in conduct that would take it outside section 230's purview in connection with the removal order." [20] This is an undeniable Section 230 victory.

IMPORTANT TAKEAWAYS

- Although neither plaintiffs nor Bird can force Yelp to remove the challenged reviews, Bird is compelled, by court order, to take reasonable efforts to secure the removal of her posts. So it remains yet to be seen whether those remedies will ultimately prove to be effective.
- Aiding and abetting has been tossed around as a potential workaround to Section 230 for quite some time. This decision contains some of the most significant language addressing aiding and abetting liability as it relates to Section 230. First, the plurality clarifies that:

> the Court of Appeal did not rely on an aiding and abetting theory to justify the extension of the injunction to Yelp. We expressly reject the argument offered by Justice Cuéllar in his dissent, that the circumstances stressed by the trial court … might somehow serve to deprive Yelp of immunity. **Most of these facts involve what are clearly publication decisions by Yelp.** [21]

In his concurring opinion, Justice Kruger writes:

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> To the extent the question might arise in the future, however, I offer a cautionary note. The difficulties with the trial court's aiding and abetting analysis extend beyond matters of timing and procedure. **The trial court in this case reasoned, among other things, that Yelp is aiding and abetting Bird's violation of the injunction simply by failing to remove Bird's reviews from the website. But this establishes only that Yelp has not stepped forward to act despite Bird's noncompliance. That is not aiding and abetting.** (*See Blockowicz*, supra, 630 F.3d at p. 568 [concluding that Internet service provider's refusal to comply with an injunction was "mere inactivity" that was "simply inadequate to render them aiders and abettors in violating the injunction"]; *see also Conrad, supra*, 55 Cal.App.4th at p. 903 [before a nonparty can be punished for violating the terms of an injunction, it must be shown that the nonparty has acted "with or for those who are restrained"; "some actual relationship with an enjoined party is required" and "[m]ere 'mutuality of purpose' is not enough"].) Put differently: **The mere fact that Yelp has not removed Bird's reviews from its website is not reason enough to avoid litigating the question whether Yelp does, in fact, have a legal obligation to remove the reviews from its website, in a forum in which Yelp has a meaningful opportunity to be heard.** [22]

The plurality opinion is clear that aiding and abetting claims are preempted by Section 230. And the concurring opinion seems to follow that logic as well.

- Because there is no resolution of the constitutional due process issues, the question still remains as to whether an injunction can bind a nonparty with a "removal order." On this point, we wait and see.

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[1] Opinion available online at: http://www.courts.ca.gov/opinions/documents/S235968.PDF.

[2] Opinion, 2 (emphasis added).

[3] The California Supreme Court determined that Section 230 applied and thus did not need to address the constitutional issues raised by Yelp: "Because the statutory argument is dispositive, there is no need to address the due process question." Opinion, 12.

[4] Founded in 2004, Yelp is a website (yelp.com) and an app that publishes crowd-sourced reviews about local businesses. As of Q1 2018, "Yelpers" posted more than 155 million reviews online. https://www.yelp.com/about (retrieved Jul. 3, 2018).

[5] https://www.yelp.com/biz/hassell-law-group-san-francisco-2 (spacing and formatting in original).

[6] Opinion, 4.

[7] In her briefing, Bird acknowledged writing the January 2013 review but denied writing the February 2013 review. Opinion, 7 n. 5 (spacing and formatting in original).

[8] Opinion, 6.

[9] *Hassell v. Bird* (2015) 247 Cal.App.4th 1336, 1341, 1355, 1361.

[10] *Hassell v. Bird* (2015) 247 Cal.App.4th 1336, 1365-1366.

[11] *See* 47 U.S.C. § 230 (b)(1-2).

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[12] *Backpage.com, LLC v. Hoffman*, No. 13-cv-03952, 2013 WL 4502097, *6 (D.N.J. Aug. 20, 2013).

[13] *Saponaro v. Grindr, LLC*, 93 F. Supp. 3d 319, 324 (D.N.J. 2015) (quoting *Zeran v. Am. Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997)), *cert. denied*, 524 U.S. 937 (1998); *see also, Green v. Am. Online, Inc.*, 318 F.3d 465, 470-71 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000).

[14] *Saponaro*, 93 F. Supp. 3d at 325; *see also, Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735 (RMB), 2009 WL 1704355, at *3 (S.D.N.Y. June 15, 2009) ("Courts across the country have repeatedly held that the CDA's grant of immunity should be construed broadly"); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123-24 (9th Cir. 2003) ("reviewing courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition of 'interactive computer service' and a relatively restrictive definition of 'information content provider'"); *Ben Ezra*, 206 F.3d at 985 n.3 (10th Cir. 2000).

[15] *Obado v. Magedson*, Civil No. 13-2382 (JAP), 2014 WL 3778261, at *3 (D.N.J. Jul. 31.2014) (quoting *Dimeo v. Max*, 433 F. Supp. 2d 523, 529 (E.D. Pa. 2006), *aff'd*, 248 F. Appx 280 (3d Cir. 2007)).

[16] *Id.* at *4; *see also Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101-02 (9th Cir. 2009) ("[W]hat matters is not the name of the cause of action—defamation versus negligence versus intentional infliction of emotional distress—what matters is whether the cause of action inherently requires the court to treat the defendant as the `publisher or speaker' of content provided by another.").

[17] Opinion, 21-22.

[18] *Id.* at 22.

[19] *Id.* at 29.

[20] *Id.* at 25.

[21] *Id.* at 26 n.14 (emphasis added).

[22] Concurring Opinion, 12-13 (emphasis added).

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