

PAPER TITLE: Social Media Litigation –Novel Theories of Products Liability

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Social Media Litigation –Novel Theories of Products Liability

I. Introduction

The plaintiffs' Bar remains in pursuit to upend years of protection from legal liability conferred to social media companies by Congress with Section 230 of the Communications Decency Act. The case of *Lemmon v. Snap* provided plaintiffs with their first real success. *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021). In that case, plaintiffs' counsel raised a novel products liability argument – the speed filter on Snapchat was a “product”, and Snap should be subject to common law products liability law. The Ninth Circuit agreed. From there, we have seen an explosion of social media addiction and radicalization litigation based in part on novel theories of product liability.

This surge in social media litigation follows the rise in products liability litigation nationwide. In Swiss Re's Research of Nuclear Verdicts, as further supported by the U.S. Chamber of Commerce, Institute for Legal Reform – products liability litigation has seen a 30% increase in the past 5 years. This paper explores how these novel theories of products liability and negligence seek to create a duty where none existed prior, and serve as lessons learned for the broader torts context. This paper will also explore certain coverage issues presented by social media plaintiffs' allegations.

II. What is Section 230?

In 1996, when the internet was young and prior to the development of social media companies, Congress passed Section 230. The purpose of the statute was to “promote the continued development of the Internet and other interactive computer services and other interactive media.” 47 U.S.C. 230(b)(1).

According to Section 230, “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

“Interactive computer service” means “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”

“Information content provider” means “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”

III. How Section 230 Applies to Modern Day Social Media

a. Barnes v. Yahoo:

In 2009, the Ninth Circuit decided *Barnes v. Yahoo*, which created a three prong test to determine if a social media provider enjoys section 230 immunity. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), as amended (Sept. 28, 2009). The test is: the company is a provider or user of an interactive computer service; that a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker; of information of another content provider.

b. Post- Barnes

Prior to 2021, under the *Barnes* analysis, social media companies enjoyed broad immunity as courts routinely found that such companies merely act as publishers of third-party content and are immune from liability pursuant to Section 230. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), as amended (Sept. 28, 2009).

Cases such as *Dyroff v. Ultimate Software Group, Inc.* held that the operator of the social media platform was immune from liability under Section 230 because its functions were content-neutral tools used to facilitate communication. *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093 (9th Cir. 2019). In *Dyroff*, a user had purchased heroin from a third-party through the site and died of an overdose. *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093 (9th Cir. 2019).

c. Lemon

In 2021, *Lemmon* distinguished for the first time the immunity protection under Section 230 and product/design defect type liability for products social media companies were creating. *Lemmon*, 995 F.3d 1085. The *Lemmon* suit was brought by the parents of three deceased young men against Snap after the men lost control of their vehicle while driving 100+ mph to record a high speed on Snapchat's Speed Filter Application. *Id.* at 1088-90. The court ruled that the Speed Filter Application was defectively designed. *Id.* at 1092-1093. In doing so, it did not treat Snap as a "publisher or speaker". *Id.* at 1091-1092. The court further determined that Snap did not simply rely on "information provided by another information content provider". *Id.* at 1093. Therefore, the *Lemmon* court determined that Section 230 did not provide immunity to Snap for the claims involving the Speed Filter Application. *Id.* at 1094.

d. Post- Lemon

Courts have held that there is no duty on the part of a platform provider to its users, and no liability for a third-party's wrongdoing merely for knowing/allowing wrongdoers to use the platform's services and failing to stop the use. For liability to arise, the harm alleged must arise out of a design defect or a platform's own conduct, rather than the mere publication of third-party content. Cases include *L.W. through Doe v. Snap Inc.*, 675 F. Supp. 3d 1087 (S.D. Cal. 2023), *Does 1-6 v. Reddit, Inc.*, 51 F.4th 1137 (9th Cir. 2022), cert. denied sub nom. *Does v. Reddit, Inc.*, 143 S. Ct. 2560, 216 L. Ed. 2d 1180 (2023), *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 143 S. Ct. 1206, 215 L. Ed. 2d 444 (2023), *G.G. v. Salesforce.com, Inc.*, 76 F.4th 544 (7th Cir. 2023).

IV. Social Media Addiction Claims

In the MDL and JCCP, (minor users of social media platforms or parents of those users) have filed suit against Facebook, Instagram, and Snapchat, among others, alleging that the users became addicted to these social media platforms due to their interactive manipulative features, which sought to maximize the amount of time people spent on these sites. As a result of their addiction, the users claim to have suffered depression and anxiety, engaged in self-harm, became suicidal, and developed eating disorders.

Both the MDL and JCCP courts have cited to the *Lemon* case in denying the motions to dismiss filed by virtually all of the social media defendants and largely denied by both judges. As addressed in the next section, the courts zeroed in on the language used in *Lemmon* in stating that “our case law has never suggested that internet companies enjoy absolute immunity from all claims related to their content-neutral tools.” “To the contrary, “[Section 230] was not meant to create a lawless no-man’s land on the internet.” Social media companies face liability, “even for their ‘neutral tools,’ so long as plaintiffs’ claims do not blame them for the content that third parties generate with those tools.” But separating the concepts of protected speech from actionable product liability has proven difficult for the social media addiction courts and others grappling with this issue across the country. Courts have also struggled to determine whether and to the extent a legal duty is owed by social media companies to end users.

V. Products Liability Perspective

JCCP

On October 13, 2023, the JCCP Court dismissed most of Plaintiffs’ claims, including, notably, Plaintiffs’ product liability-based causes of action:

- The Court found that Plaintiffs adequately pled a cause of action for: (1) negligence against all Defendants that is not barred by Section 230 or the First Amendment; and (2) fraudulent concealment against Defendant Meta.
- The Court made clear that “the fact that Plaintiffs have adequately alleged that their harms were caused by the design features of Defendants’ platforms is critical” and informed its decision.

The Court acknowledge that “some allegations of the Master Complaint can be read to state that Plaintiffs’ harms are caused by the actual content found on Defendants’ platforms, rather than just the design features of those platforms”—an important distinction regarding application of Section 230 and the First Amendment

MDL

On November 14, 2023, the MDL Court granted in part and denied in part Defendants’ Motion to Dismiss:

- The Court held that the **negligent and strict liability design defect allegations** that did not involve Defendants publishing or monitoring third-party content were not barred by Section 230. Examples of such allegations include not providing options to users to self-restrict time used on a platform; making it challenging for users to delete their account; not using robust age verification; offering appearance-altering filters; etc.
- The Court held that the allegations that directly target Defendants’ roles as publishers of third-party content were barred by Section 230. Examples of such allegations include failing to put “not providing a beginning and end to a user’s “Feed”; publishing geolocating information for minors; recommending minor accounts to adult strangers; timing and clustering of notifications of third-party content in a way that promotes addiction; use of algorithms to promote addictive engagement; etc.
- The Court denied the Motion as to the **negligent and strict liability failure to warn claims**. The Court held that Defendants’ duty arise not from their publication of conduct, but from their knowledge of the ways that their product harm children.

The Court also overruled the Motion to Dismiss as to Plaintiffs’ **negligence per se claims**, allowing those to go forward.

VI. Allegations of Addictive Design in Tech Products

Plaintiffs allege that major tech and gaming companies, including ByteDance, Snap, Meta, and EA Sports, have intentionally designed their platforms and games to be addictive, with a particular focus on exploiting the vulnerabilities of children and adolescents. In these cases, Plaintiffs argue that the companies purposefully incorporate features intended to capture and hold the attention of younger users, resulting in excessive engagement that harms their mental and emotional well-being.

At the core of these allegations is the claim that the platforms use *intermittent variable rewards* (IVR), a psychological principle rooted in B.F. Skinner’s 1950’s research on operant conditioning. Skinner’s experiments demonstrated that unpredictable rewards—such as giving rats food at irregular intervals when they pressed a lever—induce stronger behavioral reinforcement than predictable rewards. The plaintiffs argue that tech companies have applied this principle to digital design, engineering platforms like TikTok and Instagram to continuously deliver unpredictable dopamine-triggering content. As a result, users, particularly minors, compulsively engage with these platforms, seeking the next unpredictable reward. (*A.A. et. al. v. ByteDance Inc. et al.*, (2024) No. 2:24-CV-06784 (C. D. Cal)(“A.A.”), SAC at ¶¶77-79).

For example, in *Foster v. Take-Two Interactive*, plaintiffs claim that video game developers use IVR and other manipulative design features to create addictive gameplay experiences. *Foster v. Take-Two Interactive Software, Inc., et al.*, (2024) No. 1:24-CV-00919 (N. D. of Ohio)(“*Foster*”). The complaint highlights microtransactions and “near misses”—situations where players feel they almost won—as methods used to prolong playtime and encourage spending. By unpredictably

spacing out dopamine-triggering rewards with dopamine gaps, the IVR structure creates stronger associations (conditioned changes in the neural pathway) than fixed rewards. Plaintiffs argue that these games are designed to create dependency, exploiting minors' lack of impulse control and underdeveloped cognitive abilities to keep them engaged longer, often at great financial and psychological cost (Foster Complaint at ¶¶1-7).

Similarly, the *Patterson v. Meta Platforms* case focuses on social media companies' intentional design of addictive features to increase user engagement. *Patterson v. Meta Platforms, Inc.*, (2024) N.Y. Slip Op. 77204 (N.Y. App. Div.) (“*Patterson*”). The Plaintiffs allege that platforms like Facebook and Instagram are engineered to keep users, particularly teens, constantly returning for more content. The complaint claims that Meta and others intentionally designed their platforms without natural stopping points (such as Instagram's “infinite scroll”) and used algorithmic recommendations to ensure that users would remain engaged for as long as possible, often leading to compulsive behavior. This addiction, the complaint argues, results in both mental health issues and exposure to harmful content (Patterson Complaint, ¶¶3-7).

The *Patterson* case also introduces a new dimension to these allegations, arguing that social media platforms are not only addictive but also dangerous because they encourage “radicalization” by exposing young users to harmful extremist content. In this instance, the lawsuit claims that Meta, Discord, and others fostered an environment that radicalized Payton Gendron, who was influenced by racist, extremist content delivered by the platforms' algorithms causing and/or contributing to his actions in targeting African Americans at a Buffalo supermarket and shooting them while filming his crime. The Plaintiffs assert that the companies' focus on maximizing engagement led to the promotion of dangerous ideologies, resulting in real-world harm like the TOPS shooting. (Patterson Complaint, ¶¶10-11).

VII. The Science Behind Addictive Design

According to plaintiffs, tech companies use IVR to create a cycle of engagement by rewarding users unpredictably with dopamine-triggering content. The unpredictable nature of these rewards—whether in the form of social validation (likes and comments) or personalized content—leads users, especially minors, to receive and crave dopamine. The complaints argue that these dopamine-driven responses make children and adolescents particularly vulnerable, as their brains are still developing, and they lack the impulse control necessary to moderate their use of these platforms, resulting in compulsive and addictive behavior (A.A., at SAC at ¶¶77-80).

Likewise, in addition to the dopamine release, the infinite scroll and variable reward pattern increase the addictive quality as they may induce a flow-like state for users that is characterized by a high degree of focus and productivity at the task at hand. Once immersed in the flow-like state, users may experience a distorted sense of time in which they do not realize how much time has passed.

The American psychiatric association recognizes videogame addiction under the DSM-5. The APA suggests the effects or symptoms of internet gaming disorder (IGD) may be similar to those of other proposed psychological addictions and may also be considered as an impulse control disorder similar to compulsive gambling. The APA has developed nine criteria for characterizing

internet gaming disorder: (1) preoccupation with internet games; (2) withdrawal symptoms when internet gaming is taken away; (3) tolerance, resulting in the need to spend increasing amounts of time engaged in internet games; (4) unsuccessful attempts to control participation in internet games; (5) loss of interests in previous hobbies and entertainment as a result of, and with the exception of, internet games; (6) continued excessive use of internet games and despite knowledge of psychosocial problems; (7) deceiving family members, therapists, or others regarding the amount of internet gaming; (8) use of internet games to escape or relieve negative moods; and (9) jeopardizing or losing a significant relationship, job, or education or career opportunity because of participating in internet games. IDG is also recognized by the World Health Organization.

Additional design features such as the “infinite scroll”, which prevents users from finding natural stopping points, compounds the addictive behavior by encouraging endless consumption of content. Similarly, video games contain features like microtransactions and reward-based systems designed to create a “flow-like” state in which users lose track of time, reinforcing their dependence on the product (Foster Complaint at 10-12).

VIII. Legal Landscape of Addictive Design

The overarching legal theory in these cases is that tech companies have intentionally designed their products to be addictive, causing substantial harm to young users. Plaintiffs claim that the companies knew or should have known that their products would lead to excessive use and addiction, particularly among minors who are especially susceptible to these manipulative design tactics.

The lawsuits allege that by prioritizing engagement and profit over user well-being, these companies have contributed to a growing mental health crisis among children and adolescents. For example, the *Foster* and *A.A.* complaints focus on how video game and social media companies knowingly designed systems that encourage addictive behaviors through IVR and other psychological manipulation techniques. Meanwhile, the *Patterson* case expands this argument, highlighting the harmful consequences of addiction in the form of exposure to extremist content and its role in real-world violence.

These lawsuits reflect an increased public concern about the harmful effects of addictive design in the tech industry, with plaintiffs seeking to hold companies accountable for the detrimental impact their products have on minors. Whether through algorithmic recommendations, endless content feeds, or manipulative game mechanics, tech companies face increasing scrutiny for using behavioral science to create dependency among their users, particularly young people, and will likely face continued litigation, scrutiny, and monetary exposure.

IX. Coverage Issues

***a.* Coverage A**

Coverage A of a Commercial General Liability policy typically affords coverage only for those sums an insured becomes legally obligated to pay as damages because of bodily injury or property damage that is caused by an occurrence, that occurs during the policy period, that was not known

to have occurred by any insured or any employee of an insured prior to the policy period, and that is not otherwise excluded. Occurrence is most often defined as “an accident, including continuous and repeated exposure to substantially the same general harmful conditions.”

Most, if not all, of the allegations against the social media defendants in the addiction litigation allege intentional conduct. For example, the addiction plaintiffs allege that defendants intentionally developed their social media platforms to cause users to become addicted, thereby increasing use and advertising revenue. Plaintiffs also allege that the platforms contain algorithms designed to increase user engagement. In particular, plaintiffs allege the design of its platform is inherently dangerous because it encourages and permits minors to share harmful and explicit images with adults. It is alleged that the social media defendants were aware of this harm but refused to change these features. Plaintiffs also assert counts of negligence and strict products liability against the social media defendants.

In *McKesson*, the Ninth Circuit addressed similar allegations of intentional conduct made in litigation involving opioid distributors and explained that “[t]he mere fact that such intentional conduct gives rise to causes of action for negligence does not transform those allegations into allegations of merely accidental conduct.” *AIU Ins. Co. v. McKesson Corp.*, No. 22-16158, 2024 WL 302182 at *5 (9th Cir. Jan. 26, 2024) (internal quotations omitted). In particular, the Ninth Circuit clarified that the phrase “should have known” was only included “for its legal effect, not as a factual contention that McKesson may not have actually known that it was engaging in certain conduct.” *Id.* The Ninth Circuit made clear that “[h]aving concluded that the Exemplar Suits allege strictly deliberate conduct, the only remaining question is whether they also allege ‘some additional, unexpected, independent, and unforeseen happening’ that may have caused the alleged damage. We conclude that they do not.” *Id.*

To the extent there are any allegations made in the addiction or radicalization cases that would constitute an occurrence, the question will become if whether such allegations would constitute multiple occurrences under the law pursuant to which the policy is interpreted. For instance, California courts generally apply the “cause” test, pursuant to which the number of occurrences is determined by examining the cause or causes of the damage. *See e.g., State Farm Fire & Cas. Co. v. Elizabeth N.*, (1992) 9 Cal.App.4th 1232, 1236; *citing Hyer v. Inter-Insurance Exchange, etc.*, (1926) 77 Cal.App. 343, 350 (“Where, as here, one negligent act or omission is the sole proximate cause, or *causa causans*, there is, as a general rule, but one accident, even though there be several resultant injuries or losses.”).

Moreover, if coverage is initially triggered under a CGL policy, certain exclusions will clearly need to be analyzed including: (1) the Expected or Intended Injury Exclusion, which removes coverage, in relevant part, for “bodily injury” or “property damage” expected or intended from the standpoint of the insured; and (2) the Personal and Advertising Injury Exclusion, which precludes coverage for “bodily injury” arising out of “personal and advertising injury.”

a. Coverage B

In addition to Coverage A, Commercial General Liability policies usually contain a part B that provides coverage only for those sums the insured becomes legally obligated to pay as damages because of “personal and advertising injury” to which the insurance applies that is caused by an offense arising out of the named insured’s business, but only if the offense was committed in the coverage territory during the policy period. While often amended, the definition of “personal and advertising injury” typically includes the following:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- e. Oral or written publication of material that violates a person's right of privacy;
- f. The use of another’s advertising idea in your “advertisement”; or
- g. Infringing upon another's copyright, trade dress or slogan in your “advertisement”.

None of the allegations/causes of action alleged in the complaints filed by the social media addiction plaintiffs thus far allege an offense falling within the definition of “personal and advertising injury”.

Should plaintiffs further amend their complaints to initially allege a “personal and advertising injury”, there are several exclusions typically found in Coverage B that would likely limit coverage, in whole or in part: (1) a Knowing Violation of Rights of Another (or similar) Exclusion, which bars coverage for “personal and advertising injury” caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict “personal and advertising injury”; and (2) an Insureds in Media and Internet Type Business (or similar) Exclusion, which removes coverage for “personal and advertising injury” committed by an insured whose business is: (a) advertising, broadcasting, publishing or telecasting; (b) designing or determining content of websites for others; or (c) an internet search, access, content or service provider.

X. Conclusion

While still in its infancy, the litigation involving social media has already taught us much about the breadth and contours of products liability claims. It remains to be seen whether plaintiffs’ science is sufficiently reliable to support their claims and whether courts and juries will accept these claims and award damages under these theories. Social media companies will also have to overcome several obstacles to prove coverage should they be liable for plaintiffs’ claims.