SYMPOSIUM: FEATURED ARTICLES

A PRODUCT BY ANY OTHER NAME? THE EVOLVING TREND OF PRODUCT LIABILITY EXPOSURE FOR TECHNOLOGY PLATFORMS

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I. INTRODUCTION

Consumer applications – "apps" – are big business. In 2022 alone, gross consumer mobile app spending amounted to $167 billion.[1] Barely ten years since the iPhone[2] App Store and Google Play store first launched, 255 billion apps were downloaded to consumers' connected devices by the end of 2022—an increase of more than 80 percent from 2016.[3] These trends show no sign of slowing down. With this increased reliance has come, arguably, another evolution, a growing trend among lawyers and some courts to view apps not as merely a connection between consumers and service providers but as "products" themselves. Can an app or the algorithm it uses be considered a "product" for the purposes of civil liability exposure due to alleged defects in how it is designed, developed, or marketed?

As this article explores, what was once an easily resolved issue for courts has become a much thornier one. Consequently, technology platforms, app developers, and the lawyers who represent them must now consider the very real prospect of product liability litigation and legal responsibility for the indirect, and purportedly direct, injuries caused by apps and the algorithms they incorporate. This article will begin with a background discussion of the fundamental principles of product liability

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[1] L. Ceci, *Worldwide Consumer Spending on Mobile Apps from 2016 to 2022*, STATISTA (Aug. 29, 2023), https://www.statista.com/statistics/870642/global-mobile-app-spend-consumer/.

[2] While iPhone, Google, Match.com, Grindr, Snap, Snapchat, Omegle.com, X (formerly known as Twitter), TikTok, Netflix, Pokémon, Facebook, and others are trademarked, this article omits the ™ symbol from the text for readability.

[3] L. Ceci, *Number of Mobile App Downloads Worldwide from 2016 to 2022*, STATISTA (Sept. 5, 2023), https://www.statista.com/statistics/271644/worldwide-free-and-paid-mobile-app-store-downloads/.

claims in tort law, as well as the advent of the Communications Decency Act ("CDA" or the "Act") and the immunity provided by Section 230 of the Act. The article will go on to examine early, unsuccessful attempts to assert a product liability theory against apps, particularly in failed lawsuits against dating apps like Match.com and Grindr. Yet, as this article will continue on to demonstrate, courts gradually warmed to the concept of an app as a product capable of being subject to liability for defects in design or warning in cases like *Lemmon v. Snap, Inc.*, *Maynard v. Snap, Inc.*, and *A.M. v. Omegle.com*. The article's final section goes further, examining the most recent cases construing whether an app is truly a "product" or whether efforts at suing the platform responsible for it warrant invoking Section 230's immunity for "publishers" and "speakers."

Product liability theory has long been praised for its role as the "stick" that encourages needed product safety innovations that benefit consumers and society at large, but is the application of product liability principles worth eroding the protection that Section 230's immunity provides against restrictions on the free flow of online speech? The United States Supreme Court, in *Twitter, Inc. v. Taamneh* and *Gonzales v. Google LLC*, recently rejected attempts to hold social media platforms responsible for "aiding and abetting" terrorist acts by third parties. However, courts continue to confront legal efforts, under the rubric of product liability theory, to hold these platforms responsible for a panoply of societal ills ranging from cyberbullying and online child sexual predation, to mental health issues and teen suicide. Consequently, it is vital to consider whether something like a Snapchat filter or TikTok algorithm constitutes a "product," or whether litigation against such platforms seeks to punish them for the content and actions of third-party users.

A. A Brief Refresher on Product Liability Law

Product liability has been defined as a common-law doctrine that seeks to protect consumers from injuries resulting from poorly designed or poorly manufactured products.[4] The origins of product liability can be traced to the nineteenth century, when the new technology of the Industrial Revolution, which disrupted traditional relationships between manufacturer and consumer, created "an accident crisis like none the world had ever seen and like none any Western nation has witnessed since."[5] As the "ever-increasing capacity of institutions to harm in mass quantities was becoming evident," courts acknowledged that laws should

[4] *Products Liability*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[5] John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690, 694–96 (2001).

hold the manufacturers of dangerous products accountable when those manufacturers failed to provide basic protection for consumers.[6]

In 1916, the New York Court of Appeals first held that manufacturers could be held liable for placing a dangerous instrumentality into the stream of commerce when the damage caused by that instrumentality was foreseeable.[7] When a product liability claim is brought in strict liability, Justice Benjamin Cardozo wrote that a plaintiff need only show that the seller is "engaged in the business of selling such a product, and . . . [the product] is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."[8] Incidentally, Justice Cardozo acknowledged that courts would have to adapt their reasoning to the innovations in technology, writing that "[p]recedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day."[9]

Although *MacPherson* inspired state courts around the country to reject the doctrine of privity of contract as a shield to manufacturer's liability, no other jurisdiction adopted the doctrine of strict product liability until Justice Roger Traynor's 1944 concurrence in *Escola v. Coca Cola Bottling Co.*[10] In upholding an award for a waitress injured when a defective Coca Cola bottle shattered in her hand, Justice Traynor wrote that "it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."[11] Justice Traynor reasoned:

> [P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared for its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business . . . Against such risk there should be general and constant protection and the manufacturer is best situated to afford such protection.[12]

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[6] Kira M. Geary, *Section 230 of the Communications Decency Act, Product Liability, and a Proposal for Preventing Dating-App Harassment*, 125 PA. STATE L. REV. 501, 513 (2021).

[7] MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).

[8] *See id.*; RESTATEMENT (SECOND) OF TORTS § 402A(1) (AM. L. INST. 1965).

[9] *MacPherson*, 111 N.E. at 1053.

[10] *See generally id.*; 150 P.2d 436, 440–44 (Cal. 1944) (Traynor, J., concurring).

[11] *Escola*, 150 P.2d at 437, 440.

[12] *Id.* at 440–41.

Traynor's later works, including product liability opinions like *Greenman v. Yuba Power Products, Inc.*[13] and his collaboration with Professor Prosser on the *Restatement (Second) of Torts*, continued to refine the underlying rationales of product liability and influence courts around the country.[14] These rationales included deterrence, incentivizing the party best able to control product accidents (the manufacturer) to take steps to minimize their occurrence, and reliance rationale, that consumers will rely on the assurances of manufacturers.[15]

Modern product liability has three bases on which liability may be imposed: design defect, manufacturing defect, and failure to warn.[16] A product is defective in design when the manufacturer's design itself is unreasonably dangerous.[17] As the *Restatement (Third) of Torts* characterizes it, a design is defective when:

> The foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution and the omission of the alternative design renders the product not reasonably safe.[18]

A manufacturing defect, on the other hand, results from an error in the fabrication process, where the product that caused the injury was not produced in accordance with the manufacturer's intended design.[19] The Restatement defines this as when "the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product."[20] And even if a product is neither defective in design nor from manufacturing, a manufacturer may still be strictly liable under the failure to warn theory. According to the *Restatement*, a failure to warn claim arises "because of inadequate instructions or warning when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller . . . and the omission of the instructions or warnings renders the product not reasonably safe."[21]

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[13] 377 P.2d 897 (Cal. 1963).

[14] Reed Dickerson, *Was Prosser's Folly Also Traynor's? Or Should the Judge's Monument be Moved to a Firmer Site?*, 2 HOFSTRA L. REV. 469, 470 (1974).

[15] *Escola*, 150 P.2d at 441–43; Keith N. Hylton, *The Law and Economics of Products Liability*, 88 NOTRE DAME L. REV. 2457, 2463–65 (2013).

[16] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (AM. L. INST. 1998).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* § 2(a).

[21] *Id.* § 2(c).

As this article will discuss, claims of manufacturing defects against app developers or online platforms are virtually nonexistent, while claims by plaintiffs for injuries resulting from a defect in the app's software, or by a developer's or platform's failure to warn, predominate. For example, the design defect complained of might be the failure to include, implement, or monitor age verification measures, such as in a "meet up" or anonymous chat app, rendering minor users vulnerable to online child predators. A warning defect might be a platform's failure to caution users about the risks of such predators. As we shall see, speech by a third party on an online platform, by itself, would not be enough under most circumstances to give rise to a civil liability, due to the provisions of the CDA.[22] To better understand Section 230, the immunity it provides, and the importance of ongoing efforts to limit its scope, so as to allow product liability suits against app developers and online platforms, let us take a brief overview of the Act.

B. The Communications Decency Act

The CDA was enacted in 1996—a time when only 7% of Americans enjoyed access to the internet, Google did not exist, Netscape was the dominant search engine, and Facebook's launch was still 8 years off.[23] Congress ostensibly enacted the CDA "to promote the continued development of the Internet and other interactive computer services" and "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[24] However, as at least one court observed, "[t]he text and legislative history of [Section 230(c)(1)] shout to the rafters Congress' focus on reducing children's access to adult material."[25] In fairness, the CDA was also motivated to override the decision of a New York court in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, in which an internet

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[22] 47 U.S.C. § 230.

[23] Farhad Manjoo, *Jurassic Web: The Internet of 1996 Is Almost Unrecognizable Compared with What We Have Today*, SLATE (Feb. 24, 2009, 5:33 PM), https://slate.com/technology/2009/02/the-unrecognizable-internet-of-1996.html; Sara L. Zeigler, *Communications Decency Act and Section 230 (1996)*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV., https://firstamendment.mtsu.edu/article/communications-decency-act-and-section-230-1996/ (May 23, 2023); *News Attracts Most Internet Users: Online Use*, PEW RSCH. CTR. (Dec. 16, 1996), https://www.pewresearch.org/politics/1996/12/16/online-use/; Mythili Devarakonda, *'The Social Network': When Was Facebook Created? How Long Did It Take to Create Facebook?*, USA TODAY (July 25, 2022), https://www.usatoday.com/story/tech/2022/07/25/when-was-facebook-created/10040883002/.

[24] 47 U.S.C. § 230(b)(1)–(2).

[25] Force v. Facebook, Inc., 934 F.3d 53, 88 (2d Cir. 2019) (Katzman, C.J., dissenting in part) (citing legislative history).

service provider was held liable for a third party's libelous statements posted on its computer bulletin boards.[26]

Under Section 230, plaintiffs may hold liable the person who creates or develops unlawful content, but not the interactive computer service provider that merely *enables* such content to be posted online.[27] Certainly, Section 230 is a reflection of Congress' belief that, without excessive restrictions, the internet would usher in a new era of economic progress. Indeed, historians have characterized the emergence of the internet over the past three decades as analogous to the Industrial Revolution in terms of its political, social, cultural, and economic impact.[28]

A number of legal scholars have become vocal critics of the immunity from civil liability that Section 230 provides to online platforms. Professors Danielle Keats Citron and Benjamin Wittes, for example, have lamented that "courts have built a mighty fortress protecting platforms from accountability for unlawful activity on their systems."[29] Others have defended it.[30] Yet despite critics' protestations that courts have been too quick and accepting of applying Section 230 immunity, giving platforms "a free pass to ignore destructive activities,"[31] the reality is less imbalanced. According to a review of all Section 230-related court opinions published between July 1, 2015 and June 30, 2016, courts did not grant full Section 230 immunity in approximately half the cases.[32]

So what exactly *is* Section 230 immunity? In what one scholar has described as "the twenty-six words that created the internet,"[33] Section 230

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[26] 1995 WL 323710, at *7 (N.Y. Sup. Ct. 1995).

[27] 47 U.S.C. §§ 230(c)(2)(A)–(B). Section 230 includes exceptions for federal criminal law, intellectual property governed by the Digital Millennium Copyright Act, and, since the passage of SESTA/FOSTA (the combined Stop Enabling Sex Traffickers Act and Allow States and Victims to Stop Online Sex Trafficking Act), content that promotes or facilitates prostitution. *Id.* §§ (e)(1), (2), (5)(A)–(C); s*ee Digital Millennium Copyright Act*, DIGITAL.GOV, https://digital.gov/resources/digital-millennium-copyright-act/ (last visited Dec. 28, 2023); Kendra Albert et al., *FOSTA in Legal Context*, COLUM. HUM. RTS. L. REV. 1085, 1100–02 (2021).

[28] *See, e.g.*, THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 202–04 (2005); KLAUS SCHWAB, THE FOURTH INDUSTRIAL REVOLUTION 11–13 (2016).

[29] Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 406 (2017).

[30] *See, e.g.*, Jeff Koseff, *Defending Section 230: The Value of Intermediary Immunity*, 15 J. TECH. L. & POL'Y 123, 145–48 (2010).

[31] Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpages: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 472 (2018).

[32] Jeff Kossef, *The Gradual Erosion of the Law That Shaped the Internet: Section 230's Evolution over Two Decades*, 18 COLUM. SCI. & TECH. L. REV. 1, 3–4 (2016).

[33] *See generally* JEFF KOSSEF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019).

provides that "[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."[34] "Interactive computer service" is defined by the Act as "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."[35] An information content provider is defined as "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."[36] While Section 230 does not define the terms "publisher" or "speaker," courts have generally held that those terms should be "construed broadly in favor of immunity."[37]

Accordingly, a Section 230 defense contains three elements. The service must be a provider or user of an interactive computer service, the cause of action must treat the defendant as the publisher or speaker of the allegedly unlawful content, and the content in dispute must have been provided by another information content provider other than the defendant. As we shall see in the cases discussed herein, it is this final element that is usually in dispute.

Section 230 has shaped the largely user-generated internet that we know today. Without it, online platforms would be forced to excessively censor user content for fear of costly litigation, thus saddling established companies and innovative startups alike with prohibitively high content moderation costs. As the following sections illustrate, the lawsuits that have sought redress for online harms have framed their grievances in terms of product liability theory in an effort to circumvent Section 230 immunity. While courts, especially initially, have viewed these attempts with a jaundiced eye, there have been signs that the "mighty fortress" of Section 230 immunity, complained of by Professors Citron and Wittes, is weakening.

II. PRODUCT OR NOT? EARLY OPPOSITION TO APPLYING LIABILITY THEORY AGAINST TECHNOLOGY PLATFORMS

In early 2022, Netflix debuted a reality show inspired by a popular meme that had captivated people during the pandemic called "Is It

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[34] 47 U.S.C. § 230(c)(1).

[35] *Id.* § 230(f)(2).

[36] *Id.* § 230(f)(3).

[37] *See, e.g.*, Force v. Facebook, Inc., 934 F.3d 53, 64 (2d Cir. 2019).

Cake?"[38] In it, skilled "cake artists" regularly create "mouthwatering replicas of handbags, sewing machines, and more in a mind-bending baking contest."[39] The appeal of the series, which released its second season in 2023, is evident: you can appreciate the artistry that went into creating these dessert doppelgangers, while indulging in the belief that something can appear to be one thing while actually be another. In many ways, the desire to treat a technology platform and its accompanying apps and algorithms as tangible objects, rather than according them the status that Congress originally did under Section 230, would seem to make as much sense as slicing into a designer handbag expecting a tasty treat.

The *Restatement (Third) of Torts* is clear in its definition of what constitutes a product: "tangible personal property distributed commercially for use or consumption."[40] Should a technology platform be regarded as a "product"? Should a tech company's algorithm or software be considered a "product"? As we shall see, courts resisted the temptation to place such labels when initially confronted with this theory of liability, though in recent years, a growing number of courts around the country have been increasingly receptive to it.

A. The Early Days

Arguably the first case to address defective product allegations against an app was *Hayes v. SpectorSoft Corp.* in 2009.[41] Thomas Hayes filed suit against SpectorSoft alleging that either Mary Jo Davis (the plaintiff's sister) or Alice Hayes (the plaintiff's former wife) purchased a software program called the "Spector Professional Edition for Windows" or "Spector Pro" in the fall of 2005 and installed this software on the plaintiff's laptop computer.[42] He claimed that either Ms. Davis or Ms. Hayes had also purchased and installed software called "eBlaster for Windows" from SpectorSoft as well.[43] Following the installation of both programs, Hayes claimed that the software "recorded and transmitted over the Internet all chat conversations, instant messages, e-mails sent and received, and the websites visited by Plaintiff whenever he used his laptop computer."[44] According to a report submitted by Hayes' computer software expert, both eBlaster and Spector Pro are "key logger" software

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[38] *Is It Cake?*, NETFLIX, https://www.netflix.com/title/81333845 (last visited Dec. 28, 2023).
[39] *Id.*
[40] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19(a) (AM. L. INST. 1998).
[41] No. 08-cv-187, 2009 WL 3713284 (E.D. Tenn. Nov. 3, 2009).
[42] *Id.* at *1.
[43] *Id.*
[44] *Id.*

that capture and can transmit "all instant messages, sent and received emails, web searches, online chats, file transfers, electronic data and other activity on the computer."[45] Hayes maintained that the use of the software violated both his right to privacy and the federal Electronic Communications Privacy Act (ECPA),[46] and that this conduct had caused him severe mental anguish and humiliation.[47]

What made the plaintiff's complaint particularly interesting was that it also alleged that SpectorSoft had not only "aided and abetted" in the tortious conduct, but that the company was:

> [N]egligent in the manufacture, construction and design of its SpectorPro and eBlaster software programs by Mary Jo Davis and Alice Suzanne Hayes, and in its failures to warn Plaintiff of the possible illegal use of such software programs. Such software programs are "defective" and "unreasonably dangerous" within the meaning of Tennessee law.[48]

SpectorSoft Corporation countered that its software was designed to make it "easier for parents to monitor their children's Internet use and for employers to monitor their employees' Internet use," and that the company's license agreement required the installer of the software to agree that he or she had explicit permission to do so.[49] Installers also had to agree to inform anyone who might use their computer that their internet and PC's activity was subject to being recorded and archived.[50]

The court rejected Hayes' ECPA claims.[51] It also granted summary judgment on the plaintiff's product liability theory, noting that Tennessee's product liability statute defined "product liability action" as one brought "for or on account of *personal injury, death or property damage* caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning instruction, marketing, packaging or labeling of any product."[52] After analyzing the statute's and Tennessee courts' prior interpretations of the two tests for what makes a product "unreasonably dangerous," the court noted that under Tennessee law, evidence of bodily injury or damage to property was required for a product liability claim.[53] The court observed that Hayes' claims of

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[45] *Id.*
[46] *Id.* at *2; 18 U.S.C. §§ 2510–2523.
[47] *Hayes*, 2009 WL 3713284, at *2.
[48] *Id.*
[49] *Id.* at *2–3.
[50] *Id.* at *3.
[51] *Id.* at *8–9.
[52] *Id.* at *10–11, *13 (quoting TENN. CODE ANN. § 29-28-102(6)) (emphasis in original).
[53] *Id.* at *10–11.

emotional injuries alone ("severe mental anguish and humiliation") were not accompanied by any claim or physical injury or damage to property like his computer or his business.[54] Accordingly, the court dismissed the plaintiff's product liability claims.[55] For similar reasons (emotional injury alone unaccompanied by any physical manifestation), the court rejected Hayes' negligence claims as well, finding "no Tennessee authority suggesting that a manufacturer of spyware software owes a duty to avoid emotional injury to the victim of the misuse of that software in violation of the software's licensing agreement."[56] The court granted summary judgment against Hayes on his remaining causes of action.[57]

B. Pokémon GO Arrives

The need for a showing of an accompanying physical injury (or a standalone claim of physical injury or death) from an app was presented by cases arising from the highly publicized and hugely popular Pokémon GO app in 2016. With its location-based augmented reality (AR) experience, the Pokémon GO app raised novel legal questions about users' legal interactions with the world and property laws. There were countless media reports about the craze, including how Pokémon GO players were so caught up in the game that many walked into hazardous situations, trespassed onto private property, and in one case, even became the victim of violent crime when they failed to see an incoming attack.[58] In 2019, app developer Niantic settled a class action lawsuit stemming from the nuisance claims of property owners who lived near the real world locations converted into the game's Pokéstops.[59]

While Pokémon GO had provided users with a variety of pop-up warnings about the risk of physical injury associated with its activities (and had also included an express limitation of liability in its Terms and Conditions), these actions did not prevent Niantic from being sued all over the country, including over serious injuries in New York, California, and

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[54] *Id.* at *11.

[55] *Id.*

[56] *Id.* at *12.

[57] *Id.* at *13.

[58] Philip Quaranta, *Pokémon GO: An Indicator of Product Liability in the App Economy*, WILSON ELSER: PROD. LIAB. ADVOC. (Aug. 19, 2016), https://www.productliabilityadvocate.com/2016/08/pokemon-go-an-indicator-of-product-liability-in-the-app-economy/.

[59] Alissa McAloon, *Niantic Settles Pokémon Go Public Nuisance Class Action Lawsuit*, GAME DEVELOPER (Sept. 5, 2019), https://www.gamedeveloper.com/mobile/niantic-settles-i-pokemon-go-i-public-nuisance-class-action-lawsuit.

Pennsylvania.[60] In addition, traditional product liability defenses like assumption of the risk were of limited value, since they varied in effect from state to state; for example, in comparative fault states like Texas, Florida, and California, assumption of the risk would not necessarily operate as a complete bar to recovery.[61] Despite this, Niantic managed to fend off the legal assaults over its virtual creatures and the appellate courts were not presented with the opportunity to consider the strict liability ramifications of the popular Pokémon GO app.

C. Risk Assessment Algorithms as "Products": Rodgers v. Laura & John Arnold Foundation

Certain areas seem like fertile ground for nurturing product liability claims against software developers. For example, for years scholars have speculated about the viability of asserting product claims against such developers of software for autonomous vehicles (also known as self-driving cars), since physical injury or death is a legitimate risk.[62] Other arenas seem less likely to be candidates for product liability claims, such as risk assessment algorithms. Those algorithms are data-driven tools used by courts in many jurisdictions to assess the risk that a criminal defendant will fail to appear for future court appearance or commit additional violent crimes if released pending trial.[63] After an offender's scores are assessed, a decision-making framework proposes pretrial conditions to manage that risk.[64] Although judges in jurisdictions that use these tools must consider such assessments and recommendations, it is the court that ultimately makes the decision on condition of release (or detention), and it may consider a variety of factors besides the assessment.[65]

According to a lawsuit brought by June Rodgers, mother of the late Christian Rodgers, a criminal defendant named Jules Black was released on non-monetary conditions for a weapons charge on April 6, 2017, and

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[60] *See generally* Celina Kirchner, *Guest Post: Pokémon Oh No! Augmented Reality Raises Specter of Personal Injury Claims*, GEEKWIRE (Aug. 6, 2016, 1:00 PM), https://www.geekwire.com/2016/guest-post-pokemon-oh-no-augmented-reality-raises-specter-personal-injury-claims/.

[61] *Contributory and Comparative Negligence by State*, BLOOMBERG L. (Jan. 2023), https://pro.bloomberglaw.com/brief/contributory-and-comparative-negligence-by-state/.

[62] *See, e.g.*, Sunghyo Kim, *Crushed Software: Assessing Product Liability for Software Defects in Automated Vehicles*, 16 DUKE L. & TECH. REV. 300, 300 (2017).

[63] Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

[64] *Id.*

[65] *Id.*

murdered 26 year-old Christian three days later.[66] Rodgers alleged that Black had been arrested by the New Jersey State Police on April 5, 2017, and charged with being a felon in possession of a firearm.[67] But due to Black's purportedly low score on the algorithm's risk assessment, he was released the following day—one of 18,000 individuals freed on non-monetary conditions in New Jersey during the first six months of 2017.[68] Mrs. Rodgers argued that had the algorithm not been a defective product, Black never would have been released nor had the chance to murder her son.

Under New Jersey's Criminal Justice Reform Act (CJRA) that took effect January 1, 2017, pretrial release decisions were moved away from a resource-based model largely reliant on monetary bail, to a risk-based model.[69] The CJRA requires judges to first consider the use of non-monetary pretrial release conditions, which had the practical effect of significantly reducing the use of monetary bail.[70] In order to assess risk, the CJRA provides for the use of an artificial intelligence (AI) tool, a Public Safety Assessment (PSA) developed by the Laura and John Arnold Foundation.[71] Much like other algorithmic risk assessments, the PSA purportedly analyzes and predicts the risk that a defendant will fail to appear for future court settings or re-offend, and assigns a score that corresponds to that risk.[72]

The court's analysis began with an examination of the definition of a "product" under the New Jersey Product Liability Act (PLA).[73] That definition mirrored the *Restatement*'s definition, "tangible personal property distributed commercially for use or consumption," and included "other items" like electricity, which may be considered a "product" within the context of its distribution and use.[74] The court rejected the plaintiff's urgings to treat the Foundation's algorithm as a product, finding that the PSA was "neither a tangible product or a non-tangible 'other item' as contemplated by Section 19 of the Restatement of Torts and it is not distributed commercially."[75] The court reasoned that, instead, the PSA

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[66] Rodgers v. Laura & John Arnold Found., No. 17-5556, 2019 WL 2429574, at *1 (D. N.J. June 11, 2019).

[67] *Id.*

[68] *Id.*

[69] *See id.*; *see also* N.J. STAT. ANN. § 2A:162-15 (2017).

[70] *Rodgers*, 2019 WL 2429574, at *1.

[71] *Id.*

[72] *Id.*

[73] *Id.* at *2; N.J. STAT. ANN. § 2A:58C-2 (1987).

[74] *Rodgers*, 2019 WL 2429574, at *2.

[75] *Id.*

"constitutes information, guidance, ideas, and recommendations for considering the risk a given criminal defendant presents."[76] As such, the court explained, the information and guidance reflected in the PSA algorithm "are not subject to tort liability because they are properly treated as speech, rather than product."[77]

Judge Rodriguez went on to dismiss the plaintiff's proximate causation element required for her product liability claims. Addressing Rodgers' argument that the PSA was defective in that it omitted risk indicators like firearm possession and sex crimes, the court noted that, by statute, "the judge is required to consider many different pieces of information in addition to the PSA score; the judge then has complete discretion to reject the recommendation to which the PSA contributes."[78] In other words, the algorithm didn't supplant or entirely replace judicial decision making, but merely informed the judge's decision as to whether a defendant should be detained or released.

On appeal, the Third Circuit agreed with Judge Rodriguez's reasoning.[79] It held that AI software "is neither 'tangible personal property' nor remotely 'analogous to' it to qualify as a product for product liability purposes."[80] Following Section 19 of the Restatement, the appellate court stated:

> [The program] is an "algorithm" or "formula" using various factors to estimate [the likelihood of a result] . . . [I]nformation, guidance, ideas, and recommendations are not "product[s]" under the Third Restatement, both as a definitional matter and because extending strict liability to the distribution of ideas would raise serious First Amendment concerns.[81]

Accordingly, in the eyes of the Third Circuit, strict liability under the New Jersey statute "applies only to defective products, not to anything that causes harm or fails to achieve its purpose."[82]

The *Rodgers* case was the first of its kind to involve an attempt to treat a risk assessment algorithm as a product, but it will not be the last. Criminal defendants have challenged algorithms like this under constitutional rights/due process theories, but have not yet attacked them

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[76] *Id.* at *3.
[77] *Id.*
[78] *Id.* (citing N.J. STAT. ANN. §§ 2A:162-16(b)(2), 2A:162-17(a)).
[79] Rodgers v. Christie, 795 F.App'x 878, 879–80 (3d Cir. 2020).
[80] *Id.* at 880.
[81] *Id.* (citation and quotation marks omitted).
[82] *Id.*

as "consumers" of "products."[83] Similarly, criminal investigative software has been challenged on due process grounds, but not a product liability theory.[84] The makers of TrueAllele, a software program used to analyze traces of DNA from crime scenes, have faced legal action from criminal defendants seeking to review its source code in order to confront and cross-examine its programmer about how the software works.[85] TrueAllele's developers have successfully relied on trade secret evidentiary privilege to thwart such attempts at discovery.[86]

D. Dating Apps as Products

Dating apps would appear to meet the "physical harm" test of potentially being viewed as defective products. With relatively weak geolocation technology and unencrypted sensitive personal information, unwary dating app users can be at risk of physical injury by bad actors who obtain their personal data. But early on, courts were not receptive to plaintiffs maintaining suits against such platforms under a product liability theory.

1. *Herrick v. Grindr, LLC*

In *Herrick v. Grindr, LLC*,[87] Matthew Herrick became the victim of an extended (ten month-long) harassment campaign after his former boyfriend used the dating app Grindr[88] to impersonate Herrick by posting fake profiles to Grindr and encouraging potential suitors to go to Herrick's home or workplace for sex.[89] The profiles described Herrick as interested in "fetishistic sex, bondage, role playing, and rape fantasies."[90] Although the court described the resulting harassment as allegedly involving

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[83] *See, e.g.*, Loomis v. Wisconsin, 881 N.W.2d 749 (Wis. 2016), *cert. denied*, 137 S. Ct. 2290 (2017).

[84] *See* Justin Jouvenal, *A Secret Algorithm Is Transforming DNA Evidence. This Defendant Could Be the First to Scrutinize It*, WASH. POST (July 13, 2021), https://www.washingtonpost.com/local/legal-issues/trueallele-software-dna-courts/2021/07/12/66d27c44-6c9d-11eb-9f80-3d7646ce1bc0_story.html; *see also* People v. Wakefield, 195 N.E.3d 19, 24 (N.Y. 2022).

[85] Jouvenal, *supra* note 84; *Wakefield*, 195 N.E.3d at 24.

[86] *See, e.g.*, People v. Superior Ct., No. B258569, 2015 WL 139069, at *5 (Cal. Ct. App. Jan. 9, 2015).

[87] 306 F. Supp. 3d 579 (S.D.N.Y. 2018).

[88] Described in Judge Capioni's opinion as "a web-based dating application ("app") for gay and bisexual men," Grindr describes itself as "the world's largest social networking app for gay, bi, trans, and queer people." *Id.* at 584; *see About*, GRINDR, https://www.grindr.com/about/ (last visited Dec. 29, 2023).

[89] *Herrick*, 306 F. Supp. 3d at 585.

[90] *Id.*

"hundreds" of interested Grindr users who physically sought out Herrick,[91] one of Herrick's attorneys wrote that the campaign led to more than 1,400 strangers showing up at her client's home and place of work.[92] The former lover not only impersonated Herrick but also manipulated Grindr's geolocation tools to make it seem like the messages were coming from Herrick's actual residence or workplace.[93]

Herrick repeatedly tried to enlist Grindr's help in ending this harassment.[94] He initiated more than 100 complaints, sent a cease-and-desist letter, and even obtained a temporary injunction.[95] Despite these measures, Grindr refused to take any action.[96] In 2017, Herrick filed suit against Grindr, alleging, among other claims, product liability claims that maintain the app's design enabled this harassment campaign.[97] The lawsuit claimed that the design of the Grindr app was defective in that it did not incorporate certain safety features that could prevent the impersonation of profiles, and that even though Grindr was aware of the potential for the app to be misused, it "neither warned users of this location exposure vulnerability, nor that Grindr could be used to direct scores of potentially dangerous individuals to their workplace and home."[98] Herrick argued that the app was a defective product because it was easily exploited and lacked the ability to identify and exclude abusive users when safeguards were readily available for Grindr to implement.[99] Had there been a warning of the potential for such abuse, Herrick argued, he would not have downloaded the app and could have prevented his injuries.[100]

Both the trial court (the U.S. District Court for the Southern District of New York) and, on appeal, the Second Circuit Court of Appeals, held that Section 230 of the CDA barred Herrick's product liability claims.[101] The trial court reasoned that "Herrick's design and manufacturing defect, negligent design, and failure to warn claims are all based on content

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[91] *Id.* at 584.

[92] Carrie Goldberg, Herrick v. Grindr*: Why Section 230 of the Communications Decency Act Must Be Fixed*, LAWFARE (Aug. 14, 2019, 8:00 AM), https://www.lawfaremedia.org/article/herrick-v-grindr-why-section-230-communications-decency-act-must-be-fixed.

[93] *Id.*

[94] *Id.*

[95] Andrew Schwartz, *The Grindr Lawsuit That Could Change the Internet*, THE OUTLINE (Jan. 11, 2019, 2:02 PM), https://theoutline.com/post/6968/grindr-lawsuit-matthew-herrick.

[96] *Id.*

[97] Herrick v. Grindr, 306 F. Supp. 3d 579, 586 (S.D.N.Y. 2018).

[98] *Id.* at 585–86, 591.

[99] *Id.* at 584, 588.

[100] *Id.* at 588.

[101] *Id.*; Herrick v. Grindr, 765 F. App'x 586, 589, 590–91 (2d Cir. 2019)

provided by another user—Herrick's former boyfriend."[102] As the court explained, the fact that Herrick's ex-boyfriend put content onto Grindr gave it immunity under Section 230 because an interactive computer service (ICS)[103] cannot be held liable for content if it did not contribute to the development of what made the content unlawful.[104] The court stated, "To the extent Herrick has identified a defect in Grindr's design or manufacture or a failure to warn, it is inextricably related to Grindr's role in editing or removing offensive content—precisely the role for which Section 230 provides immunity."[105]

In its opinion, the court rejected Herrick's argument that Grindr contributed to what made the impersonating profiles offensive.[106] Harkening back to the Ninth Circuit's holding in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*,[107] the court distinguished Grindr's "drop-down menus, geolocation function, or its sorting aggregation and display functions" that provided neutral assistance from a website that requires users to respond to questions regarding protected personal characteristics and then used the answers to those improper questions to determine which users learned about what available housing.[108]

The court noted that Herrick's failure to warn claims required treating Grindr as the "publisher" or "speaker" of the impersonating profiles.[109] Liability under this dimension of product liability theory is dependent upon Grindr's decision to publish the impersonating profiles without reviewing them first. Observing that the traditional function of a publisher is to supervise content, the court held that "requiring Grindr to post a warning at the outset or along with each profile is no different than requiring Grindr to edit the third-party content itself."[110] Because the proposed warning would be about user-generated content and went to

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[102] *Herrick*, 306 F. Supp. 3d at 589.

[103] Section 230 defines an interactive computer service as "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." 47 U.S.C. § 230(f)(2).

[104] *Herrick*, 306 F. Supp. 3d at 589.

[105] *Id.* at 588.

[106] *Id.* at 589–90.

[107] 521 F.3d 1157 (9th Cir. 2008).

[108] *Herrick*, 306 F. Supp. 3d at 589–90.

[109] *Id.* at 590–91.

[110] *Id.* at 591.

Grindr's publishing function, Section 230's immunity applied.[111] Accordingly, the trial court held that Herrick's product liability claims were barred by Section 230.[112] The Second Circuit affirmed, and in October 2019, the U.S. Supreme Court denied certiorari.[113]

2. *Beckman v. Match.com, LLC*

In another "dating app as product" case, the Ninth Circuit rejected the idea that Match.com was liable for failure to warn of the dangers purportedly associated with using its app.[114] In late August 2010, Mary Kay Beckman subscribed to Match.com's service and set up an online profile.[115] Not long thereafter, she began interacting with another user, Wade Mitchell Ridley.[116] On September 26, 2010, the two had their first date in Las Vegas.[117] After dating for approximately ten days, Beckman and Ridley had their last physical meeting on October 3, 2010, and Ms. Beckman ended the relationship.[118] Over the course of the following days, Ridley sent Ms. Beckman "numerous threatening and harassing text messages."[119] On January 21, 2011, Ridley ambushed Beckman at her home, stabbing and kicking her repeatedly.[120] As a result of the attack, Ms. Beckman suffered severe physical injuries, requiring multiple surgeries and hospitalizations.[121]

Ms. Beckman filed a lawsuit against Match.com on January 18, 2013, alleging claims for negligence as well as negligent failure to warn under Nevada's product liability law.[122] Match.com sought to dismiss the case, arguing that Beckman's state law claims were barred by Section 230, since the plaintiff sought to hold it "liable for enabling Ridley to post a profile on its website that plaintiff ultimately saw and responded to."[123] Beckman's product liability claim, on the other hand, asserted that Match.com had failed "to protect her from individuals trolling the website to further

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111 *Id.* at 588, 590, 592.

112 *Id.* at 584, 586, 588.

113 Herrick v. Grindr, 765 F. App'x 586, 588 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 221 (2019).

114 Beckman v. Match.com, LLC, No. 13-CV-97, 2013 WL 2355512, at *1 (D. Nev. May 29, 2013), *aff'd*, 743 F. App'x 142 (9th Cir. 2018).

115 *Beckman*, 2013 WL 2355512, at *1.

116 *Id.*

117 *Id.* at *1–2.

118 *Id.* at *2.

119 *Id.*

120 *Id.*

121 *Id.* at *1.

122 *Id.* at *1, *7.

123 *Id.* at *7.

criminal activity" by "exposing Plaintiff to a serial murderer who used the website as a vessel to facilitate attacks on unsuspecting women."[124] Beckman argued that her claims were not directed at Match.com's publication of third-party profiles but rather at the platform's "failure to implement basic safety measures to prevent criminals and other dangerous people from communicating with users of Match.com that are genuinely attempting to start a relationship."[125] Essentially, Ms. Beckman argued that she never would have met or been attacked by Ridley had Match.com warned her or not misrepresented the safety of using its site.[126]

The trial court felt that these claims were actually directed at Match.com's publishing, editorial, and/or screening functions, which all fell within Section 230's grant of immunity.[127] It also found that under Nevada's failure to warn doctrine, Match.com would only have a duty to warn Ms. Beckman if there was a special relationship between the parties, such as that of an innkeeper-guest or employer-employee.[128] The court held there was no such special relationship between a provider of online dating services and its subscribers and dismissed the case.[129]

The Ninth Circuit affirmed, ruling that Ms. Beckman lacked this "special relationship" that would have given rise to such a duty to warn.[130] It wrote:

> Nevada courts have never recognized a special relationship akin to that between Beckman and Match, and Beckman failed to allege facts sufficient to show that her ability to provide for her own protection was limited by her "submission to the control of the other" such that a special relationship should be found here.[131]

Although Ms. Beckman sought review by the U.S. Supreme Court, it denied her petition for writ of certiorari.[132]

3. *Doe v. Snap, Inc.*

From seeking to assert product liability claims against dating apps, enterprising plaintiffs have also placed social networking platforms in their

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[124] *Id.* at *11.
[125] *Id.* at *16–17.
[126] *Id.* at *17.
[127] *Id.*
[128] *Id.* at *21–22.
[129] *Id.* at *22–23.
[130] Beckman v. Match.com, LLC, 743 F. App'x 142, 143 (9th Cir. 2018).
[131] *Id.* at 142–43.
[132] Beckman v. Match.com, LLC, 139 S. Ct. 1394 (2019).

sights. The overwhelming majority of these, asserting a variety of negligence causes of action, have been rejected by courts on grounds of Section 230 immunity.[133] *Doe v. Snap, Inc.* represents a departure because, in addition to the expected state law negligence claims, the plaintiff asserted a product liability cause of action as well.[134]

The facts in this case regarding sexual predation are as disturbing as the attacks described in the foregoing dating apps cases. The anonymized minor plaintiff, Doe, was a "troubled adolescent who survived a difficult childhood," according to the court.[135] In October 2021, during his sophomore year at Oak Ridge High School, the teen was lured into a relationship with his thirty-something science teacher, Bonnie Guess-Mazock.[136] After asking Doe to stay with her in the classroom after the other students were dismissed, Guess-Mazock "began to groom Doe for a sexual relationship and, in furtherance of that goal, asked Doe for his Snapchat username."[137] Guess-Mazock then began "to seduce Doe via Snapchat by sending seductive photos of herself appended with solicitous messages."[138] She also encouraged him to take prescription and over-the-counter drugs prior to their sexual encounters. Guess-Mazock and Doe had sexual contact multiple times throughout the fall and winter of 2021.[139] The illicit relationship was discovered when, on January 12, 2022, Doe overdosed on prescription drugs purportedly provided by the teacher.[140] After a long hospital stay, the student recovered.[141]

Doe's legal guardian filed suit on his behalf soon afterward, asserting a litany of federal and state law negligence causes of action against the school district, school leaders, and the teacher in question. The claims were primarily for failure to identify the illegal and inappropriate student-teacher relationship, failure to supervise Guess-Mazock, and for the sexual assaults themselves.[142] In addition, Doe sued Snap, Inc. (the owner of

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[133] *See, e.g.*, *In re* Facebook, Inc., 625 S.W.3d 80, 94–96 (Tex. 2021) (noting that it has been "the unanimous view of other courts confronted with claims alleging that defectively designed internet products allowed for transmission of harmful third-party communication" to hold that they are barred by Section 230).

[134] Doe v. Snap, Inc., No. H-22-00590, 2022 WL 2528615, at *6–7 (S.D. Tex. July 7, 2022).

[135] *Id.* at *3.

[136] *Id.*

[137] *Id.* at *3–4.

[138] *Id.* at *4.

[139] *Id.*

[140] *Id.* at *2, *4.

[141] *Id.* at *1.

[142] *Id.* at *1–2.

Snapchat), alleging three state law negligence claims.[143] The first two claims asserted that Snap breached a duty to intervene when an adult started sending sexually explicit messages and images to a minor, and that Snap was grossly negligent through its conscious indifference to the use of its application to foster "an environment that draws in sexual predators and allows them to act with impunity."[144] The third claim alleged that Snapchat is "negligently designed" because the app "allow[s] for the widespread practice of using false birth dates," permitting "users younger than 13 years old" to use the application.[145] This failure to use ordinary care "in designing, maintaining, and distributing its products and services," the lawsuit alleged, created a platform that deletes messages and images shortly after they are sent, emboldening predators that "there will be no long-lasting evidence" of their interactions with underage users.[146]

Much of Judge Lee Rosenthal's opinion discusses and dismisses the claims against the other defendants on immunity grounds. As to the claims against Snap, Inc., the court agreed with the platform's argument that Section 230 of the CDA barred such claims because the Act "provide[s] broad immunity . . . to Web-based service providers for all claims stemming from their publication of information created by third parties."[147] The judge noted that multiple courts had held that Snap is an "interactive computer service" provider because its app "permits its users to share photos and videos through Snap's servers and the internet."[148] Doe's claims, which attempted to hold Snap liable for messages and photos sent by Guess-Mazock, put the platform squarely within Section 230's safe harbor of immunity.

The court also addressed the plaintiff's product liability claim of negligent design—that Snapchat is negligently designed because the app fails to prevent underage users from creating accounts using false birthdays and allows messages to automatically delete after a short period of time.[149] The court noted the Ninth Circuit's recent decision that Snap was not entitled to Section 230 immunity on a negligent design allegation.[150] The court distinguished the *Lemmon* holding, saying that there, the parents' claim was not about the publication of content but about Snap's liability

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[143] *Id.* at *2, *12.
[144] *Id.*
[145] *Id.*
[146] *Id.* at *12.
[147] *Id.* at *13 (quoting Doe v. Myspace, Inc., 528 F.3d 413, 418 (5th Cir. 2008)).
[148] *Id.* (quoting Lemmon v. Snap, Inc., 995 F.3d 1085, 1091 (9th Cir. 2021).
[149] *Id.* at *14.
[150] *Id.* (citing *Lemmon*, 995 F.3d at 1091) (discussed in the following section of this article).

"as a product designer."[151] In its case, Judge Rosenthal opined that "[t]he crux of Doe's negligent design claim, like his negligent undertaking and gross negligence claims, is that Snapchat designed its product with features that allegedly created the opportunity for Guess-Mazock to send illicit messages to Doe."[152] Since the plaintiff was seeking to hold Snap liable for communication exchanged between Doe and Guess-Mazock, therefore, Snap was immune due to Section 230.[153] The court dismissed plaintiff's claims against Snap.[154]

However, as Judge Rosenthal noted, the Ninth Circuit had reached a different result in the *Lemmon* case just months earlier.[155] Do *Lemmon* and similar cases represent the beginning of a shift in attitude toward holding app developers and platforms accountable under product liability theories? Is Section 230's immunity eroding? As we will examine in the next section, the answer to such questions is complicated.

III. A TURNING OF THE TIDE? *LEMMON*, *MAYNARD*, AND THE APP AS PRODUCT

The response to cases like those discussed in the previous section, those that have arguably broadened the scope of Section 230 to preclude product liability suits against interactive computer service (ICSs) because an injury involved some degree or kind of third-party content, might appear at first blush to represent a radical shift in interpretation. However, the notion that computer software could be considered a "product" within the rubric of product liability law is neither new nor novel. For example, as far back as 1991, the Ninth Circuit suggested that computer software might be regarded as such a product.[156] In 2007, a federal court in Louisiana also held that computer software was a "product" under a product liability analysis.[157]

Heralding later cases that warned of the dangers of "social media addiction," some attempts have been made to classify computer games as products for strict liability purposes, but to no avail. In *Sanders v. Acclaim Entertainment, Inc.*, the court explicitly held that computer games are *not*

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[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* at *15.

[155] *Id.* at *14 (citing *Lemmon*, 995 F.3d at 1087, 1095).

[156] Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1036 (9th Cir. 1991). This was, however, merely dictum, since the case's holding "decline[d] to expand products liability law to embrace the ideas and expression" found (in that case) in a book. *Id.*

[157] Schafer v. State Farm Fire & Cas. Co., 507 F. Supp. 2d 587, 600–01 (E.D. La. 2007).

products subject to strict liability.[158] Similarly, in *Wilson v. Midway Games, Inc.*, the court ruled that interactive "virtual reality technology" is not a product for the purposes of strict products liability.[159] And in yet another ill-fated effort, both a Kentucky federal court and the Sixth Circuit declared that software makers and website operators do not deal in "products."[160] The courts rejected the attempt to impose strict product liability, holding:

> While computer source codes and programs are construed as "tangible property" for tax purposes and as "goods" for UCC purposes, these classifications do not indicate that intangible thoughts, ideas, and messages contained in computer video games, movies, or internet materials should be treated as products for purposes of strict liability.[161]

More recently, a case alleging addiction to an online game and economic losses from purchasing "in-game currency" also advanced a product liability claim among other liability theories. It alleged that the game's "unfair practices and cheating . . . and attempting to cause a medical condition" in its users implicated "a broader public interest of protecting the public from predatory companies."[162] The court, however, disagreed, holding that the game was not a product within the meaning of Washington state's product liability statute:

> [O]nline games are not subject to Washington's products liability law. [The statute] defines "Product" as "any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce." [The game] is software as a service, not an "object," hence Plaintiff's product liability claim must fail as a matter of law.[163]

However, a crucial difference exists between cases that advance a product liability theory in an effort to impose liability for third-party content, like the cases discussed in the previous section, and those lawsuits that target an app's design function itself as the defect. As one case put it:

> While providing neutral tools to carry out what may be unlawful or illicit [conduct] does not amount to development, Meta defendants are not alleged to have filtered pornographic content in a *neutral* manner. . . . [W]hen

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[158] Sanders v. Acclaim Ent., Inc., 188 F. Supp. 2d 1264, 1278, 1281 (D. Colo. 2002).

[159] Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 173–74 (D. Conn. 2002).

[160] James v. Meow Media, Inc., 90 F. Supp. 2d 798, 810–11 (W.D. Ky. 2000), *aff'd*, 300 F.3d 683, 700–01 (6th Cir. 2002).

[161] *Id.*

[162] Quinteros v. InnoGames, No. C19-1402, 2022 WL 898560, at *7 (W.D. Wash. Mar. 28, 2022).

[163] *Id.* The court also cites RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19 (AM. L. INST. 1998). *Id.*

> automated content-moderation tools are allegedly *designed* to *facilitate* unlawful conduct; the claims survive CDA defenses.[164]

A. Lemmon v. Snap, Inc.

The first case to expose a chink in the armor of tech developers' reliance on Section 230 to deflect product liability claims was the Ninth Circuit's 2021 decision in *Lemmon v. Snap, Inc.*[165] The facts of the case are tragic. On May 28, 2017, at approximately 7:00 p.m., 17-year-old Jason Davis, 17-year-old Hunter Morby, and 20-year-old Landen Brown were driving in Walworth County, Wisconsin (Jason was driving).[166] Traveling at high speeds for several minutes, the young men's car ran off the road at 113 miles per hour and crashed into a tree; all three were killed.[167]

Shortly before the crash, one of the passengers opened the Snapchat app to document how fast they were traveling.[168] The social media platform allows users to share photos and videos and rewards users with "trophies, streaks, and social recognitions" based on the snaps they share.[169] The app also permits its users to superimpose a "filter" over the photos or videos they share.[170] Minutes before the wreck, the occupants of the car had used one of them, the "Speed Filter," which enables users to "record their real-time speed."[171] Among Snapchat users, it was widely believed that Snapchat would reward them for "recording a 100 MPH or faster [s]nap using the Speed Filter," and then sharing it.[172]

On May 23, 2019, Hunter and Landen's parents filed a negligent design lawsuit against Snap.[173] Among other things, the suit contended that Snapchat was "incentivizing young drivers to drive at dangerous speeds;" that at least three other accidents had occurred that were linked to Snapchat users' pursuit of high-speed "snaps;" that at least one other lawsuit had been filed and an online petition circulated condemning Snapchat's featuring of the "Speed Filter;" and that Snapchat failed to

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[164] Dangaard v. Instagram, LLC, No. C 22-01101, 2022 WL 17342198, at *4 (N.D. Cal. Nov. 30, 2022) (first alteration in original).

[165] 995 F.3d 1085 (9th Cir. 2021).

[166] *Id.* at 1088.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.* at 1089 (alteration in original).

[173] *Id.* at 1090.

remove or restrict access to the app while traveling at dangerous speeds.[174] The district court granted a motion to dismiss on the basis of Section 230 immunity.[175]

The Ninth Circuit reversed.[176] In its opinion, it began by analyzing whether the three-prong test the court had announced previously for immunity under the CDA was met by Snapchat.[177] To enjoy immunity, Snapchat would have to be: "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider."[178] The first and third prongs of this test were dealt with summarily; it was undisputed that Snap was a provider of an "interactive computer service" and that the lawsuit did not seek to address Snap being liable for its conduct as a publisher or speaker, or for any third-party content.[179] Instead, the lawsuit viewed Snap as a manufacturer, "accusing it of negligently designing a product (Snapchat) with a defect (the interplay between Snapchat's reward system and the Speed Filter)."[180]

As the opinion points out, the plaintiffs' claim did not rest on third-party content, unlike previous cases on Section 230 immunity.[181] Snap was faulted, not for publishing Landen's snap of the car's high speed, but for the architecture of the Snapchat app itself. The "app's Speed Filter and reward system worked together to encourage users to drive at dangerous speeds."[182] In other words, the court interpreted the defective design claim as standing independently of any content that third parties (such as Snapchat's users) might create with the Speed Filter.

The court rejected Snap's defense that its app was merely a content-neutral tool and that it shouldn't be considered a "developer" of the downstream content that third-party users had produced with that tool.[183] As the court pointed out, the plaintiffs' claim of defective design "does not depend on what messages, if any, a Snapchat user employing the Speed

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[174] *Id.* at 1089–90.
[175] *Id.* at 1090.
[176] *Id.* at 1095.
[177] *Id.* at 1091.
[178] *Id.* (quoting Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1097 (9th Cir. 2019)).
[179] *Id.*
[180] *Id.* at 1092.
[181] *Id.* at 1093–94.
[182] *Id.* at 1093.
[183] *Id.* at 1094.

Filter actually sends."[184] The danger complained of by the plaintiffs was not in the "snap" itself—the message using the Speed Filter; instead, the danger was the speeding.[185] The court acknowledged that the parents were not faulting Snap for "publishing other Snapchat user content (e.g., snaps of friends speeding dangerously) that may have incentivized the boys to engage in dangerous behavior."[186] If the parents had attempted to hold Snap liable using such evidence, it would have been tantamount to treating the platform as a publisher of third-party content.[187] At the end of the day, even had Snap been acting as a "publisher" in releasing Snapchat and its myriad features to the public, the plaintiffs' claims rested on Snap's "own acts" in designing its app, not on information from another content provider.[188]

The *Lemmon* suit and the resulting exposure met with mixed reactions. In 2021, just a month after the Ninth Circuit's decision, Snap, Inc. decided to eliminate the Speed Filter feature, which had been originally introduced in 2013.[189] The company stated, "[n]othing is more important than the safety of our Snapchat community," while not commenting on the specific reasons behind the decision; critics questioned why it had taken Snap so long to make the move.[190] Regarding the case itself, the decision that the products case could go forward did not guarantee a win at trial on the merits. Should the court have narrowed the scope of Section 230's immunity for a case that might have only limited, if any, impact?

Even with other courts being receptive to this "defective design" approach, the fact remains that the vast majority of Section 230 immunity cases have involved some form of third-party content.[191] As *Lemmon* and cases like it remind us, product liability allegations are about more than merely the ability to recover damages from companies. They are also about the ability to effect change and to shape corporate behavior through not just the threat of trial but also of discovery that might subject a

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[184] *Id.*

[185] *Id.* at 1093.

[186] *Id.* at 1093 n.4.

[187] *Id.* at 1093–94.

[188] *Id.* at 1094.

[189] Bobby Allyn, *Snapchat Ends "Speed Filter" That Critics Say Encouraged Reckless Driving*, NPR (June 17, 2021), https://www.npr.org/2021/06/17/1007385955/snapchat-ends-speed-filter-that-critics-say-encouraged-reckless-driving.

[190] *Id.*

[191] Danielle Draper, *Section 230 – Are Online Platforms Publishers, Distributors, or Neither?*, BIPARTISAN POL'Y CTR. (Mar. 13, 2023), https://bipartisanpolicy.org/blog/section-230-online-platforms/.

company's products and practices to the glare of public scrutiny. No doubt, the decision to drop Snapchat's Speed Filter feature was not a curious coincidence.

B. Maynard v. Snapchat, Inc.

Another case that centered around defective product allegations against Snapchat for its Speed Filter was *Maynard v. Snapchat, Inc.*[192] In 2015, 18-year-old Christal McGee was driving her father's Mercedes C230 at over 100 miles per hour with three passengers in her car when she rear-ended Wentworth Maynard's Mitsubishi Outlander.[193] The impact knocked Maynard into a highway barrier, causing severe personal injuries, including brain injury.[194] Maynard and his wife filed suit against McGee and Snapchat, alleging that just before the accident, McGee had told her three passengers that she was "just trying to get the car to 100 m.p.h. to post it on Snapchat" using Snapchat's Speed Filter.[195]

The Maynards alleged that Snapchat had defectively designed the Speed Filter feature of the Snapchat app, since it encouraged users to endanger themselves and others while on the roadway.[196] They argued that Snapchat had violated Georgia product liability law, which imposes a duty on manufacturers "to exercise reasonable care in manufacturing its products to make products that are reasonably safe for intended or foreseeable users."[197] Specifically, the Maynards alleged that Snap failed to "remove, abolish, restrict access to, or otherwise use reasonable care to address the danger created by Snapchat's Speed Filter," that its "design decisions regarding its Speed Filter . . . [were] unreasonable and negligent," and that Snap's disclaimers and warning were also "inadequate, unreasonable, and knowingly ineffective."[198] The Maynards also alleged that Snap had designed their products in such a way that they were "motivating, incentivizing, or otherwise encouraging its users to drive at excessive, dangerous speeds in violation of traffic and safety law."[199]

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[192] 851 S.E.2d 128 (Ga. Ct. App. 2020), *rev'd*, 870 S.E.2d 739 (Ga. 2022).

[193] Brief of Appellants-Plaintiffs at 1–3, Maynard v. Snapchat, Inc., 870 S.E.2d 739 (Ga. 2022) (No. S21G0555), 2021 WL 3634908.

[194] John G. Browning, *Downloading Liability? The Evolving Trend of Product Liability Exposure for Apps*, STATE BAR OF TEX. 26 (2021), https://sbot.org/wp-content/uploads/2022/05/Circuits-June-2021-Final.pdf.

[195] *See Maynard*, 870 S.E.2d at 743.

[196] *See Maynard*, 851 S.E.2d at 130.

[197] *See Maynard*, 870 S.E.2d at 748.

[198] *Id.*

[199] *Id.*

In response, Snap stated that its app had a "pop-up warning" that a user accessing the Snapchat Speed Filter would see before anything else, that it included another warning not to "Snap and drive," and that by agreeing to Snap's Terms of Use, a user agreed not to use Snapchat for "any illegal or unauthorized purpose."[200] There was no mention of or need to mention Section 230 immunity. The trial court granted Snap's motion to dismiss, concluding that it owed no legal duty under Georgia product liability law as a manufacturer to design its product so as to control McGee's conduct or to prevent her from driving dangerously.[201]

In the first of two appeals, the Georgia Court of Appeals affirmed the trial court's decision that Snap owed no legal duty to the Maynards.[202] On appeal to the Georgia Supreme Court, the Court reversed and remanded.[203] It held that a manufacturer may owe a design duty under either Georgia's product liability statute (imposing strict liability against the manufacturer or a defectively designed product) or under Georgia's decisional law negligence theory of defective design.[204] The Maynards pursued the latter theory of liability.[205] The Court agreed with the Maynards that Snap could reasonably foresee that its product design would create the particular risk of harm, specifically, injury to a driver resulting from someone else's distracted use of the Speed Filter while driving at an excessive rate of speed.[206] As a result of Snap's awareness that drivers were using the Speed Filter while driving at speeds in excess of 100 m.p.h., its purposeful design of a product to encourage such behavior, its warning not to use the product while driving, and its downloading of upgrades and new features, the court ruled that Snap could reasonably foresee that the product's design created a risk of car accidents, triggering a duty for Snap to use reasonable care in designing the product in light of the risk.[207]

On remand in 2023, the Georgia Court of Appeals denied Snapchat's motion to dismiss the claims of defective design.[208] Judge Sara Doyle wrote: "a finder of fact could infer that Snap's Speed Filter was a proximate cause of the collision . . . the complaint points to evidence that could be introduced to show an explicit causal connection between the driver's

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[200] *Id.* at 744.

[201] *Id.*

[202] Maynard v. Snapchat, Inc., 851 S.E.2d 128, 131 (Ga. Ct. App. 2020).

[203] *Maynard*, 870 S.E.2d at 743, 756.

[204] *Id.* at 749–50.

[205] *Id.* at 743.

[206] *Id.* at 743, 747.

[207] *Id.* at 747–48.

[208] Maynard v. Snapchat, Inc., 883 S.E.2d 533, 536 (Ga. Ct. App. 2023).

conduct and the Speed Filter."[209] The opinion rejected Snapchat's claim that it was the intervening cause of Ms. McGee's speeding and unsafe driving, not the defective design of its app, that led to the accident.[210]

In the case's first hearing at the Georgia Court of Appeals, the court ruled that Section 230 did not bar the product liability claims against Snapchat.[211] Section 230 jurisprudence played only a negligible role in the subsequent consideration of the case, primarily because the Maynards amended their complaint to allege solely the state law negligence claims.[212] Unlike *Lemmon* and *Maynard*, the question of Section 230 immunity would resurface in a case in which the allegations marked a departure from solely a defective design of the product approach to (once again) a look at use and communication by third parties, as in the "dating app" cases against Grindr and Match.com. This time, however, the platform was accused of fostering sexual predation of minors—reaching a result diametrically opposed from the Southern District of Texas in the *Doe v. Snap, Inc.* case.

C. A.M. v. Omegle.com LLC

In *A.M. v. Omegle.com LLC*,[213] the defendant, described by the court as "a videochat website primarily used for online sexual rendezvous,"[214] was accused of a variety of product liability claims.[215] These included a claim for defective design, defective warning, and negligent failure to warn or provide adequate instructions.[216] The case involved an 11 year-old girl who was purportedly and randomly "paired" by the platform with an adult male sexual predator, Ryan Fordyce.[217] Over the course of three years, Fordyce harassed and blackmailed the pre-teen into sending him obscene content.[218]

The plaintiff's claims against the chat site asserted claims under Oregon product liability law, not for content or communications posted by a third party.[219] Despite this, Omegle.com moved to dismiss based on

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[209] *Id.*
[210] *Id.*
[211] Maynard v. Snapchat, Inc., 816 S.E.2d 77, 79, 81–82 (Ga. Ct. App. 2018).
[212] Maynard v. Snapchat, Inc., 851 S.E.2d 128, 130 n.1 (Ga. Ct. App. 2020).
[213] No. 21-cv-01674, 2023 WL 1470269, at *1 (D. Or. Feb. 2, 2023).
[214] *Id.*
[215] *Id.*
[216] *Id.* at *2.
[217] A.M v. Omegle.com, LLC, 614 F. Supp. 3d 814, 817 (D. Or. 2022).
[218] *Id.*
[219] *Id.*; *see also Omegle.com, LLC*, 2023 WL 1470269, at *1–2.

its defense of Section 230 immunity, that it was being sued as a "publisher" or "speaker" of content.[220] The court denied the motion, pointing out that Omegle was sued for a defective product design and not as a publisher or speaker of third-party content.[221] In addition, the court observed that Section 230 contained an exception to its immunity for claims related to the sex trafficking of children by force, fraud, or coercion.[222] As the court noted, the plaintiff had pleaded the following allegations that removed Omegle.com from Section 230's safe harbor:

> [Omegle] knew that predators frequented the website for the purpose of meeting children and engaging in child sexual exploitation . . . know that children were using the website and being matched with predators. In light of this known risk, Omegle's active solicitation of predators and children constitutes active and knowing participation in the sex trafficking or children.[223]

Because of what was pleaded, there appeared to be little doubt that the case would survive a motion for dismissal. Even so, the safeguards and restrictions that are features of more mainstream platforms that have been sued for making the misconduct of a third party possible appear to have been wholly lacking here. As the plaintiff's complaint alleged, "Omegle markets its product to children as young as thirteen years old and knowingly matches its child users with adults . . . Omegle's most regular and popular use is for live sexual activity, such as online masturbation. Omegle employs no mechanism to prevent children from being matched with adults . . . ."[224]

IV. THE APP AS PRODUCT—WHERE DO WE GO FROM HERE?

It would be facile to say that in the wake of cases like *Lemmon*, *Maynard*, and *Omegle.com, LLC*, technology defendants can no longer count on the safe haven of Section 230 immunity to which they have long grown accustomed, including for claims of product liability. After all, even in a polarized America, social media companies seem to be public enemy number one; according to *Politico*, more than 100 bills were introduced by state legislators to regulate how social media platforms like Facebook and X (formerly known as Twitter) treat their users' posts, translating into

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[220] *Omegle.com, LLC*, 614 F. Supp. 3d at 818.

[221] *Id.* at 820.

[222] *See id.* at 822–23; *see also* 18 U.S.C. § 1591.

[223] *Omegle.com, LLC*, 2023 WL 1470269, at *2; *see* Second Amended Complaint ¶ 107, A.M. v. Omegle.com LLC, No. 21-cv-01674 (D. Or. Aug. 1, 2022).

[224] Second Amended Complaint ¶ 4, A.M. v. Omegle.com LLC, No. 21-cv-01674 (D. Or. Aug. 1, 2022).

legislation in 34 states.[225] Two of the only three bills passed by states in 2022 became law, including content moderation laws in Texas and Florida that were immediately subjected to legal challenges.[226] Social media companies are popular targets, with two cases that sought to hold such platforms civilly liable for terroristic attacks reaching the U.S. Supreme Court last term.[227] A 2020 survey conducted by the Pew Research Center even concluded that 64% of Americans believe that social media has a primarily negative effect on modern life.[228]

Yet, the truth is far more nuanced. *Lemmon* and *Maynard* have not exactly ushered in a wave of pro-plaintiff results for litigants asserting product liability claims against tech companies, regardless of how sympathetic the plaintiff may be. This truth can readily be seen in four of the most recent trial court decisions.

A. Anderson v. TikTok, Inc.

In *Anderson v. TikTok, Inc.*, Plaintiff Tawainna Anderson's 10-year-old daughter saw something referred to as the "Blackout Challenge" on TikTok and died after attempting the challenge she had seen.[229] TikTok, the wildly popular app that enables users to create and share short videos, has a popular feature known as its "For You Page" (FYP), the algorithm which learns an individual user's preferences and displays content tailored to that user.[230] The plaintiff's daughter's FYP presented a video of the "Blackout Challenge," in which individuals strangled themselves with household items to the point of blacking out.[231] The plaintiff returned home to find her daughter unconscious in the closet hanging from a purse strap; the girl died several days later in intensive care.[232]

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[225] Rebecca Kern, *Push to Rein in Social Media Sweeps the States*, POLITICO (July 1, 2022, 4:30 AM), https://www.politico.com/news/2022/07/01/social-media-sweeps-the-states-00043229.

[226] *See id.*

[227] Twitter, Inc. v. Taamneh, No. 21-1496, 598 U.S. 471, 481–82, 499 (2023) (holding that social media companies did not "aid and abet" an ISIS terrorist attack simply because their algorithms recommended ISIS content); Gonzalez v. Google LLC, 598 U.S. 617, 621 (2023) (citing *Taamneh*, the Court affirmed a Ninth Circuit ruling that Section 230 insulated Google from similar claims of aiding and abetting terrorism because its algorithm recommended ISIS content).

[228] Brooke Auxier, *64% of Americans Say Social Media Have a Mostly Negative Effect on the Way Things Are Going in the U.S. Today*, PEW RSCH. CTR. (Oct. 15, 2020), https://www.pewresearch.org/short-reads/2020/10/15/64-of-americans-say-social-media-have-a-mostly-negative-effect-on-the-way-things-are-going-in-the-u-s-today/.

[229] Anderson v. Tiktok, Inc., 637 F. Supp. 3d 276, 278 (E.D. Pa. 2022).

[230] *Id.* at 278.

[231] *Id.*

[232] *Id.*

The plaintiff filed a product liability suit against TikTok and its parent company ByteDance, in May 2022, grounded in product liability allegations.[233] The plaintiff claimed that TikTok and its algorithm were defectively designed because they "recommend[ed] inappropriate, dangerous, and deadly videos to users" to make them addicted to the platform and that TikTok failed to warn "of the risks associated with dangerous and deadly videos and challenges."[234]

TikTok and ByteDance filed a motion to dismiss based on Section 230 immunity.[235] The court granted the motion, finding that both purported duties stemmed from the defendants' status or conduct as a publisher or speaker and thus would be protected under Section 230.[236] The court reasoned that the duty to warn was related to TikTok's publication of third-party information without a warning disclaimer and that the claims of design defect over a failure to implement safety measures to protect minors are "merely another way of claiming that [service providers are] liable for publishing the communications."[237] The case has been appealed to the Third Circuit.[238]

B. Bride v. Snap, Inc.

Another case involving a societal ill, teen suicide in the wake of online harassment, was *Bride v. Snap, Inc.*[239] In *Bride*, the estate of a 16-year-old boy, Carson Bride, sued Snapchat, Inc. and the two companies behind the messaging platforms, YOLO Technologies, Inc. (YOLO) and Lightspace, Inc. (Lightspace).[240] Carson took his own life on June 23, 2020 after being bullied on the defendants' messaging app. YOLO is an anonymous question-and-answer app used on Snapchat, as is LMK, an app developed by Lightspace.[241] Among other causes of action, the suit alleged strict product liability based on design defect and failure to warn, claiming that user anonymity was a defective design feature of the defendants'

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[233] Brief of Tawainna Anderson, Individually and as Administratix of the Estate of Nylah Anderson, Deceased Minor, as Amicus Curiae Supporting Petitioners at 2, Gonzalez v. Google LLC, 598 U.S. 617 (2023) (No. 21-1333).

[234] *Tiktok, Inc.*, 637 F. Supp. 3d at 280.

[235] *Id.* at 278–79.

[236] *Id.* at 278.

[237] *Id.* at 281.

[238] *See id.* at 276.

[239] No. 21-cv-06680, 2023 U.S. Dist. LEXIS 5481 (C.D. Cal. Jan 10, 2023).

[240] *Id.* at *1–2; *see also* Sam Dean, *A Teen Who Was Bullied on Snapchat Died. His Mom Is Suing to Hold Social Media Liable*, L.A. TIMES (May 10, 2021), https://www.latimes.com/business/story/2021-05-10/lawsuit-snap-teen-suicide-yolo-lmk.

[241] *Bride*, 2023 U.S. Dist. LEXIS 5481, at *1–2.

app.[242] The court was, to say the least, highly skeptical of the product allegations that sought to work around Section 230 immunity:

> Though Plaintiffs seek to characterize anonymity as a feature or design independent of the content posted on Defendants' applications, the theories underlying Plaintiffs' claims essentially reduce to holding Defendants liable for publishing content created by third parties that is allegedly harmful because the speakers are anonymous. Imposing such a duty would "necessarily require [Defendants] to monitor third-party content," e.g. in the form of requiring Defendants to ensure that each user's post on their applications is traceable to a specifically identifiable person.[243]

Later, the court expressed it more bluntly: "Defendants did not create or develop the harassing and explicit messages that led to the harm suffered by Plaintiffs; the sending users did."[244] The court granted Defendants' motion to dismiss.[245]

C. L.W. v. Snap, Inc.

A final recent case that illustrates that merely alleging product liability causes of action while attacking third-party content, but not the product design itself, is not enough is *L.W. v. Snap, Inc.*[246] In this case, the Plaintiffs (L.W. was the nominal plaintiff of a group of similarly situated minors) sued Snapchat over the online grooming and acquisition of Child Sexual Abuse Material (CSAM) (which includes items such as nude photos or video) by pedophiles.[247] The Plaintiffs alleged strict product liability causes of action, including defective design and failure to warn.[248] Once again, the Plaintiffs claimed product defect, but in reality are treating Snapchat as a publisher or speaker by asserting that Snapchat's ephemeral design features are to blame.[249] As the court observed:

> [T]he Court must treat Defendants as publishers or speakers, regardless of how [Plaintiffs'] claims are formed, because their theories of liability plainly turn on Defendants' alleged failure to monitor and remove third-party content. By definition, Snap's failure to remove CSAM distributed on Snapchat by third parties . . . involve[s] "reviewing . . . and deciding whether to publish or to withdraw from publication third-party content." Whether *they style their allegations as claims for product liability, fraud, or negligence, Plaintiffs can't*

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[242] *Id.* at *3, *11.
[243] *Id.* at *14–15.
[244] *Id.* at *16.
[245] *Id.* at *22.
[246] No. 22-cv-619, 2023 WL 3830365, at *1–4 (S.D. Cal. June 5, 2023).
[247] *Id.* at *1–2.
[248] *Id.* at *2.
[249] *See id.* at *3–4.

> *sue Defendants* "*for third-party content simply by changing the name of the theory.*" [250]

Having found the offending CSAM material was "unquestionably created and distributed by third-party individuals" and that the defendants qualified for Section 230 immunity, the court granted the motion to dismiss on all of the Plaintiffs' claims, since they were "predicated on the theory that Defendants violated various state laws by failing to adequately monitor and regulate end-users' harmful messages."[251]

Although the court's ruling in *L.W. v. Snap, Inc.* will likely be appealed, it (together with the *Bride* and *Anderson* decisions) provides useful guidance for judges facing a new onslaught of product liability lawsuits against app developers and tech platforms. There are estimated to be well over 100 cases pending against Facebook, Instagram, Snapchat, TikTok, YouTube, and their parent companies brought on behalf of minor Plaintiffs alleging that the providers have caused an array of mental health issues, including sleep deprivation, eating disorders, depression, low self-esteem, and suicide.[252] The plaintiffs in these cases maintain that social media algorithms "are defective products that encourage addictive behavior and are governed by existing product liability law."[253] And they have powerful allies; school districts in states like Alabama, Arizona, California, Florida, New Jersey, Oregon, Pennsylvania, and Washington have filed their own lawsuits against social media platforms for the added financial burden incurred in dealing with "social media addiction."[254] No less a figure than President Biden weighed in, writing a January 2023 op-ed for *The Wall Street Journal* in which he proclaimed "[w]e must hold social media companies accountable for the experiment they are running on our children for profit."[255]

The lawyers behind lawsuits that purport to paint social media companies in stark, black and white terms as the "bad guys"[256] behind a

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[250] *Id.* at *4 (emphasis added).

[251] *Id.* at *6, *8, *11.

[252] Laurel-Ann Dooley, *School Districts Sue Social Media Platforms, Saying They're Harming Youths' Mental Health*, ABA J. (June 1, 2023, 1:00 AM), https://www.abajournal.com/magazine/article/school-districts-sue-social-media-platforms-saying-theyre-harming-youths-mental-health.

[253] Ruth Reader, *Social Media Is a Defective Product, Lawsuit Contends*, POLITICO (Jan. 16, 2023, 4:30 AM), https://www.politico.com/news/2023/01/26/social-media-lawsuit-mental-illness-00079515.

[254] Dooley, *supra* note 252.

[255] Reader, *supra* note 253.

[256] *See* Dooley, *supra* note 252.

panoply of societal ills—from "social media addiction"[257] to youth suicide to cyberbullying to online sexual predators—need to be mindful of the lessons to be learned from cases like *L.W. v. Snap, Inc.* and its companions. If a claim, however it is couched, is based on a service's failure to monitor or remove third-party users' content, then Section 230 immunity applies.[258] It is that simple. The few cases that focus on a defective design that may precipitate a specific harm without implicating third-party content – think *Lemmon* or *Maynard* – are far more likely to withstand a Section 230 immunity challenge. Cases that are fundamentally based on, or inextricably linked to, third-party content, including not just cases of bad actors connecting and interacting with victims on social media but also many of the so-called "addiction" lawsuits, are far less likely to withstand such defenses. If it remains in its current form, Section 230 represents a resolution to many of the lawsuits that attempt to lay the blame for societal ills at the doorstep of Facebook, Snapchat, Instagram, and the like.

D. Health Apps and Medical Device Software

Another potential dimension for apps' product liability exposure came from one of the largest markets within the app community: fitness, wellness, and medical apps. Consumers use these apps for everything from tracking weight and blood pressure to gathering personal health information and sharing it with doctors.[259] Mobile medical apps (MMAs) pose unique concerns. The Food & Drug Administration (FDA) intervened in 2015 with its Final Guidance on MMAs, pronouncing such mobile apps as medical devices and therefore subject to FDA regulations.[260] This regulatory oversight specifically targets medical apps that function as medical instruments, such as those that are connected to and control devices like blood pressure machines or insulin pumps.[261] Apps that help track a consumer's medical data, but do not provide

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[257] *See, e.g.*, *In re* Social Media Addiction/Pers. Inj. Prods. Liab. Litig., 637 F. Supp. 3d 1377 (J.P.M.L. 2022).

[258] L.W. v. Snap Inc., No. 22cv619, 2023 WL 3830365, at *2–5 (S.D. Cal. June 5, 2023).

[259] Sarah Duranske, *This Article Makes You Smarter! (Or, Regulating Health and Wellness Claims)*, 43 AM. J. L. & MED. 7, 9–10 (2017).

[260] *Device Software Functions Including Mobile Medical Applications*, U.S. FOOD & DRUG ADMIN. (Sept. 29, 2022) [hereinafter *Device Software*], https://www.fda.gov/medical-devices/digital-health-center-excellence/device-software-functions-including-mobile-medical-applications.

[261] *Id.*

specific treatment suggestions or connect to wired devices, are deemed to be lesser risks and therefore not subject to FDA regulations.[262]

These changes in the regulatory landscape for digital health products were hastened by federal legislation. In Section 3060 of the 21st Century Cures Act (Cures Act), Congress amended the definition of "device" to exclude certain software functions.[263] It provides that when a medical device has multiple functions, such as both device and non-device software functions, then the FDA is not permitted to regulate the non-device functions.[264] Yet the nature of digital health products can make the question of assessing liability a difficult one.[265] Some digital health products are a system of connected parts, with different parts subject to different standards. A device will be subject to FDA oversight, while an app associated with it may or may not, depending on whether it has device functions under the Cures Act.[266] To add to the potential confusion, there may also be third parties supporting the app's functions, like a data analytics firm that analyzes the device's raw data and provides feedback.

Against this backdrop are other unresolved questions about treating an MMA as a "product," in the wake of recent U.S. Supreme Court decisions involving personal jurisdiction.[267] It could become difficult to determine whether a medical product manufacturer may be subject to jurisdiction in a forum other than its home state, such as the forum where the app developer resides. A number of factors become part of this equation, such as the degree of control and oversight the medical manufacturer has over the design of the connecting app and how integrated the app is to the overall product functioning.

Complicating matters is the fact that the FDA has been regulating software that meets the Food, Drug & Cosmetic Act definition of a medical device for several years. FDA's policies toward software regulation are "independent of the platform on which [the software] might run, are

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[262] U.S. FOOD & DRUG ADMIN., POLICY FOR DEVICE SOFTWARE FUNCTIONS AND MOBILE MEDICAL APPLICATIONS, GUIDANCE FOR INDUSTRY AND FOOD AND DRUG ADMINISTRATION STAFF 13 (2022) [hereinafter FDA POLICY], https://www.fda.gov/regulatory-information/search-fda-guidance-documents/policy-device-software-functions-and-mobile-medical-applications.

[263] *Device Software*, *supra* note 260.

[264] *See id.*

[265] *See generally* Sarah Jean Kilker, Note, *Effectiveness of Federal Regulation of Mobile Medical Applications*, 93 WASH. U. L. REV. 1341, 1341–44 (2016) (explaining that recent technological advancements in mobile medical applications have created a need for the implementation of FDA regulations to protect consumers).

[266] *See* FDA POLICY, *supra* note 260, at 1–2.

[267] *See* Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 582 U.S. 255, 268–98 (2017).

function-specific, and apply across platforms."[268] In other words, software may meet the definition of a medical device for purposes of FDA regulation, whether it is itself a medical device or is used in the function or control of hardware devices, mobile platforms, or other general-purpose computing platforms. For purposes of product liability litigation, on the other hand, it is possible software may be treated differently based on its platform, function, or other characteristics.

If a medical device's software or algorithm that malfunctions is treated as a "product," rather than a service, a whole host of product liability defenses may be implicated, from federal preemption[269] (under the Medical Amendments to the Food, Drug, and Cosmetic Act[270]) to the component parts doctrine[271] to the learned intermediary doctrine.[272] To date, however, no published decisions have addressed medical device software or algorithms as a product.

V. CONCLUSION

In our increasingly wired world, in which our lives seem to be increasingly dominated by online engagement, our existing legal definitions may sometimes appear inadequate to the task of keeping up with technology. Product liability law is no different. Take, for example, something as simple as supply chain liability; the issue of who the "seller" of a product is would appear to be fairly straightforward. Online transactions on Amazon now account for more than 50 percent of U.S. e-commerce, and more than 50 percent of Amazon's sales are generated by third-party sellers on Amazon Marketplace.[273] Yet when an aggrieved product liability plaintiff (often faced with foreign or judgment-proof manufacturers or third-party sellers) wants to hold Amazon liable as a "seller" of third-party goods (when in many instances Amazon never takes

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[268] FDA POLICY, *supra* note 262, at 1.

[269] *See generally* JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER (2019).

[270] 21 U.S.C. §§ 351–360fff-8.

[271] RESTATEMENT (THIRD) OF TORTS § 5 (AM. L. INST. 1998).

[272] Mark A. Behrens & Kateland R. Jackson, *Washington Supreme Court Reaffirms Learned Intermediary Doctrine with No Exception for Direct-to-Consumer Advertising*, FEDERALIST SOC'Y (June 8, 2022), https://fedsoc.org/commentary/fedsoc-blog/washington-supreme-court-reaffirms-learned-intermediary-doctrine-with-no-exception-for-direct-to-consumer-advertising.

[273] James Anthony, *74 Amazon Statistics You Must Know: 2023 Market Share Analysis & Data*, FINANCEONLINE, https://financesonline.com/amazon-statistics/ (Dec. 15, 2023).

possession of those goods), a surprising number of jurisdictions have been receptive to such a legal interpretation.[274]

With U.S. consumers spending more time on their smartphones than ever before,[275] and with consumer spending on apps exceeding $156 billion in 2022,[276] it is more essential than ever to critically examine whether something like a Snapchat filter or a TikTok algorithm meets the definition of a "product." Product liability law is premised on the concept of risk-sharing: a manufacturer has the resources, knowledge, and ability to ensure the safety of the products it sells. Because manufacturers are the experts on the products they sell, have a corresponding duty to consumers or end users. Technology platforms and app developers, on the other hand, may be experts in the development of online communication tools, but they are not experts in the endless variety of content posted to their sites. They cannot ensure that all such content is accurate, appropriate, and unlikely to present a risk to users. Mandating that these platforms and app developers police the diverse content that is posted in the same way that traditional product manufacturers are expected to ensure the safety of users would require technology entities to be experts in every conceivable topic on which users might post and protect against every conceivable harm. Imposing such a duty is not only wildly impractical but also contrary to product liability principles.

With traditional products, the design features, manufacturing processes, and written and graphic warnings are the work of those in the chain of sale, from manufacturers to distributors to retailers. Creation of online content, however, whether words or images, is not the work of the technology platform or app developer but the user who posts that content. A cornerstone principle of product liability law is that a manufacturer can only be liable if the product it designed and/or sold is the source of the harm to the Plaintiff.[277] Advancing the novel product liability theory against app developers and technology platforms that they are civilly liable for content created by a user of the app or platform ignores this principle.

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[274] Jurisdictions like California and the Third Circuit, among others, have held that Amazon can be considered a "seller." *See* Bolger v. Amazon.com, 267 Cal. Rptr. 3d 601, 627 (Cal. Ct. App. 2020), *rev. denied*, 2020 Cal. LEXIS 7993 (Nov. 18, 2020); N.J. Mfrs. Ins. Grp. v. Amazon.com, Inc., No. 16-cv-9014, 2022 U.S. Dist. LEXIS 115826, at *22–23 (D. N.J. June 29, 2022). Other states have declined to consider Amazon as a "seller" under their respective statutes. *See, e.g.*, Amazon.com v. McMillan, 625 S.W.3d 101 (Tex. 2021); State Farm Co. v. Amazon.com, 835 F. App'x. 213 (9th Cir. 2020) (applying Arizona law); Stiner v. Amazon.com, 120 N.E.3d 885 (Ohio Ct. App. 2012), *aff'd*, 164 N.E.3d 394 (Ohio 2020).

[275] *See* Kilker, *supra* note 265, at 1343.

[276] *See* Ceci, *supra* note 1.

[277] *See* N.C. GEN. STAT. § 99B-1(3) (2023).

The *Lemmon v. Snap, Inc.* case has been described by some commentators as "a potentially paradigm-shifting moment for online platforms,"[278] and plaintiffs' lawyers seem to regard "Big Tech" as the next "Big Tobacco."[279] A number of legal observers have pointed out the fact that, since its inception, product liability has demanded a certain flexibility.[280] As one scholar commented:

> Products liability has been one of the most dynamic fields of law since the middle of the 20th century. In part, this is because the new technologies that emerged over this period have led courts to consider a continuing series of initially novel products liability questions. On the whole, the courts have generally proven quite capable of addressing these questions.[281]

The wave of efforts to "rein in" social media platforms legislatively have been joined by this onslaught (largely unsuccessful to date, as we have discussed) of lawsuits targeting these digital intermediaries through product liability suits, for their role in providing platforms for unwanted and/or harmful speech. Rather than attempting to treat these platforms and app developers as publishers, instead the litigation casts them as designers of dangerous, defective products. These artful pleadings seem intended to circumvent Section 230's protections, "justified" by the authoring lawyers' derision for Section 230 as protection for the industry. Yet in reality, Section 230 is effectively a protection for the First Amendment rights of users and needs to continue to be protected as digital communication continues to be central to American life. Although digital publishing tools may be misused to malignant ends, Section 230 immunity and an appreciation of platforms' importance to Americans' ability to exercise their free speech rights preclude redesign via product liability litigation as remedy.

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[278] Danny Barefoot et al., *Social Media Firms Navigate Product Liability Claims*, BLOOMBERG L. (Sept. 28, 2022, 4:00 AM), https://news.bloomberglaw.com/us-law-week/social-media-firms-navigate-product-liability-claims.

[279] Aleeza Furman, *TikTok's Algorithm Blamed for Girl's Death in 'Blackout Challenge' Stunt in Products Liability Lawsuit*, LEGAL INTELLIGENCER (May 13, 2022, 3:53 PM), https://www.law.com/thelegalintelligencer/2022/05/13/tiktoks-algorithm-blamed-for-girls-death-in-blackout-challenge-stunt-in-products-liability-lawsuit/.

[280] *See* John Villasenor, *Products Liability and Driverless Cars: Issues and Guiding Principles for Legislation*, BROOKINGS INST. (Apr. 24, 2014), https://www.brookings.edu/articles/products-liability-and-driverless-cars-issues-and-guiding-principles-for-legislation/.

[281] *Id.*