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# **Understanding Section 230 & the Impact of Litigation on Small Providers**

Elizabeth Banker  
VP, Legal Advocacy, Chamber of Progress

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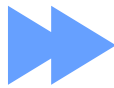
## Contact Us

—  
1390 Chain Bridge Rd. #A108  
McLean, VA 22101

[info@chamberofprogress.org](mailto:info@chamberofprogress.org)

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# 01.

# Executive Summary

Too much of the discussion of Section 230 focuses on cases involving a small number of large providers.<sup>1</sup> That only tells part of the story. This paper looks at how Section 230 has helped individuals, non-profits, and other small providers (collectively referred to as “small providers” throughout) maintain comments sections on local news sites, run websites on niche topics, and foster open discussion on the web.

### **Sometimes, even when small providers win, they lose.**

Take for example, the story of Allnurses.com: In 2014, a company offering test prep courses for nursing students sued an online forum called Allnurses.com (allnurses®) for allegedly defamatory posts from students discussing the merits of nursing test prep options.<sup>2</sup>

In 2020, after six years of litigation, the Eighth Circuit Court of Appeals affirmed Allnurses’s Section 230 immunity. Is this a victory? In a [blog post](#) announcing the Second Circuit decision, Allnurses.com wrote, “Even though we won (successfully defended) the case, this long and drawn-out meritless lawsuit has resulted in tremendous mental anguish and massive legal costs.”

[For more on this case see Allnurses.com Case Study →](#)

While this case and others like it didn’t generate congressional hearings or investigations by major news publishers, it was a significant event for the small provider involved and Section 230 played a critical role in allowing the company to maintain their services. Section 230 offers small providers confidence in a positive outcome if a suit – which is likely to be costly and could potentially take years to resolve – is filed. This makes it easier for small providers to resist litigation threats and lawsuits seeking to censor user content. For this reason, Section 230 is a vital tool for protecting and promoting some of the most important speech that happens online.

<sup>1</sup> 47 U.S.C. § 230; Engine Advocacy, [The Startup Agenda 2022](#), Introduction (January 31, 2022).

<sup>2</sup> *E. Coast Test Prep LLC v. Allnurses.com, Inc.*, 971 F.3d 747 (8th Cir. 2020). Several of the unidentified posters were also sued but were dismissed by district courts along the way. As discussed further in the case study, Allnurses defended the anonymity of its users in addition to mounting its own legal defense.

## Our key findings are:

### 1. Section 230 protects important speech made possible by small providers.

Reviewing even a small portion of Section 230 cases shows that activists, professional associations and unions, hobbyists, local newspapers, community blogs, regional ISPs, business review sites, anti-fraud and anti-scam services, and the individuals who create, manage, or own them are frequently sued over the speech of others. In short, anyone with a website, app, or forum that includes content from others relies on Section 230.<sup>3</sup>

The various forums offered by these types of organizations attract a significant amount of First Amendment-protected expression on issues of importance to their communities, whether the impact of potentially toxic waste being dumped in a nearby landfill or evidence of racism by police officers.<sup>4</sup> Unfortunately, politicians, public figures, and corporations have attempted to use lawsuits against providers to cut off legitimate, but unflattering, discourse.<sup>5</sup> These suits are destined to fail because of the First Amendment, but Section 230 still provides important benefits for small providers.

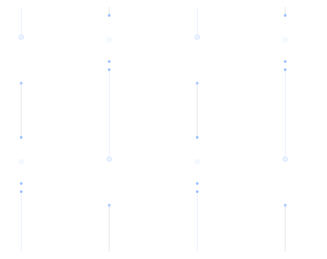
▶▶
**Small Entities & 230**

<p><b>Anti Spam &amp; Anti Fraud</b></p> <ul style="list-style-type: none"> <li>· Fraud-net.com</li> <li>· 800notes.com</li> </ul> <p><b>Search &amp; Knowledge Sharing</b></p> <ul style="list-style-type: none"> <li>· Leagle.com</li> <li>· Justicia</li> <li>· Pacermonitor</li> <li>· Urban Dictionary</li> <li>· Quora</li> <li>· Wikipedia</li> </ul>	<p><b>Online Services</b></p> <ul style="list-style-type: none"> <li>· Avvo</li> <li>· Glassdoor</li> <li>· WordPress</li> <li>· Angie's List</li> <li>· Topix.com</li> <li>· GiveForward.com</li> </ul> <p><b>Community Blogs, Newsletters</b></p> <ul style="list-style-type: none"> <li>· LiveJournal Forum</li> <li>· Lumberton Informer</li> <li>· Burnt Orange Report</li> <li>· Eye on Emerson</li> <li>· Conroe Texas Watchdog</li> <li>· LeHigh Valley Ramblings</li> <li>· Ibrattleboro.com</li> <li>· SByNews.blogspot.com</li> <li>· Pavillon.blog</li> </ul>	<p><b>Local Newspapers &amp; Other Publishing</b></p> <ul style="list-style-type: none"> <li>· Quadcities Online</li> <li>· Daily Herald</li> <li>· Independent Newspapers</li> <li>· Lee Enterprises</li> <li>· Floor 64/Techdirt</li> <li>· Maritime Executive</li> <li>· Maine Antique Digest</li> <li>· Worcester Telegram &amp; Gazette</li> </ul>
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<sup>3</sup> See, e.g., *Russell v. Implode-Explode Heavy Indus. Inc.*, Civil Action No. DKC 08-2468, at \*14 (D. Md. Sep. 18, 2013) (“websites” are interactive computer services and their owners are “providers” under Section 230); *Charles Novins, Esq., P.C. v. Cannon*, Civ. No. 09-5354, at \*4-5 (D.N.J. Apr. 27, 2010) (“The CDA is worded broadly enough to protect not only ISPs, but also individuals who operate websites and web forums to which other individuals can freely post content.”).

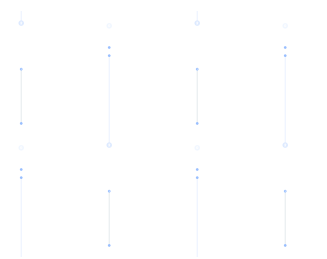
<sup>4</sup> *Green Group Holdings, LLC, et al. v. Schaeffer, et al.*, 2016 WL 6023841 (S.D. Ala. Oct. 13, 2016); *Pace v. Baker-White*, No. 20-1308 (3d Cir. Mar. 15, 2021), *reh'g denied* (April 13, 2021), *cert. denied*, No. 21-394 (Nov. 1, 2021).

<sup>5</sup> These lawsuits are further described in [Public Figures Suing Critics](#) and [Businesses Suing Critics](#).



The Internet has made way for little guys to be heard; unfortunately, little guys are still squashed by the big companies who have thousands of dollars to throw at legal fees all in an effort to stifle criticism. First amendment rights are fantastic in theory, but if the rubber doesn't meet the road in cases like ours, anyone who posts material on the internet ... is susceptible to losing everything they've worked for to frivolous lawsuits funded by deep pockets.

— Justin Owings, Founder, Mortgage Lender Implode-O-Meter, JustinOwings.com, April 15, 2009



## 2. Small providers rely on Section 230 to mitigate damage from litigation.

Litigation is devastating to a small provider, but Section 230 can mitigate damage by ending the lawsuit in an early stage of the case – limiting the heavy costs associated with litigation. The liability associated with lawsuits for small businesses with less than \$1 million in revenue is proportionately 10 times higher than the liability faced by businesses with more than \$50 million in revenue.<sup>6</sup>

Hard and soft costs stemming from litigation include fees for lawyers, lost business opportunities, inability to obtain funding through loans or venture capital, investment of time to respond to legal claims, and intense stress and worry.<sup>7</sup> And the longer litigation goes on, the higher the toll. Most defendants, regardless of how meritless the lawsuit, never recoup what they spent on their defense.<sup>8</sup>

Section 230's protection for small providers can be invoked in the early stages of a lawsuit, typically through a motion to dismiss the case. Courts have recognized the importance of reviewing whether Section 230 immunity applies early, because of the damage prolonged litigation inflicts.<sup>9</sup> This “procedural fast lane” aspect of Section 230 is frequently identified by both defendants and experts as one of its most crucial benefits.<sup>10</sup> This is especially true for small providers, because they usually cannot afford to litigate a full-blown case and may be forced to choose from unpalatable options such as paying a settlement, removing protected speech, turning over user identity information, or proceeding with a lawsuit knowing that the plaintiff has the funds to outlast them.<sup>11</sup>

## 3. Section 230's “procedural fast lane” has important economic benefits.

Without Section 230, it is likely that more small providers would be forced out of business by litigation costs. Even in an ideal scenario in which a defendant is successful in dismissing a case at an early stage, they've potentially spent \$100,000 they will never recover.<sup>12</sup> Cases that involve

<sup>6</sup> Institute for Legal Reform (“ILR”), [Tort Liability Costs for Small Businesses](#), at 3 (October 2020)(“ILR Report”).

<sup>7</sup> See, Small Business Administration (SBA), [Office of Advocacy, Impact of Litigation on Small Businesses—rs265](#), at ii, 15 (2005).

<sup>8</sup> See *supra*, [The Financial Costs of Litigation](#)(discussing how cost recovery works in the U.S.). See also, Engine Advocacy, [Primer: Value of 230](#) (2019)(noting that each party covers their own costs to litigation).

<sup>9</sup> See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1147 (9th Cir. 2008) (stating “section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles”).

<sup>10</sup> See, e.g., Eric Goldman, [Why Section 230 Is Better Than the First Amendment](#), at 29. Notre Dame Law Review, Vol. 95, No. 33, at 29 (2019); Jeff Hermes, [“Section 230 as Gatekeeper: When Is an Intermediary Liability Case Against a Digital Platform Ripe for Early Dismissal?”](#) *Litigation* 43, no. 3 (2017); Jessica Melugin, [Preserving Section 230 Is Key to Maintaining the Free and Open Internet: Innovation Beats Regulation in Content and Social Media Moderation](#), OnPoint No. 271 (June 23, 2021); Engine Advocacy, [Primer: Value of 230](#) (“Goldman, Why Section 230 is Better”).

<sup>11</sup> See, e.g., [Russell v. Krowne, Implode-Explode Heavy Indus. Inc.](#) (when defendants ran out of funds to pay outside counsel a default judgment was entered against them).

<sup>12</sup> See [Financial Costs of Litigation](#), *infra*, p. 17. Motions to strike under CA's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16 (2021), are similar to motions to dismiss and allow prevailing defendants to recover costs and thus provide a helpful point of reference on the costs associated with such motions. See, [CALIFORNIA ATTORNEY'S FEES: Cases: SLAPP: Recent Developments in California Anti-SLAPP Case Law, Summer 2021 - Gibson Dunn](#).

multiple motions, discovery, or appeals can easily run into hundreds of thousands of dollars or more in legal expenses.<sup>13</sup> Successful defendants are not entitled to recover their attorney's fees except in rare cases. While it's worth noting that cost data on individual cases is scarce, there's no doubt these costs are nontrivial for the average small business, not to mention other Section 230 defendants like individual hobbyists or nonprofit groups.

These costs can easily exceed the ability of an individual, nonprofit, or small business to pay. The tremendous cost of paying for a legal defense coupled with an uncertain outcome often leads defendants to settle lawsuits they would prefer to fight.<sup>14</sup> When settling is not a viable option, legal costs can have devastating impacts since most small entities do not have liability insurance. Individuals and entities may have to shut their operations, lay off employees, and spend years paying down legal bills.<sup>15</sup>

The risk of business-ending litigation also impacts the ability of startups to attract funding and the cost-benefit analysis for entities who want to offer an interactive forum but know it will not produce significant revenue. By providing certainty around liability and mitigating litigation costs, Section 230 has allowed the development of a rich, competitive range of options for those who want to share their thoughts with the world and connect with others.<sup>16</sup>

Without Section 230, the opportunities would narrow. Existing companies may find that new costs of doing business require changes to their business model. Startups may not attract venture funding. Small businesses may struggle to survive when sued and may have to choose between being bought or closing their doors. And the many organizations that today provide forums for online discussion as an adjunct to a business or without the intent to profit may close them down because the risk is too great.<sup>17</sup>

#### 4. Section 230's "procedural fast lane" has important speech benefits

Section 230's economic benefits also translate into speech-promoting benefits. Users have a diverse set of options for expressing themselves online, because of the economic effects of Section 230. Despite the sometimes steep costs associated with litigation we outline in this paper, thanks to Section 230, creators or moderators feel more comfortable forming interactive communities and keeping speech up even when threatened. Section 230 also helps small defendants get and stay online with the larger services they use for hosting, domains, connectivity, or social

<sup>13</sup> Engine Advocacy studied cost data by stage of litigation in its 2019 [Primer: Value of 230](#). In the rare instances where information is available from court records on the costs of defending a lawsuit, the numbers track the ranges that Engine provided in its [Primer](#).

<sup>14</sup> SBA, [Office of Advocacy, Impact of Litigation on Small Businesses—rs265](#), at 19-20.

<sup>15</sup> *Id.* at 20 (discussing examples of the impact of litigation costs).

<sup>16</sup> See, e.g., Jeff Koseff, A User's Guide to Section 230, and a Legislator's Guide to Amending It (or Not) (August 14, 2021), Berkeley Technology Law Journal, Vol. 37, No. 2, at 33 (2022), SSRN: <https://ssrn.com/abstract=3905347> (discussing the potential implications of uncertainty that would be created by rolling back Section 230 immunity).

<sup>17</sup> Even large businesses have closed interactive services, such as comments sections for newspapers, in response to potential liability. See, [Australia looks to revise laws after court rules publishers can be liable for defamatory comments](#), CNBC/Reuters (Oct. 7, 2021).

media presence, by protecting the underlying service providers from liability for the content posted on their customers' sites. Beneficiaries of these protections include small towns fighting against toxic waste being dumped near their homes and advocates against police brutality.

Section 230 allows speech to remain available even in the face of legal threats. Faced with the prospect of expensive litigation over someone else's speech, the rational choice for the operator of a forum will be to remove content rather than pay to defend it.<sup>18</sup> Section 230 limits the risk of protracted litigation and ultimate liability, making it easier for forum operators and any underlying service providers to leave content up.

A troubling number of Section 230 cases involving small providers revolve around First Amendment-protected speech.<sup>19</sup> A remarkable number of those providers stood firm against legal threats and lawsuits to defend their right to keep the speech of others online. Without Section 230, it would be far harder, and significantly more expensive, for small providers to stand their ground.

**5. Anti-SLAPP laws, when applicable, provide better outcomes for small providers, than Section 230 alone.**

Cases like [East Coast Test Prep v. Allnurses.com](#) show that even the simplest, most "prototypical" lawsuits can become long, drawn out, expensive nightmares for small providers.<sup>20</sup> The mistaken belief that Section 230 is a magical "get out of jail free card" that stops meritorious lawsuits in their tracks ignores the more complicated reality of Section 230 cases and how critical it can be to a small provider to escape a frivolous lawsuit quickly.<sup>21</sup> Strong anti-SLAPP (Strategic Lawsuits Against Public Participation) laws provide additional protections from meritless lawsuits that Section 230 lacks.

Anti-SLAPP statutes, much like Section 230, are designed to allow quick scrutiny of the merits of lawsuits. They are generally only applicable when a lawsuit targets expression on a matter of public interest. When they do apply, anti-SLAPP statutes have some additional benefits that Section 230 lacks, like cost recovery, stays of discovery, and simplified path for appellate review. Small provider defendants fared substantially better if an anti-SLAPP statute was available, including by receiving fees and costs if they successfully defended themselves.<sup>22</sup> Unfortunately, as many as 17 states still don't have anti-SLAPP laws, and those that do sometimes have laws that lack adequate protections.<sup>23</sup>

<sup>18</sup> Eric Goldman, [Why Section 230 is Better than the First Amendment](#), at 41.

<sup>19</sup> See *infra*, [Speech Benefits of Section 230](#).

<sup>20</sup> See *infra* [Case Study](#).

<sup>21</sup> It also treats it as though the lawsuits that Section 230 may block would have been successful in the absence of Section 230. A full exploration of the reasons why such an assumption is mistaken is outside the scope of this paper, but cases discussed in this paper demonstrate how flawed many are even without considering Section 230. For additional examples where Section 230 was asserted but the cases were dismissed on other grounds, see Internet Association, U.S. Department of Justice, Section 230 — Nurturing Innovation or Fostering Unaccountability, [Participant Written Submissions](#), at 3 (February 2020).

<sup>22</sup> Compare, *infra*, Case Study: [East Coast Test Prep v. Allnurses.com](#) with Case Study: [International PADI v. Diverlink.com](#).

<sup>23</sup> Anti-SLAPP Scorecard, [State Anti-SLAPP Laws — Public Participation Project](#).





## 2. Pass federal anti-SLAPP legislation

When small providers are targeted with legal threats and litigation involving user speech on matters of public interest, state anti-SLAPP laws are an important complement to Section 230. They can mitigate the expense of the early stages of litigation by limiting the legal work that needs to be done before a plaintiff's claims are subjected to scrutiny and provide fee recovery for small providers who are successful in having claims dismissed under the statute.

Currently, not every U.S. state or territory has an anti-SLAPP statute and not every state anti-SLAPP law provides the same level of protection against SLAPPs.<sup>25</sup> A federal anti-SLAPP statute should fill the gap and ensure a higher level of protection of First Amendment rights than the current patchwork. In addition, a federal anti-SLAPP law would ensure that small providers have adequate protection from meritless suits and a possibility of recovering the cost of their defense when they stand up for the speech of their users.<sup>26</sup>

## 3. Understand that changes to Section 230 for “big tech” will have unintended consequences for small providers too

A single small provider may use multiple large providers to operate their own service or forum. Many organizations maintain accounts and advertise across multiple social media and other services, in addition to relying on ISPs, domain name registrars, and hosting providers. A site may also fund itself by allowing a third party to run advertising on its pages. Changes to Section 230 that target larger providers while exempting “small providers” ignore the reality that small providers use larger providers, often many of them. Thus, the impact of new liability rules for large providers will inevitably flow to small providers, potentially making it more difficult and expensive to get online or resulting in platforms taking a more active role in moderating speech on their sites or services. Large providers' new rules could even eliminate the ability to use their platforms to discuss certain topics or to engage in certain activities. Small providers may also be forced to provide more identifying information, putting at risk the ability to engage on important issues anonymously.

## 4. Better understand what gives rise to liability to avoid encouraging meritless litigation

A number of the cases covered in this paper should never have been filed. Not only did the claims not meet the applicable legal standards, many of the suits targeted content that is affirmatively protected by the First Amendment.

Given how damaging litigation is to small providers, it would be devastating if Section 230 were weakened to allow more suits that may not have viable

<sup>25</sup> See, [State Anti-SLAPP Laws — Public Participation Project](#) (identifying 17 states/territories without an anti-SLAPP law and comparing provisions in the states that do have them).

<sup>26</sup> See, *infra*, [p. 27](#) (discussing anti-SLAPP laws).

underlying legal claims. Lawmakers and policymakers should ensure they are informed about the laws that apply to online providers in the absence of Section 230 and consider whether removing Section 230 will achieve their policy goal or simply invite more litigation and make it harder for defendants to end a lawsuit.

For example, several legislative proposals would create a Section 230 exception for civil lawsuits related to terrorist content without regard to the prospects of such cases being successful.<sup>27</sup> While a few cases made headlines when courts relied on Section 230 to dismiss claims,<sup>28</sup> the majority of cases were dismissed for failure to state viable legal claims unrelated to Section 230.<sup>29</sup> In short, Section 230 merely ended an otherwise doomed case early.

<sup>27</sup> See, e.g., [S.299 - 117th Congress](#) (2021-2022): SAFE TECH Act, S.299, 117th Cong. (2021).

<sup>28</sup> See, e.g., *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019); *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140 (E.D.N.Y. 2017) (applying Section 230 to *Force* plaintiffs claims, but finding that *Cohen* plaintiffs lacked standing to bring their claims).

<sup>29</sup> See, e.g., *Colon v. Twitter, Inc.*, No. 20-11283 (11th Cir. Sep. 27, 2021); *Retana v. Twitter, Inc.*, 1 F.4th 378 (5th Cir. 2021); *Crosby v. Twitter, Inc.*, 921 F.3d 617 (6th Cir. 2019); *Fields v. Twitter, Inc.*, 881 F.3d 739 (9th Cir. 2018); *Palmucci v. Twitter Inc.*, No. 18-cv-03947-WHO (N.D. Cal. Apr. 17, 2019); *Clayborn v. Twitter, Inc.*, No. 17-cv-06894-LB (N.D. Cal. Dec. 31, 2018); *Copeland v. Twitter, Inc.*, 352 F. Supp. 3d 965 (N.D. Cal. 2018); *Taamneh v. Twitter, Inc.*, 343 F. Supp. 3d 904 (N.D. Cal. 2018); *Cain v. Twitter Inc.*, Case No.17-cv-02506-JD (N.D. Cal. Sep. 24, 2018); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874 (N.D. Cal. 2017).

# 02.

# Introduction

In 2014, a company offering test prep courses for nursing students sued an online forum called Allnurses.com (Allnurses®) for allegedly defamatory posts from students discussing the merits of nursing test prep options.<sup>1</sup> In 2020, after six years of litigation, the Eighth Circuit Court of Appeals affirmed Allnurses's Section 230 immunity. Is this a victory? In a [blog post](#) announcing the Second Circuit decision, Allnurses.com wrote, “Even though we won (successfully defended) the case, this long and drawn-out meritless lawsuit has resulted in tremendous mental anguish and massive legal costs.”

For more on this case see [Allnurses.com Case Study](#) →

The *Allnurses* case shows that even the simplest, most “prototypical” Section 230 cases can become long, drawn out, expensive nightmares for small providers. A mistaken belief that Section 230 is a magical “get out of jail free card” that stops meritorious lawsuits in their tracks ignores the more complicated reality of Section 230 cases and how critical it can be to a small provider to get out of a frivolous lawsuit quickly.<sup>2</sup>

The purpose of this paper is to put a spotlight on the experience of small providers impacted by litigation by looking at it through the lens of actual cases.<sup>3</sup> By understanding how these cases proceeded, were ultimately resolved, and the hard and soft costs associated with them, the importance of Section 230 and anti-SLAPP laws becomes clear and the need for a federal anti-SLAPP law is evident.<sup>4</sup>

Policymakers should carefully evaluate the impact of Section 230 reform proposals on the people and small businesses whose livelihoods, public interest activities, and passion projects are most at risk from any erosion of its protections.

***“Section 230 of the Communications Decency Act is the rock on which all websites that deal in user generated content are built—they would not exist if people could sue companies for whatever their users put online.”***

↑ Engine, [Startup Agenda 2021](#), at 5 (quoting John Pettus, Founder & CEO of Fiskkit).

1 *E. Coast Test Prep LLC v. Allnurses.com, Inc.*, 971 F.3d 747 (8th Cir. 2020). Several of the unidentified posters were also sued but were dismissed by district courts along the way. As discussed further in the case study, Allnurses defended the anonymity of its users in addition to mounting its own legal defense. See [Case Study: East Coast Test Prep v. Allnurses.com](#).

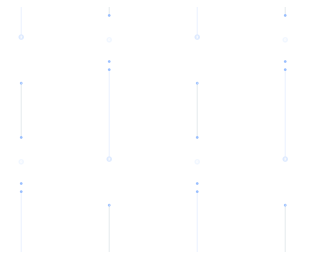
2 This treatment also assumes that lawsuits that Section 230 may block would have been successful in the absence of Section 230. See *supra* Executive Summary p. 7. A full exploration of the reasons why such an assumption is flawed is outside the scope of this paper, but many cases discussed demonstrate how weak the merits of many Section 230 cases are putting aside provider immunity.

3 Many of the reasons why Section 230 is so important to small providers have been ably discussed by academics, think tanks, and other experts. We hope to expand on their work by taking a close look at what has happened in specific instances where small providers have been sued.

4 Anti-SLAPP statutes recognize the importance of ending litigation early when it seeks to censor First Amendment protected expression. See, *infra*, p. 27. This paper began by looking exclusively at the role Section 230 plays in cases involving small providers. However, reviewing cases it became very clear that providers who were able to rely on a state anti-SLAPP law often fared better than those who relied on Section 230 alone. Compare, *infra*, [Case Study: East Coast Test Prep v. Allnurses.com](#) with [Case Study: International PADI v. Diverlink.com](#).

**03.**

# **The Impact of Litigation on Small Providers**



"The burdens of the tort system vary significantly across firms of different sizes, and the smallest businesses have disproportionately higher costs. The tort liability per thousand dollars in revenue (price of tort liability) for companies with under \$1 million in annual revenue is more than 10 times larger than that of companies with over \$50 million in annual revenue."

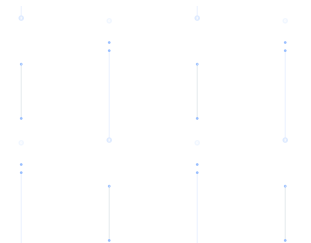
— Institute for Legal Reform, [Tort Liability Costs for Small Businesses](#), at 3.

"[T]he results [of the lawsuit] were devastating to the company. The price of defending the speech in question, which included a related user comment, was lost time and money, lost sleep for the company's principal and editor, lost opportunity to further develop the company's business, and a general chilling of the company's expressive activities. And that was just one lawsuit that still resulted in protected expression remaining online."

— Copia Institute, [Brief of Amicus Curiae, NetChoice v. State of Florida](#), at 16-17 (internal citations omitted) ("Copia Amicus Brief").

"A small business owner is likely to be extensively involved in all of his or her company's litigation as investigator, witness, custodian of documents, contact person with attorneys and many other roles. The time the owner spends is time taken away from running the business and such lost time can have devastating consequences."

— SBA, [Impact of Litigation on Small Business](#) at 3.



Small businesses bear the brunt of civil litigation in the U.S., and their litigation costs represent a far greater percentage of operating costs than those of larger companies.<sup>5</sup> Statistics focus primarily on measuring the "hard costs" of litigation such as attorney's fees, discovery, and other litigation expenses, but litigation also comes with an array of "soft costs," and these costs impact small businesses disproportionately more than large corporations.

Most small businesses or individuals experience a lawsuit filed against them as an existential threat with profound emotional, financial, and opportunity costs.<sup>6</sup> It may create worry about losing one's livelihood and the ability to provide for dependents or continue to pay employees. Small providers and individuals may be faced with hard choices like whether to get a second mortgage or dip into savings to pay legal bills. Even getting a loan may be difficult, because being a party to a lawsuit must be disclosed on personal and business loan applications and may result in a loan being denied due to concerns about the ability to repay.<sup>7</sup> A small business owner or individual has to worry not just about funding a defense to a lawsuit, but also the risk of a damage award against them which could put assets like a home, cars, children's college funds, and other savings accounts at risk.<sup>8</sup>

While defending a lawsuit, a business also misses out on important opportunities such as expanding the business; purchasing needed infrastructure; and attracting investment, new clients, employees, or partnerships with other organizations.<sup>9</sup> Defending the suit will also take a significant amount of time consulting with lawyers, appearing in court, and gathering information<sup>10</sup>—distracting from the business as well as from family and other obligations.<sup>11</sup> In other words, at the time when the business needs revenue and leadership the most, they may be the most scarce.

Most small businesses are uninsured, because liability insurance isn't a realistic option.<sup>12</sup> Beyond an initial price tag that may be out of reach for small providers, insurance is likely to have a high deductible that needs to be paid out of pocket (in addition to premiums) before insurance coverage will apply. Even with insurance, there is a risk the insurance carrier may dispute a specific claim if, for example, it was improperly tendered.<sup>13</sup> And finally, if the business has already been sued once, getting insurance may prove impossible or the terms may be so bad that it is almost like not being covered by insurance at all.<sup>14</sup>

5 Institute for Legal Reform ("ILR"), [Tort Liability Costs for Small Businesses](#), at 3 (October 2020) ("ILR Report").

6 See, Small Business Administration (SBA), [Office of Advocacy, Impact of Litigation on Small Businesses—rs265](#), at ii, 15 (2005) ("SBA, Impact of Litigation").

7 See, e.g., Sapling, [Can a Buyer Involved in a Lawsuit Get a Mortgage?](#).

8 Once a plaintiff has a judgment, they may be able to garnish your bank account, seize assets, put liens on your real estate, and more. See, e.g., [Lawsuits And Judgments For Each Business Structure](#); SBA, [Impact of Litigation](#), at 13 (providing example of business owner who took a loan against her house to pay a settlement). See also, *O'Hare v. Mezzacappa*, [Civil Action No. 15-1625](#) (E.D. Pa. June 8, 2015) (plaintiff sued the mother of a defendant who transferred ownership of her home to her mother to avoid paying the \$67,000 judgment against her).

9 SBA, [Impact of Litigation](#), at 15 (Identifying litigation costs to small business as including, "Publicity (article in the paper, word of mouth) about the problems or specific litigation, inattention of the owner, confusion in the marketplace as to the status of the company and a loss of reputation with current and potential customers generates concern among ongoing and potential clients").

10 See, e.g., John Marcson, operator of the online forum eLightbars, said in a [blog post](#) about his case, "This [lawsuit] has impacted both my time and funds, and been a major factor during the months it spanned."

11 SBA, [Impact of Litigation](#), at 2 ("Litigation is significant for small businesses because of the lack of infrastructure required to handle such diversions from daily operations"). See also, *id.* at 12 (explaining reasons why a business owner made need to devote time to their defense, including using internal resources rather than law firm resources to perform certain tasks to reduce cost and the need to ensure counsel are adequately informed about the details of the business).

12 *Id.*, at 3.

13 See, e.g., Erica Villanueva, [Tendering Your Claim](#) (Feb. 10, 2012) (explaining how to avoid disputes with insurers by properly tendering a claim).

14 Monika Bauerlein, [The Legal War Against Mother Jones Keeps Getting More Intense – Mother Jones](#) (November 2, 2021).



"After VanderSloot, we went to renew our libel insurance, which pays for us to defend ourselves in case someone comes after us. 41 of the 42 companies in the business turned us down. The 42nd one offered us a policy, but it cost a fortune and had a high deductible. We took it. And now, we are on the hook for that deductible every time we get sued. In total, our legal costs over the past two and a half years have approached \$400,000, not including the cost of insurance. The Covington case alone has cost \$150,000."

— [Monika Bauerlein, \*The Legal War Against Mother Jones Keeps Getting More Intense – Mother Jones\*](#) (November 2, 2021).

"If startups are distracted from these core activities by the possible existential threat of frivolous litigation or uncertainty due to policy debates playing out in Washington or state capitals, the capital allocated to them is further diluted. Startup funding is pulled in so many directions, and even tweaks around the edges of policies could have a substantial impact."

— [Engine Advocacy, \*The State of the Startup Ecosystem\*](#), at 19 (April 2021).



Startups are particularly vulnerable to litigation for several reasons. Like other small businesses, they often lack the internal structure and staffing to respond to complaints and legal threats. Litigation itself may impact their ability to obtain necessary funding to continue to build out their capacity, add employees, or continue operating in the face of a lawsuit.<sup>15</sup> As one startup founder put it,

*"Starting a business is hard enough without baseless lawsuits, so some startups have folded under the weight of frivolous lawsuits... I feel like I've had to become a lawyer. It's a huge waste of time. I just want to build things."*<sup>16</sup>

↳ Todd Moore, founder of 3-person app development startup

More broadly, research has found correlations between intermediary liability protections and venture capital funding, as well as between intermediary liability protections and success rates for startups.<sup>17</sup>

In contrast, larger enterprises are less impacted by lawsuits.<sup>18</sup> The company may already have: 1) lawyers ready to deal with lawsuits (allowing the business to continue with minimal disruption);<sup>19</sup> 2) insurance coverage that can offset the cost of a defense, a settlement, or a damage award;<sup>20</sup> and 3) sufficient revenue and cash reserves such that most cases are viewed as a cost of doing business rather than a cataclysmic event.<sup>21</sup>

<sup>15</sup> See, e.g., Jahna Berry, [San Francisco startup Homejoy will shut down amid funding challenges, independent contractor lawsuits](#) - *San Francisco Business Times*, July 17, 2015.

<sup>16</sup> Consumer Electronics Association, [Patent trolls are forcing startups to shut down – you can help stop them!](#) *VentureBeat* (quoting Todd Moore founder of 3-person app development startup).

<sup>17</sup> See, Michael Masnick, Copia Institute, [Don't Shoot the Message Board](#) (June 2019).

<sup>18</sup> Engine Advocacy, [Startup Ecosystem](#), at 17 (noting that larger companies are better equipped to handle regulatory requirements and litigation).

<sup>19</sup> Cf., SBA, [Impact of Litigation](#), at 11 (noting that none of the small businesses in their study had in-house counsel at the time of the study).

<sup>20</sup> "[S]mall businesses typically can only protect themselves...by purchasing liability insurance. However, many small businesses either find that the cost of insurance is too great or fail to appreciate the level of risk they are assuming, and choose to be uninsured." *ILR Report*, at 15.

<sup>21</sup> "Larger companies often have a number of tools that small businesses do not when it comes to the tort system, typically including more robust financial reserves and more flexibility in choosing how to manage litigation risk." *ILR Report*, at 15. See, also, Gregory Myers, (2012) "[When the Small Business Litigant cannot Afford to Lose \(Or Win\): Litigation Consequences for Small Businesses, Strategies for Managing Costs, and Recommendations for Courts and Policymakers](#)," *William Mitchell Law Review*: Vol. 39: Iss. 1, Article 8, at 41 (noting differences in preparedness for litigation between large and small businesses) ("Myers").



**04.**

# **The Financial Cost of Litigation**

The American civil litigation system offers few opportunities for a small provider targeted by a frivolous lawsuit to recoup their costs. The general rule is that each party bears their own costs, including attorney's fees.<sup>22</sup> Specific laws may alter the rule through fee shifting, which may require the losing party to pay the prevailing party's reasonable fees and expenses.<sup>23</sup> At the state level, anti-SLAPP statutes may grant prevailing defendants their fees. Absent a fee shifting provision, a successful defendant's only avenue to recover their costs is to incur further expense by filing a new suit against the plaintiff that brought the original lawsuit.<sup>24</sup> Given the additional financial outlay, burdens of litigation, and uncertain outcome, successful defendants may not consider this a palatable option.<sup>25</sup> Additionally, it is important to note that even when a party receives an order from the court granting their attorney's fees and expenses, it is unlikely to cover the actual financial cost of their defense, assuming they can ever collect.

Fee awards are usually limited to "reasonable" attorney's fees and expenses.<sup>26</sup> Thus, courts have a substantial amount of discretion as to the dollar amount awarded. The process for determining the amount of the award may vary, but may include factors that result in discounts to the actual cost, such as:<sup>27</sup>

1. **Prevailing market rate:** The "prevailing market rate" is an average hourly rate for lawyers in a particular area of similar experience, which is often less than the actual hourly rate a defendant is charged. For example, in [Spreadbury v. Bitterroot Public Library](#), the defense attorney requested attorney's fees based on a rate of \$165 per hour when his rate was \$225 per hour.
2. **Time spent:** Courts will only award fees for a reasonable amount of time put into litigating the case. Before submitting detailed time sheets to a court, the lead attorney will often remove time entries that are not likely to meet the court's requirements. The judge can also adjust the time spent based on its view of how much time a task may take. In *Higher Balance Group v. Quantum Future LLC*, the judge found the hours submitted by counsel excessive and substantially reduced the hours for the final award of \$51,550 (the original request was for \$135,000).<sup>28</sup>
3. **Expenses:** Expenses, or costs other than attorney's fees, must also be reasonable. For example, in *Allnurses.com*, the court determined that [Allnurses](#) was entitled to reasonable expenses associated with discovery. Allnurses requested \$130,000 for costs incurred with voluminous electronic records. The court awarded Allnurses \$18,000 because it believed that they could have found a more cost-effective way of meeting the discovery requirements.

"This specific case was decided by existing case law early in the process by a summary judgement. [sic] This action officially began in November 2014. I was dealing with it prior to that out of the courts as well. So, at this time I am considering the costs to the site to date, the site budget moving forward, the chances of recovering damages and what the site stands to gain."

— John Marcson, Announcement, [eLightbars Blog](#) (June 25, 2016).

<sup>22</sup> See, Congressional Research Service, [Awards of Attorneys' Fees by Federal Courts and Federal Agencies](#), at 41-42 (discussing fee recovery in federal cases).

<sup>23</sup> See, e.g., the Copyright Act, Remedies for Infringement: Costs and Attorney's Fees, 17 U.S. Code § 505 (allowing courts to award cost to the prevailing party).

<sup>24</sup> The appropriate claim will vary by jurisdiction. Oregon, for example, has a statute for Wrongful Use of Civil Proceedings. [ORS § 31.230](#).

<sup>25</sup> See, e.g., John Marcson, Announcement, [eLightbars Blog](#) (June 25, 2016)(explaining why he would not file a suit to recover the costs of successfully defending a lawsuit).

<sup>26</sup> Michale Kao, [Calculating Lawyers' Fees: Theory and Reality](#), 51 UCLA Law Rev. 825, 828 (2004).

<sup>27</sup> *Id.* at 832.

<sup>28</sup> Case 3:08-cv-00233-HA, ECF [No. 76](#) (D. Or. June 18, 2009).

**4. Equitable considerations:** The court may further adjust fee awards based on other considerations, such as evidence of bad faith or inability of the plaintiff to pay. For example, the fees awarded in *Choyce v. San Francisco Independent Media*, see figure 1 below, under the Copyright Act were influenced by the court's perception of bad faith on the part of the plaintiff.

The chart below uses figures from court records, including submissions to the court requesting fees and expenses, and the resulting court decisions. For the reasons noted above, fee requests to courts are usually discounted already and are frequently further discounted by the court. For these reasons, the available court documents only help give insight to the **minimum** amount the prevailing defendant spent defending the suit.

In some cases, the numbers below only represent one part of the litigation. For example, awards based on anti-SLAPP laws only cover the costs of a case through a successful motion to strike the complaint and only apply to work done to prepare the parts of the motion covering claims that were struck by the court. The final variable that determines how much of the cost a defendant may recoup is whether after the court issues its order, the plaintiff actually pays it. Several of the awards listed below have yet to be collected.<sup>29</sup>

"Civil litigation is notoriously expensive.... Simply responding to demand letters can cost companies thousands of dollars in lawyer fees, not to mention any obligations to preserve documents the letter might trigger, which themselves impose non-trivial costs, especially for smaller companies without the infrastructure larger companies may have to manage them. Id. And if these cases somehow manage to go forward, the costs threaten to be even more ruinous. A motion to dismiss can easily cost in the tens of thousands of dollars. Id. But at least if the company can get out of the case at that stage they will be spared the even more exorbitant costs of discovery, or, worse, trial."

— *Copia Amicus Brief*, at 17-18.

Figure 1

## Costs of Defending a Lawsuit

Case	Basis for Fee Award	Attorney's Fees, Expenses, & Costs		Other cost information
		Requested	Granted	
<a href="#">International PADI v. Diverlink.com</a>	Anti-SLAPP	\$195,183	\$177,325	
	Appeal	\$183,000		
Browne v. Avvo				\$134,000 <sup>30</sup>
<a href="#">Monsarrat v. Newman</a>	Copyright Act	\$58,000	\$29,000	
<a href="#">Hamad v. Center for...</a>	Fee award as sanction for appeal		\$32,000	
<a href="#">Hamad v. Center for...</a>	Costs of defending an unsuccessful sanctions motion (per defendant)	\$12,915	\$12,915	
		\$18,401.93	\$18,401.93	
		\$19,524	\$19,524	
<a href="#">Despot v. Balt. Life</a>	Title VII		\$42,000	
<a href="#">Higher Balance v. Quantum Future</a>	Anti-SLAPP	\$135,000	\$51,550	
<a href="#">Eade v. Investorhub.com</a>	Anti-SLAPP	\$72,000	\$49,000	
<a href="#">Cruz v. Van Sickle</a>				
→ Van Sickle	Anti-SLAPP		\$32,000	
→ Burnt Orange Report	Anti-SLAPP	\$158,000	\$0 <sup>31</sup>	

<sup>29</sup> See, e.g., *Monsarrat v. Newman*, *Stipulation of Parties Regarding Attorneys' Fees*, Case 1:20-cv-10810-RGS, ECF No. 42 (D. Mass. March 25, 2021); *Eade v. Investorhub.com*, *Case No. 2:11-cv-013115* (C.D. Cal. filed Feb. 11, 2011) (Defendants have spent more time trying to collect their fee award, now 11 years, than defending the case).

<sup>30</sup> This figure is from *litigation* Avvo brought against their insurer who declined to pay their claim for costs of defending the suit. *Avvo Inc. v. Westchester Fire Insurance Company*, *Case No. 2:2008cv01597* (W.D. Wash. filed Oct. 30, 2008).

<sup>31</sup> A law firm represented the Burnt Orange Report on a pro bono basis and the court declined to award fees because BOR did not "incur" any costs. *Cruz v. Van Sickle*, 452 SW 3d 503, 523-24 (TX Ct. App. 2014). *But see International PADI v. Diverlink* where court allowed attorney fee award for pro bono counsel under the California anti-SLAPP statute.

Case	Basis for Fee Award	Attorney's Fees, Expenses, & Costs		Other cost information
		Requested	Granted	
<u><a href="#">Choyce v. SF Independent Media</a></u>				
→ Indybay, Inc.	Copyright Act		\$108,000	
→ Layer42	Anti-SLAPP	\$29,000	\$73,350 <sup>32</sup>	
	Copyright Act	\$55,000		
		\$30,000		
Nieman v. Versuslaw				\$50,000 <sup>33</sup>
<u><a href="#">Joude v. WordPress</a></u>	SPEECH Act	\$13,000	\$0	
<u><a href="#">East Coast Test Prep v. Allnurses</a></u>	Discovery Costs at District Court	\$133,000 <sup>34</sup>	\$17,580	
<u><a href="#">Spreadbury v. Bitterroot Public Library</a></u>	Fee award for defense of Motion to Compel	\$3,800	\$2,800	
Loan Center of California v. Krowne				\$40,000 <sup>35</sup>

<sup>32</sup> *Choyce v. SF Bay Area Independent Media Center*, No. 3:13-cv-01842, [Abstract of Judgment](#), ECF No. 93 (N.D. Cal Jan. 26, 2017).

<sup>33</sup> Figure is from a [lawsuit by Versuslaw's counsel](#) against the company to recover unpaid fees.

<sup>34</sup> This figure is for discovery costs only. *E. Coast Test Prep, LLC v. Allnurses.Com, Inc.*, Civil No. 15-3705 (JRT/ECW) (D. Minn. Apr. 4, 2019).

<sup>35</sup> As reported by defendant ML-Implode on its blog: [LCC vs. ML-Implode Lawsuit Over](#) (Dec. 30, 2007). According to the blog posts on the case, the costs included filing an anti-SLAPP motion and resisting efforts to identify an anonymous user. The case was settled by the parties with no financial payments.

**05.**  
**Defending  
Frivolous Suits Is  
an Uphill Battle**

## I System Design

There are certain aspects of our judicial system that can prolong litigation, making it more costly, stressful, and even more likely that an innocent defendant will never be made whole. To be clear this is an observation—not a normative judgment—drawn from cases reviewed for this paper. The right to “have your day in court,” also known as due process, is enshrined in the Bill of Rights.<sup>36</sup> While due process rights do not literally, “entitle every civil litigant to a hearing on the merits in every case,”<sup>37</sup> courts carefully consider the impact of procedural decisions that may limit due process rights. Thus, while state and federal courts may have tools at their disposal to counter the harmful effects of frivolous suits and/or harassing litigation tactics, those tools allow courts considerable discretion over when and to what extent such steps are taken. Given the significance of the constitutional rights at stake, courts may be reluctant to take actions that limit access to the judicial process.<sup>38</sup> Many of the cases reviewed for this paper provide examples of how reluctance to take action against a plaintiff can substantially increase the duration, impact, and cost of litigation for a defendant.<sup>39</sup>

### The following aspects of civil litigation can draw out proceedings:

- 1. Right to Amend:** After a case is filed, the plaintiff is able to make changes to the lawsuit by amending their complaint.<sup>40</sup> This can happen early in the litigation, or after a significant event like the court granting a motion to dismiss the complaint. Courts frequently assist plaintiffs by identifying the shortcomings of the complaint when granting a motion to dismiss, so that they may be more successful on their amended complaint. While generally viewed as being in the interest of justice, multiple amendments of a complaint can also prolong and increase the expense of litigation, particularly when it requires the defendant to file multiple motions to dismiss. Defendants generally need to respond each time a complaint is amended, adding significant expenses for re-writing and arguing motions to dismiss.
- 2. Pro Se Litigants:** Individuals can file and participate in litigation without hiring a lawyer. This important aspect of the justice system allows individuals at all levels of income to have access to the courts. Given that non-lawyers may not be familiar with the requirements of legal proceedings, they are afforded a certain amount of latitude, including for filing a complaint that states a sufficient legal claim.<sup>41</sup>

<sup>36</sup> See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982)(citing to the Fifth Amendment due process clause and the Fourteenth Amendment due process clause as prohibiting federal and state governments, respectively, from denying an individual an opportunity to be heard on their claimed rights).

<sup>37</sup> *Id.* at 437.

<sup>38</sup> *Albert v. YouTube, LLC*, No. 15-cv-05283 NC, at \*1 (N.D. Cal. Dec. 4, 2015)(“In those rare instances when parties attempt to use the court system for improper purposes, judges have a responsibility to stop it while at the same time always respecting the rights of parties to pursue legitimate claims”).

<sup>39</sup> See also, Myers, at 151 (describing how “an opponent’s tactics can drive up costs”).

<sup>40</sup> A plaintiff may amend a complaint any time before the defendant answers or files a responsive pleading. In addition, a plaintiff may ask the court for permission to amend later in the proceedings. Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that a party shall be given leave to amend “when justice so requires.” Nevertheless, “[l]eave to amend, though liberally granted, may properly be denied for: ‘undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.’” *Estes v. Toyota Fin. Serv.*, No. 14-CV-1300 (JFB)(SIL), at \*6-7 (E.D.N.Y. June 22, 2015)(quoting *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008)).

<sup>41</sup> “Pro se pleadings must be liberally construed. Leave to amend is liberally granted to pro se litigants unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.” *Albert v. YouTube, LLC*, No. 15-cv-05283 NC, at \*1 (N.D. Cal. Dec. 4, 2015)(internal citations and quotations omitted).

A federal court in Florida recently discussed the challenge for judges when savvy pro se plaintiffs seek to use this latitude to their advantage:

*On one hand, courts must be open and available to all, including those who choose to represent themselves, and the law directs that pro se filings are to be liberally construed and “held to less stringent standards than formal pleadings drafted by lawyers.” On the other hand, some experienced and savvy pro se litigants, proceeding in bad faith, understand this directive and attempt to exploit it to their advantage.*

↑ Ho v. Warren, 8:21-cv-2621-TPB-CPT, at \*1-2 (M.D. Fla. Nov. 23, 2021).

*If judges allow the court system to be weaponized by any party for improper purposes, the public is not well-served. The results are disastrous and unfair to the parties and to the court system itself. Judicial time and resources are wasted responding to phone calls, e-mails, letters, and voluminous pleadings and filings of various sorts. These resources are, of course, diverted from legitimate, meritorious claims. But perhaps more importantly, parties defending claims brought by a pro se vexatious litigant are penalized because they are required to expend their own time and resources they can never get back even if the case is eventually dismissed, and they have no possibility of ever being compensated for their losses because the pro se litigant is judgment-proof. In this way, the vexatious litigant always wins - even if he “loses” his case.*

↑ Ho v. Warren, 8:21-cv-2621-TPB-CPT, at \*5 (M.D. Fla. Nov. 23, 2021).

Many of the cases discussed in this paper, including the *Hamad* case referenced above, involved pro se litigants that, whether purposefully or not, engaged in practices that increased the amount of work associated with litigation, extending the length and cost of the cases to the parties and the judicial system.

**3. Appeals:** Civil litigants generally have the right to appeal adverse rulings, at the appropriate time and on appropriate grounds.<sup>42</sup> It is an unavoidable consequence that appeals result in additional expense and prolonged litigation for the prevailing party at the district court level.<sup>43</sup> The Ninth Circuit Court of Appeals estimates that a civil appeal [takes 12-20 months](#) from the date the notice of appeal is filed until a decision is issued. The respondent in an appeal must continually balance the risks of not opposing or replying to a filing against the cost savings of not responding. Even if the appeal lacks merit, the court could view the absence of response as lack of opposition, waiver, default, or even consent to the contents of the filing. See *Griffith v. Wall* for an example where a prevailing defendant was forced to appeal a ruling entered after he failed to oppose a groundless appeal.<sup>44</sup>

<sup>42</sup> American Bar Association, [How Courts Work](#), Appeals (November 28, 2021).

<sup>43</sup> The Federal Rules of Appellate Procedure’s Rule 39 provides costs to the prevailing party in an appeal. However, the costs that can be recovered are strictly limited by the rules of individual federal courts of appeal and exclude attorney fees. Recoverable costs include filing fees and copying briefs. Since this is not a significant source of cost recovery, it is not discussed further. A somewhat dated but helpful report by the Federal Judicial Center shows average costs awarded under Rule 39 by Circuit generally range from a couple hundred dollars to a couple of thousand dollars. [Comparative Study of the Taxation of Costs in the Circuit Courts of Appeals Under Rule 39 of the Federal Rules of Appellate Proc](#) (2011).

<sup>44</sup> Compare to [Pace v. Baker-White](#), where Baker-White who was a lawyer represented by counsel, was more successful in picking and choosing when to file, allowing her to defend her win at the district court level while controlling the costs of responding to Pace’s continued appeals. For example, she chose to file a petition for cross-appeal, but elected not to oppose Pace’s requests for reconsideration, rehearing en banc, and Supreme Court review. See *infra* [p. 48](#).

[\*Hamad v. the Center for the Study of Popular Culture\*](#) is a case that shows each of these dynamics at work. Hamad was an experienced pro se plaintiff who repeatedly amended his complaint without the permission of the court. Dotster, a domain name registrar, was named for the first time in Hamad's fifth amended complaint which was filed after the court had already ordered Hamad to dismiss the case.<sup>45</sup> Hamad also filed numerous motions after the court ordered him to dismiss the lawsuit. He incurred a \$3,000 sanction for failing to dismiss the case, but parties still needed to respond to his motions for another six months. Dotster filed a motion to dismiss and defended itself in Hamad's appeal.<sup>46</sup> Despite being sanctioned by the district court for the frivolousness of the lawsuit, Hamad was able to appeal and that [appeal extended](#) the case an additional 15 months.

Courts have tools for addressing abuse of the litigation process, such as imposing financial or other sanctions on parties or their attorneys under the applicable rules of civil procedure, specific statutes, or the inherent authority of the court. In addition, attorneys may also face discipline for professional misconduct under the rules of their state bar. However, because of the potential to chill advocacy by parties seeking redress of harms through the courts, there is a high bar for when the sanctions can be applied.<sup>47</sup> One study of data estimates that 74 percent of requests for sanctions are denied.<sup>48</sup>

Figure 2

## Examples of Sanctions Awards

Case	Basis for Sanctions	Amount Awarded
Joyner v. Lazzareschi	Discovery violations	\$1,900
Eade v. Investorhub.com	Non-compliance with court orders	\$2,500
Hamad v. Center for...	Non-compliance with court orders	\$12,000 <sup>49</sup>

<sup>45</sup> See [Motion filed by Appellee Dotster Inc for sanctions against appellant Riad Hamad](#), *Hamad v. Ctr for the Study*, 07-50165, No. 0050262826, at 4-5 (5th Cir. Jun. 11, 2007).

<sup>46</sup> *Id.*

<sup>47</sup> For example, courts have held that "Federal Rules of Civil Procedure Rule 11 is violated only when it is 'patently clear that a claim has absolutely no chance of success.'" *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986). The Ninth Circuit has stated that imposing pre-filing restrictions on a vexatious litigant is "an extreme remedy that should rarely be used" and set a four part test for considering such an order. *De Long v. Hennessey*, 912 F.2d 1144, 1147 (9th Cir. 1990). See, also, *Brooke v. IA Lodging Santa Clara LLC*, No. 19-cv-07558-NC, at \*7 (N.D. Cal. July 8, 2020). The federal statute 28 U.S.C. § 1927 only allows sanctions against a lawyer that "unreasonably and vexatiously multiplies the proceedings." A court's inherent authority to award legal fees as a sanction is limited only to bad-faith conduct and only to the fees incurred as a result of the bad faith conduct. *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178 (2017).

<sup>48</sup> Finnegan, [Trends in Attorney Fees and Sanctions Decisions in 2020 Q4 | Articles | Finnegan | Leading Intellectual Property Law Firm](#) (2021).

<sup>49</sup> This is an aggregate amount of the sanctions the court imposed per defendant that had to respond to Hamad's unwarranted motions. See [Hamad](#), ECF No. 124.



**06.**

**The Importance of  
Ending Frivolous  
Litigation Early &  
Section 230**

## Economic benefits of Section 230

“Justice delayed is justice denied.”

↑ Myers, at 144.

Section 230’s “procedural fast lane” is critical to keep existing small providers active and to encourage new entrants to the market by mitigating the risk of business ending litigation.

From a practical standpoint, it is easy to understand that the longer a case goes on, the more expensive it becomes.<sup>50</sup> The more hours lawyers work, the higher their bills become. But for small providers, litigation that drags out also means prolonged stress and uncertainty, stretching to meet bills over a longer period of time, and continued demands to work on the litigation rather than their products and services. A single case can easily create a financial burden big enough to shutter a provider for good.<sup>51</sup>

Without Section 230, it is likely that more small providers would be forced out of business by litigation costs.<sup>52</sup> There is very little hard data on how much it costs for a small provider to defend themselves in litigation. Successful defendants are not entitled to recover their attorney’s fees and other expenses except in rare cases, so cost data is not widely available. Where it is available, it suggests that it is not uncommon for defendants that are successful in having a case dismissed in its early stages to incur over \$100,000 in legal fees and expenses.<sup>53</sup> Cases that involve multiple motions, discovery, or appeals easily run into hundreds of thousands of dollars or more in legal expenses.<sup>54</sup>

These costs can easily exceed the ability of an individual, nonprofit, or small business to pay. The tremendous cost of paying for a legal defense coupled with an uncertain outcome often leads defendants to settle lawsuits they would prefer to fight. When settling is not a viable option, legal costs can have devastating impacts since most small entities do not have liability insurance. Individuals and entities may have to shut their operations, lay off employees, and spend years paying down legal bills.

“Having Section 230 deter these lawsuits outright, or at least help companies get out of them relatively inexpensively, helps ensure that a company won’t die a ‘death by ten thousand duck-bites.’”

— [Copia Amicus Brief](#), P. 18 (quoting [Fair Housing Coun. Of San Fernando Valley v. Roommates.com](#), 521 F.3d 1157, 1174 (9th Cir. 2008)).

“If the decision is to make the motion [to dismiss] and the strategy is successful, the business will foreclose months of future legal costs in addition to winning the claim. But as every lawyer knows, confidence in the facts and the law can be misplaced. And if the small business’s motion is denied, it has spent money it will not get back, and will never see an advantage. The process might even inflict its own harm, win or lose, if the court takes several months to decide the claim, and if all the while the business has to forego receiving its payment or incurs litigation costs or damage to its reputation in the meantime. Or, if the business can dismiss only one or two of several claims, such limited success might not reduce the magnitude of the case or the litigation activity or expense.”

— Myers at 145.

<sup>50</sup> See, e.g., Myers, at 144-47 (describing costs associated with various stages of litigation); Engine Advocacy, [Primer: Value of Section 230](#) (discussing costs of litigation by stage).

<sup>51</sup> SBA, [Impact of Litigation](#), at 2 (“For most small businesses, which survive on small profit margins, litigation costs can prove disastrous, if not fatal. An average civil case can cost \$50,000 to \$100,000 to litigate through trial exclusive of appeals and any judgment”). See also, [Primer: Value of 230](#) (noting the cost of litigation can exceed the valuation of a startup). Even a startup that has attracted significant venture funding and been successful in attracting customers to its service may not survive meritless litigation. For example, in the context of copyright, “Veoh, a YouTube competitor with largely similar service, had millions of users and some \$70 million in investment from sources like Goldman Sachs and Time Warner. Nevertheless, it became, as Wired put it, one of a ‘long list of promising start-ups driven into bankruptcy by copyright lawsuits’— against both the company and its investors. Although Veoh ultimately prevailed under the DMCA, it did not survive the litigation. Meanwhile, YouTube—backed by the resources of corporate parent Google—emerged intact from very similar, and nearly simultaneous, litigation. The realistic consequence of stories like Veoh’s may be that the next YouTube competitor simply never gets funded.” Daphne Keller, [Internet Platform: Observations on Speech, Danger, and Money](#), Hoover Institution, Aegis Series Paper No. 1807, at 27 (2018).

<sup>52</sup> For smaller Internet services, defending a single protracted lawsuit may be financially ruinous. Eric Goldman, [Why Section 230 Is Better Than the First Amendment](#), at 40.

<sup>53</sup> See [Financial Costs of Litigation](#), *supra*, p. 17. Motions to strike under CA’s anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16 (2021), are similar to motions to dismiss and allow prevailing defendants to recover costs and thus provide a helpful point of reference on the costs associated with such motions. See [CALIFORNIA ATTORNEY’S FEES: Cases: SLAPP: Recent Developments in California Anti-SLAPP Case Law, Summer 2021 - Gibson Dunn](#).

<sup>54</sup> Engine Advocacy published cost data by stage of litigation in its 2019 [Primer: Value of 230](#). In the rare instances where information is available from court records on the costs of defending a lawsuit, the numbers track the ranges that Engine provided in its [Primer](#).

The risk of business-ending litigation also impacts the [ability of startups to attract](#) funding. A 2019 [study](#) by the Copia Institute looked at the impact that Section 230's intermediary liability protections have had on startup investment in online platforms by comparing it to investments in similar businesses under the less-favorable protections in the EU. One of the findings was that,

*“under the framework set forth by CDA 230, a company is 5 times as likely to secure investment over \$10 million and nearly 10 times as likely to receive investments over \$100 million, as compared to internet companies in the EU, under the more limited E-Commerce Directive. In short, the data shows that internet platform companies built under a CDA 230 regime, are much more likely to receive the significant investment necessary to grow and succeed.”*

↑ Michael Masnick, Copia Institute, [Don't Shoot the Message Board](#), at 8 (June 2019).

“Changes in the law that increase the cost or rate of litigation would mean only the largest companies would be able to operate in these spaces.”

— Engine, [Startup Ecosystem](#) at 18.

“As is made clear by the costs we faced in the suit, providing a forum for whistleblowing and debate on critical contemporary issues remains a risky and expensive proposition. It is virtually “death upon challenge” for any individual or small-scale operation. It is thus unclear to us why anyone would ever get involved in such an enterprise if they truly understood the peril they were placing themselves in. We certainly would not have, if we knew then what we know now.

At a time when the internet's promise of lower communication barriers for average citizens is becoming a reality, the legal system remains the greatest threat to the public's receiving the benefit of this gift.”

— ML-Implode.com, [LCC vs. ML-Implode Lawsuit Over](#) (Jan. 30, 2007).

Section 230's reduction of the risk of catastrophic losses from litigation also impacts individuals' and organizations' decisions to start and run interactive forums that don't produce significant revenue—everything from neighborhood listservs to travel blogs to niche book communities. By alleviating concerns around liability and litigation costs, Section 230 has allowed the development of a rich range of options for those who want to share their thoughts with the world and connect with others, including sites with little to no commercial component. As Prof. Eric Goldman has noted,

*“complex litigation can divert substantial managerial and organizational attention and mindshare from maintaining or enhancing the service. Thus, the ability of a defendant to resolve a case on a motion to dismiss (and avoiding expensive discovery) protects small and low-revenue Internet services, which in turn enhances the richness and diversity of the Internet ecosystem.”*

↑ Eric Goldman, [Why Section 230 Is Better Than the First Amendment](#), at 41.

Without Section 230, the choices in the market will narrow because of increased exposure to litigation risks and the associated costs. Existing companies may find that new costs of doing business require changes to their business model. Startups may not attract venture funding. Small businesses may struggle to survive when sued and may have to choose between being bought or closing their doors. And the many organizations that today provide forums for online discussion for minimal or no profit may close them down because the risk is too great.<sup>55</sup>

## Speech benefits of Section 230

Because litigation related to free expression can be particularly damaging to defendants, as well as a deterrent to future expression,<sup>56</sup> courts have developed rules for First Amendment cases that scrutinize the merits of claims to prevent cases that cannot succeed from turning into protracted and expensive suits.<sup>57</sup>

<sup>55</sup> See, [Ross v. eLightbars.com](#), discussed *infra* p. 39

<sup>56</sup> See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (“What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.” See *City of Chicago v. Tribune Co.*, 307 Ill. 595, 607, 139 N.E. 86, 90 (1923)).

<sup>57</sup> See, e.g., *Jungherr v. San Francisco U.S.D. Bd. of Educ.*, 923 F.2d 743, 745 (9th Cir. 1991) (“The *New York Times* requirement that the plaintiff must show actual malice on the part of a libel or defamation defendant protected Jungherr's speech in this instance because it led to a summary judgment in his favor rather than forcing him to endure protracted litigation.” See *New York Times*, 376 U.S. at 283, 84 S.Ct. at 727.”)

As explained by Judge Kozinski of the Ninth Circuit Court of Appeals,

*“The federal courts have recognized that lawsuits impinging on speech presumptively protected by the First Amendment are subject to far more stringent pleading requirements than ordinary lawsuits, precisely because protected speech is so precious—and so fragile—that it can easily be smothered under piles of document requests, depositions, interrogatories, requests for admission and the other ordnance in the modern litigator’s arsenal.”*

<sup>58</sup> [McCalden v. California Library Ass’n](#), 955 F.2d 1214, 1226 (9th Cir. 1990)(Kozinski dissent).

“After my initial post on the suit, Monsarrat [Plaintiff in Monsarrat v. Newman] sent me a similar e-mail message, threatening to include me in the lawsuit unless I took down the post about the lawsuit and the comments on it. Fortunately, I was able to retain counsel, who has responded to Monsarrat’s lawyers. The post stays up, in part because of Sect. 230 of the Communications Decency Act.”

— [By adamg on Wed, 05/15/2013 - 9:41pm](#) <https://www.universalhub.com/2013/online-moderator-fires-back-lawsuit-over-discussion-of-discussion-group-threatened-for-posting-about-a-lawsuit-relevant-to-the-group>.

“Generally, state anti-SLAPP laws share four basic goals: (1) to provide as a matter of substantive law a statutory immunity for statements (and expressive conduct) on matters of public concern, where the plaintiff is unable to establish a prima facie case supporting his or her cause of action; (2) to furnish a suggested procedural framework that encourages and facilitates prompt and inexpensive resolution of such SLAPP claims; (3) to provide a right of immediate appeal of a trial court ruling on an anti-SLAPP motion; and (4) to require appropriate reimbursement for the targets of SLAPP lawsuits. Anti-SLAPP laws also provide a mechanism for meritorious claims to survive this stage of the litigation.”

— [American Bar Association, Report accompanying Resolution 115-Free Speech](#), at 1 (2012).

However, as noted by Prof. Goldman in his article [Why Section 230 is Better than the First Amendment](#), First Amendment defenses to litigation are not always easily resolved early in the litigation which leaves protected speech at risk of censorship—a gap Section 230 helps to fill.<sup>59</sup>

State legislatures have responded to this gap by creating procedural mechanisms to subject suits involving speech on matters of public interest to early scrutiny.<sup>60</sup> These laws are called anti-SLAPP statutes. As previously noted, “SLAPP” refers to “strategic litigation against public participation”—lawsuits specifically designed to prevent robust discussion of an issue of public interest.<sup>61</sup>

Section 230 plays a similar role as anti-SLAPP laws. When it operates as intended, it ends litigation early, which limits the damage in terms of cost and duration. This allows Section 230 to reduce the negative impact on a provider of allowing speech to remain online, and therefore makes it less likely that a provider will remove protected speech in response to a threatening letter or complaint solely to avoid a potential legal fight.<sup>62</sup> This procedural aspect of Section 230 is frequently identified as one of its most crucial benefits.<sup>63</sup> This is borne out by many of the cases discussed in this paper.

<sup>58</sup> [McCalden v. California Library Ass’n](#), 955 F.2d 1214, 1227 (9th Cir. 1990)(Kozinski dissent); quoting [Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board](#), 542 F.2d 1076, 1082-83 (9th Cir. 1976). See also, [Michel v. NYP Holdings, Inc.](#), 816 F.3d 686, 702 (11th Cir. 2016)(Discussing the actual malice standard, explaining “There is a powerful interest in ensuring that free speech is not unduly burdened by the necessity of defending against expensive yet groundless litigation...Forcing publishers to defend inappropriate suits through expensive discovery proceedings in all cases would constrict that breathing space in exactly the manner the actual malice standard was intended to prevent. The costs and efforts required to defend a lawsuit through that stage of litigation could chill free speech nearly as effectively as the absence of the actual malice standard altogether.”).

<sup>59</sup> Goldman, [Why Section 230 is Better](#), at 42 (“[C]onstitutional litigation is rarely quick or cheap. In particular, courts are reluctant to resolve constitutional arguments on motions to dismiss. Further, constitutional doctrines often raise sufficient factual questions that courts wait until summary judgment (or later) before disposing of an unmeritorious case.”).

<sup>60</sup> As of 2019, 30 states and the District of Columbia had anti-SLAPP statutes. Reporters Committee for Freedom of the Press (“RCFP”), [Understanding Anti-SLAPP Laws](#). However, the laws vary significantly by state. Media Law Resource Center, [Guide to SLAPP Laws in the 50 States](#). For purposes of this paper, references to state anti-SLAPP provisions are to features shared by some or all state laws, unless otherwise indicated. A good example of a strong state anti-SLAPP law is California’s. See, Cal. Civ. Proc. Code § 425.16.

<sup>61</sup> RCFP, [Understanding Anti-SLAPP Laws](#). See also, American Civil Liberties Union of Ohio, [SLAPPed: A Tool for Activists - Part 6: The Importance of Anti-SLAPP](#).

<sup>62</sup> A helpful resource for understanding censorship through litigation threats is the [Threats Database](#) created by the [Digital Media Law Project](#) (DMLP) was a project of the Berkman Klein Center for Internet & Society. The database is no longer kept up to date but years of entries are available to be searched. The beginnings of many Section 230 cases can be found in the database.

<sup>63</sup> Eric Goldman, [Why Section 230 Is Better](#), at 29 (arguing that Section 230 provides better procedural protections than the First Amendment). See also, Hermes, Jeff, “[Section 230 as Gatekeeper: When Is an Intermediary Liability Case Against a Digital Platform Ripe for Early Dismissal?](#)” *Litigation* 43, no. 3 (2017), 34–41; Cathy Gellis, [Section 230 Isn’t A Subsidy: It’s A Rule Of Civil Procedure](#) | [Techdirt](#) (Dec. 29, 2020).

**07.**

**Section 230's  
Speech Protections  
In Practice**



"Congress decided that speakers – not their soapboxes – should be responsible for what they say," said EFF Senior Staff Attorney Matt Zimmerman. "That's why the Internet hosts such an incredible diversity of content today. If sites could be held legally responsible for anything anyone said on them, no one would allow users to post controversial views online."

— [Reality TV Star's Lawsuit Flouts Laws Protecting Internet Speech](#), [Electronic Frontier Foundation](#) (May 29, 2012).

"[T]he most economically rational decision for most Internet services is to capitulate to any lawsuit over UGC—or avoid the lawsuit altogether by quickly removing third-party content in response to prelitigation demands, without any investigation or pushback. This causes "collateral censorship": the proactive removal of legitimate content as a prophylactic way of reducing potential legal risk and the associated potential defense costs."

— Eric Goldman, [Why Section 230 is Better than the First Amendment](#), at 41.



The cases discussed in this paper show a strong common theme of litigation used for the purpose of censorship. The traditional media industry has centuries of experience dealing with lawsuits and threats of lawsuits with the sole purpose of silencing unwanted speech.<sup>64</sup> Speech in the online world is no different, but now each individual with an internet connection has the potential to be the editor of their own online newspaper or an on-the-scene broadcast reporter giving descriptions and commentary on the events around them.<sup>65</sup> Section 230 plays a speech-protective role by preventing lawsuits against a third party from becoming the "heckler's veto"<sup>66</sup> that results in protected speech being censored—forcing platforms to choose between fighting to protect a user's speech and their own continued existence.<sup>67</sup> This role appears to be particularly critical for small providers who are more likely to be harmed by lawsuits than larger providers.<sup>68</sup>

There are repeated examples of cases, as detailed further below, that fall into this broad category of lawsuits filed with the intent to censor First Amendment-protected speech. Within the broad category, there are five significant subcategories:

1. Public figures suing critics
2. Businesses suing critics
3. Individuals & businesses suing to suppress public records
4. Seeking to identify anonymous speakers
5. Targeting infrastructure providers

These subcategories and select cases are discussed below to show how tools like Section 230 and anti-SLAPP statutes function when important First Amendment rights are at stake. Frequently they work as intended, providing both speech and economic protections for defendants, but other times they fail to adequately protect the small providers and users targeted by litigation.

## Category 1: Public figures suing critics

There are numerous cases where candidates or holders of a public office have targeted community newsletters, blogs, and local paper comment sections with lawsuits to silence criticism of their fitness for or performance in their roles. Oftentimes, the defendants in these cases are trying to hold the powerful to account or shine a light on corruption or misbehavior. Anti-SLAPP statutes are designed to quickly end exactly these types of cases. In *Maloney v. T3Media, Inc.*, the Ninth Circuit Court of Appeals explained,

<sup>64</sup> Defamation law was already well-developed by the time of the invention of the printing press. See generally, Van Vechten Veeder, "The History and Theory of the Law of Defamation. I," *Columbia Law Review*, vol. 3, no. 8, Columbia Law Review Association, Inc., 1903, 546–73.

<sup>65</sup> "Any person or organization with a computer connected to the Internet can 'publish' information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853 (1997).

<sup>66</sup> *Jones v. Dirty World Entertainment Recordings*, 755 F. 3d 398, 407 (6th Cir. 2014) ("The immunity provided by § 230 protects against the "heckler's veto" that would chill free speech. Without § 230, persons who perceive themselves as the objects of unwelcome speech on the internet could threaten litigation against interactive computer service providers, who would then face a choice: remove the content or face litigation costs and potential liability.")

<sup>67</sup> Cathy Gellis, [Section 230 Isn't A Subsidy: It's A Rule Of Civil Procedure](#) | [Techdirt](#) (Dec. 29, 2020).

<sup>68</sup> See *supra* p. 14

*"The anti-SLAPP statute was enacted to allow for early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation. Its 'burden-shifting mechanism' weeds out lawsuits 'brought to deter common citizens from exercising their political or legal rights or to punish them for doing so.'"*

↑ 853 F.3d 1004, 1009 (9th Cir. 2017).

A state anti-SLAPP statute was only available in one of the four cases highlighted below. Notably, Section 230 played a role in these cases, but courts also dismissed cases based on their failure to state viable legal claims.



## Spreadbury v. Bitterroot Public Library, et al.<sup>69</sup>

### The Premise:

A mayoral candidate was involved in an incident at the local library that resulted in the police being called, him being removed from the library, and criminal charges filed. Later, an order of protection was issued to a librarian to stop him from contacting her. The candidate sued the local newspaper for the paper's coverage of, and user comments on, the legal proceedings against him, including the criminal charges related to the incident at the library. [Lee Enterprises](#), the paper's owner, and a group of municipal defendants (including the library) were sued for \$22 million in damages. The case lasted over one year and had over three hundred entries on its [docket](#)—the high number of filings largely driven by the plaintiff's repeated improper motions and defendants' responses.

### The Case:

Spreadbury, the mayoral candidate who brought the case pro se (without the assistance of a lawyer), filed a significant number of motions, many of them with novel, improper, or unclear requests. For example, some of the more inventive motions Spreadbury filed were for "authority to deny peaceful assembly," "notice of Fourth Amendment violations," and "notice of financial influence." Eventually, the judge ordered Spreadbury to refrain from filing any motion that was not specifically provided for in the rules of procedure.<sup>70</sup>

### The Outcome:

While the case was pending, Lee Enterprises filed for bankruptcy and the case against it had to be temporarily stayed. Once the proceedings resumed, the court found in Lee's favor on a Motion for Summary Judgment based on Section 230 for user comments and fair reporting privilege for their own content covering the legal proceedings.<sup>71</sup> None of the defendants were found liable.<sup>72</sup>

"We're a small ISP.... If I had known who [the user] was, I might just have closed the account. I mean, it costs US\$5,000 to \$15,000 just to answer even a bogus suit. You compare that to a nominal user fee, and from a business perspective, it's awfully tempting just to shut someone down." [Temptations aside, however, Alan entered the legal fray in the first California attempt to use the CDA to vacate a suit against a service provider.]

— *Wired.com*, [Satanist Sues ISP to Silence Usenet Poster](#) (quoting Christopher Alan, *ElectriCiti*, defendant in *Aquino v. ElectriCiti*).

<sup>69</sup> [Case No. 9:11-cv-00064](#) (D. Mont. filed April 19, 2011).

<sup>70</sup> Spreadbury was pro se, but he was an experienced litigant. See Defendant Lee Enterprises' Response Brief in Opposition to Plaintiff's Motion to Appoint Counsel, ECF No. 44 (May 20, 2011). See also, Eric Goldman, Technology & Marketing Law Blog, [Another Newspaper Isn't Liable for User Website Comments Per 47 USC 230—Spreadbury v. Bitterroot Library](#) (March 12, 2012) ("Spreadbury...has sued what seems like half of Montana and, in less than a year, has helped generate a PACER docket of over 250 entries").

<sup>71</sup> *Spreadbury v. Bitterroot Pub. Library*, 856 F. Supp. 2d 1195 (D. Mont. 2012).

<sup>72</sup> The case was voluntarily dismissed May 31, 2012. See, Order Granting Motion to Dismiss, ECF No. 307 (May 31, 2012).



## Cruz v. Van Sickle<sup>73</sup>

### The Premise:

Cruz, a lawyer and candidate for judge, sued an online publication with a forum for discussion of state politics—the *Burnt Orange Report*—and one of its users over a single line in a post discussing “hot races” for public office.<sup>74</sup>

### The Case:

The defendants brought successful motions to dismiss the complaint under the Texas anti-SLAPP statute (TCPA).<sup>75</sup> The defendants referenced immunity under Section 230 in their motions, but both the lower and the appellate court found it unnecessary to address Section 230. Cruz failed to make out a prima facie<sup>76</sup> case of defamation as required by the TCPA. Cruz, representing himself, appealed, and eventually filed an amended brief, to the chagrin of the court, was “80 pages in length and list[ed] 121 issues complaining of ten different trial court orders in connection with th[e] appeal.”<sup>77</sup> Cruz argued, among other things, that the anti-SLAPP statute did not apply because the post regarding the elections was not on a “matter of public concern” within the scope of the TCPA. Because elections are clearly within the scope of the anti-SLAPP law, the appeal was unsuccessful.

### The Outcome:

Under the cost recovery provisions of the TCPA, Van Sickle, the author of the post, was awarded \$32,000 in costs and attorney’s fees for his defense. The *Burnt Orange Report* requested and was denied \$158,000 in attorney’s fees because its lawyers handled the case pro bono.



## Griffith v. Wall<sup>78</sup>

### The Premise:

A municipal clerk, Merlene Wall, sued the owner of a local blog focused on politics—the *Lumberton Informer*—for defamation and sought an injunction against further postings.<sup>79</sup> Despite the significant First Amendment issues involved with an injunction against future speech on matters like local politics,<sup>80</sup> the injunction was granted.<sup>81</sup>

The named defendants need legal help. One of them—Ron Newman—helps maintain a LiveJournal community. Like many Americans, he’s out of work, and like almost all Americans, he’d find it impossible to fund the defense of a lawsuit. Lawsuits are ruinously expensive to most folks—which is exactly why merely the threat of a defamation suit can silence people, and why plaintiffs can abuse the legal system to chill expression.

— Ken White aka Popehat, [Popehat Signal: Seeking Help In A Troublesome Massachusetts Defamation Case](#) (*Monsarrat v. Newman*)

<sup>73</sup> 452 S.W.3d 503 (Tex. App. 2014).

<sup>74</sup> *Id.*, at 509-10.

<sup>75</sup> The Texas Citizen Participation Act, Tex. Civ. Prac. & Rem. Code section 27.002-9. See also, the Public Participation Project’s [evaluation](#) of its key provisions.

<sup>76</sup> When plaintiffs are required to make out a prima facie claim, they must state the elements of the specific legal claim (e.g. the elements of a defamation claim usually include: 1) publication; 2) statement of fact; 3) that is false; 4) that causes harm) and provide a statement of facts, which if assumed to be true, are sufficient to support that those elements are satisfied. For example, if a plaintiff files a claim for defamation, but fails to provide any factual assertions regarding why the statements at issue are false, they will not have made out a prima facie claim. *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 833 (9th Cir. 2018) (“the plaintiff must demonstrate that “the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”).

<sup>77</sup> *Cruz v. Van Sickle*, 452 S.W.3d 503, 511 (Tex. App. 2014).

<sup>78</sup> Mississippi Court of Appeals, NO. 2016–CA–01131–COA (August 29, 2017).

<sup>79</sup> *Id.*

<sup>80</sup> An injunction against future speech is a “prior restraint” and only allowed under the First Amendment in cases where there is a compelling need. See, e.g., [Russell v. Krowne](#), *infra*, p. 37.

<sup>81</sup> *Griffith v. Wall*, ¶ 3.



## The Case:

After a trial in county court, the court found for Griffith, because Wall failed to provide adequate evidence to support her defamation claims.<sup>82</sup> Griffith's statements were legally-protected opinions and there was no evidence connecting Griffith to anonymous posts.

Wall appealed to the county circuit court to raise a new argument—Section 230(c)(2)(A) creates an affirmative duty for the owner of a blog to monitor user comments, something Griffith allegedly failed to do.<sup>83</sup> Because Griffith didn't file a response, the court found for Wall despite the undisputable weakness of Wall's legal argument.<sup>84</sup> Griffith appealed to the Mississippi Court of Appeals, which reversed the county circuit court, saying,

*"Wall did not, for example, claim that the county court erred in finding that she was a public figure, that it erred in determining that she failed to prove that Griffith's post contained false statements of fact, or that it erred in finding that she failed to prove actual malice. Indeed, Wall's only hope was to attempt to use an inapplicable federal statute as a vehicle to attach ownership of these anonymous comments to Griffith."*

↩ [Griffith v. Wall](#), ¶ 14.

## The Outcome:

In writing about the case on his blog, Griffith quoted another community blogger as saying,

*"Griffith's blog has addressed his perspective on events happening with Lumberton city government and is now being threatened with even a restraining order to keep him away from city hall. You can make your own judgement [sic] on the merit of the issues in question...[b]ut regardless of whether you support Griffith's opinions or not such a move by any city official against anyone on the blogosphere should be regarded with much concern."*

↩ Jonathan Griffith, *Lumberton Informer*, [I'm Offended: Well, Get Over Yourself!](#)

The [Lumberton Informer blog is still active; as is the Lumberton Informer sucks](#).



## Pace v. Baker-White<sup>85</sup>

### The Premise:

D. F. Pace, Esq., an inspector with the Philadelphia police who served on the Philadelphia Police Department's Board of Inquiry,<sup>86</sup> sued Emily Baker-White, the Plain View Project (PVP), and Injustice Watch for defamation by implication and false light in connection with the [Plain View Project](#). Baker-White, an attorney, is a former employee of Injustice Watch. The PVP gathers publicly available social media posts made by police employees that could undermine public trust in the police.

The PVP displays a disclaimer before users of the site are able to view specific postings from police officers. The district court noted that it is "prominent, robust, and presented in easily readable font. Reading just the first two paragraphs would suffice to explain to a viewer that the content on the PVP website is open to debate."<sup>87</sup>

<sup>82</sup> *Id.* ¶ 4.

<sup>83</sup> *Id.* ¶ 5.

<sup>84</sup> *Id.*

<sup>85</sup> *Pace v. Baker-White*, No. 20-1308 (3d Cir. Mar. 15, 2021), *reh'g denied* (April 13, 2021), *cert. denied*, No. 21-394 (Nov. 1, 2021).

<sup>86</sup> The Third Circuit Court of Appeals noted that Pace "is currently an Inspector and member of the PPD's Board of Inquiry, "responsible for taking appropriate action against other members of the PPD when a departmental violation has occurred." *DF Pace v. Emily Baker-White*, No. 20-1308, \*3.

<sup>87</sup> *Pace v. Baker-White*, 432 F. Supp. 3d 495, 511 (E.D. Pa. 2020).



— Emily Hoerner & Rick Tusky, BuzzFeed News, *Police Post Racist And Violent Messages On Facebook, A Review Shows* (July 1, 2019).

#### About the Plain View Project

In the summer of 2016, a team of attorneys in Philadelphia learned that numerous local police officers had posted content on Facebook that appeared to endorse violence, racism and bigotry. In some of these posts, officers commented that apprehended suspects—often black men— “should be dead” or “should have more lumps on his head.” In other Facebook conversations, officers advocated shooting looters on sight and using cars to run over protestors. Numerous posts deemed Islam “a cult, not a religion” and referred to Muslims as “savages” and “goat-humpers.” And, in still others, officers appeared to joke about beating and raping women.

This discovery inspired the creation of the Plain View Project (PVP), a research project that has identified thousands of Facebook posts and comments by current and former police officers. We believe that these statements could erode civilian trust and confidence in police, and we hope police departments will investigate and address them immediately.

— <https://www.plainviewproject.org/about>

Pace was shown in the database saying, “insightful point,” in response to a post from a police officer commenting on an American teenager who had been jailed in North Korea.<sup>88</sup> Baker-White and Injustice Watch responded by challenging the merit of the claims and asserting Section 230 protection for sharing the content of posts written by others.<sup>89</sup>

#### The Case:

The district court dismissed the case with prejudice on the basis that there was no viable claim for defamation.<sup>90</sup> The court noted the important policy reasons for the application of the legal rules that require lawsuit pleadings to meet specific standards,

*“In these cases, there is a powerful interest in ensuring that free speech is not unduly burdened by the necessity of defending against expensive yet groundless litigation. Indeed, the actual malice standard was designed to allow publishers the ‘breathing space’ needed to ensure robust reporting on public figures and events. Forcing publishers to defend inappropriate suits through expensive discovery proceedings in all cases would constrict that breathing space in exactly the manner the actual malice standard was intended to prevent. The costs and efforts required to defend a lawsuit through that stage of litigation could chill free speech nearly as effectively as the absence of the actual malice standard altogether.”*

↑ *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016).” –432 F. Supp. 3d. 495, 515.

Though it wasn't necessary to grant the motion to dismiss, the District Court addressed the applicability of Section 230 and held that it did not apply.<sup>91</sup>

Despite the district court dismissing his complaint with prejudice because any amendment of his complaint would be futile, Pace wasn't satisfied and filed a motion asking the district court to reconsider.<sup>92</sup> That motion was denied without any discussion.<sup>93</sup> Pace then appealed to the Third Circuit Court of Appeals. Baker-White filed a conditional cross-appeal to ensure that the district court's ruling on the applicability of Section 230 would be addressed if the Court of Appeals were to reverse the district court's decision on defamation. However, the Court of Appeals affirmed the district court decision on narrow grounds and didn't address Section 230 or the cross-appeal.<sup>94</sup>

#### The Outcome:

When the Court of Appeals affirmed the lower court ruling, Pace filed a request for a rehearing en banc.<sup>95</sup> When that was denied, Pace filed a writ of certiorari with the Supreme Court, which was also denied.<sup>96</sup> The PVP database is still active and lead to police disciplinary actions, such as the „mass disciplining of Philadelphia officers, including 15 who were forced off the job and 193 officers in total being found to have violated department policy.“<sup>97</sup>

<sup>88</sup> *Id.* at 501-2.

<sup>89</sup> *Id.* at 502.

<sup>90</sup> *Id.* at 515.

<sup>91</sup> *Id.* at 508.

<sup>92</sup> *Pace v. Baker-White*, Plaintiff's Motion for Reconsideration, No. 2:19-cv-04827, ECF No. 26 (E.D. Pa. Jan. 23, 2020).

<sup>93</sup> *Id.*, Order That Plaintiff's Motion For Reconsideration Of This Court 1/13/20 Order Is Denied, ECF No. 27 (E.D. Pa. Jan. 27, 2020).

<sup>94</sup> *Pace v. Baker-White*, No. 20-1308, \*5 n. 11.

<sup>95</sup> Order Denying Motion for Rehearing En Banc, Case No. 20-1401, ECF No. 38 (April 13, 2021).

<sup>96</sup> U.S. Supreme Court, [Case No. 21-394](#) (Nov. 1, 2021).

<sup>97</sup> [Philly police officer fired over Facebook posts reinstated | AP News](#) (June 1, 2021).



The Internet has made way for little guys to be heard; unfortunately, little guys are still squashed by the big companies who have thousands of dollars to throw at legal fees all in an effort to stifle criticism. First amendment rights are fantastic in theory, but if the rubber doesn't meet the road in cases like ours, anyone who posts material on the internet ... is susceptible to losing everything they've worked for to frivolous lawsuits funded by deep pockets.

— Justin Owings, Founder, Mortgage Lender Implode-O-Meter, [JustinOwings.com](http://JustinOwings.com) April 15, 2009



### See Also:

- *Roskowski v. Corvallis Police Officers' Association, et al.*, [250 F. App'x 816](#) (9th Cir. 2007)(Corvallis Police Officers' Association online forum).
- *Dimeo v. Max*, [248 F. App'x 280](#) (3d Cir. 2007)(community forum).
- *Monsarrat v. Newman*, [514 F. Supp. 3d 386](#) (D. Mass. 2021)(community forum).
- *Raggi v. Las Vegas Metropolitan Police Department*, [Case No. 2:08-cv-00943](#), D. Nevada (filed 2008)(Las Vegas Police Protective Association online forum).
- *Straw v. Streamwood Chamber of Commerce, Inc.*, [2015 Ill. App. 143094](#) (Ill. App. Ct. 2015)(newspaper letter to the editor).
- *Mezzacappa v. O'Hare*, 125 A. 3d 465 (Pa. Sup. Ct. 2015)(affirming [lower court decision](#))(community blog).
- *Gains v. Romkey*, [110594-U](#) (2012 IL App (3d))(newspaper comments section).
- *Johnson v. Barras*, [No. 2007 CA 001600B](#) (DC Super. Feb. 1, 2008)(online magazine for community activists).
- *D'Alonzo v. Truscello*, No. 0274, 2006 Phila. Ct. Com. Pl. LEXIS 244 (Pa. Com. Pl. May 31, 2006)(re-publication of newspaper article to website).
- *Donato v. Moldow*, [374 N.J. Super. 475](#) (App. Div. 2005)(community forum).

## Category 2: Businesses suing critics

Section 230 and anti-SLAPP statutes play an important role in cases involving businesses, leveling a playing field where the business is often a “Goliath” to the small provider’s “David.” Even when this isn't the case, Section 230 and anti-SLAPP statutes are nonetheless important, often protecting activism or other projects that may be in the public interest.

It's no surprise that review sites—whether for products or services—are frequently sued for claims that critical reviews are defamatory or disparaging to a business.<sup>98</sup> What may be surprising is that lawsuits targeting criticism of a business or business owner extend far beyond traditional review sites. Discussion forums for professionals, students, hobbyists, providers of anti-fraud services, activists, and other communities have also been swept into this kind of activity.

Businesses can be some of the most relentless plaintiffs, given the potential financial and reputational stakes. Lawyers bringing suits to protect their professional reputation are some of the most aggressive litigants.<sup>99</sup> The aggressive litigation tactics business plaintiffs employ frequently appear inversely proportional to the strength of their legal claims. In fact, commentary on business products, services, or executives receives full First Amendment

<sup>98</sup> Frequently, what are essentially defamation claims are styled as Lanham Act claims in an attempt to avoid Section 230 through 230(e)(2)'s intellectual property exception. Orange County Bar Association, [Using the Lanham Act to Combat Misleading Online Reviews](#) (2019). See also, *Parker v. Google, Inc.*, [422 F. Supp. 2d 492 \(E.D. Pa. 2006\)](#); CRS Report, [Section 230: An Overview](#), at 26 (discussion of Lanham Act claims and Section 230).

<sup>99</sup> See, e.g., Adam Martin, [Meet the Lawyer Who Sued the Internet - The Atlantic](#) (June 14, 2011).

protection, unless it is defamatory or otherwise illegal.<sup>100</sup> In addition, commentary on products and services, licensed professionals, executives of companies and other high-profile figures are matters of public interest and within the scope of many state anti-SLAPP statutes.

The following cases illustrate how the statutes operate in these types of cases.



## Green Group Holdings v. Schaeffer<sup>101</sup>

### The Premise:

Two companies with ownership interests in a landfill sued members of a local citizens group for defamation when the residents expressed concern about the health implications for the community related to dumping toxic coal ash in the landfill. In posts to the group's website and Facebook page, they and other local citizens made statements such as:

- "The landfill's pollution problems are influencing the decrease of property values while increasing health concerns."
- "[The landfill] affected our everyday life."
- "[W]e all should have the right to clean air and clean water."<sup>102</sup>

Before filing suit, the companies offered the citizens a deal:



*"Not only did Green Group Holdings sue these activists for \$30 million, they first demanded they abandon a 2013 complaint filed with the EPA's Office of Civil Rights in opposition to the dumping. The company also told the four activists in a demand letter they would have to hand over their electronic devices, pay the company's \$100 legal filing fee, and publish a pre-drafted apology to the company on Facebook in order to avoid a federal lawsuit."<sup>103</sup>*

### The Case:

The ACLU stepped in to represent the defendants in a case where the majority of statements at issue in the suit were statements of opinion and therefore not capable of being defamation. The court never needed to reach Section 230, which would have protected the four defendants for statements posted by others on the sites, because there was no valid defamation claim.

(Source)

The case settled after the federal magistrate judge issued a report and recommendations on the defendants' motion to dismiss finding for defendants but granting the companies a limited opportunity to amend and refile their complaint.

### The Outcome:

The terms of the settlement included "dismissal of all claims, with prejudice, a joint statement of the parties, and advance notice to the public of plans to take in more hazardous waste."<sup>104</sup> Each party was responsible for their own costs related to the suit.

<sup>100</sup> An advertisement for a product or service is often considered commercial speech and is subject to "intermediate scrutiny," a reduced standard compared to the "strict scrutiny" applied to fully protected speech under the First Amendment. *IMDb.com Inc. v. Bencerra*, 962 F.3d 1111, 1122 (9th Cir. 2020) ("Commercial speech "does no more than propose a commercial transaction.") However, reviews and other commentary on products and services are generally not commercial speech under the First Amendment and must satisfy the strict scrutiny test. *Exeltis U.S. Inc. v. First Databank*, 520 F. Supp. 3d 1225, 1230 (N.D. Cal. 2021).

<sup>101</sup> 2016 WL 6023841 (S.D. Ala. Oct. 13, 2016).

<sup>102</sup> ACLU of Alabama, [Green Group Holdings, LLC, et al., v. Schaeffer, et al.](#)

<sup>103</sup> ACLU, [Environmental Protesters Fight Defamation Lawsuit Filed by Coal Ash Landfill Slideshow](#).

<sup>104</sup> ACLU of Alabama, [Green Group Holdings, LLC, et al., v. Schaeffer, et al.](#)

Reflecting on the case, the ACLU of Alabama said,

*“This case presents a stark and disturbing narrative that makes this case important because of its free speech and racial justice implications. Uniontown is a predominantly Black and badly impoverished city (per capita annual income is just above \$8,000), which the plaintiffs have strategically chosen for the site of a toxic landfill. And, as the community has sought to unite and speak out in opposition to racial and environmental injustice, the plaintiffs have attempted to silence them by filing a meritless defamation lawsuit.”<sup>105</sup>*



## Russell v. Krowne, Implode-Explode Heavy Indus. Inc.<sup>106</sup>

**“ALERT:** We are once again being frivolously sued, this time for speaking out against a particular FHA seller-financed downpayment outfit. The legal costs of our defense are already heading past a level we can self-finance, eliminating most if not all of our net income. If this continues for much longer, ML-Implode may not be able to continue as a going concern.”

↳ [Why Donate?](#) ML-Implode.com

### The Premise:

After the collapse of the housing market and beginning of the 2008 financial crisis,<sup>107</sup> a mortgage industry news and analysis website, the Mortgage Lender Implode-OMeter (“ML-Implode”),<sup>108</sup> and its owners were sued for defamation by the Penobscot Indian Nation (“PIN”) and companies that helped administer a PIN program providing down payment assistance for Federal Housing Authority (“FHA”)-qualified home purchasers. Under the PIN program, home sellers had to enroll their home in the program prior to closing in order for the buyer to receive PIN grant money for a down payment. The amount the seller paid to enroll correlated to the size of the grant the buyer received. Congress eventually forbade seller-funded down payment assistance for FHA loans in 2008 in the Housing and Economic Recovery Act of 2008.<sup>109</sup>

### The Case:

In the complaint,<sup>110</sup> PIN, and its business partners, alleged it was defamed by a blog post hosted on ML-Implode that called their grant program a “scam” and referred to seller-funded grants made to buyers as “laundering” money. They sought actual and punitive damages, as well as attorney fees and costs. They also sued the author of the blog post.

<sup>105</sup> *Id.*

<sup>106</sup> *Russell v. Implode-Explode Heavy Indus. Inc.*, Civil Action No. DKC 08-2468 (D. Md. Sep. 18, 2013).

<sup>107</sup> Investopedia, [The 2007–2008 Financial Crisis in Review](#).

<sup>108</sup> [ml-implode.com](#)

<sup>109</sup> *Id.*

<sup>110</sup> *Russell v. Krowne*, Complaint, ECF [No. 1](#) (D. Md. Sept. 13, 2008).

Not long after filing the complaint, PIN filed an *ex parte* motion for a preliminary injunction and temporary restraining order ("TRO") claiming that they would face irreparable harm if the website was not enjoined from future false or misleading speech about their mortgage program. Defendants argued that an injunction preventing future speech would be an unlawful prior restraint under the First Amendment and asked to be excused from attending the hearing due to the cost of travel. The judge agreed with the defendants and denied the injunction and TRO from the bench, noting that,

*"Public interest, this is an area where to say the public has become more involved is an understatement...The whirlwind of international activity in terms of the financial markets, many say prompted by a mortgage, subprime mortgage crisis, there is probably little that's as much in the public interest today as this. And, to the extent to which this article furthers discussion, debate, consideration of that situation, it is not in the public interest for me to broadly order that this article not be posted. ... Any injunction in this regard would chill the First Amendment rights of people like the defendants, never mind just the defendants, and would stifle rather than foster appropriate debate at this precise time when it is so important."*

↑ *Russell v. Krowne*, Transcript of Hearing, ECF [No. 35](#), at 41 (D.Md. Dec. 10, 2008).

ML-Implode eventually filed a special motion to dismiss under the Maryland anti-SLAPP statute. Their motion was denied because of a requirement in MD's anti-SLAPP law that requires bad faith by plaintiffs and the court didn't believe they met the requirement.<sup>111</sup> According to defendants, later in the case they learned of emails showing a plaintiff was "scheming on how to 'make ML-Implode go bankrupt.'"<sup>112</sup>

Due to the inability of the defendants to pay legal bills, ML-Implode's counsel withdrew from the case. Defendant Aaron Krowne attempted to respond to court papers, but under the local rules a corporate defendant could not be represented by a non-lawyer. The failure to file responses by counsel resulted in default.<sup>113</sup>

After a year, ML-Implode obtained new counsel who immediately filed to vacate the default. The court granted the motion to vacate over PIN's objections. The court found that defendants had an adequate excuse for default<sup>114</sup> and that they had meritorious defenses to raise in response to the complaint. Their defenses included that PIN, as an Indian Nation, is a government and governments can't sue for defamation, and that the statements were true and thus not defamatory.

With their default vacated, defendants sought to end the case. Given that the article was written by a third party, ML-Implode asserted Section 230 immunity for hosting it.<sup>115</sup> The court granted ML-Implode's motion and rejected PIN's argument that communications between the author and site owner resulted in the website being an "information content provider" outside Section 230's protections.<sup>116</sup> In doing so, the court also noted that it was appropriate to apply Section 230 at that stage because,

*"Section 230 immunity, like other forms of immunity, is generally accorded effect at the earliest point in the litigation because it is otherwise 'effectively lost if a case is erroneously permitted to go to trial.' Brown v. Gilmore, 278 F.3d 363, 366 n.2 (4th Cir. 2002)."*

↑ *Russell v. Implode-Explode Heavy Indus. Inc.*, Civil Action No. DKC 08-2468, at \*12 (D. Md. Sep. 18, 2013).

<sup>111</sup> See, Paul Alan Levy, [Lessons for Anti-SLAPP Work from Russell v ML-Implode.com](#) (July 15, 2010)(explaining why the SLAPP motion was denied).

<sup>112</sup> [ML-Implode News - Teri Buhl: Downpayment-Evasion Kingpin Knew Injunction Against ML-Implode Was Frivolous](#) (March 22, 2012).

<sup>113</sup> Aaron Krowne, who was founder and CEO of the company that operated ML-Implode at the time of the lawsuit, now works as a lawyer in New York.

<sup>114</sup> "IEHI and Krowne Concepts contend that litigation expenses have driven them to the brink of bankruptcy, and that their default was the result of their inability to secure pro bono counsel. Rather than act in bad faith, Mr. Krowne attempted (futilely) to file numerous papers on behalf of the IEHI and Krowne Concepts to oppose the entry of default." *Russell v. Krowne*, Civil Action No. DKC 08-2468, at \*9 (D. Md. Jan. 3, 2013).

<sup>115</sup> *Russell v. Krowne*, Motion for judgment on the pleadings, ECF [No. 138](#) (D.Md. Sep. 18, 2013).

<sup>116</sup> *Russell v. Implode-Explode Heavy Indus. Inc.*, Civil Action No. DKC 08-2468 (D. Md. Sep. 18, 2013).

"Indeed, ML-Implode resultingly ran out of funds needed to pay counsel in 2011, causing it to be ruled in default by the court in July, 2011. ML-Implode continues to search for pro bono local counsel in the DC/Maryland area in hopes of salvaging the case from default so that it may defend itself at trial and prevail on the merits."

— [Teri Buhl: Downpayment-Evasion Kingpin Knew Injunction Against ML-Implode Was Frivolous](#), *ML-Implode.com* (Mar. 22, 2012).

## The Outcome:

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After the website defendants were dismissed from the case, PIN and the author of the post settled the remaining claims. ML-Implode continues to operate today, noting on its homepage,

*"The site even became, in part, a whistleblower platform, fighting (and winning) half a dozen lawsuits to defend the right of its contributors to post about corruption and malfeasance in financial companies, and be able to do so confidentially. Despite its initial incarnation being rendered insolvent by these frivolous legal attacks, ML-Implode continues today in a stripped-down, lean-and-mean embodiment, remaining dedicated to tracking the fallout of the 2007-2008 credit crisis." "About the Implode-O-Meter," [The Mortgage Lender Implode-O-Meter](#) (visited Mar. 24, 2022).*

## [Epilogue blog post](#)



## Ross v. eLightbars.com<sup>117</sup>

### The Premise:

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eLightbars is owned by John Marcson and provides various online resources and services to emergency responders, including a discussion forum. In 2014, eLightbars was sued by Ross and his company, Emergency Vehicle Products Group. According to the complaint, the whole situation began as a misunderstanding.<sup>118</sup>

The complaint explains that as a seller of emergency lights, Ross used the forum on eLightbars.com to market and sell his products. He noticed that a competing vendor was advertising products made by the company Star at prices less than those contractually required by Star. Ross called Star to inform them of the situation. Star suggested that Ross email the competing vendor selling the lights at the discounted price and put Star's company name in the "from" field of the online contact form. When the retailer reviewed the contact email, they were able to discern that it came from Ross rather than Star. As a result, the message was viewed as "impersonation" and it was mentioned in threads on the message board. Early posts didn't mention Ross or his company. Eventually, a message board user outed Ross as the author of the email that was purportedly from Star. This resulted in Ross' account being suspended. Ross was able to contact Marcson, explain the misunderstanding, and have his account reinstated.

But the story does not end there. Ross, through his lawyer, sent letters to John Marcson threatening to file suit unless he did the following:

*"Remove all defamatory statements made on the eLightbars Forum; Make a public retraction of Defendant's banning of Plaintiff Ban users who made defamatory statements (viz. OutletPSE and Jman423) Retract all defamatory statements by saying that such defamatory statements were not made by people acting in their capacity as Defendant's employees or contractors; and Disclose publicly the roles that users Jman423 and FEVER had with Defendant."<sup>119</sup>*

<sup>117</sup> [Ross v. Elightbars LLC](#), No. 3:14 CV 2610 (N.D. Ohio June 24, 2016).

<sup>118</sup> *Id.*, ECF No. 1 (N.D. Ohio Nov. 26, 2014).

<sup>119</sup> *Id.* at 4.

In response to the two demand letters from Ross' counsel, eLightbars suspended Ross' account again, explaining that it has a policy of suspending users when they have legal action pending against the company. Ross objected because he had only threatened and not yet actually filed a suit. Soon after, Ross sued eLightbars for defamation in connection with the "defamatory post" and the defamatory statements regarding his account being banned.

### The Case:

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Section 230 resulted in the case being dismissed, but only after a year and a half of litigation. In its motion for summary judgment, eLightbars explains the importance of Section 230, saying,

*"Clearly, eLightbars is a computer service provider who created an interactive computer service to provide a forum for people to exchange their thoughts and ideas, and should not be subjected to liability for any of the information posted on this protected website by permission content providers. Without this grant of immunity, providers of an interactive computer service would cease operation for fear that some other information content provider would post defamatory content on the website, subjecting them to a never ending exposure to liability."*

[↑](#) –Ross v. eLightbars LLC, 3:14-cv-02610, ECF [No. 12](#), at 5 (N.D. Ohio Dec. 7, 2015).

Interestingly, according to the motion for summary judgment, Star had no official statement about Ross' account in the complaint, saying only that, "they don't contact dealers via email about pricing."<sup>120</sup>

### The Outcome:

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John Marcson posted on the eLightbars website the following statement after learning of the judgment of the court,

*I am pleased to report a summary judgment was granted in our favor. The judgement [sic] and opinion are attached below, and the summary from the opinion document is quoted below. Thanks to all who assisted through purchases, donations and volunteering time. I am happy to put this chapter of the site behind us and look towards the future.*

[↑](#) John Marcson, [Jared Ross v. eLightbars](#) (June 24, 2016).

The following day, in response to a question about recovering costs associated with the lawsuit, Marcson reflected that,

*Defending the occasional lawsuit is a cost of doing business, and this has taught me that valuable lesson. eLightbars is now taking a more proactive stance to legal threats. Just because you are on very sound legal ground doesn't mean people won't sue you. Anyone can sue another person or company for any reason they desire any time they desire. A lot of times getting it decided by summary judgement [sic] and moving on is the cheapest thing. **I still feel federal law adequately protects me, the operator, from significant liability. Moving forward a larger amount of the site budget has to go to legal review and defense reserves.***

[↑](#) John Marcson, [Announcement - Jared Ross v. eLightbars](#), (June 25, 2016)(emphasis added).

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<sup>120</sup> *Id.*, ECF No. 12, at 3 (N.D. Ohio Dec. 7, 2015).





"Unlike Section 230, constitutional litigation is rarely quick or cheap. In particular, courts are reluctant to resolve constitutional arguments on motions to dismiss. Further, constitutional doctrines often raise sufficient factual questions that courts wait until summary judgment (or later) before disposing of an unmeritorious case. Thus, Internet services will expect it to cost less to defend UGC via Section 230 than the First Amendment, which makes the services more willing to stand up for their users. And if Section 230 and the First Amendment both equally dictate the defense wins, society as a whole benefits from reaching that result as quickly and cheaply as possible."

— Goldman, Eric, [Why Section 230 Is Better Than the First Amendment](#), at 42.



### See also:

- *eDropoff v. Burke, Midley, Inc., et al.* ([case study](#))
- *Marfione v. Kai U.S.A., Ltd.*, [Civil Action No. 17-70](#) (W.D. Pa. Mar. 27, 2018)(third-party product review posted to Instagram).
- *Advanfort Co. v. Mar. Exec., LLC*, [Civil Action No. 1:15-cv-220](#) (E.D. Va. July 28, 2015) (third party article on maritime industry journal website).
- *Higher Balance, LLC v. Quantum Future Group, Inc.*, [Civil No. 08-233-HA](#) (D. Or. Nov. 18, 2008)(discussion forum).
- *Delle v. Worcester Telegram & Gazette Corp.*, [29 Mass. L. Rptr. 239](#) (2011) (newspaper comments section).
- *Deer Consumer Prods., Inc. v. Little*, [2011 NY Slip Op 51691\(U\)](#) (Sup. Ct. NY August 31, 2011)(discussion forum on financial topics).
- *Von Kuersteiner v. Schrader*, [2008 N.Y. Slip Op. 33614](#) (N.Y. Sup. Ct. 2008)(community blog).
- *Chelsea Fine Custom Kitchens v. Apartment Therapy*, [2008 N.Y. Slip Op. 31871](#) (N.Y. Sup. Ct. 2008)(user comments).
- *Vision Media TV Group, LLC v. Forte*, [724 F. Supp. 2d 1260](#) (S.D. Fla. 2010)(800notes website for comments about telemarketers).
- *Regions Bank v. Kaplan*, [8:12-CV-1837-T-17MAP](#) (M.D. Fla. Mar. 22, 2013)(Florida Banker's Association's fraud-net system for banks).

## Category 3: Suppressing public records & information

Even before Europe adopted the "right to be forgotten" as part of the General Data Protection Regulation, plaintiffs in the U.S. were filing suits to try to prevent use of public records and information in ways they considered unflattering or unhelpful. In cases involving public figures and businesses, cases were brought to suppress or punish reporting on legal proceedings, criminal investigations and charges, and lawsuits. Section 230, anti-SLAPP statutes, and First Amendment protections make these cases almost impossible to win, yet suits are still filed.

Several First Amendment doctrines protect reporting on public figures, public proceedings, and public records:

### Fair report:

The [fair report privilege](#) recognizes the difference between making a libelous statement and reporting on a proceeding where one of the participants may have made a libelous statement. Under certain circumstances, accurate reports of legislative hearings, city council meetings, arrest reports, civil and criminal trials, and official statements made to, by, and about law enforcement officials

are privileged.<sup>121</sup> Some jurisdictions recognize an additional, similar defense to defamation for neutral reporting on allegations against public figures so long as they come from an authoritative source.<sup>122</sup>

### Public record:

The First Amendment affords broad protection to individuals that publish information from a public record, such as a birth certificate, police report, or judicial proceeding.<sup>123</sup> For example, "a newspaper can print a list of people who have been granted divorces, for instance, when the information is derived from court records, no matter how embarrassing it is to the individuals."<sup>124</sup>

### Fair comment:

The [fair comment privilege](#) provides a defense to a defamation claim for media reports and individuals who express opinions and factual statements about public officials and public figures, even if the factual statements are proven false. The defense only applies if the speaker commented without knowledge or reckless disregard of the inaccuracy of their statement.

In cases where these privileges apply, Section 230 can accelerate the case reaching its obvious conclusion, saving defendants time, money, and stress.

"Casetext indicates that its own website reveals 10 lawsuits, BLIC refers specifically to 5, Google states that he has filed 'over 40' and Microsoft contends that he has been a plaintiff in 45 cases and a defendant in 3 more."

— *Despot v. Balt. Life Ins. Co.*, Civil Action No. 15-1672, \*6 n.4 (W.D. Pa. June 28, 2016)



## Despot v. Baltimore Life Insurance, et al.<sup>125</sup>

### The Premise:

David Despot sued Baltimore Life Insurance ("BLI") after he interviewed for, but did not receive, a job. Despot sued for employment discrimination under Title VII of federal civil rights law along with various state claims. Despot's theory was that BLI refused to hire him after they learned that he sued prior employers for discrimination.<sup>126</sup> Despot also sued a collection of search providers who provide access to legal filings, including the larger search engines of the time (Google, Microsoft, and Yahoo!) as well as smaller specialized legal search tools such as Pacermonitor, Casetext, Justicia, and Leagle.com. Despot alleged the search engine defendants defamed him by returning search results for his name that prominently featured links to the various lawsuits he had filed.<sup>127</sup> Despot also applied for jobs with five of the search engine defendants a month before filing the suit and included employment discrimination claims against those defendants because he had not been hired.<sup>128</sup>

<sup>121</sup> See, e.g., *Crane v. the Arizona Republic*, 972 F.2d 1511, 1518 (9th Cir. 1992)(explaining that "[t]he fair report privilege is required because of the public's need for information to fulfill its supervisory role over government. Thus, reports of official proceedings are not privileged 'merely to satisfy the curiosity of individuals,' but to tell them how their government is performing. While the public may not have an overriding interest in knowing the details of every crime committed, its interest in overseeing the conduct of the prosecutor, the police, and the judiciary is strong indeed.").

<sup>122</sup> [Neutral Reportage Privilege | The First Amendment Encyclopedia](#).

<sup>123</sup> Doris Del Tosto Brogan, *Expungement, Defamation, and False Light: Is What Happened Before What Really Happened or is There a Chance for a Second Act in America?*, Loyola University Chicago Law Journal, Vol. 49, 1 (2017); also at 26-30 (discussing Supreme Court cases upholding the right to publish information from public records).

<sup>124</sup> RCFP, [The First Amendment Handbook](#), at 8.

<sup>125</sup> Civil Action No. 15-1672 (W.D. Pa. June 28, 2016).

<sup>126</sup> *Id.* \*2.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*



"We at Avvo believe that disciplinary actions and sanctions are very important—and that consumers have a right to know about them. Part of what Avvo is doing is taking a great big flashlight and shining it into places that have been forever dark to consumers."

"We believe that Mr. Browne's lawsuit is an effort to make sure these places stay dark, an effort to turn off that flashlight. This lawsuit is an effort to censor and to chill Avvo's analysis, commentary and opinion in order to protect attorneys who have disciplinary actions in their backgrounds. It seems to reflect a belief, on behalf of the lawyers bringing this lawsuit, that the First Amendment doesn't apply to the dissemination of opinions and information about them."

— Robert Ambrogi, *Lawsitesblog.com*, [Avvo Responds to Lawyers' Lawsuit](#) (June 15, 2007).



### The Case:

The search engines defendants filed motions to dismiss that raised three primary arguments: 1) Section 230 protects search engines who link to third party content; 2) Despot failed to state a claim upon which relief could be granted; and 3) his claims were impeded by the First Amendment. Before responding to the various motions to dismiss, Despot petitioned the court for additional time and for appointment of counsel.<sup>129</sup> The court allowed him half of the 90-day extension he requested and denied appointment of counsel, noting that, "there is simply no provision of the Federal Rules of Civil Procedure or federal statutes which allows for the appointment of counsel in this kind of case."<sup>130</sup>

The federal magistrate judge easily concluded that Section 230 applied to the state tort claims for defamation, intentional infliction of emotional distress, unfair trade practices, and similar allegations.<sup>131</sup> Several other claims were dismissed for failure to state a claim either because the claims were legally deficient or because of applicable First Amendment defenses, such as fair report privilege.

### The Outcome:

The District Court Judge adopted the Magistrate's Report and Recommendations, despite Despot's objections, and dismissed all defendants.<sup>132</sup> As discussed further in [Financial Costs of Litigation](#), Despot ended up being ordered by the court to pay \$42,000 to BLI to help cover the costs and fees associated with their defense under the cost recovery provisions in Title VII. The search engine defendants did not receive any fee awards.



## Browne v. Avvo<sup>133</sup>

### The Premise:

Avvo was not the first rating system for lawyers, but it immediately created controversy on its launch. Avvo collects information on lawyers and assigns them a star rating based on that information, in addition to publishing third-party information and reviews. Browne, an attorney, filed a class action lawsuit against Avvo because he took issue with his star rating and other content.<sup>134</sup>

### The Case:

Browne's claims included defamation and unfair trade practices under the state consumer protection act. Avvo responded by arguing that Section 230 and the First Amendment protect the service, particularly when the third-party content involves public records or disciplinary actions against attorneys.<sup>135</sup>

In plaintiffs' reply brief, they "disavowed" their claims related to third party content on the site, so the court did not end up reaching the issue.<sup>136</sup>

<sup>129</sup> *Id.*, Order on Plaintiff's Motions, ECF [No. 48](#) (March 8, 2016).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*, Report & Recommendations, ECF [No. 69](#) (June 28, 2016).

<sup>132</sup> *Id.*, Memorandum Order, ECF [No. 75](#) (August 4, 2016).

<sup>133</sup> *Browne v. Avvo, Inc.*, 525 F. Supp. 2d 1249 (W.D. Wash. 2007).

<sup>134</sup> *Browne et al v. Avvo Inc et al*, 2:07-cv-00920, Complaint, ECF [No. 1](#) (W.D. Wash. Jun. 14, 2007).

<sup>135</sup> *Id.*, Motion for Judgment on the Pleadings, ECF [No. 6](#) (June 28, 2007).

<sup>136</sup> *Id.*, [525 F. Supp. 2d 1249](#) (W.D. Wash. 2007).

## The Outcome:

As for the other claims, the court found the claims in the lawsuit so flawed that she dismissed the suit with prejudice, denying the plaintiffs the ability to amend their complaint. The court's views of the merits of the lawsuit were clear both from the ruling and its observations on the claims,

*Ironically, plaintiff Browne relies on his designation as a "Super Lawyer" by Washington Law & Politics magazine as evidence that he could not possibly deserve an "average" rating from Avvo. Why one should assume that the attorney rating system developed by Washington Law & Politics is any better than that used by Avvo is not specified, and the Court is not inclined to make such an assumption.*

↑ [525 F. Supp. 2d 1249](#), 1253 n.2 (W.D. Wash. 2007).

Avvo's lawyer ratings have been the subject of controversy, but an Above the Law article credits Avvo founder Mark Brittan with disrupting the legal industry while also noting,

*"How did the legal profession respond? With lawsuits, of course. Within days of Avvo's launch, Seattle class-action attorney Steve Berman filed a lawsuit on behalf of another Seattle attorney, John Henry Browne, calling Avvo a "flat-out scam...That lawsuit was dismissed on First Amendment grounds, as were other lawsuits that followed."*

↑ Robert Ambrogi, [The Person Who Most Disrupted Law This Decade](#), Above the Law (April 9, 2018).

## See also:

- [Spreadbury v. Bitterroot Public Library](#) (local newspaper; fair reporting privilege)
- [Rakofsky v. Wash. Post](#), 39 Misc. 3d 1226 (N.Y. Sup. Ct. 2013)(legal blogs; fair reporting privilege)
- [Nieman v. Versuslaw, Inc.](#), [512 F. App'x 635](#) (7th Cir. 2013)(legal search engine; publication of judicial records)

## Category 4:

### Unmasking anonymous speakers

Lawsuits against providers are sometimes filed to determine the real-world identity of pseudonymous online posters. Anonymous speech has historically enjoyed robust First Amendment protections based on its important role in shaping our country through works such as the Federalist Papers.<sup>137</sup> The Supreme Court and other federal courts have continually noted that the fact that speech is online does not change the level of First Amendment protection that applies:

*"We have explained, moreover, that '[a]lthough the Internet is the latest platform for anonymous speech, online speech stands on the same footing as other speech—there is 'no basis for qualifying the level of First Amendment scrutiny that should be applied' to online speech.' In re Anonymous Online Speakers, [661 F.3d 1168, 1173](#) (9th Cir.2011) (quoting [Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870](#)(1997))."*

↑ [Doe v. Harris](#), 772 F.3d 563, 574 (9th Cir. 2014)

<sup>137</sup> [Anonymous Speech | The First Amendment Encyclopedia](#).

That said, it took courts years to develop approaches to evaluating requests to “unmask” online speakers that properly recognized the important First Amendment interests at stake. The most influential test developed to weigh these interests is called the *Dendrite* test. The *Dendrite* test asks the court to evaluate whether: 1) the doe defendant received notice and the opportunity to respond; 2) the complaint identifies the specific statements that are the subject of the claims; 3) the complaint sets out a prima facie cause of action; 4) the plaintiff has brought forth sufficient evidence to support the claims; and 5) on balance the strength of the case and need to identify the doe outweigh the doe's interest in maintaining their anonymity.<sup>138</sup>

For a court to apply *Dendrite* or a similar test to a discovery request, typically someone will have to ask the court to review a subpoena, for example by filing a motion to quash the subpoena after it has been issued to a provider. For this and other reasons, small providers have frequently been put in the position of having to defend their own legal cases while simultaneously fighting discovery requests that compromise the First Amendment rights of their users.

Given the costs and burdens of litigation, it is somewhat surprising how dedicated small providers are to protecting their users, even if it is to their financial detriment. Some providers feel like there is no choice, because the user privacy is an essential part of the service and, despite the additional cost of fighting discovery seeking the identities of users in court, it is essential to do so for the business's survival. For example, Allnurses fought attempts to identify the nurses using their platform because of the important privacy issues involved for nurses who need to shield their identities so that the privacy of patients won't be compromised when they discuss cases with the community. Allnurses told their user community,

*“Allnurses values its members and will continue to defend the First Amendment rights of its users to engage in protected anonymous speech. We will stand firm and protect from disclosure of any identifying information to the fullest extent possible.*

*Allnurses has become the world's leading nursing community based on its members' contributions and efforts, and we are extremely thankful for all that you do. The Allnurses community's interests have and will continue to guide us in responding to any future litigation.”*

↑ [Allnurses@ Defeats Test Prep Firm in Defamation Lawsuit](#) (Dec. 19, 2020).

The following case involved anonymous speech concerns, as well as Section 230.



## **Brodie v. Independent News, Inc., et al.**<sup>139</sup>

### **The Premise:**

Zebulon Brodie became a topic of public controversy following the sale of a historic estate near Centreville, Maryland. Soon after the sale to a developer, the antebellum house

<sup>138</sup> *Dendrite International v. Doe No. 3*, 342 N.J. Super. 134, 141-42 (App. Div. 2001).

<sup>139</sup> *Independent News v. Brodie*, 407 Md. 415 (Md. 2009); Order Denying Non-Party Independent Newspaper, Inc's Motion to Quash Subpoena and for Protective Order, *Brodie v. Independent News*, No. 17C06011665, Queen Anne's County Circuit Court (February 19, 2008).

burnt down. On a discussion board for Centreville hosted by Newszap.com (owned by Independent Newspapers ("INI")), local residents criticized Brodie for selling to a developer. Other posters criticized Brodie for alleged lack of cleanliness at Dunkin' Donuts locations he owned and operated. Brodie's lawyer complained to INI about the comments about the Dunkin' Donuts and it removed the posts. Months later, Brodie sued INI and three users who wrote about the sale of the estate for defamation, identifying posts about the house and the donut stores.

### The Case:

INI quickly filed a motion to dismiss the claims against it based on Section 230 and on Brodie's failure to state a claim for defamation.<sup>140</sup> Simultaneously, Brodie sought discovery of the identities of *five* users—the three he sued for defamation plus two others who made comments about Dunkin' Donuts. INI filed motions objecting to the subpoena, arguing that Brodie should not be able to obtain the identity information for the posters without showing he had viable legal claims against them.<sup>141</sup>

When the court ruled on the pending motions, it dismissed INI from the lawsuit based on Section 230 without considering the merits of the defamation claims.<sup>142</sup> The Judge ordered INI to turn over the identities of the users because Brodie couldn't sue INI, but could sue those who posted the content.<sup>143</sup>

INI, no longer a party to the lawsuit, asked the court to reconsider its ruling regarding the discovery of the users' identities.<sup>144</sup> On reconsideration, the judge noted that the statements about the house fire were about the developer who acquired the house and not Brodie, failing to meet the First Amendment requirement that defamation suits be based on statements *about* the plaintiff.<sup>145</sup> However, the court thought the statements about the donut stores could be potentially actionable defamation and so he allowed discovery.<sup>146</sup>

Brodie issued a new subpoena which, despite the court's ruling, requested information about all five posters, not just those the court thought could have defamed him. INI filed another objection arguing that none of the statements were actionable for defamation because they were all protected opinions. The judge denied the motion and ordered INI to comply.<sup>147</sup> INI appealed.<sup>148</sup>

Public Citizen represented INI on appeal and argued that Maryland, which at that point had yet to settle on a test for unmasking anonymous online speakers, should adopt the test articulated in *Dendrite*. In their opening brief, INI explained the importance of testing the validity of the legal claims against an anonymous speaker before ordering the disclosure of their identifying information, saying:

***"In a suit against an anonymous speaker, identifying the speaker gives an important measure of relief to the plaintiff because it enables him to employ extra-judicial self-help measures to counteract both the speech and the speaker, and creates a substantial risk of harm to the speaker, who not only loses the right to speak anonymously, but may be exposed to efforts to***

<sup>140</sup> *Brodie v. Independent News*, Motion of Defendant Independent Newspapers Inc to Dismiss or in the Alternative for Summary Judgment and Attachments, No. 17C06011665 (July 31, 2006).

<sup>141</sup> *See Id.*, Motion for Protective Order and Exhibits A-B (Aug. 31, 2006).

<sup>142</sup> *Id.*, Memorandum and Order (Nov. 21, 2006).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*, Motion of Def. for Reconsideration with Memorandum of Grounds and Authorities (Dec. 21, 2006).

<sup>145</sup> The First Amendment requires that statements be "of and concerning" a plaintiff bringing defamation claims. *See*, RCFP, Libel-Identification, [First Amendment Handbook | RCFP Newsgathering Guide](#).

<sup>146</sup> *Brodie v. Independent News*, Memorandum and Order (Mar. 12, 2007).

<sup>147</sup> *Id.*, Order Denying Non-Party Independent Newspaper, Inc's Motion to Quash Subpoena and for Protective Order (Feb. 19, 2008).

<sup>148</sup> *Id.*, Notice of Appeal (Mar. 17, 2008).

*restrain or oppose his speech. For example, an employer might discharge a whistleblower, and a public official might use his powers to retaliate against the speaker or might use knowledge of the critic's identity in the political arena."*

↑ [Brief of Appellant Independent Newspapers](#), at 9.

It further describes the challenge for the courts as developing,

*"a test for the identification of anonymous speakers that makes it neither too easy for deliberate defamers to hide behind pseudonyms, nor too easy for a big company or a public figure to unmask critics simply by filing a complaint that manages to state a claim for relief under some tort or contract theory."*

↑ [Id.](#)

INI identified the numerous ways that Brodie failed to meet the *Dendrite* or any similar test: statements were outside the statute of limitations, not about Brodie, non-actionable opinion, and not false.<sup>149</sup> INI also raised that the lower court judge enforced the subpoena as to users that the judge already decided did not defame Brodie as a matter of law and were dismissed from the suit.<sup>150</sup> The judge also enforced the subpoena for identifying information about two users who were never named in the lawsuit and whose statements were not actionable because of the statute of limitations.<sup>151</sup> If Brodie could not sue the users, what possible need could he have for their identifying information?

INI explained how often obtaining the identifying information is the actual purpose of lawsuits, saying

*"[I]n a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Some lawyers...have admitted that the mere identification of their clients' anonymous critics may be all that they desire...One of the leading advocates of using discovery procedures to identify anonymous critics has urged...to decide whether to sue for libel only after the critics have been identified and contacted privately. Lawyers...have also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because '[t]he mere filing of the John Doe action will probably slow the postings.' ...Even the pendency of a subpoena may have the effect of deterring other members of the public from discussing the plaintiff."*

↑ [Brief of Appellant Independent Newspapers](#), at 26 (internal citations omitted).

## The Outcome:

The Maryland Court of Appeals agreed with INI's arguments and reversed the lower court's enforcement of the subpoena.<sup>152</sup> The court also took the opportunity to articulate a test for future use by Maryland courts when faced with discovery requests seeking to identify anonymous online speakers.<sup>153</sup>

## See also:

- [East Coast Test Prep v. Allnurses.com](#)
- [Aquino v. Electriciti](#) (see below, category 5)
- *Kenneth Eade v. Investorshub.com, Inc., et al.*, No. 2:11-cv-01315-JAK-CW, ECF [No. 25](#) (C.D.Cal. April 25, 2011)(discussion forum for publicly traded companies).

<sup>149</sup> [Brief of Appellant Independent Newspapers](#), at 23-25.

<sup>150</sup> *Id.* 23.

<sup>151</sup> *Id.* 25.

<sup>152</sup> *Independent News v. Brodie*, 407 Md. 415 (Md. 2009).

<sup>153</sup> *Id.* 454-55.

- *Kurland & Associates, P.C. v. Glassdoor, Inc.*, 162083/2018, ECF No. [316](#) (N.Y. Sup. Ct. Jul. 26, 2021); See also [Glassdoor Legal Fact Sheet](#). (employer review site).
- *Deer Consumer Prods., Inc. v Little*, [2011 NY Slip Op 51691\(U\)](#) (N.Y. Sup. Ct. Aug. 31, 2011)(discussion forum on financial topics).
- *Von Kuersteiner v. Schrader*, [2008 N.Y. Slip Op. 33614](#) (N.Y. Sup. Ct. 2008)(community blog).
- *Joyner v. WWW.SOCALSOCCERTALK.COM*, [G037181](#) (Cal. Ct. App. June 13, 2007) (soccer league forum).
- *Loan Center of California v. Krowne*, [No. 029554](#) (Cal. Super. 2008)(discussion forum on financial topics).

## Category 5: Targeting infrastructure providers

Section 230 protections are also important to various infrastructure providers who help online publications and users get and stay online. This includes the companies that host websites, register domain names, and provide connectivity. Cases that focus on infrastructure providers can have particularly dramatic consequences for expression, because the goal is often to force an entire website offline or to completely cut off a user's internet connectivity. This raises significant First Amendment concerns because the remedy of taking a user or website offline is not narrowly crafted to limit the impact on protected expression.<sup>154</sup>

Infrastructure providers may also be added to a case because plaintiffs want to obtain a user's identifying information, raising the same concerns discussed above regarding [unmasking anonymous speakers](#). These dynamics are seen in the cases below:



### **Aquino v. Electrici, Inc.**<sup>155</sup>

#### **The Premise:**

In an early Section 230 case, Michael Aquino filed suit against Electrici, Inc. for providing internet access to an individual who was [allegedly harassing leaders of the Temple of Set](#), claiming that they were the "ringleaders" of an "international conspiracy" to further "Satanic Ritual Abuse" of children.<sup>156</sup>

#### **The Case:**

Electriciti, a small San Diego ISP, moved to have the suit dismissed based on Section 230 and the First Amendment, noting "even if the CDA did not preempt plaintiffs' negligence claim, it is also barred by the First Amendment, which does not allow either a claim for

<sup>154</sup> For example, in a challenge to a Pennsylvania law requiring ISPs to block IP addresses based on informal notices from the state that child pornography was available at the IP address, a federal court noted the significant First Amendment issues associated with overblocking protected speech in order to comply with the statute and ultimately found the state law unconstitutional. *Center for Democracy & Technology v. Pappert*, 337 F. Supp. 2d 606, 655-56 (E.D. Pa. 2004).

<sup>155</sup> 26 Med. L. Rptr. 1032 (Cal. Super., San Francisco, Sept. 23, 1997); [Docket](#).

<sup>156</sup> Matthew Schruers, [The History And Economics Of Isp Liability For Third Party Content](#), 206 Virginia Law Review [Vol. 88:205], 215-16 (Feb. 2002).



negligent publication or for negligent distribution in this context based on content that originates from another person or entity.”<sup>157</sup> They also argued that the claim for intentional infliction of emotional distress should be dismissed explaining that, “the failure or refusal of an Internet Service Provider to identify and deny Internet access to an anonymous user does not constitute the type of ‘extreme and outrageous behavior’ that is a necessary element of the tort.”<sup>158</sup>

### The Outcome:

The court held that Section 230 preempts state law claims against an ISP for negligence, breach of contract, intentional infliction of emotional distress, alter ego liability, injunctive relief and violation of civil rights where the ISP's only role is providing internet access to an individual.



## Susan Johnson, et al v. Elizabeth Arden, et al.<sup>159</sup>

### The Premise:

The Johnsons operated the Cozy Kittens Cattery, a cat breeding business that came under fire on a review site called Complaintsboard.com. The Johnsons sued a former business associate, Complaintsboard, and Complaintsboard's hosting provider, InMotion Hosting. The Johnsons claimed that “by serving as the web hosting provider for the www.complaintsboard.com website where defamatory statements were posted, InMotion was liable for injurious falsehood, defamation, and intentional infliction of emotional distress.”

### The Case:

InMotion filed a motion to dismiss raising a number of procedural issues, and that, substantively, the complaint failed to state a claim. InMotion did not raise Section 230, but the district court determined *sua sponte* that InMotion was entitled to Section 230 immunity.<sup>160</sup> The Johnsons appealed to the Eighth Circuit.

On appeal, InMotion argued that even if Section 230 didn't apply, “even under a common law analysis, Plaintiffs-Appellants failed to allege in the petition that InMotion is liable since InMotion did not “publish” the alleged statements or “act in concert” with any other third party.”<sup>161</sup>

*As a web host, InMotion had no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for InMotion to examine every customer website it hosts for potentially defamatory statements. Plaintiffs-Appellants failed to meet their burden of setting forth the necessary allegations showing that there exist genuine claims as to whether InMotion meets those elements.*

↑ Appellee Brief at 12, *Johnson v. Arden*, 09-2601, (8th Cir. Nov. 2, 2009).

### The Outcome:

The Court of Appeals affirmed the district court's ruling that InMotion was entitled to Section 230 immunity without addressing InMotion's arguments about the merits of the

<sup>157</sup> *Aquino v. Electriciti*, No. 984751, [Electriciti Demurrer](#) (Cal. Super., San Francisco, May 12, 1997).

<sup>158</sup> 26 Med. L. Rptr. 1032 (Cal. Super., San Francisco, Sept. 23, 1997).

<sup>159</sup> *Johnson v. Arden*, [614 F.3d 785](#) (8th Cir. 2010).

<sup>160</sup> *Id.* 6.

<sup>161</sup> *Id.*, Brief of Appellee, at 12 (Nov. 2, 2009).

Johnson's claims.

**See also:**

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- *Abate v. Maine Antique Dig.*, No. [No. 03-3759](#) (Mass. Cmmw. Jan. 26, 2004)(Suit against hosting provider).
- *Hamad v. Center for Popular Culture* (suit against domain name registrar).
- *Bank Julius Baer & Co. v. Wikileaks*, [535 F. Supp. 2d 980](#) (N.D. Cal. 2008)(suit against domain name registrar).
- *Joyner v. WWW.SOCALSOCCERTALK.COM*, [G037181](#) (Cal. Ct. App. June 13, 2007)(suit against domain name registrar).
- *Smith v. Intercosmos Media Group, Inc.*, [Civil Action No. 02-1964](#) (E.D. La. Dec. 17, 2002)(suit against domain name registrar).
- *Beyond Systems, Inc. v. Keynetics, Inc.*, [422 F. Supp. 2d 523](#) (D. Md. 2006)(suit against hosting provider).
- *Choyce v. SF Bay Area Independent Media Center*, [No. 13-cv-01842-JST](#) (N.D. Cal. Dec. 1, 2013)(suit against hosting provider).

# 08. Recommendations

As policymakers consider Section 230 reform proposals, it is essential to first understand how Section 230 operates in practice and what the real-world consequences of changes will be to those who rely on its immunities the most.

Individuals and small businesses have the most to lose from the type of protracted litigation that Section 230 prevents. Section 230 and other mechanisms that can end frivolous litigation early are critical to allowing diverse voices to engage in robust discussion online and to preserving forums that provide some of the most meaningful online interactions for discussions among smaller-scale communities with strong shared interests. Section 230 facilitates robust discussion of critical topics like politics and management of the towns where we live, management of the labor union or professional association that helps protect our interests at work, and issues of personal and community significance such as racial justice or environmental concerns about toxic waste.

The law provides important mechanisms to allow those who are harmed by illegal acts of others to obtain redress through the courts. Unfortunately, some portion of litigants use these mechanisms to try to silence First Amendment-protected speech. Mechanisms that provide for early review of the merits of claims, such as motions to dismiss and motions to strike, allow courts to limit the adverse impact of litigation when cases target protected speech or acts that are not illegal while still allowing meritorious cases to move forward. Because small businesses and individuals are unlikely to ever be made whole or even recover more than a small portion of the costs of their litigation defense, ending cases early is the best protection from the extraordinary business and personal costs of being sued.

## In light of this, we offer the following recommendations:

### 1. Don't condition Section 230 immunity in ways that prolong litigation

Section 230 is not a silver bullet in every case, but it is nonetheless crucial to shutting down meritless cases before irreparable harm is done to defendants. Proposals to condition immunity or apply a test to determine the applicability of immunity are invitations to prolonged and costly litigation that would likely include the time and expense of discovery. This would defeat the purpose of Section 230.

Individuals, non-profits, and small businesses are not positioned to withstand the additional expense of discovery, generally the most cost-intensive part of litigation.<sup>162</sup> In addition, processes like discovery take significantly more time from the owner or manager of a forum or service away from all of their work – which for many is just a small part of what they do.

<sup>162</sup> Myers, at 145.

Increasing the risk of devastating financial losses for operating a forum for discussion will cause many small providers to forgo adding new features to their website, blog, or online service. It may also increase reliance on large social media providers as a lower risk way of interacting with customers, business associates, or other members of communities of shared interest, harming competition.

## 2. Pass federal anti-SLAPP legislation

When small providers are targeted with legal threats and litigation involving user speech on matters of public interest, state anti-SLAPP laws are an important complement to Section 230. They can mitigate the expense of the early stages of litigation by limiting the legal work that needs to be done before a plaintiff's claims are subjected to scrutiny and provide fee recovery for small providers who are successful in having claims dismissed under the statute.

Currently, not every U.S. state or territory has an anti-SLAPP statute and not every state anti-SLAPP law provides the same level of protection against SLAPPs. A federal anti-SLAPP statute should fill the gap and ensure a higher level of protection of First Amendment rights than the current patchwork. In addition, a federal anti-SLAPP law would ensure that small providers have adequate protection from meritless suits and a possibility of recovering the cost of their defense when they stand up for the speech of their users.

## 3. Understand that changes to Section 230 for “big tech” will impact small providers too

A single small provider may use multiple large providers to operate their own service or forum. Many organizations maintain accounts and advertise across multiple social media and other platforms, in addition to relying on ISPs, domain name registrars, and hosting providers. A site may fund itself by allowing a third party to run advertising on its pages. Changes to Section 230 that target larger providers while exempting “small providers” ignore the reality that small providers use on larger providers.

Thus, the impact of new liability rules for large providers will inevitably flow to small providers, potentially making it more difficult and expensive to get online or resulting in platforms taking a more active role in moderating speech on their sites or services. Large providers' new rules could even eliminate the ability to use their platforms to discuss certain topics or to engage in certain activities. Small providers may also be forced to provide more identifying information, putting at risk the ability to engage on important issues anonymously.<sup>163</sup>

<sup>163</sup> [Copia Amicus Brief](#), 20-22 (discussing Copia Institute's reliance on other providers for its expressive activities, including web hosts, ad platforms, social media services, and specialized providers and the impact lessening Section 230 protections would have on their business).

From FOSTA, we know that introducing new liability risks causes larger platforms to shrink the types of speech that they allow and aggressively enforce or over-enforce restrictions.<sup>164</sup> In addition, larger providers can also seek to limit liability risk by collecting more identifying information from users or prohibiting pseudonymous users, charging fees, or limiting or conditioning opportunities for speech to those who are able and willing to agree to indemnify the provider for carrying their content.

#### 4. Better understand what gives rise to liability

A number of the cases covered in this paper should never have been filed. Not only did the claims not meet the applicable legal standards, many of the suits targeted content that is affirmatively protected by the First Amendment.

Given how damaging litigation is to small providers, it would be devastating if Section 230 were weakened to allow more suits that may not have viable underlying legal claims. Lawmakers and policymakers should ensure they are informed about the laws that apply to online providers in the absence of Section 230 and consider whether removing Section 230 will achieve their policy goal or simply invite more litigation and make it harder for defendants to end a lawsuit.

For example, several legislative proposals would create a Section 230 exception for civil lawsuits related to terrorist content without regard to the prospects of such cases being successful.<sup>165</sup> While a few cases made headlines when courts relied on Section 230 to dismiss claims,<sup>166</sup> the majority of cases were dismissed for failure to state viable legal claims unrelated to Section 230.<sup>167</sup> In short, Section 230 merely ended an otherwise doomed case early.

“Litigation for litigation’s sake”<sup>168</sup> causes harm for all parties involved, the courts, and those with legally redressable harms whose access to the courts is delayed or diminished because of meritless cases. While some may view litigation as an important tool for social and policy change, suits that are untethered to existing law hold risks for movements, the lawyers, and the clients.

<sup>164</sup> Kosseff, Jeff, A User’s Guide to Section 230, and a Legislator’s Guide to Amending It (or Not) (August 14, 2021). Berkeley Technology Law Journal, Vol. 37, No. 2, 34 (2022). Available at SSRN: <https://ssrn.com/abstract=3905347>.

<sup>165</sup> See, e.g., [S.299 - 117th Congress](#) (2021-2022); SAFE TECH Act, S.299, 117th Cong. (2021).

<sup>166</sup> See, e.g., *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019); *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140 (E.D.N.Y. 2017) (applying Section 230 to *Force* plaintiffs claims, but finding that *Cohen* plaintiffs lacked standing to bring their claims).

<sup>167</sup> See, e.g., *Colon v. Twitter, Inc.*, No. 20-11283 (11th Cir. Sep. 27, 2021); *Retana v. Twitter, Inc.*, 1 F.4th 378 (5th Cir. 2021); *Crosby v. Twitter, Inc.*, 921 F.3d 617 (6th Cir. 2019); *Fields v. Twitter, Inc.*, 881 F.3d 739 (9th Cir. 2018); *Palmucci v. Twitter Inc.*, No. 18-cv-03947-WHO (N.D. Cal. Apr. 17, 2019); *Clayborn v. Twitter, Inc.*, No. 17-cv-06894-LB (N.D. Cal. Dec. 31, 2018); *Copeland v. Twitter, Inc.*, 352 F. Supp. 3d 965 (N.D. Cal. 2018); *Taamneh v. Twitter, Inc.*, 343 F. Supp. 3d 904 (N.D. Cal. 2018); *Cain v. Twitter Inc.*, Case No.17-cv-02506-JD (N.D. Cal. Sep. 24, 2018); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874 (N.D. Cal. 2017).

<sup>168</sup> Herbert Harley, [Justice or Litigation?](#), Virginia Law Review, Vol. 6, No. 3, at 143 (Dec., 1919).

## Conclusion

The purpose of this paper is to examine lawsuits against small providers to understand how such litigation impacts this subset of providers and their users, with an eye to better understanding the role Section 230 plays in fostering an open internet full of rich discourse, unimpeded by frivolous lawsuits or the heckler's veto. Numerous cases show that even with Section 230, lawsuits can be devastating for small providers and individuals. Small providers often never fully recover from the stress, expense, and time that lawsuits cost to those involved. Early application of Section 230 can limit the duration of litigation and mitigate the costs, improving small providers' odds of resilience.

However, Section 230 isn't a silver bullet when it comes to avoiding the negative consequences of protracted litigation. If application of Section 230 is delayed or denied improperly, the additional costs of discovery and appeals may compound existing costs. Additionally, Section 230 does not provide any serious disincentives to prevent parties from filing lawsuits that lack merit. States with strong anti-SLAPP laws provide much stronger protections to small providers facing frivolous lawsuits by allowing an early motion to strike a complaint, stay of discovery, immediate appeal, and recovery of costs and fees.

While Section 230 is a critical element to protect small providers from devastating consequences for their business, personal, or public interest pursuits, federal anti-SLAPP legislation would fill a void and ensure that First Amendment-protected speech is not censored every time a threat of litigation is uttered or a case filed.

# 09.

# Case Studies





## East Coast Test Prep v. Allnurses.com<sup>169</sup>

Allnurses' story is tragic on many levels. The company endured six years of litigation in a case that should have been an easy dismissal, took on the additional battle of protecting the anonymous speech rights of its users, and, in the course of the litigation, the company lost its founder and CEO and his entire family. The company still struggles to recover.

While legally, the case is a prototypical Section 230 case—defamation on a message board<sup>170</sup>—the way it unfolded was anything but prototypical.

### The Premise:

Allnurses runs an online community that supports nurses and nursing students. Allnurses started in 1997 in Minnesota as a support system for nurses and students. The lawsuit began following a discussion of the merits of East Coast Test Prep ("ECTP") nursing exam prep courses. At the time the lawsuit began, Allnurses was a founder-run company with a small staff of less than 10 employees. When ECTP filed suit in New Jersey in 2014, Allnurses was blindsided, uninsured, and lacked the substantial cash reserves required to settle. The statements at issue were, as the District Court for the District of Minnesota put it when dismissing the case in 2018, "mildly disparaging" and "not defamatory."<sup>171</sup> The company and employees were left wondering what they had done wrong that merited a lawsuit.

One of the reasons the "mild" criticism in the discussion thread escalated is that ECTP decided to respond to the negative postings. As a result, ECTP employee accounts, including the one registered to its CEO Mark Olynyck, were shut down after posting favorable material about ECTP without disclosing their affiliation with the company. The discussion threads were closed. ECTP felt it had no recourse to respond to what it considered false statements that were damaging to its business.<sup>172</sup>

### The Case:

ECTP brought suit in state court in New Jersey and Allnurses had it removed to federal court. ECTP requested permission from the court to obtain discovery from Allnurses on the identities of the users who were part of the suit. Allnurses challenged jurisdiction in New Jersey and opposed discovery. It expected the case was finished when the court agreed the court in New Jersey didn't have jurisdiction. But rather than dismiss the action, the court decided to transfer it to Minnesota.

The transfer only delayed the discovery fight over the identities of AN's users. ECPT wasted no time filing a motion to compel the discovery it had requested in New Jersey. Allnurses objected on multiple grounds, arguing that,

*"If plaintiffs are allowed to unmask the posters and retaliate against them for criticizing Plaintiffs, Allnurses faces the very real possibility that its clients will stop using the Allnurses website for fear of facing similar retribution in the future."*

↑ *Opposition to Motion to Compel*, No. 0:15-cv-03705-JRT-ECW, ECF No. 66, at. 17-18 (D. Minn. filed Oct. 30, 2015).

<sup>169</sup> 307 F.Supp. 3d 952 (3rd. Cir. 2020).

<sup>170</sup> "The prototypical cause of action seeking to treat an interactive computer service provider as a publisher or speaker is defamation." *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964, 969 (N.D. Cal. 2016). As the Tenth Circuit has remarked, "The prototypical service qualifying for [Section 230] immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posted by others." *Greer v. Moon*, 2:20-cv-00647-TC-JCB, \*6 (D. Utah Sep. 21, 2021).

<sup>171</sup> *East Coast Test Prep v. Allnurses*, No. 0:15-cv-03705-JRT-SER, ECF No. 426, 2 (D. Minn. filed Jan. 29, 2018).

<sup>172</sup> *Id.*, Complaint, Case 2:15-cv-03202-MCA-JBC, ECF No. 1-1 (N.D.N.J. May 7, 2015)(Complaint filed in state court attached to Notice of Removal filed in federal court).

The magistrate judge determined that discovery could move forward as to the user identities so long as Allnurses provided notice on the discussion forum. Allnurses sought review of the magistrate ruling from the district court judge assigned to their case, arguing that “If the Court’s Opinion and Order is allowed to stand, it will result in a serious Constitutional violation that cannot later be remedied, will likely have a “chilling effect” on future speech, and will cripple Allnurses’ business model.”

While the magistrate’s discovery order was pending review before the district court judge, ECTP continued to file motions to compel discovery and for sanctions. The district court shared AN’s concerns with the magistrate’s ruling that disclosure of IP addresses did not raise constitutional issues and vacated the magistrate’s order approving discovery. The court issued a new order allowing ECTP to refile a motion requesting discovery, but requiring that it satisfy a test designed to preserve the First Amendment rights of the anonymous users similar to the [Dendrite test](#).

While notices were being posted to the users of the discussion forum about the lawsuit, Allnurses continued to file motions to have the case dismissed. After failing on a motion to dismiss for a technical reason, in December 2016, Allnurses was told it would have to wait for all defendants (including the anonymous users) to be served and answer the complaint to be able to file a motion for judgment on the pleadings.<sup>173</sup>

In January 2017, ECTP filed a third amended complaint naming additional users and adding a claim of defamation based on an open letter Allnurses posted about the lawsuit on its site calling it “meritless.”<sup>174</sup> ECTP also sought to identify users who commented on the open letter. This resulted in new motions to dismiss the case, including by users named as defendants, and further discovery battles.

By May 2017, the discovery issue was once again before the district court judge who denied ECTP discovery of identity information of two of the anonymous defendants, because ECTP could not make out a prima facie claim for defamation because the statements at issue were opinion.<sup>175</sup> To buttress his finding of opinion, the judge cited to Plaintiff’s own post on the thread and said,

*Viewing the thread as a whole, the posters . . . were engaged in a robust give-and-take discourse regarding the pros and cons of a variety of options for schooling to become a nurse, the advisability and value of taking test prep courses to obtain degrees, and what Excelsior College in particular would and would not require to obtain a degree from it.*

*\* \* \* [t]o permit discovery of [JustBeachyNurse’s and monkeyhq’s] identities would unacceptably chill this type of speech and cause others in the online community to withhold their opinions for fear of litigation. Memorandum Opinion and Order, at \*11*

*↑ (D. Minn. May 22, 2017).*

## The Outcome:

In January 2018, the claims against Allnurses, Allnurses founder Brian Short’s estate, and three users were dismissed with prejudice.<sup>176</sup> While ECTP alleged that Allnurses “secretly schemed” to disparage ECTP, the district court found that ECTP “alleges few specific facts in support of these allegations, and despite two years of trying it has discovered virtually no evidence that they are true.” The court found there was no factual basis to dispute the application of Section 230 to Allnurses, as well as that the

<sup>173</sup> *E. Coast Test Prep LLC v. Allnurses.Com, Inc.*, Civil No. 15-3705 (JRT/JSM), Memorandum Opinion and Order (D. Minn. Sep. 19, 2016).

<sup>174</sup> *Id.*, Memorandum Opinion and Order Granting Motion To Dismiss and Renewed Motion For Judgment On The Pleadings, \*9 (D. Minn. Jan. 29, 2018).

<sup>175</sup> *Id.*, Memorandum Opinion and Order, \*11 (D. Minn. May 22, 2017).

<sup>176</sup> Memorandum Opinion and Order Granting Motion To Dismiss and Renewed Motion For Judgment On The Pleadings, \*9 (D. Minn. Jan. 29, 2018).

statements at issue in the suit were not legal violations (statements were found to be factually true or opinions). Believing that the case had finally come to an end, Allnurses filed a motion for sanctions and costs of \$135,000 for preserving electronic evidence in anticipation of discovery requests. By August 2018, all claims in the case had been dismissed.<sup>177</sup>

But in October 2018, ECTP filed its notice of appeal. The case was argued before the 3rd Circuit a year later, and in August of 2020, two years after the district court dismissed the case, the court affirmed that decision and the applicability of Section 230 to Allnurses and Brian Short, its founder.



## International PADI v. Diverlink<sup>178</sup>

*International PADI v. Diverlink* shows how an anti-SLAPP statute and Section 230 can work in tandem to protect small providers from the damage caused by frivolous lawsuits.

### The Premise:

International PADI (PADI), a privately held company that was the "largest diving certification program of its type," sued Diverlink.com for defamation after an author posted an article comparing diver certification programs.<sup>179</sup> Diverlink.com, a one-person operation bringing in less than \$5,000 a year, was a website for diving enthusiasts featuring news, articles, classified ads, and discussion on diving topics.<sup>180</sup> The article was posted by a user of the site, but was moved to a more prominent position on Diverlink after it was published.<sup>181</sup> PADI claimed the article contained false statements that injured its business in violating laws on defamation, trade libel, and unfair competition.<sup>182</sup>

### The Case:

Because Diverlink was operated from Florida and the lawsuit was originally brought in state court in California, Diverlink first filed papers to have the suit removed to federal court.<sup>183</sup> It then filed a motion to have the case dismissed for a lack of personal jurisdiction, or, in the alternative, to have it transferred to federal court in Florida.<sup>184</sup> PADI sought permission of the court to do factual discovery on the issue of personal jurisdiction, which the court allowed.<sup>185</sup> The court ultimately denied Diverlink's motion to dismiss, allowing the suit to move forward.<sup>186</sup> Diverlink then filed an answer to the complaint.<sup>187</sup>

Shortly after filing its answer, Diverlink filed a special motion to strike under California's

<sup>177</sup> *E. Coast Test Prep LLC v. Russ*, 333 F. Supp. 3d 891, 899 (D. Minn. 2018) ("ATP has submitted no argument as to why transfer would be in the interests of justice – and the Court can conceive of none. "The phrase 'if it is in the interest of justice' relates to claims which are nonfrivolous and as such should be decided on the merits." *Galloway Farms, Inc. v. United States*, 834 F.2d 998, 1000 (Fed. Cir. 1987) (interpreting Section 1631). The Court has dismissed every claim against every other defendant in this case – almost all on the merits. As such, the interests of justice counsel dismissal, not transfer.")

<sup>178</sup> *International Padi v. Diverlink, et al*, 8:02-cv-00289, ECF [No. 98](#) (C.D. Cal. Jul. 10, 2003).

<sup>179</sup> *Id.*, ECF [No. 24](#), 1 (C.D. Cal. Jun. 24, 2002).

<sup>180</sup> *Id.* at 1-2.

<sup>181</sup> *Id.*, ECF [No. 98](#), 1.

<sup>182</sup> *Id.* at 2.

<sup>183</sup> *Id.*, ECF No. 1 (C.D. Cal. Mar. 18, 2002).

<sup>184</sup> *Id.*, ECF [No. 24](#) (C.D. Cal. Jun. 24, 2002).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*, ECF No. 26 (C.D. Cal. June 26, 2002).

anti-SLAPP statute, Cal.Civ.Pro. § 425.16, and a motion to dismiss the case for failure to state a claim.<sup>188</sup> Diverlink cited Section 230 to support its anti-SLAPP motion, arguing that Section 230 made it impossible for PADI to show a “reasonable probability of prevailing” on its defamation claim.<sup>189</sup> It also attacked other aspects of the defamation claim, including whether it was barred by the statute of limitations.<sup>190</sup> Because PADI wanted to show that Diverlink was an “information content provider” who could be held responsible for the content of the article, it took almost a year of back and forth on discovery, including depositions of the article’s author and Diverlink’s owner, before the court granted the anti-SLAPP motion to strike.<sup>191</sup> The court found no evidence that Diverlink participated in the creation of the content of the article.<sup>192</sup>

The court’s ruling didn’t end the case. Diverlink, as a prevailing defendant on an anti-SLAPP motion, was entitled to attorneys fees. PADI also filed an appeal of the ruling dismissing the case with the Ninth Circuit Court of Appeals.<sup>193</sup> PADI disputed the fees and costs claimed by Diverlink, arguing among other things that Diverlink’s counsel worked pro bono. However, under California’s anti-SLAPP law, that does not bar recovery of attorney’s fees.<sup>194</sup> After the court awarded Diverlink nearly \$200,000 in attorney’s fees and costs, PADI filed an additional appeal of that ruling which was consolidated with its appeal of the ruling on the anti-SLAPP motion.<sup>195</sup>

### The Outcome:

After the appeal was fully briefed and argued, the Ninth Circuit affirmed the district court’s ruling.<sup>196</sup> PADI filed a request for a rehearing and/or rehearing en banc which was denied six weeks later.<sup>197</sup> Diverlink filed a motion for its attorney’s fees and costs in connection with the appeal asking for an award of \$183,000. Before the Ninth Circuit could rule on Diverlink’s request, the parties reached a settlement and the case was dismissed.<sup>198</sup>

While the case lasted nearly four years, because California’s anti-SLAPP statute provided a vehicle to assert Section 230 immunity, Diverlink was able to benefit from fee award requirements for prevailing defendants. Though Diverlink was not awarded the full amount requested, the ability to recover a substantial portion of the approximately \$500,000 of legal fees and costs associated with defending such a suit is significant for a sole proprietor who does not generate any meaningful revenue from their online project.

This is a better result than Allnurses had in their similar case litigated under Minnesota state law. Minnesota had a narrow anti-SLAPP statute in place at the time that only covered statements made while advocating to government bodies and thus was inapplicable to the discussion among Allnurses’ users.<sup>199</sup>

About [diverlink.com](http://diverlink.com)

<sup>188</sup> *Id.*, ECF No. 2 (C.D. Cal. Aug. 26, 2002).

<sup>189</sup> *Id.*, ECF No. 98, 2.

<sup>190</sup> *Id.* at 5 n.4.

<sup>191</sup> *Id.*, ECF Nos. 28-98. During this time, PADI sought discovery from the author of the article and was forced to pay the author’s attorney’s fees of roughly \$3,000 for defending against a motion to compel by PADI after the witness showed up for the deposition, but PADI’s own lawyers failed to appear. *International Padi v. Diverlink*, 2:03-mc-00005, ECF No. 21 (M.D. Fla. Sep. 5, 2003).

<sup>192</sup> *Id.*, ECF No. 98, 4-5.

<sup>193</sup> *Id.*, ECF No. 100 (C.D. Cal. Aug. 12, 2003).

<sup>194</sup> *Id.*, ECF No. 115, 4 (C.D. Cal. Sep. 8, 2003).

<sup>195</sup> *Id.*, ECF No. 117 (C.D. Cal. Sep. 30, 2003); ECF No. 120 (C.D. Cal. Oct. 23, 2003).

<sup>196</sup> *Id.*, No. 03-56478, ECF No. 62 (9th Cir. July 13, 2005).

<sup>197</sup> *Id.*, ECF No. 68 (9th Cir. Aug. 3, 2005); ECF No. 70 (9th Cir. Sep. 19, 2005).

<sup>198</sup> *Id.*, ECF No. 86 (9th Cir. Dec. 16, 2005).

<sup>199</sup> [Minnesota State Anti-SLAPP — Public Participation Project](#).

## Comments on lawsuit:

- <https://web.archive.org/web/20060323092331/http://diverlink.com/modules.php?op=modload&name=News&file=article&sid=55>
- [https://web.archive.org/web/20060323102638mp\\_/http://diverlink.com/modules.ws&file=article&sid=15&mode=thread&order=0&thold=0](https://web.archive.org/web/20060323102638mp_/http://diverlink.com/modules.ws&file=article&sid=15&mode=thread&order=0&thold=0)



## eDropoff Chicago v. Burke, Midley, Inc. (d/b/a Purseblog.com)<sup>200</sup>

### The Premise:

In 2012, a VH1 reality star and eBay powerseller sued a popular purse blog, [Purseblog.com](http://Purseblog.com) (“Purseblog”), after an individual posted a message alleging that the seller, operating under the name eDropoff Chicago, engaged in shill bidding to drive up prices on their auctions. Ruling on Purseblog’s anti-SLAPP motion, the court noted, “This case has been a case study in strategic procedural maneuvers – some shrewd and some, perhaps, ill-advised. The present proceeding maintains that hallmark.”<sup>201</sup> Indeed, the case’s convoluted beginning created a great deal of complexity and ultimately made a positive resolution difficult for either party.

After eDropoff was unable to voluntarily dismiss the suit in the favor of the subsequently filed action in Chicago, it substantially amended its complaint adding claims under Illinois statutory and common law.<sup>202</sup> By doing so, they argued that Illinois law should control both the merits of the claims and render the CA anti-SLAPP law inapplicable. Activity continued in the Illinois case until Purseblog was granted a stay pending the outcome of the case in California.<sup>203</sup>

Before the stay in Illinois was granted, Purseblog renewed its motion to strike in the California action under the CA anti-SLAPP law again arguing that,

*Plaintiffs pursued Purseblog with a level of aggressiveness rarely seen in civil federal court proceedings involving major law firms – among other things, filing ex parte applications when noticed motions would have sufficed, seeking extraordinary relief without even attempting service of process, and filing supplemental briefs without leave of court – all of which had the effect of making this lawsuit extraordinarily time consuming and expensive for Purseblog to defend. The California legislature understood that litigants with money to burn, such as plaintiffs in this case, could chill speech by forcing defendants to choose between financial ruin and the exercise of protected activities. The California Supreme Court similarly has recognized that the anti-SLAPP statute protects defendants from having to incur the costs of Strategic Lawsuits Against Public Participation because merely prevailing on the merits is of little consequence if a defendant must suffer the time, expense and frustration associated with defending a SLAPP. Absent the protections of the anti-SLAPP statute, plaintiffs would likely be successful in closing public fora and censoring and chilling free speech on blogs such as Purseblog.*

<sup>200</sup> *eDrop Off Chicago LLC et al v. Nancy R Burke et al*, 2:12-cv-04095, ECF [No. 48](#), 20 (C.D. Cal. Jul. 9, 2012).

<sup>200</sup> *eDrop Off Chicago LLC et al v. Nancy R Burke et al*, 2:12-cv-04095, ECF [No. 122](#) (C.D. Cal. Aug. 9, 2013).

<sup>201</sup> *Id.*, 2.

<sup>202</sup> *Id.*, ECF [No. 96](#) (C.D. Cal. Nov. 6, 2012).

<sup>203</sup> *eDrop-Off Chicago LLC et al v. Burke et al*, 1:12-cv-03632, ECF No. 51 (N.D. Ill. Jul. 24, 2012).

This case provides a textbook example of why anti-SLAPP motions are important to protecting the rights of California residents to speak and read blog posts and to deter claims of questionable merit that chill free speech and public participation. Plaintiffs filed suit against a blog operator for claims preempted by federal law, seeking relief in the form of a mandatory injunction to censor speech and obtain a prior restraint barred by both the First Amendment and California's broader constitutional right to free speech. Plaintiffs unsuccessfully sought three TROs against Purseblog to accomplish this result – one in this court and then, after being denied relief on May 11, two in a parallel action in Chicago filed for the purpose of forum shopping and subsequently litigated for the purpose of avoiding California's anti-SLAPP statute and unfavorable Ninth Circuit precedent.

— *eDropoff v. Burke, Defendant's Motion to Strike*, ECF No. 96, at 28 (C.D. Cal. Nov. 6, 2012).

Every motion in this case was contested, even the efforts of the Electronic Frontier Foundation (“EFF”) to file amicus briefs in support of Purseblog. The court denied EFF's motions for leave to file briefs twice.<sup>204</sup> The EFF briefs raised important points about the plaintiff's repeated efforts to seek discovery before the court would rule on the anti-SLAPP motion. EFF explained,

*“If this Court allows the plaintiffs proceed with discovery, Purseblog will be forced to spend even more time and money defending this lawsuit—which already has 99 docket entries at the time of this filing—despite a clear statutory intent to the contrary. This result will have ramifications beyond the immediate parties because it will create precedent for drawing out similar lawsuits against other online service providers. Section 230 is intended to ensure that online service providers do not have to waste valuable time and money defending against claims that have no likelihood of success. As Chief Judge Kozinski has noted, Section 230 “must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.” Fair Housing Council v. Roommates.com, LLC, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc). Without this protection, the vast majority of service providers would simply choose to self-censor rather than risk having to defend against expensive, fact-intensive lawsuits, a result that runs counter to Section 230's policy goals and undermines free expression online.”*

↑ *eDrop Off Chicago LLC et al v. Nancy R Burke et al*, 2:12-cv-04095, No. 100, 3 (C.D. Cal. Nov. 15, 2012).

## The Case:

In Purseblog's motion to strike the complaint under the California anti-SLAPP law, it explained the early part of the lawsuit:

- “The California Complaint was filed just one day after Purseblog received a cease and desist letter from plaintiffs' counsel on May 9, 2012.”
- “Nowhere in the letter did counsel mention the intent to file this suit or seek ex parte relief. At 9:17 p.m. eastern time on the evening of May 10, 2012, plaintiffs' counsel emailed a copy of the Complaint and notice of an intention to appear ex parte in LA on Friday morning, May 11, 2012, to Purseblog's Vladimir Dusil in New York.”
- “Plaintiffs filed this suit on May 10, 2012, against Purseblog, a Florida entity owned by New York residents, in California – ostensibly because Los Angeles was the closest courthouse to plaintiffs' counsel's office.”
- “Without serving process or providing adequate notice for ex parte relief, plaintiffs sought a TRO in Los Angeles on May 11, 2012, that would have required Purseblog to take down statements posted on its blog by Burke, a third-party user, and to censor future statements by its users and block their postings if allegedly “defamatory” or even merely “disparaging” to plaintiffs.”
- “This Court denied the TRO on Friday, May 11, and issued a written order expressing concerns about jurisdiction (subject matter and personal) and questioning the merits of plaintiffs' case, including their request for a prior restraint.”
- “On that same day (but prior to learning about the denial of the TRO), Purseblog contacted plaintiffs and advised...that it would seek dismissal and recovery of its fees under California's anti-SLAPP statute and the CDA if plaintiffs moved forward with litigation.”
- “Plaintiffs subsequently advised that Judge Wu had denied their request for a

<sup>204</sup> *Id.*, ECF Nos. 36 & 102.

TRO that morning, and they would be filing a Complaint and request for a TRO in Chicago. They subsequently did so and set a hearing in Chicago for Tuesday, May 15, on their motion for TRO (the same TRO denied by this Court earlier that morning)."

- "Plaintiffs ultimately sought and were denied three separate TROs against Purseblog to censor prospective speech by third party users of Purseblog – once in this Court and on two separate occasions in the Chicago action."
- "After this Court denied plaintiffs' request for a temporary restraining order, they filed substantially the same lawsuit in Illinois, and sought to avoid the consequences of their misconduct under California's anti-SLAPP statute by seeking voluntary dismissal of this action. This Court denied that request."

<sup>4</sup> *eDrop Off Chicago LLC et al v. Nancy R Burke et al*, 2:12-cv-04095, ECF [No. 48](#), 9-12 (C.D. Cal. Jul. 9, 2012)(internal citations omitted).

After eDropoff was unable to voluntarily dismiss the suit in the favor of the subsequently filed action in Chicago, it substantially amended its complaint adding claims under Illinois statutory and common law. By doing so, they argued that Illinois law should control both the merits of the claims and render the CA anti-SLAPP law inapplicable. Activity continued in the Illinois case until Purseblog was granted a stay pending the outcome of the case in California.

Before the stay in Illinois was granted, Purseblog renewed its motion to strike in the California action under the CA anti-SLAPP law again arguing that,

*"Plaintiffs' claims against Purseblog are subject to the California anti-SLAPP law because they arise from statements about issues of public interest— consumer protection information and statements about alleged misconduct by a reality television star and a top eBay seller— made in a public forum. Plaintiffs cannot establish a probability that they will prevail on their claims against Purseblog because they are barred by section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230. Therefore, defendant Purseblog's special motion to strike should be granted."*

<sup>4</sup> *eDrop Off Chicago LLC et al v. Nancy R Burke et al*, 2:12-cv-04095, ECF [No. 48](#), 9 (C.D. Cal. Jul. 9, 2012).

Every motion in this case was contested, even the efforts of the Electronic Frontier Foundation ("EFF") to file amicus briefs in support of Purseblog. The court denied EFF's motions for leave to file briefs twice. The EFF briefs raised important points about the plaintiff's repeated efforts to seek discovery before the court would rule on the anti-SLAPP motion. EFF explained,

*"If this Court allows the plaintiffs proceed with discovery, Purseblog will be forced to spend even more time and money defending this lawsuit—which already has 99 docket entries at the time of this filing—despite a clear statutory intent to the contrary. This result will have ramifications beyond the immediate parties because it will create precedent for drawing out similar lawsuits against other online service providers. Section 230 is intended to ensure that online service providers do not have to waste valuable time and money defending against claims that have no likelihood of success. As Chief Judge Kozinski has noted, Section 230 "must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles." Fair Housing Council v. Roommates.com, LLC, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc). Without this protection, the vast majority of service providers would simply choose to self-censor rather than risk having to defend against expensive, fact-intensive lawsuits, a result that runs counter to Section 230's policy goals and undermines free expression online."*

<sup>4</sup> *eDrop Off Chicago LLC et al v. Nancy R Burke et al*, 2:12-cv-04095, No. 100, 3 (C.D. Cal. Nov. 15, 2012).

### Outcome:

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Ultimately the court did grant Purseblog's anti-SLAPP motion to strike as to certain state law claims based on third-party content. Even though the motion to strike was only partially granted, Purseblog was in a position to file for attorneys fees and costs. However, because the court also identified issues for supplemental briefing in its ruling, resolution of the case was further delayed. After additional briefing was submitted to the court, the parties ultimately settled the case, as well as the still pending case in federal court in Illinois.



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2022

## Contact Us

—

1390 Chain Bridge Rd. #A108  
McLean, VA 22101

[info@chamberofprogress.org](mailto:info@chamberofprogress.org)

[Twitter](#)  
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