

Products Liability Law Daily Wrap Up, DESIGN AND MANUFACTURING DEFECTS—SOFTWARE—S.D.N.Y.: Social media user's products liability claims barred by Communications Decency Act, (Jan. 26, 2018)

Products Liability Law Daily Wrap Up

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By Sheryl Allenson, J.D.

Siding with the online dating application, Grindr LLC, and its two corporate parents (collectively, Grindr), a federal district court in New York agreed that the Communications Decency Act (CDA) immunized the Grindr companies from an app user's products liability, negligent design, and failure to warn claims. The user claimed that the app lacked built-in safety features that should have prevented a malicious impersonation campaign against him. However, to the extent the user identified a defect in Grindr's design or manufacture or a failure to warn, it was "inextricably related" to the website's role in editing or removing offensive content—roles for which Section 230 of the CDA provides immunity. Therefore, the court granted Grindr's motion to dismiss (*Herrick v Grindr, LLC*, January 25, 2018, Caproni, V.).

Grindr is a web-based dating application for gay and bi-sexual men. It is designed to match users on their interests and location. Users, including the user at issue in the case at bar, set up a profile with an e-mail address, accept the terms of service, create a display name, provide a profile phone number, and create an "about me" section. The profile can be customized through selecting certain features from a list of drop down menus.

The user set up a profile and was matched with a man who ultimately became his exclusive partner, at which time the user deactivated his account. After the relationship ended (on bad terms), the ex-boyfriend began impersonating the user on Grindr. He set up impersonating profiles wrongly portraying the user's interests and indicating that he was looking for partners to meet him at his location. The user alleged that about 1100 users responded to the impersonating profiles over the course of five months. One of Grindr's features was used to transmit maps of the user's location, leading to certain other men approaching him at his home and workplace. The user and others reported the impersonation but Grindr did not take any action other than to send out an automated form response.

Amended complaint. In his amended complaint, the user asserted products liability claims, alleging that the design of the Grindr application enabled the harassment he was suffering. He claimed that Grindr did not incorporate safety features that could prevent such impersonation. He also claimed that Grindr was on notice of the potential misuse of the application, but nonetheless failed to warn users, including himself, of that risk. The user alleged Grindr was liable for the impersonating profiles because it designed an app that could be manipulated easily and misused, and because Grindr failed to take steps to stop the impersonation.

His claims asserted that Grindr's "server-side software" is defectively and negligently designed and manufactured because it does not incorporate "widely used, proven and common software to flag and detect abusive accounts," which "resulted in Grindr selecting and directing a "stream [of] men demanding sex" from the user. Similarly, the user's failure to warn claim (also pleaded as products liability and negligence) was based on Grindr's failure to warn that the app could be used as a tool for harassment and that Grindr had limited ability to stop abuse. The user claimed that product advertising and the terms of service led him to believe that the company had controls in place to prevent harassment. His claims were premised on Grindr's failure to monitor and remove content it did not create.

After the user filed his amended complaint, Grindr moved to dismiss, alleging that all of the user's claims, but for a claim for copyright infringement, were barred by the CDA because the user's former boyfriend created the

impersonating profiles, not Grindr. In essence, Grindr claimed that the CDA barred the user's allegations based on its failure to more effectively search for and remove impersonating profiles, because they treated Grindr as responsible for the false content itself.

Section 230 of the CDA. Examining the user's products liability and negligent design and failure to warn claims, the court considered Grindr's argument that these allegations fell squarely within Section 230 of the CDA. The user's identification of Grindr's design or manufacture or of a failure to warn was "inextricably related" to Grindr's role in editing and removing offensive content—which was the role for which Section 230 provided immunity.

Section 230 provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." There are three elements to a claim of immunity: a defendant must show that "(1) [it] 'is a provider of an interactive computer service, (2) the claim is based on information provided by another information content provider and (3) the claim would treat the defendant as the publisher or speaker of that information.'"

Looking to the first element needed for immunity, the court concluded that Grindr is an "interactive computer service" (ICS), meeting the first element of the immunity requirements. The court analyzed to other social networking sites that have been declared ICSs, and found that like the other sites, Grindr provides its subscribers with access to a common server. The court next found that Grindr met the second element needed for immunity, finding that the design and manufacturing defect, negligent design, and failure to warn claims against it were based on information provided by another information content provider, i.e., the former boyfriend, not by Grindr itself. "An ICS is not the creator of offensive content unless it contributes to the 'development by what [makes] the content unlawful,' the court said, citing another district court ruling. An ICS cannot be held liable if it simply provides "neutral assistance," or tools and functionality that are available equally to bad actors and the app's intended users. The court found that to the extent Grindr contributed to the impersonating profiles, it was through such neutral assistance, which fell under the CDA's immunity provisions. Thus, the court dismissed the user's argument that Grindr's actions went beyond that scope into making the impersonating profiles offensive, and distinguished a case the user relied upon in support of his arguments. Finally, the court found that the third element required for immunity also was satisfied because the user sought to hold Grindr as the publisher or speaker of the impersonating profiles.

Failure to warn claims. The user's failure to warn claims also relied upon Grindr as publisher. In its analysis, the court found that if Grindr was required to post a warning, either at the outset or along with each profile, it would be analogous to requiring Grindr to edit third-party content itself. The court was persuaded that there was an applicable exception to Section 230 (c), specifically with respect to the failure to warn case. The court distinguished the case relied upon by the user to support his failure to warn claims. The user's proposed warning was about user-generated content, bringing it back to the question of whether Grindr was a publisher. In all, the court was convinced that Grindr met the elements necessary to qualify for immunity under Section 230 of the CDA, and, therefore, dismissed those claims, along with the rest of the claims brought by the user.

The case is [No. 17-CV-932 \(VEC\)](#).

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