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Newsletter

Consumer Law

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Section Meeting Notice

The Consumer Law Section will have its annual meeting via Zoom on September 21st at 2 p.m. Details will be available on the section page at https://connect.michbar.org/consumerlaw/home. Part of the meeting will be the election of officers and board members. There is a proposed slate, but nominations can be made for all positions except fo the chair, which automatically is filled by the current chair-elect, Daniel Myers.

Profits Over People

By Gary M. Victor

Introduction

In 2012, when Mitt Romney ran for president he received a good deal of criticism for saying that corporations were people[1] even though he was correct at least in terms of several constitutional provisions.[2] One thing about corporations is true, however, they are run by corporate executives, people—human beings.[3] Unfortunately, these same corporate executives sometimes make decisions that they know or should know will be detrimental to the health, safety or lives of other human beings in order to secure greater profits. In short, they decide to hold profit over people. Cases involving such decisions and the consequences, if any, to those making those decisions are the focus of this article.

Sadly, in researching this article it was amazing to find the number of cases where such cooperate decisions were made. To discuss even a significant proportion of those cases would be more than a single treatise let alone an article so a selection process was necessary. Some cases not discussed here are more egregious than those selected;[4] others less.[5] Some discussed more famous;[6] others less so.[7] However, for virtually all there are three basic themes. First, corporate executives made decisions that put other human beings at risk. Second, when victims of these decisions sought redress, additional decisions were made to hide corporate malfeasance in order to avoid accountability. Third, in almost all cases, any eventual accountability was disproportionally lower than the harm caused, especially for the corporate executives that made the decisions.

Profit Over People Cases

Purdue Pharma and the Opioid Crisis

With the possible exception of the cigarette companies,[8] Purdue Pharma, the manufacturer of OxyContin, may well have the highest body count of all corporations choosing profit over people. Some 470,000 people have died from opioid overdoses over the past two decades;[9] over 230,000 from prescription opioids.[10] What makes this more horrific is that much of this astounding death toll was accomplished by a single corporation, and in fact, by a single family—the Sackler family, owners of Purdue Pharma.[11]

Opioids have been around for thousands of years. Opium poppies were first cultivated in lower Mesopotamia in 3400 BC.[12] Addiction and overdoses did not become a significant problem in the United States until morphine was used to treat wounded soldiers in the Civil War.[13] The real opioid crisis did not begin in the U.S. until the development of OxyContin by Purdue Pharma in 1995[14] and the company's more than aggressive marketing of the product.[15] Purdue Pharma, without conducting any clinical tests[16], started marketing OxyContin in 1996 as safer and less subject to abuse than oth-

er opioids.[17] This representation was patently false. The active ingredient in OxyContin is oxycodone which is twice as potent as morphine[18] and has an abuse potential similar to heroin.[19]

Purdue Pharma's marketing blitz was assisted by the FDA's approval of a single sentence on OxyContin's initial labeling which stated: "Delayed absorption as provided by OxyContin tablets, is believed to reduce the abuse liability of a drug."[20] In marketing OxyContin, Purdue Pharma used some methods that were reasonable, others that were unethical and still others that were patently illegal.[21] Those methods were successful. By 2001 OxyContin had become the most frequently prescribed brand-name opioid in the United States.[22] Over the life of OxyContin sales, Purdue Pharma reaped in over $30 billion.[23] Even as the number of opioid deaths were increasing astronomically,[24] Purdue Pharma, and Richard Shackler in particular, kept pushing its sales people to sell more and more OxyContin at higher and higher strengths.[25]

Once the opioid crisis was in full swing, Purdue Pharma became the focus of both state governments burdened with the consequences of the crisis[26] as well as the federal government being charged with responsibility of solving the problem. The company was eventually subject to a federal indictment and on November 24, 2020 plead guilty to conspiracies to defraud the United States and violate the anti-kickback statute.[27] The plea agreement included an $8 billion settlement under which the company was to be dissolved and money used for opioid treatment and abatement programs.[28] It also included a $225 million civil settlement with the Sackler family, a small fraction of the over $10 billion the family withdrew from Purdue Pharma during the opioid crisis.[29] Despite critics who think Sackler family members should be criminally prosecuted, as of this writing they have escaped personal accountability.[30] Corporate decisions were made to secure more profits while hundreds of thousands of people died and nobody went to jail.

Ford Pintos' Exploding Gas Tanks

One the most famous cases involving corporate executives making decisions favoring profit over the health, safety and lives of their customers is the Ford Pinto case—a case which often finds its way into university classrooms. This fame is primarily based on what has become known as the "Ford Pinto Memo"[31] and its cost-benefit analysis, the significance of which is in considerable dispute.[32] The facts of the case, however, are not in dispute. These facts are discussed in great detail in *Grimshaw v. Ford Motor Company*.[33]

Grimshaw was the appeal of a case where in 1972 a Pinto's gas tank exploded as the result of a rear end collusion burning the driver to death and causing the 13 year old passenger to suffer permanently disfiguring burns.[34] After a six month trial, the jury returned a verdict awarding the driver's family $559,680 in compensatory damages and awarding the passenger $2,516.000 in compensatory damages and $125 million in punitive damages. The court reduced the $125 million award of punitive damages to $3.5 million on the condition that Ford's motion for a new trial be denied.[35] We can now turn to the facts that led the jury to so manifestly demonstrate its displeasure with Ford.

In 1968, led by Lee Iacocca, then Ford Vice President, Ford embarked on a rushed project to get a small, inexpensive car on the market. As the project was a rush, rather than starting with marketing and engineering studies before proceeding with the styling of a vehicle, this project went in reverse with styling coming first. Disregarding the practice of other subcompact car manufactures to have the gas tank over the rear axle, Ford's styling option was to have the gas tank behind the rear axle "leaving only 9 or 10 inches of "crush space"—far less than in any other American automobile."[36] Compounding this design flaw, the Pinto's differential housing had an exposed flange and a line of exposed bolt heads—protrusions sufficient to puncture a gas tank driven forward against the differential upon rear impact.[37]

Ford conducted numerous crash tests of the Pinto. These tests revealed that the Pinto as designed could not withstand a 20 miles-per-hour rear end collusion without fuel leakage, and in at least one test at 21 miles-per-hour test, the gas tank was punctured by the bolt heads on the differential. Other tests with a modified and reinforced version of the Pinto proved safe.[38] Investigations by Ford engineers into fixing the Pinto's gas tank problem determined that there were multiple ways to attack the issue. This could be done at the low end of about $2 per car to a high of just over $15—the latter solution would enable the Pinto to withstand a 34 to 38 mile-per-hour rear end collusion with no gas leakage.[39] The crash test results and potential fix information was funneled up the line to Ford's top management. Those

Ford executives decided not to fix the Pinto's gas tank problem in order to save money.[40] In short, these individuals decided they would rather take a chance on killing or maiming people than spending a few dollars to avoid that possibility. One can see how the jurors in *Grimshaw*, almost all of whom probably were car buyers, might not like that idea.

At least 27 people burned to death in Pinto rear end collusions and an unknown number were injured. The dead included three young women in Indiana who died in a rear end collusion/gas tank explosion. Ford was charged with reckless homicide in that case and acquitted.[41] Numerous lawsuits were filed against Ford arising out of the Pinto's obvious design defect and millions of dollars—which Ford could easily afford—were paid out in damages. However, none of the corporative executives who made the appalling decision to sell what they knew was a dangerous vehicle were individually held accountable.

Bayer Decisions Lead To Aids In Hemophiliacs

The Bayer contaminated blood case is similar to the Ford Pinto case in that corporate executives decided to sell products that they knew or should have known would harm other people—a basic theme throughout these cases. The difference is that in Bayer's case the results were much more catastrophic, especially considering intended users of its products. As a result of Bayer's unconscionable conduct hemophiliacs around the world contracted the human immunodeficiency virus (AIDS); many died and those that survived had to live with an incurable disease.

Although spreading around the world since the 1960s, AIDS first came to the United States in 1970 and did not become publically known until the early 1980s.[42] A division of Bayer, Cutter Biological, manufactured Factor VIII concentrate, a blood clotting agent used by hemophiliacs to help in clotting blood.[43] In July of 1982, the CDC started to warn that blood concentrates were likely causing AIDS in hemophiliacs.[44] In January 1983, a manager at Cutter stated in a letter that there was strong evidence AIDS was being passed on through its plasma products.[45] Recognizing the need to compete with other blood companies who were producing a heated AIDS free version of Factor VIII, on February 29, 1984, Cutter obtained authorization to make the heated alternative.[46] The company's next move was really reprehensible.

Once Cutter started manufacturing the heat treated AIDS free Factor VIII, it was left with a large inventory of the older contaminated version. Also, the heated product was more expensive to produce. To protect its profits Cutter knowingly continued to sell its inventory of contaminated Factor VIII and even manufactured additional supply of the contaminated product in order to fulfill several fixed price contacts.[47] However, rather than sell the older version in the United States which Bayer executives thought could turn out to be more problematic, it sold the product overseas to such countries as Argentina, Indonesia, Japan, Malaysia, and Singapore.[48] As a result, tens of thousands of hemophiliacs around the world contracted AIDS and thousands died.[49]

Eventually in 1997, Bayer agreed to a settlement of a class action brought by AIDS infected hemophiliacs pursuant to which it paid $300 million into a compensation fund.[50] Certainly, this amount was but a drop in the bucket considering Bayer's net worth and the extent of the damage it had knowingly caused. As criminal as this Bayer-Cutter behavior was, nobody was prosecuted. Thousands of people died and no corporate executives were held accountable.

A.H. Robbins and the Dalkon Shield Disaster

The Dalkon Shield was an intrauterine device (IUD), a contraceptive device designed to prevent pregnancy. It was sold by A.H. Robbins from 1971 until pulled off the market in 1974.[51] It was originally marketed by a small company, the Dalkon Corporation.[52] One of the developers and owners of the device, Dr. Hugh J. Davis, conducted a very flawed study of the device indicating that the product had a pregnancy rate of 1.1%, lower than the pill and other IUDs on the market. Dr. Davis had an article published touting the lower pregnancy rate without disclosing his financial interest in the device. Later, more scientific studies found the actual rate to be between 5% and 10%.[53] A.H. Robbins purchased the Dalkon Corporation, made some changes in the product, and even knowing the actual pregnancy rate was much higher than 1.1%, marketed the IUD without any additional testing emphasizing the bogus lower rate and claiming it was safer than other contraceptive methods. This false and deceptive marking program was the least of A.H. Robbins transgressions.

IUDs are designed to be inserted into the uterus, which is generally sterile, with a tail hanging down into the vagina, which can be prone to containing bacteria. The tail of the Dalkon Shield consisted of several encased filaments with an open top and bottom. Six months before the Dalkon Shield was put on the market by A.H. Robbins, it knew that the design of the Dalkon Shield tail could allow bacteria to wick up from the vagina to the uterus and cause infections.[54] The company executives decided that they did not want to spend the money to correct this defect because it would be too costly and could indicate an admitted problem with the original design.[55] The results of this decision were, to put it mildly, calamitous.

One commentator described the results of this act of this corporate malfeasance, if not outright criminality, as follows:

> At least 110,000 women using the device became pregnant, and more than half of them miscarried; 15 in the United States are known to have had fatal septic abortions and 18 died of pelvic inflammatory disease. Some of the women left the shield in place during pregnancy and gave birth to deformed children, and thousands of others suffered pelvic infections that left them infertile.[56]

As the problems with the Dalkon Shield became known, thousands of suits were filed against A.H. Robbins[57] including several individual cases where the plaintiff was awarded substantial damages. For example in *Palmer v. A.H. Robbins*[58] the plaintiff was awarded $600,000 in compensatory damages and $6,200,000 in punitive damages. In order to avoid this deluge of lawsuits, A.H. Robbins declared Chapter 11 bankruptcy in 1985.[59] Eventually, a compensatory trust fund was established which was woefully insufficient to compensate the victims of its reprehensive conduct.[60] None of A.H. Robbins executives were held personally liable and nobody went to jail.

The Peanut Corporation of America (Pca) and the Salmonella Outbreak

The PCA case is worth mention, not because of the number of casualties—9 deaths and 714 confirmed illnesses, most of those children[61]--but because it is one of the few cases where the corporate executives responsible were subject to criminal liability. The PCA scandal stems from a salmonella outbreak that took place in late 2008 and early 2009.

The PCA was the manufacturer of peanut butter and related products. Its customers included such companies as Kellogg, Sara Lee and Little Debbie. It also sold items to the federal government for use by poor school children, disaster victims and military troops.[62] In late 2008, as it became clear that there was a salmonella outbreak, the Center for Disease Control and Prevention (CDC) conducted an investigation which led it back to PCA.[63] Eventually, the investigation resulted in the largest food recall in the United States involving at least 361 companies and 3,913 different products manufactured using PCA ingredients.[64]

The outbreak led to several state investigations and one by the FBI.[65] The FBI investigation discovered that PCA executives had sent out peanut putter products knowing they were contaminated with salmonella.[66] The following executives of PCA were indicted in 2013: Stewart Parnell, the owner and president of PCA, his brother Michael Parnell, a food broker for the company and Mary Wilkerson, who held several positions for PCA including receptionist, office manager and quality control manager.[67] In 2014, all were convicted. Stewart Parnell was sentenced to 28 years, Michael Parnell to 10 years and Mary Wilkerson to 5 years.[68]

One might think that this level of punishment for corporate executives who valued profit over the lives, health and safety of the public would be a disincentive to similar corporate behavior in the future. However, since the PCA is such an anomaly and maximizing profit or minimizing loss appears to remain the Holy Grail of the corporate world, that outcome is probably more a hope than a probability.

Conclusion

The cases discussed above are but a small sample of situations where corporate executives chose profit over the health, safety and lives of the public. This article has examined the Sackler family squiring away $10 billion dollars while they promoted higher sales of OxyContin during the opioid crisis,[69] Ford selling cars they knew were prone to exploding in rear end collusions,[70] Bayer selling a blood clotting agent that they knew could cause AIDS in hemophiliacs;[71] A.H. Robbins selling an IUD

which they knew not only had a higher chance of pregnancy than other contraceptive methods but also could be harmful or even deadly to women who used it[72] and the Peanut Corporation of American (PCA) that knowingly sold peanut butter products contaminated with salmonella.[73] In each case, the corporate executives and/or owners of these companies simply ignored the potential human devastation that was likely to result from their decisions in order to make an extra buck. The public be damned. Perhaps more concerning is the fact that with the exception of PCA[74] nobody—no corporate executive or company owner—was held accountable.

The question for all of us is: Where have we gone wrong?" Do more corporate executives than we would like to believe really think as Gordon Gekko said in the movie *Wall Street*[75]that "Greed is good"? Is it part of human nature that human beings, left to their own devices, will seek out money and power without regard to the consequences? If there are truths in these questions, we as a society must seek out ways to solve those issues. In the meantime, we can hope that when corporate officers make these types of shameful decisions they will more often face real accountability discouraging other corporate executives from engaging in similar conduct.

Endnotes

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2 The Supreme Court has held that corporations have the freedoms of speech (*See*, *Citizens United v Federal Elections Com'n,* 558 U.S. 310 (2010), 130 S.Ct. 876, 175 L.Ed.2d 753); and even that closely held corporations have the freedom of religion, (*See, Burwell v Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014), 134 S.Ct. 2751, 189 L.Ed.2d 675).

3 *See,* Steve Tobak, *Of Course Corporations are People*, Entrepreneur (September 17, 2015) <https://www.entrepreneur.com/article/250682#:.> (accessed November 28, 2020).

4 Perhaps the most egregious case may be the decisions and obfuscations by tobacco company executives with 480,000 deaths each year related to smoking (See, Center for Disease Control and Prevention, *Tobacco—Related Mortality*, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/index.htm (last visited February 15, 2021). See also, *5 tobacco company lies about the dangers of smoking cigarettes,* Truth Initiative (December 21, 2017) https://truthinitiative.org/research-resources/tobacco-prevention-efforts/5-ways-tobacco-companies-lied-about-dangers-smoking (last visited February 21, 2021).

5 One might view the Boeing 737 Max scandal as falling within the less egregious category as "only" 340 people died—189 in the Lion Air flight out of Jakarta and 151 Ethiopian Airlines flight out of Addis Ababa. See, *Boeing Admits Knowing of 737 Max Problem,* BBC (May 6, 2019) <https://www.bbc.com/news/business-48174797#:> (last visited February 15, 2021).

6 See the Ford Pinto Case, *infra* is very well known and often discussed in university business classes.

7 The Bayer contaminated blood case, *infra*, is probably less well known than a number of other cases.

8 *See supra f.n* 4.

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13 Sonia Moghe, *Opioid history: From 'wonder drug' to abuse epidemic*, CNN (October 20, 2016), https://www.cnn.com/2016/05/12/health/opioid-addiction-history/index.html, (last visited February 15, 2021).

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18 See General Accounting Office *infra* f.n 15 at *What GAO Found*.

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21 See General Accounting Office *infra* f.n. 15 at 16-28.

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67 *Id.*

68 *Id.*

69 *See supra,* pp 2-3.

70 *See supra*, pp 3-5

71 *See supra*, pp 5-6

72 *See supra,* pp 6-8

73 *See supra*, pp 8-9

74 *See supra,* P 9.

75 Oliver Stone, Wall Street, 1987, Film, Hollywood, Twentieth Century Fox

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Twitter Bans, *Masterpiece Cakeshop*, and Consumer Protection

By Alyson Oliver

What does Twitter banning individuals, including former President Donald Trump, from its platform and the Supreme Court's decision in *Masterpiece Cakeshop* have in common? Both have profound impacts on those businesses' consumers. As such, questions about the role of consumer protection arise. These questions lay bare the tension between expansive consumer protections and the freedom of private businesses to control who they transact with. Because of the issues at play in this analysis, specifically a discriminatory denial of services, the discussion of consumer protection will inherently include relevant civil rights laws. This article will examine the balance between the rights of businesses to withhold services from consumers and laws offering protection to those consumers.

In *Masterpiece Cakeshop*, the Supreme Court held that the Colorado Civil Rights Commission's decision upholding a discrimination complaint against a baker who refused to bake a cake for a gay couple violated the First Amendment's Free Exercise Clause.[1] While the *Masterpiece Cakeshop* decision was narrow, only deciding that the Colorado Civil Rights Commission had acted in a manner demonstrating "hostility to a religion or religious viewpoint"[2], it is not unreasonable to believe that with the current composition of the Supreme Court religious objections may become a viable basis for businesses to discriminate against their customers on the basis of other individual identity criteria.[3]

Another recent issue implicating the relationship between consumer protection and the freedom of private business comes from the tech world. In the wake of the 2016 election, tech companies such as Facebook and Twitter began to reckon with the use of their platforms to spread misinformation. This reckoning came to a head in late 2020 with disinformation surrounding the United States Presidential election. In an attempt to control the use of their platforms as a means of spreading disinformation Twitter and Facebook began banning or de-platforming users that violated certain policies on disinformation, a practice they can do without being subject to civil liability under Section 230 of the Communications Decency Act of 1996 (CDA).[4] Most notable, of course, is the permanent suspension of former President Donald Trump's Twitter account and temporary suspension of his Facebook account after the January 6, 2021 insurrection.

Whatever your personal views on the propriety of these actions are, there is a clear connection between the two cases. In both, a private company refused to provide services to a specific individual. The questions then arise, should consumers who have been denied services have recourse and what should that recourse be?

It is important to first inquire into the basis for each company's denial of service to the consumer. In *Masterpiece Cakeshop*, the baker refused service to individuals based on their inherent characteristics—the fact that they were gay. The baker did not refuse service to the gay couple because of an opinion they held, or something they said (aside from a description of the service they desired). On the other hand, Twitter's ban of the former President's account, at least facially, was based on statements he made, not on any inherent characteristics of his person.

It is also significant to note the impact of these denials on other consumers. In *Masterpiece Cakeshop*, the baker's denial of service had no impact on the bakery's other consumers; except, of course, a relatively small class of other gay potential consumers in the area. Alternatively, banning the former president from Twitter undeniably impacted a large portion of the ex-Presidents' millions of Twitter's followers. Some would characterize this as protecting other Twitter consumers from disinformation and the violence that it can engender.[5] Still others would argue that the ban limits those consumers' access[6] to information they desire including, in some cases, critiques of Twitter itself. Regardless of how one views this particular issue, the added interests of other consumers complicates the balancing of the interests of consumers and private companies.

Another issue that arises is the issue of how state and federal laws have addressed this balancing act. Many states

have enacted civil rights laws that often bleed into consumer protection by prohibiting a refusal of services based solely on an individual's status within a protected class.[7] As demonstrated by the Supreme Court in *Masterpiece Cakeshop*, these laws may be held unconstitutional when the application demonstrates a hostility toward religion. *Masterpiece Cakeshop* may well be the outer limit of the Court's approach to this conflict. It would appear to be an error for the Court expand this ruling to the application of a truly neutral anti-discrimination law.

With all of this in mind, we turn now to Michigan laws that afford consumers protection regarding who they are. The most obvious example is Michigan's Elliot-Larsen Civil Rights Act (Elliot-Larson) which prohibits discrimination on the basis of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status . . ."[8] The act also prohibits discrimination in housing and "full and equal utilization of public accommodations . . ." based on an individual's status as a member of a protected class.[9] Another status protection law is Michigan's anti-redlining statute which provides that banks "shall not deny a loan application or vary" the terms of the loan "[d]ue to racial or ethnic characteristics or trends in the neighborhood in which the real estate is located."[10] Although the Michigan's Consumer Protection Act[11] (MCPA) does not explicitly prohibit discriminatory practices, it prohibits a wide array of "Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce . . ."[12] Even though the definitions of these unlawful practices do not specifically include a requirement that a business provide non-discriminatory services, it is certainly arguable that a discriminatory contract provision could well violate the MCPA by "[c]ausing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.[13]

Federal law also plays a role in this matter. Much like Michigan's Elliot-Larsen, the Civil Rights Act of 1964 prohibits places of public accommodation from discriminating based on "race, color, religion, or national origin."[14] However, the classes of impermissible discrimination under the federal law are much narrower than Michigan's law.[15]

With the law in mind, we now return to the question of what recourse do a consumers have when they are refused services by a private business entity or have their content removed from an online social media platform. Considering the laws above, the key issue becomes quickly apparent, that being *why* was the service refused or the content removed. State and federal law prohibit a discrimination based on an individual's protected status. If the business has refused service *because* of a consumer's race, religion, national origin, or other protected characteristic they are in violation of Michigan and Federal law.

However, this does not answer the question about sexual orientation or any other non-specified individual characteristic. For example, under federal law, there is clearly no protection for *consumers* who suffer discrimination based on their status as a member of the LGBTQ+ community. The issue is closer in Michigan under Elliot-Larsen as the Act currently prohibits discrimination against individuals based on their gender identity *but not* their sexual orientation.[16] This is the result of a 1993 Court of Appeals decision holding that sexual orientation does not fall within the Elliot-Larsen definition of "sex".[17] This decision is currently pending appeal to the Michigan Supreme Court and the case law indicates a likelihood that it will be overturned[18] providing protections for both gender identity and sexual orientation under the Elliot-Larsen.

With respect to the removal of content by a social media platform such as Twitter, a consumer's recourses are much more limited. As noted, Twitter, and other companies are shielded from liability under the CDC when acting "in good faith" [19] This provides significant latitude for social media platforms to remove content based on the opinions held by the company as long as it is done in good faith.[20] Thus, it is not unlikely that a social media company with deep religious ties could, without civil liability, be able to remove content posted by users if it was objectionable to the company's controlling religious dogma.

Having considered these examples of private businesses refusing services to individuals there are some clear lessons that can be learned. First, with the exception of social media companies, consumers are protected from discrimination based on their status as a member of a protected class. Over time, the scope of these classes changes and is currently expanding to encompass more people who suffer discrimination. With regard to social media companies, many people may applaud the decision of Twitter to ban certain users for spreading misinformation, however, there are significant questions about the propriety of having such large companies con-

trolling the dissemination of information to consumers. Unfortunately, consumers have little recourse at present other than migrating to other platforms.

Finally, these examples raise real questions about the way we want our society to function. Do we want the balance of rights to fall on the side of private companies and allow them to refuse service to people based solely on some aspect of their personhood? Do we want to allow large companies sole discretion in determining the truth?[21] These questions truly boil down to one issue, what is the appropriate balance of consumer protection and business freedom? These issues continue to be debated may come to a head with a ballot initiative to amend Elliot-Larsen Act to explicitly prohibit discrimination on the basis of sexual orientation or gender identity and with proposed amendments to the CDA.[22] One of the proposed amendments to the CDA would explicitly eliminate immunity in "any action alleging discrimination on the basis of any protected class, or conduct that has the effect or consequence of discriminating on the basis of any protected class . . ."[23] The only certainty is that the proper balance between consumer protection and business freedom will continue to be debated.

Endnotes

1 *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

2 *Id.* at 1731.

3 *See* Ronald Brownstein, *The Supreme Court is Colliding With a Less-Religious America*, The Atlantic (Dec. 3, 2020), https://www.theatlantic.com/politics/archive/2020/12/how-supreme-court-champions-religious-liberty/617284/.

4 47 U.S.C. § 230. Section 230 of the CDA provides two distinct forms of immunity that prevent companies such as Twitter from being civilly liable for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.

5 *Free Speech and the Regulation of Social Media Content*, CRS, page 2 (Mar. 27, 2019), https://fas.org/sgp/crs/misc/R45650.pdf.

6 *Id.* at 2–3.

7 *Customer Non-Discrimination Act*, Human Rights Council (Oct. 16, 2020), https://www.hrc.org/resources/customer-non-discrimination-act ("As of December 2018, 20 states and the District of Columbia have LGBTQ-inclusive non-discrimination laws and regulations that cover public accommodations.").

8 *Id.*

9 MCL § 37.2102(1).

10 MCL § 445.1602(1)(a).

11 MCL § 445.901 *et seq.*

12 MCL § 445.903(1).

13 MCL § 445.903(1)(n)

14 42 U.S.C. § 2000a(a).

15 *Compare* MCL § 37.2301(a) ("'Place of public accommodation' means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind . . .") *with* 42 U.S.C. § 2000a (limiting "public accommodations" to lodgings, food sellers, gas stations, and entertainment establishments).

16 *Rouch World, LLC et al. v. Mich. Dep't of Civil Rights*, Case No. 20-000145-MZ (Mich. Ct. Claims Dec. 7, 2020).

17 *Id.* at *4 *citing Barbour v. Dep't of Soc. Servs.*, 198 Mich.App. 183, 185 (1993).

18 It is very likely that the Michigan Supreme Court will follow the example set by the U.S. Supreme Court in *Bostock v. Clayton Cty. Georgia*, 140 S.Ct. 1731 (2020), which held that the prohibition of sex discrimination in Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation or gender identity. *Id.* at 1754.

19 See, 47 U.S.C. § 23(c)(2)(A).

20 *See, e.g.*, *Domen v. Vimeo, Inc.*, 433 F.Supp.3d 592, 603–04 (S.D.N.Y. 2020) ("Section 230(c)(2) . . . 'does not require that the material actually be objectionable; rather, it affords protection for blocking material that the provider or user considers to be objectionable.'") (citation omitted).

21 On this point, the author would like to note that social media companies' ban of disinformation is beneficial to society. The issue arises in the determination of what constitutes disinformation. The author is at a loss for a system that adequately protects the public, and other consumers from propaganda and threats of violence, while still ensuring the free flow of information and ideas.

22 *Group of Democratic Senators Release Latest CDA Reform Bill*, Nat'l L. Rev. (Feb. 16, 2021).

23 Proposed Senate Bill Titled "Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act" § 2, *available at* https://www.warner.senate.gov/public/_cache/files/4/f/4fa9c9ba-2b34-4854-8c19-59a0a9676a31/66DECFBC0D6E6958C2520C3A6A69EAF6.safe-tech-act---final.pdf.

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