

JANET T. MILLS  
ATTORNEY GENERAL

Telephone: (207) 626-8800  
TDD: (207) 626-8865



STATE OF MAINE  
OFFICE OF THE ATTORNEY GENERAL  
6 STATE HOUSE STATION  
AUGUSTA, MAINE 04333-0006

REGIONAL OFFICES:  
84 HARLOW ST., 2<sup>ND</sup> FLOOR  
BANGOR, MAINE 04401  
TEL: (207) 941-3070  
FAX: (207) 941-3075

44 OAK STREET, 4<sup>TH</sup> FLOOR  
Portland, Maine 04101-3014  
TEL: (207) 822-0260  
FAX: (207) 822-0259  
TDD: (877) 428-8800

128 SWEDEN ST., STE 2  
CARIBOU, MAINE 04736  
TEL: (207) 496-3792  
FAX: (207) 496-3291

**To:** The Honorable Lawrence Bliss, Senate Chair  
The Honorable Charles R. Priest, House Chair  
Joint Standing Committee on Judiciary

**From:** Christopher C. Taub, Assistant Attorney General

**Date:** October 8, 2009

**Subject:** Summary of Litigation Challenging Chapter 230 (LD 1183)

---

On August 26, 2009, a group of plaintiffs filed a lawsuit in the federal court in Bangor challenging the constitutionality of Public Laws 2009, Chapter 230, "An Act to Prevent Predatory Marketing Practices Against Minors." The plaintiffs included the Maine Independent Colleges Association, the Maine Press Association, Reed Elsevier (the parent of Lexis/Nexis), and NetChoice. NetChoice is a national coalition of online business and trade associations, and its members include America Online/Time Warner, Yahoo!, eBay, Oracle, and others. Plaintiffs sought to stop Chapter 230 from taking effect, which was due to happen on September 12, 2009.

The plaintiffs argued that Chapter 230 was unconstitutional for three reasons. First, plaintiffs claimed that the law violates free speech rights protected by the First Amendment. They argued that the law interferes both with the ability of businesses to convey information to minors and with the ability of minors to acquire information, even when minors have obtained

parental consent. The plaintiffs alleged that while the original purpose of Chapter 230 may have been to prevent businesses from using coercive techniques to market pharmaceuticals and other health-related products to minors and to prevent certain other predatory marketing practices directed at minors, the law swept too broadly and was not “narrowly tailored” to the problem at hand. The plaintiffs further alleged that even if the more lenient standard applicable to laws regulating “commercial speech” applied, the law violated that standard too.

Next, the plaintiffs argued that Chapter 230 violates the Commerce Clause of the United States Constitution because the law allegedly 1) regulates internet commerce occurring wholly outside of Maine’s borders; 2) imposes excessive burdens on interstate commerce; and 3) results in a potential “patchwork” of conflicting state regulations.

Third, the plaintiffs argued that Chapter 230 is preempted by the federal Children’s Online Privacy Protection Act (“COPPA”), 15 U.S.C. §§ 6501 - 6506. Generally speaking, COPPA restricts the ability of website operators to collect personal information from children under the age of thirteen without obtaining parental consent. COPPA declares that states may not “impose any liability for commercial activities or actions by [website] operators in interstate or foreign commerce” that is “inconsistent” with COPPA’s treatment of such activities. 15 U.S.C. § 6502(d). The plaintiffs argued that Chapter 230 is “inconsistent” with COPPA because it prohibits conduct not prohibited by COPPA and that Chapter 230 is thus preempted.

After the suit was filed, the Attorney General filed a brief advising the federal court that she shared some of the plaintiffs’ concerns over the implications of the law on the exercise of First Amendment rights, especially the rights of minors to access information. She also noted that the Legislature intended to revisit the law when it convenes again in January 2010. Accordingly, the Attorney General announced that she would not enforce Chapter 230 pending

further legislative action. In light of the fact that the plaintiffs faced no threat of enforcement by the Attorney General, the Attorney General asked the federal court to dismiss the lawsuit for lack of a legitimate “case or controversy.” The Attorney General did not address the merits of plaintiffs’ claims that Chapter 230 is unconstitutional.

Subsequently, the plaintiffs agreed to dismiss the case pursuant to a “Stipulated Order of Dismissal.” In the Order entered on September 9, 2009, a copy of which is attached, the federal court concluded that the plaintiffs had demonstrated that they were likely to prevail on the merits of their claim that Chapter 230 violates the First Amendment. The court also noted that the Attorney General had expressed concerns regarding the substantial overbreadth of Chapter 230 as related to the exercise of First Amendment rights, and had committed to not enforcing the law. Finally, the court noted that any private causes of action that individuals might bring under Chapter 230 could suffer from the same constitutional infirmities. The court then proceeded to dismiss the lawsuit.

No further challenges to Chapter 230 have been filed and, to the best of the Attorney General’s knowledge, no individuals have brought private causes of action under the statute.

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

MAINE INDEPENDENT COLLEGES	)	
ASSOCIATION, MAINE PRESS	)	
ASSOCIATION, NETCHOICE, AND	)	
REED ELSEVIER, INC.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CV-09-396-B-W
	)	
GOVERNOR JOHN BALDACCI	)	
and ATTORNEY GENERAL JANET	)	
MILLS, in their official capacities,	)	
and JOHN DOE,	)	
	)	
Defendants.	)	

**STIPULATED ORDER OF DISMISSAL**

The Court finds that the Plaintiffs have met their burden of establishing a likelihood of success on the merits of their claims that Chapter 230 is overbroad and violates the First Amendment. The Attorney General has acknowledged her concerns over the substantial overbreadth of the statute and the implications of Chapter 230 on the exercise of First Amendment rights and accordingly has committed not to enforce it. She has also represented that the Legislature will be reconsidering the statute when it reconvenes. As a result, third parties are on notice that a private cause of action under Chapter 230 could suffer from the same constitutional infirmities.

In light of these considerations, the parties have agreed to a dismissal of this action without prejudice and the Court hereby SO ORDERS.

/s/John A. Woodcock, Jr.  
JOHN A. WOODCOCK, JR.  
CHIEF UNITED STATES DISTRICT JUDGE

Dated this 9th day of September, 2009