ANALYSIS AND PERSPECTIVE

# PRODUCTS LIABILITY CLAIMS AGAINST PUBLISHERS: CAN INFORMATION BE A DEFECTIVE PRODUCT?

By Lawrence Savell *

Products liability actions have been and continue to be brought against publishers, alleging that readers suffered personal injuries caused by reliance on information presented in books, articles, or advertisements. These suits invoke a variety of theories, most often strict liability and negligence. The vast majority of courts have properly rejected such claims, often on grounds that publications are not "products" or due to overriding First Amendment concerns.

However, some courts have ruled otherwise, particularly in the limited context of aeronautical navigation charts, or where there is clear evidence of express endorsement or guarantee by the publisher of information presented or items advertised. Other courts have suggested they might be more receptive to claims were the facts different, such as the publisher's involvement in creating the work's content. Publishers can reduce the risks of liability by strategies such as avoiding making guarantees and printing consistent disclaimers. Insurance and indemnification provisions should be examined and negotiated to provide additional protection.

When most lawyers think of the potential claims that a newspaper, magazine, or book publisher may face, they probably think first of traditional allegations such as copyright infringement, libel, and invasion of privacy. [1] It's less likely that even those of us who specialize in the products liability area would immediately think about *products liability* actions being brought against publishers. But the reality is that claims have been and continue to be made that the publication of a newspaper or magazine article or advertisement, or of a book, caused personal injuries to a reader who relied on the information presented.

Fortunately for publishers, so far the courts have not given much credence to such claims. But they continue to be brought, as reflected most recently in the May 13 decision by the Texas Court of Appeals in *Way v. Boy Scouts of America.* [2]

## The 'Way' Case

The September 1988 issue of *Boys' Life* magazine (published by the Boy Scouts) included an advertising supplement on shooting sports, sponsored by National Shooting Sports Foundation Inc. (NSSFI), in which Remington Arms Company, Inc., and other firearms and ammunition manufacturers placed ads. The supplement also contained articles such as "Earn Your Straight Shooter Award" and "Getting Started in the Shooting Sports." These provided information about earning merit badges for shooting; the biathlon, an Olympic shooting sport; and the Presidential Sports Award, earned for shooting accomplishments. The supplement also included a checklist on firearm safety.

After reading the supplement, twelve-year-old Rocky William Miller and several of his friends located an old rifle and a .22-caliber cartridge. On November 19, 1988, Rocky was killed when the rifle accidentally discharged.

Rocky's mother, Jan Way, sued the Boy Scouts, NSSFI, and Remington on theories of negligence and strict products liability. Way claimed that the publication of the supplement was negligent and that the information contained in the supplement made the magazine a defective product. She alleged that the supplement, presenting information about the power and speed of firearms, with images promoting the fun and excitement of shooting to boys the age of Rocky and his friends, motivated him to experiment with the rifle.

The Boy Scouts and NSSFI filed motions for summary judgment alleging: (1) Texas law does not recognize a cause of action for negligent publication, and no duty was owed to plaintiff; (2) there was no duty to warn of the allegedly dangerous nature of the supplement; (3)

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[1] See, *e.g.*, Savell, "Right of Privacy—Appropriation of a Person's Name, Portrait, or Picture for Advertising or Trade Purposes Without Prior Written Consent: History and Scope in New York," 48 *Albany Law Review* 1-47 (1983).

[2] 856 S.W.2d 230 (Tex. Ct. App. 1993). See *Product Safety & Liability Reporter* 633 (June 18, 1993). According to WESTLAW, an application for writ of error in this case was filed on July 19.




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no special duty was owed to Rocky, a minor; (4) no statute was violated; (5) *Boys' Life* magazine and the supplement were not "products" within the meaning of Sections 402A and 402B of the *Restatement (Second) of Torts*; and (6) the claims were barred by the First Amendment of the United States Constitution and article I, section eight of the Texas Constitution.[3] Remington's motion for summary judgment similarly asserted there was no duty and that the claims were barred by the federal and state Constitutions.

The trial court granted the defendants' motions (although it did not specify the grounds). Way appealed. The Court of Appeals affirmed, concluding that Texas law does not recognize a cause of action for publishing an article or advertisement that allegedly causes harm under such circumstances.

### *A. Negligent Publication*[4]

In Texas, the court noted, common law negligence consists of three elements: (1) a legal duty owed by one person to another; (2) a breach of that duty; and (3) damages proximately resulting from the breach.[5] To determine whether a duty exists, Texas courts apply a risk-utility balancing test, weighing several interrelated factors, including the risk, foreseeability, and likelihood of injury, against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendants.[6] Foreseeability is the foremost and dominant consideration.[7]

The court concluded that the defendants owed no duty to Rocky. It decided that his experimentation with the rifle and cartridge was not a reasonably foreseeable consequence of the publication. Way herself had characterized Rocky's conduct with the rifle and cartridge as an "experiment," and had reported that Rocky was with several young boys who were not supervised by an adult when the rifle discharged. By contrast, the supplement's photographs, features, and manufacturer advertisements presented firearm use not as an experiment, but as a supervised, structured, and safety-conscious activity. The court indicated that it would be wrong to focus on the risk of harm without looking also at the context in which the publication presented the activity involved.

Moreover, on the utility side of the equation, the court concluded that encouraging safe and responsible use of firearms by minors with Boy Scout and other supervised activities was of significant social value.

Thus, the court ruled that the defendants had no duty either to refrain from publishing the supplement or to add any warning about the danger of firearms.[8]

### *B. Defective "Product"*

Turning to the plaintiff's strict liability claims, the court again upheld the trial court's rejection of Way's arguments. Under Texas law, a manufacturer may be responsible for physical harm caused by (1) a defective product or (2) a misrepresentation (even if innocent) of material fact concerning the character or quality of the product upon which the consumer justifiably relied.[9]

However, "the very essence of a products liability cause of action under 402A or 402B is the existence of a *product* within the meaning of the Restatement (Second) of Torts."[10]

The court distinguished a series of cases Way cited involving aeronautical charts and flight maps that erroneously depicted data necessary for the navigation and operation of airplanes, where the inaccurate data was

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[3] The Boy Scouts did not claim the Texas Constitution as a defense.

[4] Way asserted negligence claims alleging negligent publication, negligence per se (violation of statutory duty), and the attractive nuisance doctrine. The Court of Appeals upheld summary judgment on the negligence per se claim on the ground that the advertisements were not offers to sell firearms to minors as would violate Texas Penal Code section 46.07(a)(2). It also declined to extend the doctrine of attractive nuisance to written publications such as the advertising supplement at issue, following *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802, 803 (S.D. Tex. 1983) (applying Texas law; "No court has held that the written word is either an attractive nuisance that would impose a special duty on defendant magazine, or a dangerous instrumentality for which defendant would be strictly liable.")

[5] *Way*, 856 S.W.2d at 233.

[6] *Id.* at 234.

[7] *Id.* (noting the test for foreseeability is what one should under the circumstances reasonably anticipate as the consequences of one's conduct). The court examined a number of cases involving *Soldier of Fortune Magazine* that the parties had cited on the issue of whether a publisher may be held liable for negligence in publishing an article or advertisement. The defendants cited *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990), a negligence action against a magazine that published a classified advertisement for an ex-Marine willing to take "high risk assignments," whom a reader hired to murder his wife. The *Way* court noted that, applying Texas law, the Fifth Circuit held that the publisher had not violated a legal duty by publishing an advertisement that was facially innocuous. Turning to Way's citations, the court characterized *Norwood v. Soldier of Fortune Magazine, Inc.*, 651 F. Supp. 1397 (W.D. Ark. 1987) (applying Arkansas law), as inapplicable because, although it held the risk of injury from a "gun for hire" advertisement to be foreseeable, the court did not use a risk-utility analysis. It found *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1028 (1993) (applying Georgia law) to be distinguishable based on the fact that the particular "gun for hire" advertisement at issue there clearly conveyed the advertiser to be "ready, willing and able" to use his gun to commit crimes.

[8] The court did not reach the defendants' First Amendment freedom of speech arguments, although it agreed that the Supreme Court's recognition of limited First Amendment protection for commercial speech highlighted the important role of such communication for purposes of risk-utility analysis.

[9] *Way*, 856 S.W.2d at 238.

[10] *Id.* (emphasis in original).


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alleged to have caused accidents in a manner analogous to a faulty compass or altimeter. [11]

It noted that Way was not complaining about the physical properties of the supplement (such as the toxicity of the ink or the sharpness of the paper). Instead, she alleged that the *ideas and information* contained in the magazine encouraged children to engage in dangerous activities. As the court observed: "These are intangible characteristics, not tangible properties." [12]

It concluded that the ideas, thoughts, words, and information conveyed by the magazine and the supplement did not qualify as "products" within the meaning of the *Restatement*. [13]

### Other Decisions

As the *Way* court noted, the ruling follows the trend of products liability decisions refusing to find publishers liable for physical injuries to readers. Courts have addressed this issue in cases involving many types of "publications," providing information on a broad spectrum of subjects, including the following sampling. [14]

*A. Magazines*

#### 1. Articles

Like *Way*, other cases have involved claims raised against magazine publishers regarding articles they have printed. In one case, the plaintiffs asserted negligent publication and strict liability claims concerning a *Hustler Magazine* article on the practice of "autoerotic asphyxiation," the printing of which they alleged caused the death of a relative. [15]

The court granted the defendant's motion to dismiss the "novel claims" that the article was both "an attractive nuisance" and "a dangerous instrumentality or a defective, unreasonably dangerous product" on the ground that the complaint failed to state a claim. [16]

It also said there was no case law support for the plaintiffs' negligent publication claim.

Finally, it noted that First Amendment considerations argue against imposing liability on a publisher for a reader's reactions to a publication, unless there is evidence of "incitement" to commit an illegal act. [17]

#### 2. Advertisements

Also like *Way*, some cases against publishers have involved advertisements contained within their magazines. In *Yuhas v. Mudge*, [18] the plaintiffs sued a magazine publisher for injuries sustained from fireworks purchased by other defendants through an advertisement in *Popular Mechanics Magazine*. The court affirmed summary judgment for the publisher, ruling that a magazine publisher that did not manufacture, distribute, sell, test, warrant, or endorse an allegedly defective product advertised in its magazine may not be held responsible in negligence for injuries resulting from the use of the product. The court reasoned:

> To impose the suggested broad legal duty upon publishers of nationally circulated magazines, newspapers and other publications, would not only be impractical and unrealistic, but would have a staggering adverse effect on the commercial world and our economic system. For the law to permit such exposure to those in the publishing business who in good faith accept paid advertisements for a myriad of products would open the doors 'to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.' [19]

Similarly, in *Walters v. Seventeen Magazine*, [20] a subscriber sued a magazine and its publisher under negli-

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[11] *Id.* at 238-239 (citing *Brocklesby v. United States*, 767 F.2d 1288 (9th Cir. 1985), *cert. denied sub nom. Jeppesen & Co. v. Brocklesby*, 474 U.S. 1101 (1986); *Saloomey v. Jeppesen & Co.*, 707 F.2d 671 (2d Cir. 1983); *Fluor Corp. v. Jeppesen & Co.*, 216 Cal. Rptr. 68 (1985)). These cases are discussed *infra*.

[12] *Way*, 856 S.W.2d at 239.

[13] Having so concluded, the court rejected as without merit Way's additional contentions that: (1) the magazine was dangerous in the design of its content because the inclusion of the commercial shooting supplement rendered the product unreasonably dangerous; and (2) the defendants had a duty to furnish adequate warnings and instructions for the safe use of the product.

[14] This article is limited to cases where *personal injuries* were alleged to have been caused, excluding situations claiming only property damage or economic harm. See, *e.g.*, *L. Cohen & Co. v. Dun & Bradstreet, Inc.*, 629 F. Supp. 1425, 1430-1431 (D. Conn. 1986) (granting motions to dismiss and for summary judgment in action for damages resulting from dissemination of allegedly inaccurate credit report; credit report was not a "product" for purposes of Connecticut Product Liability Act). It is also limited to cases involving *written* publications, excluding claims regarding television or radio broadcasts or films.

[15] *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802 (S.D. Tex. 1983).

[16] *Herceg*, 565 F. Supp. at 803. The court noted that the plaintiffs' strict liability claims were "without support in existing case law" and that it was "aware of no court which has held that the content of a magazine or other publication is a product within the meaning of Section 402A of the Second Restatement of Torts. Rather, they have held to the contrary." The court further observed: "A magazine article is easily distinguishable from items such as gunpowder, fireworks, gasoline and poison which have an obvious physical effect."

[17] *Id.* at 804. Although the court granted the plaintiffs leave to amend to add an incitement claim, it noted that the article in question began with the following italicized "Editor's Note": *"HUSTLER emphasizes the often-fatal dangers of the practice of 'auto-erotic asphyxia' and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method. The facts are presented here solely for an educational purpose."* *Id.* at 805 n.3.

[18] 322 A.2d 824 (N.J. Super. Ct. App. Div. 1974).

[19] 322 A.2d at 825 (quoting *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441, 444 (N.Y. 1931)).

[20] 241 Cal. Rptr. 101 (Ct. App. 1987).



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gence, product liability, breach of warranty, and other theories, for injuries allegedly sustained as a result of using tampons advertised in the magazine. Affirming the dismissal of the claims, the court of appeal likewise voiced economic concerns:

> In the absence of any cause of action supported by traditional theories, we are loathe to create a new tort of negligently failing to investigate the safety of an advertised product. Such a tort would require publications to maintain huge staffs scrutinizing and testing each product offered. The enormous cost of such groups, along with skyrocketing insurance rates, would deter many magazines from accepting advertising, hastening their demise from lack of revenue. Others would comply, but raise their prices beyond the reach of the average reader. Still others would be wiped out by tort judgments, never to revive. Soon the total number of publications in circulation would drop dramatically. [21]

### 3. Endorsements/Guarantees

Some courts may be more willing to hold a magazine publisher liable for a defective advertised product, however, if the publisher expressly guarantees or endorses the item. The *Walters* court distinguished *Hanberry v. Hearst Corp.*, [22] which upheld a shoe purchaser's claim alleging personal injuries sustained when she slipped and fell wearing defective shoes guaranteed by the publisher through the consumer guaranty service of one of its publications. The shoes had been advertised in *Good Housekeeping* as meeting "Good Housekeeping's Consumers' Guaranty Seal." The magazine stated regarding the "Seal": "This is Good Housekeeping's Consumers' Guaranty" and "We satisfy ourselves that products advertised in *Good Housekeeping* are good ones and that the advertising claims made for them in our magazine are truthful." [23]

The *Hanberry* court ruled that one who endorses a product for one's own economic gain, and for the purpose of encouraging and inducing the public to buy it, may be liable to a purchaser who, relying on the endorsement, buys the product and is injured because it is defective and not as represented in the endorsement. [24] It stated that this case went beyond the typical situation of a magazine simply accepting and publishing advertisements, finding that the seal and certification implicitly represented that the publisher had independently and reasonably examined the product and found it satisfactory. [25] It suggested that Hearst might be liable for negligent misrepresentation if it failed to test, inspect, or examine the shoes it certified, or did but did so negligently. [26] However, it did reject the plaintiff's attempt to pursue warranty or strict liability in tort claims, since the publisher was not directly involved in manufacturing or supplying the products to the public. [27]

*B. Books*

### 1. Travel

Last year, in *Birmingham v. Fodor's Travel Publications, Inc.*, [28] the Hawaii Supreme Court affirmed sum-

[21] 241 Cal. Rptr. at 102-103.

[22] 81 Cal. Rptr. 519 (Ct. App. 1969). See Shapo, "Advertising and the Liability of Product Sellers," *Product Safety & Liability Reporter* 510, 513 (May 7, 1993).

[23] 81 Cal. Rptr. at 521.

[24] *Id.* The court conceded (with appropriate footwear language): "In arriving at this conclusion, we are influenced more by public policy than by whether such cause of action can be comfortably fitted into one of the law's traditional categories of liability."

[25] *Id.* at 522. The court concluded that Hearst thus had a duty to use reasonable care:

"Having voluntarily involved itself into the marketing process, having in effect loaned its reputation to promote and induce the sale of a given product ... we think respondent Hearst has placed itself in the position where public policy imposes upon it the duty to use ordinary care in the issuance of its seal and certification of quality so that members of the consuming public who rely on its endorsement are not unreasonably exposed to the risk of harm."

In *Walters*, the court distinguished *Hanberry* as "clearly inapposite" because *Seventeen* "did not in any way sponsor or endorse products advertised in its pages. There was no representation of quality, no promotional effort, and no attempt to induce the public to buy Playtex tampons beyond merely printing the advertisement." *Walters*, 241 Cal. Rptr. at 102. The *Walters* court rejected the plaintiffs' claim that (1) the placement of the ad amid articles on menstruation, sex and the female body, or (2) the supposed resemblance of the ad to feature stories (which the court disagreed with), somehow implied an endorsement.

Another, older case demonstrates that recovery is not guaranteed, even when the facts seem to indicate an endorsement. In *Mac Kown v. Illinois Publishing & Printing Co.*, 6 N.E.2d 526 (Ill. App. Ct. 1937), the court held that a newspaper was not liable for injuries to a reader resulting from her use of a dandruff remedy formula, even though an article (not an advertisement) describing it used language like: "Effective Remedy for Dandruff Woes," "Proves Its Values in Doctors' Tests," "has proved an effective remedy," and "is not only reliable, it is scientific, having been given to me years ago by a reputable doctor for my own use." *Id.* at 527. However, the court did observe: "There is no allegation, nor is there any contention, that the article did not speak the truth. Plaintiff may have been allergic to this remedy." *Id.* at 529.

[26] *Id.* at 523. The court further concluded that Hearst's attempt to limit its liability by inserting in its seal the words "If the product or performance is defective, Good Housekeeping guarantees replacement or refund to consumer," while possibly bearing on the contractual obligation it assumed, would not insulate it from full liability for injury resulting from tortious negligent misrepresentation.

[27] *Id.* at 524 ("liability for individually defective items should be limited to those directly involved in the manufacturing and supplying process, and should not be extended through warranty or strict liability to a general endorser who makes no representation it has examined or tested each item marketed").

[28] 833 P.2d 70 (Haw. 1992).

mary judgment for Fodor's and against a reader who alleged that a travel guide negligently failed to warn of dangerous ocean conditions at a Kauai beach, causing him injuries when he body surfed there. Fodor's did not author its publications; it published manuscripts prepared and submitted by outside writers. It also did not expressly guarantee, warrant, or endorse the locations and subjects as to which the publication provided descriptions and information. Addressing a question of first impression before it, and having reviewed available precedents, [29] the court ruled that "a publisher of a work of general circulation, that neither authors nor expressly guarantees the contents of its publication, has no duty to warn the reading public of the accuracy of the contents of its publication." [30] With regard to the plaintiffs' strict liability claims, the court also ruled that a publication is not a "product" for purposes of strict products liability analysis. [31]

### 2. Food/Cooking

A comprehensive analysis of these issues was presented in *Winter v. G.P. Putnam's Sons*. [32] There, mushroom enthusiasts who became severely ill from picking and eating mushrooms after relying on information in *The Encyclopedia of Mushrooms* sued the reference book's publisher under strict liability, negligence, and other theories. Affirming summary judgment for the defendant, the Ninth Circuit drew and explained the distinction between tangible and intangible aspects of a publication:

> A book containing Shakespeare's sonnets consists of two parts, the material and print therein, and the ideas and expression thereof. The first may be a product, but the second is not. The latter, were Shakespeare alive, would be governed by copyright laws; the laws of libel, to the extent consistent with the First Amendment; and the laws of misrepresentation, negligent misrepresentation, negligence, and mistake. These doctrines applicable to the second part are aimed at the delicate issues that arise with respect to intangibles such as ideas and expression. Products liability law is geared to the tangible world. [33]

Moreover, the court observed, the application of strict liability to the publishing context would have a chilling effect, outweighing the benefits of such a legal doctrine. [34] It rejected as "illusory" any attempt to mitigate that concern by applying strict liability only to publications giving instruction on how to accomplish a physical activity that is inherently dangerous. [35]

The *Winter* court also rejected the plaintiffs' analogizing their case to the defective aeronautical chart situation. The court reasoned that, while aeronautical charts were highly technical tools similar to a compass, in contrast, *The Encyclopedia of Mushrooms* was like a book on how to *use* a compass or aeronautical chart. The court further observed that, although the chart itself is like a physical "product," the "How To Use" book is pure thought and expression. It thus "decline[d] to expand products liability law to embrace the ideas and expression in a book." [36]

"Guided by the First Amendment and the values embodied therein," the court also declined to extend negligence liability to the ideas and expression contained in a book. [37] The court concluded that the publisher (which neither wrote nor edited the volume) had no duty to investigate independently the accuracy of the content of the books it published. It noted that, while a publisher may assume such a burden, "there is nothing inherent in the role of publisher or the surrounding legal doctrines to suggest that such a duty should be imposed"; consequently, "the cases uniformly refuse to impose such a duty." [38] Finally, it ruled that a publisher had no duty to

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[29] The court observed (*id.* at 75 (footnotes omitted)):

"It appears from a review of relevant case law that no jurisdiction has held a publisher liable in negligence for personal injury suffered in reliance upon information contained in the publication, unless the publisher authored or guaranteed the information. Whether based on negligent misrepresentation or negligent manufacture of a defective product, the cases uniformly hold, for the same policy reasons, that, absent guaranteeing or authoring the contents of the publication, a publisher has no duty to investigate and warn its readers of the accuracy of the contents of its publications."

[30] *Id.* at 76.

[31] *Id.* at 79.

[32] 938 F.2d 1033 (9th Cir. 1991) (applying California law).

[33] *Id.* at 1034 (additionally noting that "[t]he language of products liability law reflects its focus on tangible items" and that "[t]he purposes served by products liability law also are focused on the tangible world and do not take into consideration the unique characteristics of ideas and expression").

[34] *Id.* at 1035. The court stated:

"We place a high priority on the unfettered exchange of ideas. We accept the risk that words and ideas have wings we cannot clip and which carry them we know not where. The threat of liability without fault (financial responsibility for our words and ideas in the absence of fault or a special undertaking or responsibility) could seriously inhibit those who wish to share thoughts and theories."

[35] *Id.* The court explained:

"Ideas are often intimately linked with proposed action, and it would be difficult to draw such a bright line. While 'How To' books are a special genre, we decline to attempt to draw a line that puts 'How To Live A Good Life' books beyond the reach of strict liability while leaving 'How To Exercise Properly' books within its reach."

[36] *Id.* at 1036 (advising that "no court ... has chosen the path to which the plaintiffs point"). The court noted that its analysis applied as well to plaintiffs' false representation claims, observing: "To the extent that it is inappropriate to apply Section 402A because strict liability should not be applied to the transmission of ideas, the same logic would apply to Section 402B which also imposes strict liability." *Id.* at 1036 n.5.

[37] *Id.* at 1036.

[38] *Id.* at 1037.



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warn of the information being incomplete or of the publisher's lack of investigation, as it had no duty to investigate or guarantee the contents.

Of interest to those representing retailing clients, the analysis applied in these cases has been held to apply—and with increased vigor—to claims against the *sellers* of publications. In *Cardozo v. True*,[39] a person allegedly injured by following a cookbook recipe that used poisonous ingredients sued the author and book seller for breach of warranty. With regard to the seller,[40] the court noted that, since the U.C.C. definition of "goods" includes books, the seller "is held to have impliedly warranted the tangible, physical properties; *i.e.*, printing and binding of books."[41] However, the court emphasized it was "necessary to distinguish between the tangible properties of these goods and the thoughts and ideas conveyed thereby."[42] Thus, the court held:

> absent allegations that a book seller knew that there was reason to warn the public as to contents of a book, the implied warranty in respect to sale of books by a merchant who regularly sells them is limited to a warranty of the physical properties of such books and does not extend to the material communicated by the book's author or publisher.[43]

### 3. Dieting

Addressing a related subject, in *Smith v. Linn*,[44] the court affirmed summary judgment in favor of the publisher of *When Everything Else Fails ... The Last Chance Diet*, against claims that a reader died allegedly due to sudden complications caused by following a liquid protein diet described in the book. The court rejected the plaintiff's claim that the publisher should be as responsible as if it had directly sold liquid protein to the decedent and concomitantly had supplied her with the book as a form of "package insert."[45] It also rejected the plaintiff's argument that the book was a product and defective under Section 402A, noting that "no appellate court in any jurisdiction has held a book to be a product for purposes of section 402A. ..."[46]

### 4. Medical Treatment

In *Jones v. J.B. Lippincott Co.*,[47] the court granted summary judgment to a publisher against a nursing student who sued for allegedly suffering personal injuries when she followed a treatment described in the *Textbook for Medical and Surgical Nursing*. The court distinguished the liability of publishers from that of authors:

> Author liability for errors in the content of books, designs, or drawings is not firmly defined and will depend on the nature of the publication, on the intended audience, on causation in fact, and on the foreseeability of damage. ... Publisher liability, on the other hand, has more clearly defined principles and is therefore more easily determined. If a publisher serves the function of publishing the contents of an author, other than one of its own employees for whom it would be liable under the doctrine of respondeat superior, it has no duty for the contents.[48]

Since there was no evidence of Lippincott's having participated in preparing the content of the section of the book involved, the court concluded that it had no duty of care, and made no warranty, to the plaintiff with respect to the content.[49] The court also refused to hold Lippincott strictly liable as publisher for the content of

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[39] 342 So. 2d 1053 (Fla. Dist. Ct. App.), *cert. denied*, 353 So. 2d 674 (Fla. 1977).

[40] The author did not answer the complaint. The court expressly noted, "We make no statements concerning the liability of an author or publisher under the facts as certified to us." *Id.* at 1057.

[41] *Id.* at 1056.

[42] *Id.*

[43] *Id.* at 1057. The court reasoned that "[t]he principles of law and considerations of public policy which support denial of liability of a publisher" in cases involving products appearing in advertisements or referred to in articles "more urgently mandates denial of liability of a newsdealer." *Id.* at 1056.

[44] 563 A.2d 123 (Pa. Super. Ct. 1989), *aff'd*, 587 A.2d 309 (Pa. 1991).

[45] *Id.* at 126 ("Instructions by a manufacturer which accompany medication or use of certain marketed goods cannot be equated with publication of books which espouse a writer's theory, opinions or ideology."). *Cf. Beasock v. Dioguardi Enterprises, Inc.*, 494 N.Y.S.2d 974, 978 (Sup. Ct. 1985) (where trade association merely published dimensional specifications for tire and rim involved in explosion, "the publications themselves did not produce the injuries and thus cannot serve as the basis for the imposition of liability under a theory of either strict products liability or breach of warranty").

[46] *Id.* The court additionally distinguished the aeronautical map/chart cases, noting that there, "extremely technical and detailed materials were involved, upon which a limited class of persons imposed absolute trust having reason to believe in their unqualified reliability," such that the publications "took on the attributes of a product and are not protected by the first amendment." *Id.* at 127.

[47] 694 F. Supp. 1216 (D. Md. 1988).

[48] *Id.* at 1216-1217. Even if the "product" and "defect" hurdles are somehow overcome, the issue of authorship—and whether editing is considered akin to authorship—might be a muddy one. In *Brocklesby v. United States*, 767 F.2d 1288, 1296 (9th Cir. 1985), *cert. denied sub nom. Jeppesen & Co. v. Brocklesby*, 474 U.S. 1101 (1986) (applying California law), the court discounted the publisher's argument that the data upon which its charts were based came from the government, noting a manufacturer "is strictly liable for injuries caused by a defective product even though the defect originated from a component part manufactured by another party." However, it somewhat contradictorily later agreed that it would be unfair to hold a chart manufacturer strictly liable for accurately republishing a government regulation. *Id.* at 1297-1298 (observing the charts were more than a mere republication of government regulations, but were distinct products converting text into graphic form).

[49] *Id.* at 1217.

books that it published, noting that "[n]o case has extended Section 402A to the dissemination of an idea or knowledge in books or other published material," and that "to do so could chill expression and publication which is inconsistent with fundamental free speech principles." [50]

Similarly, in *Libertelli v. Hoffman-La Roche, Inc.*, [51] the court granted a motion to dismiss by the publisher of the *Physicians Desk Reference* against a plaintiff who allegedly became addicted to Valium, a drug listed in the volume. The court rejected claims of gross negligence against the publisher for failing to warn or test. The publisher argued, in effect, that the *PDR* was a book of advertisements. Noting that each annual volume explicitly stated that the products' descriptions were supplied by their manufacturers and that the publisher did not advocate the use of any of the products, the court ruled that no warranty had been made and that neither intent to harm nor recklessness had been shown. [52] It also ruled that, even if the publisher's characterization of the descriptions as "advertisements" were rejected, the First Amendment would defeat the plaintiff's claim.

### 5. Toolmaking/Metalsmithing

In *Alm v. Van Nostrand Reinhold Co.*, [53] the appellate court upheld the dismissal of a negligence action against the publisher of *The Making of Tools* by a reader injured while allegedly following the book's instructions for making a tool which shattered. Concluding that the facts did not support a cause of action for negligent misrepresentation, the court rejected the plaintiff's contention that a publisher of a "How To" book has a duty to provide adequate and safe instructions and warnings to intended purchasers and users of its publications. Such a contention, it cautioned, "would place upon publishers the duty of scrutinizing and even testing all procedures contained in any of their publications" such that "[t]he scope of liability would extend to an undeterminable number of potential readers." [54]

The *Alm* decision was adopted (as interpreted) as the law in Michigan in *Lewin v. McCreight*, [55] which granted a book publisher's motion to dismiss an action regarding an explosion that allegedly occurred while the plaintiffs were mixing a mordant according to instructions in *The Complete Metalsmith*. Noting that the issue of whether a publisher owes a legal duty to warn the reading public of the content of the books it publishes was one of first impression in Michigan, it observed that "[e]very case in other jurisdictions that would support a products liability cause of action against a publisher for injurious information in the books it publishes involves a situation in which the publisher actually created, rather than merely printed, the content." [56] In contrast, in this case the publisher had merely printed and bound a book written by an outside author. Following the analysis in *Alm*, the *Lewin* court agreed that:

> publishers of information supplied by third-party authors do not have a duty to warn of the content of the books it [sic] publishes, because the burden of scrutinizing and testing all procedures contained in their publications is too great. . .
>
> [G]iven the tremendous burden such a duty would place upon defendant publishers, the weighty societal interest in free access to ideas, and potentially unlimited liability, it would be unwise to impose a duty to warn of 'defective ideas' upon publishers of information supplied by third party authors. [57]

Nevertheless, the court expressly cautioned:

> The balance might well come out differently, however, if the publisher contributed some of the content of the book. The burden of determining whether the content was accurate would be less than in the present case. Similarly, publishers may have greater responsibilities where the risk of harm is plain and severe such as a book entitled *How To Make Your Own Parachute*. Any such legal responsibilities would, of course, have to comport with the rule that manufacturers have no duty to warn of obvious dangers. [58]

### 6. Science Experiments/Textbooks

In *Walter v. Bauer*, [59] a case involving a student injured while conducting a science experiment described in a textbook published by the defendant publisher, [60] the

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[50] *Id.* at 1217-1218 (distinguishing (at 1217) the aeronautical chart cases, where such publications are analogized to "other instruments of navigation such as a compass or radar finder which, when defective, will prove to be dangerous").

[51] 7 Med. L. Rptr. 1734 (S.D.N.Y. 1981).

[52] *Id.* at 1735-1736. The court did speculate that, had the evidence indicated the publisher tested the drug and learned of its alleged addictive qualities but did not warn readers, a claim against the publisher might have been stated. *Id.* at 1736.

[53] 480 N.E.2d 1263 (Ill. App. Ct. 1985).

[54] *Id.* at 1267. The court also noted that First Amendment concerns militated against imposition of the duty sought by the plaintiff, referring to "the chilling effect which liability would have upon publishers" and that "the adverse effect of such liability upon the public's free access to ideas would be too high a price to pay."

[55] 655 F. Supp. 282 (E.D. Mich. 1987).

[56] 655 F. Supp. at 283 (citing as an example *Saloomey v. Jeppesen & Co.*, 707 F.2d 671 (2d Cir. 1983), involving aircraft navigational charts). The *Lewin* court declined to certify the issue to the Michigan Supreme Court "in the interest of judicial economy and in accordance with the wishes of all parties." *Lewin*, 655 F. Supp. at 283 n.1.

[57] 655 F. Supp. at 283-284.

[58] *Id.*

[59] 451 N.Y.S.2d 533 (App. Div. 1982), *mod'g and aff'g*, 439 N.Y.S.2d 821 (Sup. Ct. 1981).

[60] The experiment, designed to demonstrate pitch, employed a rubber band and a ruler; when attempted, the ruler was propelled into the plaintiff's eye.



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court affirmed a lower court's ruling denying leave to add a products liability cause of action, upholding the determination that the proposed amendment failed to state a cause of action. [61]

However, in *Kercsmar v. Pen Argyl Area School District*, [62] a prior (and somewhat obscure) case not cited in the *Walter* trial or appellate opinions, the court denied the preliminary objections of the publisher of a high school chemistry textbook alleged to have been followed by a student injured while conducting an experiment. In a portion of its opinion regarding jurisdiction over the nonresident *authors*, the court broadly proclaimed: "Freedom of speech is not absolute" and "There is no right to be free to commit tortious acts or distribute defective or dangerous products." [63] It explained:

> This substantive issue of tortious and warranty liability for physical injury on the basis of the words of a book is novel. This is clearly not within the often litigated defamation and privacy areas where First Amendments [sic] rights are discussed at length. The court does not feel that First Amendment rights would be chilled if authors of informational texts are held liable for physical harm caused as a result of their tortious conduct. A book, such as that which is the subject of a portion of this lawsuit, might well prove to be a defective product within the ever-expanding field of products liability. [64]

The court stated that, since "the duty imposed is an affirmative one to warn, not a negative one that would chill the author's freedom to write and publish," attaching jurisdiction would not be "unreasonable or offensive" to the First Amendment. [65]

The *Kercsmar* court denied and dismissed the publisher's preliminary objections to the plaintiff's negligence counts, finding that the pleadings were sufficient and stated a cause of action. It also denied and dismissed objections by the publisher and authors to the plaintiff's breach of implied warranty claims (granting objections to breach of express warranty claims), noting that the textbook was a "good" under the U.C.C.:

> Defendants argue that an experiment in a book cannot possibly be 'movable,' and hence, not a 'good.' However, we deem it to be the text book which constitutes the 'goods,' while the description of the chemistry experiment contained therein is the defect, ergo—the breach. Today, when the Supreme Court has heralded the demands of public policy and legal symmetry, we cannot afford to take a myopic view of the area of products liability. [66]

The court thus concluded that the plaintiff had sufficiently pled a breach of implied warranty: "The averment of an injury due to the defect in the text (the chemistry experiment) is sufficient for the liberal implied warranty pleading requisites." [67]

A similar claim in another case reportedly resulted in a sizable out-of-court settlement. [68]

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[61] *Id.* at 534. The lower court characterized as "a novel theory" the plaintiff's contention that the publisher was subject to a cause of action for strict liability in tort. 439 N.Y.S.2d at 822. Concluding such a theory was "not applicable to the current situation," it (at 822-823) reasoned:

"*Discovering Science 4* cannot be said to be a defective product, for the infant plaintiff was not injured by use of the book for the purpose for which it was designed, i.e., to be read. More importantly perhaps, the danger of plaintiff's proposed theory is the chilling effect it would have on the First Amendment—Freedoms of Speech and Press. Would any author wish to be exposed to liability for writing on a topic which might result in physical injury? e.g. How to cut trees; How to keep bees?"

[62] 1 Pa.D. & C.3d 1 (Common Pleas Northampton County 1976).

[63] *Id.* at 7.

[64] *Id.* at 7 n.7.

[65] *Id.* at 8.

[66] *Id.* at 11.

[67] *Id.* at 12-13. The only reported decisions to cite *Kercsmar* are the trial and intermediate appellate opinions in *Smith v. Linn*, discussed *supra*. The Pennsylvania Superior Court in *Smith* distinguished and declined to accept the reasoning in *Kercsmar*: "While *Kercsmar* does suggest at least that a trial court believed the contents of a book to be a good, as an appellate court, we may decline to accept that view. Further, as the trial court in the instant matter observed, no other court has followed the *Kercsmar* view." *Smith*, 563 A.2d at 126-127. In the lower court decision in *Smith*, the Court of Common Pleas of Montgomery County had noted that "*Kercsmar* provides little help in deciding this case since it deals with preliminary objections, settled before progressing further, and is not binding authority on this court." *Smith v. Linn*, 48 Pa.D. & C.3d 339, 344 (Common Pleas Montgomery County 1988), *aff'd*, 563 A.2d 123 (Pa. Super. Ct. 1989), *aff'd*, 587 A.2d 309 (Pa. 1991). The lower court further stated (48 Pa.D. & C.3d at 356-357):

"We find *Kercsmar* unpersuasive for several reasons and limit it to its facts. . . . In the 12 years since *Kercsmar* was decided, no court has followed the *Kercsmar* view, rather the view has been rejected as witnessed by the *Cardozo* and *Herceg* decisions. *Kercsmar* does not set precedent on this court as it hails from the common pleas level in Philadelphia, as does this court. Further, in light of the First Amendment concerns discussed earlier in this opinion and the more recent cases dealing with publisher's liability we see no indication of the *Kercsmar* view being adopted."

[68] The district court's opinion in *Herceg*, 565 F. Supp. 802 (S.D. Tex. 1983), contains the following footnote:

"The court notes, however, that a theory of negligent publication has been used in an action against the publisher of a textbook for injuries caused to a student by methyl alcohol vapors which exploded where use of the alcohol was recommended and suggested by the publisher without warnings. *Carter v. Rand McNally*, C.A. 76-1864-F (D.Mass.) (unreported case cited in Swartz, 'You can't judge a book by its cover,' Trial, Nov. 1981, 89 at 110. The action settled for $1.1 million."

*Id.* at 804 n.1. Whether the "recommendation" or "suggestion" referred to rose to the level of a guarantee is unclear.

*C. Aeronautical Charts/Maps*

As noted above, some courts have ruled that publishers may be held responsible for personal injuries of readers in the narrow and specific situation of aeronautical charts and maps, graphically depicting geographical features or instrument approach information for pilots, which are considered "products." [69] Nevertheless, as also noted above, the courts have refused to extend the rulings or reasoning applicable to these specific and highly technical publications to the broader claims regarding ideas and expressions in popular periodicals and books discussed above. Interestingly, in a case involving an ordinary *highway* map, the court did not specifically address the issue whether the map was a "product," but agreed that there was no substantial evidence that the map was defective. [70]

**The Next Chapter**

Although the vast majority of courts have largely—and properly—rejected readers' claims against publishers for personal injuries, there is no guarantee that all future decisions will follow this trend. Moreover, many of these decisions have stated or implied that certain changes in the facts presented might possibly lead to different results. Courts ruling that a publisher has no duty to verify or guarantee the accuracy of articles or manuscripts submitted to it may be more receptive to claims where the publisher or its employees (such as a staff writer or reporter) participate in the creation of the work's content. Additionally, if a plaintiff can convince a court that a particular technical book or article merits "aeronautical chart" treatment, recovery may be more likely. Finally, the increasingly-apparent inclination to give a clearly injured person his or her "day in court" may allow such claims eventually to survive summary judgment or dismissal and be presented to a potentially sympathetic jury.

So what advice can counsel give publisher clients to minimize the risk of their being hit with such a claim, or to maximize the chance of winning if they do get sued? Based on general litigation defense principles and on insights from the rulings in these cases, some suggestions to publishers can be offered:

1. *Do not make any guarantees* either in particular articles or elsewhere in publications regarding the accuracy of the information presented—or the safety of the products or activities described.

2. *Consider printing a disclaimer* in each issue specifically advising and putting readers on notice that the publication is *not* making any guarantees regarding safety. Be aware that a "warning" tied to a specific article or book of particular concern (such as "How to Make Your Own Parachute") might prompt a plaintiff's lawyer to argue that the failure to do the same for another article or book somehow implied that the product or activity discussed in the latter was safe.

3. For internally-produced articles, *institute and follow defensible procedures for verifying accuracy* of information presented, particularly for discussions of products or activities that pose a significant risk of physical injury.

4. For free-lance articles, *require verification of information by outside writers* as a term of their contract with the publisher.

There are additional steps publishers and counsel can take to reduce the risk of having to pay money damages if liability is found:

1. *Check the publisher's insurance policies* to verify that it is covered for personal injury claims allegedly arising out of published information and, if not, consider negotiating for such coverage.

2. *Obtain indemnification from advertisers* for all claims relating to or arising from their advertisements and the products or services mentioned. Consider doing the same for information provided by manufacturers for stories regarding their products or services. Optimally, both insurance coverage and advertiser indemnification should include reimbursement of litigation defense costs in addition to possible damage payments.

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[69] *E.g., Brocklesby v. United States*, 767 F.2d 1288, 1295 (9th Cir. 1985) (applying California law) ("We agree with the plaintiffs' position that Jeppesen's chart was a defective product for purposes of analysis under section 402A."), *cert. denied sub nom. Jeppesen & Co. v. Brocklesby*, 474 U.S. 1101 (1986); *Fluor Corp. v. Jeppesen & Co.*, 216 Cal. Rptr. 68, 71-72 (Ct. App. 1985) (characterizing instrument approach charts as "products" promotes "the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them"; "although a sheet of paper might not be dangerous, per se, it would be difficult indeed to conceive of a salable commodity with more inherent lethal potential than an aid to aircraft navigation that, contrary to its own design standards, fails to list the highest land mass immediately surrounding a landing site"); *Saloomey v. Jeppesen & Co.*, 707 F.2d 671, 676-677 (2d Cir. 1983) (applying Colorado law) ("We believe that the trial court did not err in classifying appellant's charts as products. . . . The comments to Section 402A . . . envision strict liability against sellers of such items in these circumstances. By publishing and selling the charts, Jeppesen undertook a special responsibility, as seller, to insure that consumers will not be injured by the use of the charts"); *Aetna Casualty and Surety Co. v. Jeppesen & Co.*, 642 F.2d 339, 342-343 (9th Cir. 1981) (applying Nevada law) (graphic approach chart was publisher's "product"; trial court's finding that chart was defective product not clearly erroneous). *But see Times Mirror Co. v. Sisk*, 593 P.2d 924, 927 (Ariz. Ct. App. 1978) (applying Colorado law) ("we have serious misgivings about whether this is a products liability case"; court did not reach question whether charts were "products" or "goods" within Sections 402A and 402B or the Colorado Commercial Code).

[70] *Miller v. Rand McNally & Co.*, 595 So. 2d 1367, 1368 (Ala. 1992) (action by truck driver against highway map publisher for injuries sustained in accident under Alabama Extended Manufacturer's Liability Doctrine; summary judgment for publisher affirmed). It can be argued that the "defect" issue would not have been reached had the court not determined (or assumed) that the map was a "product" under the statute.



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