

Fall 2013

## The Disorderly Conduct of Words: Civil Liability for Injuries Caused by the Dissemination of False or Inaccurate Information

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### Recommended Citation

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**“THE DISORDERLY CONDUCT OF WORDS”: CIVIL LIABILITY FOR INJURIES  
CAUSED BY THE DISSEMINATION OF FALSE OR INACCURATE INFORMATION**

Richard C. Ausness\*

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I. INTRODUCTION

This Article is concerned with the potential liability of those who disseminate false or inaccurate information that causes physical injury or property damage to those who rely upon it. However, this Article will not address the question of whether those who advocate or depict violence or other antisocial activities should also be subject to liability.<sup>1</sup> For the most part, such publications are considered to be a form of constitutionally protected speech, even when they directly cause physical harm to others.<sup>2</sup> Although the issue of liability for the publication of factually inaccurate information is narrower in scope than liability for the publication of bad ideas, a surprising amount of variation exists regarding how courts treat those who publish such information.<sup>3</sup> Liability may be based on whether the information relates to the sale of a product, whether it is embodied in a product, or whether it is disseminated electronically or in some kind of tangible form.<sup>4</sup> This Article will try to determine whether any of these distinctions are relevant to the type of liability applicable to those who publish inaccurate information.

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1. See generally Richard C. Ausness, *The Application of Product Liability Principles to Publishers of Violent or Sexually Explicit Materials*, 52 FLA. L. REV. 603 (2000) (discussing the potential imposition of liability with respect to publishers of violent or sexually explicit material and potential first amendment protections); Paul E. Salamanca, *Video Games as a Protected Form of Expression*, 40 GA. L. REV. 153 (2005) (discussing the potential for liability with respect to violent or sexually explicit video games and first amendment protections afforded to them).

2. See, e.g., *Waller v. Osbourne*, 763 F. Supp. 1144, 1152 (M.D. Ga. 1991) (finding no tort liability where wrongful acts were based on protected speech), *aff'd*, 958 F.2d 1084 (11th Cir. 1992) (unpublished decision); *Zamora v. Columbia Broad. Sys.*, 480 F. Supp. 199, 206 (S.D. Fla. 1979) (holding that broadcasting conduct that incited violence was protected speech); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 198 (Ct. App. 1988) (holding that music producers were not liable for suicide of listener); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1072 (Mass. 1989) (holding that production, distribution, and exhibition of violence was protected speech). But see, e.g., *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 266–67 (4th Cir. 1997) (holding that an instructional manual on murder was not protected speech and that the book's publisher could be liable for aiding and abetting a triple murder when the publisher stipulated that they marketed the book to would-be murderers); *Byers v. Edmondson*, 712 So. 2d 681, 691 (La. Ct. App. 1998) (holding that the production of a movie that inspired a shooting was not protected speech because it fell within the incitement to imminent lawless activity exception to the First Amendment).

3. See 2 DAVID G. OWEN ET AL., *MADDEN & OWEN ON PRODUCTS LIABILITY* § 20:9, at 481–84, 485 & nn. 34–35 (3d ed. 2000) (footnotes omitted).

4. See 1 *id.* § 3:1, at 79.

The Article begins by examining the existing state of the law in this area. Part II focuses on liability for information associated with the marketing or sale of a product. In such cases, liability for product sellers may arise from product descriptions in advertising or express warranties,<sup>5</sup> as well as mistakes in instructions and warnings.<sup>6</sup> Potential liability theories include negligence, misrepresentation, breach of warranty, and strict liability in tort.<sup>7</sup> Part III examines liability for inaccurate information published in books, magazines, and other tangible media. Although plaintiffs have invoked a variety of theories, such as negligence and strict liability in tort, courts have generally refused to impose liability either on doctrinal grounds or because of concerns about the chilling effect of tort liability on the free exchange of ideas.<sup>8</sup>

Part IV ventures into the largely unexplored area of liability for information embodied in computer programs and the more conventional forms of information disseminated over the Internet. Because there are no reported cases on the subject, it is difficult to predict what sort of liability rule would apply to those who sell computer programs. In theory, stand-alone computer programs could be considered goods and, therefore, subject to sales warranties under the Uniform Commercial Code (UCC);<sup>9</sup> however, it is less certain that courts will also treat them as products for purposes of applying strict principles.<sup>10</sup> On the other hand, consumers may be able to recover against product sellers when defective computer programs embedded in a product cause it to malfunction. In addition, Part IV considers which liability rules currently apply to inaccurate information that is made available to the public over the Internet. What little case law there is suggests that courts will impose liability of some sort when the information provider is trying to sell a product, but not otherwise.

Finally, Part V considers a bifurcated liability standard that distinguishes between commercial and noncommercial information. Part V also concludes that a negligence standard is appropriate for those who disseminate information of a commercial nature. However, publishers of noncommercial information should be subject to tort liability only if they breach an express warranty or engage in fraudulent misrepresentation.

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5. See 1 *id.* § 1:5, at 17.

6. See 1 *id.* § 2:7, at 62.

7. See 1 *id.* § 1:5, at 15.

8. See 2 *id.* § 20:9, at 481 (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19 cmt. d (1998)).

9. *Goods* are defined as “all things that are movable when a security interest attaches. . . . [including] a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program.” U.C.C. § 9-102(a)(44) (2013).

10. A *product* is defined as “tangible personal property distributed commercially for use or consumption.” RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19 (1998).

## II. LIABILITY FOR INACCURATE PRODUCT WARNINGS AND INSTRUCTIONS

Factual statements associated with products can appear in a variety of forms, including product labels and packaging, brochures and other sales literature, owner's manuals, sales contracts, instructional or promotional videos, service bulletins, and certain specialized materials such as material safety data sheets (MSDS) and preliminary design review (PDR) entries. When these statements are inaccurate, incomplete, or misleading—and thereby cause injury—accident victims may seek compensation by invoking theories such as breach of express warranty, fraud, negligent misrepresentation, and strict liability in tort.<sup>11</sup> When the claim is based on breach of warranty or misrepresentation, liability can arise directly from the information itself. However, when the claim is based on strict liability in tort under the “failure-to-warn” theory, most courts impose liability because the product—rather than the information provided—is defective.<sup>12</sup>

A. *Liability Theories*

Plaintiffs usually rely on breach of warranty or misrepresentation when claiming that statements in product literature are factually inaccurate.<sup>13</sup> In other cases, strict liability in tort is the preferred theory of liability.<sup>14</sup>

1. *Breach of Express Warranty*

The law of express warranty is codified in section 2-313 of the UCC, which declares that “[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.”<sup>15</sup> Express warranties may arise from descriptions of the product, as well as statements or promises that appear in labels, packaging, or sales literature.<sup>16</sup> Some states refuse to allow consumers to sue for breach of express warranty unless they have actually relied on the seller's statements or promises;<sup>17</sup> other states have dispensed with this requirement.<sup>18</sup>

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11. See 1 OWEN ET AL., *supra* note 3, § 1.5, at 15.

12. See generally W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 99, at 697 (5th ed. 1984) (noting that a strict liability action for failure to warn “is really nothing more than a ground of negligence liability described as the sale of a product in a defective condition”).

13. See OWEN ET AL., *supra* note 3, § 4:1, at 121.

14. *Id.*

15. U.C.C. § 2-313(1)(a) (2012).

16. See *id.* §§ 2-313(1)(b), -313(2) (2012).

17. See, e.g., *Wendt v. Beardmore Suburban Chevrolet, Inc.*, 336 N.W.2d 424, 428 (Neb. 1985) (“Since an express warranty must have been ‘made part of the basis of the bargain,’ it is essential that the plaintiffs prove reliance upon the warranty.”); *Kelleher v. Marvin Lumber & Cedar Co.*, 891 A.2d 477, 500 (N.H. 2005) (citing *Cipollone v. Liggett Grp., Inc.*, 893 F.2d 541, 564

## 2. *Fraudulent Misrepresentation*

Misrepresentation involves the communication of false or misleading information to another person.<sup>19</sup> Misrepresentation is often called “fraud” or “deceit” when a defendant knows that a statement is false and makes it to mislead the plaintiff.<sup>20</sup> If the scienter requirement cannot be met, an injured party may still sue for negligent misrepresentation.<sup>21</sup> The drafters of the Restatement (Second) of Torts pioneered the introduction of “innocent” misrepresentation in the 1960s.<sup>22</sup> Although very few states embraced this concept,<sup>23</sup> it was retained in the new Restatement (Third) of Torts: Products Liability (Products Liability Restatement) when it was promulgated in 1998.<sup>24</sup>

## 3. *Strict Liability in Tort*

The concept of strict liability for the sale of defective products was first incorporated into the Restatement (Second) of Torts almost fifty years ago.<sup>25</sup> It is now codified in the new Products Liability Restatement.<sup>26</sup> Under strict liability principles, manufacturers<sup>27</sup>—as well as others in the distributive

(3d Cir. 1990); *Torres v. Nw. Eng’g Co.*, 949 P.2d 1004, 1013 (Haw. Ct. App. 1997)) (“A majority of jurisdictions continues [sic] to find that reliance is an essential element of an express warranty claim.”).

18. *See, e.g., Martin v. Am. Med. Sys., Inc.*, 116 F.3d 102, 105 (4th Cir. 1997) (citing *Daughtrey v. Ashe*, 413 S.E.2d 336, 338 (Va. 1992)) (noting that any description of the goods is a part of the basis of the bargain and, therefore, “[i]t is unnecessary that the buyer actually rely upon it”); *Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638, 645 (10th Cir. 1991) (“[T]he majority of jurisdictions . . . have found it unnecessary to require reliance from the buyer.”); *Keith v. Buchanan*, 220 Cal. Rptr. 392, 398 (Ct. App. 1985) (“The representation need only be a part of the basis of the bargain, or merely a factor or consideration inducing the buyer to enter into the bargain.”).

19. DAVID G. OWEN, *PRODUCTS LIABILITY LAW* § 3.1, at 113 (2d ed. 2008).

20. *Estate of Schwarz v. Phillip Morris, Inc.*, 1356 P.3d 409, 423 (Or. Ct. App. 2006) (citing *U.S. Nat’l Bank v. Fought*, 630 P.3d 337, 351 (Or. 1981)).

21. *See, e.g., Bd. of Educ. of Chi. v. A, C & S, Inc.*, 546 N.E.2d 580, 591 (Ill. 1989) (noting that liability for negligent misrepresentation does not require that the defendant “know that the statement is false. His own carelessness or negligence in ascertaining its truth will suffice”); *Snelten v. Schmidt Implement Co.*, 647 N.E.2d 1071, 1076 (Ill. App. Ct. 1995) (stating that the elements of negligent misrepresentation are the same as fraud except the defendant is not required to know the statement was false).

22. RESTATEMENT (SECOND) OF TORTS § 402B cmt. a (1965).

23. OWEN, *supra* note 19, § 3.4, at 140.

24. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 9 cmt. b (1998).

25. RESTATEMENT (SECOND) OF TORTS § 402A cmt. a (1965).

26. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998).

27. *See, e.g., Dayton Tire & Rubber Co. v. Davis*, 348 So. 2d 575, 581–82 (Fla. Dist. Ct. App. 1977), *rev’d on other grounds sub nom. Goodyear Tire & Rubber Co. v. Hughes*, 358 So. 2d 1339 (Fla. 1978)) (discussing a manufacturer’s “strict duty to warn” of a product’s risks); *Scherman-Gonzalez v. Saber Mfg. Co.*, 816 So. 2d 1133, 1139 (Fla. Dist. Ct. App. 2002) (citing *Brito v. Cnty. of Palm Beach*, 753 So. 2d 109, 112 (Fla. Dist. Ct. App. 1998); *Am. Cyanamid Co. v. Roy*, 466 So. 2d 1079, 1082 (Fla. Dist. Ct. App. 1984)) (“[A] manufacturer has a duty to warn where its product . . . has dangerous propensities.”); *Jone v. Coleman Co.*, 183 S.W.3d 600, 609 (Mo. Ct.

chain<sup>28</sup>—have a duty to provide adequate warnings about product-related risks to foreseeable users of their products.<sup>29</sup> Manufacturers are also responsible for providing instructions for the safe operation of their products.<sup>30</sup> In theory,

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App. 2005) (citing *Duke v. Gulf & W. Mfg. Co.*, 660 S.W.2d 404, 418 (Mo. Ct. App. 1983)) (“The fact remains that the manufacturer of an inherently dangerous product has a duty to warn ultimate users.”); *Liriano v. Hobart Corp.*, 700 N.E.2d 303, 305 (N.Y. 1998) (citing *Rastelli v. Goodyear Tire & Rubber Co.*, 582 N.Y.S.2d 373, 376 (1992)) (holding that a manufacturer has a duty to warn against dangers that could harm foreseeable users).

28. See, e.g., *Adams v. Owens-Corning Fiberglas Corp.*, 923 So. 2d 118, 123 (La. Ct. App. 2005) (“[A] non-manufacturer/seller . . . has a duty to warn a purchaser of defects . . . in the products he sells.”).

29. See M. Stuart Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 89 W. VA. L. REV. 221, 279 (1987) (citing *Hammond v. N. Am. Asbestos Corp.*, 454 N.E.2d 210 (Ill. 1983); *Venus v. O’Hara*, 468 N.E.2d 405 (Ill. App. Ct. 1984)). This also requires sellers to test their products or otherwise investigate to discover the existence of product-related risks. See, e.g., *Richter v. Limax Int’l, Inc.*, 45 F.3d 1464, 1470 (10th Cir. 1995) (noting that Kansas imposes a duty on manufacturers to test and inspect products for safety); *Cartwright v. Pfizer, Inc.*, 369 F. Supp. 2d 876, 886 (E.D. Tex. 2005) (citing *Wood v. Phillips Petrol. Co.*, 119 S.W.3d 870, 873 (Tex. App. 2003)) (stating that Texas law requires testing of products to determine necessity of warnings); *Elam v. Lincoln Elec. Co.*, 841 N.E.2d 1037, 1045 (Ill. App. Ct. 2005) (finding that manufacturer could be liable for failing to investigate risks after receiving advice on dangers of product); *Baylie v. Swift & Co.*, 670 N.E.2d 772, 782 (Ill. App. Ct. 1996) (holding that sufficient evidence existed to determine that manufacturer had the ability to test the product, but failed to do so); *Lindquist v. Ayerst Labs., Inc.*, 607 P.2d 1339, 1350 (Kan. 1980) (quoting 1 ROBERT D. HURSH & HENRY J. BAILEY, *AMERICAN LAW OF PRODUCTS LIABILITY* § 2:29, at 214 (2d ed. 1974)) (recognizing a manufacturer’s duty to test and inspect the product for risks and safety). This is distinct from a manufacturer’s duty to design a safe product; therefore, a plaintiff does not have to elect between these two liability theories. *Gosewisch v. Am. Honda Motor Co.*, 737 P.2d 376, 379 (Ariz. 1987).

30. See, e.g., *Duford v. Sears, Roebuck & Co.*, 833 F.2d 407, 411–12 (1st Cir. 1987) (reasoning that the jury could have found defendants liable due to inadequacy of warnings or unclear instructions); *Finn v. G.D. Searle & Co.*, 677 P.2d 1147, 1152 (Cal. 1984) (noting the possible warning requirement for instructions on product usage); *Midgley v. S.S. Kresge Co.*, 127 Cal. Rptr. 217, 219 (Ct. App. 1976) (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965)) (stating that the seller may be required to give instructions or warnings on proper product usage); *E. Penn Mfg. Co. v. Pineda*, 578 A.2d 1113, 1122–3 (D.C. 1990) (footnotes omitted) (citations omitted) (holding that defendants were responsible for providing specific instructions on how to use a product); *Payne v. Soft Sheen Prods., Inc.*, 486 A.2d 712, 724 (D.C. 1985) (upholding the jury’s finding of insufficient instructions on product usage); *Edwards v. Cal. Chem. Co.*, 245 So. 2d 259, 265 (Fla. Dist. Ct. App. 1971) (finding a warning label inadequate when it failed to instruct on proper usage and necessary precautions users should take); *Miller v. Rinker Boat Co.*, 815 N.E.2d 1219, 1239–41 (Ill. App. Ct. 2004) (citations omitted) (noting that strict liability can result from a manufacturer’s failure to provide instructions on how to use a product); *Cook v. Ford Motor Co.*, 913 N.E.2d 311, 319–20 (Ind. Ct. App. 2009) (citations omitted) (discussing manufacturer’s duty to include warnings about product usage); *Hooker v. Super Prods. Corp.*, 751 So. 2d 889, 907 (La. Ct. App. 1999) (finding liability from the manufacturer’s failure to warn about known dangers of personal product repair); *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 274 (Minn. 2004) (citing *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 787 (Minn. 1977)) (“The duty to warn includes the duty to give adequate instructions for the safe use of the product.”); *Tompkins v. Log Sys., Inc.*, 385 S.E.2d 545, 548 (N.C. Ct. App. 1989) (discussing manufacturers failure to provide complete instructions on product usage).

warnings and instructions are different.<sup>31</sup> Warnings inform consumers about inherent, product-related risks, thereby enabling consumers to encounter the risks safely or avoid them altogether by not using the product.<sup>32</sup> Instructions, on the other hand, inform consumers about how to avoid unnecessary risks by using the product properly.<sup>33</sup>

Most courts<sup>34</sup> and commentators<sup>35</sup> agree that the duty to warn is the same under theories of negligence and strict liability. However, each of these theories has a different focus. In a negligence case, liability is determined based on whether the defendant exercised due care in deciding whether to warn about a particular risk and in formulating that warning.<sup>36</sup> In other words, the court looks to the reasonableness of the defendant's *conduct*.<sup>37</sup> In a strict liability case, however, liability is based on the condition of the *product*.<sup>38</sup> Thus, the seller will

31. See, e.g., *McConnell v. Cosco, Inc.*, 238 F. Supp. 2d 970, 977 (S.D. Ohio 2003) (noting that warnings must disclose risks beyond mere instructions); *Shuras v. Integrated Project Servs., Inc.*, 190 F. Supp. 2d 194, 201 (D. Mass. 2002) (“Instructions on the use of a product does not discharge a manufacturer’s duty to warn.”); *Hiigel v. Gen. Motors Corp.*, 544 P.2d 983, 988 (Colo. 1975) (citing *Anderson v. Klix Chem. Co.*, 472 P.2d 806, 810 (Or. 1970)) (noting that the duty to warn is not satisfied by only providing instructions on product use); *Brown v. Glade & Grove Supply, Inc.*, 647 So. 2d 1033, 1036 (Fla. Dist. Ct. App. 1994) (determining that providing advice on proper use is an instruction, not a warning); *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 99 (Minn. 1987) (finding that directions on how to park a vehicle did not constitute warnings about the risks of parking a vehicle); *D’Arienzo v. Clairol, Inc.*, 310 A.2d 106, 110 (N.J. Super. Ct. App. Div. 1973) (“[T]he duty to warn is not discharged by the mere presence of directions for use on the product, no matter how clear their meaning.”).

32. *Salinas v. Amteck of Ky., Inc.*, 682 F. Supp. 2d 1022, 1025 (N.D. Cal. 2010) (citing *Johnson v. Am. Standard, Inc.*, 179 P.3d 905 (Cal. 2008)); *Byrne v. SCM Corp.*, 538 N.E.2d 796, 811 (Ill. App. Ct. 1989) (citing *Collins v. Sunnyside Corp.*, 496 N.E.2d 1155 (Ill. App. Ct. 1986)).

33. *Helene Curtis Indus., Inc. v. Pruitt*, 385 F.2d 841, 860 (5th Cir. 1967) (citing Hardy Cross Dillard & Harris Hart, II, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145, 147 (1955)); *McGee v. Corometrics Med. Sys., Inc.*, 487 So. 2d 886, 893 (Ala. 1986) (quoting *Helene Curtis Indus., Inc.*, 385 F.2d at 860); Jerry J. Phillips, *A Synopsis of the Developing Law of Products Liability*, 28 DRAKE L. REV. 317, 350 (1978–1979); Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. CIN. L. REV. 38, 52 (1983).

34. See, e.g., *Cooley v. Carter-Wallace, Inc.*, 478 N.Y.S.2d 375, 379 (App. Div. 1984) (noting that when failure to adequately warn is alleged, “negligence and strict liability are equivalent”).

35. See, e.g., James B. Sales, *The Duty to Warn and Instruct for Safe Use in Strict Tort Liability*, 13 ST. MARY’S L.J. 521, 546 (1981) (noting that “[o]ther jurisdictions . . . perceive the theories of strict tort liability and negligence . . . [as] providing essentially identical standards for the duty to warn”).

36. See, e.g., *Croskey v. BMW of N. Am., Inc.*, 532 F.3d 511, 515 (6th Cir. 2008) (“A negligence claim in a products liability action looks to the manufacturer’s conduct . . . .”); *Gregory v. Cincinnati, Inc.* 538 N.W.2d 325, 328–29 (Mich. 1995) (noting that the balancing test of risk and utility is employed to determine a manufacturer’s exercise of due care).

37. *Giglio v. Conn. Light & Power Co.*, 429 A.2d 486, 489 (Conn. 1980) (“The doctrine of strict liability is concerned with the character of the product injected into the stream of commerce, not with the specific conduct of the defendant.”).

38. *Gregory*, 538 N.W.2d at 329 & n.8 (citing *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 186 (Mich. 1984)).



be liable if the product is defective, unreasonably dangerous, or not reasonably safe.<sup>39</sup> If the manufacturer fails to provide adequate warnings or instructions in appropriate circumstances then a product that is otherwise properly made would still be deemed defective and unreasonably dangerous.<sup>40</sup>

In a failure-to-warn case, the court must first decide whether the seller owes a duty to warn about the particular risk in question.<sup>41</sup> This issue is usually treated as a question of law, rather than a factual matter for the jury to decide.<sup>42</sup> In many states, courts have concluded that a defendant has no duty to warn if the risk is an obvious one that should be known to the consumer.<sup>43</sup> Once a court

39. See, e.g., *Croskey*, 532 F.3d at 515–16 (discussing that a plaintiff can show the product was not reasonably safe in order to establish a design defect); *Koonce v. Quaker Safety Prods. & Mfg. Co.*, 798 F.2d 700, 716 (5th Cir. 1986) (citing *Pavlidis v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338 (5th Cir. 1984)) (noting that a product can be defective because it was made unreasonably dangerous by way of failing to include adequate warnings).

40. See, e.g., *Croskey*, 532 F.3d at 515 n.2 (citing *Gregory*, 538 N.W.2d at 329) (“A negligent failure to warn renders a product defective even if the design chosen does not render the product defective.”); *Koonce*, 798 F.2d at 716 (citing *Pavlidis*, 727 F.2d at 338) (stating the absence of warnings renders a product unreasonably dangerous, and, therefore, defective even if the product is otherwise properly made); *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809, 811 (9th Cir. 1974) (citing *Davis v. Wyeth Labs.*, 399 F.2d 121 (9th Cir. 1968)) (noting that a product may be “perfectly manufactured” but still be unreasonably dangerous due to the failure to warn); *Lee v. Butcher Boy*, 215 Cal. Rptr. 195, 201 (Ct. App. 1985) (citing *Cavers v. Cushman Motor Sales, Inc.*, 157 Cal. Rptr. 142, 147 (Ct. App. 1979)) (“Even if a product is faultlessly made, if may be found defective if it is unreasonably dangerous . . . without adequate warnings.”); *Canifax v. Hercules Powder Co.*, 46 Cal. Rptr. 552, 558 (Dist. Ct. App. 1965) (noting that a manufacturer will be liable for a flawlessly made product when the lack of adequate warnings makes the product unreasonably dangerous); *Giglio*, 429 A.2d at 489 (“The failure to warn . . . is, of itself, a defect.” (quoting WILLIAM L. PROSSER, LAW OF TORTS 659 (4th ed. 1971))); *Hunter v. Werner Co.*, 574 S.E.2d 426, 431 (Ga. Ct. App. 2002) (quoting *Battersby v. Boyer*, 526 S.E.2d 159, 162 (Ga. Ct. App. 1999)) (noting that a failure to adequately warn renders a product even when the product is otherwise safe for use); *Wise v. Ford Motor Co.*, 943 P.2d 1310, 1314 (Mont. 1997) (citing *Krueger v. Gen. Motors Corp.*, 783 P.2d 1340, 1348 (Mont. 1989); *Brown v. N. Am. Mfg. Co.*, 576 P.2d 711, 718–19 (Mont. 1978)) (observing that an otherwise technically sound product is defective when the manufacturer fails to warn); *Lucas v. Tex. Indus., Inc.*, 696 S.W.2d 372, 377 (Tex. 1984) (citing *Carter v. Massey-Ferguson, Inc.*, 716 F.2d 344, 346 n.1 (5th Cir. 1983); *Miller v. Bock Laundry Mach. Co.*, 568 S.W.2d 648, 650 (Tex. 1977)) (observing that a product may be defective solely due to a failure to warn of risks).

41. See, e.g., *Schultz v. Hennessy Indus., Inc.*, 584 N.E.2d 235, 242 (Ill. App. Ct. 1991) (citations omitted) (noting that the determination of whether the manufacturer’s duty to warn exists is a question of law for the court and the plaintiff must establish this in order to establish a products liability claim).

42. *Schaffer v. A.O. Smith Harvestore Prods., Inc.*, 74 F.3d 722, 729 (6th Cir. 1996) (citing *Mussivand v. David*, 544 N.E.2d 265, 269 (Ohio 1989)); *Schultz*, 584 N.E.2d at 242 (citing *Genaust v. Ill. Power Co.*, 343 N.E.2d 465, 471 (Ill. 1976); *Mason v. Caterpillar Tractor Co.*, 487 N.E.2d 1043, 1048 (Ill. App. Ct. 1985)); *Anderson v. Shaughnessy*, 519 N.W.2d 229, 233 (Minn. Ct. App. 1994), rev’d, 526 N.W.2d 625 (Minn. 1995) (citing *Gorath v. Rockwell Int’l, Inc.*, 441 N.W.2d 128, 133 (Minn. Ct. App. 1989)).

43. See, e.g., *Greene v. A.P. Prods., Ltd.*, 717 N.W.2d 855, 859–60 (Mich. 2006) (citing MICH. COMP. LAWS § 600.2948(2) (West 2012)) (“[A] manufacturer has no duty to warn of a material risk associated with the use of the product if the risk . . . is obvious, or should be obvious . . .”).

concludes that the manufacturer has a duty to warn, the jury must then determine whether the warning actually given was adequate.<sup>44</sup> The adequacy of the warning issue, as well as the causation issue,<sup>45</sup> is usually regarded as a question of fact for the jury to decide.<sup>46</sup>

Assuming that a warning is given, it must be adequate—that is, the warning must be reasonable under the circumstances.<sup>47</sup> The adequacy of a warning involves a consideration of a number of factors.<sup>48</sup> First, a warning must provide complete information about all significant risks associated with the products' use.<sup>49</sup> Each risk must be specifically identified.<sup>50</sup> For example, an Arizona court

44. *Smith v. Louisville Ladder Co.*, 237 F.3d 515, 522 (5th Cir. 2001); *Zettle v. Handy Mfg. Co.*, 837 F. Supp. 222, 227 (E.D. Mich. 1992) (citing *Hill v. Husky Briquetting, Inc.*, 220 N.W.2d 137, 141 (Mich. Ct. App. 1974)); *Graham v. Wyeth Labs.*, 666 F. Supp. 1483, 1499 (D. Kan. 1987) (citing *Wooderson v. Ortho Pharm. Corp.*, 681 P.2d 1038, 1056 (Kan. 1984)); *see also Ortho Pharm. Corp. v. Chapman*, 388 N.E.2d 541, 552 (Ind. Ct. App. 1979) (citing *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 86 (4th Cir. 1962)).

45. *See, e.g., Goodner v. Hyundai Motor Co.*, 650 F.3d 1034, 1044 (5th Cir. 2011) (“[C]ausation generally is a question of fact for the jury.” (quoting *Flock v. Scripto-Tokai Corp.*, 319 F.3d 231, 237 (5th Cir. 2003))); *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204, 209 (N.Y. 1983) (noting that “it would be proper for the jury to decide whether the defective design was a substantial factor causing plaintiff’s injury”).

46. *Gracyalny v. Westinghouse Elec. Corp.*, 723 F.2d 1311, 1316 (7th Cir. 1983); *Bryant v. Technical Research Co.*, 654 F.2d 1337, 1345 (9th Cir. 1981) (citing *Dougherty v. Hooker Chem. Corp.*, 540 F.2d 174, 178 (3d Cir. 1976); *Anderson v. Heron Eng’g Co.*, 604 P.2d 674, 679 (Colo. 1979)); *Kovach v. Alpha Pharma, Inc.*, 890 N.E.2d 55, 66 (Ind. Ct. App. 2008), *vacated*, 913 N.E.2d 193 (Ind. 2009) (citing *Ford Motor Co. v. Rushford*, 868 N.E.2d 806, 810 (Ind. 2007)); *Alm v. Aluminum Co. of Am.*, 717 S.W.2d 588, 592 (Tex. 1986) (citing *Bituminous Cas. Corp. v. Black & Decker Mfg. Co.*, 518 S.W.2d 868, 873 (Tex. Civ. App. 1974)); *see also Fyssakis v. Knight Equip. Corp.*, 826 P.2d 570, 571–72 (Nev. 1992).

47. *Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 853 (10th Cir. 2003) (citing *Brochu v. Ortho Pharm. Corp.*, 642 F.2d 652, 657 (1st Cir. 1981)).

48. *Anderson v. Hedstrom Corp.*, 76 F. Supp. 2d 422, 440 (S.D.N.Y. 1999); *Werckenthein v. Bucher Petrochemical Co.*, 618 N.E.2d 902, 908–09 (Ill. App. Ct. 1993) (citing *Taylor v. Gerry’s Ridgewood, Inc.*, 490 N.E.2d 987, 992 (Ill. App. Ct. 1986)) (analyzing the adequacy of warnings by looking at a number of factors).

49. *Thornton v. E.I. Du Pont de Nemours & Co.*, 22 F.3d 284, 289 (11th Cir. 1994) (quoting *Pavrides v. Galveston Yacht Basin*, 727 F.2d 330, 338 (5th Cir. 1984)); *Little v. Liquid Air Corp.*, 939 F.2d 1293, 1300 (5th Cir. 1991) (quoting *Jackson v. Johns-Mansville Sales Corp.*, 750 F.2d 1314, 1320 (5th Cir. 1985)), *aff’d in part, rev’d in part*, 952 F.2d 841 (5th Cir. 1992); *Pavrides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338 (5th Cir. 1984); *Lindsay v. Ortho Pharm. Corp.*, 637 F.2d 87, 91 (2d Cir. 1980) (citing *Baker v. St. Agnes Hosp.*, 421 N.Y.S.2d 81, 85 (App. Div. 1979); *Tinnerholm v. Parke Davis & Co.*, 285 F. Supp. 432, 451 (S.D.N.Y. 1968), *aff’d on other grounds*, 411 F.2d 48 (2d Cir. 1969)); *Reid v. BMW of N. Am.*, 430 F. Supp. 2d 1365, 1373 (N.D. Ga. 2006) (quoting *Pavrides*, 727 F.2d at 338), *amended by*, 464 F. Supp. 2d 1267 (N.D. Ga. 2006); *Deines v. Vermeer Mfg. Co.*, 755 F. Supp. 350, 353 (D. Kan. 1990) (citing *Wooderson v. Ortho Pharm. Corp.*, 681 P.2d 1038, 1062 (Kan. 1984)); *Cooley v. Carter-Wallace, Inc.*, 478 N.Y.S.2d 375, 377–78 (App. Div. 1984) (quoting *Lancaster Silo & Block Co. v. N. Propane Gas Co.*, 427 N.Y.S.2d 1009 (App. Div. 1980)); *Eddleman v. Scalco*, 484 S.W.2d 122, 126 (Tex. App. 1972) (quoting *Rumsey v. Freeway Mano Minimax*, 423 S.W.2d 387 (Tex. Civ. App. 1968)); *see also Gean v. Cling Surface Co.*, 971 F.2d 642, 644 (11th Cir. 1992) (citing *Entrekin v. Atl. Richfield Co.*, 519 So. 2d 447, 449 (Ala. 1987); *Casrell v. Altec Indus.*, 335 So. 2d 128, 132–33 (Ala. 1976)); *Hayes v. Spartan Chem. Co.*, 622 So. 2d 1352, 1354–55 (Fla. Dist. Ct. App. 1993) (citing *Holl v. Talcott*, 191 So. 2d 40 (Fla.

in *Tucson Industries, Inc. v. Schwartz*<sup>51</sup> held that the warnings on a container of contact adhesive were inadequate because they warned about flammability, but did not disclose that fumes from the product could cause blindness.<sup>52</sup> In addition, the warning must reveal the actual likelihood and gravity of such risks when they are known by the manufacturer.<sup>53</sup> Applying this principle, in *Martinkovic v. Wyeth Laboratories, Inc.*,<sup>54</sup> a federal district court ruled that a jury might conclude that the defendant's warning with respect to its DTP vaccine was inadequate.<sup>55</sup> Although the package insert stated that the incidence of convulsions from the vaccine was "exceedingly rare," the plaintiff introduced expert testimony that the risk of convulsions might be as high as 1 in 300.<sup>56</sup> This evidence was sufficient to prevent the defendant from obtaining summary judgment.<sup>57</sup>

The physical format of the warning is also important.<sup>58</sup> A warning will be deemed inadequate if its print size is too small to be noticed by the user,<sup>59</sup> or if

1966)); *Fiorentino v. A.E. Staley Mfg. Co.*, 416 N.E.2d 998, 1003–04 (Mass. App. Ct. 1981) (citing *Murray v. Wilson Oak Flooring Co.*, 475 F.2d 129, 132–33 (7th Cir. 1973)); *Gen. Motors Corp. v. Saenz*, 966 S.W.2d 545, 552 (Tex. App. 1997).

50. *See, e.g.*, *Tucson Indus., Inc. v. Schwartz*, 501 P.2d 936, 941 (Ariz. 1972) (discussing how disclosure of the exact risks, such as immediate blindness, associated with use of the product would make the warning adequate); *Zeigler v. CloWhite Co.*, 507 S.E.2d 182, 184 (Ga. Ct. App. 1998) (noting a lack of an adequate warning specifically pertaining to the use of a lemon scent to disguise the use of bleach in the product); *Mack v. Ford Motor Co.*, 669 N.E.2d 608, 610 (Ill. App. Ct. 1996) (noting that the manufacturer had a duty to warn of the existence of a switch that disabled the vehicle); *First Nat'l Bank in Albuquerque v. Nor-Am Agric. Prods., Inc.*, 537 P.2d 682, 691 (N.M. Ct. App. 1975) ("The warning must designate specifically all of the dangers that may cause serious injury . . . ." (quoting Comment, *The Manufacturer's Duty to Warn of Dangers Involved in Use of a Product*, 1967 WASH. U. L.Q. 206, 210 (1967))).

51. 501 P.2d 936 (Ariz. 1972).

52. *Id.* at 941.

53. *See, e.g.*, *Martinkovic ex rel. Martinkovic v. Wyeth Labs., Inc.*, 669 F. Supp. 212, 216 (N.D. Ill. 1987) (analyzing whether defendants knew or should have known of the actual incidence of adverse reactions in the product); *Michael v. Warner/Chilcott*, 579 P.2d 183, 187 (N.M. Ct. App. 1978) ("The warning must reasonably communicate the extent or seriousness of harm that could result from the danger." (quoting *First Nat'l Bank in Albuquerque*, 537 P.2d at 691)); *Benjamin v. Wal-Mart Stores, Inc.*, 61 P.3d 257, 265 (Or. Ct. App. 2002) (noting that an expert testified that "a warning should identify what the hazard is, the seriousness of the hazard, and the reason that it is important"); *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 429 (Tenn. 1994) (noting that "a reasonable warning . . . warns with the degree of intensity required by the nature of the risk" (citing *Seley v. G.D. Searle & Co.*, 423 N.E.2d 831 (Ohio 1981))).

54. 669 F. Supp. 212 (N.D. Ill. 1987).

55. *See id.* at 216.

56. *Id.* (citation omitted).

57. *Id.*

58. *See, e.g.*, *Gardner v. Q. H. S., Inc.*, 448 F.2d 238, 241, 243 (4th Cir. 1971) (analyzing the placement and size of a warning to determine adequacy); *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 82, 86 (4th Cir. 1962) (describing in detail the prominence, position, size, and color of a warning); *Jones v. Amazing Prods., Inc.*, 231 F. Supp. 2d 1228, 1242 (N.D. Ga. 2002) (discussing at length the physical format of a warning label).

59. *See, e.g.*, *Gardner*, 448 F.2d at 243 (noting font size as a factor in determining adequacy); *Spruill*, 308 F.2d at 86 (examining the font size of a warning to determine prominence and

the warning is not placed in a prominent position on the label.<sup>60</sup> If the risk is particularly serious, the seller may be required to place a warning on the product itself, rather than simply mentioning it in an owner's manual or other off-product location.<sup>61</sup> Even when a warning is placed on the product itself, it must be located where it is easily visible.<sup>62</sup> Thus, in *Delery v. Prudential Insurance Company*,<sup>63</sup> a Louisiana intermediate appellate court determined that a chair manufacturer's warning—which was placed underneath the chair—was inadequate because it was unlikely to be visible to an ordinary user.<sup>64</sup>

Third, a warning must be phrased with a degree of intensity that is commensurate with the danger involved.<sup>65</sup> A warning will also be considered

adequacy); *Jones*, 231 F. Supp. 2d at 1247–48 (holding that a warning was inadequate due to its miniscule font size); *Am. Optical Co. v. Weidenhamer*, 404 N.E.2d 606, 617–18 (Ind. Ct. App. 1980) (holding that a warning was inadequate due to its miniscule font size), *vacated*, 457 N.E.2d 181 (Ind. 1983); *Johnson v. Delta Int'l Mach. Corp.*, 876 N.Y.S.2d 577, 579 (App. Div. 2009) (noting the small print size of the warning); *Benjamin v. Wal-Mart Stores, Inc.*, 61 P.3d 257, 266 (Or. Ct. App. 2002) (citing *Schmeiser v. Trus Joist Corp.*, 540 P.2d 998, 1004–05 (Or. 1975); *Anderson v. Klix Chem. Co.*, 472 P.2d 806, 810 (Or. 1970)) (finding that a jury could have found the warning was not in a form to catch the attention of a reasonable user due to its size and color).

60. *See, e.g., Derienzo v. Trek Bicycle Corp.*, 376 F. Supp. 2d 537, 568 (S.D.N.Y. 2005) (citing *Arbaiza v. Delta Int'l Mach. Corp.*, No. CV 96-1224(RJD), 1998 WL 846773 (E.D.N.Y. Oct. 5, 1998)) (“A warning that is inconspicuously located . . . may be deficient.”); *Nowak ex rel. Nowak v. Faberge, U.S.A. Inc.*, 812 F. Supp. 492, 497–98 (M.D. Pa. 1992) (holding that expert testimony on the prominence of the label was a sufficient foundation for the jury to find inadequacy), *aff'd*, 32 F.3d 755 (3d Cir. 1994); *D'Arienzo v. Clairrol, Inc.*, 310 A.2d 106, 111 (N.J. Super. Ct. Law Div. 1973) (noting the importance of the prominence of the warning); *Darsan v. Guncalito Corp.*, 545 N.Y.S.2d 594, 596 (App. Div. 1989) (finding that the plaintiff produced sufficient evidence to present to a jury on defendant's failure to display warning with sufficient prominence); *Maize v. Atl. Ref. Co.*, 41 A.2d 850, 852–53 (Pa. 1945) (noting that the word “safety” was more prominent than the warning, leading the consumer to believe the product was safe).

61. *See, e.g., Folsom v. Kawasaki Motors Corp., U.S.A.*, 509 F. Supp. 2d 1364, 1379–80 (M.D. Ga. 2007) (citing *Camden Oil Co., LLC v. Jackson*, 609 S.E.2d 356, 359 (Ga. Ct. App. 2004); *Wilson Foods Corp. v. Turner*, 460 S.E.2d 532, 534 (Ca. Ct. App. 1995)) (finding that a jury could conclude the position of the label was not sufficiently conspicuous because the driver could not see it while operating the jet-ski); *McGarrigle v. Mercury Marine*, 838 F. Supp. 2d 282, 293 (D.N.J. 2011) (noting that expert testimony was sufficiently reliable to establish that a warning should be affixed to the product itself).

62. *See, e.g., Jones v. P.K. Smith Chevrolet-Olds, Inc.*, 444 So. 2d 1372, 1377 (La. Ct. App. 1984) (noting that despite location of the warning, if the warning “is not clearly visible [it] is not an adequate warning” (quoting *Andries v. Gen. Motors Corp.*, 444 So. 2d 1180, 1183 (La. 1983))).

63. 643 So. 2d 807 (La. Ct. App. 1994).

64. *Id.* at 814.

65. *See, e.g., Salmon v. Parke, Davis & Co.*, 520 F.2d 1359, 1363 (4th Cir. 1975) (finding that a jury could reasonably conclude that the drug manufacturer's warning “lacked the emphasis that the danger demanded”); *Martinkovic ex rel. Martinkovic v. Wyeth Labs., Inc.*, 669 F. Supp. 212, 216 (N.D. Ill. 1987) (finding a genuine issue of material fact as to whether the wording “extremely rare” clearly conveys the dangers of the vaccination); *Burke v. Deere & Co.*, 780 F. Supp. 1225, 1248 (S.D. Iowa 1991) (noting that the duty to warn requires emphasis that would “cause a reasonable man to exercise . . . caution commensurate with the potential danger” (quoting *Schuh v. Fox River Tractor Co.*, 218 N.W.2d 279, 285 (Wis. 1974))), *rev'd on other grounds*, 6 F.3d 497 (8th Cir. 1993); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 210 (Colo. 1984) (noting that expert testimony was not required to determine whether the company was negligent in failing to

inadequate if it is ambiguous, equivocal, or contradictory.<sup>66</sup> Thus, an Oregon court declared that a jury could reasonably conclude that a reference to “acid” in a cleaning product’s labeling was not sufficient to warn the plaintiff that she should wear rubber gloves while using the product.<sup>67</sup> In addition, an effective warning must be written in such a way that it can be easily understood by its intended audience.<sup>68</sup> For example, in *MacDonald v. Ortho Pharmaceutical Corp.*,<sup>69</sup> a Massachusetts court agreed with the jury that the manufacturer of oral contraceptives failed to adequately warn about the inherent risks of using its birth control pills.<sup>70</sup> A booklet distributed by Ortho warned about “abnormal blood clotting,” but failed to use the more common term “stroke” to describe this risk.<sup>71</sup> Finally, an otherwise acceptable warning may be found inadequate if it has not been communicated through the most effective channels.<sup>72</sup> This concept

provide a full warning of the significant dangers of the medicine); *Seley v. G. D. Searle & Co.*, 423 N.E.2d 831, 837 (Ohio 1981) (“A reasonable warning . . . warns with the degree of intensity demanded by the nature of the risk.”); *Hilliard v. A.H. Robins Co.*, 196 Cal. Rptr. 117, 131–32 (Ct. App. 1983) (finding that the labeling and warning of a device “was inadequate to apprise the doctors of the risk”); *Scheman-Gonzalez v. Saber Mfg. Co.*, 816 So. 2d 1133, 1139 (Fla. Dist. Ct. App. 2002) (“The warning should be . . . commensurate with the potential danger.” (quoting *Am. Cyanamid Co. v. Roy*, 466 So. 2d 1079, 1082 (Fla. Dist. Ct. App. 1984))); *Miller v. Rinker Boat Co.*, 815 N.E.2d 1219, 1240 (Ill. App. Ct. 2004) (noting that the plaintiff’s expert concluded that the warning was inadequate because it did not convey the seriousness of the risk); *Mahr v. G.D. Searle & Co.*, 390 N.E.2d 1214, 1230 (Ill. App. Ct. 1979) (“Implicit in the duty to warn is the duty to warn with a degree of intensity that would cause a reasonable [person] to exercise . . . caution . . .” (quoting *Bristol-Myers Co. v. Gonzales*, 548 S.W.2d 416, 423–24 (Tex. Civ. App. 1976))); *Richards v. Upjohn Co.*, 625 P.2d 1192, 1196 (N.M. Ct. App. 1980) (finding that there was evidence that the warnings were unclear and did not effectively communicate the dangers of product use); *Gen. Chem. Corp. v. De La Lastra*, 815 S.W.2d 750, 754 (Tex. App. 1991) (“Implicit in the duty to warn is the duty to warn with a degree of intensity . . . commensurate with the potential danger.” (quoting *Bituminous Cas. Corp. v. Black & Decker Mfg. Co.*, 518 S.W.2d 868, 873 (Tex. Civ. App. 1974))), *aff’d in part, rev’d in part*, 852 S.W.2d 916 (Tex. 1993).

66. *See, e.g.*, *Givens v. Lederle*, 556 F.2d 1341, 1345 (5th Cir. 1977) (citation omitted) (noting that an expert concluded “this was a very nebulous way of putting [the warning].”); *Bean v. Ross Mfg. Co.*, 344 S.W.2d 18, 23–24 (Mo. 1961) (analyzing the ambiguous and contradictory nature of the warning); *Anderson v. Klix Chem. Co.*, 472 P.2d 806, 810 (Or. 1970) (noting the plaintiff’s assertion that the warning was equivocal).

67. *See Anderson*, 472 P.2d at 809–10.

68. *See, e.g.*, *MacDonald v. Ortho Pharm. Corp.*, 475 N.E.2d 65, 71–72 (Mass. 1985) (holding that the jury could have concluded that the warning “failed to make the nature of the risk reasonably comprehensible to the average consumer”); *Gen. Chem. Corp.*, 815 S.W.2d at 754 (citing *Bituminous Cas. Corp.*, 518 S.W.2d at 872–73) (“[A] warning . . . is legally adequate if it . . . is of such a nature as to be comprehensible to the average user . . .”).

69. 475 N.E.2d 65 (Mass. 1984).

70. *Id.* at 70–71.

71. *Id.* at 66–67.

72. *See, e.g.*, *Rhodes v. Interstate Battery Sys.*, 722 F.2d 1517, 1519–20 (11th Cir. 1984) (determining that a genuine issue of material fact existed as to whether there were more effective ways of communicating the warning), *superseded by statute*, 1987 Ga. Laws 1152–53; *Yarrow v. Sterling Drug, Inc.*, 263 F. Supp. 159, 163 (D.S.D. 1967) (analyzing the most effective way to provide a warning for drugs already in use by doctors), *aff’d*, 408 F.2d 978 (8th Cir. 1969); *Brown v. Glade & Grove Supply, Inc.*, 647 So. 2d 1033, 1035 (Fla. Dist. Ct. App. 1994) (noting that the

is illustrated in *Yarrow v. Sterling Drug, Inc.*,<sup>73</sup> in which a federal district court concluded that the manufacturer of Aralen—a prescription drug used in the treatment of arthritis—failed to adequately warn the plaintiff’s physician about the risks of blindness because it relied on package inserts, product cards, and other forms of literature, instead of directing its sales representatives to personally warn doctors about this risk.<sup>74</sup>

### *B. Inaccurate Information in Connection with the Sale of a Product*

As the cases illustrate below, although manufacturers and other sellers are not liable for every kind of misstatement they make in connection with the sale of a product, liability may be imposed in any number of situations. This includes statements that inaccurately describe the nature of a product or its ingredients,<sup>75</sup> unwarranted assurances of product safety,<sup>76</sup> misinformation about the existence or nature of a particular risk,<sup>77</sup> understatement of the seriousness of a particular risk,<sup>78</sup> and inaccurate statements about product performance.<sup>79</sup> Courts have also imposed liability upon manufacturers who provide faulty information about the assembly, operation, maintenance, and repair of their products.<sup>80</sup>

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placement and manner of conveyance of the warning was not effective to apprise the user of the danger); *Richards v. Upjohn Co.*, 625 P.2d 1192, 1196 (N.M. Ct. App. 1980) (“There is also evidence that the warnings which were given . . . were unclear, and that they did not effectively communicate . . . the dangers from using the drug . . .”).

73. 263 F. Supp. 159.

74. *Id.* at 162–63.

75. *See, e.g., Lane v. C.A. Swanson & Sons*, 278 P.2d 723, 726 (Cal. Dist. Ct. App. 1955) (finding defendant liable where the label on the can coupled with a newspaper advertisement misrepresented that the canned chicken contained “no bones”); *Kolarik v. Cory Int’l Corp.*, 721 N.W.2d 159, 166 (Iowa 2006) (finding it reasonable that consumers would expect pits to be removed from a jar that claimed olives were “minced pimento stuffed”).

76. *See, e.g., Drayton v. Jiffee Chem. Corp.*, 395 F. Supp. 1081, 1093 (N.D. Ohio 1975) (noting that the defendants advertised “that liquid plumr was ‘safe’ for ordinary household use,” before it cause severe burns to plaintiff’s face), *aff’d*, 591 F.2d 352 (6th Cir. 1978); *McLachlan v. Wilmington Dry Goods Co.*, 22 A.2d 851, 851 (Del. Super. Ct. 1941) (noting that defendant seller gave an affirmation of fact that the dress was suitable for wear, when it actually contained injurious and poisonous substances).

77. *See, e.g., Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1235 (Kan. 1987) (affirming a jury verdict for the plaintiff where the defendant falsely stated the product had a significantly lower pregnancy rate than it actually did); *Crocker v. Winthrop Labs.*, 514 S.W.2d 429, 433 (Tex. 1974) (holding that the defendant was liable where its sales materials stated that the product was not addictive and plaintiff died from addiction to the product).

78. *See, e.g., Crocker*, 514 S.W.2d at 433 (holding that the defendant was liable where its sales materials stated that the product was not addictive and plaintiff died from addiction to the product).

79. *See, e.g., Caboni v. Gen. Motors Corp.*, 398 F.3d 357 (5th Cir. 2005) (noting that the defendants inaccurately portrayed the performance of an airbag in the owner’s manual).

80. *See, e.g., Pavlides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338–40 (5th Cir. 1984) (analyzing the manufacturer’s failure to warn for providing inadequate operation and maintenance instructions to prevent the boats sold from sinking); *Midgley v. S.S. Kresge Co.*, 127 Cal. Rptr. 217, 221 (Ct. App. 1976) (“[A] product requiring assembly . . . is defective if the supplier fails to warn

### 1. *Inaccurate Descriptions of Products or Product Ingredients*

There are a number of cases in which consumers have sued purveyors of canned or packaged food products, claiming that they were injured because the product labeling was inaccurate.<sup>81</sup> In most instances, the plaintiffs based their claims on breach of express warranty,<sup>82</sup> but plaintiffs have also relied on other liability theories, such as strict liability and negligence.<sup>83</sup> For example, *Lane v. C. A. Swanson & Sons*<sup>84</sup>—which was decided by a California intermediate appellate court in 1955—involved a consumer who purchased a can of boned chicken packaged by the defendant, C.A. Swanson & Sons.<sup>85</sup> The plaintiff brought suit when a bone fragment hidden in the contents of the can became lodged in his throat.<sup>86</sup> Swanson argued that the phrase “boned chicken” did not constitute an express warranty that the product was entirely free of bones or bone fragments; rather, this phrase was merely descriptive of the manner in which the product was prepared and packaged.<sup>87</sup> However, the court rejected this argument partly because the defendant had explicitly stated in a newspaper advertisement that the product had “no bones.”<sup>88</sup>

*Kolarik v. Cory International Corp.*,<sup>89</sup> a more recent case, concerned a jar of imported pimento-stuffed green olives bottled by the defendant, a wholesale distributor.<sup>90</sup> The plaintiff broke a tooth when he bit down on an olive pit or pit fragment while consuming one of the defendant’s olives.<sup>91</sup> The label on the jar described the olives as “minced pimento stuffed.”<sup>92</sup> The plaintiff maintained that

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adequately of conditions . . . created by such assembly or use which would render the product dangerous to the user.”).

81. See, e.g., *In re McDonald’s French Fries Litig.*, 257 F.R.D. 669, 670 (N.D. Ill. 2009) (noting that plaintiffs diagnosed with certain medical conditions sued when McDonald’s falsely claimed that its French fries were gluten, wheat, and dairy free); *Lane v. C. A. Swanson & Sons*, 278 P.2d 723, 723–24 (Cal. Dist. Ct. App. 1955) (noting that plaintiff sued after receiving severe injuries to his throat after a bone from defendant’s canned chicken product lodged in plaintiff’s throat); *Kolarik v. Cory Int’l Corp.*, 721 N.W.2d 161, 166 (Iowa 2006) (noting that plaintiff sued defendant after fracturing his tooth on a pit found in a jar of pimiento stuffed olives).

82. See, e.g., *In re McDonald’s French Fries Litig.*, 257 F.R.D. at 670 (noting that plaintiffs brought claim against McDonald’s, alleging breach of express warranty for misrepresenting that McDonald’s fries were gluten free); *Lane*, 278 P.2d at 723–24 (noting that plaintiffs alleged breach of warranty against defendant for misrepresenting that its canned chicken contained “no bones”).

83. See, e.g., *Kolarik*, 721 N.W.2d at 161 (stating that the plaintiff relied on theories of negligence, strict liability, and breach of express and implied warranty in bringing suit against defendant manufacturer of minced pimento stuffed olives).

84. 278 P.2d 723.

85. *Id.* at 723.

86. *Id.* at 723–24.

87. *Id.* at 724.

88. *Id.* at 726.

89. 721 N.W.2d 159 (Iowa 2006).

90. *Id.* at 161.

91. *Id.*

92. *Id.* at 163.

the language on the product's container constituted an express warranty that the olives had been pitted and were free of pits or pit fragments.<sup>93</sup>

The plaintiff brought suit against the distributor, claiming breach of express and implied warranty, strict liability in tort, and negligence.<sup>94</sup> The trial court granted the defendant's motion for summary judgment on all counts.<sup>95</sup> On appeal, the Iowa Supreme Court affirmed the lower court's rejection of the plaintiff's implied warranty and strict liability claims because it concluded that the defendant, as a re-packager, was protected from liability by statute.<sup>96</sup> The court also held that the description on the label did not amount to an express warranty that the olives would not contain any pits.<sup>97</sup>

However, the appellate court reinstated the plaintiff's negligence claim.<sup>98</sup> Applying a negligence analysis, the court declared that because the seller knew that consumers would rely on its assurance that olive pits were removed, the seller was required to exercise reasonable care in its processing operation to ensure that the pits were in fact removed.<sup>99</sup> At the same time, the court acknowledged that it was probably impossible for the defendant to remove all olive pits and fragments from the product since the pitting was done by a machine;<sup>100</sup> therefore, the court concluded that the defendant had not been negligent in this respect.<sup>101</sup> However, the court concluded that, under negligence principles, the defendant might have a duty to warn its customers that, despite its best efforts, some pits or pit fragments might still be present in the finished product.<sup>102</sup> Consequently, the court remanded the case back to the lower court for trial on the failure-to-warn issue.<sup>103</sup>

## 2. *Inaccurate Statements About Product Safety*

Courts have also imposed liability on product sellers who make inaccurate statements about the safety of their products.<sup>104</sup> These statements include unwarranted assurances of product safety, misinformation about the existence or

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93. *Id.*

94. *Id.* at 161.

95. *Id.*

96. *Id.* at 162 (quoting IOWA CODE § 613.18(1)(a) (2001)).

97. *Id.* at 164.

98. *Id.* at 166.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *See, e.g.,* Drayton v. Jiffee Chem. Corp., 395 F. Supp. 1081, 1093 (N.D. Ohio 1975) (noting that the defendants advertised "that liquid-plumr was 'safe' for ordinary household use," before it caused severe burns to plaintiff's face), *aff'd*, 591 F.2d 352 (6th Cir. 1978); McLachlan v. Wilmington Dry Goods Co., 22 A.2d 851, 851 (Del. Super. Ct. 1941) (noting that defendant seller gave an affirmation of fact that the dress was suitable for wear, when it actually contained injurious and poisonous substances).



nature of a particular risk, understatement of the seriousness of a particular risk, and inaccurate statements about product performance.<sup>105</sup>

*a. Unwarranted Assurances of Product Safety*

In their efforts to create a market for their products, sellers sometimes issue blanket assurances of safety, which are based more on wishful thinking than on their actual knowledge of the product's characteristics.<sup>106</sup> Courts are quick to impose liability on the basis of misrepresentation or breach of express warranty when these assurances turn out to be unwarranted. Thus, in *Spiegel v. Saks 34th Street*,<sup>107</sup> a New York intermediate appellate court upheld a claim by a consumer who suffered severe burns and blisters after using the defendant's skin cream.<sup>108</sup> The court concluded that the defendant expressly warranted that the product was non-allergenic when it proclaimed that the skin cream was "hospital tested," "non-irritating," and "completely safe."<sup>109</sup>

One of the best known examples of unwarranted assurances of product safety occurred in an express warranty case, *Baxter v. Ford Motor Co.*,<sup>110</sup> decided more than eighty years ago. In that case, a car manufacturer provided its dealers with sales literature incorrectly assuring potential purchasers that the windshields of its automobiles were equipped with "shatterproof" glass.<sup>111</sup> The plaintiff was injured by flying glass when his windshield was struck by a pebble kicked up by a passing vehicle.<sup>112</sup> On appeal, the Washington Supreme Court held that Ford's description of the glass as "shatterproof" amounted to an express warranty and that the trial court erred in refusing to admit Ford's sales literature into evidence.<sup>113</sup>

Another case involving unwarranted assurances of product safety is *Hauter v. Zogarts*,<sup>114</sup> in which the plaintiff was severely injured while using a product called the "Golfing Gizmo." The device consisted of an elastic cord that was looped around two pegs driven into the ground, a twenty-one-foot cotton cord that was tied to the middle of the elastic cord, and a regulation-size golf ball that

105. See cases cited *supra* notes 72–73.

106. See, e.g., *Drayton*, 395 F. Supp. at 1093 (analyzing breach of warranty claims where the defendants advertised "that liquid plumr was 'safe' for ordinary household use," before it cause severe burns to plaintiff's face), *aff'd*, 591 F.2d 352 (6th Cir. 1978); *McLachlan*, 22 A.2d at 851 (noting that defendant seller gave an affirmation of fact that the dress was suitable for wear, when it actually contained injurious and poisonous substances); *Rogers v. Toni Home Permanent Co.*, 147 N.E.2d 612, 613–14 (Ohio 1958) (discussing facts that involve a manufacturer who asserted the product was safe and harmless, when in fact it was harmful).

107. 252 N.Y.S.2d 852, 854, 861 (App. Div. 1964).

108. *Id.* at 854, 861.

109. *Id.* at 854, 857.

110. 12 P.2d 409 (Wash. 1932).

111. *Id.* at 411.

112. *Id.* at 410.

113. *Id.* at 412.

114. 534 P.2d 377 (Cal. 1975).

was attached to the other end of the cotton cord.<sup>115</sup> The plaintiff, a thirteen-year-old novice golfer, apparently hit underneath the ball and caught the cord with his golf club, thereby causing the ball to loop over the club on his backswing and hit him in the head.<sup>116</sup> The plaintiff sued for misrepresentation, breach of warranty, and strict liability in tort.<sup>117</sup> The jury found in favor of the defendant, but the trial judge entered a judgment notwithstanding the verdict in favor of the plaintiff.<sup>118</sup>

The misrepresentation claim was based on section 402B of the Restatement (Second) of Torts.<sup>119</sup> According to the plaintiff, the label the defendant placed on the shipping carton and the cover of the instruction booklet contained the following assurance: “COMPLETELY SAFE BALL WILL NOT HIT PLAYER.”<sup>120</sup> The appellate court rejected the defendant’s contention that its statement was mere puffery and concluded instead that it was a statement of material fact.<sup>121</sup> The court also concluded that the defendant’s statement would lead a novice golfer to reasonably assume that the Golfing Gizmo could be safely used even if the ball was not hit properly.<sup>122</sup> Accordingly, the court affirmed the lower court’s decision in favor of the plaintiff on the misrepresentation claim.<sup>123</sup>

*b. Denying of the Existence of a Specified Risk*

As *Crocker v. Winthrop Laboratories*<sup>124</sup> illustrates, courts may impose liability on sellers who deny that a specified risk exists or claim that the risk is minimal.<sup>125</sup> In that case, the defendant became addicted to Talwin, a prescription drug manufactured by the defendant.<sup>126</sup> The plaintiff died while undergoing treatment for his addiction; his widow brought suit against the drug manufacturer, claiming that it falsely assured the medical profession that Talwin was not addictive.<sup>127</sup> A statement in the *Physicians’ Desk Reference*—circulated to the medical profession when the drug was first introduced—contained a

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115. *Id.* at 379.

116. *Id.* at 379–80.

117. *Id.* at 379.

118. *Id.* at 380.

119. *Id.* at 380 (citing RESTATEMENT (SECOND) OF TORTS § 402B (1965)).

120. *Id.* at 379.

121. *Id.* at 381.

122. *Id.* at 382–83.

123. *Id.* at 383.

124. 514 S.W.2d 429 (Tex. 1974).

125. *See id.* at 433 (citing RESTATEMENT (SECOND) OF TORTS § 402B (1965)); *see also* *Hawkinson v. A.H. Robins Co.*, 595 F. Supp. 1290, 1310 (D. Colo. 1984); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 218 (Colo. 1984) (quoting David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1259–60 (1976)); *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1235 (Kan. 1987).

126. *Crocker*, 514 S.W.2d at 429.

127. *Id.* at 429–30.

heading that read “[a]bsence of addiction liability.”<sup>128</sup> In addition, the defendant’s sales representative orally assured the plaintiff’s physician that Talwin was not addictive.<sup>129</sup> Applying the principles of section 402B of the Restatement (Second) of Torts, the Texas Supreme Court declared:

Whatever the danger and state of medical knowledge, and however rare the susceptibility of the user, when the drug company positively and specifically represents its product to be free and safe from all dangers of addiction, and when the treating physicians relies upon that representation, the drug company is liable when the representation proves to be false and harm results.<sup>130</sup>

Consequently, the court reinstated the lower court’s judgment for the plaintiff, which had been overturned by an intermediate appellate court.<sup>131</sup>

One of the most egregious examples of risk denial involved the manufacturer of the Dalkon Shield intrauterine device (IUD).<sup>132</sup> The risk in question arose because the string of the IUD would “wick” bacteria from the vagina to the uterus, thereby causing pelvic inflammatory disease (PID) in users and septic abortions in users who were already pregnant.<sup>133</sup> *Tetuan v. A.H. Robins Co.*<sup>134</sup> is illustrative of the many cases that were brought against the Dalkon Shield’s manufacturer.<sup>135</sup> The plaintiff in *Tetuan* was forced to undergo a complete hysterectomy after sustaining a severe pelvic infection that resulted from using the Dalkon Shield.<sup>136</sup> In 1982, the plaintiff brought suit against A.H. Robins—the product’s manufacturer—alleging negligence, civil conspiracy, strict liability in tort, breach of warranty, fraud, and gross negligence.<sup>137</sup> The jury awarded the plaintiff \$1.7 million in compensatory damages and \$7.5 million in punitive damages.<sup>138</sup> This verdict was affirmed on appeal.<sup>139</sup>

The Dalkon Corporation began manufacturing Dalkon Shields in late 1968.<sup>140</sup> In 1970, Dr. Hugh Davis, one of the developers of the Dalkon Shield, published an article in the *American Journal of Obstetrics and Gynecology* in

128. *Id.* at 430.

129. *Id.*

130. *Id.* at 433 (citing RESTATEMENT (SECOND) OF TORTS § 402B (1965)).

131. *Id.*

132. See Gina Kolata, *The Sad Legacy of the Dalkon Shield*, N.Y. TIMES, Dec. 6, 1987, at A120, available at <http://www.nytimes.com/1987/12/06/magazine/the-sad-legacy-of-the-dalkon-shield.html>.

133. *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1222 (Kan. 1987).

134. 738 P.2d 1210.

135. See C. Gavin Shepherd, *Transvaginal Mesh Litigation: A New Opportunity to Resolve Mass Medical Device Failure Claims*, 80 TENN. L. REV. 477, 486 (2013).

136. *Tetuan*, 738 P.2d at 1215–16.

137. *Id.* at 1215.

138. *Id.*

139. *Id.* at 1246.

140. *Id.* at 1216.

which he claimed that the Dalkon Shield had a pregnancy rate of 1.1% per year.<sup>141</sup> Later investigations, however, raised serious doubts about the methodology of the Davis study and its conclusion about the IUD's pregnancy rate.<sup>142</sup> In fact, one of the defendant company's own employees informed the company that the minimum pregnancy rate for the Dalkon Shield was no less than 5.3%.<sup>143</sup> Nevertheless, the company purchased the rights to the Dalkon Shield shortly thereafter.<sup>144</sup>

In 1971, the company began an aggressive marketing campaign to promote the use of the Dalkon Shield.<sup>145</sup> The company circulated hundreds of thousands of copies of the Davis article but failed to disclose that it was a preliminary report, the conclusions of which had not yet been established as scientifically valid.<sup>146</sup> In addition, the company prepared "product cards" for its sales representatives to give to doctors.<sup>147</sup> These product cards stressed the 1.1% pregnancy rate and claimed that the IUD was safe and produced no harmful side effects.<sup>148</sup> The company also distributed "[p]atient [i]nformation [s]heets," which claimed that IUDs—including the Dalkon Shield—were "the safest method of effective contraception available today."<sup>149</sup> Finally, during this period, the company placed advertisements in various newspapers and magazines.<sup>150</sup> However, beginning in 1972, reports of adverse reactions caused by the Dalkon Shield—particularly PID and septic abortions—began to reach the medical profession.<sup>151</sup> Spokesmen for Robins denied that the Dalkon Shield was either dangerous or ineffective, and characterized the risk from wicking as a "red herring."<sup>152</sup> However, a number of studies concluded that the rates of PID for the Dalkon shield were three times higher than other IUDs, and as much as fifteen times higher for the rate for non-IUD users.<sup>153</sup>

The appellate court considered a number of issues on appeal, including the validity of the plaintiff's fraud claim.<sup>154</sup> After reviewing the evidence, the court concluded that the company was aware of "the higher pregnancy rate, perforations, and septic abortions," but nevertheless continued to claim that the

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141. *Id.*

142. *Id.* at 1216–17.

143. *Id.* at 1217.

144. *Id.*

145. *See id.* at 1218.

146. *Id.* at 1218.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 1219.

151. *Id.* at 1219–20.

152. *Id.* at 1221.

153. *Id.* at 1223.

154. *Id.* at 1224.

Dalkon Shield was “safe and effective.”<sup>155</sup> Consequently, the court upheld the fraud claim.<sup>156</sup>

In *Hawkinson v. A.H. Robins Co.*<sup>157</sup>—another Dalkon shield case—the plaintiffs raised a claim for misrepresentation based on section 402B of the Restatement (Second) of Torts.<sup>158</sup> In *Hawkinson*, the court focused on the defendant’s “Progress Report” and concluded that it “misrepresented material facts to the public concerning the safety and effectiveness of the Dalkon Shield by presenting the Dalkon Shield as a totally carefree contraceptive device for all categories of women wanting to avoid pregnancy.”<sup>159</sup> In particular, the court pointed out that the company had falsely claimed it did not produce “any general effects on the body . . . [and] was easily tolerated by all types of potential users.”<sup>160</sup> Finally, the court rejected the argument that subjecting the company to liability for misrepresentation would impose an undue burden on the company.<sup>161</sup> The court declared that:

[I]mposing strict liability on manufacturers who misrepresent their products does not impose an undue burden. A manufacturer intends to reap economic benefit from the public representations it makes regarding the character and quality of its products, and must assume the economic consequences for physical harm resulting from misrepresentations it has made about its products. Manufacturers should not benefit economically from representations they make to the public and, at the same time, be insulated from liability for misrepresentations which result in physical harm.<sup>162</sup>

### *c. Understating an Acknowledged Risk*

Sometimes, a seller acknowledges that a particular risk may exist, but underestimates the likelihood or seriousness of the risk.<sup>163</sup> For example, the manufacturer of the Dalkon Shield IUD provided figures representing the risk of pregnancy associated with the use of its product that were considerably lower than the actual risk.<sup>164</sup> Another example of understating an acknowledged risk is

155. *Id.* at 1225.

156. *Id.* at 1229.

157. 595 F. Supp. 1290 (D. Colo. 1984).

158. *Id.* at 1306.

159. *Id.* at 1310.

160. *Id.*

161. *Id.* at 1310.

162. *Id.* (quoting *Am. Safety Equip. Corp. v. Winkler*, 640 P.2d 216, 220–21 (Colo. 1982)).

163. *See, e.g., Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1217 (Kan. 1987) (finding that the defendant advertised that its product carried a 1.1% risk of pregnancy, but the risk of pregnancy was actually 5.5%).

164. *Hawkinson*, 595 F. Supp. at 1310; *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 195 (Colo. 1984); *Tetuan*, 738 P.2d at 1217.

provided by the case of *Michael v. Warner/Chilcott*,<sup>165</sup> in which the seller of an over-the-counter sinus medicine stated that prolonged use of the product in large doses *may* damage the user's kidneys; according to the plaintiff, however, such usage was almost certain to damage his kidneys.<sup>166</sup>

On the advice of his physician, the plaintiff in *Michael* began using Sinutab in 1965 to relieve sinus congestion symptoms.<sup>167</sup> In 1970, he switched to the Skaggs brand "Sinus Congestion Tablets"—the defendant's generic brand of sinus congestion tablets—and used them until 1973.<sup>168</sup> A "warning" on the label of the Sinus Congestion Tablets declared that "[t]his medication may damage the kidneys when used in large amounts or for a long period of time. Do not take more than the recommended dosage, nor take regularly for longer than 10 days without consulting your physician."<sup>169</sup> The sinus medicine contained phenacetin, a chemical that could potentially cause kidney failure.<sup>170</sup> After taking the sinus medicine for three years, the plaintiff developed symptoms of kidney failure and stopped taking the drug.<sup>171</sup>

The plaintiff brought negligence and strict liability claims against the drug manufacturers, arguing that, *inter alia*, they failed to adequately warn about the risk of kidney failure resulting from long-term consumption of their products.<sup>172</sup> When the trial court denied the defendants' motion for summary judgment on the negligence claim, the defendants appealed.<sup>173</sup> On appeal, the New Mexico Court of Appeals upheld the trial court's ruling, declaring that it could not determine, as a matter of law, that the warning was adequate.<sup>174</sup> According to the court, "[t]he 'warning' given by defendants states that 'This medication may damage the kidneys.' It does not apprise the consumer of the fact that it will damage the kidneys."<sup>175</sup> This language, along with other shortcomings, presented a jury question regarding whether the warning was sufficient to inform the plaintiff about the true risk of taking the defendant's sinus medicine on a long-term basis.<sup>176</sup>

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165. 579 P.2d 183 (N.M. Ct. App. 1978).

166. *Id.* at 185, 187.

167. *Id.* at 184.

168. *Id.* at 184–85.

169. *Id.* at 184.

170. *Id.* at 185.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 186.

175. *Id.* at 187.

176. *See id.*

*d. Providing Inaccurate Information About a Specified Risk*

Sellers may also be subject to liability for providing inaccurate information about the nature of a specified risk,<sup>177</sup> as illustrated by *In re M/V DG Harmony*.<sup>178</sup> In that case, the owner of a container ship brought suit against the manufacturer of calcium hypochlorite hydrated chemicals, a large quantity of which caught fire and destroyed the ship and most of its cargo.<sup>179</sup> The ship owner based its claim on strict liability, breach of warranty, negligence, and failure to warn.<sup>180</sup>

Calcium hypochlorite hydrated (cal-hypo) is a bactericide used to purify water.<sup>181</sup> The cal-hypo in question was manufactured by PPG Industries, Inc. and packaged in 136-kilogram cardboard fiber drums, with metal rings at the top and bottom.<sup>182</sup> Approximately 120 drums were packed in each of the ten containers on the ship for its voyage from Newport News, Virginia to Rio de Janeiro and other ports in Brazil.<sup>183</sup> It appears that the cal-hypo was first placed into 136-kilogram drums at the PPG plant while still hot, then subsequently shrink-wrapped onto wooden pallets and “tightly packed three-high into unrefrigerated, unventilated metal containers.”<sup>184</sup> The temperature in the ship’s hold ranged from approximately 95°F to 104°F.<sup>185</sup> The fire started when the cal-hypo in one—or possibly two—of the containers decomposed and self-heated, causing a “thermal runaway,” which in turn led to an explosion and a fire.<sup>186</sup>

After finding PPG strictly liable under the Carriage of Goods by Sea Act for causing goods of an inflammable, explosive, or dangerous nature to be placed on the container ship without informing the ship’s owners and crew of the true character of the cal-hypo material, the court turned to the failure-to-warn issue.<sup>187</sup> According to the court, “The warnings provided by PPG were inadequate and misleading.”<sup>188</sup> In particular, the court found that the Material Safety Data Sheet PPG provided to the ship’s personnel stated that cal-hypo

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177. See, e.g., *In re M/V DG Harmony*, 394 F. Supp. 2d 649, 675 (S.D.N.Y. 2005) (quoting *Pavlidis v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 339 (5th Cir. 1984)), *amended by* 98 CIV. 8394 (DC), 2007 WL 895251 (S.D.N.Y. Mar. 16, 2007), *aff’d in part, vacated in part, rev’d in part*, 518 F.3d 106 (2d Cir. 2008), *opinion amended and superseded*, 533 F.3d 83 (2d Cir. 2008), *aff’d*, 408 F. App’x 435 (2d Cir. 2011).

178. 394 F. Supp. 2d 649.

179. *Id.* at 651.

180. *Id.* at 652.

181. *Id.* at 651.

182. *Id.* at 659.

183. *Id.* at 654, 659–60.

184. *Id.* at 669.

185. *Id.* at 661.

186. *Id.* at 651–52.

187. *Id.* at 672 (citing 46 U.S.C. § 1304 (2012)).

188. *Id.* at 674.

decomposed at 356°F and became unstable above 253°F.<sup>189</sup> In fact, cal-hypo could decompose or become unstable at lower temperatures, especially when packed tightly in metal containers and stored in the hold of a ship.<sup>190</sup> Accordingly, the court concluded that PPG negligently failed to provide an adequate warning.<sup>191</sup>

*e. Proving Inaccurate Information About Product Performance*

*Caboni v. General Motors Corp.*<sup>192</sup> illustrates the nature of a claim based on providing inaccurate—and overly optimistic—information about a product’s performance, particularly as it relates to safety.<sup>193</sup> In *Caboni*, the plaintiff was injured when, after smashing into a guardrail, the airbag in his General Motors Corporation (GM) pickup truck failed to open.<sup>194</sup> The plaintiff brought suit against the truck manufacturer under the Louisiana Products Liability Act (LPLA), alleging that the airbag was unreasonably dangerous because it failed to conform to an express warranty set forth in the owner’s manual.<sup>195</sup> At trial, the jury found in favor of the plaintiff, and GM subsequently appealed.<sup>196</sup>

The owner’s manual declared that the airbag was designed to inflate in “moderate to severe front or near-frontal crashes.”<sup>197</sup> It also stated that the airbag would not deploy below a certain threshold level, which varied from thirteen to eighteen miles per hour.<sup>198</sup> The Fifth Circuit rejected GM’s claim that the statement in the owner’s manual was not an express warranty, but rather, a general description of the vehicle’s safety features.<sup>199</sup> The court also disagreed with GM’s contention that the truck did not go straight into the guardrail and was not traveling at a high enough speed to reach the “threshold level.”<sup>200</sup> The court determined this was a jury issue and that the jury had accepted the plaintiff’s version of the facts.<sup>201</sup> However, although GM breached an express warranty concerning the performance of the truck’s airbag, the court was forced to vacate

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189 *Id.* at 660. The court of appeals ultimately affirmed the district court’s finding that PPG negligently failed to provide an adequate warning. *In re M/V DG Harmony*, 408 F. App’x 435, 437 (2d Cir. 2011).

190. *In re M/V DG Harmony*, 394 F. Supp. 2d 649, 674 (S.D.N.Y. 2005).

191. *Id.* at 675.

192. 398 F.3d 357 (5th Cir. 2005).

193. *See id.*

194. *Id.* at 358.

195. *Id.* (citing LA. REV. STAT. ANN. §§ 9:2800.51–.60 (2009)).

196. *Id.* at 359.

197. *Id.* at 358–59 n.1 (quoting GEN. MOTORS CORP., THE 1996 CHEVROLET S-SERIES OWNER’S MANUAL 1–20 (1995)).

198. *Id.* (citing GENERAL MOTORS CORP, *supra* note 197, at 1–20)).

199. *Id.* at 360.

200. *Id.*

201. *Id.*



the lower court's judgment because the plaintiff failed to prove that his injuries were caused or enhanced by the failure of the airbag to inflate.<sup>202</sup>

### 3. *Instructions on Assembly, Operation, and Maintenance*

Courts have also imposed liability for providing inaccurate instructions relating to the assembly, operation, and maintenance of a product.<sup>203</sup>

#### a. *Inaccurate Information About Assembly*

It is surprising that few reported cases involving instructions for assembly exist, particularly given how bad such instructions often can be.<sup>204</sup> *Midgley v. S. S. Kresge Co.*<sup>205</sup> provides an interesting example.<sup>206</sup> In that case, although the information in the instructions for assembly was incomplete—rather than inaccurate—the instructions, coupled with the product's design, created a false impression of safety for the product user.<sup>207</sup> The product involved in *Midgley* was a refracting telescope manufactured in Japan for the defendant, S.S. Kresge Company.<sup>208</sup> The plaintiff was a thirteen-year-old boy.<sup>209</sup>

The telescope was sold disassembled and was accompanied by a booklet of instructions on assembly, use, and maintenance.<sup>210</sup> The telescope's components included a sun filter that consisted of a dark lens labeled "Sun."<sup>211</sup> The instructions declared that "[s]un and moon glasses are deposited in the eyepieces cases; screwed into the eyepiece bottom. Be sure to use sun glass for solar observation and moon glass for moon observation."<sup>212</sup> The telescope's eyepiece consisted of a hollow cylinder—threaded at each end—that was about an inch in length.<sup>213</sup> When properly assembled for viewing the sun, the clear glass lens

202. *See id.* at 360–63.

203. *See, e.g.,* *Pavlidis v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 339 (5th Cir. 1984) (holding manufacturer strictly liable for failure to warn because owner's manual failed to completely disclose the existence and extent of risks involved with operations of a boat); *Midgley v. S.S. Kresge Co.*, 127 Cal. Rptr. 217, 221 (Ct. App. 1976) (holding supplier "strictly liable for injury proximately resulting from composing and furnishing a set of instructions for assembly and use which does not adequately avoid the danger of injury").

204. *See* Lisa L. Locke, Note, *Products Liability and Home-Exercise Equipment: A Failure to Warn and Instruct May Be Hazardous to Your Health*, 22 SUFFOLK U. L. REV. 779, 800 (1988) ("Some consumer group tests and ratings of fitness equipment indicate that difficult or 'impossible' assembly of some of the devices is a common and potentially hazardous problem.").

205. 127 Cal. Rptr. 217 (Ct. App. 1976).

206. *Id.* at 221 (noting that the product was technically complex, thus the manufacturer should have known that the instructions provided for assembly, if not clear, would present a risk of injury).

207. *See id.* at 218–19.

208. *Id.* at 218.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 219.

213. *Id.*

would screw into one end of the eyepiece and the sun filter would screw into the other end.<sup>214</sup> Unfortunately, the plaintiff suffered eye damage while viewing the sun because he removed the eyepiece lens and replaced it with the sun filter, instead of using both of them at the same time.<sup>215</sup>

The plaintiff sued Kresge for negligence, breach of warranty, and strict liability, although only the strict liability claim was submitted to the jury.<sup>216</sup> The trial court refused to instruct the jury on failure-to-warn as an aspect of the strict liability claim.<sup>217</sup> After a jury verdict for the defendant, the plaintiff appealed.<sup>218</sup> Reversing the trial court, the appellate court declared that because the defendant had “marketed a technically complex product intended for use by technically unsophisticated consumers,” it had a duty to warn about the dangers of improper assembly.<sup>219</sup> Consequently, the court concluded that “the supplier [w]as strictly liable for injury proximately resulting from composing and furnishing a set of instructions for assembly and use which [did] not adequately avoid the danger of injury.”<sup>220</sup>

*b. Inaccurate Instructions About Operation and Maintenance*

Many products are inherently dangerous, and consumers must rely on manufacturers and other sellers to instruct them how to properly operate and maintain these products.<sup>221</sup> Unfortunately, manufacturers do not always provide adequate instructions, and such inadequate warnings have created a fertile source for litigation.<sup>222</sup> In most of these cases, plaintiffs allege that the manufacturer has failed to provide a vital piece of information; sometimes, however, plaintiffs claim that the information provided is affirmatively wrong. *Pavlides v. Galveston Yacht Basin, Inc.*<sup>223</sup> is illustrative of this fact pattern. In *Pavlides*, the estates of a group of fishermen sued the manufacturer of a Robalo 236 motorboat that sank in the Gulf of Mexico.<sup>224</sup> Four of the fishermen drowned in the

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214. *Id.*

215. *Id.*

216. *Id.* at 218.

217. *Id.*

218. *See id.*

219. *Id.* at 221.

220. *Id.*

221. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. i (1998) (“In addition to alerting users and consumers to the existence and nature of product risks so that they can, by appropriate conduct during use or consumption, reduce the risk of harm, warnings also may be needed to inform users and consumers of nonobvious and not generally known risks that unavoidably inhere in using or consuming the product.”).

222. *See, e.g., Pavlides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330 (5th Cir. 1984) (holding manufacturer liable on failure to warn claim for failing to provide adequate instructions about avoiding the risks involved with use of the product).

223. *Id.*

224. *Id.* at 333 & n.1.

accident—leaving only one survivor<sup>225</sup>—after the boat’s bilge drain plug apparently came out, causing the boat to take on water and eventually sink.<sup>226</sup>

Most Robalo boats were “fully-foamed,” meaning that all of the void spaces in the hull were filled with foam flotation material to prevent any void bilge spaces.<sup>227</sup> However, the particular boat in question—the R-236—was not fully foamed, but instead had a large void space in the bilge with a through-hull bilge drain in the rear of the bilge below the waterline.<sup>228</sup> Water that entered the bilge area could only be removed by means of the bilge pump.<sup>229</sup> However, “[t]he R-236 was not equipped with an automatic bilge pump”—which would begin to operate “when water reached a certain level in the bilge”—nor did it have an alarm that would warn the boat’s “occupants of the presence of water in the bilge.”<sup>230</sup> Furthermore, once the bilge filled with water, the bilge pump would stop operating if the batteries were flooded.<sup>231</sup>

The sales literature furnished by the boat’s manufacturer claimed that the R-236 was “‘85 percent closed-cell foam,’ suggesting [incorrectly] that the boat [was] foamed to 85 percent of capacity with closed-cell foam.”<sup>232</sup> The owner’s manual—which was designed for the entire Robalo product line—did not divulge the fact that the R-236, unlike other Robalo boats, “ha[d] a void bilge space, a bilge drain and a bilge drain plug,” nor did it inform operators what to do if the bilge pump failed.<sup>233</sup> The manual’s sole piece of advice on this issue was “[i]f water in the boat appears excessive, open the upper drain plugs.”<sup>234</sup>

The trial court ruled that the boat’s design and manufacture were not defective and also concluded that the warnings and operating instructions were adequate.<sup>235</sup> The Fifth Circuit affirmed the lower court’s decision on the manufacturing and design defect claims, but reversed its ruling on the failure-to-warn claim.<sup>236</sup> The court declared that an adequate warning required “a complete disclosure of the existence and extent of the risk involved.”<sup>237</sup> In this case, the owner’s manual failed to inform the plaintiffs that the accidental removal of the bilge drain plug would lead to a catastrophic sequence of events that, if not immediately corrected, would cause the boat to sink.<sup>238</sup> Consequently, the manufacturer should have foreseen that this series of events

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225. *Id.* at 333.

226. *Id.* at 336–37.

227. *Id.* at 334.

228. *Id.*

229. *Id.*

230. *Id.* at 334–35.

231. *Id.* at 335.

232. *Id.*

233. *Id.* at 335–36.

234. *Id.* at 336.

235. *Id.* at 337.

236. *Id.* at 338, 341.

237. *Id.* at 338 (quoting *Alman Bros. Farms & Feed Mill, Inc. v. Diamond Labs., Inc.*, 437 F.2d 1295, 1303 (5th Cir. 1971)).

238. *Id.* at 339.

might occur, and should have provided warnings and instructions that may have enabled the plaintiffs to prevent the boat from sinking.<sup>239</sup>

### C. Conclusion

The foregoing discussion leads to the following conclusions. First, product sellers have a duty to provide adequate warnings and instructions to ensure that consumers can use their products safely.<sup>240</sup> Although breach of this duty is commonly referred to as “failure-to-warn,” liability is not limited to failure to provide information, but also may be based on providing inaccurate or misleading information.<sup>241</sup> Second, these factual misstatements can appear in a variety of forms, including product labels and packaging, brochures and other sales literature, owner’s manuals, sales contracts, instructional or promotional videos, service bulletins, and certain specialized materials such as MSDS and PDR entries.

Third, the duty to provide accurate information in connection with the sale of a product can be based on negligence, breach of the implied warranty of merchantability, or strict liability in tort.<sup>242</sup> In addition, a product seller is liable for misrepresentation or breach of express warranty for any inaccurate descriptions or false statements about a product’s quality or performance characteristics.<sup>243</sup> Finally, no court has expressed concern about the possible “chilling effect” that this imposition of liability might have on the commercial speech—or other First Amendment rights—of product sellers.

## III. PRINTED MATERIALS

There have been cases involving inaccurate information contained in various forms of media, such as textbooks, encyclopedias, cookbooks, instructional publications, travel guides, diet books, self-improvement books, advertisements, maps and charts, medical forms, and published standards by trade associations.<sup>244</sup> Unlike their treatment of cases involving inaccurate information

239. *Id.*

240. *Id.* at 338 (citing *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1088 (5th Cir. 1973)) (“It is a fundamental principle of the law of product liability . . . that a manufacturer has a responsibility to instruct consumers as to the safe use of its product and to warn consumers of dangers associated with its product . . .”).

241. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. i (1998) (discussing liability of manufacturers and sellers for defects due to inadequate warnings containing inaccurate or false information); *see also* 2 OWEN ET AL., *supra* note 3, § 20:9, at 480–81 (citing RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19 cmt. d (1998)).

242. *See* 1 OWEN ET AL., *supra* note 3, § 1.5, at 15.

243. *See supra* Part II.A.1–2.

244. *See, e.g.,* *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033 (9th Cir. 1991) (involving an encyclopedia); *Weirum v. RKO Gen., Inc.*, 539 P.2d 36 (Cal. 1975) (involving a radio advertisement); *Fluor Corp. v. Jeppesen & Co.*, 216 Cal. Rptr. 68 (Ct. App. 1985) (involving an aeronautical chart); *Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977) (involving a

provided in connection with the sale of a product, courts almost always have refused to impose strict liability on the publishers of freestanding written materials not connected with a separate product.<sup>245</sup>

#### A. Textbooks

A small number of courts have refused to impose liability on textbook publishers.<sup>246</sup> For example, in *Walter v. Bauer*,<sup>247</sup> the plaintiff suffered an injury to his eye while engaged in a science experiment that involved a ruler and rubber bands.<sup>248</sup> The instructions for the experiment were provided in a fourth-grade textbook—*Discovering Science 4*—published by the defendant, Charles E. Merrill Publishing Company.<sup>249</sup> The plaintiff brought a strict liability claim against the publisher, arguing that “the experiment contained in the textbook was inherently defective because it contained an unreasonable risk or [sic] harm by placing dangerous instrumentalities of rubber bands and ruler in the hands of fourth grade students.”<sup>250</sup> The plaintiff also claimed that the textbook was defective because it failed to warn about the risks associated with that experiment.<sup>251</sup>

However, the court rejected what it called the plaintiff’s “novel theory” because it concluded that the plaintiff’s injury was not caused by the book’s intended use—to be read—but rather, by a ruler and rubber bands that were provided by the school, not the defendant publisher.<sup>252</sup> The court also expressed concern that extending strict liability to book publishers would have a chilling effect on the dissemination of information and ideas.<sup>253</sup> The *Walter* case

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cookbook); *Birmingham v. Fodor’s Travel Publ’ns, Inc.*, 833 P.2d 70 (Haw. 1992) (involving a travel guide); *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263, 1264 (Ill. App. Ct. 1985) (involving an instructional book); *MacKown v. Ill. Publ’g & Printing Co.*, 6 N.E.2d 526 (Ill. App. Ct. 1937) (involving an article in a newspaper); *Yuhas v. Mudge*, 322 A.2d 824 (N.J. Super. Ct. App. Div. 1974) (involving an advertisement in a magazine); *Young v. Mallet*, 371 N.Y.S.2d 1 (App. Div. 1975) (involving a self-help book on vitamins); *Walter v. Bauer*, 439 N.Y.S.2d 821 (Sup. Ct. 1981) (involving a textbook), *modified*, 451 N.Y.S.2d 533 (App. Div. 1982); *Smith v. Linn*, 563 A.2d 123 (Pa. Super. Ct. 1989), *aff’d*, 587 A.2d 309 (Pa. 1991) (involving diet book).

245. *See, e.g., Winter*, 938 F.2d at 1036 (declining to impose strict liability on an encyclopedia publisher); *Cardozo*, 342 So. 2d at 1057 (declining to impose strict liability on publisher of a cookbook); *Birmingham*, 833 P.2d at 79 (declining to impose strict liability on the publisher of a travel guide).

246. *See, e.g., Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1218 (D. Md. 1988) (holding that a textbook publisher should not be held “strictly liable as publisher for the content of the books that it publishes”); *Walter*, 439 N.Y.S.2d at 822 (concluding that strict liability should not apply where an experiment described in a textbook caused injury to a student’s eye).

247. 439 N.Y.S.2d 821.

248. *Id.* at 822.

249. *Id.*

250. *Id.*

251. *Id.*

252. *See id.*

253. *Id.* at 823.

provides an early example of the tangibility rationale. In the court's view, strict liability was most appropriate when it was confined to injuries directly caused by the physical or tangible aspects of a product.<sup>254</sup> In contrast, the imposition of strict liability on sellers for injuries caused by intangible aspects—such as the information contained in printed textbooks—was much more problematic.<sup>255</sup>

*Jones v. J.B. Lippincott Co.*<sup>256</sup> also involved an allegedly defective textbook.<sup>257</sup> In that case, a constipated nursing student sustained injuries when she treated herself to a hydrogen peroxide enema in accordance with the instructions set forth in the *Textbook for Medical and Surgical Nursing*.<sup>258</sup> The nursing student brought a negligence action against one of the authors of the book, as well as negligence and strict products liability actions against the book's publisher, J.B. Lippincott Company.<sup>259</sup> Lippincott moved to dismiss the complaint or for summary judgment, claiming that it was not responsible for the contents of the book.<sup>260</sup>

In granting the defendant's summary judgment motion, the court distinguished between author liability and publisher liability for inaccurate information.<sup>261</sup> While acknowledging that the law was not settled, the court conceded that an author might be liable for injuries to readers caused by errors in the content of books, designs, and drawings.<sup>262</sup> However, the court declared that one who merely publishes something written by another owed no duty to the reader to check the contents for accuracy.<sup>263</sup> Finding that Lippincott's involvement in the normal process of editing did not make it an author, the court concluded that the plaintiff's negligence claim must fail.<sup>264</sup>

Addressing the plaintiff's contention that Lippincott should be subject to strict liability under Section 402A of the Restatement (Second) of Torts, the court observed that strict liability for factual errors was currently restricted to the narrow area of maps and charts.<sup>265</sup> The court seemed to think that maps and charts were more like tools than books, whose principal function was to disseminate information and ideas.<sup>266</sup> Finally, the court expressed concern that imposing tort liability on book publishers would chill free expression.<sup>267</sup> For these reasons, the court granted Lippincott's motion for summary judgment.<sup>268</sup>

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254. *See id.* at 822–23.

255. *See id.*

256. 694 F. Supp. 1216 (D. Md. 1988).

257. *Id.* at 1216.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 1216–17.

262. *Id.* at 1216.

263. *Id.* at 1216–17.

264. *See id.* at 1217.

265. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

266. *Id.*

267. *Id.*

268. *Id.* at 1218.

*B. Treatises and Encyclopedias*

Several cases have considered whether publishers of treatises or encyclopedias should be held liable for factual errors that cause injury to their readers.<sup>269</sup> One of the most influential cases involving the liability of book publishers is *Winter v. G.P. Putnam's Sons*.<sup>270</sup> In that case, two mushroom collectors—relying on information and descriptions contained in a book published by the defendant, G.P. Putnam's Sons—ate some mushrooms that turned out to be highly poisonous.<sup>271</sup> The book in question, *The Encyclopedia of Mushrooms*, was a reference work on the collection and preparation of mushrooms.<sup>272</sup> Although the book was originally published in Great Britain, the defendant purchased copies of the book and distributed them without alteration in the United States.<sup>273</sup>

Alleging that the encyclopedia contained erroneous and misleading information about the mushrooms they consumed, the plaintiffs sued Putnam on the basis of strict products liability, breach of warranty, negligence, and negligent misrepresentation.<sup>274</sup> In response, Putnam moved for summary judgment, arguing that the products liability claim could not be maintained because the information contained in the book was not a product.<sup>275</sup> Putnam also contended that the other claims were invalid because it had no duty to check the accuracy of the contents of the books it published.<sup>276</sup>

Turning to the products liability claim, the court observed that products liability law—at least as it was embodied in Section 402A of the Restatement (Second) of Torts—was exclusively concerned with items of a tangible nature.<sup>277</sup> The court also noted that all of the examples of products listed in comment *d* that were subject to strict liability in tort were tangible in nature.<sup>278</sup> Moreover, according to the *Winter* court, strict products liability was principally concerned with forcing the sellers of manufactured products to bear the cost of injuries inflicted on those who used their products.<sup>279</sup> To achieve this objective, it was not necessary to also impose strict liability on book publishers.<sup>280</sup> Furthermore,

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269. See, e.g., *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991) (discussing whether the publishers of an encyclopedia should be held liable for the damages a reader incurred from relying on information in the encyclopedia).

270. *Id.*

271. *Id.* at 1033.

272. *Id.* at 1034.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

278. *Id.* at 1034 n.3 (quoting RESTATEMENT (SECOND) OF TORTS § 402A, cmt. d (1965)).

279. *Id.* at 1034–35 (quoting KEETON ET AL., *supra* note 12, § 98, at 692–93) (citing RESTATEMENT (SECOND) OF TORTS § 402A, cmt. a (1965)).

280. See *id.* at 1035, 1036.

subjecting publishers to strict liability “could seriously inhibit those who wish to share thoughts and theories.”<sup>281</sup>

The plaintiffs responded to this *chilling effect* concern by urging the court to limit the scope of strict liability to books that give instructions on performing some form of activity that is inherently dangerous.<sup>282</sup> However, the court felt that any distinction between instructional materials and the expression of abstract ideas was illusory.<sup>283</sup> The court also rejected the argument that “how-to” books—a category which the plaintiffs believed would include the *Encyclopedia of Mushrooms*—were similar to aeronautical charts, which some courts had characterized as products.<sup>284</sup> Instead, the court likened a chart to a compass, in the sense that both are tools that “may be used to guide an individual who is engaged in an activity requiring certain knowledge of natural features.”<sup>285</sup> In contrast, the court thought that books like the *Encyclopedia of Mushrooms* more closely resembled a primer on how to use a compass or a chart.<sup>286</sup> Thus, the court concluded a chart was “like a physical ‘product’ while [a] ‘How To Use’ book [was] pure thought and expression.”<sup>287</sup>

The court also disagreed with the plaintiff’s claim that California courts would not distinguish between physical products and intangible ideas.<sup>288</sup> Responding to the trial court’s contention that strict liability was only applicable to items whose physical properties caused them to be innately dangerous, the court in *Fluor* observed that, while a sheet of paper might not be dangerous in itself, a paper designed to aid aircraft navigation would create a danger to aircraft whose pilots relied on it if it failed to identify a mountain located near a landing site.<sup>289</sup> The *Winter* court, however, concluded the *Fluor* court simply meant that strict liability principles do not require that an injury necessarily be caused by the physical properties of the product.<sup>290</sup> The court declared that “the injury does not have to result because a compass explodes in your hand, but can result because the compass malfunctions and leads you over a cliff.”<sup>291</sup> In the court’s view, imposing liability in the case of a malfunctioning compass was quite different from imposing liability for “such things as ideas which have no physical properties at all.”<sup>292</sup> Consequently, the court refused to hold Putnam

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281. *Id.* at 1035.

282. *Id.*

283. *Id.*

284. *Id.* at 1035–36.

285. *Id.* at 1036.

286. *Id.*

287. *Id.*

288. *Id.* at 1036 & n.4 (citing *Fluor Corp. v. Jeppesen & Co.*, 216 Cal. Rptr. 68, 71–72 (Ct. App. 1985)).

289. *Id.* at 1036 n.4 (quoting *Fluor Corp.*, 216 Cal. Rptr. at 71–72).

290. *Id.*

291. *Id.*

292. *Id.*



liable under the law of strict products liability for injuries that were allegedly caused by the ideas and statements in its books.<sup>293</sup>

The court then turned its attention to the plaintiff's negligence claim, which was based on Putnam's failure to verify the accuracy of the *Encyclopedia of Mushrooms*' contents or to warn readers that they should not rely on any factual statements in the book.<sup>294</sup> The court's analysis began with a statement that "[i]n order for negligence to be actionable," the plaintiff must show that the defendant had "a legal duty to exercise due care" on his or her behalf.<sup>295</sup> The court acknowledged that a publisher may assume a duty to investigate, but in the absence of an assumption, there was nothing in the normal process of publishing a book that would support the imposition of such a duty on publishers.<sup>296</sup> The plaintiffs argued that the holding in *Weirum v. RKO General, Inc.* provided support for the imposition of a duty of care on the media.<sup>297</sup> However, the court pointed out that in *Weirum*, the defendant radio station actively promoted a "competitive scramble" and encouraged teenage members of its audience to race from point to point in search of clues.<sup>298</sup> The *Weirum* court upheld a jury verdict against the radio station for contributing to a fatal automobile accident caused by one of the scramble contestants.<sup>299</sup> However, the court declared that there was no connection between the radio station's role in *Weirum* and the publisher's role in *Winter*, which merely consisted of disseminating ideas and information to the public.<sup>300</sup> Accordingly, the court ruled that Putnam had no duty to independently determine whether the contents of the encyclopedia were accurate.<sup>301</sup>

Finally, the court concluded that Putnam did not have to inform its customers that the information in the encyclopedia was not necessarily complete and that customers should not rely on it.<sup>302</sup> Nor was Putnam required to warn that it had not investigated the text and, therefore, could not guarantee its accuracy.<sup>303</sup> According to the court, to require the publisher to satisfy the first requirement would force it "to do exactly what we have said he has no duty to do—that is, independently investigate the accuracy of the text."<sup>304</sup> The court determined that the second requirement was unnecessary since no publisher had

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293. *Id.* at 1036.

294. *Id.* at 1037. The court rejected the plaintiff's claims of misrepresentation and negligent misrepresentation because it found that the defendant had not guaranteed the accuracy of the author's work. *Id.* at 1036.

295. *Id.* at 1037 (citing 6 BERNARD E. WITKIN, SUMMARY OF CALIFORNIA LAW § 732 (9th ed. 1988)).

296. *Id.*

297. *Id.* at 1037 n.8 (citing *Weirum v. RKO Gen., Inc.*, 539 P.2d 36 (Cal. 1975)).

298. *Id.* (citing *Weirum*, 539 P.2d at 41).

299. *Id.* (citing *Weirum*, 539 P.2d at 37, 42).

300. *Id.*

301. *Id.* at 1037.

302. *Id.*

303. *Id.*

304. *Id.*

a duty to act as a guarantor.<sup>305</sup> For these reasons, the court in *Winter* affirmed the lower court's grant of summary judgment for the publisher.<sup>306</sup>

### C. Travel Guides

The leading case on the issue of liability for publishing inaccurate information in travel guides is *Birmingham v. Fodor's Travel Publications, Inc.*<sup>307</sup> One of the plaintiffs in that case was injured while body surfing in the ocean waters of Kekaha Beach on the Hawaiian island of Kauai.<sup>308</sup> The plaintiff claimed to have relied on language in the defendant's publication, *Fodor's Hawaii 1988*, which described the Kekaha Beach Park as "a long, luxurious strip of sand recalling the beaches of California," but failed to mention the existence of dangerous wave and water conditions offshore.<sup>309</sup> The plaintiff brought a negligent misrepresentation action against Fodor's Travel Publications, Inc. for failing to warn about these dangerous conditions in its travel guide.<sup>310</sup> The trial court granted Fodor's motion for summary judgment and the plaintiff appealed.<sup>311</sup> On appeal, the plaintiff—for the first time—attempted to make a claim based on strict products liability.<sup>312</sup>

The court first discussed the negligence claim, concluding that Fodor's had no duty to investigate surf conditions at Kekaha Beach, nor to warn about them, unless it authored or guaranteed the accuracy of the information in its book.<sup>313</sup> The court also refused to impose a duty to investigate or warn under the provisions of the Restatement's version of negligent misrepresentation.<sup>314</sup> Finally, the court reasoned that the imposition of such a duty would have an undesirable chilling effect on the publication of ideas and information.<sup>315</sup>

The court then addressed the plaintiff's strict products liability claim.<sup>316</sup> The plaintiff argued that Fodor's guidebook was a product and that the publisher was strictly liable for his injuries.<sup>317</sup> In support of this argument, the plaintiff cited a

305. *Id.* at 1038.

306. *Id.*

307. 833 P.2d 70 (Haw. 1992).

308. *Id.* at 73. Gail Birmingham, the wife of the injured party, was also a party to the lawsuit. *Id.*

309. *Id.* at 73 & n.1.

310. *Id.* at 73.

311. *Id.* at 74.

312. *Id.* at 77.

313. *Id.* at 76–77.

314. *Id.* at 75 (citing RESTATEMENT (SECOND) OF TORTS § 311 (1965)).

315. *Id.* at 75–76 (quoting *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263, 1267 (Ill. App. Ct. 1985)).

316. *Id.* at 77–79 (citing *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034–46 (9th Cir. 1991); *Brooklesby v. United States*, 767 F.2d 1288, 1294–95 (9th Cir. 1985); *Salomey v. Jeppesen & Co.*, 707 F.2d 671, 673, 677 (2d Cir. 1983); *Fluor Corp. v. Jeppesen & Co.*, 216 Cal. Rptr. 68, 70 n.1 (Ct. App. 1985); *Bidar v. Amfac, Inc.*, 669 P.2d 154, 160–61 (Haw. 1983)).

317. *Id.* at 77.

number of cases involving aeronautical charts.<sup>318</sup> According to the plaintiff, the courts in these cases concluded that aeronautical approach charts should be treated as products because they could be extremely dangerous for their intended use if they were inaccurate.<sup>319</sup> In addition, it was appropriate for the publisher to bear the costs of injuries when the charts were defective because they were mass-produced and mass-marketed.<sup>320</sup>

In response, the court in *Birmingham* pointed out that the errors in the chart cases were caused by the publisher, not the original source of the information.<sup>321</sup> Furthermore, echoing the court's reasoning in *Winter*, the court stated that aeronautical charts were technical tools—and therefore like a physical product—while the information in a travel guide resembled pure thought or expression.<sup>322</sup> Finally, the court invoked the chilling effect rationale, declaring that “[t]he 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.”<sup>323</sup> Accordingly, the court held that the plaintiff could not recover against Foder's for his injuries based on a theory of strict products liability.<sup>324</sup>

#### D. Cookbooks

So far, only one reported case, *Cardozo v. True*,<sup>325</sup> has involved a cookbook. In that case, the plaintiff innocently nibbled on a slice of Dasheen plant—otherwise known as “elephant's ears”—while preparing a recipe from a book titled *Trade Winds Cookery*.<sup>326</sup> Unfortunately, the plaintiff did not realize that the Dasheen plant was poisonous in its raw state.<sup>327</sup> The plaintiff sued Ellie's Book and Stationery, Inc., the retail seller of the book, for breach of implied warranty.<sup>328</sup> The trial court certified to the intermediate appellate court the question of whether a retail book seller was liable for breach of warranty to the purchaser for injuries caused by improper instructions or inadequate warnings with respect to poisonous ingredients called for in a recipe.<sup>329</sup>

318. *Id.* (citing *Brocklesby*, 767 F.2d 1288; *Saloomey*, 707 F.2d 671; *Fluor Corp.*, 216 Cal. Rptr. 68).

319. *Id.* (citing *Brocklesby*, 767 F.2d at 1295).

320. *Id.* (quoting *Saloomey*, 707 F.2d at 677).

321. *Id.* at 78 & n.9 (citing *Brocklesby*, 767 F.2d at 1292; *Saloomey*, 707 F.2d at 677; *Fluor*, 216 Cal. Rptr. at 72).

322. *Id.* at 78 (quoting *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991)).

323. *Id.* at 79 (quoting *Winter*, 938 F.2d at 1035).

324. *Id.*

325. 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977).

326. *Id.* at 1054.

327. *Id.*

328. *Id.* at 1055. The plaintiff also sued the author, Norma True, but she was not a party to the proceeding. *Id.* at 1054.

329. *Id.*

The defendant, Ellie's, argued that any implied warranty that may have arisen in connection with the sale of the *Trade Winds* cookbook was limited to its physical characteristics and did not extend to the author's thought processes.<sup>330</sup> The defendant also claimed that imposing liability on booksellers would infringe upon freedom of speech and expression.<sup>331</sup> The court acknowledged that the UCC's definition of *goods*<sup>332</sup> was broad enough to include books and that Ellie's qualified as a merchant with respect to books.<sup>333</sup> Consequently, the court declared that the issue was not whether Ellie's had given a warranty, but what the scope of that warranty was.<sup>334</sup> In the court's view, Ellie's clearly warranted the tangible properties of its books, but the bookseller did not necessarily warrant the intangible thoughts and ideas conveyed by them.<sup>335</sup> According to the court, it was "unthinkable that standards imposed on the quality of goods sold by a merchant would require that merchant—who is a book seller—to evaluate the thought processes of the many authors and publishers of the hundred, and often thousands, of books the merchant offers for sale."<sup>336</sup>

The court identified several principles that limited the liability of publishers to readers and others.<sup>337</sup> One such principle was the rule that publishers were not generally liable for injuries to consumers from products advertised in newspapers or magazines.<sup>338</sup> Another principle protected distributors of newspapers and magazines from liability for defamation when they could not reasonably know that a particular publication contained defamatory material.<sup>339</sup> Finally, the court observed that, under Florida law, newspapers were not ordinarily liable for reprinting material from other news publications.<sup>340</sup> According to the court, these protective rules reflected the fact that "ideas hold a privileged position in our society."<sup>341</sup>

The court went on to declare that ideas—and presumably factual information as well—are not commercial products and, therefore, those who disseminate ideas should not be subject to liability under the UCC.<sup>342</sup> To impose liability on booksellers and others who disseminate information, regardless of fault, "would severely restrict the flow of the ideas."<sup>343</sup> In light of this, the court concluded

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330. *Id.* at 1055.

331. *Id.*

332. *Id.* (citing FLA. STAT. § 672.105 (2004)).

333. *Id.* (citing FLA. STAT. § 672.105 (2004)).

334. *Id.*

335. *Id.* at 1057.

336. *Id.* at 1056.

337. *Id.*

338. *Id.* (citing *MacKown v. Ill. Publ'g & Printing Co.*, 6 N.E.2d 526 (Ill. App. Ct. 1937); *Yuhas v. Mudge*, 322 A.2d 824 (N.J. Super. Ct. App. Div. 1974)).

339. *Id.*

340. *Id.* (citing *Layne v. Tribune Co.*, 146 So. 234 (Fla. 1933)).

341. *Id.*

342. *Id.* at 1056–57.

343. *Id.* at 1057.

that the drafters of the UCC did not intend for its warranty provisions to extend to the content of books and other published material.<sup>344</sup>

### *E. Instructional Publications*

Instructional or how-to publications instruct their readers how to perform a particular task or operation.<sup>345</sup> Obviously, these publications can cause harm if their instructions are unclear, incomplete, or incorrect.<sup>346</sup> *Alm v. Van Nostrand Reinhold Co., Inc.*<sup>347</sup> provides an interesting example of this.<sup>348</sup> In that case, the plaintiff claimed that he was injured while making a woodworking tool according to instructions provided in a book titled *The Making of Tools*, published by the defendant.<sup>349</sup> The plaintiff brought suit against the publisher on a theory of negligent misrepresentation, contending that the publisher should have independently verified the accuracy of the book's contents.<sup>350</sup> In support of this claim, the plaintiff relied on section 311 of the Restatement (Second) of Torts, which he contended imposed a duty on publishers to provide safe and adequate instructions.<sup>351</sup>

The court rejected the plaintiff's argument and refused to impose a duty on publishers to verify the accuracy of the materials they disseminate.<sup>352</sup> The court warned that the "[p]laintiff's theory, if adopted, would place upon publishers the duty of scrutinizing and even testing all procedures contained in any of their publications."<sup>353</sup> Furthermore, the potential liability under such a rule would "extend to an undeterminable number of potential [victims]."<sup>354</sup> The court observed that a number of other courts had cited First Amendment concerns as a reason for refusing to impose a duty to investigate on publishers.<sup>355</sup> Thus, the court in *Alm* affirmed the lower court's dismissal of the plaintiff's claim.<sup>356</sup>

A federal district court reached a similar conclusion in *Lewin v. McCreight*.<sup>357</sup> In *Lewin*, an explosion occurred while the plaintiff was mixing a

344. *Id.*

345. *See, e.g., Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263, 1264 (Ill. App. Ct. 1985) (noting that a how-to book explains how to accomplish a task).

346. *See, e.g., id.* (discussing that a plaintiff was injured after trying to make a tool based on the instructions in a how-to book).

347. 480 N.E.2d 1263.

348. *See id.* at 1264.

349. *Id.*

350. *Id.* at 1264–65 (citing RESTATEMENT OF TORTS (SECOND) § 311 (1965)).

351. *Id.* at 1265 (citing RESTATEMENT (SECOND) OF TORTS § 311 (1965)).

352. *Id.* at 1267 (citing *MacKown v. Ill. Publ'g & Printing Co.*, 6 N.E.2d 526, 530 (Ill. App. Ct. 1937)).

353. *Id.*

354. *Id.*

355. *Id.* (citing *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990, 993–94 (E.D.N.Y. 1977); *Cardozo v. True*, 342 So. 2d 1053, 1056–57 (Fla. Dist. Ct. App. 1977)).

356. *Id.*

357. 655 F. Supp. 282 (E.D. Mich. 1987).

mordant in accordance with directions set forth in a book titled *The Complete Metalsmith*.<sup>358</sup> The injured plaintiff brought a statutory products liability claim against the author and the publisher of the book.<sup>359</sup> The plaintiff asserted that the publisher failed to warn that the book might contain “defective ideas.”<sup>360</sup> In response, the book publisher moved to dismiss the claim against it.<sup>361</sup> The court viewed the issue as one of duty: did the publisher have a duty to warn potential readers about the accuracy of the book’s content?<sup>362</sup> The court acknowledged that a publisher might have a duty to warn when it actually created the information contained in the book’s contents.<sup>363</sup> However, relying on the reasoning of the *Alm* decision, the court declined to extend that duty to publishers when a book’s content was generated by a third-party author.<sup>364</sup> The court also agreed with the court in *Alm* that imposing such a duty on publishers would subject them to potentially unlimited liability, thereby impairing society’s access to ideas.<sup>365</sup> Consequently, the court granted the defendant’s motion to dismiss.<sup>366</sup>

#### F. Diet and Self-Improvement Books

There are several reported cases involving lawsuits against the publishers of diet books.<sup>367</sup> For example, in *Smith v. Linn*,<sup>368</sup> the decedent died of cardiac failure allegedly caused by a liquid protein diet promoted in a book titled *When Everything Else Fails . . . The Last Chance Diet*.<sup>369</sup> The administrator of the decedent’s estate brought suit against the publisher of the diet book based on several theories of liability.<sup>370</sup> The lower court granted summary judgment in favor of the publisher, concluding that it was protected from civil liability by the First Amendment.<sup>371</sup>

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358. *Id.* at 282.

359. *Id.* at 282–83 (citing MICH. COMP. LAWS § 600.2945 (2010)).

360. *Id.* at 283.

361. *Id.* at 282.

362. *Id.* at 283.

363. *Id.* (citing Cent. Soya Co. v. Rose, 352 N.W.2d 727, 729 (Mich. Ct. App. 1984)).

364. *Id.* at 283–84 (citing *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263, 1267 (Ill. App. Ct. 1985)).

365. *Id.* at 284.

366. *See id.*

367. *See, e.g., Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315 (S.D.N.Y. 2006) (involving injuries allegedly sustained from proscribing to a low-carbohydrate diet); *Smith v. Linn*, 563 A.2d 123 (Pa. Super. Ct. 1989), *aff’d*, 587 A.2d 309 (Pa. 1991) (involving the death of a dieter, allegedly resulting from complying with a liquid protein diet).

368. 563 A.2d 123.

369. *Id.* at 124–25.

370. *See id.*

371. *Id.* at 125.

The plaintiff's first claim was based on a theory of "negligent publication."<sup>372</sup> According to the plaintiff, liability for physical harm caused by negligent publication was supported by the reasoning in *Incollingo v. Ewing* and *Robb v. Gylock Corp.*, as well as several sections of the Restatement (Second) of Torts.<sup>373</sup> The plaintiff also relied on *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, *Gertz v. Robert Welch, Inc.*, *New York Times v. Sullivan*, and *Schenck v. United States* to support his contention that the First Amendment did not protect certain kinds of harmful expression from civil liability.<sup>374</sup> Nevertheless, the Pennsylvania court concluded that none of the exceptions identified in these decisions were applicable to the facts of the instant case.<sup>375</sup>

The court in *Smith* also rejected the argument that various provisions of the Restatement (Second) of Torts supported the imposition of liability on publishers.<sup>376</sup> For example, the court declared that sections 310, 311 and 557A—dealing with conscious misrepresentation, negligent misrepresentation, and fraudulent misrepresentation, respectively—were not applicable to publishers.<sup>377</sup> Furthermore, the court declined to extend the provisions of section 388 to book publishers.<sup>378</sup> According to the court, section 388—which required sellers of dangerous products to supply their customers with adequate warnings and instructions for safe use—was not applicable to publishers because warnings and instructions are not equivalent to published materials that espouse theories, opinions, or ideologies.<sup>379</sup>

Finally, the court rejected the plaintiff's contention that the defendant's diet book was a product subject to liability under section 402A.<sup>380</sup> Citing *Herceg v. Hustler Magazine, Inc.* and *Cardozo v. True*, the court observed that a number of courts refused to hold that a publication was a product and that no court had taken the opposite position.<sup>381</sup> The court also rejected the argument that the defendant's diet book was similar to aviation and navigation charts.<sup>382</sup> In the

372. *Id.*

373. *Id.* (citing *Incollingo v. Ewing*, 282 A.2d 206 (Pa. 1971); *Robb v. Gylock Corp.*, 120 A.2d 174 (Pa. 1956); RESTATEMENT (SECOND) OF TORTS §§ 310, 311, 388, 390, 402A, 557A (1965)).

374. *Id.* at 125–26 & n.2 (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–49 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264–65 (1964); *Schenck v. United States*, 249 U.S. 47, 52–53 (1919)).

375. *Id.* at 126.

376. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

377. *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 310, 311, 557A (1965)).

378. *See id.* (citing *Incollingo v. Ewing*, 282 A.2d 206 (Pa. 1971); RESTATEMENT (SECOND) OF TORTS § 388 (1965)).

379. *See id.* (citing *Incollingo*, 282 A.2d 206; RESTATEMENT (SECOND) OF TORTS § 388 (1965)).

380. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

381. *Id.* (citing *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802, 803 (S.D. Tex. 1983); *Cardozo v. True*, 342 So. 2d 1053, 1057 (Fla. Dist. Ct. App. 1977); RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

382. *Id.* at 127 (citing RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

court's view, the chart cases involved "extremely technical and detailed materials . . . upon which a limited class of persons imposed absolute trust having reason to believe in their unqualified reliability."<sup>383</sup> In contrast, *The Last Chance Diet* was not extremely technical, nor was it sold to a limited class of people.<sup>384</sup> Moreover, readers of the book were free to exercise their own judgment about choosing which aspects of the diet to follow.<sup>385</sup> For these reasons, the court in *Smith* affirmed the lower court's decision to grant summary judgment in favor of the publisher.<sup>386</sup>

*Gorran v. Atkins Nutritionals, Inc.*,<sup>387</sup> a more recent case, also involved a diet book. In that case, the plaintiff purchased the 1999 and 2002 editions of *Dr. Atkins' New Diet Revolution* and went on the high-protein, low-carbohydrate diet prescribed in the book.<sup>388</sup> While he was on the diet, the plaintiff's cholesterol level increased from 146 milligrams per deciliter to 230 milligrams per deciliter in two months.<sup>389</sup> Eventually, the plaintiff developed a blocked coronary artery, which required an angioplasty to unclog it and the insertion of a stent to keep it open.<sup>390</sup> Fortunately, the plaintiff's cholesterol returned to normal within two months after he discontinued the Atkins Diet.<sup>391</sup> The plaintiff then sued the Atkins estate and Atkins Nutritionals, Inc. (ANI), a company that sold food products and nutritional supplements over the Internet for use in connection with the Atkins Diet.<sup>392</sup> The suit was based on strict liability, negligent misrepresentation, and deceptive practices in violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).<sup>393</sup> However, soon after the complaint was filed, the federal district court judge granted the defendants' motion for judgment on the pleadings, and the claims were dismissed.<sup>394</sup>

The plaintiff's products liability claim alleged that the food products he purchased from ANI were defective and unreasonably dangerous.<sup>395</sup> In addition, the plaintiff claimed that the Atkins Diet was a defective product because it subjected a substantial number of persons who followed it to an increased risk of cardiovascular disease and other illnesses.<sup>396</sup> Turning to the first part of the products liability claim, the court applied the consumer expectation test to the food products sold by ANI on its website and concluded that they were not

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383. *Id.*

384. *See id.* at 124.

385. *See id.*

386. *Id.* at 127.

387. 464 F. Supp. 2d 315 (S.D.N.Y. 2006).

388. *Id.* at 319 & n.1, 320.

389. *Id.* at 321.

390. *Id.* at 321–22.

391. *Id.* at 322.

392. *Id.* at 318, 322.

393. *Id.* at 323.

394. *Id.* at 319.

395. *Id.* at 323.

396. *Id.*



defective merely because they increased the risk of heart disease.<sup>397</sup> Furthermore, “[t]he average consumer surely anticipates that a high-fat, high-protein diet would increase both cholesterol levels and the risk of heart disease.”<sup>398</sup> Finally, even if high-fat foods were considered to be inherently defective or unreasonably dangerous, the “\$25 worth of protein bars, pancake mix, and pancake syrup” that the plaintiff consumed was not enough to cause his heart problems.<sup>399</sup>

The court also determined that the plaintiff’s claim that the *Dr. Atkins’ New Diet Revolution* book was a defective product must fail because the content of the book was not a product.<sup>400</sup> Invoking the reasoning of *Winter* and *Cardozo*, as well as the language of the Products Liability Restatement, the court in *Gorran* distinguished between the tangible nature of the book itself and the intangible nature of the thoughts and ideas expressed therein.<sup>401</sup> The court also relied upon similar reasoning in *Smith v. Linn* to conclude that the intangible expressions contained in the Atkins Diet book were not products and, therefore, could not be defective products.<sup>402</sup> Accordingly, the court ruled that the plaintiff’s products liability claim must be dismissed.<sup>403</sup>

The court also considered the plaintiff’s negligent misrepresentation and FDUTPA violation claims.<sup>404</sup> In his negligent misrepresentation claim, the plaintiff alleged that the defendants negligently misrepresented the risks of the Atkins Diet, that the defendants intended for him to rely on these representations, and that his reliance resulted in his heart problems and subsequent need for heart surgery.<sup>405</sup> The defendants responded that the plaintiff failed to allege that the defendants owed him a duty of care and that their statements were protected by the First Amendment.<sup>406</sup> The court agreed with the defendants that plaintiffs must allege that the defendants owe them a duty of care when making a negligent misrepresentation claim and holding that the plaintiff in the instant case had failed to do so.<sup>407</sup>

Turning to the First Amendment issue, the court acknowledged that negligent misrepresentation claims, like other actions based on allegedly false

397. *Id.* at 323–24 (quoting RESTATEMENT (SECOND) OF TORTS § 402A (1965)) (citing *Bruner v. Anheuser-Busch, Inc.*, 153 F. Supp. 2d 1358, 1360–61 (S.D. Fla. 2001), *aff’d*, 31 F. App’x. 932 (11th Cir. 2002)).

398. *Id.* at 324.

399. *Id.*

400. *Id.*

401. *Id.* (citing *Winter v. G.P. Putnam Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991); *Cardozo v. True*, 342 So. 2d 1053, 1056 (Fla. Dist. Ct. App. 1977); RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY §§ 19(a) & cmt. d (1998)).

402. *Id.* at 325 (*Smith v. Linn*, 563 A.2d 123, 126–27 (Pa. Super. Ct. 1989), *aff’d*, 587 A.2d 309 (Pa. 1991)).

403. *Id.*

404. *Id.* at 325–29 (citations omitted).

405. *Id.* at 325.

406. *Id.*

407. *Id.* at 326.

statements, were subject to constitutional limitations.<sup>408</sup> The court also pointed out that the level of First Amendment protection afforded to such statements depended upon whether they could be classified as commercial or noncommercial speech.<sup>409</sup> The court then determined which type of speech was involved in the Atkins book and the ANI website.<sup>410</sup> First, the court characterized the Atkins book as “a guide to leading a controlled carbohydrate lifestyle,” not merely an advertisement for the defendant’s dietary products.<sup>411</sup> Relying on the *Smith* court’s analysis, the court in *Gorran* concluded that the contents of the book were fully protected by the First Amendment, even if they caused harm to the plaintiff.<sup>412</sup>

The plaintiff also claimed that the ANI website negligently misrepresented the safety of the Atkins Diet.<sup>413</sup> The court again applied the commercial/noncommercial speech analysis to statements made on the website.<sup>414</sup> The court agreed that the portions of the website devoted to the sale of Atkins dietary products were commercial in character.<sup>415</sup> Other portions of the website that discussed nutrition or provided recipes or general health information were noncommercial.<sup>416</sup> However, since the plaintiff’s misrepresentation claim was based on the website’s advocacy of the Atkins Diet—not its promotion of dietary products—the court concluded that this aspect of the plaintiff’s negligent misrepresentation claim must fail as well.<sup>417</sup>

The court also rejected the plaintiff’s FDUTPA claim because it concluded that FDUTPA only protected against unfair or deceptive conduct that caused economic injury to someone “in the course of trade or commerce.”<sup>418</sup> The act protected against economic losses, not personal injuries.<sup>419</sup> Because the plaintiff was seeking to recover for personal injuries—not economic losses—the court concluded that FDUTPA was not applicable.<sup>420</sup> Thus, the court dismissed the

408. *Id.* (quoting *Oxycal Labs., Inc. v. Jeffers*, 909 F. Supp. 719, 724 (S.D. Cal. 1995)).

409. *Id.* (quoting *World Wrestling Fed’n Entm’t, Inc. v. Bozell*, 142 F. Supp. 2d 514, 524 (S.D.N.Y. 2001)).

410. *Id.* at 327.

411. *Id.*

412. *Id.* (quoting *Smith v. Linn*, 563 A.2d 123, 125 (Pa. Super. Ct. 1989), *aff’d*, 587 A.2d 309 (Pa. 1991)).

413. *Id.* at 328.

414. *Id.*

415. *Id.* at 327.

416. *Id.* at 327–28.

417. *Id.* at 328.

418. *Id.* at 328, 329 (citing *Fla. Office of Attorney Gen. v. Tenet Healthcare Corp.*, 420 F. Supp. 2d 1288, 1309 (S.D. Fla. 2005); *Shibata v. Lim*, 133 F. Supp. 2d 1311, 1317 (M.D. Fla. 2000)).

419. *Id.* at 329 (citing *FLA. STAT. ANN.* § 501.212(3) (West 2010); *T.W.M. v. Am. Med. Sys., Inc.*, 886 F. Supp. 842, 844 (N.D. Fla. 1995); *Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc.*, 693 So. 2d 602, 606 (Fla. Dist. Ct. App. 1997)).

420. *Id.*

plaintiff's products liability, negligent misrepresentation, and FDUTPA violation claims.<sup>421</sup>

Courts also have refused to impose tort liability on the publishers of other types of self-improvement books.<sup>422</sup> For example, in *Young v. Mallett*,<sup>423</sup> the parents of a young child brought suit against the author and publisher of a book titled *Let's Have Healthy Children*. The parents alleged that their child became injured by ingesting large amounts of vitamin A, as instructed by the defendants' book.<sup>424</sup> The case was primarily concerned with whether New York courts could assert personal jurisdiction over the book's author, who was a resident of California.<sup>425</sup> Reversing the trial court's decision, the Appellate Division of the New York Supreme Court ruled that the author's estate could not be sued in New York.<sup>426</sup> In a dissenting opinion, one member of the court suggested that the legislature may have viewed manuscripts as "goods used or consumed or services rendered."<sup>427</sup>

### G. Trade Publications

Customers and others often rely on information about products provided in trade publications and other forms of trade literature distributed by product manufacturers.<sup>428</sup> The court in *Demuth Development Corp. v. Merck & Co., Inc.*,<sup>429</sup> an early decision, laid down a "no liability" rule—at least where economic damages were concerned.<sup>430</sup> In that case, the defendant, a large chemical and pharmaceutical company, published *The Merck Index*—a self-proclaimed "encyclopedia of chemicals and drugs"—which provided information about the "general, medical or veterinary uses as well as toxicity" of "some 10,000 chemicals, drugs and biologicals."<sup>431</sup>

421. *Id.*

422. *See, e.g., Young v. Mallett*, 371 N.Y.S.2d 1 (App. Div. 1975) (discussing a book about raising healthy children).

423. *Id.*

424. *Id.* at 2.

425. *Id.*

426. *See id.* at 2–3. The author, Adele Davis died during the litigation. *Id.* at 2.

427. *Id.* at 4 (Yesawich, J., dissenting).

428. *See, e.g., Newby v. Wyeth*, No. 4:11CV00339AGF, 2011 WL 5024572, at \*3 (E.D. Mo. Oct. 21, 2011) (alleging reliance on Patient Education Monographs providing information on prescription drug); *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990, 991 (E.D.N.Y. 1977) (alleging liability for manufacturer's reliance on an encyclopedia of chemicals and drugs to ensure product's safety).

429. 432 F. Supp. 990.

430. *See id.* at 993–94 (citing *Ultramares Corp. v. Touche*, 174 N.E. 441, 447 (N.Y. 1931); *Jaillet v. Cashman*, 139 N.E. 714, 714 (N.Y. 1923); *Kings Creations Ltd. v. Conde Nast Publ'ns, Inc.*, 311 N.Y.S.2d 757, 758 (App. Div. 1970); WILLIAM L. PROSSER, *LAW OF TORTS* § 107 (4th ed. 1971)).

431. *Id.* at 991.

In its description of the chemical, triethylene glycol, *The Merck Index* suggested that its toxicity was comparable to that of ethylene glycol, a highly toxic chemical used in antifreeze.<sup>432</sup> According to the plaintiff, triethylene glycol was not as toxic as ethylene glycol; in fact, it was “completely non-toxic when inhaled as a vapor and significantly less toxic than ethylene glycol when ingested orally.”<sup>433</sup> The plaintiff manufactured a vaporizer that used triethylene glycol “as a germicidal agent to disinfect the air in hospitals, laboratories and other places” where it was necessary to maintain a germ-free environment.<sup>434</sup> The plaintiff alleged that its customers regarded *The Merck Index* as a reliable source of information on the “toxic effects of chemicals and drugs.”<sup>435</sup> Consequently, many of them quit purchasing the plaintiff’s vaporizers because they erroneously believed that triethylene glycol was unsafe for use as an air sterilizer.<sup>436</sup> The plaintiff brought suit against Merck, alleging negligent misrepresentation, and Merck moved for summary judgment.<sup>437</sup>

Quoting *International Products Co. v. Erie Railroad Co.*, the court declared that there must be a duty to exercise due care before a person can be held liable for the publication of incorrect information.<sup>438</sup> For such a duty to arise between the plaintiff and the defendant, the following requirements must be satisfied:

There must be knowledge, or its equivalent, that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that, if false or erroneous, he will because of it be injured in person or property. Finally, the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care.<sup>439</sup>

Applying this standard, the court in *Demuth* determined that Merck published *The Merck Index* for a serious purpose, and expected its readers to rely and act upon it as an authoritative source of accurate information “concerning [the characteristics of] drugs and chemicals.”<sup>440</sup> However, the court observed that the plaintiff did not detrimentally rely on the information provided by Merck, nor did it show the existence of a “relationship of the parties, arising out of contract or otherwise” that would give rise to a duty for Merck to exercise due

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432. *Id.* at 991–92.

433. *Id.* at 992.

434. *Id.* at 991.

435. *Id.* at 992.

436. *Id.*

437. *Id.* at 991.

438. *Id.* at 992–93 (quoting *Int’l Prods. Co. v. Erie R.R.*, 155 N.E. 662, 664 (N.Y. 1927)).

439. *Id.* (quoting *Int’l Prods. Co.*, 155 N.E. 2d at 664).

440. *Id.* at 993.

care on the plaintiff's behalf.<sup>441</sup> Finally, the court concluded that imposing liability on publishers in the absence of such a relationship would have a "manifestly chilling effect upon the right to disseminate knowledge."<sup>442</sup> Accordingly, the court granted the defendant's motion for summary judgment.<sup>443</sup>

#### *H. Advertisements and Endorsements*

Advertisements and endorsements have also generated some litigation.<sup>444</sup> For example, in *Hanberry v. Hearst Corp.*,<sup>445</sup> the plaintiff was injured when she slipped on the vinyl floor of her kitchen.<sup>446</sup> Contending that the shoes she was wearing were defectively designed, the plaintiff not only brought suit against the manufacturer and the retail seller, but also sued Hearst Corporation—the publisher of *Good Housekeeping* magazine, which had awarded its "Good Housekeeping Consumers' Guaranty Seal" to the shoes.<sup>447</sup> The plaintiff's claims were based on negligent misrepresentation, conspiracy, and breach of warranty.<sup>448</sup> However, the trial court sustained Hearst's general demurrer to the complaint.<sup>449</sup>

The appellate court agreed with the plaintiff's contention that *Good Housekeeping* did not just routinely accept and publish advertising from all sorts of manufacturers and retail sellers.<sup>450</sup> Rather, the magazine actively used its Guaranty Seal as a marketing device, profiting from the fact that consumers were more likely to purchase products that had been certified by *Good Housekeeping* as being of high quality.<sup>451</sup> This led the court to declare:

In voluntarily assuming this business relationship, 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.<sup>452</sup>

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441. *Id.*

442. *Id.* at 994.

443. *Id.* at 995.

444. *See, e.g., Hanberry v. Hearst Corp.*, 81 Cal. Rptr. 519, 521 (Ct. App. 1969) (asserting liability against a magazine for certifying that shoes were "good ones and that the advertising claims made for them in [the] magazine [were] truthful.").

445. 81 Cal. Rptr. 519.

446. *Id.* at 521.

447. *Id.*

448. *Id.*

449. *Id.* at 520–21.

450. *Id.* at 522.

451. *Id.*

452. *Id.* (citing *Connor v. Great W. Sav. & Loan Ass'n*, 447 P.2d 609, 617 (Cal. 1968)).

Having concluded that the plaintiff could proceed against Hearst on a theory of negligent misrepresentation, the court refused to go further and allow her to also seek recovery based on strict products liability or breach of warranty.<sup>453</sup> Finding no decision to the contrary, the court reasoned that strict liability and warranty claims should be limited to those who were directly involved in the manufacturing and distribution process.<sup>454</sup> Extending liability to others, such as Hearst, might expose them to liability for manufacturing defects when they had no ability to examine individual products.<sup>455</sup>

### *I. Maps and Navigational Charts*

In contrast to cases involving other types of publications, courts have uniformly imposed liability on the publishers of navigational charts when their products contained inaccurate or misleading information.<sup>456</sup> The first reported case to consider this issue was *Times Mirror Co. v. Sisk*,<sup>457</sup> which was decided in 1978. In that case, the surviving spouses of the crew members of a Pan Am 707 cargo jet brought suit against Jeppesen & Company—the publisher of instrument approach charts—and its parent company, the Times Mirror Company.<sup>458</sup> The decedents were killed when their aircraft crashed into Mt. Kamunay while approaching Manila International Airport in the Philippine Islands.<sup>459</sup> The approach chart they were using did not depict Mt. Kamunay or warn of its presence in the area.<sup>460</sup>

The plaintiffs brought suit on the basis of strict liability in tort and breach of warranty.<sup>461</sup> At trial, the jury returned a verdict for the plaintiffs; however, the trial court granted the defendant's motion for a judgment notwithstanding the verdict.<sup>462</sup> On appeal, the defendant argued that its charts were neither products within the meaning of the Restatement (Second) of Torts Section 402A nor

453. *Id.* at 524.

454. *Id.*

455. *See id.*

456. *See, e.g.,* Brocklesby v. United States, 767 F.2d 1288 (9th Cir. 1985) (affirming the lower court's decision that a publisher of instrument approach procedures that caused an airplane crash should be liable for its defective product); Saloomey v. Jeppesen & Co., 707 F.2d 671 (2d Cir. 1983) (affirming the lower courts judgment for a plaintiff for damages arising out of reliance on a navigational chart); Aetna Cas. & Sur. Co. v. Jeppesen & Co., 642 F.2d 339 (9th Cir. 1981) (affirming the trial court's finding that a chart maker should be held liable for its defectively designed product); *Times Mirror Co. v. Sisk*, 593 P.2d 924 (Ariz. Ct. App. 1978) (setting aside a judgment n.o.v. and ordering judgment in favor of plaintiffs against the publisher of instrument approach charts); Fluor Corp. v. Jeppesen & Co., 216 Cal. Rptr. 68 (Cal. Ct. App. 1985) (reversing judgment for a manufacturer of an airplane instrument approach chart and holding that such charts are products).

457. 593 P.2d 924.

458. *Id.* at 925, 926.

459. *Id.* at 925.

460. *Id.* at 926.

461. *Id.* at 927.

462. *Id.* at 925.

goods within the meaning of the UCC.<sup>463</sup> However, the court dodged this issue, declaring that “[a]lthough we have serious misgivings about whether this is a products liability case, we need not decide this issue because we find that the court erred in granting judgment n.o.v. in any event.”<sup>464</sup> Because the jury found that the chart was not defective and not unreasonably dangerous, the appellate court concluded that there was no reason to overrule the jury verdict.<sup>465</sup>

A federal appellate court also upheld a trial court’s finding that a navigation chart was defective in *Aetna Casualty & Surety Co. v. Jeppesen & Co.*<sup>466</sup> In that case, an insurance company brought an indemnity action against the chart maker after settling wrongful death claims for airline passengers who were killed when a Bonanza Airlines plane crashed near Las Vegas.<sup>467</sup> The insurance company maintained that the instrument approach chart for the Las Vegas Airport was defective.<sup>468</sup> The raw data on which the chart was based had been provided by the Federal Aviation Administration and was correct.<sup>469</sup> However, the defendant converted this information—which was originally in tabular form—into a graphic form.<sup>470</sup> The chart had two graphic depictions: the top portion, or “plan” view, provided a bird’s eye view from above, while the bottom portion depicted a “profile,” or side view, of the approach with a descending line representing the minimum altitude that the plane needed to maintain to make a safe approach to the airport.<sup>471</sup> The chart was allegedly defective because different scales were used to portray the plan and profile views, thereby confusing the pilot.<sup>472</sup>

The trial court concluded that the chart was a defective product and ruled in favor of the insurance company.<sup>473</sup> On appeal, the Ninth Circuit declared that, under Nevada law, a plaintiff could “recover for injuries caused by use of a product with a defective design which makes it unsafe for its intended use.”<sup>474</sup> The appellate court also concluded that the lower court’s finding that the chart was a defectively designed product was not clearly erroneous and, therefore, affirmed its judgment for the plaintiff.<sup>475</sup>

Shortly thereafter, another federal appellate court decided *Saloomey v. Jeppesen & Co.*<sup>476</sup> The decedents in *Saloomey* were killed in a crash near

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463. *Id.* at 927 (citing COLO. REV. STAT. § 4-2-314(2)(C) (2012); RESTATEMENT (SECOND) OF TORTS §§ 402A, 402B (1965)).

464. *Id.* (citing COLO. REV. STAT. § 4-2-314(2)(C) (2012); RESTATEMENT (SECOND) OF TORTS §§ 402A, 402B (1965)).

465. *Id.* at 929.

466. 642 F.2d 339, 343 (9th Cir. 1981).

467. *Id.* at 341.

468. *Id.*

469. *Id.* at 342.

470. *Id.*

471. *Id.*

472. *Id.*

473. *Id.* at 341.

474. *Id.* at 342–43.

475. *Id.* at 343.

476. 707 F.2d 671 (2d Cir. 1983).

Martinsburg, West Virginia.<sup>477</sup> The defendant's chart incorrectly stated that the Martinsburg airport was equipped with a full instrument landing system.<sup>478</sup> According to the decedents' personal representative, this error resulted in the pilot striking a ridge while trying to land at the airport.<sup>479</sup> The personal representative brought suit against the chart publisher, Jeppesen, alleging negligence, breach of warranty, and strict products liability.<sup>480</sup> After a lengthy trial, the jury found in favor of the plaintiffs on all counts.<sup>481</sup>

On appeal, the defendant argued that navigational charts were services rather than products and, therefore, were not subject to strict liability.<sup>482</sup> First, the court observed that the charts were not individualized—like architectural plans—but rather were mass-produced like ordinary products.<sup>483</sup> Furthermore, the court declared that by producing and marketing these charts to the general public, Jeppesen “undertook a special responsibility, as seller, to insure that consumers will not be injured by the use of the charts.”<sup>484</sup> Finally, the court concluded that because the charts were mass-produced, Jeppesen could treat damage awards “as a cost of production to be covered by liability insurance.”<sup>485</sup> The appellate court also determined that there was sufficient evidence to support the jury's finding that Jeppesen was negligent in manufacturing the map and failing to inspect it for errors.<sup>486</sup>

A federal appellate court in *Brocklesby v. United States*<sup>487</sup> also imposed liability on the publisher of an allegedly defective navigational chart.<sup>488</sup> In that case, personal representatives of the deceased crew members of an airplane owned by World Airways, Inc. that crashed into a mountain near Cold Bay, Alaska, brought suit against the publisher of an allegedly inaccurate instrument approach procedure.<sup>489</sup> The case was submitted to a jury under theories of negligence, breach of warranty, and strict products liability.<sup>490</sup> The jury held in favor of the plaintiffs and the publisher appealed.<sup>491</sup> On appeal, the defendant maintained that the chart was not a product.<sup>492</sup> The appellate court, relying on

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477. *Id.* at 673.

478. *Id.*

479. *See id.*

480. *Id.*

481. *Id.* at 673–74.

482. *Id.* at 676.

483. *Id.*

484. *Id.* at 676–77.

485. *See id.* at 677.

486. *Id.*

487. 767 F.2d 1288 (9th Cir. 1985).

488. *Id.* at 1291, 1297.

489. *Id.* at 1291.

490. *Id.* at 1292.

491. *Id.*

492. *Id.* at 1294 (citing RESTATEMENT (SECOND) OF TORTS § 402A (1965)).



the reasoning of *Saloomey*, disagreed and concluded that the chart was a product because it was mass-produced.<sup>493</sup>

Finally, in *Fluor Corp. v. Jeppesen & Co.*,<sup>494</sup> a California intermediate appellate court reversed a lower court judgment in favor of the publisher of navigational charts.<sup>495</sup> In that case, a Lockheed Jet Star crashed into the side of Johnson Hill near Lake Saranac, New York, killing everyone aboard.<sup>496</sup> The defendant's approach chart depicted one hill in the general area, but did not show the location of the higher Johnson Hill.<sup>497</sup> The owner of the airplane filed suit against the chart publisher on the bases of negligence, breach of warranty, and strict products liability.<sup>498</sup> The lower court entered judgment in favor of the chart publisher.<sup>499</sup>

On appeal, the court acknowledged that no California court had found navigational charts to be products for purposes of determining the applicability of strict products liability principles.<sup>500</sup> However, the court adopted the reasoning of *Saloomey* and *Brocklesby*—namely, that charts should be treated as products because they were mass-produced; therefore, the court concluded that it was appropriate for publishers to bear the costs of injuries caused by inaccurate charts.<sup>501</sup> The court also declared that “the policy reasons underlying the strict products liability concept should be considered in determining whether something is a product within the meaning of its use . . . rather than . . . to focus on the dictionary definition of the word.”<sup>502</sup>

Turning to the question of whether the defendant's chart was defective, the court applied the *Barker v. Lull Engineering Co.* decision's two-pronged test, under which a plaintiff could rely on either the consumer expectation or the risk utility test to prove that a product was defectively designed.<sup>503</sup> The court concluded that even if the trial court determined that the chart satisfied ordinary consumer expectations, a jury could have found it to be defective because its design embodied “excessive preventable danger.”<sup>504</sup> Accordingly, the court reversed the lower court's judgment in favor of the defendant.<sup>505</sup>

493. See *id.* at 1294–95 (quoting *Saloomey v. Jeppesen & Co.*, 707 F.2d 671, 676–77 (2d Cir. 1983); *Aetna Cas. & Sur. Co. v. Jeppesen & Co.*, 642 F.2d 339, 341–42 (9th Cir. 1981)).

494. 216 Cal. Rptr. 68 (Ct. App. 1985).

495. *Id.* at 70, 75.

496. *Id.* at 70.

497. *Id.*

498. *Id.*

499. *Id.*

500. *Id.* (quoting *Brocklesby v. United States*, 753 F.2d 794, 800 & n.9 (9th Cir. 1985), amended by 767 F.2d 1288 (9th Cir. 1985); *Saloomey v. Jeppesen & Co.*, 707 F.2d 671, 676–77 (2d Cir. 1983)).

501. See *id.* (quoting *Brocklesby*, 753 F.2d at 800 & n.9; *Saloomey*, 707 F.2d at 677).

502. *Id.* at 71 (quoting *Lowrie v. City of Evanston*, 365 N.E.2d 923, 928 (Ill. App. Ct. 1977)).

503. *Id.* at 73 (quoting *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 446 (Cal. 1978)).

504. *Id.* (quoting *Barker*, 573 P.2d at 452).

505. *Id.* at 75.

*J. Medical Manuals, Forms, and PDE Materials*

Several cases have involved allegedly defective medical history intake forms.<sup>506</sup> For example, the plaintiff in *Appleby v. Miller*<sup>507</sup> brought a products liability claim against the publisher of a form that allegedly failed to inquire into whether the plaintiff had a history of heart problems or whether she should not take prophylactic antibiotics.<sup>508</sup> As a consequence of these omissions, as well as other omissions on the form, the plaintiff alleged that she “suffered bacterial endocarditis, coma, brain artery aneurysm, and hemiparesis.”<sup>509</sup> However, the lower court dismissed the plaintiff’s suit because it concluded that the form was not a product and therefore did not fall within the purview of strict liability in tort.<sup>510</sup> The court also ruled that the plaintiff failed to bring her action within the applicable statute of limitations period.<sup>511</sup>

On appeal, the Illinois appellate court declared that, in determining whether something was a product, courts did not focus on dictionary definitions; rather, they considered the policy justifications behind strict products liability.<sup>512</sup> According to the court, these policies included “the public interest in human life and health, the manufacturer’s invitations and solicitations to use the product, its representations that the product is safe and suitable for intended use, and the justice of imposing the loss on the one creating the risk and reaping the profit.”<sup>513</sup> Considering these policies, the court concluded that “the medical form in question was a service provided to the dentist rather than a product subject to strict liability.”<sup>514</sup> In light of the generality of the questions and the shortness of the form, the court concluded that it would be unreasonable for the plaintiff to assume that the form was intended to provide a comprehensive inquiry into a patient’s medical history.<sup>515</sup> Finally, the court declared that the real cause of the plaintiff’s injury was the dentist’s reliance on the form, not the form’s content.<sup>516</sup> Therefore, the court upheld the lower court’s judgment for the defendant.<sup>517</sup>

However, a federal district court recently reached a different result in *Coleman v. Dental Organization for Conscious Sedation, LLC*.<sup>518</sup> In that case,

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506. See, e.g., *Appleby v. Miller*, 554 N.E.2d 773 (Ill. App. Ct. 1990) (affirming the lower court’s dismissal of a plaintiff’s products liability claim arising out of an allegedly defective medical history intake form).

507. 554 N.E.2d 773.

508. *Id.* at 774.

509. *Id.* at 775.

510. *Id.* at 776.

511. *Id.* (citing ILL. COMP. STAT. § 2-413 (1986)).

512. *Id.* (citing *Trent v. Brasch Mfg. Co.*, 477 N.E.2d 1312, 1314–15 (Ill. App. Ct. 1985)).

513. *Id.* at 775–76 (citing *Suvada v. White Motor Co.*, 210 N.E.2d 182 (Ill. 1965)).

514. *Id.* at 776.

515. *Id.*

516. *Id.*

517. *Id.*

518. No. 4:10CV798 TIA, 2010 WL 5146603 (E.D. Mo. Dec. 13, 2010).

the decedent's surviving spouse brought strict liability and negligence actions against the publishers of various manuals and protocols, claiming that they failed to provide proper warnings.<sup>519</sup> In their motions to dismiss, the defendants contended that the publications were not products and therefore were not subject to strict liability or negligence on the basis of their content.<sup>520</sup> The defendants relied on the reasoning of the *Winter*, *Smith*, and *Jones* decisions to support their claim that written ideas and expressions should not be treated as products.<sup>521</sup> The plaintiffs, on the other hand, cited the navigational chart cases for the proposition that information can be a product subject to strict liability when such information is inaccurate.<sup>522</sup> The court concluded that the plaintiff had alleged sufficient facts to "to raise a right to relief above the speculative level" and therefore refused to dismiss the products liability claim at such an early stage in the proceedings.<sup>523</sup>

The court also refused to dismiss the plaintiff's negligence claim.<sup>524</sup> The court observed that the plaintiff had alleged the defendants owed a duty to the decedent because they knew that "dentists would utilize the methods, procedures, products, and protocols on patients."<sup>525</sup> Furthermore, the plaintiffs contended that the defendants downplayed the risks associated with their sedation products, "failed to provide adequate information about the reversal agent," and "encouraged the use of the medications that were off label, contrary to drug manufacturers' recommendations, and without an adequate scientific basis."<sup>526</sup> The court concluded that these allegations were sufficient to create a reasonable expectation that sufficient evidence supporting the plaintiff's negligence claim would be revealed during discovery.<sup>527</sup>

Patient drug education materials (PDEs) are another potential source of liability for the dissemination of inaccurate information. Pharmacies often provide PDEs to their customers when they dispense pharmaceutical products.<sup>528</sup> There have been several instances in which patients brought negligence or misrepresentation claims against PDE publishers for disseminating inaccurate medical information.<sup>529</sup> The courts in two of these cases ruled in favor of the

519. *Id.* at \*1.

520. *Id.*

521. *Id.* at \*2 (citing *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991); *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1217–18 (D. Md. 1988); *Smith v. Linn*, 563 A.2d 123, 127 (Pa. Super. Ct. 1989), *aff'd*, 587 A.2d 309 (Pa. 1991)).

522. *See id.* at \*3.

523. *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (internal quotation marks omitted).

524. *Id.* at \*4.

525. *Id.*

526. *Id.* (internal quotation marks omitted).

527. *Id.* (citing *Twombly*, 550 U.S. at 556).

528. *See, e.g.*, *Cheatham v. Teva Pharm. USA*, 726 F. Supp. 2d 1021, 1022–23 (E.D. Ark. 2010) (providing an example of a company that published PDE information in electronic databases).

529. *See Neeley v. Wolters Kluwer Health, Inc.*, No. 4:11-CV-325JAR, 2013 WL 3929059, at \*1 (E.D. Mo. 2013); *Cheatham*, 726 F. Supp. 2d at 1022; *Rivera v. First Databank, Inc.*, 115 Cal.

publisher based on duty<sup>530</sup> and free speech grounds.<sup>531</sup> However, in an unreported opinion, a federal district court in Missouri recently refused to dismiss a similar claim against a PDE publisher.<sup>532</sup> In *Neeley v. Wolters Kluwer Health, Inc.*,<sup>533</sup> the plaintiff was diagnosed with tardive dyskinesia after taking metoclopramide—the generic version of Reglan—between November 2006 and February 2008, to treat her gastroesophageal reflux disease.<sup>534</sup> The plaintiff and her spouse sued various parties, alleging that they failed to warn about the risks of taking metoclopramide on a long-term basis.<sup>535</sup>

Wolters Kluwer Health, Inc. and Wolters Kluwer United States were among the defendants in this litigation, and the court referred to them collectively as the “PEM [d]efendants.”<sup>536</sup> Although PEM publishers were not regulated by the FDA, they developed guidelines to assure that PEMs were, *inter alia*, scientifically accurate, timely, and up-to-date.<sup>537</sup> Nevertheless, the PEM defendants argued that they assumed no legal duty to the plaintiffs because they had no relationship with them.<sup>538</sup> In addition, the PEM defendants contended they did not assume any legal duty to the plaintiffs by undertaking to publish the PEM pamphlets for distribution to drug consumers.<sup>539</sup>

In response, the plaintiffs argued that the PEM defendants were not “independent publishers” who published books or articles written by others for sale to the general public; rather, they targeted patients and health providers, knowing that they would rely on the information contained in the PEMs.<sup>540</sup> The court agreed with the plaintiffs, concluding that even though the PEM defendants did not have a formal relationship with the plaintiffs, they nevertheless assumed a duty to the plaintiffs.<sup>541</sup> Specifically, the court declared that the plaintiffs had sufficiently alleged “they were foreseeable third-party beneficiaries based upon the ‘clear foreseeability to harm of [p]laintiff’ and because the PEM defendants ‘voluntarily assumed a duty of care to [p]laintiff under the Restatement [(Second) of Torts section] 324 and common law duty principles.’”<sup>542</sup>

The PEM defendants also maintained that their publications did not constitute commercial speech simply because they licensed the publications to

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Rptr. 3d 1 (Ct. App. 2010); *see also* Newby v. Wyeth, Inc., No. 4:11CV00339AGF, 2011 WL 5024572 (E.D. Mo. Oct. 21, 2011).

530. *See Cheatham*, 726 F. Supp. 2d at 1022–24.

531. *See Rivera*, 115 Cal. Rptr. 3d at 5–6.

532. *Neeley*, No. 4:11-CV-325JAR, 2013 WL 3929059, at \*23.

533. No. 4:11-CV-325JAR, 2013 WL 3929059.

534. *Id.* at \*1.

535. *Id.* at \*3.

536. *Id.* at \*10.

537. *Id.* at \*12.

538. *Id.*

539. *Id.*

540. *Id.*

541. *Id.* at \*13.

542. *Id.*

pharmacies for profit.<sup>543</sup> Furthermore, the PEM defendants claimed that even if the PEMs were characterized as commercial speech, they were not false; rather, they were merely incomplete.<sup>544</sup> Finally, the PEM defendants argued that they should be immune from liability because they simply published information provided by drug manufacturers and approved by the FDA.<sup>545</sup> In response, the plaintiffs stated that the PEM defendants were authors—rather than publishers<sup>546</sup>—and therefore had a duty to verify the accuracy of their work.<sup>547</sup> Nevertheless, the court concluded that the PEM defendants did not make a sufficient First Amendment claim to warrant dismissal of the plaintiffs’ case at that point in the proceedings.<sup>548</sup>

### K. Trade Association Standards

Finally, several decisions have addressed the issue of whether a trade association may be held liable for promulgating defective design standards for its members.<sup>549</sup> One such case, *Beasock v. Dioguardi Enterprises, Inc.*,<sup>550</sup> involved standards published by the Tire and Rim Association (TRA).<sup>551</sup> TRA is a not-for-profit trade association that was founded in 1903 for the purpose of promoting dimensional standards for tires and rims to allow interchangeability among the products of different manufacturers.<sup>552</sup> TRA did not engage in the design, sale, manufacture, or distribution of any tires, rims, or other automotive products.<sup>553</sup>

In *Beasock*, the plaintiff’s husband suffered fatal injuries when a 16-inch truck tire that had been mistakenly mounted on a 16.5-inch rim exploded.<sup>554</sup> The

543. *Id.* at \*14.

544. *Id.*

545. *Id.*

546. *See, e.g.*, *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1037 (9th Cir. 1991) (holding that those who publish the work of others do not have to independently investigate the accuracy of the author’s statements); *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1216–17 (D. Md. 1988) (holding that a textbook publisher should not be held “strictly liable as publisher for the content of the books that it publishes”); *Cardozo v. True*, 342 So. 2d 1053, 1056 (Fla. Dist. Ct. App. 1977) (holding that retail bookseller had no duty to verify the accuracy of the books she sold).

547. *Neeley*, No. 4:11-CV-326JAR, 2013 WL 3929059, at \*14.

548. *Id.*

549. *See, e.g.*, *Howard v. Poseidon Pools, Inc.*, 506 N.Y.S.2d 523 (Sup. Ct. 1986) (granting the defendant’s motion for summary judgment for claims arising out of damages alleged to have resulted from a trade association who was not a manufacturer); *Beasock v. Dioguardi Enters., Inc.*, 494 N.Y.S.2d 974 (Sup. Ct. 1985) (holding that no liability attached for damages allegedly arising from trade association activities).

550. 494 N.Y.S.2d 974.

551. *Id.* at 976.

552. *Id.* All manufacturers of tires, rims, and related components may join TRA. *Id.* At the time of the *Beasock* litigation, forty-three domestic and eighty-three foreign manufacturers were members of this trade association. *Id.*

553. *Id.* at 977.

554. *Id.* at 975.

plaintiff alleged that the 16.5-inch rim was defectively designed because it permitted a 16-inch tire to easily mount on it.<sup>555</sup> In such cases, “the tire bead will not seat against the rim flange but instead will break with explosive force,” as it did when the plaintiff’s decedent attempted to inflate a tire.<sup>556</sup> The plaintiff also claimed that the tire and rim were defective because they did not contain adequate warnings about the risk of inflating tires on mismatched rims.<sup>557</sup> The plaintiff further contended that TRA “approved, adopted, promulgated and perpetuated” this defective design even though it knew that the design was dangerous and the accompanying warnings were inadequate.<sup>558</sup> In its complaint, the plaintiff asserted claims against TRA based on strict products liability, breach of warranty, and negligence.<sup>559</sup>

In response, TRA declared that it merely provided a service to the automobile industry by publishing tire and rim standards to facilitate interchangeability of products within the industry.<sup>560</sup> TRA pointed out that these standards were not mandatory—but only advisory—and that it did not undertake to monitor or enforce compliance with the standards.<sup>561</sup> Ruling on TRA’s motion for summary judgment, the court acknowledged that there was little authority on the liability of trade associations for injuries caused by the products of its members.<sup>562</sup> However, the court concluded that the plaintiff’s products liability and breach of warranty claims must fail because these theories could only be applied to those who directly manufactured or distributed defective products.<sup>563</sup> According to the court, the only products that the defendant placed in the stream of commerce were its publications.<sup>564</sup> Although these publications did contain tire and rim design specifications, they did not actually cause the decedent’s injuries, and therefore they could not serve as the basis for imposing liability on the defendant.<sup>565</sup>

Turning to the negligence claim, the court observed that TRA had not undertaken to develop or promulgate any safety measures for the benefit of the public, nor did it undertake to warn the public about the dangers of tire and rim mismatches.<sup>566</sup> The defendant did not create or establish design standards; rather, it merely provided a forum for its members to do so.<sup>567</sup> Nor could a duty

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555. *Id.* at 976.

556. *Id.*

557. *Id.*

558. *Id.*

559. *Id.*

560. *Id.* at 977.

561. *Id.*

562. *Id.*

563. *Id.* at 978 (citing *Cover v. Cohen*, 461 N.E.2d 864 (N.Y. 1984); *Bolm v. Triumph Corp.*, 305 N.E.2d 769 (N.Y. 1973)).

564. *Id.*

565. *Id.*

566. *Id.*

567. *Id.*

to the public be based on TRA's control over rim and tire manufacturers because it did not have the authority to exercise any control over what its members produced.<sup>568</sup> Finally, the court declared that there was no legal basis for it to impose a duty on publishers to avoid disseminating inaccurate information.<sup>569</sup> Accordingly, the court granted the defendant's motion for summary judgment.<sup>570</sup>

Another case, *Howard v. Poseidon Pools, Inc.*,<sup>571</sup> involved standards published by the National Spa Pool Institute (NSPI), a trade association for swimming pool manufacturers.<sup>572</sup> NSPI certified swimming pools and equipment, reviewed equipment, and recommended changes in design.<sup>573</sup> The plaintiff in *Howard* was injured when he dove into an above-ground pool that had a uniform depth of four feet.<sup>574</sup> He brought suit against NSPI based on "negligent misrepresentation, strict product liability, breach of warranty and negligence."<sup>575</sup> After reviewing the plaintiff's complaint, the trial court granted the defendant's motion for summary judgment.<sup>576</sup>

The court rejected the negligent misrepresentation claim because it "fail[ed] to allege that the plaintiff relied upon the information" published by NSPI.<sup>577</sup> The plaintiff also failed to plead that he was within the class that the defendant would reasonably expect to rely on any representation the defendant may have made.<sup>578</sup> Furthermore, the court refused to accept the plaintiff's contention that false representations made to the general public were sufficient to support his claim for negligent misrepresentation.<sup>579</sup>

The court also dismissed the plaintiff's products liability claim.<sup>580</sup> First, the court pointed out that trade association product certifiers were not within the type of product sellers and distributors traditionally subjected to strict products

568. *Id.* at 979 (citing *Pulka v. Edelman*, 358 N.E.2d 1019, 1022 (N.Y. 1976); *Vogel v. W. Mountain Corp.*, 470 N.Y.S.2d 475, 477 (App. Div. 1983)).

569. *Id.* (citing *Credit Alliance Corp. v. Arthur Anderson & Co.*, 483 N.E.2d 110, 115, 116 (N.Y. 1985), *amended by* 489 N.E.2d 249; *White v. Guarente*, 372 N.E.2d 315, 319 (N.Y. 1977) *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931); *Glanzer v. Shepard*, 135 N.E. 275, 276 (N.Y. 1922)).

570. *Id.* at 979–80.

571. 506 N.Y.S.2d 523 (Sup. Ct. 1986).

572. *Id.* at 524. For more on NSPI standards, see generally Robert H. Heidt, *Damned for Their Judgment: The Tort Liability of Standards Development Organizations*, 45 WAKE FOREST L. REV. 1227 (2010).

573. *Howard*, 506 N.Y.S.2d at 524.

574. *Id.*

575. *Id.*

576. *Id.* at 528.

577. *Id.* at 525.

578. *See id.* at 526.

579. *Id.* at 525–26 (citing *White v. Guarente*, 372 N.E.2d 315, 319, 320 (N.Y. 1977); *Chem. Bank v. Nat'l Union Fire Ins. Co.*, 425 N.Y.S.2d 818, 819 (App. Div. 1980)).

580. *Id.* at 526.

liability.<sup>581</sup> In addition, the court observed that trade associations did not have the ability to spread risks in the same manner as manufacturers and others in the distributive chain.<sup>582</sup> Relying on the reasoning in the *Beasock* case, the court declared that the publication of information cannot serve as the basis for liability because it did not directly cause any injuries.<sup>583</sup> The court also held that the plaintiff's breach of warranty claim was subject to the same deficiencies as his products liability claim.<sup>584</sup>

The court rejected the plaintiff's negligence claim because it concluded that NSPI owed no duty to the plaintiff.<sup>585</sup> The court apparently viewed the plaintiff's negligence claim as a claim based on NSPI's alleged responsibility to prevent pool manufacturers from producing defective products.<sup>586</sup> However, the court declared that NSPI would not have such a duty, unless it had the ability to control the actions of its members.<sup>587</sup> In the absence of such ability to control the manufacture of swimming pools by its members, the court concluded that NSPI owed no duty to protect the plaintiff from allegedly defective swimming pools manufactured by independent third parties.<sup>588</sup>

### *L. Conclusion*

Virtually all of the courts in the cases discussed above have refused to hold publishers of printed material strictly liable for personal injuries or property damage caused by inaccurate information.<sup>589</sup> For the most part, courts have also rejected negligence and negligent misrepresentation claims as well.<sup>590</sup> In cases involving claims based on strict products liability, courts have not distinguished between the various kinds of printed material; instead, they have generally concluded that information was not a product.<sup>591</sup> Some of these courts have emphasized the physical nature of products, while others have focused on their method of production.<sup>592</sup> The first group of cases emphasized the differences between the tangible and intangible aspects of a product.<sup>593</sup> While the tangible

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581. *Id.* at 526–27 (citing *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944); *Hanberry v. Hearst Corp.*, 81 Cal. Rptr. 519, 524 (Ct. App. 1969); *Beasock v. Dioguardi Enters., Inc.*, 494 N.Y.S.2d 974 (Sup. Ct. 1985)).

582. *See id.* (quoting *Escola*, 150 P.2d at 441).

583. *Id.* at 527 (citing *Beasock*, 494 N.Y.S.2d at 978; *Walter v. Bauer*, 439 N.Y.S.2d 821 (Sup. Ct. 1981)).

584. *Id.* (citing *Beasock*, 494 N.Y.S.2d at 978).

585. *Id.*

586. *Id.*

587. *Id.*

588. *Id.* at 527–28 (citing *Beasock*, 494 N.Y.S.2d at 979).

589. *See supra* Part III.A–K and accompanying discussion.

590. *See supra* Part III.A–K and accompanying discussion.

591. *See supra* Part III. Cases involving inaccurate aeronautical charts are the only exception to this. *See, e.g., Brocklesby v. United States*, 767 F. 2d 1288 (9th Cir. 1985).

592. *See supra* Part III.

593. *See supra* Part III.A–F and accompanying discussion.



objects—such as books—could be regarded as products, the information contained therein was considered to be intangible in nature and, as such, would not be treated as a product.<sup>594</sup> Other courts have recognized this distinction by declaring that, for strict liability to apply, the physical properties of a product must cause the harm.<sup>595</sup> Thus, in *Walter v. Bauer*, the court refused to hold the publisher of a science book liable when a child was injured while performing a science experiment described in the book, concluding that the ruler and rubber bands used in the experiment caused the plaintiff's injury, not the instructions provided in the defendant's book.<sup>596</sup>

A second group of cases justify the imposition of strict liability on the basis that the defendant's products were mass-produced,<sup>597</sup> while another group has limited strict liability to those who are directly involved in the manufacture or distribution of the product in question.<sup>598</sup> In *Hanberry v. Hearst Corp.*,<sup>599</sup> the court refused to subject a magazine publisher to strict liability because it had not manufactured or distributed the allegedly defective shoes that caused the plaintiff's injury; rather, the publisher merely endorsed the shoe manufacturer in its magazine.<sup>600</sup> Similarly, in *Beasock v. Dioguardi Enterprises, Inc.*, the court refused to apply strict liability principles to a trade association because it did not manufacture or distribute the defective tires or rims in question.<sup>601</sup>

594. See, e.g., *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991) ("The 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."); *Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315, 324–325 (S.D.N.Y. 2006) ("Because the intangible expressions contained in the Book are not products, [the] products liability claim, to the extent it is based on the Book, also fails."); see also Joseph L. Reutiman, Note, *Defective Information: Should Information be a "Product" Subject to Products Liability Claims?*, 22 CORNELL J.L. PUB. POL'Y 181, 188 (2012) (citing RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19 cmt. d (1998)).

595. See, e.g., *Beasock v. Dioguardi Enters., Inc.*, 494 N.Y.S.2d 974, 978 (Sup. Ct. 1985) ("[T]he publications themselves did not produce the injuries and thus cannot serve as the basis for the imposition of liability under . . . strict products liability."); *Walter v. Bauer*, 439 N.Y.S.2d 821, 822 (Sup. Ct. 1981) (holding that liability did not attach where the plaintiff was not injured by the use of the book for the purpose for which it is intended—to be read).

596. *Walter*, 439 N.Y.S.2d at 822.

597. See, e.g., *Brocklesby v. United States*, 767 F.2d 1288, 1295 (9th Cir. 1985) ("[T]he mass production and marketing of these charts requires [the Defendant] to bear the costs of accidents that are proximately caused by defects in the charts." (quoting *Saloomey v. Jeppesen & Co.*, 707 F.2d 671, 677 (2d Cir. 1983))).

598. See, e.g., *Hanberry v. Hearst Corp.*, 81 Cal. Rptr. 519, 524 (Ct. App. 1969) ("We believe this kind of liability for individually defective items should be limited to those directly involved in the manufacturing and supplying process . . ."); *Beasock*, 494 N.Y.S.2d at 978 ("Since [the defendant] did not manufacture or market [the product] alleged to have caused the injury in this case, liability cannot be imposed upon it under the theor[y] of strict products liability . . .").

599. 81 Cal. Rptr. 519.

600. *Id.* at 524.

601. *Beasock*, 494 N.Y.S.2d at 978 (citing *Cover v. Cohen*, 461 N.E.2d 864 (N.Y. 1984); *Bolm v. Triumph Corp.*, 305 N.E.2d 769 (N.Y. 1973)).

Other courts characterize something as a product only when it would promote the policies that underlie strict products liability.<sup>602</sup> In *Fluor Corp. v. Jeppesen & Co.*, a California appellate court held that navigational charts were products, and consequently subject to strict liability, reasoning that strict liability's risk-spreading rationale supported the imposition of liability on the chart maker.<sup>603</sup> In contrast, an Illinois court ruled that the distribution of a medical history form was not the sale of a product, but a service, because it believed that the imposition of strict liability on those who produced these forms would not reduce accident costs or promote risk-spreading.<sup>604</sup> Applying a similar analysis, a federal appellate court declared that the informational content of a textbook on mushrooms was not a product.<sup>605</sup>

Because most courts have concluded that information is not a product, they largely avoided any serious consideration of whether distributors of such information are protected from strict liability under the First Amendment.<sup>606</sup> However, a few courts have observed that imposing tort liability on publishers might be inconsistent with First Amendment guarantees of free speech and expression.<sup>607</sup> For example, one federal district court declared that imposing liability on publishers for alleged inaccuracies in their medical textbook "[w]ould chill expression and publication" in a way that was "inconsistent with fundamental free speech."<sup>608</sup> Yet the court did not provide any basis for this

602. See, e.g., *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1035 (9th Cir. 1991) (noting that the policy principles of strict liability include a "determination of how society wishes to assess certain costs" and "the unfettered exchange of ideas"); *Fluor Corp. v. Jeppesen & Co.*, 216 Cal. Rptr. 68, 71 (Ct. App. 1985) ("[T]he policy reasons underlying the strict products liability concept should be considered in determining whether something is a product . . ." (quoting *Lowrie v. City of Evanston*, N.E.2d 923, 928 (Ill. Ct. App.)); *Appleby v. Miller*, 554 N.E.2d 773, 775–76 (Ill. App. Ct. 1990) (citing *Suvada v. White Motor Co.*, 210 N.E.2d 182 (Ill. 1965)) (noting that the policy justifications include public interest, manufacturer's solicitations to use the product, representations about the product, and justice of imposing costs).

603. *Fluor Corp.*, 216 Cal. Rptr. at 71 (citing *Campbell v. Gen. Motors Corp.*, 669 P.2d 224, 230 (Cal. 1982)).

604. See *Appleby*, 554 N.E.2d at 775–76 (citing *Suvada*, 210 N.E.2d at 186).

605. See *Winter*, 938 F.2d at 1036.

606. See, e.g., *Lewin v. McCreight*, 655 F. Supp. 282, 284 & n.2 (E.D. Mich. 1987) (declining to reach the First Amendment issue but referring to another case's discussion of the issue).

607. See, e.g., *Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315, 327 (S.D.N.Y. 2006) (concluding that imposing liability on book publisher for negligent misrepresentation would violate the First Amendment); *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1217 (D. Md. 1988) (noting that to extend liability to publishers of books would "chill expression and publication which is inconsistent with fundamental free speech principles"); *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990, 993 (E.D.N.Y. 1977) ("Merck's right to publish free of fear of liability is guaranteed by the First Amendment . . ."); *Smith v. Linn*, 563 A.2d 123, 126 (Pa. Super. Ct. 1989), *aff'd*, 587 A.2d 309 (Pa. 1991) (affirming trial court's finding that the publication of the diet book was protected by the First Amendment). See also *Brocklesby v. United States*, 767 F.2d 1288, 1295 n.9 (9th Cir. 1985) (citing *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 655 (9th Cir. 1984)) (refusing to consider defendant's First Amendment argument on appeal because it was not raised at trial).

608. *Jones*, 694 F. Supp. at 1217–18.

conclusion.<sup>609</sup> A Pennsylvania appellate court also considered the effect of the First Amendment on publisher liability in a case involving a diet book.<sup>610</sup> In that case, the plaintiff objected to the trial court's conclusion that the publisher was protected from tort liability by the First Amendment.<sup>611</sup> The appellate court agreed that none of the established exceptions to First Amendment protection were applicable and upheld the lower court's decision.<sup>612</sup>

Other courts have expressed a more generalized concern regarding the potential chilling effect that imposing strict liability on publishers would have on the dissemination of ideas and information.<sup>613</sup> For example, the federal appellate court in *Winter* cautioned that while strict liability's risk-spreading rationale might be appropriate when applied to defective tangible products, it is less persuasive when applied to words and ideas.<sup>614</sup> According to the court, "[t]he threat of liability without fault (financial responsibility for our words and ideas . . .) could seriously inhibit those who wish to share thoughts and theories."<sup>615</sup> The federal district court in *Lewin v. McCreight* echoed similar sentiments, declaring that in light of the "weighty societal interest in free access to ideas," it would be unwise to impose liability for "defective ideas" on publishers of how-to books.<sup>616</sup>

Finally, some courts have suggested that liability may be imposed on publishers whose products are mass-produced.<sup>617</sup> This rationale has been used to distinguish mass-produced navigational charts from custom-made or one-of-a-kind plans—like architectural or engineering plans—that were developed for a specific application.<sup>618</sup> While the production of custom-made plans could be treated as a service, some courts have held that it is reasonable to treat mass-produced materials as products.<sup>619</sup> Though courts are willing to apply this analysis to navigation charts, they have declined to extend it to textbooks, cookbooks, travel books, how-to books, and diet books—all of which are

609. *See id.*

610. *Smith*, 563 A.2d at 125–26 (citations omitted).

611. *Id.* at 125.

612. *Id.* at 126.

613. *See, e.g., Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1035 (9th Cir. 1991) ("Strict liability principles even when applied to products are not without their costs. Innovation may be inhibited."); *Birmingham v. Fodor's Travel Publ'ns, Inc.*, 833 P.2d 70, 75–76 (Haw. 1992) (discussing the "chilling effect which liability would have upon publishers"); *Jones*, 694 F. Supp. at 1217 (asserting that applying strict liability to publishers of books could "chill expression and publication which is inconsistent with fundamental free speech principles"); *Walter v. Bauer*, 439 N.Y.S.2d 821, 822–23 (Sup. Ct. 1981) (stating that the plaintiff's theory of strict liability could have a chilling effect on the First Amendment).

614. *Winter*, 938 F.2d at 1035.

615. *Id.*

616. *Lewin v. McCreight*, 655 F. Supp. 282, 284 (E.D. Mich. 1987).

617. *See, e.g., Brocklesby v. United States*, 767 F.2d 1288, 1295 (9th Cir. 1985) (discussing that mass-production constituted a consideration in finding a product defective (quoting *Saloomey v. Jeppsen & Co.*, 707 F.2d 671, 676–77 (2d Cir. 1983))).

618. *See id.* at 1295 (quoting *Saloomey*, 707 F.2d at 676–77).

619. *See id.* (quoting *Saloomey*, 707 F.2d at 676–77).

produced in greater numbers.<sup>620</sup> This refusal suggests that the mass-production analysis does not provide a sound basis for determining which kinds of written materials should be considered *products* for the purposes of applying strict liability.

#### IV. INFORMATION DISSEMINATED IN ELECTRONIC FORM

This portion of the article considers which liability principles should apply when information that causes injury is embodied in a purely electronic form, including information transmitted to consumers by the Internet, by computer software embedded in a product that causes it to malfunction, by stand-alone software that is embodied in a tangible medium (such as a CD), or by software that is purchased and downloaded from the vendor's website. Unfortunately, much of what follows is necessarily speculative because very few cases are directly on point.

##### *A. Information on Internet Websites*

A tremendous amount of information is available on Internet websites. Sources of information include (1) information provided by manufacturers and retail sellers about their products on official company websites, (2) information provided on websites owned by third-party sellers who are not directly in the chain of distribution, (3) information provided to subscribers for a fee, and (4) information provided gratuitously to the public by commercial and noncommercial entities. Under existing law, the liability of a website owner who publishes inaccurate information over the Internet may depend on which of the above categories best defines the particular website.<sup>621</sup>

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620. *See, e.g.*, *Cardozo v. True*, 342 So. 2d 1053, 1056 (Fla. Dist. Ct. App 1977) (refusing to extend UCC's warranty provisions to the content of cookbooks); *Birmingham v. Fodor's Travel Publ'ns, Inc.*, 833 P.2d 70, 78 (Haw. 1992) (quoting *Saloomey*, 707 F.2d at 677) (refusing to allow plaintiff to recover from publisher of travel guide for injuries under strict products liability and refusing to hold that a book is a product); *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263, 1267 (Ill. App. Ct. 1985) (refusing to hold that a "how-to" book was a product because "[t]he scope of liability would extend to an undeterminable number of potential readers"); *Walter v. Bauer*, 439 N.Y.2d 821, 822 (Sup. Ct. 1981) (refusing to declare that a textbook is a product and refusing to impose liability on textbook publishers); *Smith v. Linn*, 563 A.2d 123, 126 (Pa. Super. Ct. 1989), *aff'd*, 587 A.2d 309 (Pa. 1991) (citing RESTATEMENT (SECOND) OF TORTS § 402A (1965)) (refusing to impose liability on diet book publisher for protein diet because the book was not a product).

621. Social network services, like Facebook and Twitter, constitute another category and present potential liability issues, such as defamation and intentional infliction of emotional distress. *See, e.g.*, *Farquharson v. Metz*, No. 13-10200-GAO, 2013 WL 3968018, at \*1 (D. Mass. July 30, 2013) (indicating that plaintiff alleged defendant used Facebook to intentionally inflict emotional distress); *Brocato v. City of Baker City*, No. 2:10CV592-SU, 2012 WL 1085493, at \*3 (D. Or. Jan. 4, 2012) (involving a plaintiff that alleged that city councilors made defamatory comments about plaintiff's termination on Facebook). However, these sites do not serve as platforms for commercial activities. *See generally* What Is a Facebook Page?, *Help Center*, FACEBOOK, <http://www.facebook.com/help/174987089221178> (last visited Oct. 14, 2013) (discussing how

Websites maintained by manufacturers of automobiles, farm machinery, or home appliances, along with those maintained by retail stores, often contain information, such as instructions for assembly, operation, and maintenance; performance characteristics; safety history; warnings; and warranty information.<sup>622</sup> Internet pharmacies, as well as sellers of dietary supplements and health foods, also provide a great deal of information about the health benefits of the products they sell.<sup>623</sup>

If such information on the Internet is intended to induce customers to purchase a product, it may resemble an express warranty, or a product description, on which potential purchasers can be expected to rely.<sup>624</sup> If the website purports to provide information about product safety, it can be categorized as a warning or an instruction.<sup>625</sup> It should not matter that the information is conveyed in electronic—rather than printed—form, as long as the information is connected to the potential sale of a new product. Therefore, the reasoning of the cases discussed in Part II suggests that product sellers will be subject to strict liability whenever this information is inaccurate and causes

businesses can use Facebook to grow their clientele); How Twitter Ads Can Help Your Business, *Help Center*, TWITTER, <https://support.twitter.com/articles/20170393-how-twitter-ads-can-help-your-business> (last visited Oct. 14, 2014) (discussing the various ways in which businesses can promote themselves on Twitter via advertisements and accounts).

622. See, e.g., *Sitemap*, FORD, <http://www.ford.com/help/sitemap/> (last visited Oct. 14, 2013) (providing an example of the information available on an automobile company's website); *Sitemap*, GEN. ELECTRIC, <http://www.ge.com/sitemap> (providing an example of information available on a home appliance company's website); *Sitemap*, GEN. MOTORS, <http://www.gm.com/toolbar/sitemap.html> (last visited Oct. 14, 2013) (providing an example of the information available on an automobile company's website); *Sitemap*, JOHN DEERE [http://www.deere.com/wps/dcom/en\\_US/SiteMap.page?](http://www.deere.com/wps/dcom/en_US/SiteMap.page?) (last visited Oct. 14, 2013) (providing an example of the information available on a farm machinery company's website); *Sitemap*, SEARS BRANDS, LLC, [http://www.sears.com/shc/s/smv\\_10153\\_12605](http://www.sears.com/shc/s/smv_10153_12605) (last visited Oct. 14, 2013) (providing an example of a retail store's company's website); TARGET BRANDS, INC., <http://www.target.com> (last visited Oct. 14, 2013) (providing an example of a retail store's website).

623. See generally GNC, <http://www.gnc.com> (last visited Oct. 14, 2013) (providing information about health benefits and products that the company sells); HERBSPRO, <http://www.herbspro.com> (last visited Oct. 14, 2013) (providing information about health benefits and products that the company sells); IHERB, <http://www.iherb.com> (last visited Oct. 14, 2013) (providing information about health benefits and products that the company sells); PURITAN'S PRIDE, <http://www.puritan.com> (last visited Oct. 14, 2013) (providing information about health benefits and products that the company sells); VITACOST, <http://www.vitacost.com> (last visited Oct. 14, 2013) (providing information about health benefits and products that the company sells).

624. See, e.g., *Farrey's, Inc. v. Supplee-Biddle Hardware Co.*, 103 F. Supp. 480, 490 (1952) (“[A]ny affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods.”).

625. See, e.g., *Helene Curtis Indus., Inc. v. Pruitt*, 385 F.2d 841, 860 (5th Cir. 1967) (citing *Hardy Cross Dillard & Harris Hart, II, Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145, 147 (1955)) (“Directions tell how to use the product efficiently while warnings tell the dangers involved.”).

physical harm to product users and consumers, regardless of whether it is distributed in written or electronic form.<sup>626</sup>

A second category of Internet sites is maintained to facilitate the sale of products by sellers who are not directly in the original chain of distribution. Craigslist and eBay are examples of this type of operation.<sup>627</sup> If a purchaser is harmed because inaccurate information was provided by the seller—as opposed to the operator of the website—the seller could be held liable for breach of warranty, or even under a strict liability standard.<sup>628</sup> However, because website owners are not sellers—like auctioneers or brokers—they probably would escape liability for product-related injuries, unless they had actual knowledge that the information provided by the seller was inaccurate.

A third category involves website information that is not readily available to the general public, but provided to subscribers for a fee. LexisNexis and Westlaw are examples of this type of enterprise. Since most information in this category is economic or commercial in nature, it is unlikely to cause physical injuries; therefore, the economic loss rule will prevent recovery under tort law for any economic damages.<sup>629</sup> In these cases, victims will have to rely on warranty law for any recourse against website owners.<sup>630</sup> Even if inaccurate information causes physical injury to a subscriber, the owner of the offending website could still escape strict liability by arguing that providing information—even on a compensated basis—is not the sale of a “product,” but rather, the furnishing of a service.<sup>631</sup> Indeed, the cases discussed above involving the sale of information in printed form lend some support to this view.<sup>632</sup> Thus, a

626. See *supra* Part III.A–K and accompanying discussion.

627. CRAIGSLIST, <http://www.craigslist.org> (facilitating classified advertisements such as jobs, housing, personal services, and goods from third parties); EBAY, INC., <http://www.ebay.com> (last visited Oct. 14, 2013) (facilitating the sale of goods by third parties in an auction format).

628. There are several reasons why it is unlikely that a seller would be subject to strict liability in these circumstances. First, many of them are casual sellers who would not qualify as “[o]ne engaged in the business of selling.” See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998). Secondly, most of the products sold in these venues are used, not new. Although the Products Liability Restatement imposes strict liability on the sellers of used products in some cases, these are exceptions to the general rule. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 8 (1998).

629. See Michael R. Maule, Comment, *Applying Strict Products Liability to Computer Software*, 27 TULSA L.J. 735, 745 (1992) (citing KEETON ET AL., *supra* note 279, § 101, at 708).

630. See Francis E. Zollers et al., *No More Soft Landings for Software: Liability for Defects in an Industry That Has Come of Age*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 745, 757 (2005).

631. See Seldon J. Childers, Comment, *Don’t Stop the Music: No Strict Products Liability for Embedded Software*, 19 U. FLA. J.L. & PUB. POL’Y 125, 140 (2008).

632. See, e.g., *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1035 (9th Cir. 1991) (holding that plaintiffs who became ill after relying on information from a book could not recover against book’s publisher under a products liability theory).

website owner may be subject to liability under negligence principles, but not on a strict products liability basis.<sup>633</sup>

Finally, thousands of websites on the Internet are operated by non-sellers who provide information gratuitously to the general public. For example, a number of websites provide medical advice or health information.<sup>634</sup> Some of these sites are maintained by commercial organizations, while others are operated by trade associations, such as the American Medical Association,<sup>635</sup> or nonprofit entities like the American Cancer Society<sup>636</sup> and the Mayo Clinic.<sup>637</sup> Another group of specialized websites, such as Epicurious and the Food Network, publish recipes and other information about food preparation and fine dining.<sup>638</sup> Some websites, such as How Stuff Works, provide guidance on how to perform various tasks or projects.<sup>639</sup> Other examples include sites that are devoted to performing high school chemistry experiments,<sup>640</sup> making electrical repairs,<sup>641</sup> and engaging in other potentially dangerous activities.<sup>642</sup> Another group of websites provide weather<sup>643</sup> and travel<sup>644</sup> information. Finally,

633. See, e.g., Childers, *supra* note 631, at 140 & n.63 (explaining that established law requires the plaintiff to prove fault under ordinary negligence if software is considered a service instead of a product).

634. See, e.g., FAMILYDOCTOR.ORG, <http://www.familydoctor.org> (last visited Oct. 14, 2013) (providing medical information regarding diseases, conditions, prevention, and family wellness); *Health and Living Center*, MEDICINET.COM, [http://www.medicinenet.com/health\\_and\\_living/focus.htm](http://www.medicinenet.com/health_and_living/focus.htm) (last visited Oct. 14, 2013) (providing medical disease information, symptom checking and healthy-living advice); *Health and Wellness*, CARE2, <http://www.care2.com/greenliving/health-wellness> (last visited Oct. 14, 2013) (providing information regarding healthy living); *What We Do For Our Users*, WEBMD, <http://www.webmd.com/about-webmd-policies/about-what-we-do-for-our-users> (last visited Oct. 14, 2013) (providing free medical information and symptom checking to the public).

635. See *AMA Resources*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/physician-resources.page?> (last visited Oct. 15, 2013).

636. See AM. CANCER SOC'Y, <http://www.cancer.org> (last visited Oct. 15, 2013).

637. See *Health Information*, MAYO CLINIC, <http://www.mayoclinic.com/health-information> (last visited Oct. 15, 2013).

638. See EPICURIUS, <http://www.epicurious.com> (last visited Oct. 15, 2013); FOOD NETWORK, <http://www.foodnetwork.com> (last visited Oct. 15, 2013).

639. See HOWSTUFFWORKS, <http://www.howstuffworks.com> (last visited Oct. 15, 2013) (providing insight into the way items function).

640. See *Worked Chemistry Problems*, ABOUT.COM CHEMISTRY, <http://www.chemistry.about.com/od/workedchemistryproblems/a/workedproblems.htm> (last visited Oct. 15, 2013) (providing ideas and instructions on how to perform chemistry experiments).

641. See, e.g., ELECTRONIC REPAIR GUIDE, <http://www.electronicrepairguide.com> (last visited Oct. 15, 2013) (providing ideas and tips on electronic repairs for all skill levels).

642. See, e.g., *How-To Guides and Videos*, AUTOMD, <http://www.automd.com/how-to/> (last visited Oct. 15, 2013) (providing information regarding automobile repairs); *Hunting*, N.Y. ST. DEPARTMENT ENVTL. CONSERVATION, <http://www.dec.ny.gov/outdoor/hunting.html> (last visited Oct. 15, 2013) (providing information regarding hunting); *THIS OLD HOUSE*, <http://www.thisoldhouse.com/toh> (providing information regarding household repairs).

643. See, e.g., INTELICAST, <http://www.intellicast.com> (last visited Oct. 15, 2013) (providing national, state, and local weather information); WEATHER CHANNEL, <http://www.weather.com> (last visited Oct. 15, 2013) (providing weather information and weather-related news stories).

numerous sites, such as Wikipedia, provide general or specialized information about thousands of topics.<sup>645</sup>

Much of the information dispensed by these websites is similar to information published in written form. For example, *Jones v. J.B. Lippincott Co.*, *Young v. Mallett*, and *Smith v. Linn* involved faulty health advice,<sup>646</sup> while *Cardozo v. True* concerned an unsafe recipe.<sup>647</sup> *Walter v. Bauer*, *Lewin v. McCreight*, and *Alm v. Van Nostrand Reinhold Co., Inc.* all involved how-to instructions causing injuries,<sup>648</sup> while *Birmingham v. Fodor's Travel Publications, Inc.* dealt with inaccurate travel information.<sup>649</sup> Finally, *Winter v. G.P. Putnam's Sons* and *Demuth Development Corp. v. Merck & Co.* involved more generalized information.<sup>650</sup> What these cases all have in common is that the courts uniformly refused to hold the publishers strictly liable for disseminating allegedly inaccurate information.<sup>651</sup> Therefore, courts would likely be equally reluctant to impose strict liability on those who provide such information over the Internet. Even negligence claims may be difficult to maintain in these cases.

### B. Computer Software

Computer software is used to help fly airplanes, monitor hospital patients, operate nuclear power plants, and—at least to some extent—to control the operation of motor vehicles, household appliances, and other machinery.<sup>652</sup> Obviously, the potential for personal injury is great if defective computer programming causes these products to malfunction.<sup>653</sup> For example, reports say

644. See, e.g., *Maps & Directions*, MAPQUEST, <http://www.mapquest.com> (last visited Oct. 15, 2013) (providing travel information, maps, and directions for locations world-wide).

645. See, e.g., WIKIPEDIA, [http://en.wikipedia.org/wiki/Main\\_Page](http://en.wikipedia.org/wiki/Main_Page) (last visited Oct. 15, 2013) (providing user-generated information on an untold number of topics).

646. See *Jones v. Lippincott Co.*, 694 F. Supp. 1216 (D. Md. 1988); *Young v. Mallett*, 371 N.Y.S.2d 1, 2 (App. Div. 1975); *Smith v. Linn*, 563 A.2d 123, 124 (Pa. Super. Ct. 1989), *aff'd*, 587 A.2d 309 (Pa. 1991).

647. See *Cardozo v. True*, 342 So. 2d 1053, 1054 (Fla. Dist. Ct. App. 1977).

648. See *Lewin v. McCreight*, 655 F. Supp. 282, 282–83 (E.D. Mich. 1987); *Alm v. Van Nostrand Reinhold Co.*, 480 N.E. 2d 1263, 1264 (Ill. App. Ct. 1985); *Walter v. Bauer*, 439 N.Y.S.2d 821, 822 (Sup. Ct. 1981).

649. See *Birmingham v. Fodor's Travel Publ'ns, Inc.*, 833 P.2d 70, 73 (Haw. 1992).

650. *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991); *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990 (E.D.N.Y. 1977).

651. See *Winter*, 938 F.2d at 1037–38; *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1218 (D. Md. 1988); *Lewin*, 655 F. Supp. at 284; *Demuth Dev. Corp.*, 432 F. Supp. at 995; *Cardozo*, 342 So. 2d at 1057; *Birmingham*, 833 P.2d at 79; *Alm*, 480 N.E.2d at 1267; *Young v. Mallett*, 371 N.Y.S.2d 1, 3 (App. Div. 1975); *Walter*, 439 N.Y.S.2d at 822–23; *Smith v. Linn*, 563 A.2d 123 (Pa. Super. Ct. 1989), *aff'd*, 587 A.2d 309 (Pa. 1991).

652. See Jonathan K. Gable, Note, *An Overview of the Legal Liabilities Facing Manufacturers of Medical Information Systems*, 5 QUINNIAC HEALTH L.J. 127, 127 (2001).

653. See Maule, *supra* note 629, at 735–36 (discussing the consequences of computer malfunctions in the context of air traffic control operation, radiation therapy, and subway systems).



that a software glitch in a Therac 25 accelerator, which was used to monitor radiation therapy, caused cancer patients to receive excessive doses of radiation.<sup>654</sup> In another case, a Royal Air Force fighter jet was shot down by a patriot missile because the aircraft's software caused the fighter jet to be identified as an enemy rocket by the Patriot battery.<sup>655</sup> In addition, several accidents have been caused by inaccurate GPS information or directions.<sup>656</sup> Finally, it was reported that a software failure endangered an American astronaut during a spacewalk in 2011.<sup>657</sup>

Thus, the issue becomes whether, and on what basis, software manufacturers should be held strictly liable for consumer injuries caused by their software issuing improper commands to computers. As far as strict products liability is concerned, liability may depend on whether software is a product and whether improperly programmed software is defective.<sup>658</sup>

### 1. *Embedded Software*

There seems to be little doubt that a product malfunctioning because of defective software would be treated as a defective product, and the manufacturer of that product would be subject to strict liability for any injuries suffered by users, consumers, or foreseeable bystanders.<sup>659</sup> However, it is unclear whether

654. See Patrick T. Miyaki, Comment, *Computer Software Defects: Should Computer Software Manufacturers be Held Strictly Liable for Computer Software Defects?*, 8 SANTA CLARA COMPUTER & HIGH TECH. L.J. 121, 122 (1992) (citing Cheryl S. Massingale & A. Faye Borthick, *Risk Allocation for Injury Due to Defective Medical Software*, 11 J. PROD. LIAB. 181, 181–84 (1988)).

655. See Zollers et al., *supra* note 630, at 754–55 (citing 'System Error' Link to RAF Deaths, BBC NEWS, May 14, 2004, [http://news.bbc.co.uk/2/hi/uk\\_news/3714251.stm](http://news.bbc.co.uk/2/hi/uk_news/3714251.stm) (last visited Oct. 15, 2013); *Tornado GR4/GR4A*, ROYAL AIRFORCE, <http://www.raf.mod.uk/equipment/tornado.cfm> (last visited Oct. 15, 2013)).

656. See John E. Woodard, Comment, *Oops, My GPS Made Me Do It!: GPS Manufacturer Liability Under a Strict Products Liability Paradigm When GPS Fails to Give Accurate Directions to GPS End-Users* 34 U. DAYTON L. REV. 429, 442–443 (2009) (citing Yuval Azoulay, *American Tourist Stoned by Mob After Accidentally Entering Qalandiya* HAARETZ June 25, 2008, <http://www.haaretz.com/news/american-tourist-stoned-by-mob-after-accidentally-entering-qalandiyah-1.248473>; Jennifer Langston, *GPS Routed Bus Under Bridge, Company Says*, SEATTLEPI, Apr. 17, 2008, <http://www.seattlepi.com/local/article/GPS-routed-bus-under-bridge-company-says-1270598.php>; Mark Havnes, *Trusting GPS, Convoy of Visitors Get Monumentally Lost*, SALT LAKE LAKE TRIB., Aug. 5, 2008, <http://archive.slttrib.com/article.php?id=10098426&itype=NGPSID&keyword=&qtype=>; Yaron Steinbuch & Hoa Nguyen, *Driver Blames GPS for Crash with Metro-North Train in Bedford Hills*, BROTHERHOOD LOCOMOTIVE ENGINEERS & TRAINMEN (Sept. 30, 2008), <http://www.blet.org/pr/news/headline.asp?id=23809>).

657. See Taiwo A. Oriola, *Bugs for Sale: Legal and Ethical Proprieties of the Market in Software Vulnerabilities*, 28 J. MARSHALL J. COMPUTER & INFO. L. 451, 453 n.16 (2011).

658. See Childers, *supra* note 631, at 155.

659. See *id.*

providers of embedded software would be treated as component manufacturers, or merely providers of a service—like architects or engineers.<sup>660</sup>

In *General Motors Corp. v. Johnston*,<sup>661</sup> a seven-year-old child was killed in an accident while riding in a truck with his grandfather, who was injured in the accident.<sup>662</sup> The accident occurred when the grandfather's new pickup truck stalled at an intersection and was struck by a tractor-trailer truck.<sup>663</sup> The grandfather and the personal representative of the grandson sued GM, alleging that the pickup truck was defective because a defective programmable read-only memory (PROM) chip in the TBI/ECM system<sup>664</sup> cut off fuel to the truck's engine, thereby causing the vehicle to stall.<sup>665</sup> General Motors disputed this allegation, claiming that the engine had not stalled, but rather, was running when the collision occurred.<sup>666</sup> Nevertheless, the jury awarded the plaintiffs \$75,000 in compensatory damages and \$15 million in punitive damages, resulting in an appeal to the Alabama Supreme Court.<sup>667</sup> After rejecting the defendant's claim that much of the plaintiff's evidence should not have been admitted at trial,<sup>668</sup> the court upheld the compensatory award, but reduced the punitive damage award to \$7.5 million.<sup>669</sup>

Although the court did not emphasize the point, it clearly agreed that the truck was defective within the meaning of the Alabama Extended Manufacturer's Liability Doctrine.<sup>670</sup> That is, the commands programmed into the truck's PROM chip caused the truck's engine to malfunction, a condition that rendered the truck defective.<sup>671</sup> The jury awarded punitive damages because it concluded that GM was aware of the problem and failed to alert its customers.<sup>672</sup>

*Sparacino v. Andover Controls Corp.*<sup>673</sup> involved negligence and products liability claims against emergency management system (EMS) manufacturer Andover, as well as Communications Management Corporation (CMC)—which installed the EMS in the high school where the plaintiff worked as a chemistry teacher.<sup>674</sup> The plaintiff arrived at the school around 6:00 A.M. to prepare for a

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660. *See id.*

661. 592 So. 2d 1054 (Ala. 1992).

662. *Id.* at 1055.

663. *Id.*

664. "TBI" stands for throttle body injection and "ECM" stands for electronic control module. *Id.* at 1056. Together, this system controls several engine functions, including the operation of the fuel delivery system. *Id.*

665. *Id.*

666. *Id.*

667. *Id.* at 1057.

668. *Id.* at 1057–59.

669. *Id.* at 1064.

670. *See id.* at 1056, 1061.

671. *See id.* at 1061.

672. *Id.*

673. 592 N.E.2d 431 (Ill. App. Ct. 1992).

674. *Id.* at 432.

chemistry experiment that would enable his students to produce chlorine gas.<sup>675</sup> The plaintiff intended to activate a large exhaust fan in the chemistry laboratory that was located directly above the chemical solution he had prepared for the experiment.<sup>676</sup> However, the fan did not turn on, and the plaintiff became severely injured after inhaling the deadly chlorine gas fumes.<sup>677</sup> The fan failed to operate because the EMS had programmed it to remain inactive until 6:30 A.M.<sup>678</sup> Neither Andover nor CMC posted a warning that informed teachers the fan would not be activated until 6:30 A.M., nor did they install an override switch to activate the fan in an emergency.<sup>679</sup>

The plaintiff brought design defect and failure-to-warn claims against Andover and CMC.<sup>680</sup> When the trial court granted summary judgment in favor of Andover, both the plaintiff and CMC—who had filed counterclaims against Andover for contribution—appealed.<sup>681</sup> In pretrial proceedings, Andover’s marketing director, Robert Klein, testified that the company did not install or program the EMS.<sup>682</sup> In fact, the EMS was “user programmable,” which enabled the user to program the system with the options and functions needed to meet the user’s specifications.<sup>683</sup> Andover shipped the EMS to CMC—without any embedded program—and CMC installed an application program in accordance with the specifications provided by the high school.<sup>684</sup> Additionally, because Andover did not supply the exhaust fan switch, it could not have provided a mechanical override mechanism to the fan.<sup>685</sup>

In light of this evidence, the court concluded that Andover should be treated as a component manufacturer.<sup>686</sup> In the court’s view, “the manufacturer of a component part has no control over that part once it is sold and has no control over the final assembly of the machine.”<sup>687</sup> Instead, the court determined that CMC programmed the EMS system that disabled the chemistry laboratory fan, causing the fan not to operate as intended.<sup>688</sup> In other words, the fan did not malfunction because of an inherent design flaw; rather, it shut down because CMC had programmed it to do so.<sup>689</sup> Furthermore, CMC—not Andover—had the ability to install an override device when it integrated the EMS with the

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675. *Id.*

676. *Id.* at 433.

677. *Id.*

678. *Id.*

679. *Id.*

680. *See id.*

681. *Id.* at 433–34.

682. *Id.* at 434.

683. *Id.*

684. *Id.* at 435.

685. *Id.*

686. *See id.*

687. *Id.* (quoting *Curry v. Louis Allis Co.*, 427 N.E.2d 254, 258 (Ill. App. Ct. 1981)).

688. *Id.*

689. *See id.*

school's HVAC system.<sup>690</sup> Finally, the court found that Andover could not have foreseen that a chemistry experiment would be conducted when no one was scheduled to be in the school; therefore, it had no duty to provide a warning that the fan would be inoperable during certain periods of time.<sup>691</sup> Accordingly, the court affirmed the granting of summary judgment for Andover on both the strict liability and the failure-to-warn claim.<sup>692</sup>

The court in *Sparacino* did not consider whether CMC's program was defective in any way.<sup>693</sup> In fact, Mr. Klein acknowledged that many schools and universities program exhaust fans and other devices on an occupancy schedule because students and teachers often fail to turn them off.<sup>694</sup> Therefore, if CMC were held liable, it probably would be on the basis of failure-to-warn or failure to install a manual override switch on the exhaust fan, not for a defect in the EMS programming.<sup>695</sup>

*Turner v. Isecuretrac Corp.*,<sup>696</sup> an unreported decision by an Ohio intermediate appellate court, involved a monitoring device that failed to function properly.<sup>697</sup> Viva Turner, the plaintiff in that case, was a victim of domestic violence.<sup>698</sup> A local court issued a civil protective order against the plaintiff's husband, David Turner, and ordered him to wear a GPS monitoring device manufactured by the defendant, iSecuretrac Corporation.<sup>699</sup> As a condition of his probation, the court also ordered Turner to leave the county and temporarily reside at his house near Lake Erie.<sup>700</sup> When placed on Turner's ankle, the device in question would transmit information about his location to law enforcement authorities.<sup>701</sup> However, the device did not transmit this information in real time, but only after it had been downloaded.<sup>702</sup> Unfortunately, the device that was supposed to be placed on Turner's ankle could not be activated, and before iSecuretrac could send Turner's probation officer a replacement, Turner broke into the plaintiff's house and assaulted her, causing serious injuries.<sup>703</sup>

The plaintiff brought suit against iSecuretrac, alleging that the GPS monitoring device was defectively manufactured.<sup>704</sup> The plaintiff also claimed that iSecuretrac negligently failed to promptly provide a new GPS monitor when

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690. *Id.*

691. *Id.* at 435–436.

692. *Id.*

693. *See id.* at 435.

694. *Id.* at 436.

695. *See id.* at 435–36.

696. No. 03CA70, 2004 WL 944386 (Ohio Ct. App. Apr. 28, 2004).

697. *Id.* at \*1.

698. *Id.*

699. *Id.*

700. *Id.*

701. *Id.*

702. *Id.*

703. *Id.*

704. *Id.* at \*5.

it learned that the original device was not operating properly.<sup>705</sup> However, the trial court ruled that there was no evidence the original device was defective when it left the manufacturer's possession.<sup>706</sup> Moreover, because the device was not defective, the defendant was not negligent in providing a replacement more promptly.<sup>707</sup> Accordingly, the court granted the defendant's motion for summary judgment.<sup>708</sup>

Affirming the lower court's ruling, the Ohio appeals court concluded that the GPS monitoring device could have been "previously damaged by another felon, broken during shipping or damaged while stored at the Fairfield County Probation Department."<sup>709</sup> Therefore, in the absence of evidence to the contrary, the court declared that it was mere speculation to conclude that the GPS monitoring device was defective when it left the defendant's possession.<sup>710</sup> For this reason, the court affirmed the lower court's grant of summary judgment in favor of iSecuretrac.<sup>711</sup>

While they are primarily concerned with issues other than tort liability, several other cases are worth discussing because they provide interesting examples of how defective software can cause personal injuries and property damage.<sup>712</sup> For example, in *City & County of San Francisco v. Factory Mutual Insurance Co.*,<sup>713</sup> the City and County of San Francisco (CCSF) sued Factory Mutual Insurance Co. (FMIC) and Bombardier Transportation (Holdings) USA, Inc., seeking to recover for economic losses and property damage to its track and several of its train cars after a collision between two trains.<sup>714</sup> CCSF and Bombardier entered into a contract under which Bombardier would provide CCSF with its light-rail train system at the San Francisco International Airport.<sup>715</sup> CCSF also purchased an insurance policy from FMIC to protect itself against property damage and any extra expenses that might result from such property damage.<sup>716</sup>

CCSF sought to force FMIC to pay for time-element losses that the City incurred as a result of the accident.<sup>717</sup> FMIC contended that the policy did not

705. *Id.* at \*4.

706. *Id.*

707. *Id.*

708. *Id.* at \*2.

709. *Id.* at \*5.

710. *Id.*

711. *Id.* at \*8.

712. *See, e.g.,* West v. Bell Helicopter Textron, Inc., No. 10-cv-214-JL, 2011 WL 6371791, at \*1 (D.N.H. Dec. 20, 2011) (addressing suit against manufacturer for injuries caused during helicopter crash that resulted from a digital control shutdown); City & Cnty. of S.F. v. Factory Mut. Ins. Co., No. C04-5307 PJH, 2006 WL 3544979, at \*1 (N.D. Cal. Dec. 8, 2006) (addressing liability for damage caused by train collision as a result of software malfunction).

713. 2006 WL 3544979.

714. *Id.* at \*1.

715. *Id.*

716. *Id.*

717. *Id.* at \*2.

cover this type of loss. Bombardier sued CCSF for breach of contract due to the failure to procure the type of insurance required by the contract between them.<sup>718</sup> The parties stipulated that the collision was caused by a software malfunction.<sup>719</sup> After discovery was completed, each of the three parties filed motions for summary judgment.<sup>720</sup> The court denied CCSF and FMIC's motions, but granted Bombardier's motion for summary judgment.<sup>721</sup>

*West v. Bell Helicopter Textron, Inc.*,<sup>722</sup> on the other hand, involved pretrial requests for the production of documents.<sup>723</sup> In that case, the plaintiff became injured when the helicopter he was piloting lost power and crashed.<sup>724</sup> The plaintiff contended that the crash was caused by an "uncommanded shutdown," in which fuel to the aircraft's engine was cut off without warning due to a problem with the helicopter's electronic control unit (ECU)—part of the "Full Authority Digital Engine Control" (FADEC) system.<sup>725</sup> According to the plaintiff, "the computer seized control of the engine," causing a malfunction in the hydromechanical unit (HMU), a device that interfaces with the FADEC to control the flow of fuel to the engine.<sup>726</sup> The plaintiff sued Bell Helicopter (the aircraft manufacturer), Rolls Royce Corporation (the manufacturer of the aircraft's engine), and Goodrich Pump & Engine Control Systems, Inc. (the supplier and manufacturer of the ECU and HMU components).<sup>727</sup> The defendants objected to the plaintiff's request for the production of certain documents on relevance and privilege grounds.<sup>728</sup> However, the court overruled the defendants' objections to all but one document request.<sup>729</sup>

Courts have decided a number of cases in which embedded software caused a product to malfunction, injuring consumers, bystanders, or property.<sup>730</sup> However, rarely did a court consider the issue of the software's defectiveness.<sup>731</sup> Instead, when a court imposed liability, it did so by finding that the finished product—not the embedded software—was defective.<sup>732</sup> Any liability on the software supplier is based on an action for contribution or breach of warranty

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718. *Id.*

719. *Id.* at \*3.

720. *Id.* at \*1.

721. *Id.* at \*4.

722. No. 10-cv-214-JL, 2011 WL 6371791 (D.N.H. Dec. 20, 2011).

723. *Id.* at \*1.

724. *Id.*

725. *Id.*

726. *Id.*

727. *Id.*

728. *Id.* at \*1, 6.

729. *Id.* at \*11.

730. *See, e.g.,* Gen. Motors Corp. v. Johnston, 592 So. 2d 1054, 1056 (Ala. 1992) (finding that an electronic system in a truck was the source of engine malfunction, rendering the truck defective).

731. *See, e.g.,* Turner v. Isecuretrac Corp., No. 03CA70, 2004 WL 944386, at \*5 (Ohio Ct. App. Apr. 28, 2004) (finding conclusion that GPS monitor was defective when it left defendant's possession to be mere speculation).

732. *Id.*

between the manufacturer of the finished product and the software supplier.<sup>733</sup> This approach enables courts to avoid some of the difficult questions that would arise if stand-alone—rather than embedded—software caused the plaintiff's injuries.

To be subject to strict liability, software must be considered a product, independent of the product in which it is embedded.<sup>734</sup> Because embedded software is usually contained in some sort of physical form—such as a CD or a microchip—one could argue that it satisfies the tangibility test and, therefore, qualifies as a product. However, because embedded software is part of a larger finished product, the rules relating to component products presumably would apply. Component manufacturers' liability to the consumers of finished products is summarized in section 5 of the Products Liability Restatement.<sup>735</sup> Under this provision, the supplier of a component part is subject to strict liability for physical harm if the component itself is defective or if the supplier of the component part “substantially participates in the integration of the component into the design of the [finished] product” and the “component causes the [finished] product to be defective.”<sup>736</sup>

A number of cases discussed above seem consistent with the Products Liability Restatement's first alternative.<sup>737</sup> For example, in *Johnston*, *CCSF*, and *West*, the suppliers of the alleged improperly programmed software in each of these cases could have been held liable under section 5 of the Products Liability Restatement.<sup>738</sup> The second alternative is more problematic because it concerns situations in which the component is not defective for all purposes, but rather, is inadequate or inappropriate for use in a particular finished product.<sup>739</sup> In such cases, it seems unfair to hold the component part supplier liable for the conduct of the manufacturer of the finished product.<sup>740</sup> Of course, the situation is

733. See, e.g., *Sparacino v. Andover Controls Corp.*, 592 N.E.2d 431, 432 (Ill. App. Ct. 1992) (involving counter claims of contribution regarding an energy management system installed in a high school chemistry lab).

734. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1, 19 (1998).

735. See *id.* § 5.

736. *Id.*

737. *Id.* (explicating the principal that a distributor and/or seller of component parts is subject to liability if the component in itself is defective). See, e.g., *City & Cnty. of S.F. v. Factory Mut. Ins. Co.*, No. C 04-5307 PJH, 2006 WL 3544979, at \*1–2 (N.D. Cal. Dec. 8, 2006) (reviewing summary judgment motions in a liability dispute involving a train collision in which both parties agreed that the collision was caused by a software malfunction).

738. See *West v. Bell Helicopter Textron, Inc.*, No. 10-cv-214-JL, 2011 WL 6371791, at \*1 (D.N.H. Dec. 20, 2011) (involving a helicopter crash claimed to be caused by a malfunction in a digital engine control system); *City & Cnty. of S.F.*, 2006 WL 3544979, at \*2 (involving a train collision caused by a software malfunction); *Gen. Motors Corp. v. Johnston*, 592 So. 2d 1054, 1056 (Ala. 1992) (affirming trial court's holding that a programmable read-only memory chip is defective).

739. See 2 OWEN ET AL., *supra* note 3, § 15.3, at 1018.

740. See, e.g., *Cipollone v. Yale Indus. Prods., Inc.*, 202 F.3d 376, 379 (1st Cir. 2000) (refusing to extend liability for injuries to component maker of loading dock lift because the defect did not exist in the manufacturer's component itself); *Jacobs v. E.I. Du Pont de Nemours & Co.*, 67

different when the component supplier actively participates in the design of the finished product;<sup>741</sup> however, it is hard to conceive of embedded software that would fit this scenario.

In theory, an injured consumer may still bring a negligence action against the producer of defective software, even if a strict liability claim would not satisfy the Products Liability Restatement's requirements.<sup>742</sup> To prevail in a negligence action, the plaintiff has to show that the software producer (1) had a duty of reasonable care, (2) failed to exercise reasonable care when it created the program, (3) the failure to exercise reasonable care was the proximate cause of the plaintiff's injury, and (4) the plaintiff did in fact suffer physical injury.<sup>743</sup> A negligence action against a software manufacturer may be based on negligent programming, negligent software testing, or negligent quality control.<sup>744</sup>

However, it might be difficult to win a negligence case against a software manufacturer.<sup>745</sup> First, even though many of those involved in the design and manufacture of computer software are highly trained, courts are reluctant to hold them to a professional standard of care.<sup>746</sup> Another difficulty that arises is

F.3d 1219, 1241 (6th Cir. 1995) (finding the restatement section inapplicable due to a lack of evidence that the component products were defective in and of themselves); *Temple v. Wean United, Inc.*, 364 N.E.2d 267, 272 (Ohio 1977) (refusing to extend a component manufacturer's duty to warn of the potentially dangerous effects of component parts not defective in and of themselves).

741. *See, e.g.*, *Springmeyer v. Ford Motor Co.*, 71 Cal. Rptr. 2d 190, 194–97 (Ct. App. 1998) (citations omitted) (distinguishing from cases in which a supplier of a component part was found to have no control over the design of the injury-causing product as a matter of law and refusing to apply component parts manufacturer defense when the component fan was specifically designed for Ford engines).

742. *See, e.g.*, Gable, *supra* note 652, at 142 (citing Diane Savage, *Avoiding Tort Claims for Defective Hardware & Software: Strategies for Dealing with Potential Liability Woes*, 15 COMPUTER L. STRATEGIST 1, 2 (1998)) (recognizing a claim for negligence against computer software or hardware providers).

743. *See id.*; *see also* Miyaki, *supra* note 654, at 125.

744. *See* Paul A. Mathew, *The Next Wave: Federal Regulatory, Intellectual Property, and Tort Liability Considerations for Medical Device Software*, 2 J. MARSHALL REV. INTELL. PROP. L. 259, 291 (2003) (citing Cem Kaner, *The Law of Software Quality* 192–252 (Mar. 2000), <http://www.kaner.com/pdfs/asmlaw.pdf> (explicating the various causes of action for negligence in the area of computer software law)).

745. *See* L. Nancy Birnbaum, *Strict Products Liability and Computer Software*, 8 COMPUTER/L.J. 135, 145–46 (1988) (discussing that when plaintiffs bring negligence actions against software manufacturers, they have the burden of showing the programmer failed to use due care); Lori A. Weber, Note, *Bad Bytes: The Application of Strict Products Liability to Computer Software*, 66 ST. JOHN'S L. REV. 469, 478 (1992) (discussing the likelihood of success against computer manufacturers in negligence actions).

746. *See* Lee Kissman, Comment, *Revised Article 2 and Mixed Goods/Information Transactions: Implications for Courts*, 44 SANTA CLARA L. REV. 561, 588 (2004). One theory that would impose a higher standard of care on computer programmers and manufacturers is known as "computer malpractice." *See* John Jay Fossett, *The Development of Negligence in Computer Law*, 14 N. KY. L. REV. 289, 307–09 (1987) (discussing the concept of computer negligence and its application by courts); *see also* Alia Susann Zohur, Comment, *Acknowledging Information Technology Under the Civil Code: Why Software Transactions Should Not be Treated as Sales*, 50



proving causation.<sup>747</sup> To prove causation, the plaintiff has to identify who in the development process was responsible for the programming or manufacturing error and what exactly caused the plaintiff's injury.<sup>748</sup> All of this suggests that consumers who are injured by malfunctions of embedded software would be better off suing the manufacturer of the finished product, not the defective software producer.<sup>749</sup>

## 2. *Stand-Alone Software*

Stand-alone software that is not embedded in a finished product may be classified as mass-produced or custom designed.<sup>750</sup> The former category refers to software that is not developed for a particular user and includes products consumers can purchase "off the shelf" from retailers, or even online.<sup>751</sup> Because mass-produced software can be purchased in this fashion, some commentators characterize such transactions as "sales of goods" under the UCC.<sup>752</sup> In contrast, custom software is either specially developed to fit the needs of a particular user or it is existing software that is modified for this purpose.<sup>753</sup> Arguably, the development of custom software should be classified as a service.<sup>754</sup>

LOY. L. REV. 461, 494–96 (2004) (citing RAYMOND T. NIMMER, THE LAW OF COMPUTER TECHNOLOGY § 9.30 (2002)). However, most courts have rejected computer malpractice claims. *See, e.g.,* Triangle Underwriters, Inc. v. Honeywell, Inc., 604 F.2d 737, 746 (2d Cir. 1979) (refusing to apply a continuous treatment standard, which relies upon the manufacturer's expertise); Chatlos Sys., Inc. v. Nat'l Cash Register Corp., 479 F. Supp. 738, 740 n.1 (D.N.J. 1979) (declining to adopt the theory in the absence of sound precedential authority). *But see* Diversified Graphics, Ltd. v. Groves, 868 F.2d 293, 297 (8th Cir. 1989) (upholding lower court's application of a professional standard of care in a negligence action against a computer software company).

747. Gable, *supra* note 652, at 144 (citing Brian H. Lamkin, Comment, *Medical Expert Systems and Publisher Liability: A Cross-Contextual Analysis*, 43 EMORY L.J. 731, 735 (1994)).

748. *Id.* (citing Lamkin, *supra* note 747, at 758).

749. *See, e.g., id.* (citing Lamkin, *supra* note 747, at 758) (stating that negligence causes of action are complicated by difficulties in proving causation).

750. Zohur, *supra* note 746, at 466.

751. *Id.* at 466–67 (citing Lorin Brennan, *Why Article 2 Cannot Apply to Software Transactions*, 38 DUQ. L. REV. 459, 465 (2000)).

752. Brennan, *supra* note 751, at 465 & n.16 (quoting Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111, 118 n.15 (1999)); *see also* Douglas A. Barnes, Note, *Deworming the Internet*, 83 TEX. L. REV. 279, 316 (2004). Actually, software manufacturers usually license rather than sell mass-produced software. *See* Zohur, *supra* note 746, at 467 (citing CLARISSE GIROT, USER PROTECTION IN IT CONTRACTS: A COMPARATIVE STUDY OF THE PROTECTION OF THE USER AGAINST DEFECTIVE PERFORMANCE IN INFORMATION TECHNOLOGY 103 (2001); Brennan, *supra* note 751, at 465 & n.16)).

753. Zohur, *supra* note 746, at 466.

754. *See generally* Weber, *supra* note 745, at 473 (citing RRX Indus., Inc. v. Lab-Con, Inc., 772 F.2d 543, 546 (9th Cir. 1985); Anthony Pools v. Sheehan, 455 A.2d 434, 438 (Md. 1983); John M. Conley, *Tort Theories of Recovery Against Vendors of Defective Software*, 13 RUTGERS COMPUTER & TECH L.J. 1, 3 (1997)) (discussing how software may be characterized as a service depending on a fact-intensive analysis).

## V. CHANGING THE EXISTING LIABILITY REGIME

A. *A Summary of Existing Liability Rules*

Under the existing hodgepodge of liability rules, the choice of a liability rule depends on whether information is published in tangible form—as opposed to electronic form—or whether the information is associated with the sale of a product.<sup>755</sup> For example, statements about product quality, performance, or safety, if known to be false, may also subject the seller to liability for fraud or misrepresentation if the injured party relies on these statements.<sup>756</sup> Even statements made in good faith may constitute a breach of express warranty if relied upon by the buyer.<sup>757</sup> In addition, inaccurate warnings and instructions may give rise to strict liability for a product seller if they cause a product to become defective.<sup>758</sup>

In contrast, the publisher of pure information—unconnected with the sale of a particular product—is usually not subject to liability of any kind.<sup>759</sup> As far as strict liability in tort is concerned, virtually all of the courts considering this issue have concluded that information is not a product, even when it is published in some sort of tangible form, such as a book, magazine, audio recording, or video recording.<sup>760</sup> The only exception to this rule applies to cases involving inaccurate navigational charts.<sup>761</sup>

755. See, e.g., Childers, *supra* note 631, at 140 (explaining that established law requires the plaintiff to prove fault under ordinary negligence if software is considered a service instead of a product).

756. See, e.g., Bd. of Educ. of Chi. v. A, C & S, Inc., 546 N.E.2d 580, 592 (Ill. 1989) (citing RESTATEMENT (SECOND) OF TORTS § 311 (1965)) (declaring that a person who gives false information to another may be liable for physical harm caused by the other's reliance upon that information).

757. See U.C.C. § 2-313(a) (2012).

758. See, e.g., Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809 (9th Cir. 1974) (reversing a finding for defendants because had the jury been properly instructed on the law, the jury could have found that the warnings were inadequate); Boyd v. Lincoln Elec. Co., 902 N.E.2d 1023 (Ohio Ct. App. 2008) (reversing summary judgment for defendants because trial court failed to determine if a warning defect existed before granting summary judgment as to the strict liability claim).

759. See Reutiman, *supra* note 594, at 188 n.40 (citing RESTATEMENT (THIRD) OF TORTS § 19 & cmt. d (1998)).

760. *Id.*

761. See, e.g., Brocklesby v. United States, 767 F.2d 1288, 1295 (9th Cir. 1985) (finding an inaccurate chart to be a product under section 402A); Salomey v. Jeppesen & Co., 707 F.2d 671, 676–77 (2d Cir. 1983) (recognizing the mass-produced nature of the navigational charts and finding the charts to be products rather than services); Aetna Cas. & Sur. Co. v. Jeppesen & Co., 642 F.2d 339, 341 (9th Cir. 1981) (affirming the trial court's finding that a chart maker should be held liable for its defectively designed product); Fluor Corp. v. Jeppesen & Co., 216 Cal. Rptr. 68, 70–71 (Ct. App. 1985) (stating that the classification as a product would promote and uphold the policies behind strict liability).

A few courts have considered whether a publisher of inaccurate information should be subject to liability for negligence.<sup>762</sup> However, courts generally conclude that the duty of due care does not require publishers to verify the accuracy of the material they disseminate.<sup>763</sup> In theory, authors who submit inaccurate information to publishers may be liable to injured consumers if they fail to exercise due care in obtaining information.<sup>764</sup> However, there are no reported cases in which a court actually imposed liability on this basis.<sup>765</sup> Instead, accident victims usually seek compensation from commercial publishers—and not from authors—when they are injured.<sup>766</sup> Finally, publishers of inaccurate information may be held liable for fraudulent misrepresentation or breach of express warranty,<sup>767</sup> although successful claims under such liability theories seem to be uncommon.<sup>768</sup>

Information may also be disseminated in nontangible form.<sup>769</sup> The principal areas of potential liability involve software and information that is published on the Internet. Software includes both embedded or intrinsic software, as well as stand-alone software.<sup>770</sup> Embedded software is contained within a product and controls some aspect of its operation.<sup>771</sup> Courts generally agree that a finished product that malfunctions due to defective software will be considered defective, and the product's manufacturer may be held strictly liable for any injuries that ensue.<sup>772</sup> However, it is uncertain whether the supplier of defective embedded

762. See, e.g., *Jones v. Lippincott Co.*, 694 F. Supp. 1216, 1216 (D. Md. 1988). Cf. *Young v. Mallett*, 49 A.D.2d 528, 528–29 (N.Y. App. Div. 1975) (dismissing a negligence claim against the author of a self-improvement book for lack of personal jurisdiction).

763. See *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1037 (9th Cir. 1991) (concluding that publishers have no duty to verify the accuracy of the contents of the books that are published); *Jones*, 694 F. Supp. at 1217 (noting that the publisher's duty was limited to publishing and that it had taken no responsibility for the contents of the book); *Birmingham v. Fodor's Travel Publ'ns, Inc.*, 833 P.2d 70, 75 (Haw. 1992) (holding that, absent a showing that the publisher authored or guaranteed the contents, "a publisher has no duty to investigate and warn its readers of the accuracy of the contents of its publications"); *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263, 1265–66 (Ill. App. Ct. 1985) (refusing to extend a duty to investigate or test all procedures or products to a publisher of a magazine).

764. See generally Lars Noah, *Authors, Publishers, and Products Liability: Remedies for Defective Information in Books*, 77 OR. L. REV. 1195, 1209–10 (1998) (discussing the challenges of holding authors and publishers liable for the dissemination of false information).

765. *Id.* at n.43 (providing examples of cases in which courts have declined negligent misrepresentation claims against authors based on unreasonable action).

766. See *id.* at 1209–10.

767. 2 OWEN ET AL., *supra* note 3, § 20:9, at 480.

768. Noah, *supra* note 764, at n.43; see also 2 OWEN ET AL., *supra* note 3, 20:9, at 481.

769. See Maule, *supra* note 629, at 712 (discussing the past exclusion of software manufacturers from strict products liability due to the intangible nature of the software).

770. See T. Randolph Beard et al., *Tort Liability for Software Developers: A Law & Economics Perspective*, 27 J. MARSHALL J. COMPUTER & INFO. L. 199, 201 (2009).

771. See *id.*

772. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. b (1998); see also 2 OWEN ET AL., *supra* note 3, § 19:2, at 423–24.

software would be liable to an injured consumer as well.<sup>773</sup> First, it is unclear whether commands contained in software are information.<sup>774</sup> Second, even if software commands are regarded as information, as suppliers of component products, software providers may not be subject to strict liability unless they played a significant role in the design of the finished product.<sup>775</sup> In the absence of strict liability, it is possible that suppliers of defective embedded software may still be held liable to injured consumers for breach of express warranty<sup>776</sup> or negligence.<sup>777</sup> However, no cases have been reported in which liability has been imposed.<sup>778</sup>

Also, no cases subjecting sellers of stand-alone software to strict liability have been reported.<sup>779</sup> There are two arguments against imposing such liability. First, according to some commentators, a computer program is a service—not a product<sup>780</sup>—even if it is embodied in some tangible form, such as a compact disc.<sup>781</sup> Second, if stand-alone software is considered a form of information,<sup>782</sup> it should be treated the same as information in written form.<sup>783</sup> Of course, suppliers of stand-alone software may also be liable for fraudulent misrepresentation,<sup>784</sup> breach of express warranty,<sup>785</sup> or negligence,<sup>786</sup> but liability is almost never imposed on any of these bases.<sup>787</sup>

### *B. Distinguishing Between the Dissemination of Commercial and Noncommercial Information*

The foregoing discussion suggests that it would be desirable to modify the existing liability regime to make it more coherent and rational. One promising approach would be to develop a rule that focuses on the difference between

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773. 2 OWEN ET AL., *supra* note 3, § 20:9, at 485–86.

774. See Roy N. Freed, *Products Liability in the Computer Age*, 17 JURIMETRICS J. 270, 279 (1977).

775. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. a (1998).

776. Maule, *supra* note 629, at 736 (citing U.C.C. § 2-313 (2012)).

777. *Id.* at 712.

778. Childers, *supra* note 631, at 142.

779. *Id.* at 757.

780. *Id.*

781. See Freed, *supra* note 774, at 278–79; Maule, *supra* note 629, at 752–53.

782. Freed, *supra* note 774, at 279 (recognizing the common treatment of output as information).

783. See 2 OWEN ET AL., *supra* note 3, § 20:9, at 480–83 (explaining that courts have generally refused to apply products liability law to information conveyed through printed media and other forms of written information).

784. Maule, *supra* note 629, at 737.

785. *Id.*

786. *Id.*; see also Daniel T. Perlman, Note, *Who Pays the Price of Computer Software Failure?*, 24 RUTGERS COMPUTER & TECH. L.J. 383, 397 (1998).

787. Maule, *supra* note 629, at 737; Perlman, *supra* note 786, at 397.

commercial and noncommercial information.<sup>788</sup> The United States Supreme Court has made a similar distinction in *Central Hudson Gas & Electric Corp. v. Public Service Committee*,<sup>789</sup> in which it considered whether commercial speech should be entitled to the same level of constitutional protection against government regulation as noncommercial speech.<sup>790</sup> In *Central Hudson*, the Court reaffirmed that the government cannot normally subject noncommercial speech to prior restraint or regulate it on the basis of content.<sup>791</sup> At the same time, the Court held that while commercial speech was subject to some government regulation, it was constitutionally protected against unreasonable regulation.<sup>792</sup>

Applying the *Central Hudson* analysis to the problem of inaccurate information, one could classify information primarily intended to inform the public, or to promote a particular point of view, as noncommercial.<sup>793</sup> Under this approach, noncommercial publications would include ideas and information expressed in some tangible form, such as print, cinema, or compact discs.<sup>794</sup> Thus, information or advice contained in textbooks, encyclopedias, cookbooks, instructional materials, travel guides, diet books, self-improvement books, medical forms, and trade association standards would all be classified as noncommercial. Logically, maps and charts would also be treated as noncommercial. Additionally, this sort of information should be treated as noncommercial when disseminated in electronic form on the Internet, including websites maintained by private individuals, government entities, and nonprofit organizations that provide information free of charge to the general public.

In contrast, information that is disseminated to promote the sale of a product or the furnishing of a service, as well as information that is disseminated in connection with the sale of a product or the provision of a service, would be classified as commercial in nature.<sup>795</sup> This would include statements made by

788. See Noah, *supra* note 764, at 1224 (“Commercial speech doctrine may provide a more apt analogy for publisher liability than defamation or incitement.”).

789. 447 U.S. 557 (1980) (discussing the constitutional limits of restrictions on commercial speech).

790. *Id.* at 561–73.

791. *Id.* at 561 & n.4 (citing *Consol. Edison Co. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 537–40 (1979)).

792. *Id.* at 566, 571–72; see also Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 596–97 (1996) (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993)) (rejecting the distinction between commercial and noncommercial speech).

793. See *Central Hudson*, 447 U.S. at 562 (defining commercial speech as “expression related solely to the economic interests of the speaker and its audience” (citing *Friedman v. Rogers*, 440 U.S. 1 (1979); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363–64 (1977); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976))); see also Noah, *supra* note 764, at 1225–26 (“[C]ommercial speech refers to advertising material that encourages recipients to purchase a particular product or service.”).

794. See, e.g., *Va. State Bd. of Pharm.*, 425 U.S. at 761 (discussing whether statements made by pharmacists in selling a drug are protected as noncommercial speech).

795. See Noah, *supra* note 764, at 1225–26.

product sellers in advertising, sales contracts, or product packaging, such as product descriptions; statements about product safety; and warnings and instructions for assembly, operation or maintenance. Furthermore, this type of information would be treated as commercial whether disseminated in tangible form or posted on a seller's Internet website.<sup>796</sup> Embedded software should also be treated as commercial, but software providers should not be held liable unless they actively participated in the design of the product in question.<sup>797</sup> Mass-produced operating programs—as opposed to video games—should also be treated as commercial, since whatever information such programs contain has no artistic value, nor is it intelligible to the general public.<sup>798</sup>

The next issue to decide is which liability standard or standards to impose on those who disseminate inaccurate information. Following the reasoning of the Court in *Central Hudson*, the correct approach would be to subject those who disseminate noncommercial information to a lesser liability standard than those who disseminate information of a commercial character.<sup>799</sup> The four liability theories presently employed are breach of express warranty, fraudulent misrepresentation, strict liability, and negligence.<sup>800</sup>

Breach of express warranty and fraudulent representation should be available, regardless of whether inaccurate information is commercial or noncommercial. However, such breaches apply to very specific kinds of conduct and, therefore, would not apply to most cases.<sup>801</sup> For example, an action for breach of warranty is usually confined to “transactions in goods,”<sup>802</sup> and it is therefore doubtful that pure information would constitute *goods* under the current provisions of the UCC.<sup>803</sup> In addition, warranties are usually limited to

796. See, e.g., *Spirit Airlines v. U.S. Dep't of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012) (citing *Va. State Bd. of Pharm.*, 425 U.S. at 762) (classifying Spirit Airlines print and online price advertisements as commercial speech).

797. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 (1998) (declaring the supplier of a component part subject to strict liability for physical harm caused by finished product if supplier “substantially participates” in the design).

798. See generally Noriko Kawawa, *Comparative Studies on the Law of Tort Relating to Liability for Injury Caused by Information in Traditional and in Electronic Form: England and the United States*, 12 ALB. L.J. SCI. & TECH. 493, 589–91 (2002) (citations omitted) (discussing the implication of mass production on computer software liability).

799. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*, 447 U.S. 557, 562–63 (1980) (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978)) (stating that noncommercial speech is afforded more Constitutional protection than commercial speech).

800. See Conley, *supra* note 754, at 5, 11, 15, 27; see also Maule, *supra* note 629, at 736–37.

801. U.C.C. § 2-313 (2012).

802. Ronald N. Weikers, Comment, “*Computer Malpractice*” and Other Legal Problems Posed by Computer “*Vaporware*” 33 VILL. L. REV. 835, 856 (1988) (quoting U.C.C. § 2-102 (2012)).

803. See David A. Owen, *The Application of Article 2 of the Uniform Commercial Code to Computer Contracts*, 14 N. KY. L. REV. 277, 277–78 (1987) (discussing the primary purpose test employed by courts defining software sold with computer hardware to be “goods” under the UCC); see also Childers, *supra* note 631, at 146–49 (recognizing the inherent intangible character of software).

transactions between buyers and sellers<sup>804</sup> and, therefore, would not apply to communications when a contractual relationship between the parties does not exist. In addition, publishers would have to affirmatively guarantee the accuracy of the information they publish for an express warranty to arise;<sup>805</sup> however, most publishers would either refuse to do so or hedge their warranties with disclaimers or other limitations on liability—as software providers typically do at the present time.<sup>806</sup>

Fraudulent misrepresentation is also very narrow in scope. To recover under a misrepresentation theory, a plaintiff must prove, among other things, both reliance and intent.<sup>807</sup> These requirements are difficult to prove and would greatly limit the number of victims who might prevail under a fraudulent misrepresentation claim.<sup>808</sup> Thus, while breach of express warranty and fraudulent misrepresentation might be applicable in certain limited circumstances, they do not have much potential as universal liability rules in this area.

This leaves strict liability and negligence. Under a strict liability regime, an injured party would have to prove that the defendant published the information, that the information provided was inaccurate, that the defendant owed a duty to the plaintiff to provide accurate information,<sup>809</sup> and that the information proximately caused a physical injury to the plaintiff.<sup>810</sup> However, the plaintiff would not be required to prove that the defendant failed to exercise reasonable care<sup>811</sup>—or the existence of privity of contract<sup>812</sup>—and the defendant would not be allowed to disclaim or limit its liability.<sup>813</sup> Strict liability would presumably be limited to publishers of commercial information. Several arguments support the imposition of strict liability upon the publishers of commercial information. First, the prospect of paying damages to injured parties creates an incentive for publishers to make an effort to ensure that the information they disseminate is

804. See Maule, *supra* note 629, at 736.

805. U.C.C. § 2-313 (2012) (“Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty . . .”).

806. See Barnes, *supra* note 752, at 317; Weikers, *supra*, note 802, at 871–73.

807. Richard Ausness, *Conspiracy Theories: Is There a Place for Civil Conspiracy in Products Liability Litigation?*, 74 TENN. L. REV. 383, 400 (2007) (quoting *Goldstein v. Phillip Morris, Inc.*, 854 A.2d 585, 590–91 (Pa. Super. Ct. 2004)).

808. Ausness, *supra* note 807, at 401.

809. See Perlman, *supra* note 786, at 396.

810. See 1 OWEN ET AL., *supra* note 3, § 7:10, 423–24.

811. See *id.* § 7:10, at 424 (citing RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965)).

812. See Maule, *supra* note 629, at 736 (recognizing that privity is required if a theory of recovery is based on contract law).

813. Disclaimers by the manufacturer and waivers by the buyer “do not bar or reduce otherwise valid products liability claims against sellers or other distributors of new products for harm to persons.” RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 18 (1998).

accurate.<sup>814</sup> In addition, those who profit from the dissemination of information—either directly or indirectly—are usually better able to bear some of the losses caused by their dissemination of inaccurate information.<sup>815</sup>

However, potential problems can arise with the application of strict liability. First, strict liability is usually limited to commercial sellers of defective products.<sup>816</sup> Extending strict liability principles to Internet publishers and software suppliers would require treating this type of information in the same manner as tangible products—something that courts so far have been unwilling to do.<sup>817</sup> Furthermore, the threat of liability may also inhibit the development of useful products, such as software programs that architects, engineers, and product designers use in their work.<sup>818</sup>

The alternative is subjecting publishers of commercial information to a negligence standard. A negligence standard would have a number of advantages over the strict liability standard if it were adopted as the prevailing liability rule for the publishers of commercial information. First, from a jury's point of view, "negligence is 'hot,' while strict liability is 'cold'";<sup>819</sup> that is, jurors instinctively understand and relate to the conduct-based evidence required in a negligence case, while they are less accepting of the cost-benefit analysis underpinning strict liability.<sup>820</sup> In addition, unlike traditional strict liability, negligence does not require the plaintiff to prove a sale or transfer of a tangible product.<sup>821</sup> Thus, negligence principles can be easily applied without distortion to non-sale publications.

Of course, the uniform application of a negligence-based liability rule has some drawbacks. In the first place, it may be difficult for a plaintiff to prove that the publisher failed to exercise due care, especially when the information in question is embodied in computer software.<sup>822</sup> Since computer programmers are not licensed, plaintiffs cannot invoke formal professional standards to determine whether a particular software glitch is the result of negligence.<sup>823</sup> Likewise, it is unclear whether a negligence standard would require a commercial publisher to

814. See KEETON ET AL., *supra* note 12, § 96, at 681; Maule, *supra* note 629, at 743 (citing RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

815. See Kerry M. L. Smith, Comment, *Suing the Provider of Computer Software: How Courts Are Applying U.C.C. Article Two, Strict Tort Liability, and Professional Malpractice*, 24 WILLAMETTE L. REV. 743, 759 (1988).

816. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998).

817. See Zollers et al., *supra* note 630, at 757, 766.

818. See Childers, *supra* note 631, at 161–66.

819. See Paul D. Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L. REV. 521, 531 (1974).

820. *Id.* at 531.

821. See Gable, *supra* note 652, at 142 (enumerating the elements of a negligence cause of action) (citing Diane Savage, *Avoiding Tort Claims for Defective Hardware & Software: Strategies for Dealing with Potential Liability Woes*, 15 COMPUTER L. STRATEGIST 1, 2 (1998)).

822. See Weber, *supra* note 745, at 478 (citing Birnbaum, *supra* note 745, at 145–46).

823. Smith, *supra* note 815, at 760 (citing Conley, *supra* note 754, at 26).



verify the accuracy of any information generated by a third party.<sup>824</sup> Finally, one can argue that applying a negligence rule to literature distributed in connection with the sale of a product, which has traditionally been covered by a strict liability rule, would lessen the legal protection currently afforded to consumers.<sup>825</sup> In response, as both the Products Liability Restatement and a number of courts have acknowledged, while strict liability nominally applies to product warnings and instructions, the actual liability standard is negligence.<sup>826</sup>

If publishers of commercial information are subject to a negligence standard, what is left for the publishers of inaccurate noncommercial information? Arguably, a negligence standard would impose too heavy a burden on those who disseminate noncommercial information.<sup>827</sup> Time and time again, courts have expressed concern that holding book publishers and others liable would create a chilling effect and lead to self-censorship and the suppression of ideas and information.<sup>828</sup> While this risk is not as great with a negligence standard as it is with the strict liability standard, it is still significant.<sup>829</sup> However, if negligence is taken off the table as a liability standard for the publishers of noncommercial information, the only liability theories left for them are breach of express warranty and fraudulent misrepresentation.<sup>830</sup>

In fact, this is pretty close to the current situation. As the foregoing discussion has shown, those who publish various types of noncommercial information in tangible form generally escape liability under a strict products liability theory because courts refuse to treat this type of information as a product.<sup>831</sup> No court has imposed liability based on a theory of negligence

824. *See id.* (citing Conley, *supra* note 754, at 26).

825. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998) (stating that products are defective if they have inadequate instructions or warnings).

826. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. a (1998).

827. *See* Childers, *supra* note 631, at 161–66.

828. *See, e.g.,* Jones v. Lippincott Co., 694 F. Supp. 1216, 1217 (D. Md. 1988) (denying the plaintiff's claim against a publisher, in part, because of the potentially chilling effect on free speech expression).

829. In order to prove negligence against a publisher, a plaintiff would have the burden of proving that the publisher has a duty to verify the accuracy of the material it publishes. *See generally* Brett Lee Myers, Note, *Read at Your Own Risk: Publisher Liability for Defective How-To Books*, 45 ARK. L. REV. 699, 723 (1992) (evaluating liability options for publishers of books with incorrect information). In general, courts have held that there is no such duty. *Id.* However, if strict liability standards were applied to the dissemination of information, the plaintiff would have a much lower burden. *See id.* To prevail, a plaintiff would simply need to prove that the information was incorrect and as a result, there were damages. *See id.*

830. *See* Conley, *supra* note 754, at 5, 11.

831. *See, e.g.,* Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1036 (9th Cir. 1991) (declining to impose strict liability on an encyclopedia publisher because it was not a product); Jones, 694 F. Supp. at 1217 (holding that a textbook publisher should not be held strictly liable for the content of the books because the content is not a product); Birmingham v. Fodor's Travel Publ'ns, Inc., 833 P.2d 70, 79 (Haw. 1992) (declining to impose strict liability on the publisher of a travel guide).

either.<sup>832</sup> Although no cases have been reported, it is likely that courts would follow this same pattern for information transmitted in electronic form. Consequently, the better approach may be to shield those who disseminate noncommercial information from liability, unless they voluntarily warrant the accuracy of their work product or intentionally misrepresent its character.

To conclude, the optimal approach would be to subject publishers of commercial information—including product sellers—to a negligence standard, while holding publishers of noncommercial information liable only if their information constitutes either a breach of express warranty or a fraudulent misrepresentation.

## VI. CONCLUSION

Various liability rules currently govern the dissemination of inaccurate information. Inaccurate warnings and instructions provided by product sellers are—at least in theory—subject to strict liability in tort. In contrast, those who publish inaccurate information in books, magazines, and other tangible media are almost never held liable, unless their conduct amounts to a breach of express warranty or fraudulent misrepresentation. Virtually no legal standard covers liability for the dissemination of inaccurate information in electronic form. The only possible exception to this involves a few cases in which manufacturers were held strictly liable for injuries caused by malfunctioning software embedded in their products.

This Article proposes an alternative liability regime that distinguishes between information that is commercial in character and information that is noncommercial. Those who disseminate inaccurate commercial information in any form will be subject to a negligence standard. They may also be held liable for breach of express warranty or fraudulent misrepresentation when circumstances warrant such treatment. In contrast, those who disseminate inaccurate noncommercial information will be immune from liability, unless they breach an express warranty or engage in fraudulent misrepresentation. Hopefully, this suggested approach will achieve a fair balance between the rights of injured consumers and the need to avoid discouraging the free flow of information.

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832. Terri R. Day, *Publications That Incite, Solicit, or Instruct: Publisher Responsibility or Caveat Emptor*, 36 SANTA CLARA L. REV. 73, 92 (1995) (citing *Birmingham*, 833 P.2d at 75).

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