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THE EXPANDING SCOPE OF THE TORT OF NEGLIGENT MISREPRESENTATION: ARE PUBLISHERS NEXT?

Deborah A. Ballam*

I. INTRODUCTION

In recent years, both American and English courts have significantly expanded the scope of the tort of negligent misrepresentation—the making of an unintentional false representation by a party who acted unreasonably in not determining the true facts, in the manner of expressing the statement, or in making the statement in the absence of necessary skill or competence to judge the accuracy of the statement.¹ Time-honored precedents limiting or denying the existence of the tort, such as *Derry v. Peek*² and *Ultramares Corp. v. Touche*,³ have been whittled away, especially in the area of professional malpractice.⁴ Based on the reasoning of cases expanding negligent misrepresentation liability into the accounting field, some courts have opened the door to holding publishers liable for losses suffered because of reliance on negligently printed, erroneous statements by eliminating a first amendment defense.⁵

For over sixty years, publishers have relied on a New York case, *Jaillet v. Cashman*,⁶ as protection against liability for negligent misrepresentation.⁷ In *Jaillet*, the defendant, Dow Jones & Company, incorrectly

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1. W. PROSSER, *THE LAW OF TORTS*, 704 (4th ed. 1971).

2. 14 App. Cas. 337 (1889).

3. 255 N.Y. 170, 174 N.E. 441 (1931).

4. See *infra* notes 14-19, 68-89 and accompanying text.

5. Courts have held that no first amendment protections extend to objective, verifiable data. See, e.g., *Eimann v. Soldier of Fortune Magazine, Inc.*, 680 F. Supp. 863 (S.D. Tex. 1988), *op. withdrawn and substituted by*, No. H-87-0030 (S.D. Tex. Mar. 8, 1988) (LEXIS, Genfed library, Dist. file).

6. 115 Misc. 383, 189 N.Y.S. 743 (N.Y. Sup. Ct. 1921), *aff'd*, 235 N.Y. 511 (1923).

7. See generally Berns, *The Expanding Domain of Negligent Misstatement*, 8 U. TASMANIA L. REV. 127 (1985); Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231 (1966); Shimomura, *Federal Misrepresentation: Protecting the Reliance Interest*, 60 TUL. L. REV. 596 (1986); Smillie, *Negligence and Economic Loss*, 32 U. TORONTO L.J. 231 (1982); Note, *Negligent Misrepresentation: A New Trap for the Unwary?*, 27 LOY. L. REV. 1184 (1981); Comment, *Negligent Misrepresentation in Missouri: Tooling Up for the Tort of the Eighties*, 50 MO. L. REV. 877 (1985).

reported the effect a United States Supreme Court decision would have on the taxation of stock dividends as income.⁸ Jaillet, relying on the incorrect report, sold some stocks at a loss.⁹ To recover that loss, he filed an action against Dow Jones alleging that the company was negligent in making the inaccurate report.¹⁰ The court refused to impose liability for two reasons. First, there was no contract between the parties; hence there was no privity. Absent privity, the court refused to impose liability.¹¹ Second, the misrepresentation was merely negligent, and not intentional. The court reasoned that if Dow Jones were held liable for negligence to this plaintiff, then it would be equally liable to all readers who were misled by the misrepresentation.¹² The court admitted that although it might logically find such liability, it could not do so "as a matter of practical expediency."¹³

Jaillet has been widely cited for the proposition that members of the public may not hold publishers liable for negligent misrepresentation.¹⁴ The last two decades, however, have witnessed a dramatic evolution in the law regarding liability for negligent misrepresentation,¹⁵ particularly with respect to the misrepresenter's liability to third persons with whom there was no privity relationship.¹⁶ The most noteworthy expansion of liability for negligent misrepresentation has occurred in the public ac-

8. *Jaillet*, 115 Misc. at 384, 189 N.Y.S. at 744.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. See, e.g., *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990 (E.D.N.Y. 1977) (encyclopedia publisher not liable for negligently misrepresenting toxicity of chemical); *Gutter v. Dow Jones, Inc.*, 22 Ohio St. 3d 286, 490 N.E.2d 898 (1986) (publisher not liable for damages incurred by reader relying on incorrect bond listing in newspaper). See also, Annotation, *Newspaper's Liability to Reader-Investor for Negligent but Nondefamatory Misstatement of Financial News*, 56 A.L.R. 4TH 1162 (1987).

15. See sources cited *supra* note 7.

16. For example, the following professionals have been held liable for negligent misrepresentation to foreseeable third parties who rely on a misrepresentation:

Title abstract preparers—*Kovaleski v. Tallahassee Title Co.*, 363 So. 2d 1156 (Fla. Dist. Ct. App. 1978) (title abstacker liable to third parties that could reasonably be foreseen to rely on negligent misrepresentation); *Chun v. Park*, 51 Haw. 462, 462 P.2d 905 (1969) (preparer of title abstract liable to known third party for whose benefit abstract was being prepared); *Williams v. Polgar*, 43 Mich. App. 95, 204 N.W.2d 57 (1972) (title abstractors liable to reasonably foreseeable third parties), *aff'd*, 391 Mich. 6, 215 N.W.2d 149 (1974);

Attorneys—*United Leasing Corp. v. Miller*, 45 N.C. App. 400, 263 S.E.2d 313 (1980) (lessor stated cause of action against lawyer for negligently failing to discover existence of lien on property used as collateral for execution of a leasing agreement);

Surveyors—*Kent v. Bartlett*, 49 Cal. App. 3d 724, 122 Cal. Rptr. 615 (1975) (surveyors liable to reasonably foreseeable third parties who rely on accuracy of survey); *Rozny v. Marnul*,

counting profession.¹⁷ Currently, in some jurisdictions, an accountant may be held liable for negligent misrepresentations contained in annual reports prepared by the accountant and received for a business purpose by any party who might reasonably be foreseen to rely upon the report.¹⁸ Because such parties could include every present or future investor or creditor of a company, accountants in these jurisdictions are, in effect, potentially liable to the entire investment world.¹⁹

Though not decided on negligent misrepresentation grounds, a recent Texas case could portend the expansion of liability for negligent misrepresentation to publishers.²⁰ In *Eimann v. Soldier of Fortune*

43 Ill. 2d 54, 250 N.E.2d 656 (1969) (surveyor liable to third party he knew might rely on plat);

Soil engineers—*M. Miller Co. v. Dames & Moore*, 198 Cal. App. 2d 305, 18 Cal. Rptr. 13 (1961) (soil engineer who provided soil report to sanitation district regarding feasibility of sewer construction liable to third party who bid on project and based cost estimates on soil engineer's report);

Architects—*Westerhold v. Carroll*, 419 S.W.2d 73 (Mo. 1967) (architect, who incorrectly certified to owner amount of work satisfactorily performed on unfinished project with result that owner paid incorrect amount to contractor, liable to contractor's surety who had been required to reimburse owner for overpaid amount);

Notaries public—*Baikanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958) (notary public who failed to provide for correct attestation of will liable to intended beneficiary);

Accountants—see *infra* note 17.

17. See generally Achampong, *Common Law Liability of Accountants for Negligence to Non-Contractual Parties: Recent Developments*, 91 DICK. L. REV. 677 (1987); Leibensperger, *The Erosion of Ultramares: Expansion of Accountants' Liability to Third Parties for Negligence*, 69 MASS. L. REV. 54 (1984); O'Brien, *The Legal Environment of the Accounting Profession*, 25 DUQ. L. REV. 283 (1987); Wiener, *Common Law Liability of the Certified Public Accountant for Negligent Misrepresentation*, 20 SAN DIEGO L. REV. 233 (1983); Comment, *Extensions of Accountants' Liability For Negligence: One Step Closer to a New Implied Warranty of Results*, 56 U. COLO. L. REV. 265 (1985); Note, *Rosenblum, Inc. v. Adler: CPAs Liable At Common Law To Certain Reasonably Foreseeable Third Parties Who Detrimentally Rely On Negligently Audited Financial Statements*, 70 CORNELL L. REV. 335 (1985); Note, *Tort Law—The Enlarging Scope of Auditors' Liability To Relying Third Parties*, 59 NOTRE DAME L. REV. 281 (1983); Note, *Rosenblum v. Adler: The New Jersey Supreme Court Expands Accountants' Liability*, 37 RUTGERS L. REV. 161 (1984); Comment, *Accountants' Liability to the Third Party and Public Policy: A Calabresi Approach*, 39 SW. L.J. 689 (1985).

18. See e.g., *International Mortgage Co. v. John P. Butler Accountancy Corp.*, 177 Cal. App. 3d 806, 223 Cal. Rptr. 218 (1986); *Touche Ross & Co. v. Commercial Union Ins. Co.*, 514 So. 2d 315 (Miss. 1987); *H. Rosenblum, Inc. v. Adler*, 93 N.J. 324, 461 A.2d 138 (1983); *Citizens State Bank v. Timm, Schmidt & Co.*, 113 Wis. 2d 376, 335 N.W.2d 361 (1983).

19. Nevertheless, some decisions have imposed very narrow liability. See, e.g., *McLean v. Alexander*, 599 F.2d 1190 (3d Cir. 1979) (applying Delaware law); *Stephens Industries, Inc. v. Haskins & Sells*, 438 F.2d 357 (10th Cir. 1971) (applying Colorado law); *Toro Co. v. Krouse, Kern & Co., Inc.*, 644 F. Supp. 986 (N.D. Ind. 1986) (applying Indiana law), *aff'd*, 827 F.2d 155 (7th Cir. 1987); *Investment Corp. of Florida v. Buchman*, 208 So. 2d 291 (Fla. Dist. Ct. App. 1968); *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931).

20. *Eimann*, 680 F. Supp. 863. For a description of the case, see N.Y. Times, Mar. 4, 1988, § A, at 12, col. 1 and 56 U.S.L.W. 2520 (Mar. 22, 1988).

Magazine, Inc.,²¹ the court opened the door for the publisher of *Soldier of Fortune* magazine to be held liable on a negligence theory to the family of a woman whose husband procured her hired killer through a classified advertisement in that magazine.²² The publisher unsuccessfully moved to dismiss, or alternatively, for summary judgment on the grounds that the first amendment protected it from liability for mere negligence.²³ In rejecting the publisher's argument, the Texas court reasoned that "there can be little concern that 'regulation' by way of a negligence cause of action will chill . . . expression or diminish the free flow of commercial [speech]."²⁴ The court recognized that "[i]t is axiomatic that commercial speech, although enjoying some degree of first amendment protection, is not entitled to the stringent protection afforded to core speech."²⁵ For commercial speech, then, publishers have much less protection under the first amendment than they do for other types of speech.

Thus, a change from traditional views of publisher liability may be occurring.²⁶ This Article explores the likelihood that courts will begin holding publishers liable for negligent misrepresentation. The Article

21. 680 F. Supp. 863 (S.D. Tex. 1988), *op. withdrawn and substituted by*, No. H-87-0030 (S.D. Tex. Mar. 8, 1988) (LEXIS, Genfed library, Dist. file).

22. *Id.* at 865.

23. *Id.* at 864.

24. *Id.* at 866 (quoting *South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 676 F. Supp. 346, 350 (D.D.C. 1987)).

The advertisement the killer placed in *Soldier of Fortune* read as follows, "EX-MARINES—67-69 'Nam Vets—ex-DI—weapons specialist—jungle warfare, pilot, M.E., high risk assignments U.S. or overseas. (404) 991-2684." *Id.* at 864. The decedent's husband saw the advertisement and arranged to have his wife killed. Her mother and son then brought suit against the magazine for negligence in publishing the advertisement and failing to investigate the person who placed the advertisement. *Id.*

25. *Id.* at 865. In a footnote, the court defined core speech as "that which contains '[i]deological expression' and is 'integrally related to the exposition of thought.'" *Id.* n.2 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 779 (1976) (Stewart, J., concurring)).

26. Traditionally, courts have not held publishers liable for the content of advertisements placed with them. *See, e.g.*, *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969).

A trial court in New York once held a newspaper liable for emotional distress damages to a woman whose home telephone number was published by mistake in a singles advertisement suggesting she was available for sexual purposes. *Blinick v. Long Island Daily Press Publishing Co.*, 67 Misc. 2d 254, 323 N.Y.S.2d 853 (N.Y. Civ. Ct. 1971). Higher courts in New York, however, in subsequent cases, repudiated the principle that publishers can be held liable for mistakes in their advertising. *See, e.g.*, *Vaill v. Oneida Dispatch Corp.*, 129 Misc. 2d 477, 493 N.Y.S.2d 414 (N.Y. Sup. Ct. 1985); *Pressler v. Dow Jones & Co.*, 88 A.D.2d 928, 450 N.Y.S.2d 884 (N.Y. App. Div. 1982); *see also Pittman v. Dow Jones & Co.*, 662 F. Supp. 921, 922 (E.D. La.), *aff'd*, 834 F.2d 1171 (5th Cir. 1987), for a discussion of the development of New York law on this point. Indeed, in several recent cases courts have addressed the issue of the scope of publishers' liability for negligent misrepresentation. *See First Equity Corp. of*

first examines the development of the tort of negligent misrepresentation. Next, it explores the similarities between the policy arguments used to hold accountants liable to third parties and the arguments that could be used to hold publishers liable for negligent misrepresentation. Finally, the Article examines the various first amendment concerns in applying this tort to the press. The Article shows that the arguments against holding publishers liable for such a tort are essentially the same arguments that have been made unsuccessfully against holding accountants liable for the same tort. First amendment concerns, of course, are much more significant in the case of publishers than in the case of accountants.²⁷ However, recent case law indicates that some types of negligent misrepresentation may not be constitutionally protected.²⁸ Thus, the press may be the next profession that falls prey to the ever-expanding scope of this tort.

II. DEVELOPMENT OF THE TORT OF NEGLIGENT MISREPRESENTATION

A. General Background

Any discussion of the development of the tort of negligent misrepresentation must begin with the 1889 English case of *Derry v. Peek*.²⁹ In *Derry*, the defendants, directors of a tramway corporation, indicated in a prospectus for stock subscriptions that the company had the right to use steam or mechanical power on their cars, instead of horses.³⁰ In fact, at the time the prospectus was issued the company did not have this right;

Florida v. Standard & Poor's Corp., 670 F. Supp. 115 (S.D.N.Y. 1987); *Pittman*, 662 F. Supp. 921; *Demuth Dev. Corp.*, 432 F. Supp. 990; *Gutter*, 22 Ohio St. 3d 286, 490 N.E.2d 898.

An Ohio appellate court, in *Gutter v. Dow Jones, Inc.*, No. 84AP-1029 (Ohio 10th App. Dist. May 16, 1985) (WESTLAW, Ohio library, Cases file), a decision later overturned by the Ohio Supreme Court, *Gutter*, 22 Ohio St. 3d 286, 490 N.E.2d 898, reversed and remanded a trial court's dismissal of a suit for negligent misrepresentation against Dow Jones, publisher of the *Wall Street Journal*. *Gutter*, No. 84AP-1029, slip op. at 7 (WESTLAW, Ohio library, Cases file at 8-9). The suit was brought by a reader who made an investment decision based on an incorrect stock quotation, resulting in a financial loss. *Id.* at 2 (WESTLAW, Ohio library, Cases file at 2). The *Wall Street Journal* incorrectly listed certain corporate bonds as trading with interest, while they were actually trading flat. The plaintiff, in reliance on the incorrect statement, purchased more than \$36,000 worth of the bonds. *Id.* When the *Wall Street Journal* corrected the erroneous information, the bonds' market value decreased, resulting in a loss to plaintiff of \$1,692.50. *Id.*

27. The first amendment, of course, protects freedom of speech and of the press; U.S. CONST. amend. I, thus it is a significant factor in the application of tort liability for negligent misrepresentation to publishers.

28. See *infra* notes 185-213 and accompanying text.

29. 14 App. Cas. 337 (1889).

30. *Id.* at 338.

rather, it was expecting soon to receive approval from the government authorities to use steam or mechanical power.³¹ The plaintiff purchased stock relying on the statement in the prospectus indicating that the company already had obtained approval.³² Eventually, government authorities disapproved the company's application, the value of the stock plummeted, and the plaintiff filed an action grounded in deceit.³³ Because there was no intent to mislead, and merely negligent misrepresentation, the English court refused to hold the defendants liable under the deceit theory.³⁴ For the next seventy-four years, English courts, because of dictum in the opinion, interpreted the ruling in *Derry* as denying any remedy for negligent misrepresentation that results merely in pecuniary loss.³⁵ Finally, in the 1963 case of *Hedley Byrne & Co. v. Heller & Partners Ltd.*,³⁶ the English courts reversed *Derry*, holding that recovery should be allowed in negligent misrepresentation cases where the plaintiff had a "special relationship" with the defendant.³⁷

In the United States, the ruling in *Derry* was not well received by either the courts or legal scholars.³⁸ The prevailing view of American courts, although they paid lip-service to *Derry*, was to permit a negligence action for negligent misrepresentation even where the only harm was a pecuniary loss.³⁹ Professor Jeremiah Smith produced one of the

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 343-80.

35. W. PROSSER, *supra* note 1, at 705. Prosser suggested that the English courts in fact misinterpreted *Derry*, and that the ruling only prohibited recovery on a deceit theory because there was no intent to misrepresent on the facts in that case. The suggestion Prosser makes is that had the plaintiff pursued the theory of negligent misrepresentation, rather than deceit, he might have won. Prosser, *supra* note 7, at 234.

Professor Smith makes a similar suggestion. See Smith, *Liability for Negligent Language*, 14 HARV. L. REV. 184, 185 (1900). For additional discussions of *Derry*, see Goodhart, *Liability for Innocent But Negligent Misrepresentations*, 74 YALE L.J. 286, 289 (1964); Shimomura, *supra* note 7, at 606-08.

36. 1964 App. Cas. 465 (1963).

37. *Id.* at 486. Special relationship involves some sort of trust relationship between the parties. See *infra* notes 47, 64 and accompanying text.

38. See *infra* notes 39-50 and accompanying text.

39. See W. PROSSER, *supra* note 1, at 705; Prosser, *supra* note 7, at 233-34; see also W. PROSSER & W. KEETON, *THE LAW OF TORTS* 740 (5th ed. 1984), where the position of American courts on *Derry* is described as follows:

The majority purport to accept [*Derry*] as sound law, but a great many of them have devised various more or less ingenious fictions and formulae which permit them to render lip service to *Derry v. Peek*, yet allow recovery in deceit for misrepresentations which fall short of actual intent to deceive. . . . [I]t is by no means clear that *Derry v. Peek* is supported by the weight of American authority.

Id.

earliest American scholarly works on the topic of negligent misrepresentation,⁴⁰ in which he charged that the widely adopted interpretation of *Derry* as prohibiting any action for negligent misrepresentation was simply erroneous.⁴¹ *Derry* should have been interpreted only as precluding the use of the legal theory of deceit in an action for negligent misrepresentation because of the absence of intent. If the plaintiff had pursued the case based on a negligence theory, Smith asserted, he might have been successful.⁴² Smith concluded that sound legal theory would allow a negligence action for negligent misrepresentation, even where the harm was a pecuniary loss.⁴³ If the elements traditionally required to prove negligence existed, then recovery should be allowed.

Other legal scholars of the early twentieth century supported Smith's position.⁴⁴ Professor Williston actually went further, suggesting that there should be liability even for innocent misrepresentation.⁴⁵ For Williston, the issue was, as between two innocent parties, even where the misrepresentation was neither intentional nor negligent, who should bear the loss?⁴⁶ He concluded that fairness dictated that the misrepresenter, however honestly motivated, should bear the loss.⁴⁷ In effect, Williston

40. Smith, *supra* note 35.

41. *Id.* at 185.

42. *Id.* at 185-86.

43. *Id.* at 194-95. Smith then specified the circumstances under which he would impose liability for negligent misrepresentation:

- (1) Defendant volunteered a statement to the plaintiff;
- (2) The statement was not in fact true;
- (3) Defendant, though believing the statement, had no reasonable ground for such belief;
- (4) Defendant made the statement with the intention that plaintiff should act on it;
- (5) The subject matter of the statement was such that one who acted in reliance upon it would be likely to incur substantial pecuniary loss in case the statement proved incorrect;
- (6) Plaintiff acted in reliance upon the statement, and such action and reliance on his part was reasonable; and
- (7) Plaintiff was damaged by so acting.

Id. at 195-96.

44. See, e.g., Carpenter, *Responsibility for Intentional, Negligent, and Innocent Misrepresentation*, 24 ILL. L. REV. 749 (1930); Williston, *Liability for Honest Misrepresentation*, 24 HARV. L. REV. 415, 437 (1911).

45. Williston, *supra* note 44.

46. *Id.* at 437.

47. *Id.* Williston's test for imposing liability is similar to Smith's, with the exception of the third element of Smith's formulation. See *supra* note 43. Compare Smith, *supra* note 35, and 184-95 with Williston, *supra* note 44, where Williston states:

If a man makes a statement in regard to a matter upon which his hearer may reasonably suppose he has the means of information, and that he is speaking with full knowledge, and the statement is made as a part of a business transaction, or to induce action from which the speaker expects to gain an advantage, he should be held liable for his misstatement.

Williston, *supra* note 44, at 437.

advocated absolute liability for misrepresentation.

Some early commentators suggested that *Derry* was a product of its economic times, where individualism reigned supreme.⁴⁸ However, as the needs of society changed, individualism gave way to more complex social and business methods, resulting in a need to expand the legal protection given to various societal interests.⁴⁹ Professor Weisiger, for example, argued that duties arise as societal and economic changes make it increasingly difficult for an individual to protect his own interests.⁵⁰ Thus, the limitations of liability for negligent misrepresentation change with the times.

The issue as it developed in this country, then, was not whether there should be liability for negligent misrepresentation, but where the limitations on that liability should be placed.⁵¹ The first significant American case to address the issue was *Glanzer v. Shepard*, a 1922 New York case.⁵² In *Glanzer*, the defendant contracted with a bean seller to weigh the beans and certify that weight to a third party, the purchaser.⁵³ The weight the defendant reported to the purchaser was incorrect, and the purchaser suffered pecuniary loss due to the inaccuracy.⁵⁴ The defendant was held liable to the third party for economic loss arising from negligent misrepresentation.⁵⁵ The court was willing to find liability because the defendant knew at the time the contract was entered into that a third party was to receive the benefit of the contract.⁵⁶ Hence, the court

48. See, e.g., Weisiger, *Bases of Liability for Misrepresentation*, 24 ILL. L. REV. 866, 874 (1930).

49. *Id.*

50. *Id.* at 875. Weisiger stated: "Duties arise as it becomes difficult or inexpedient for the plaintiff to protect his own interests, or when he may properly assume that they will not be invaded by the defendant's conduct. In this respect an interest grows in legal significance as individuals must depend more on each other." *Id.*; see also Note, *Torts: Deceit: Liability of accountant for negligent misrepresentations*, 16 CORNELL L.Q. 419 (1931), where the author asserts, "It may well be that in the future, under changed economic conditions, it will be desirable to extend the liability for negligent misrepresentations." *Id.* at 425.

51. See, e.g., Carpenter, *supra* note 44, at 756, where the author stated: "If the law is to adopt a principle of liability for negligent misrepresentation, it is clear that there must be some limitation."

52. 233 N.Y. 236, 135 N.E. 275 (1922). One commentator described the effect of this decision as follows: "The dictum in *Derry v. Peek* was swept aside without comment in *Glanzer v. Shepard* . . ." Note, *Limitations on the Action for Negligent Misrepresentation—The Ultramares Case*, 31 COLUM. L. REV. 858, 862 (1931). The *Glanzer* case has been discussed extensively in legal literature. See, e.g., Gossman, *IMC v. Butler: A Case for Expanded Professional Liability for Negligent Misrepresentation?*, 26 AM. BUS. L.J. 99, 102 (1988).

53. *Glanzer*, 233 N.Y. at 238, 135 N.E. at 275.

54. *Id.*

55. *Id.* at 241, 135 N.E. at 276.

56. *Id.* at 241, 135 N.E. at 277.

recognized that the defendant owed a duty not just to the party to the contract, the seller, but also to the known intended beneficiary of the contract.⁵⁷

The impact of the *Glanzer* decision, however, has been overshadowed by a 1931 decision issued by the same court, *Ultramares Corp. v. Touche*.⁵⁸ In *Ultramares*, the defendant-auditor, because of negligence in preparing an audit, inaccurately certified a company's balance sheet showing a net worth of over a million dollars. In fact, the company was in dire financial straits and had very little capital.⁵⁹ When it performed the audit and certified the balance sheet, the defendant-auditor knew that the company intended to circulate the certified balance sheet to various unidentified lenders as part of the company's loan application process.⁶⁰ The plaintiff, a bank, approved a loan for the company relying on the balance sheet, and subsequently lost the entire amount of the loan when the company filed for bankruptcy.⁶¹ Plaintiff then filed a negligent misrepresentation action against the auditor.⁶² The court, in refusing to hold the auditor liable for negligent misrepresentation to the party outside the contract, based its decision on a concern as to where liability to third parties should end.⁶³ The court determined that liability could extend only to third parties who were actually known and identified beneficiaries of the audit.⁶⁴ The court feared that to hold otherwise could "expose accountants to liability in an indeterminate amount for an indeterminate time to an indeterminate class."⁶⁵

Criticism of *Ultramares* began immediately.⁶⁶ Nevertheless, the

57. *Id.*

58. 255 N.Y. 170, 174 N.E. 441 (1931). Professors Prosser and Keeton describe *Ultramares* as "[t]he leading case on this entire subject . . ." W. PROSSER & W. KEETON, *supra* note 39, at 747.

59. *Ultramares*, 255 N.Y. at 174-75, 174 N.E. at 442.

60. *Id.* at 173-74, 174 N.E. at 442.

61. *Id.* at 175-76, 174 N.E. at 443.

62. *Id.* at 176, 174 N.E. at 443.

63. *Id.* at 185, 174 N.E. at 447.

64. *Id.*

65. *Id.* at 179, 174 N.E. at 444.

66. *See, e.g.*, Note, *supra* note 52, where the author argued:

The fact that the majority of businessmen place considerable reliance upon the certified public accountants certificate leads one to question the soundness of the decision rendered in [*Ultramares*]. Essentially the problem is one affecting mercantile custom and practice, and it is submitted that its treatment by the courts should be conditioned by such considerations. The refusal to extend protection to purely economic interests would appear to have been outmoded by the present day tendency toward establishing those interests on a par with those of bodily integrity.

Id. at 865; *see also* Note, *The Accountant's Liability—For What and To Whom*, 36 IOWA L. REV. 319 (1951), which stated:

It would seem to be grossly unjust, even ridiculous, to exonerate a firm whose sole

Ultramares rule dominated the law concerning third parties and negligent misrepresentation, regardless of the profession involved, until the 1960s.⁶⁷

B. Modern Developments

It was in the 1960s that English courts finally rejected the long-standing interpretation of *Derry* which denied any remedy for negligent misrepresentation resulting solely in pecuniary losses. In *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*,⁶⁸ the House of Lords held that recovery could be had for negligent misrepresentation where the only loss was pecuniary if a "special relationship" existed.⁶⁹ The House of Lords defined that special relationship as one

where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him.⁷⁰

American courts have used much the same approach in whittling away at *Ultramares*, thus expanding the scope of liability for negligent misrepresentation.⁷¹ In recent years members of the following professions have been held liable for negligent misrepresentation for mere pecuniary loss, even in the absence of privity: title abstract preparers,⁷²

purpose in preparing a balance sheet was to provide prospective investors with information which would be needed in order to render a considered judgement [sic] because too many people placed too much trust and confidence in the quality of their service. . . . A profession should not be permitted to reap the benefits of a position of trust and confidence without assuming the responsibilities which should rightfully accompany it.

Id. at 326-27.

Other commentators, however, approved of the *Ultramares* holding. See Keeton, *The Ambit of a Fraudulent Representor's Responsibility*, 17 TEX. L. REV. 1 (1938). Keeton noted that the courts limit liability, not necessarily because it is the fairest thing to the individuals concerned, but because limiting liability is most conducive to the overall "social advantage" and promotes "general economic progress." *Id.* at 2-3.

67. See Gossman, *supra* note 52, at 103.

68. 1964 App. Cas. 465 (1963).

69. *Id.* at 474, 486.

70. *Id.* For further discussion of the case, see Berns, *supra* note 7, at 127-28; Smillie, *supra* note 7, at 232. Professor Smillie argued that the extension of liability in the *Hedley Byrne* ruling should not be limited to negligent misrepresentation; instead, that case stands for the broader proposition that one who negligently performs a service resulting in an economic loss to a third party is liable where the "special relationship" of *Hedley Byrne* exists. *Id.* at 233.

71. See cases cited *supra* note 16.

72. See *supra* text accompanying note 16; see also Annotation, *Negligence in Preparing*

surveyors;⁷³ soil engineers;⁷⁴ architects;⁷⁵ and attorneys.⁷⁶

However, the scope of accountants' liability has been expanded the most dramatically. A number of courts have expanded the scope of accountants' liability for negligent misrepresentation to allow recovery by classes of persons that are *actually known* to be foreseeable users of the information.⁷⁷ The Restatement (Second) of Torts adopted this approach in section 552.⁷⁸

The Restatement approach was first applied to accountants in a 1968 case, *Rusch Factors, Inc. v. Levin*.⁷⁹ In *Rusch*, a Rhode Island corporation sought financing from the plaintiff. Before the plaintiff would grant the financing, it requested a review of the corporation's certified financial statements.⁸⁰ The defendant, Levin, was the accountant who prepared the financial statements certifying that the corporation was solvent, when, in fact, it was insolvent.⁸¹ The plaintiff relied on the certified financial statements in granting a \$337,000 loan. Soon after, the corpora-

Abstract of Title as Ground of Liability to One Other Than Person Ordering Abstract, 50 A.L.R. 4TH 314 (1986).

73. See *supra* text accompanying note 16; see also Annotation, *Surveyor's Liability For Mistake In, Or Misrepresentation As To Accuracy Of, Survey Of Real Property*, 35 A.L.R. 3D 504 (1971).

74. See *supra* text accompanying note 16.

75. See *supra* text accompanying note 16.

76. See *supra* text accompanying note 16.

77. An actually known foreseeable user is distinguishable from a merely foreseeable user. One actually knows a foreseeable user where one does not know the specific identity of the third party, but does actually know that a limited group might be relying on the report. For example, the auditor does not know which specific bank will be relying on an audited statement, but he does know that some bank will be relying on it. A foreseeable user, however, could be any third party that the auditor, if he thought about it, might reasonably foresee as relying on the report. Obviously, the latter is a much broader category.

78. RESTATEMENT (SECOND) OF TORTS § 552 (1977). This section provides that:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Id.

79. 284 F. Supp. 85 (D.R.I. 1968) (applying Rhode Island law).

80. *Id.* at 86.

81. *Id.*

tion went into receivership, leaving the loan unpaid.⁸² In its decision, the court distinguished the *Rusch* case from *Ultramares*. The court noted that the plaintiff in *Ultramares* was a member of "an undefined, unlimited class of remote lenders and potential equity holders, not actually foreseen, but only foreseeable."⁸³ In contrast, the plaintiff in *Rusch* was "a single party whose reliance was actually foreseen by the defendant."⁸⁴ Although the holding suggested that, if faced with a situation similar to that in *Ultramares*, the court may have arrived at a decision in line with *Ultramares*, the *Rusch* case was interpreted as greatly expanding accountants' liability. *Rusch* thus spawned a whole series of cases that have effectuated such an expansion in a number of other jurisdictions.⁸⁵

Today, most American jurisdictions follow either the *Ultramares* approach⁸⁶ or the Restatement approach regarding accountants' liability.⁸⁷ A few jurisdictions, however, have adopted a third approach: Negligent misrepresenters can be liable to any party who might reasonably be a foreseeable user of the information, so long as the user received the statements from the defendant for business purposes.⁸⁸ Under this third approach, potential liability for negligent misrepresentation is greatly expanded, almost to the point of being unlimited.⁸⁹ Whether publishers eventually will be included within the expanding scope of liability for negligent misrepresentation is an issue still to be resolved. A comparison of the development of this tort as it has been applied to public accountants with how it might be applied to the publishing business portends application of liability to publishers.

82. *Id.* at 86-87.

83. *Id.* at 91 (citing *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931)).

84. *Id.*

85. See, e.g., *Ryan v. Kanne*, 170 N.W.2d 395 (Iowa 1969); *Aluma Kraft Mfg. v. Fox & Co.*, 493 S.W.2d 378 (Mo. 1973); *Haddon View Inv. Co. v. Coopers & Lybrand*, 70 Ohio St. 2d 154, 436 N.E.2d 212 (1982); *Shatterproof Glass Corp. v. James*, 466 S.W.2d 873 (Tex. Civ. App. 1971).

86. New York courts have continued to follow *Ultramares*. See, e.g., *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 483 N.E.2d 110, 493 N.Y.S.2d 435 (1985). For other jurisdictions that still follow *Ultramares*, see *Toro Co. v. Krouse Kern & Co.*, 827 F.2d 155 (7th Cir. 1987); *Stephens Indus. v. Haskins & Sells*, 438 F.2d 357 (10th Cir. 1971); *Canaveral Capital Corp. v. Bruce*, 214 So. 2d 505 (Fla. Dist. Ct. App. 1968).

87. See Gossman, *supra* note 52, at 103.

88. New Jersey was the first jurisdiction to adopt this standard. See *Rosenblum, Inc. v. Adler*, 93 N.J. 324, 461 A.2d 138 (1983). Wisconsin quickly followed *Rosenblum* in *Citizens State Bank v. Timm, Schmidt & Co.*, 113 Wis. 2d 376, 335 N.W.2d 361 (1983). Since then, a California appellate court adopted this approach in *International Mortgage Co. v. John P. Butler Accountancy Corp.*, 177 Cal. App. 3d 806, 223 Cal. Rptr. 218 (1986), as did Mississippi in *Touche Ross v. Commercial Union Ins. Co.*, 514 So. 2d 315 (Miss. 1987).

89. For a discussion of the expanding scope of liability for negligent misrepresentation, see Comment, *supra* note 7; Note, *supra* note 7.

III. A COMPARISON: POLICY ARGUMENTS REGARDING ACCOUNTANTS AND NEWSPAPERS AND THEIR LIABILITY FOR NEGLIGENT MISREPRESENTATION

The basic policy of where to draw the line for accountants' liability for economic loss arising from negligent misrepresentation has revolved around how far to extend the scope of financial liability, in terms of numbers of plaintiffs. Should it be extended to just an immediate, known party or to any reasonably foreseeable user of the information? The policy concern with respect to publisher liability for negligent misrepresentation, setting aside first amendment considerations for the moment, is similar: How far should the scope of financial liability extend? In attempting to predict how courts will treat the publisher liability issue it is useful to examine the three approaches that are currently followed in American jurisdictions regarding accountants' liability,⁹⁰ then comparing how the policy concerns of each approach would apply to publisher liability.

A. *Ultramares: The Traditional Approach*

For three decades, the *Ultramares Corp. v. Touche*⁹¹ approach dominated the scope of liability for negligent misrepresentation in this country.⁹² Judge Cardozo's policy concern in adopting the *Ultramares* holding—that one is liable for negligent misrepresentation only to those with whom one is in privity or to third parties actually known to be the beneficiary of the representations—was to protect professionals from financial ruin due to indeterminate liability to an indeterminate class, as such liability would impede the free flow of commerce.⁹³ More recently, a New York court, in *Credit Alliance Corp. v. Arthur Andersen & Co.*,⁹⁴ reaffirmed its commitment to the *Ultramares* approach, citing the same

90. See *supra* notes 68-88 and accompanying text.

91. 255 N.Y. 170, 174 N.E. 441 (1931).

92. See Gossman, *supra* note 52, at 102-03.

93. Judge Cardozo expressed this concern as follows:

Liability for negligence if adjudged in this case will extend to many callings other than an auditor's. Lawyers who certify their opinion as to the validity of municipal or corporate bonds, with knowledge that the opinion will be brought to the notice of the public, will become liable to the investors Title companies insuring titles to a tract of land, . . . will become liable to purchasers who may wish the benefit of a policy without payment of a premium.

Ultramares, 255 N.Y. at 188, 174 N.E. at 448.

94. 65 N.Y.2d 536, 483 N.E.2d 110, 493 N.Y.S.2d 435 (1985). The New York court specifically noted that its holding was "intended to preserve the wisdom and policy set forth" in the *Ultramares* decision. *Id.* at 551, 483 N.E.2d at 118, 493 N.Y.S.2d at 443 (citing *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931)); see also *New Castle Siding Co. v. Wolfson*, 63 N.Y.2d 782, 470 N.E.2d 868, 481 N.Y.S.2d 70 (1984); *White v. Guarente*, 43

policy concern—unlimited liability to an unlimited number of parties—as cited by Judge Cardozo fifty-four years earlier.⁹⁵

Jurisdictions following the *Ultramares* approach obviously will not extend the scope of negligent misrepresentation to hold publishers liable to their readers for printing errors.⁹⁶ In fact, in several recent decisions concerning the issue of publisher liability for negligence, courts have refused to hold publishers liable based on the same policy argument used in *Ultramares*—indeterminate liability to an indeterminate number of people would financially destroy publishers.⁹⁷ For example, in *First Equity Corp. of Florida v. Standard & Poor's Corp.*,⁹⁸ a New York federal district court, refused to impose liability on Standard & Poor's for a negligent factual misstatement in its publication *Corporation Records*.⁹⁹ *Corporation Records*, a service published semimonthly by Standard & Poor's and provided primarily to specific subscribers, contains bond-rating definitions, stock offerings, bond offerings, and other information about leading corporations.¹⁰⁰ One of the subscribers, First Equity, an investment banking firm, relied on erroneous information contained in *Corporation Records* in making an investment decision.¹⁰¹ Subsequently, First Equity suffered a financial loss due to this reliance.¹⁰² The court refused to impose liability, primarily because "the potential number of persons to whom a publication might become available is without limit."¹⁰³

In 1985, an Illinois court took a similar position in *Alm v. Van Nostrand Reinhold Co.*¹⁰⁴ In *Alm*, the plaintiff purchased a "How To" book on the making of tools, published by the defendant.¹⁰⁵ Although the plaintiff followed the instructions in the book, he was injured when a tool made according to the book's instructions shattered.¹⁰⁶ The court refused to impose liability for negligent misrepresentation primarily be-

N.Y.2d 356, 372 N.E.2d 315, 401 N.Y.S.2d 474 (1977); *Dworman v. Lee*, 83 A.D.2d 507, 441 N.Y.S.2d 90, *aff'd*, 56 N.Y.2d 816, 438 N.E.2d 103, 452 N.Y.S.2d 570 (1982).

95. See *supra* notes 83, 93 and accompanying text.

96. *Ultramares*, 255 N.Y. at 185, 174 N.E. at 446-47. Indeed, in the *Ultramares* decision, in an effort to illustrate the absurdity of making accountants liable to third parties for negligent misrepresentation, Judge Cardozo stated that if such liability were found it would be only a short step "to the declaration of a like liability on the part of proprietors of newspapers." *Id.*

97. *Id.* at 179, 174 N.E. at 444.

98. 670 F. Supp. 115 (S.D.N.Y. 1987).

99. *Id.* at 118.

100. *Id.* at 116.

101. *Id.*

102. *Id.*

103. *Id.* at 117.

104. 134 Ill. App. 3d 716, 480 N.E.2d 1263 (1985).

105. *Id.* at 717, 480 N.E.2d at 1264.

106. *Id.*

cause of the "undeterminable number of potential readers" to whom the liability would extend.¹⁰⁷

Thus, jurisdictions following *Ultramares* have not and likely will not, extend liability for negligent misrepresentation to publishers.¹⁰⁸ However, for those jurisdictions following the Restatement approach and the foreseeable user approach, the step could indeed be a short one, easily taken.

B. Restatement Approach

The Restatement approach¹⁰⁹ to holding accountants liable for negligent misrepresentation to third parties was first adopted judicially in an Iowa Supreme Court case, *Ryan v. Kanne*.¹¹⁰ In *Ryan*, the accountants knew they had been employed to prepare a balance sheet for a company for use by potential but not specifically identified lenders.¹¹¹ Due to the accountants' negligence, the balance sheet showed the company to be solvent, when actually it was not.¹¹² The court, in rejecting the *Ultramares* approach and its "social utility rationale," reiterated the long-standing principle of tort law "that the risk reasonably to be perceived defines the duty to be obeyed."¹¹³ The court then embraced the Restatement approach in holding that accountants would be liable to third parties, whether or not specifically identified, whom the accountants knew would be relying on financial statements prepared by them.¹¹⁴

Other jurisdictions have followed Iowa in adopting the Restatement

107. *Id.* at 721, 480 N.E.2d at 1267; see also *Yuhas v. Mudge*, 129 N.J. Super. 207, 322 A.2d 824 (1974).

108. See *supra* text accompanying notes 91-107.

109. See *supra* notes 78-85 and accompanying text.

110. 170 N.W.2d 395 (Iowa 1969). A year earlier, a Rhode Island district court, in a diversity case in which it applied Rhode Island law, held that *Ultramares* would not preclude the court from imposing liability on an accountant to a single third party "whose reliance was actually foreseen by the defendant." *Rusch Factors, Inc. v. Levin*, 284 F. Supp. 85, 91-93 (D.R.I. 1968). The court in *Rusch* questioned the wisdom of the *Ultramares* decision:

Why should an innocent reliant party be forced to carry the weighty burden of an accountant's professional malpractice? Isn't the risk of loss more easily distributed and fairly spread by imposing it on the accounting profession, which can pass the cost of insuring against the risk onto its customers, who can in turn pass the cost onto the entire consuming public? Finally, wouldn't a rule of foreseeability elevate the cautionary techniques of the accounting profession?

Id. at 91 (citing *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931)).

111. *Ryan*, 170 N.W.2d at 399.

112. The balance sheet showed the company's net worth to be \$44,424.82, when in fact the company was insolvent and had a deficit of \$5,443.34. *Id.* at 401.

113. *Id.*

114. *Id.*

approach.¹¹⁵ Ohio adopted this approach in *Haddon View Investment Co. v. Coopers & Lybrand*.¹¹⁶ The Ohio court rejected the *Ultramares* approach as no longer being consistent with modern business realities. The court reasoned that, in today's business world, accountants expect that their reports routinely will be relied upon by third parties.¹¹⁷ Thus, their duty should extend "to any third person to whom they understand the reports will be shown for business purposes."¹¹⁸

Moreover, *Haddon View Investment Co.* is significant because it formed the basis for *Gutter v. Dow Jones, Inc.*,¹¹⁹ a decision issued by the Ohio Court of Appeals holding that a publisher of a general circulation newspaper could be held liable for pecuniary loss resulting from negligent misrepresentations in its financial pages.¹²⁰ Although later overruled on this point by the Ohio Supreme Court,¹²¹ *Gutter* is an example of how Restatement section 552 can be applied to publishers.

In *Gutter*, the court explained how Dow Jones, publisher of the *Wall Street Journal*, could be held liable under Restatement section 552 to a subscriber of the *Journal* for incorrectly reporting the trading status of a stock.¹²² In reliance on the incorrect report, the subscriber had suffered a financial loss.¹²³ The court reasoned that if certain circumstances were present, section 552 would be as applicable to newspapers as it was to accountants. First, the plaintiff must prove negligence by the newspaper.¹²⁴ Second, the plaintiff must show that the erroneous information "was published for the specific benefit and guidance of a limited group of subscribers with the knowledge or intention that it could influence and be relied upon by that limited class in making investments."¹²⁵ Third, a plaintiff would have to prove that he was a member of that limited group of subscribers who reasonably relied on the information.¹²⁶ Finally, the plaintiff must show economic loss as a result of the reliance.¹²⁷

The first requirement, proving negligence, and the fourth require-

115. See cases cited *supra* note 85.

116. 70 Ohio St. 2d 154, 436 N.E.2d 212 (1982).

117. *Id.* at 157, 436 N.E.2d at 215.

118. *Id.*

119. No. 84AP-1029 slip op. (Ohio 10th App. Dist. May 16, 1985) (WESTLAW, Ohio library, Cases file), *rev'd*, 22 Ohio St. 3d 286, 490 N.E.2d 898 (1986).

120. *Id.* at 4 (WESTLAW, Ohio library, Cases file at 4-5).

121. 22 Ohio St. 3d at 291, 490 N.E. at 902.

122. *Gutter*, No. 84AP-1029, slip op. at 4 (WESTLAW Ohio library, Cases file at 4-5).

123. *Id.* at 2 (WESTLAW, Ohio library, Cases file at 2).

124. *Id.* at 4 (WESTLAW, Ohio library, Cases file at 4).

125. *Id.*

126. *Id.*

127. *Id.*

ment, proving economic loss, are relatively straightforward.¹²⁸ The second and third requirements are most likely to evoke controversy in the case of publisher liability. With respect to the second requirement—that the erroneous information was published for a specific group with the intent or knowledge it will influence decisions¹²⁹—courts have generally viewed dissemination of facts in newspapers as being for informational purposes only, and not for purposes of guiding a specific group of subscribers in making economic decisions.¹³⁰ Regarding the third requirement—that the plaintiff was a member of a limited group of subscribers who reasonably relied on the information¹³¹—courts have generally taken the position that people have not acted reasonably if they relied exclusively on newspaper reports in making economic decisions.¹³²

Thus, it appears that it would indeed be difficult for a plaintiff to prove the second and third requirements set forth for publisher liability by the Ohio appellate court in *Gutter*.¹³³ The difficulty of proving the second and third elements in itself is a limiting factor likely to preclude publishers from potential liability to the entire universe of its readers.

128. See *supra* notes 124 and 127 and accompanying text.

129. See *supra* note 125 and accompanying text.

130. See, e.g., *Pittman v. Dow Jones & Co.*, 662 F. Supp. 921, 922 (E.D. La.) (newspaper publisher unaware of false information in advertisements not liable for their falsity), *aff'd*, 834 F.2d 1171 (5th Cir. 1987); *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990 (E.D.N.Y. 1977) (encyclopedia publisher not liable for misstating toxicity of a drug); *Yuhas v. Mudge*, 129 N.J. Super. 207, 322 A.2d 824 (1974) (newspaper not liable for advertisement of a defective product); *Rubinstein v. New York Post Corp.*, 128 Misc. 2d 1, 488 N.Y.S.2d 331 (1985) (newspaper not liable for publication of obituary for person not deceased).

131. See *supra* note 126 and accompanying text.

132. See, e.g., *Samuel Sheitelman, Inc. v. Hoffman*, 106 N.J. Super. 353, 255 A.2d 807 (1969). The court there stated, "Generally, there is no legal obligation on a newspaper reporter to give such an accurate account of the subject upon which he reports as would vouch for its truthfulness." *Id.* at 355, 225 A.2d at 809; see also *Carpenter*, *supra* note 44, who foresaw this issue decades ago:

How far shall we go in imposing liability? Suppose a newspaper publishes an inaccurate statement carelessly in its news columns. Should the paper be liable to one who was misled into action by relying upon such statement to his damage? These statements it is well known are not made to induce action, but merely as news hastily gathered and under circumstances where it would be impossible in most instances to verify their truth. Reliance upon such a statement would ordinarily constitute contributory negligence on the part of the plaintiff.

Id. at 758.

However, *Carpenter* did argue that a better case for plaintiffs would be one where an inaccurate advertisement was carelessly published:

It would seem that there is a better basis for liability in the advertising case. The advertisement is put out as a part of the paper's business to induce reliance on the part of readers, and the readers should not be considered guilty of contributory negligence for relying upon the statement.

Id.

133. See *supra* notes 125-126 and accompanying text.

However, if a plaintiff can prove the second and third elements, why should a publisher (first amendment considerations aside) be held to a different standard than an accountant or any other professional?

In *First Equity Corp. of Florida v. Standard & Poor's Corp.*,¹³⁴ the issue was whether the publisher should be held liable for a negligently published error in *Corporation Records*.¹³⁵ The annual subscription rate for *Corporation Records* in April 1988 exceeded \$1,340.¹³⁶ Such a rate indicates that *Corporation Records* is a markedly different type of publication than the corner newspaper, which is produced every twenty-four hours under heavy deadline pressure, and is purchased by the ordinary individual for a nominal amount at the local newspaper stand. *Corporation Records* is a publication purchased principally by a specific and known group of users, such as the investment banking firm-plaintiff in *First Equity*, in the regular course of their business to make investment decisions and advise clients. Moreover, Standard & Poor's, the publisher of *Corporation Records*, certainly foresees reliance by its subscribers in making such decisions and giving such advice. If accountants are to be held liable to a class of known users for the information contained in their reports that they should reasonably expect will be relied on by some third parties, why should not a publisher, like Standard & Poor's, be held liable if similar circumstances prevail?

Jurisdictions that follow the Restatement approach for accountants' liability¹³⁷ could very well begin applying the same approach to publishers' liability. The policy reason behind adopting the Restatement approach has been the classic tort principle, "[t]he risk reasonably to be perceived defines the duty to be obeyed."¹³⁸ This same principle applies to publications like *Corporation Records*. Standard & Poor's reasonably should perceive that its subscribers will rely on and be influenced by the financial information contained in *Corporation Records*, and that if that information is in error, a financial loss could be suffered.

In addition, parties such as the plaintiff in *First Equity* are likely to prevail on the issue of whether they are a limited group of subscribers whose reliance was reasonable. Subscribers to publications like *Corporation Records*, which are targeted toward a specific and limited readership to be used for a specific purpose and are prepared by an agency that

134. 670 F. Supp. 115 (S.D.N.Y. 1987). See *supra* notes 98-103 and accompanying text for a discussion of the case.

135. *First Equity*, 670 F. Supp. at 116.

136. The actual subscription rate was \$1341. *Id.* n.1.

137. See *supra* note 85.

138. *Ryan*, 170 N.W.2d at 401 (citing *Rusch Factors, Inc. v. Levin*, 284 F. Supp. 85 (1968)).

reputedly has expertise in the market of financial information, should be able to rely on the accuracy of the publications' contents.

Arguments for reliance on newspapers, however, are less compelling. Publications such as *Corporation Records* are, for the most part, read only by a very specific group. In contrast, the *Wall Street Journal*, the publication at issue in *Gutter*, while probably not read by the average person on the street, is read by a much larger and more diverse group of people. Thus, most courts following the Restatement approach may be reluctant to find the second *Gutter* requirement—that the plaintiff was a member of a limited group of subscribers for whose specific benefit and guidance the information was published¹³⁹—met in cases involving newspapers of general circulation.

In addition, the reasonableness of relying on a stock quotation printed in a newspaper of general circulation is certainly more questionable than is the reasonableness of relying on a service such as *Corporation Records*. Even the appellate court in *Gutter* indicated that if Dow Jones, the publisher of the *Wall Street Journal*, could prove that it “merely published a newspaper which reported financial news for informational purposes” then there would be no liability. The court noted that “a newspaper is not liable to either subscribers or the general public for publishing incorrect information.”¹⁴⁰ The *Gutter* court merely held that a plaintiff should be given an opportunity to prove that the conditions set forth in Restatement section 552 exist.¹⁴¹ The court offered no opinion as to whether the plaintiff would prevail if the case were presented to the trier of fact.

Due to the difficulty of proving reasonable reliance, it is unlikely that the average newspaper could be held liable for negligent misrepresentation for printing erroneous facts under the Restatement standard. However, the Ohio Supreme Court, in overruling the appellate court in *Gutter*, determined that a plaintiff should not be given the opportunity to prove the existence of the section 552 criteria because newspapers could not be held liable for mere negligence, regardless of the circumstances.¹⁴² The court offered two reasons for its ruling. First, under the circumstances of the case, the section 552 criteria could never be established since a typical newspaper reader “does not fall within a special limited class (or group) of foreseeable persons” required by the Restatement, and

139. *Gutter*, 84AP-1029, slip op. at 4 (WESTLAW, Ohio library, Cases file at 4). See *supra* note 125 and accompanying text.

140. *Id.* (WESTLAW, Ohio library, Cases file at 5).

141. *Id.* See *supra* note 78 and accompanying text.

142. *Gutter*, 22 Ohio St. 3d at 289, 490 N.E.2d at 900-01.

a newspaper reader's reliance on a newspaper, without additional verification, could not be justifiable as a matter of law.¹⁴³ Second, first amendment concerns demanded that the court refuse to apply the tort of negligent misrepresentation to newspapers. The court feared that applying the tort to newspapers would have a chilling effect on expression that would be constitutionally unacceptable.¹⁴⁴

Setting aside first amendment concerns, the Ohio Supreme Court's reasoning with respect to section 552 does not preclude applying negligent misrepresentation to publications like *Corporation Records*. As discussed previously, subscribers to such a publication are a special, limited class of foreseeable persons who may reasonably rely on the accuracy of the information contained in that publication.¹⁴⁵ Thus, even under the Ohio Supreme Court's reasoning, section 552 does apply to specialized publications like *Corporation Records*.¹⁴⁶

As the above discussion illustrates, courts following the Restatement approach to accountants' liability could easily apply the same approach to a limited group of publications that cater to a specific readership, while not going to the extreme of applying liability to general publications. Those jurisdictions that follow the foreseeable user approach, however, might just take both of these steps.

C. Foreseeable User Approach

The foreseeable user standard holds accountants liable to any reasonably foreseeable user of the information who received it for a proper business purpose. The standard was first adopted by the New Jersey Supreme Court in *H. Rosenblum, Inc. v. Adler*.¹⁴⁷ Just three weeks later the Wisconsin Supreme Court adopted a similar rule in *Citizens State Bank v. Timm, Schmidt & Co.*¹⁴⁸ Later, the Mississippi Supreme Court, in *Touche Ross & Co. v. Commercial Union Insurance Co.*,¹⁴⁹ and a California appellate court, in *International Mortgage Co. v. John P. Butler Accountancy Corp.*,¹⁵⁰ adopted the same rule. These courts acknowledge that adopting the foreseeable user rule does, indeed, open up the possibil-

143. *Id.* at 289, 490 N.E.2d at 900.

144. *Id.*, 490 N.E.2d at 901.

145. See *supra* text accompanying notes 38-39.

146. See *infra* notes 172-220 and accompanying text for a discussion of first amendment concerns regarding publisher liability for negligent misrepresentation.

147. 93 N.J. 324, 461 A.2d 138 (1983).

148. 113 Wis. 2d 376, 335 N.W.2d 361 (1983).

149. 514 So. 2d 315 (Miss. 1987).

150. 177 Cal. App. 3d 806, 223 Cal. Rptr. 218 (1986). For a discussion of this case, see Gossman, *supra* note 52, at 99-100, 112-22.

ity of liability to the entire world.¹⁵¹ Nevertheless, they have justified their approach with public policy arguments.¹⁵² An analysis of these reasons indicates that these courts could handily apply the same rationale to publisher liability.

First, the foreseeable user approach was adopted out of considerations of basic fairness. The courts adopting this approach reasoned that imposing duties of reasonable care creates liability for all foreseeable consequences, and that this liability should be applied uniformly, with an exception only when a strong public policy reason dictates otherwise.¹⁵³ Moreover, fairness dictates that because other professionals are now held liable to foreseeable third parties, accountants should be held to the same standard.¹⁵⁴ Public policy demands that innocent parties who were foreseeable users of information should be compensated for losses suffered due to their reasonable reliance on negligently prepared information.¹⁵⁵

Courts adopting the foreseeable user approach also have taken the position that there is no logical reason to distinguish between a foreseen user (the Restatement approach) and a foreseeable user.¹⁵⁶ The foreseen user does not pay for the audit report any more than the foreseeable user does, so why should the foreseen user be protected by a greater duty on the part of the auditor?¹⁵⁷

Moreover, courts adopting this approach assert that imposing a duty to all foreseeable users would encourage greater care.¹⁵⁸ Further, the financial impact of this expanded duty of care would be spread to all

151. See *infra* notes 153-165 and accompanying text.

152. See *infra* notes 153-165 and accompanying text.

153. See *International Mortgage Co.*, 177 Cal. App. 3d at 820, 223 Cal. Rptr. at 227 ("An innocent plaintiff who foreseeably relies on an independent auditor's unqualified financial statement should not be made to bear the burden of the professional's malpractice."); *Rosenblum*, 93 N.J. at 341, 461 A.2d at 147 ("Whether a *duty* exists is ultimately a question of fairness.") (emphasis original) (quoting *Goldberg v. Housing Auth. of Newark*, 38 N.J. 578, 583, 186 A.2d 291, 293 (1962)); *Citizens State Bank*, 113 Wis. 2d at 386, 335 N.W.2d at 366 ("The fundamental principle of Wisconsin negligence law is that a tortfeasor is fully liable for all foreseeable consequences of his act except as those consequences are limited by policy factors . . . [thus] accountants' liability to third parties should be determined under the accepted principles of Wisconsin negligence law. According to these principles, a finding of non-liability will be made only if there is a strong public policy requiring such a finding.").

154. *International Mortgage Corp.*, 177 Cal. App. 3d at 812, 818-19, 223 Cal. Rptr. at 221, 226.

155. *Id.* at 818-19, 223 Cal. Rptr. at 226-27.

156. See, e.g., *Touche Ross*, 514 So. 2d at 321 (citing Comment, *The Enlarging Scope of Auditors' Liability to Relying Third Parties*, 59 NOTRE DAME L. REV. 281, 287 (1983)).

157. *Id.*

158. See *International Mortgage Corp.*, 177 Cal. App. 3d at 820, 223 Cal. Rptr. at 227; *Rosenblum*, 93 N.J. at 350, 461 A.2d at 152; *Citizens State Bank*, 113 Wis. 2d at 384, 335 N.W.2d at 365.

customers of the auditor through increased charges for services to cover the cost of malpractice insurance premiums.¹⁵⁹

Finally, these courts have analogized an accountant's duties to foreseeable users with those duties of a product manufacturer.¹⁶⁰ In response to the argument that adopting the foreseeable user standard will expose accountants to potentially unlimited financial liability, the courts adopting the foreseeable user approach have noted that such protectionist concerns were given up long ago with respect to product manufacturers.¹⁶¹ Further, the reason strict liability has been imposed on manufacturers of products applies with equal force to accountants.¹⁶² When manufacturers send their goods into the stream of commerce in a quest for profit, they assume a responsibility to the public.¹⁶³ Public policy demands that when products cause injuries, even if no negligence occurred, the innocent victim is entitled to compensation for those injuries.¹⁶⁴ The proper parties to provide that compensation are the manufacturers and marketers of the product. The cost of the liability insurance to cover injuries can be treated as a cost of production, ultimately paid for by all consumers of the product.¹⁶⁵ Similarly, when accountants, in their quest for profit, send information into the marketplace, they assume a responsibility to foreseeable users.

This "foreseeable user" approach to accountants' liability could easily be extended to publishers' liability. Other than first amendment con-

159. *International Mortgage Corp.*, 177 Cal. App. 3d at 820, 223 Cal. Rptr. at 227; *Rosenblum*, 93 N.J. at 350, 461 A.2d at 151; *Citizens State Bank*, 113 Wis. 2d at 384, 335 N.W.2d at 365.

160. *See Rosenblum*, 93 N.J. at 341, 461 A.2d at 147, where the court stated:

Why should a claim of negligent misrepresentation be barred in the absence of privity when no such limit is imposed where the plaintiff's claim also sounds in tort, but is based on liability for defects in products arising out of a negligent misrepresentation? If recovery for defective products may include economic loss, why should such loss not be compensable if caused by negligent misrepresentation? The maker of the product and the person making a written representation with intent that it be relied upon are, respectively, impliedly holding out that the product is reasonably fit, suitable and safe and that the representation is reasonably sufficient, suitable and accurate.

Id.; *see also International Mortgage Corp.*, 177 Cal. App. 3d at 812, 223 Cal. Rptr. at 221.

161. *See, e.g., International Mortgage Corp.*, 177 Cal. App. 3d at 812, 223 Cal. Rptr. at 221 (citing *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916)), where the court noted: "Interestingly, Justice Cardozo had no . . . protectionist concerns for manufacturers."

162. The strict liability standard for manufacturers is reflected in RESTATEMENT, *supra* note 78, § 402A.

163. *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

164. *Id.*

165. RESTATEMENT, *supra* note 78, at comment c. *See Greenman*, 59 Cal. 2d. 57, 377 P.2d 897, 27 Cal. Rptr. 697, where strict liability for defective products was initially adopted as an independent tort.

cerns, the major justification asserted by the courts for refusing to hold publishers liable for negligent misrepresentation has been the draconian financial ramifications of such liability.¹⁶⁶ However, publishers, just as do manufacturers of products, can obtain liability insurance.¹⁶⁷ The cost of such insurance can be included in production costs and built into the price of the publication, thus spreading the cost to all consumers.

Furthermore, the fairness arguments are just as compelling for readers of publications as for users of products. As between the innocent reader of a publication who relies on erroneous information, thereby suffering a financial loss, and the negligent publisher of the information, the negligent party should be held liable. This argument is particularly appealing when considering the facts in *Gutter v. Dow Jones, Inc.*¹⁶⁸ The *Wall Street Journal* negligently printed an erroneous stock quotation. Relying on the erroneous information, Gutter made an investment decision and suffered an economic loss as a result.¹⁶⁹ The *Wall Street Journal* bills itself as the journal to read to keep informed of all important business news.¹⁷⁰ Every issue contains extensive stock market quotations. Presumably, the publisher, Dow Jones, prints the *Journal* because it makes a profit from doing so. The producer of a product which is a source of financial news should not receive any greater protection from its negligence than the producer of any other product.

Continuing the analogy between product liability and publisher liability for negligent misrepresentation, contributory negligence is not a defense to a product liability action.¹⁷¹ Similarly, the reader of erroneous information should be able to rely on that information without proving that he was reasonable in doing so, so long as he had no reason to suspect its lack of accuracy. If one overcomes the reliance issue, then even daily publications like the *Wall Street Journal* could be made liable for negligent misrepresentation. Extending liability for negligent misrepresentation to publishers would be a small step indeed for those courts that have adopted the foreseeable user standard for accountants.

166. See, e.g., *Ultramares*, 255 N.Y. at 179-80, 174 N.E. at 444.

167. See Spellman, *Avoiding the Chilling Effect: News Media Tort and First Amendment Insurance*, 7 COMM. & LAW 13 (1985), for a discussion of recent developments in liability insurance for publishers.

168. 22 Ohio St. 3d 286, 490 N.E.2d 898 (1986). See *supra* notes 119-144 and accompanying text for a discussion of *Gutter*.

169. *Gutter*, 22 Ohio St. 3d at 286-87, 490 N.E.2d at 899.

170. The Educational Edition of the *Wall Street Journal* bills itself as a "concise digest of the most important business news of the day. Everyday. It has to be. More than four million readers count on the *Journal* to keep them informed." Educational Edition of the *Wall Street Journal*, 1987-88, at 2, col. 1.

171. See W. PROSSER, *supra* note 1, at 711-12.

IV. FIRST AMENDMENT CONSIDERATIONS

The judicial decisions protecting publishers from the tort of negligent misrepresentation have relied heavily on the proposition that the first amendment protects publishers from the scope of the tort.¹⁷² An analysis of recent first amendment cases, however, illustrates that in some instances such reliance may be misplaced, and that the trend may be moving toward reducing the degree of first amendment protection for publisher liability for negligence in the reporting of mere factual information.¹⁷³

The question that must be dealt with on the issue of publisher liability for negligent misrepresentation is: What precisely does the first amendment protect? The Supreme Court's first amendment cases speak of protection for "free political discussion,"¹⁷⁴ the "unfettered interchange of ideas,"¹⁷⁵ and an "uninhibited marketplace of ideas."¹⁷⁶ The free flow of ideas and thoughts, then, is what is protected.¹⁷⁷ As the United States Supreme Court stated in *New York Times Co. v. Sullivan*,¹⁷⁸ the United States has "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"¹⁷⁹

Through the years, the Supreme Court has approved certain restric-

172. See, e.g., *Pittman v. Dow Jones & Co.*, 662 F. Supp 921, 923 (E.D. La.), *aff'd*, 834 F.2d 1171 (5th Cir. 1987) ("The First Amendment strongly counsels against adoption of a rule establishing the kind of liability plaintiffs seek."); *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 . . . and the overriding societal interest in the untrammelled dissemination of knowledge."); *Gutter v. Dow Jones, Inc.*, 22 Ohio St. 3d 286, 290, 490 N.E.2d 898, 902 (1986) ("the competing public policy and constitutional concerns tilt decidedly in favor of the press when mere negligence is alleged.").

173. See *infra* notes 185-213.

174. *Stromberg v. California*, 283 U.S. 359 (1931). The Court stated: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Id.* at 369.

175. *Roth v. United States*, 354 U.S. 476 (1957). The Court stated that "[f]reedom of the press protects the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* at 484.

176. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969). The Court stated: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail" *Id.* at 390.

177. See *Associated Press v. United States*, 326 U.S. 1 (1944). The Court stated: "[The first amendment] rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, and that a free press is a condition of a free society." *Id.* at 20.

178. 376 U.S. 254 (1964).

179. *Id.* at 270.

tions that do interfere with the right to free speech. Libelous speech is not protected by the first amendment.¹⁸⁰ Nor does the first amendment shield publishers from the applicability of laws, such as antitrust laws and antidiscrimination laws, that allow the government to regulate some aspects of the publisher's business.¹⁸¹ Commercial speech—speech expressing neither political nor social views, nor criticisms, nor any kind of ideas¹⁸²—while encompassed within the protections of the first amendment,¹⁸³ can be restricted in certain ways not applicable to non-commercial speech. For example, government may regulate advertising to protect consumers from misleading claims.¹⁸⁴ The reporting of stock market quotations, which express no political or social views, nor ideas or criticisms of any kind, but merely facilitate the smooth operation of a commercial marketplace, should fall into this less protected category of commercial speech.

Furthermore, that free speech is protected does not mean speakers are shielded by the first amendment from all responsibility for injuries resulting from such speech. For example, in *Zacchini v. Scripps-Howard Broadcasting Co.*,¹⁸⁵ the Supreme Court of the United States held a television station liable for the tort of unlawful appropriation.¹⁸⁶ After the station televised the entire fifteen seconds of Zacchini's human cannonball act, which was appearing at a local fair, on its nightly news, the owner of the act demanded payment from the station for unlawful appro-

180. See *Roth*, 354 U.S. 476; *Beauharnois v. Illinois*, 343 U.S. 250 (1952); *Near v. Minnesota*, 283 U.S. 697 (1931).

181. See, e.g., *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973) (Pittsburgh city ordinance prohibiting help-wanted advertisements by sex does not violate freedom of speech or press); *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 184 (1946) (application of Fair Labor Standards Act to newspapers does not abridge freedom of press); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (application of Sherman Antitrust Act to newspapers does not violate first amendment); *Associated Press v. N.L.R.B.*, 301 U.S. 103, 130 (1937) (application of National Labor Relations Act to newspapers does not violate first amendment).

182. See *Pittsburgh Press*, 413 U.S. at 384-85, for a discussion of what constitutes commercial speech.

183. See, e.g., *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (state law banning advertising by electric utility companies invalid); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (state statute prohibiting pharmacists from advertising about drugs invalid).

184. See, e.g., *In re R.M.J.*, 455 U.S. 191, 200 (1982) (first amendment does not preclude states from entirely prohibiting misleading advertising); *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 (although states may not entirely prohibit advertising of drug prices by pharmacists, states may regulate commercial speech to insure "that the stream of commercial information flows cleanly as well as freely.").

185. 433 U.S. 562 (1977).

186. *Id.* at 574-75.

priation.¹⁸⁷ The station argued that the act was news and that it was protected from liability by the first amendment.¹⁸⁸ In rejecting the station's argument, the Court noted that the first amendment does not protect the news media from the tort of unlawful appropriation.¹⁸⁹ To hold otherwise would permit the first amendment to be used as a shield against copyright infringement actions.¹⁹⁰ In addition, the Court noted that the owner of the act was not attempting to prevent the broadcast of the performance; "he simply want[ed] to be paid for it."¹⁹¹

Lower courts have taken similar positions with respect to whether the first amendment protects the media from certain types of tort liability. In *Weirum v. R.K.O. General, Inc.*,¹⁹² a radio station was held liable for the tort of negligence after one of its listeners, engaged in a station-sponsored contest requiring him to race his car from location to location, forced a car off the highway, killing its occupant.¹⁹³ The court refused to shield the station from liability under the first amendment for two reasons. First, this was not the type of commercial activity that needed protection under the first amendment because of a possible chilling effect on future speech.¹⁹⁴ Second, the issue was not a free-speech issue, but one of accountability for foreseeable results of an action that created an undue risk of harm to others; "[t]he first amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."¹⁹⁵

A Texas court, in *Eimann v. Soldier of Fortune Magazine, Inc.*,¹⁹⁶ also contended that the first amendment does not shield the speaker from all tort liability. In *Eimann*, the tort was negligence resulting in a wrongful death.¹⁹⁷ In rejecting the magazine's argument that it was protected by the first amendment, the court reasoned that the plaintiff was not attempting to regulate speech "but only to recover damages for negligent publication."¹⁹⁸ The court then balanced free-speech concerns with the

187. *Id.* at 563-64.

188. *Id.* at 565.

189. *Id.* at 574-75.

190. *Id.* at 576.

191. *Id.* at 578.

192. 15 Cal. 3d 40, 536 P.2d 36, 123 Cal. Rptr. 468 (1975).

193. *Id.* at 469, 539 P.2d at 37-39.

194. *Id.* at 473, 539 P.2d at 40.

195. *Id.*

196. 680 F. Supp. 863 (S.D. Tex. 1988), *op. withdrawn and substituted by*, No. H-87-0030 (S.D. Tex. Mar. 8, 1988) (LEXIS, Genfed library, Dist file). For a discussion of the case see *supra* notes 21-25.

197. *Id.* at 864.

198. *Id.* at 865.

interests of the plaintiff in proceeding on a negligence theory, determining that the plaintiff's interest should prevail.¹⁹⁹ The court emphasized, however, that its holding applied only to commercial speech that creates a potential hazard, not to core speech.²⁰⁰

South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc.,²⁰¹ is another recent district court decision that limits the scope of first amendment protection from tort liability for pure commercial speech.²⁰² In *South Carolina State Ports Authority*, a federal district court held that the first amendment did not protect a defendant from a suit for negligent preparation of a report that caused economic injury to the plaintiff.²⁰³ In this case, the defendant was hired by a third party, the Georgia Ports Authority, to prepare an analysis of the ports at Savannah, Georgia, operated by the Georgia Ports Authority, and Charleston, South Carolina, operated by the plaintiff, comparing their current potential.²⁰⁴ The report was then distributed to existing and potential customers of both ports.²⁰⁵ Alleging that the report contained misleading and false information about the Charleston port, the plaintiff filed an action for negligence.²⁰⁶ In rejecting the defendant's first amendment argument, the court noted that "[t]he right to free speech is not absolute," and that the "narrow contours" of this case, where the speech is mere "objective factual data," significantly limit first amendment protection.²⁰⁷ At the heart of first amendment concerns, the court reasoned, are matters of public policy.²⁰⁸ When the speech consists solely of objective, factual data, though, first amendment concerns are greatly diminished because "the greater objectivity and hardiness of commercial speech makes it less necessary to tolerate inaccurate statements for fear

199. *Id.* at 865-87.

200. *Id.* at 866. The court noted that core speech—speech which effectuates a public exchange of ideas—is afforded a greater degree of first amendment protection than commercial speech, which is "related solely to the economic interest of the speaker and his audience . . . , and does no more than propose a commercial transaction." *Id.* at 865 n.1, 866. For an earlier case involving *Soldier of Fortune* similar to *Eimann*, see *Norwood v. Soldier of Fortune Magazine*, 651 F. Supp. 1397 (W.D. Ark. 1987).

201. 676 F. Supp. 346 (D.D.C. 1987).

202. *Id.* at 351.

203. *Id.*

204. *Id.* at 346-47.

205. *Id.* at 347.

206. *Id.* The complaint also originally contained counts for libel and tortious interference with a contract. However, these counts were later dropped. *Id.*

207. *Id.* at 348.

208. *Id.* at 349.

of silencing the speaker.'²⁰⁹ Thus, the court held the speaker could be held liable for negligence²¹⁰ for several reasons: (1) the speech was pure objective data, not opinion or debate;²¹¹ (2) the speaker had an opportunity to verify the accuracy of the factual representations;²¹² and, (3) the report had a limited audience.²¹³

The holdings in these cases expanding the scope of negligence liability of publishers and the news media who engage in commercial speech could readily be expanded to encompass the type of negligent misrepresentation in *Gutter v. Dow Jones, Inc.*²¹⁴ The inaccurate stock market quotation in that case was pure objective factual data, containing nothing involving political discussion, the interchange of ideas, or any other matter typically associated with core speech.²¹⁵ Thus, the level of first amendment protection accorded a stock market quotation should be much lower than that accorded core speech. Moreover, the plaintiff in *Gutter* made no attempt to inhibit future publications of stock market quotations;²¹⁶ like the human cannonball, he simply sought compensation for the damages he had suffered.²¹⁷ The most significant way in which the negligent stock market quotation in *Gutter* differs from cases in which first amendment considerations were held inapplicable to speech of a commercial nature²¹⁸ is that the number of potential victims of a stock market quotation is much larger than the victims in those cases. Since the financial ramifications of such a large audience being potential victims could lead to a chilling effect, courts may be reluctant to impose such liability in these cases. Note, however, the potentially unlimited class of victims has not stopped the courts from imposing widespread liability on product manufacturers,²¹⁹ and in some jurisdictions, on accountants.²²⁰ It is certainly possible, then, that for speech that is purely objective data, courts may impose liability on publishers for

209. *Id.* (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976)).

210. *Id.* at 351.

211. *Id.* at 348.

212. *Id.* at 349.

213. *Id.* at 350 n.10.

214. 22 Ohio St. 3d 286, 490 N.E.2d 898 (1986). For a discussion of *Gutter* see *supra* notes 116-133, and accompanying text.

215. *Gutter v. Dow Jones, Inc.*, No. 84AP-102 at 5 (Ohio 10th App. Dist. 1985) (WESTLAW, Ohio library, Cases file at 6). See *supra* notes 172-179 and accompanying text.

216. See discussion of *Gutter*, *supra* notes 119-127.

217. See discussion of *Zacchini*, *supra* notes 185-191.

218. See *supra* notes 182-184 and accompanying text.

219. See *supra* notes 160-165 and accompanying text.

220. See *supra* notes 78-89, 109-118, 147-165 and accompanying text.

negligent misrepresentation, regardless of the numbers of possible victims.

V. CONCLUSION

Presumably, publishers have ways of verifying the accuracy of purely objective data, like stock market quotations, and, one would hope, ways of safeguarding against printer's errors. In addition, newspapers like the *Wall Street Journal* carry stock market quotations as an inducement for people to buy their papers. Logically, then, the publishers of objective data should be held to the same standard of liability as accountants and manufacturers of products.

Certainly, it is always difficult to predict trends in the law. However, as Professor Weisiger argued over a half-century ago, with societal and economic changes come changes in the limitations of liability for negligent misrepresentation.²²¹ Increasing numbers of cases like *Gutter v. Dow Jones, Inc.*²²² and *Eimann v. Soldier of Fortune Magazine, Inc.*,²²³ witness the initial stages of what could be the next expansion of the tort of negligent misrepresentation: liability for publishers and the news media. Before the erosion of *Ultramares*, accountants probably thought it would never happen to them. While publishers may think they are safe, cases like *South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc.*,²²⁴ limiting first amendment protections for purely objective data, indicate that it is only a matter of time before publishers may be held liable to anyone who is injured in reliance on that data.

221. Weisiger, *supra* note 48, at 874; *see also* note 50 and accompanying text.

222. 22 Ohio St. 3d 286, 490 N.E.2d 898 (1986).

223. 680 F. Supp. 863 (S.D. Tex. 1988), *op. withdrawn and substituted by* No. H-87-0030 (S.D. Tex. Mar. 8, 1988) (LEXIS, Genfed library, Dist file).

224. 676 F. Supp. 346 (D.D.C. 1987).

