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Constitutional Law -- Eimann v. Soldier of Fortune and "Negligent Advertising" Actions: Commercial Speech in an Era of Reduced First Amendment Protection

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CASE COMMENT

CONSTITUTIONAL LAW — *EIMANN V. SOLDIER OF FORTUNE* AND "NEGLIGENT ADVERTISING" ACTIONS: COMMERCIAL SPEECH IN AN ERA OF REDUCED FIRST AMENDMENT PROTECTION

In *Eimann v. Soldier of Fortune*,[1] the United States District Court for the Southern District of Texas ruled that the first amendment did not preclude a negligence action against *Soldier of Fortune* for injuries allegedly resulting from an advertisement published by the magazine.[2] The *Eimann* decision comes in an era of reduced first amendment protection of commercial speech[3] and seems to open the courthouse doors to a flood of "negligent advertising" actions.[4] This Comment delineates the impact *Eimann* should have on an advertisement publisher's tort liability and duty to the public.

Part I of this Comment discusses the facts and ruling in *Eimann*. Part II briefly traces the history of first amendment protection of commercial speech, from its first recognition in 1976 to its present reduced state. Part III contrasts the rationale behind the recklessness standard of care historically imposed on publishers with the negligence standard that the *Eimann* court espoused. It suggests that the lesser degree of constitutional protection afforded commercial speech today may have provided the basis for the court's ruling. Part IV argues that courts should read *Eimann* narrowly in order to reasonably balance the publisher's interest in freedom of speech with the public's interest in protection from advertisements that cause injury, and in order to avoid the unwarranted expansion of an advertisement publisher's tort liability. Additionally, to provide courts with a means to effectuate such a balance, Part IV proposes a standard for courts to apply in future negligent advertising actions. Finally, Part V concludes that the courts should allow a negligent advertising action against a publisher only when the publisher knew or should have known that the advertisement foreseeably invited criminal activity which caused the plaintiff's injury.

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1 680 F. Supp. 863 (S.D. Tex. 1988).

2 *Id.*

3 U.S. CONST. amend. I provides that "Congress shall make no law . . . abridging the freedom of speech." Nevertheless, "[t]he Constitution . . . accords lesser protection to commercial speech than to other constitutionally guaranteed expression." Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980).

The Supreme Court has defined "commercial speech" as "speech which does no more than propose a commercial transaction." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976) (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 386 (1973)). Alternatively, the Court has described it as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561.

4 *See infra* note 87 and accompanying text. Commentators have dubbed the type of cause of action seen in *Eimann* as a "negligent advertising" action because the plaintiff is allowed to proceed against the advertisement publisher on a negligence theory.

I. *Eimann v. Soldier of Fortune*

Eimann involved a contract for murder between John Wayne Hearn and Robert Black, Jr. Hearn submitted the following advertisement to *Soldier of Fortune* magazine:

> 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.[5]

After the magazine published the advertisement, Robert Black, Jr., contacted Hearn and arranged for the murder of Sandra Black, his wife.[6] When Hearn subsequently murdered Sandra Black, her mother and son sued *Soldier of Fortune* in the United States District Court for the Southern District of Texas for negligent publication of the advertisement.[7] The plaintiffs based their action on the theory that the publisher had a duty to investigate the nature of the advertisement.[8]

The defendant's motion for dismissal or summary judgment argued that the first amendment precluded liability for the advertisement, that the magazine owed no duty of care to the plaintiffs, and that the plaintiffs' injuries resulted from the unforeseeable intervening criminal conduct of third persons.[9] In denying the motion, the court concluded that first amendment protection afforded commercial speech did not preclude a negligence action against the publisher.[10] Furthermore, because the plaintiffs presented evidence that the publisher had notice that its personal service advertisements had been used for criminal purposes, the court held that "an issue of material fact has been raised as to whether Defendants knew or should have known of the nature of the advertisement and, thus, should have foreseen the likelihood that criminal conduct would ensue."[11]

II. *Eimann's* Constitutional Context: The Eroding First Amendment Protection of Commercial Speech

In 1942, the United States Supreme Court held that the first amendment's guarantee of free speech did not preclude the government from enacting legislation which would substantially "burden or proscribe . . . purely commercial advertising."[12] This decision established what has been called "the commercial speech doctrine," which provided, in effect,

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5 Eimann v. Soldier of Fortune, 680 F. Supp. 863, 864 (S.D. Tex. 1988). Hearn's advertisement was first published in *Soldier of Fortune* in September 1984. Hearn estimated receiving ten to twenty inquiries per day based on the advertisement and, as a result, was forced to hire a professional answering service. He stated that about ninety percent of the calls received involved requests for illegal acts, including activities related to illegal drugs, jail breaks, political assassinations, and illegal arms. Hearn is serving two consecutive life sentences for the murders of Sandra Black and others. Plaintiff's Response to Defendant's Motion for Summary Judgment, Eimann v. Soldier of Fortune, 680 F. Supp. 863 (S.D. Tex. 1988) (Civ. A. No. H-87-0030) (citing John Wayne Hearn's deposition).

6 Eimann v. Soldier of Fortune, 680 F. Supp. at 864.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.* at 866.

11 *Id.* at 867.

12 Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

that the Constitution did not protect commercial advertising. The Court's rationale for this conclusion is not clear from the opinion.[13] Nonetheless, the Supreme Court adhered to the doctrine for over thirty years.[14]

During that thirty year period, individual justices criticized the doctrine.[15] However, not until 1975 did a majority of the Court clearly indicate that it was beginning to question the commercial speech doctrine.[16] Finally, in 1976, the Court abandoned the doctrine "concluding that commercial speech, like other varieties is protected."[17] In the cases that followed during the next year,[18] commercial advertising realized almost complete first amendment protection. Since 1977, however, the Court has eroded first amendment protection of commercial speech.[19] This Part briefly traces the erosion by focusing on three landmark decisions and their progeny. This erosion has reduced the constitutional protection of commercial speech to a level that is conducive to the kind of negligent advertising action seen in *Eimann*.[20]

A. *Commercial Speech Recognized as Constitutionally Protected*: Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.

In the 1976 case of *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[21] the Supreme Court faced the question of "whether there is a first amendment exception for 'commercial speech.'"[22] The Court concluded that "speech which does 'no more than propose a commercial transaction' . . . is [not] so removed from any 'exposition of ideas' . . . that it lacks all [Constitutional] protection."[23] In so concluding, the Court rejected the "commercial speech doctrine" which had denied first amendment protection to purely commercial speech since 1942.[24]

Specifically at issue in *Virginia Board* was the constitutionality of a Virginia statute which prohibited pharmacists from advertising the prices

13 G. ROSDEN & P. ROSDEN, THE LAW OF ADVERTISING § 6.01 at 6-2.0 & n.2 (1973).

14 *Id.* at 6-2.0 n.3.

15 *See* Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring); Dunn & Bradstreet, Inc. v. Grove, 404 U.S. 898, 904-06 (1971) (Douglas, J., dissenting from denial of cert.); Lehman v. City of Shaker Heights, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., dissenting); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 393, 398, 401 (1973) (Separate dissents of Burger, C.J., Douglas, J., and Stewart, J.).

16 The Court said "[t]he fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees." Bigelow v. Virginia, 421 U.S. 809, 818 (1975).

17 Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

18 *See infra* note 32 and accompanying text.

19 *See* ROSDEN, § 6.01 LAW OF ADVERTISING 6-1, 6-6.9 - 6-6.16 (1973); Lively, *The Supreme Court and Commercial Speech: New Words With an Old Message*, 72 MINN. L. REV. 289 (1987); Note, *Trends in First Amendment Protection of Commercial Speech*, 40 VAND. L. REV. 173 (1988).

20 For a more detailed history of the first amendment protection of commercial speech, see materials cited *supra* note 19.

21 425 U.S. 748 (1976).

22 *Id.* at 760-61.

23 *Id.* at 762 (citations omitted).

24 *See supra* notes 12-14 and accompanying text.

of prescription drugs.[25] Appellees, as consumers of prescription drugs, argued that the first amendment entitled them to "receive information that pharmacists wish to communicate to them through advertising."[26] Appellees claimed that because the statute banned such communication, the statute was unconstitutional.[27] The Supreme Court agreed.[28]

The Court based its holding, that advertising is entitled to first amendment protection, on the premise that society has "a strong interest in the free flow of commercial information."[29] This position marked a clear departure from what the majority opinion called the "highly paternalistic approach"[30] that the Court espoused for over three decades.[31] The cases that the Court decided in the year after *Virginia Board* extended to commercial advertising its highest degree of first amendment protection.[32]

In 1978, however, the Supreme Court departed from the relatively broad constitutional protection *Virginia Board* and its progeny afforded commercial speech. In *Ohlarik v. Ohio State Bar Association*,[33] the Court recognized a governmental interest in regulating solicitation of a lawful

25 Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 750 n.2 (citing the full text of VA. CODE ANN. § 54-524.2 (a) (1974)).

26 *Id.* at 754.

27 *Id.* at 753-54.

28 *Id.* at 770.

29 *Id.* at 764. The seven member majority stated:

> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . . Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end the free flow of commercial information is indispensible.

Id. at 763, 765. The Court did, however, recognize that "[s]ome forms of commercial speech regulation are surely permissible." *Id.* at 770. The Court said that these forms included regulations of advertisements by mere time, place, and manner restrictions; regulations of advertisements that are false and misleading; and regulations of advertisements that advocate illegal transactions. The Court also recognized that there may be some special problems with respect to the electronic broadcast media and with respect to advertisements by physicians, lawyers and professionals who provide services. But the Court specifically stated that it would not deal with these problems in this decision. *Id.* at 770-73. Note that in *Eimann* the plaintiff was seeking damages for negligent publication and was not seeking to regulate advertising. Therefore, none of the permissible forms of regulation mentioned by the court may be applied to resolve the issue in *Eimann*.

30 *Id.* at 770. By "highly paternalistic approach" the Court was referring to an approach which allows state restriction of advertising based on the state's determination that certain commercial information is not in the best interest of the public. The Court said that neither it nor a state legislature can suppress commercial speech based on such a determination because "[i]t is precisely this kind of choice, between suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.*

31 *See supra* notes 12-19 and accompanying text.

32 *See* Bates v. State Bar, 433 U.S. 350 (1977) (holding that a state bar association's disciplinary rule prohibiting most forms of legal advertising infringed on the appellant's first amendment rights); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (holding that complete suppression of advertisements for contraceptives is unconstitutional); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977) (holding that a township ordinance enacted to reduce the flight of white homeowners from a racially integrated neighborhood, by prohibiting the posting of "For Sale" and "Sold" signs, is unconstitutional).

33 436 U.S. 447 (1978).

service and upheld a state bar association's disciplinary rule restricting lawyers' in-person solicitation of employment. By placing strong emphasis on the state's interest,[34] *Ohlarik* set the stage for *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[35] a case in which the Supreme Court further restricted first amendment protection of commercial advertising.[36]

B. *Narrowing the Constitutional Protection of Commercial Speech*: Central Hudson Gas & Electric Corp. v. Public Service Commission

In *Central Hudson*, the Supreme Court considered the issue of "whether a regulation of the Public Service Commission of the State of New York violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility."[37] The Court held that a total ban violated the first amendment because it was "more extensive than is necessary to serve the state interest."[38] While this decision was apparently a victory for free commercial speech, the five member majority acted in a manner reminiscent of earlier paternalism by placing strong emphasis on the state's interest in regulating the utility company's advertisements, thereby establishing a more permissive climate for governmental restraint of commercial speech.[39]

The majority applied a four-part test in reaching its conclusion. The Court stated:

> [First], we must determine whether the expression is protected by the first amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [Second], we ask whether the governmental interest is substantial. . . . [Third], we must determine whether the regulation directly advances the governmental interest asserted, and [fourth] whether [the regulation] is not more extensive than is necessary to serve that interest.[40]

The Court found that the Commission's promotional advertising ban failed the fourth part of the test because appellee failed to show "that a more limited restriction on the content of promotional advertising would not serve adequately the State's interest."[41]

However, several justices expressed concern over the adoption of this test. For example, Justices Blackmun and Brennan indicated in a concurring opinion that they believed the Court's four-part test was in-

34 *Id.* at 462, 468.
35 447 U.S. 557 (1980).
36 Note, *Trends in First Amendment Protection of Commercial Speech*, 41 VAND. L. REV. 173, 186 (1988).
37 Central Hudson Gas & Elec. Corp v. Public Serv. Comm'n., 447 U.S. at 558.
38 *Id.* at 572.
39 In 1973, the Public Service Commission of New York ordered electric utility companies in the state to stop all advertising which promoted the use of electricity. The Commission declared all promotional advertising to be contrary to a national policy of energy conservation. The appellant, Central Hudson Gas & Electric Corp., challenged the order contending that it was an unconstitutional restraint of commercial speech. However, the Commission's order was upheld by the New York Court of Appeals on the ground that the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issue. The United States Supreme Court reversed. *Id.* at 558-59.
40 *Id.* at 566.
41 *Id.* at 570.

consistent with the established principle "that the State 'may *not* [pursue its goals] by keeping the public in ignorance.' "[42] Justice Blackmun wrote that he feared the majority's four-part test might permit a state "to suppress information about a product in order to manipulate a private economic decision."[43] Justice Blackmun concluded that the majority's test "[did] not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech."[44]

C. *Further Narrowing of the Constitutional Protection of Commercial Speech*: Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico

Between 1980 and 1986 the Court inconsistently applied the *Central Hudson* test.[45] Then, in 1986, in its most recent major decision affecting commercial speech,[46] the Court illustrated that Justice Blackmun's fears were justified by dropping its constitutional guard even further than in *Central Hudson*. In *Posadas de Puerto Rico Associates v. Tourism Co.*,[47] the Supreme Court ruled on "the facial constitutionality of a Puerto Rico statute and regulations restricting advertising of casino gambling aimed at the residents of Puerto Rico."[48] The Court applied the four-part *Central Hudson* test and concluded that this restraint on commercial speech was constitutional.[49] While purporting to apply the *Central Hudson* test objectively, the Supreme Court based its holding on a paternalistic rationale reminiscent of the commercial speech doctrine. Despite a decade of precedent promoting the free flow of commercial information, the majority allowed a state legislature to suppress commercial speech

42 *Id.* at 576 (Blackmun, J., concurring) (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976)).

43 *Id.* at 573 (Blackmun, J., concurring).

44 *Id.*

45 *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 509 (1981) (the Court applied a watered-down version of the *Central Hudson* test and held that the City's interest in restricting billboard advertising was not "manifestly unreasonable"); *In re* R.M.J., 455 U.S. 191 (1982) (holding that restrictions on lawyer advertising were unconstitutional); Bolger v. Youngs Drugs Prods. Corp., 463 U.S. 60 (1983) (holding that a ban on unsolicited advertisements of contraceptives was unconstitutional); Zauder v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985) (holding unconstitutional a state ban on price advertising by attorneys and use of nondeceptive terminology in attorney advertisements).

46 Posadas de P. R. Assocs. v. Tourism Co. of P. R., 478 U.S. 328 (1986).

47 *Id.*

48 *Id.* at 330.

49 *Id.* at 344. Shortly after legalizing certain forms of gambling, Puerto Rico implemented regulations which prohibited gambling casinos from advertising to the public of Puerto Rico but allowed restricted advertising outside of Puerto Rico. Pursuant to these regulations, appellant, a casino operator in Puerto Rico, received several fines from the appellee, a public corporation authorized to administer the regulations. Appellant continually protested these fines and eventually sued the appellee in the Superior Court of Puerto Rico, seeking a declaratory judgment that the regulations—both facially and as applied—unconstitutionally suppressed commercial speech. The court held that the regulations were unconstitutional as applied to the appellant. However, the court issued a narrowing construction, declaring that the regulations prohibited local advertising that encouraged residents of Puerto Rico to patronize casinos, but not local advertising directed at tourists. The court then held that, under this construction, the regulations were facially constitutional. The Supreme Court of Puerto Rico dismissed appellant's appeal of the lower court's decision that the regulations were constitutionally valid, on grounds that it "d[id] not present a substantial constitutional question." *Id.* at 337. A five-member majority of the United States Supreme Court affirmed. *Id.* at 331-37, 344.

based on the state's determination that this information was not in the best interest of the public.[50] This approach is exactly the type of paternalism that the Court held unconstitutional in *Virginia Board*.[51] In his dissenting opinion, Justice Brennan explained the ramifications of *Posadas*. He wrote that the decision allows a state legislature to "suppress the dissemination of truthful information about an entirely lawful activity merely to keep its residents ignorant . . . thus dramatically shrinking the scope of first amendment protection available to commercial speech, and giving government officials unprecedented authority to eviscerate constitutionally protected expression."[52] With the *Posadas* decision, first amendment protection of commercial advertising has regressed to its lowest level since the Court recognized it as constitutionally protected expression in *Virginia Board*.[53] As Part IV points out, one can understand how—in an era of reduced first amendment protection—the *Eimann* court could conclude that the first amendment does not preclude a negligence action against a publisher for injuries alleged to be the consequence of an advertisement.[54]

III. Standards of Care in Advertising Cases

Due to concern that a negligence standard of liability infringes on commercial speech interests by establishing a broad duty in publishing advertisements, courts often restrict the scope of that duty by prescribing a recklessness standard of care. Analysis of significant commercial advertising cases reveals that courts determine whether restriction of the publisher's duty is appropriate by applying a balancing test. Because commercial speech still enjoys some first amendment protection,[55] and restrictions on commercial speech threaten to curtail dissemination of noncommercial ideas as well,[56] courts should continue to employ the balance of interests approach and restrict the scope of the publisher's duty when the free speech interests are superior. However, as *Eimann* indicates, given the limited constitutional protection presently afforded commercial speech, the free speech interests will not outweigh the plaintiff's when the commercial speech foreseeably invites criminal conduct.[57]

50 The Court stated: "The [Puerto Rican] legislature could conclude, as they apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct." *Id.* at 344.

51 *See supra* note 30.

52 Posadas de P. R. Assocs. v. Tourism Co. of P. R., 478 U.S. at 358-59 (Brennan, J., dissenting).

53 The dissent stated: "[T]he Court totally ignores the fact that commercial speech is entitled to substantial First Amendment protection, giving the government unprecedented authority to eviscerate constitutionally protected expression." *Id.* at 352 (Brennan, J., dissenting). *See also* Leahy, *A Game of Chance: Commercial Speech After Posadas*, A.B.A.J., Sept. 1, 1988, at 58.

54 Eimann v. Soldier of Fortune, 680 F. Supp. 863 (S.D. Tex. 1988).

55 *See supra* notes 12-54 and accompanying text.

56 *See infra* notes 66-69 and accompanying text.

57 *See infra* notes 86-91 and accompanying text.

A. *The Public Policy Standard*

The balancing test in commercial speech cases involves weighing the interests of the public policy favoring free flow of commercial information against the interests of the injured party and public safety.[58] For example, in a recent action in a Louisiana Federal District Court, investors sought damages from the *Wall Street Journal* for alleged publication of false and misleading advertisements.[59] The plaintiffs suffered economic losses after investing in an unsound financial institution advertised in the newspaper.[60] In granting the publisher's motion for summary judgment, the court stated that "[i]n weighing private and public considerations . . . the public policy of not subjecting newspapers to the chilling prospect of hordes of suits by disgruntled readers of inaccurate ads dominates."[61]

When courts find that the public policy interests in the free flow of commercial information are superior to the injured party's interests, they generally require the plaintiff to prove that the defendant had knowledge that injury would result from the commercial speech or that he acted in reckless disregard of the possibility.[62] The purpose of this standard is to restrict the scope of the publisher's duty to those injured by advertisements.[63]

A clear example of the reasoning behind this standard is found in *Yuhas v. Mudge*.[64] In *Yuhas*, the plaintiffs were injured by fireworks purchased as a result of advertisements in *Popular Mechanics* magazine. The plaintiffs sought recovery from *Popular Mechanics* on the theory that the magazine owed the public a duty to investigate advertised products.

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58 Pittman v. Dow Jones & Co., 662 F. Supp. 921, 923 (E.D. La. 1987).

59 *Id.* at 921.

60 *Id.*

61 *Id.* at 923. *See also* Quinn v. Aetna Life & Casualty Co., 96 Misc. 2d 545, 550, 409 N.Y.S.2d 473, 476 (Sup. Ct. 1985) (stating that "when faced with First Amendment arguments, the Supreme Court employed a balancing mechanism, weighing the protections afforded by the First Amendment against the other constitutional rights, in an effort to maximize freedom of speech and press without detriment to other valid guarantees"); Gutter v. Dow Jones, Inc., 22 Ohio St. 3d 286, 290, 490 N.E.2d 898, 902 (1986) (stating that "a complaint alleging that a newspaper reader relied to his detriment in making securities investments based on a negligent and inaccurate report . . . does not state a cause of action in tort against the newspaper's publisher for 'negligent misrepresentation.' In such a case, the competing public policy and constitutional concerns tilt decidedly in favor of the press when mere negligence is alleged"); Lewin v. McCreight, 655 F. Supp. 282, 284 (E.D. Mich. 1987) (holding that summary judgment in favor of the defendant was appropriate when plaintiff alleged that defendant had a duty to warn of defective ideas in its book because "[t]he determination of whether a duty should be imposed upon a defendant is based on a balancing of the societal interest involved, the severity of the risk, the burden upon the defendant, the likelihood of occurrence and the relationship between the parties"); South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc., 676 F. Supp. 346, 349 (D.D.C. 1987) (holding that in an action for circulation of "false information" in a consultant's report, the balance of interests favored the plaintiff because "[i]n balancing these interests, not all speech is to be accorded equal first amendment importance").

62 *See, e.g.*, cases cited *supra* note 61, and *infra* notes 71-73 and accompanying text.

63 Pittman v. Dow Jones & Co., 662 F. Supp. at 922-23. The plaintiffs argued that the publisher had a duty to investigate the accuracy of the advertisement. The court held as follows:

> [T]he law is settled . . . that a duty such as that argued for here by plaintiffs may not be imposed. . . . To impose the burden of investigating the accuracy of every ad would, under ordinary circumstances, be too onerous. [Citations omitted.] In weighing private and public considerations . . . the public policy of not subjecting newspapers to the chilling prospect of hordes of suits by disgruntled readers of inaccurate ads dominates.

Id.

64 129 N.J. Super. 207, 322 A.2d 824 (App. Div. 1974).

In affirming summary judgment for the publisher, the court reasoned as follows:

> To impose the suggested broad legal duty upon publishers of nationally circulated magazines, newspapers and other publications, would not only be impractical and unrealistic, but would have a staggering adverse effect on the commercial world and our economic system. For the law to permit such exposure to those in the publishing business who in good faith accept paid advertisements for a myriad of products would open the doors 'to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.'[65]

While courts usually identify the free flow of commercial information as the public interest threatened in advertising cases,[66] a California Appellate Court in *Walters v. Seventeen Magazine*[67] ventured beyond the commercial information rationale and went directly to the heart of first amendment concerns. It based its rejection of the plaintiff's negligent advertising action on the idea that restrictions on commercial speech impair the free exchange of core ideas as well.[68] The court reasoned that allowing a negligence cause of action would require a major investment in staff resources dedicated to investigation of advertised products:

> The enormous cost of such groups, along with skyrocketing insurance rates, would deter many magazines from accepting advertising, hastening their demise from lack of revenue. Others would comply, but raise their prices beyond the reach of the average reader. Still others would be wiped out by tort judgments, never to revive. Soon the total number of publications in circulation would drop dramatically.[69]

New York courts are nearly unanimous in adopting the recklessness standard in limiting the publisher's duty in commercial advertising cases.[70] In *Suarez v. Underwood*,[71] the plaintiff sued *Newsday*, a daily news-

65 *Id.* at 825 (quoting Ultramares Corp. v. Touche, Niven & Co., 255 N.Y. 170, 174 N.E. 441, 444 (1931)). *See* W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS 745 (5th ed. 1984).

66 *See, e.g.*, Pittman v. Dow Jones & Co., 662 F. Supp. at 922. In regard to the public policy involved in advertising cases, the court stated:

> Thus, a newspaper has no duty, whether by way of tort or contract, to investigate the accuracy of advertisements placed with it which are directed to the general public, unless the newspaper undertakes to guarantee the soundness of the products advertised. [Citations omitted.] Courts seem to be sensitive to the devastating liability notion since to ignore such arguments could have the effect of discouraging the publication of ads dealing with valuable public information to enable people to make informed choices. Quite simply, courts have placed more value on the societal benefits of information availability than on the rights of private persons who claim to have been harmed. [Citations omitted.]

Id.

67 241 Cal. Rptr. 101 (Ct. App. 1987).

68 *Id.* at 102-03. Core speech contains " 'ideological expression' and is 'integrally related to the exposition of thought.' " Eimann v. Soldier of Fortune, 680 F. Supp. 863, 865 n.2 (1988) (quoting Virginia State Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 779 (1976)).

69 Walters v. Seventeen Magazine, 241 Cal. Rptr. at 103.

70 Apparently, more actions against publishers for the results of advertisements are litigated in New York than in any other forum because of the concentration of media organizations in that state. Blinick v. Long Island Daily Press Publishing Co., 67 Misc. 2d 254, 323 N.Y.S.2d 853 (Civ. Ct. 1971), is the only instance in which New York courts did not apply a recklessness standard in these actions. In that case, the plaintiff's home telephone number was mistakenly published in a "salacious" singles ad. The court found the publisher liable for the plaintiff's humiliation because it merely had to verify the telephone number to prevent the injury. However, New York courts have not followed this holding in other cases, apparently because they confine the holding to its factual setting.

paper, for injuries resulting from a hair implantation advertisement. The plaintiff argued that because the newspaper published articles concerning the medical risks of hair implantation around the time it published the advertisements, the publisher was liable for gross negligence.[72] The court granted the defendant's motion for summary judgment, stating that "the newspaper is only liable if it publishes a false advertisement maliciously or with intent to harm another or acts with total reckless abandon."[73] When courts adopt such a standard, "[t]he courts' definition of an orbit of duty based on public policy may at times result in the exclusion of some who might otherwise have recovered for losses or injuries if [a negligence standard] had been applied."[74] When the scope of the publisher's duty is thus narrowed, foreseeability of the injurious consequences of the advertisement "alone is not sufficient to establish liability."[75]

B. *The Negligence Standard*: Eimann v. Soldier of Fortune

When the publisher is held to a negligence standard, it is liable for injury foreseeably resulting from an advertisement. Courts have been willing to hold a publisher to such a duty in relatively few circumstances.[76] However, in the context of shrinking first amendment protection for commercial speech, the *Eimann* court predicated publisher liability for a classified advertisement on such a standard.[77] Citing a *Posadas* era decision, the *Eimann* court determined "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].' "[78]

71 103 Misc. 2d 445, 426 N.Y.S.2d 208 (Sup. Ct. 1980).

72 *Id.* at 209.

73 *Id.* at 210 (quoting Goldstein v. Garlick, 65 Misc. 2d 538, 543, 318 N.Y.S.2d 370, 376 (Sup. Ct. 1971)). *Accord* Quinn v. Aetna Life & Cas. Co., 96 Misc. 2d 545, 555, 409 N.Y.S.2d 473, 479 (Sup. Ct 1978) (stating that "[t]he news media, for the most part, is merely the conduit for the speech of the advertiser and, therefore, will not be held liable for the publication of advertising which is false or misleading, unless actual malice is shown"); Pittman v. Dow Jones & Co., 662 F. Supp. 921, 922 (E.D. La. 1987) (stating that "publication of a false advertisement is actionable only if the ad was published maliciously, with intent to harm, or in reckless disregard of the consequences of the ad").

74 Vaill v. Oneida Dispatch Corp., 129 Misc. 2d 477, 480, 493 N.Y.S.2d 414, 416 (Sup. Ct. 1985) (quoting Strauss v. Belle Realty Co., 65 N.Y.2d 399, 402-03, 482 N.E.2d 34, 36, 492 N.Y.S.2d 555, 557 (1985)).

75 493 N.Y.S.2d at 415 (quoting Lafferty v. Manhasset Medical Center Hosp., 54 N.Y.2d 277, 280, 429 N.E.2d 789, 791, 445 N.Y.S.2d 111, 113 (1981)).

76 *See also* Weirum v. RKO Gen., Inc., 539 P.2d 36, 40-42, 123 Cal. Rptr. 468, 472-74 (1975) (holding that a radio station was liable for wrongful death of a motorist killed when a contestant in defendant's radio contest forced decedent's car off the road); Blinick v. Long Island Daily Press Publishing Co., 67 Misc. 2d 254, 255-56, 323 N.Y.S.2d 853, 854-55 (Civ. Ct. 1971), discussed *supra* note 70; South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc., 676 F. Supp. 346, 351 (D.D.C. 1987), discussed *supra* note 61; Screen Gems-Columbia Music, Inc., v. Mark-Fi Records, Inc., 256 F. Supp. 399, 401-03, 405 (S.D.N.Y. 1966) (holding that music publisher had a cause of action against the defendant broadcasting company as a contributory infringer for negligently broadcasting advertisements by an illicit manufacturer of record albums).

77 *See supra* notes 5-11 and accompanying text.

78 Eimann v. Soldier of Fortune, 680 F. Supp. 863, 866 (S.D. Tex. 1988) (citing South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc., 676 F. Supp. 346, 350 (D.D.C. 1987)).

The *Eimann* court, unpersuaded by the publisher's free speech objection, ruled that the plaintiff could proceed.[79]

After *Posadas*, the *Eimann* court's conclusion is certainly not unreasonable. The court's ruling seems especially justifiable considering that *Posadas* upheld a prior restraint on the commercial advertising of a lawful activity.[80] As the *Eimann* court noted, "[i]n the instant case, Plaintiffs do not seek to regulate commercial speech [as in *Posadas*] but only to recover damages for negligent publication."[81]

Norwood v. Soldier of Fortune,[82] a case cited by the *Eimann* court in support of its holding, is essentially identical to *Eimann* in its pertinent facts and result.[83] The *Norwood* court emphasized that commercial speech is not protected to the same extent as core speech.[84] It recognized that an advertisement in the nature of a "gun for hire" was different from the kind of speech contemplated by the first amendment, and that the case should therefore go forward so a jury could determine if the plaintiff's injuries should have been foreseen by the publisher.[85] Thus, upon balancing the interests involved, the *Norwood* court did not find a recklessness standard of care justified when, in an era of reduced commercial speech protection, the subject of the advertisement is a "gun for hire."

IV. The Impact of *Eimann*: A Proposed Standard of Care for Future "Negligent Advertising" Actions

Considering the thin veil of constitutional protection presently afforded commercial speech,[86] the news media and other publishers which rely on advertising as a primary revenue source understandably express concern about what the *Eimann* decision portends.[87] Imposing such an onerous duty on publishers with respect to all advertisements would likely chill commercial expression through either the extensive costs of investigation or the threat of extensive litigation.[88] However, the decision does not necessarily represent a broad movement toward adoption of the foreseeability standard. Narrowly read, it merely represents a determination that when the commercial speech foreseeably invites criminal conduct, the interests of the plaintiff and society in protection from consequential injury outweighs the publisher's interest in free speech. In other words, the balancing of the parties' interests in *Eimann* favors the plaintiff. It is the foreseeable invitation to criminal activity, and the corresponding risk to public safety, that justified the *Eimann* court's decision to permit an action against an advertisement publisher based on negligence rather than malicious intent or recklessness.

79 *Id.* at 865.
80 *See supra* notes 46-52 and accompanying text.
81 Eimann v. Soldier of Fortune, 680 F. Supp. at 865.
82 651 F. Supp. 1397 (W.D. Ark. 1987).
83 *Id.* at 1397-98, 1401-02.
84 *Id.* at 1399-1401.
85 *Id.* at 1401-02.
86 *See supra* notes 46-54 and accompanying text.
87 Kent, *Magazine Liable for Ad Negligence*, 199 N.Y.L.J., Mar. 25, 1988, at 2, col. 1.
88 *See supra* notes 66-69 and accompanying text.

The court apparently recognized that its decision might cause concern among publishers. In attempting to allay these fears, the court qualified its holding by stating that the holding did not apply to core speech, and argued that a negligence standard would not result in liability if the failure to investigate the nature of the advertisement was reasonable.[89] Unfortunately, the general standard of "reasonable care"[90] espoused by the court is not specific enough to delineate the limited impact that *Eimann* should have on the scope of an advertisement publisher's tort liability. The court should have limited its holding in favor of negligent advertising actions to cases where the advertisement foreseeably invited criminal conduct. Instead, it supported its holding by noting that a negligent defamation action by a private person is not precluded by the first amendment, and cited supporting holdings in three earlier negligent commercial speech cases.[91]

Thus, in an effort to avoid unwarranted expansion of publisher liability based on *Eimann*, this Part proposes a standard for courts to apply in future "negligent advertising" actions. The proposed standard is designed to provide a civil remedy that reasonably balances a publisher's interest in free speech with society's interest in protection from injuries which are the result of advertisements foreseeably inviting criminal activity.

The proposed standard has five elements: (1) the plaintiff's injuries must be a foreseeable consequence of an advertisement, (2) which, at the time of publication, (3) the publisher knew or should have known, through the exercise of reasonable care, (4) foreseeably invited criminal activity, (5) which caused the plaintiff's injury. With respect to the third element, factors to consider in determining whether the publisher "should have known" include the content of the advertisement, the nature of the publication, and the nature of the publication's readership.[92] If the trier of fact determines, in light of these factors and by a preponderance of the evidence, that through the exercise of reasonable care, the publisher should have known the advertisement foreseeably invited criminal activity, then the publisher should be liable for the foreseeable consequences of the advertisement. The third element imposes a duty on the publisher to exercise reasonable care to investigate the nature of the advertisement. Finally, in regard to the fourth and fifth elements, if the injuries are the consequence of something other than criminal activity, then the malicious intent or recklessness standard should apply, unless the governing law provides otherwise.[93]

89 *Eimann*, 680 F. Supp. 866.

90 *Id.*

91 *Id.* at 865. For further explanation of the three cases, *see supra* notes 82-85 and accompanying text on Norwood v. Soldier of Fortune, 651 F. Supp. 1397 (W.D. Ark. 1987); *supra* note 76 on Weirum v. RKO Gen., Inc., 539 P.2d 36, 123 Cal. Rptr. 468 (1975); and *supra* note 61 on South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc., 676 F. Supp. 346 (D.D.C 1987).

92 These factors were addressed in the *Eimann* ruling. *See* Eimann v. Soldier of Fortune, 680 F. Supp. at 866.

93 For example, in a case involving defamation of a private person (as opposed to defamation of a public figure or a public official) a publisher may be held to a negligence standard. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

These elements take into account *Eimann's* unstated rationale. The significant interest in protecting the public from injury occasioned by an advertisement which the publisher knew or should have known invited criminal activity outweighs the publisher's free speech interest in publishing such an advertisement. Thus, requiring the publisher to use ordinary care to investigate advertisements of this nature is reasonable.[94] By including the criminal activity element, the proposed standard limits application of a negligence standard to a narrow class of cases in which the competing public interest clearly outweighs the publisher's free speech interest.[95]

IV. Conclusion

Until the Supreme Court reduced the first amendment protection available to publishers of commercial speech, lower courts generally required proof of recklessness in actions against publishers for the injurious results of advertisements.[96] However, by its willingness to employ a negligence standard, or duty of ordinary care, the *Eimann* court signalled a potential for expanded publisher liability. Courts hearing such cases

94 The duty that the proposed standard imposes on an advertisement publisher is somewhat analogus to the duty that tort law imposes on an employer with respect to hiring and retention of an employee. That is, where there is foreseeable risk of harm to others the employer has a duty to select competent, experienced and careful employees. If the employer breaches that duty, he may be personally liable to a third person for his negligence in hiring or retaining an employee who is incompetent or unfit. "Such negligence usually consists of hiring or retaining the employee with knowledge of his unfitness, or failing to use reasonable care to discover it before hiring or retaining him. The theory is that such negligence on the part of the employer is a wrong to such a third person, entirely independent of the liability of the employer under the doctrine of respondeat superior." 53 AM. JUR. 2d *Master and Servant* § 422 (1970).

95 Some brief examples may demonstrate how the proposed standard limits *Eimann*'s impact:

1. Assume *Popular Mechanics* magazine publishes an advertisement for a completely lawful product, a new lawn mower, which has been safety tested and approved. Plaintiff sees the ad and purchases the lawn mower which malfunctions and injures Plaintiff. Plaintiff sues *Popular Mechanics* for negligent publication of the advertisement. The proposed standard would not apply because Plaintiff's injuries were not the result of criminal activity.

2. A local newspaper publishes Ms. X's advertisement in the newspaper's "Personals" column. The advertisement says that X is looking for a new roommate, would like to interview interested, female, college sophomores at X's apartment at 123 Main St. afternoons between three and four o'clock. Ms. Q reads the ad and goes to visit X. Q is met by Mr. Y, who in fact submitted the ad using Ms. X's name. Y is a twice-convicted rapist recently released from State Prison. Y sexually assaults Q, who subsequently sues the newspaper for negligent publication of the advertisement. The proposed standard would apply. However, the newspaper would probably not be found liable because considering the content of the ad, the nature of the publication, and the nature of the publication's readership, Q will probably be unable to establish that the newspaper should have known the advertisement invited criminal activity.

3. *Soldier of Fortune* magazine publishes an advertisement entitled "How to Disappear." The advertisement describes a method of taking on a new identity, leaving your past behind you, and beginning a new life. After reading the ad, Reverend Z embezzles $50,000.00 in church funds and kills the church handyman, who bears a close physical resemblance to Z. Z mutilates the body in an attempt to remove identifying features. He then clads the body in Z's clothes, places the body in the church office, sets fire to the church, and flees with the money and a fraudulently obtained driver's license bearing his picture and a new name. The body is later identified, Z is arrested, and Z confesses that he got the idea for the bizarre scheme from the ad in *Soldier of Fortune*. (The facts in this example are taken from a recent criminal jury trial. *See* Humphrey, *In a Tennessee Church, Death of a Handyman*, 11 N.L.J., Oct. 3, 1988, at 8.) Relatives of the murdered handyman sue *Soldier of Fortune* for negligent publication of the advertisement. The proposed standard would apply, and it is likely that the plantiffs may be able to prove each of the elements by a preponderance of the evidence.

96 *See supra* notes 58-75 and accompanying text.

now confront a crossroads in advertising law. Courts can use the result in *Eimann* as precedent for broadened publisher liability. Alternatively, they can restrict the holding to its factual context, specifically to cases where the advertisement invited criminal conduct. This Comment argues that the better result is to read *Eimann* narrowly. If courts continue to use a balancing test in these cases, they should similarly conclude that allowing negligent advertising actions absent the element of foreseeable criminal conduct unduly burdens the commercial interests of the publisher.

More significant than the commercial impact, however, is the possibility that publisher liability based on a negligence standard could ultimately restrict the dissemination of core ideas as well as commercial speech. Because the negligence standard broadens the duty to investigate advertisements, it requires that publishers divert staff resources and choose between forgoing revenues and defending civil actions. Consequently, survival of the publishing institutions which serve as primary vehicles of free speech in our society is made more uncertain. Conversely, when an advertisement seemingly invites criminal activity, it is reasonable to expect publishers to exercise ordinary care in investigating the nature of the ad. Courts should reconcile these concerns by restricting negligent advertising actions to cases where the publisher should have known that the advertisement would promote criminal activity.

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