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*William L. Prosser**

Although modern tort law rejects the lack of privity as a defense in most cases, there remains considerable uncertainty and confusion when a third party institutes a suit based on misrepresentation. Dean Prosser examines the various factors which affect the decison in a third-party misrepresentation case and finds a pattern which he reduces to a concise summary of the law in this area.

"The assault upon the citadel of privity is proceeding in these days apace." So said Cardozo in 1931, and he has been much quoted since. But the case[1] in which he said it was one of misrepresentation causing pecuniary loss to a third person who acted in reliance upon it, but to whom it was not made. It is in this area that the assault upon the citadel has made, during the intervening thirty-five years, the least headway, and has broken down into a tangle of more or less unconnected struggles which are apparently making no great progress in any definite direction. It is here that there is still the greatest uncertainty, and even confusion.[2] It is the purpose of this discussion to suggest that there are a great many more cases dealing with the problem than is generally realized, that there is a pattern to be discerned from the decisions, and that some conclusions may be drawn.

I. FACTORS AFFECTING THE DECISION

The defendant makes a misrepresentation of fact to *A*. *B* learns of the misrepresentation and in reliance upon it suffers loss. Under what circumstances is the defendant liable to *B*? Much of the difficulty in

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1. Ultramares Corp. v. Touche, Niven & Co., 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).

2. See generally Goodhart, *Liability for Innocent but Negligent Misrepresentations*, 74 YALE L.J. 286 (1964); Keeton, *The Ambit of a Fraudulent Representator's Responsibility*, 17 TEX. L. REV. 1 (1938); Keeton, *Fraud: The Necessity for an Intent to Deceive*, 5 U.C.L.A. L. REV. 583 (1958); Stevens, *Hedley Byrne v. Heller: Judicial Creativity and Doctrinal Possibility*, 27 MOD. L. REV. 121 (1964); Note, 31 COLUM. L. REV. 858 (1931); 16 CORNELL L.Q. 419 (1931); 36 IOWA L. REV. 319 (1951); 37 MICH. L. REV. 1091 (1939); 16 VAND. L. REV. 266 (1962); 1964 WASH. U.L.Q. 77.

dealing with this problem arises from the interplay of a number of different factors affecting the decision—each of which, pulling in one direction or the other, may affect it, so that the result is not unlike that of a man being torn to pieces by an assortment of horses. It is necessary to begin by listing these factors, and indicating their bearing.

A. *The Nature of the Damage*

In reliance upon the misrepresentation, *B* may suffer personal injury or harm to his land or chattels. These are lumped together hereafter under the general term "physical harm." Where this is the case, the courts have been most willing to throw overboard privity, and allow recovery to the third person. On the other hand, *B* may suffer only pecuniary loss, as where he is induced to buy something at a price in excess of its value. Throughout the law of torts, the courts have been a great deal more reluctant to compensate the plaintiff for a loss of a purely economic character, and this is particularly true where the defendant's conduct has been no more than negligent. For example, there is the tort of interference with contract, which is commonly held not to lie where the conduct is merely negligent.[3] Another, actually involving misrepresentation, is the tort called, for want of a better name, injurious falsehood, where the statement is made to *A* and *B* suffers loss because it is *A*, rather than *B*, who believes and acts upon it. Here there appears to be agreement that the action will not lie for mere negligence.[4] Where the misrepresentation reaches *B* himself as a third person and he suffers loss because of his own reliance and action upon it, the courts, as in these other actions, have been alarmed at the spectre of pecuniary losses vastly disproportionate to the defendant's fault; and they have been much less eager to impose liability.

There are other kinds of damage which may result from misrepresentation and result in liability; for example, the plaintiff is deceived into cohabitation with the defendant by an invalid marriage,[5] or in-

3. Numerous cases are collected in PROSSER, TORTS § 123, at 962-64 (3d ed. 1964) [hereinafter cited as PROSSER].

4. See, *e.g.*, Dale System v. General Teleradio, Inc., 105 F. Supp. 745 (S.D.N.Y. 1952); Remick Music Corp. v. American Tobacco Co., 57 F. Supp. 475 (S.D.N.Y. 1944); Sacco v. Herald Statesman, Inc., 32 Misc. 2d 739, 223 N.Y.S.2d 329 (1961); Advance Music Corp. v. American Tobacco Co., 183 Misc. 645, 50 N.Y.S.2d 287 (1944), *aff'd*, 268 App. Div. 707, 53 N.Y.S.2d 337 (1945), *rev'd on other grounds*, 269 N.Y. 79, 70 N.E.2d 401 (1946). See also Prosser, *Injurious Falsehood: The Basis of Liability*, 59 COLUM. L. REV. 425 (1959).

5. Jekshewitz v. Groswald, 265 Mass. 413, 164 N.E. 609 (1929); Morgan v. McNab, 25 N.J. 271, 135 A.2d 657 (1957); Friedman v. Libin, 4 Misc. 2d 248, 157 N.Y.S.2d 826 (1957), *aff'd*, 3 App. Div. 2d 827, 161 N.Y.S.2d 826 (1957); Humphreys v. Baird, 197 Va. 667, 90 S.E.2d 796 (1956).

duced to leave a husband,[6] or induced to incur criminal penalties.[7] No cases have been found in which such harm has resulted to a third person; and in the nature of things they are not likely ever to arise. In what follows, therefore, the discussion will be limited to "physical harm" and "pecuniary loss."

B. *The Basis of Liability*

Tort liability traditionally is founded upon one of three bases: intent, negligence, or strict liability without either. Liability for misrepresentation is no exception, and it must be divided into the three familiar categories. The intent involved is intent to mislead, to deceive; and it requires something in the way of knowledge or belief that what is misrepresented is in fact false—or what the courts have called scienter. The negligence involved is a failure to exercise reasonable care to make sure that the representation is true, even where the defendant honestly believes it to be true. Strict liability, which is a late comer to the field, holds the defendant responsible merely because he has made the false statement, even though he reasonably believes it to be true and has exercised all reasonable care under the circumstances.

Intentional misrepresentation has been identified with the action of deceit since the leading English case of *Derry v. Peek*,[8] which held that that action could not be maintained against a defendant who had made his statement in good faith, even though his honest belief in the truth of what he said was an entirely unreasonable one. Lord Herschell, in that case, was willing to extend the action to cover representations made with reckless disregard as to whether what was said was true or false;[9] and there are several American decisions which have agreed.[10] Likewise, it appears that all of the American courts have been willing to extend it to representations made by one who is conscious that he has no sufficient basis of information to justify them.[11] A defendant who asserts a fact as of his own knowledge or

6. Work v. Campbell, 164 Cal. 343, 128 Pac. 943 (1912).
7. Burrows v. Rhodes, [1899] 1 Q.B. 816.
8. 14 App. Cas. 337 (1889).
9. *Id.* at 360-61.
10. Cooper v. Schlesinger, 111 U.S. 148 (1884); Otis & Co. v. Grimes, 97 Colo. 219, 48 P.2d 788 (1935); Rosenberg v. Howle, 56 A.2d 709 (D.C. Mun. App. 1948); Richards v. Foss, 126 Me. 413, 139 Atl. 231 (1927); Zager v. Setzer, 242 N.G. 493, 88 S.E.2d 94 (1955); Atkinson v. Charlotte Builders, 232 N.C. 67, 59 N.E.2d 1 (1950). Or without any belief at all as to truth or falsity. Shackett v. Bickford, 74 N.H. 57, 65 Atl. 252 (1906); Griswold v. Gebbie, 126 Pa. 353, 17 Atl. 673 (1889).
11. Sovereign Pocahontas Co. v. Bond, 120 F.2d 39 (D.C. Cir. 1941); Byars v. Sanders, 215 Ala. 561, 112 So. 127 (1927); Fausett & Co. v. Bullard, 217 Ark. 176, 229 S.W.2d 490 (1950); Davis v. Central Land Co., 162 Iowa 269, 143 N.W. 1073 (1913); Bullitt v. Farrar, 42 Minn. 8, 43 N.W. 566 (1889); State Street Trust Co. v.

so positively as to imply that he has knowledge,[12] under circumstances where he is aware that he will be so understood,[13] when he knows that he does not know whether what he says is true, is found to have the intent to deceive, not so much as to the fact itself, but rather as to the extent of his information. In order to avoid repetition and tedious detail, all of these types of conduct will be grouped together hereafter under the single name of intent. There appears to be no doubt that an intentional misrepresentation is actionable even when it is made quite gratuitously, by one who has no interest whatever in making it.[14]

The misrepresentation may be an entirely honest one, but may be negligently made, because of lack of reasonable care in ascertaining the truth,[15] or carelessness in the manner of expression,[16] or want of the skill and competence required by a particular business or profession.[17] After *Derry v. Peek* the English courts drew the unfortunate conclusion that, at least in the absence of some fiduciary relation between the parties,[18] there was no remedy for merely negligent misrepresentation, honestly believed, where the harm that resulted

Ernst, 278 N.Y. 104, 15 N.E.2d 416 (1938); Ultramares Corp. v. Touche, Niven & Co., *supra* note 1; Hadcock v. Osmer, 153 N.Y. 604, 47 N.E. 923 (1897); Zager v. Setzer, *supra* note 10.

12. Kirkpatrick v. Reeves, 121 Ind. 280, 22 N.E. 139 (1889); Bullitt v. Farrar, *supra* note 11; Schlossman's, Inc. v. Niewinski, 12 N.J. Super. 500, 79 A.2d 870 (1951); Pumphrey v. Quillen, 165 Ohio St. 343, 135 N.E.2d 328 (1956); First Nat'l Bank v. Hackett, 159 Wis. 113, 149 N.W. 703 (1914). A fortiori when the defendant represents that he has special knowledge. Holland Furnace Co. v. Korth, 43 Wash. 2d 318, 252 P.2d 772 (1953).

13. Thus where the matter is clearly susceptible of knowledge by the defendant. Wiley v. Simmons, 259 Mass. 159, 156 N.E.2d 23 (1927). Otherwise where it is clear to the plaintiff that it is not, or that the defendant is not asserting knowledge. Harris v. Delco Products Co., 305 Mass. 362, 25 N.E.2d 740 (1940); Smith v. Badlam, 112 Vt. 143, 22 A.2d 161 (1941); *cf.* Duryea v. Zimmerman, 121 App. Div. 560, 106 N.Y.S.2d 237 (1907).

14. Lahay v. City Nat'l Bank, 15 Colo. 339, 25 Pac. 704 (1891); Flaherty v. Till, 119 Minn. 191, 137 N.W. 815 (1912); Robb v. Gylock Corp., 384 Pa. 209, 120 A.2d 174 (1956).

15. Maxwell Ice Co. v. Brackett, Shaw & Lunt Co., 80 N.H. 236, 116 Atl. 34 (1921); International Prod. Co. v. Erie R. Co., 244 N.Y. 331, 155 N.E. 662 (1927); Houston v. Thornton, 122 N.C. 365, 29 S.E. 827 (1898).

16. See Slater Trust Co. v. Gardiner, 183 F.2d 268 (2d Cir. 1910); Nash v. Minnesota Title & Trust Co., 163 Mass. 574, 40 N.E. 1039 (1895); Angus v. Clifford, 2 Ch. Div. 449, 472 (1891).

17. Brown v. Sims, 22 Ind. App. 317, 53 N.E. 779 (1899); Dickle v. Nashville Abstract Co., 89 Tenn. 431, 14 S.W. 896 (1890). See Hawkins, *Professional Negligence Liability of Public Accountants,* 12 VAND. L. REV. 797 (1959); Roady, *Professional Liability of Abstractors,* 12 VAND. L. REV. 783 (1959); Rouse, *Legal Liability of the Public Accountant,* 23 KY. L.J. 3 (1934).

18. Nocton v. Lord Ashburton, [1914] A.C. 932 (solicitor and client); Woods v. Martins Bank, [1959] 1 Q.B. 55 (banker and customer); Burke v. Cory, [1959] 19 D.L.R.2d 252 (Ont. App.) (investment counselor).

to the plaintiff was only pecuniary loss.[19] They did, however, recognize a cause of action for negligence where there was physical harm.[20] It was not until 1964 that the House of Lords, in *Hedley Byrne & Co. v. Heller & Partners*,[21] overthrew the existing law, and extended the liability for negligence to pecuniary loss in any case where some "special relation" between the parties could be found. The decision is still too recent for the extensive dicta, strewn throughout the five opinions in the case, to do more than leave a good many unsolved problems for the English courts, as to the third persons to whom this liability may extend.[22]

In the United States the English rule was at first accepted, although a small minority of our courts refused to follow *Derry v. Peek* and held that the deceit action would lie for negligent statements—either declaring that the fault was sufficient and the reliance of the plaintiff equally justified or resorting to the rather obvious fiction that a duty to learn the facts, or not to speak without knowing them, was the equivalent of actual knowledge.[23] With the passage of time other courts, recognizing the real basis of the liability, began to carry over the negligence action from physical harm to pecuniary loss[24] and to allow the recovery. This view has ultimately prevailed and appears now to be generally accepted American law.[25]

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19. Cann v. Wilson, 39 Ch. Div. 39 (1888), began by finding liability for negligence; but the case was overruled in Le Lievre v. Gould, [1893] 1 Q.B. 491, which was followed in Old Gate Estates v. Toplis, [1939] 3 All E.R. 209, and Candler v. Crane, Christmas & Co., [1951] 2 K.B. 164. See Goodhart, *Liability for Negligent Misstatements*, 78 L.Q. REV. 107 (1962); Seavey, *Candler v. Crane, Christmas & Co.*, 67 L.Q. REV. 466 (1951).

20. The Spollo, [1891] A.C. 499; Clayton v. Woodman & Son, [1962] 2 Q.B. 533; Watson v. Buckley, [1940] 1 All E.R. 174; Sharp v. Avery, [1938] 4 All E.R. 85; White v. Broadbent, [1958] CRIM. L. REV. 129 (Eng.).

21. [1964] A.C. 465.

22. The actual decision was for the defendant, upon the ground of an effective disclaimer of responsibility. The judges agreed that the liability would arise only where there was some "special relation" between the parties, but they manifested little agreement as to what that relation might be.

See Stevens, *supra* note 2. Goodhart, *supra* note 2; Gordon, *Hedley Byrne v. Heller in the House of Lords*, 38 AUST. L.J. 39 (1964), 2 U. BRIT. COL. L. REV. 113 (1965).

23. See, *e.g.*, Anderson v. Tway, 143 F.2d 95 (6th Cir. 1944); Scholfield Gear & Pulley Co. v. Scholfield, 71 Conn. 1, 40 Atl. 1046 (1898); Watson v. Jones, 41 Fla. 241, 25 So. 678 (1899); Mullen v. Eastern Trust & Banking Co., 108 Me. 498, 81 Atl. 948 (1911); Vincent v. Corbitt, 94 Miss. 46, 47 So. 641 (1908).

24. Expressly spelled out in Weston v. Brown, 82 N.H. 157, 131 Atl. 141 (1925).

25. Gediman v. Anheuser Busch, Inc., 299 F.2d 537 (2d Cir. 1962); De Zemplen v. Home Federal Savings & Loan Ass'n, 221 Cal. Ann. 2d 197, 34 Cal. Rptr. 334 (1963); Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954); Mulroy v. Wright, 185 Minn. 84, 240 N.W. 116 (1931); Sult v. Scandrett, 119 Mont. 570, 178 P.2d 405 (1947); McCray v. Refrigerator Co., 79 Nev. 296, 382 P.2d 600 (1963); International Prod. Co. v. Erie R. Co., *supra* note 15; Houston v. Thornton, *supra* note 15; Dickle v. Nashville Abstract Co., *supra* note 17; Brown v. Underwriters at Lloyd's, 53 Wash. 2d 142, 332 P.2d 228 (1958); RESTATEMENT, TORTS § 552 (1939).

Liability for negligent misrepresentation, like other negligence liability, requires a duty to the plaintiff to exercise reasonable care; and it is about the question of the duty that the third-person cases have revolved. Even between the immediate parties, the lack of any duty may prevent recovery, particularly where the statement made is an entirely gratuitous one. A casual answer from a bystander to an inquiry as to the safety of premises[26] or the weight of a tombstone[27] requires only an honest answer—not reasonable care. The same is undoubtedly true of the curbstone advice or information given by an attorney[28] or a physician[29] to one who is not a client or a patient. It was on this basis that the Pennsylvania court[30] held that a trust company was not liable for negligence when it did a favor for the plaintiff by permitting him to look at a will.

On the other hand, there are a good many cases holding that a truck driver who takes the initiative by signaling an automobile driver that it is safe to pass[31] or a pedestrian that he may walk in front[32] has by his affirmative conduct assumed the duty of care, and so is liable if he is negligent. Particularly where the representation, although in itself gratuitous, is made in the course of the defendant's business or professional relations, the duty is readily found to be assumed;[33] and a physician who treats a contagious disease has been held liable when he negligently assures those in the vicinity that there

26. Holt v. Kolker, 189 Md. 636, 57 A.2d 287 (1948); Webb v. Cerasoli, 275 App. Div. 45, 87 N.Y.S.2d 884 (1949), *aff'd*, 300 N.Y. 603, 90 N.E.2d 64 (owner assuring contractor in presence of workman).

27. Avery v. Palmer, 175 N.C. 378, 95 S.E. 553 (1918).

28. Fish v. Kelly, 17 C.B.(n.s.) 194, 144 Eng. Rep. 78 (1864).

29. Buttersworth v. Swint, 53 Ga. App. 602, 168 S.E. 770 (1936).

30. Renn v. Provident Trust Co., 328 Pa. 481, 196 Atl. 2 (1938). In accord is Low v. Bouverie, [1891] 3 Ch. 82, where a trustee answered an inquiry from one about to deal with the cestui. See also Vartan Garapedian, Inc. v. Anderson, 92 N.H. 390, 31 A.2d 371 (1943), where there was an answer to an inquiry about the credit of a third person. Compare, as to information published in a newspaper, MacKown v. Illinois Pub. & Printing Co., 289 Ill. 59, 6 N.E. 526 (1937), and Curry v. Journal Pub. Co., 41 N.M. 318, 68 P.2d 168 (1937).

31. Petroleum Carrier Corp. v. Carter, 223 F.2d 402 (5th Cir. 1956); Haralson v. Jones Truck Lines, 223 Ark. 813, 270 S.W.2d 892 (1954); Shirley Cloak & Dress Co. v. Arnold, 92 Ga. App. 885, 90 S.E.2d 662 (1956); Thelen v. Spillman, 251 Minn. 89, 86 N.W.2d 700 (1957); Armstead v. Holbert, 146 W. Va. 582, 122 S.E.2d 43 (1961).

32. Sweet v. Ringwelski, 362 Mich. 138, 106 N.W.2d 742 (1961); Miller v. Watkins, 355 S.W.2d 1 (Mo. 1962) (waving driver on to pass bus); *cf.* Wolf v. Rebbun, 25 Wis. 2d 499, 131 N.W.2d 303 (1964) (exit from alley).

33. Washington & Berkeley Bridge Co. v. Pennsylvania Steel Co., 226 Fed. 169 (4th Cir. 1915) (contractor to subcontractor); Virginia Dare Stores v. Schuman, 175 Md. 287, 1 A.2d 897 (1938) (owner to invitee); Manock v. Amos D. Bridge's Sons, Inc., 86 N.H. 411, 169 Atl. 881 (1934) (supplier of truck, as to insurance); Robb v. Gylock Corp., *supra* note 14 (delivery of carboy); Valz v. Goodykoontz, 112 Va. 853, 72 S.E. 730 (1911) (owner to invitee).

is no danger.[34] It is no doubt on this basis that the *Hedley Byrne* case[35] in England, where one bank gratuitously gave information about the credit of its depositor to another bank, is to be justified.[36]

Strict liability for entirely innocent misrepresentation originated in cases of rescission, where equity would grant the relief even where there was only mutual mistake as to a fact basic to the transaction, and no less readily where the mistake of the plaintiff had been induced by the defendant's representation.[37] The first decision[38] in which this was carried over to a tort action for damages was one in which the court appeared serenely ignorant that there was any difference in the remedies; but it was followed by others[39] in which the extension was made quite deliberately, affording an additional remedy rather than a new basis for the action to one who found it impossible or undesirable to rescind. There are now some eighteen of our courts[40] which allow the remedy[41] in cases of the sale or rental of property.[42] The liability has been rather narrowly limited to defendants who have some pecuniary interest in making the representation,[43] to the exclu-

34. Skillings v. Allen, 143 Mich. 323, 173 N.W. 663 (1919); Edwards v. Lamb, 69 N.H. 599, 45 Atl. 580 (1899). In O'Neill v. Montefiore Hospital, 11 App. Div. 2d 132, 202 N.Y.S.2d 436 (1960), this was carried to the length of finding an assumed duty where a hospital nurse and its physician attempted to give free advice over the telephone.

35. *Supra* note 21; *cf.* Giddings v. Baker, 80 Tex. 308, 16 S.W. 33 (1891), where a bank president answering an inquiry was found to be acting in his capacity as a bank officer.

36. The case was attacked on this ground of gratuitous information in Gordon, *supra* note 22.

37. Equitable Life Assur. Soc'y v. New Horizons, Inc., 28 N.J. 307, 146 A.2d 466 (1958); Seneca Wire & Mfg. Co. v. A. B. Leach & Co., 247 N.Y. 1, 159 N.E. 700 (1928); Fields v. Haupert, 213 Ore. 179, 323 P.2d 332 (1958); De Joseph v. Zambelli, 392 Pa. 24, 139 A.2d 644 (1958).

38. Holcomb v. Noble, 69 Mich. 396, 37 N.W. 497 (1931).

39. Such as Trust Co. v. Fletcher, 152 Va. 868, 148 S.E. 785 (1929).

40. Alabama, District of Columbia, Georgia, Idaho, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, New Mexico, Ohio, Texas, Virginia, Washington, and West Virginia. Cases are listed in PROSSER § 102, at 726.

41. *E.g.*, Stein v. Treger, 86 App. D.C. 400, 182 F.2d 696 (1949) (sale of whiskey); Gulf Elec. Co. v. Fried, 218 Ala. 684, 119 So. 685 (1928) (lease of building); Becker v. McKonnie, 106 Kan. 426, 186 Pac. 496 (1920) (sale of water rights); New England Foundation Co. v. Elliott A. Watrous Co., 306 Mass. 177, 27 N.E.2d 756 (1940) (sale of chattel); Ham v. Hart, 58 N.M. 550, 273 P.2d 748 (1954) (sale of land); B-W Acceptance Corp. v. Benjamin T. Crump Co., 199 Va. 312, 99 S.E.2d 606 (1957) (transfer of trust receipt); Jacquot v. Farmers' Straw Gas Producer Co., 140 Wash. 482, 249 Pac. 984 (1926) (sale of patent rights).

42. The only cases found not involving the transfer of property are Baker v. Moody, 219 F.2d 368 (5th Cir. 1955) (inducing investment); Fidelity & Cas. Co. v. J. D. Pittman Tractor Co., 243 Ala. 354, 13 So.2d 669 (1943) (liability insurance policy); Jefferson Standard Life Ins. Co. v. Hedrick, 181 Va. 824, 27 S.E.2d 198 (inducing loan). There appears to be no essential reason why the liability should not extend to any commercial transaction.

43. As in Krause v. Cook, 144 Mich. 365, 108 N.W. 81 (1906) (agent receiving commission); Tischer v. Bardin, 155 Minn. 361, 194 N.W. 3 (1923) (same); Kuehl

sion of others[44]—such as an agent who receives no commission and has no other personal interest in the matter.[45]

So far as third persons are concerned, the strict liability has been identified[46] with the "express warranty," without privity of contract, given by the seller of chattels to the ultimate user or consumer.[47] This originated in 1932 in *Baxter v. Ford Motor Co.*,[48] where the court at first found a "warranty" in disseminated literature stating that the glass in an automobile windshield was "shatterproof," but on a second appeal[49] justified the recovery on the basis of strict liability for misrepresentation. The courts have continued to talk warranty, where few of the usual rules applicable to warranties between the immediate parties can apply; but a recent decision in Tennessee[50] has returned, and surely quite properly, to the theory of misrepresentation. All of the cases have involved the sale of chattels by the defendant, and in most of them the damage has been physical harm; but in several recent cases the strict liability has been extended to pecuniary loss, as where the ultimate purchaser of an automobile discovers that he has a bad bargain because it is not as represented by the manufacturer.[51]

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v. Parmenter, 195 Iowa 497, 192 N.W. 429 (1923); Huntress v. Blodgett, 206 Mass. 318, 92 N.E. 427 (1910); Giddings v. Baker, *supra* note 35; Osborne v. Holt, 92 W. Va. 410, 114 S.E. 801 (1922). Corporate officers, directors and promoters, whose interest is sufficiently obvious, have been held liable for statements made to induce dealings with the corporation.

44. Dykema v. Muskegon Piston Ring Co., 348 Mich. 129, 82 N.W.2d 467 (1957); Kolinski v. Reichstein, 303 Mich. 710, 7 N.W.2d 117 (1942); Rosenberg v. Cyrowski, 227 Mich. 508, 198 N.W. 905 (1924); Steele v. Banninga, 225 Mich. 547, 196 N.W. 404 (1923); Neelund v. Hansen, 144 Minn. 228, 175 N.W. 538 (1919); Noble v. Libby, 144 Wis. 632, 129 N.W. 791 (1911).

45. Aldrich v. Scribner, 154 Mich. 23, 117 N.W. 581 (1908); Williamson v. Hannan, 200 Mich. 658, 166 N.W. 829 (1918); Wimple v. Patterson, 117 S.W. 1034 (Tex. Civ. App. 1900).

46. Thus in Russo v. Merck & Co., 138 F. Supp. 147 (D. R. I. 1956), it was held that the supplier of blood plasma was not strictly liable in deceit to one with whom there was no privity of contract.

47. See PROSSER § 98, at 684.

48. 168 Wash. 456, 12 P.2d 409, 15 P.2d 1118 (1932).

49. Baxter v. Ford Motor Co., 179 Wash. 123, 35 P.2d 1090 (1934).

50. Ford Motor Co. v. Lonon, 398 S.W.2d 240 (Tenn. 1966). The court relied on a proposed RESTATEMENT OF TORTS, SECOND § 552D (Draft Nov. 7, p. 76) not yet finally approved by the American Law Institute. Another decision to the same effect is Cooper v. R. J. Reynolds Tobacco Co., 234 F.2d 170 (1st Cir. 1956).

51. Laclede Steel Co. v. Silas Mason Co., 67 F. Supp. 751 (W.D. La. 1946); Seely v. White Motor Co., 45 Cal. Rptr. 17, 403 P.2d 145 (1965); Posey v. Ford Motor Co., 128 So.2d 149 (Fla. App. 1961); Beck v. Spindler, 256 Minn. 593, 99 N.W.2d 670 (1959); Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E. 583 (1965); Ford Motor Co. v. Lonon, *supra* note 50. *Contra*, Dimoff v. Ernie Major, Inc., 55 Wash. 2d 385, 347 P.2d 1056 (1960).

Another way in which pecuniary loss may be recovered, without privity of contract, is by way of indemnity for liability incurred to one to whom the chattel has been resold. See, *e.g.*, Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965);

C. *Purpose, Expectation and Foresight That the Plaintiff May Act*

The defendant may intend that his statement shall reach the plaintiff, and that he shall take action in reliance upon it; and he may make the statement solely for that purpose, or for that purpose among others. Without any such purpose or intent, and without any interest of his own in inducing such action, he may have some special reason to expect that it may be taken. He may, for example, be informed that the plaintiff is interested in the matter and intends to rely on the information; or he may know that the recipient of the representation intends to pass it on to the plaintiff, or to a group in which he is included, in the hope of inducing action. The representation may be incorporated in a document intended to circulate, as in the case of a bill of lading or a stock certificate; or it may be affixed to a chattel expected to be resold. The tendency has been to treat such cases on the same basis as those of purpose.

On the other hand, the defendant may have no special reason to anticipate that the representation will reach others and induce their action, but because of the ever-present fact that any human words, written or oral, are capable of being repeated and passed on indefinitely, in a very general sense, it is always foreseeable that they may come into the hands of any number of third persons. "Our echoes roll from soul to soul, and grow forever and forever."[52] An extreme illustration is the case of *Howell v. Betts*,[53] where the plaintiff, in 1958, bought land in reliance upon a survey and description negligently made by the defendant in 1934.

It is here that the courts have become genuinely disturbed at the possibility of "a liability in an indeterminate amount for an indeterminate time to an indeterminate class,"[54] and the prospect of a huge and crushing burden of liability out of all proportion to the magnitude of the defendant's fault.

D. *The Size of the Group in Which Plaintiff Is Included*

The plaintiff may be identified and known to the defendant as a

Tri-City Fur Foods, Ino. v. Ammerman 7 Wis. 2d 149, 96 N.W.2d 495 (1959); *cf.* Free v. Sluss, 87 Cal. App. 2d 933, 197 P.2d 854 (1948); see note, 1965 U. ILL. L. FORUM 144.

52. TENNYSON, THE PRINCESS.

53. 211 Tenn. 134, 362 S.W.2d 924 (1962).

54. "If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw does not exist in the implication of a duty that exposes to these consequences." Cardozo, C. J., in Ultramares Corp. v. Touche, Niven & Co., 255 N.Y. 170, 179, 174 N.E. 441 444 (1931).

person likely to take action at the time the representation is made. He may be one of two, of five, of fifty, or of five hundred, whom it may be intended or expected to reach and to influence. Or he may be merely one member of an indeterminate class who may foreseeably come into possession of the information and rely on it. It is here again that the same spectre has haunted the courts.

E. *The Character of the Transaction*

The transaction into which the plaintiff enters in reliance upon the representation may be identical with that which it was intended to induce; or it may be substantially similar. There seems to be little doubt that substantial similarity is enough. If a balance sheet is certified for a corporation in the expectation that it will be used to obtain a bank loan in the amount of $10,000, the fact that the loan is made for $15,000 will certainly not defeat any liability. It is a different matter when the balance sheet is used to float a bond issue of $500,000. Not only is there a great difference in amount, but the bond issue is substantially a different thing from the loan. When the transaction is clearly a different one—as where a letter praising the plant of a title insurance company is written to aid it in obtaining title business, but is used by the company to sell its corporate stock[55] —the same ghost has walked the corridors, and the line has been drawn.

II. CLASSIFICATION OF THE CASES

After this lengthy review of the various factors that bear upon the liability to the third person, we may proceed to attempt some classification of the cases.

A. *Plaintiff Is Identified; Defendant's Purpose Is To Influence Him*

Here there is invariably liability for intentional deceit. The defendant is held liable when the misrepresentation is made to *A* in order that he may communicate it to *B*;[56] where it is made to *A* in the presence of *B* in order to induce *B* to act;[57] where the defendant refers

55. New York Title & Mortgage Co. v. Hutton, 63 App. D.C. 266, 71 F.2d 989 (1934).

56. Hoyt v. Clancey, 180 F.2d 158 (8th Cir. 1950); Harold v. Pugh, 174 Cal. App. 2d 603, 345 P.2d 112 (1959); Hubbard v. Weare, 79 Iowa 678, 44 N.W. 915 (1890); Campbell v. Goch, 131 Kan.. 546, 292 Pac. 752 (1930); Watson v. Crandall, 7 Mo. App. 233 (1899), *aff'd*, 78 Mo. 583 (1883); cf. Chubbuck v. Clevelaud, 37 Minn. 466, 35 N.W. 152 (1929).

57. Alexander v. Beresford, 27 Miss. 747 (1854); Hunter v. McKenzie, 197 Cal. 176, 139 Pac. 1090 (1925).

B to *A* as one who has the information;[58] and, of course, where *A* is the agent of *B* and is known to be acting for him.[59] Surprisingly enough, there appear to be few cases of negligence[60] or strict liability,[61] although there can be little doubt that the plaintiff would recover.

B. *Plaintiff Is Identified; Defendant Has Special Reason To Expect His Action*

Again the liability for intentional misrepresentation is sufficiently clear. The defendant has been held liable when he knows that *C* is interested in the information and is considering a deal, and he makes the statement to *B* in the presence of *C*[62] or with the expectation that *C* will obtain it from *B*.[63] He has been held liable also when he knows that *B* can be expected to approach *C* and seek to induce his action.[64] In the same category can perhaps be placed the cases in which the representation is made to those who are known to intend to form a corporation[65] or a partnership[66] to take action, and the intention is carried out. There are also two cases of the deceitful seller of a chattel, who knows that it is intended for use by an iden-

58. Hindman v. First Nat'l Bank, 112 Fed. 931 (6th Cir. 1902); Hiller v. Ellis, 72 Miss. 701, 18 So. 95 (1895); Jamestown Iron & Metal Co. v. Knofsky, 291 Pa. 60, 239 Atl. 611 (1927).

59. Lewis v. McClure, 127 Cal. App. 439, 16 P.2d 166 (1932); Advance-Rumely Thresher Co. v. Jacobs, 51 Idaho 160, 4 P.2d 657 (1931); Ettlinger v. Weil, 94 App. Div. 291, 87 N.Y.S. 1049 (1904) (letter to agent to be shown to principal).

60. Pearlman v. Garrod Shoe Co., 276 N.Y. 172, 11 N.E.2d 718 (1937) involved a sale of shoes for a child brought along by its mother. In Hedley Ryrne & Co. v. Heller & Partners, [1964] A.C. 465, the defendant knew that the information was intended for one customer of the bank to which it was sent, but did not know his identity. See also the cases of special reason to expect action on the part of an identified plaintiff, *infra* notes 68-77.

61. There is Odell v. Frueh, 146 Cal. App. 2d 504, 304 P.2d 45 (1956), where the representation was made to a school district to induce it to specify a product to be used by plaintiff contractor. Compare Jeffery v. Hanson, 39 Wash. 2d 855, 239 P.2d 346 (1952), and Lindroth v. Walgreen Co., 329 Ill. App. 105, 67 N.E.2d 595 (1946), both of which might perhaps be classified as involving purpose.

62. Southern States Fire & Cas. Ins. Co. v. Cromartie, 181 Ala. 295, 61 So. 907 (1913). In this case the court also found a duty to disclose the falsity when the plaintiff subsequently bought from him.

63. Pilmore v. Hood, 5 Bing. N.C. 98, 132 Eng. Rep. 1042 (1838); Peabody Bldg. & Loan Ass'n v. Houseman, 89 Pa. St. 261 (1879); Houseman v. Girard Mutual Bldg. & Loan Ass'n, 81 Pa. St. 256 (1876).

64. Gulf Oil Corp. v. Newton, 130 Coun. 37, 31 A.2d 462 (1943). Defendant made the statement to one of two guarantors, knowing that he could be expected to communicate it to the other.

65. E. M. Fleischmann Lumber Corp. v. Resources Corp. International, 105 F. Supp. 681 (D. Del. 1952); Iowa Economic Heater Co. v. American Economic Heater Co., 32 Fed. 735 (N.D. Ill. 1887); Crystal Pier Amusement Co. v. Cannan, 219 Cal. 184, 25 P.2d 839 (1933); Scholfield Gear & Pulley Co. v. Scholfield, *supra* note 23.

66. *Cf.* Henry v. Dennis, 95 Me. 24, 49 Atl. 58 (1901), where defendant answered an inquiry sent to him on the letterhead of a firm.

tified person other than the buyer.[67]

The negligence liability is no less clear. The defendant is liable where, without proper care, he provides *B* with a title[68] or weight certificate,[69] an abstract of title,[70] an appraisal,[71] an audit,[72] or a report of a boiler inspection,[73] knowing that *B* intends to pass it on to *C* and that *C* is contemplating action in reliance upon it. The report may even be sent by the defendant to *C* at the request of *B*,[74] or the defendant may be informed that *B* and *C* expect to act in concert.[75] Strict liability is represented by one case[76] of an express "warranty" sent by the defendant to a dealer who had requested it for a particular customer, and perhaps by another[77] where a retailer made the statement to a mother knowing that she intended to use the chattel for her infant child.

C. *Plaintiff Is Identified: Defendant Has No Special Reason To Expect His Action*

There are a few cases involving intentional misrepresentation. In one of them, in Texas,[78] the defendant, offering lots for sale, made

67. Woodward v. Miller & Karwich, 119 Ga. 618, 46 S.E. 847 (1904); Langridge v. Levy, 2 M. & W. 519, 150 Eng. Rep. 519 (1836).

68. Economy Bldg. & Loan Ass'n v. West Jersey Title & Guarantee Co., 64 N.J.L. 27, 44 Atl. 854 (1899).

69. Plata American Trading Co. v. Lancashire, 29 Misc. 2d 246, 214 N.Y.S.2d 43 (1957); Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922).

70. Beckovsky v. Borton Abstract & Title Co., 208 Mich. 224, 175 N.W. 225 (1919); Western Loan & Savings Co. v. Silver Bow Abstract Co., 31 Mont. 448, 78 Pac. 774 (1904); Dickle v. Nashville Abstract Co., 89 Tenn. 431, 14 S.W. 896 (1890); Decatur Land, Loan & Abstract Co. v. Rutland, 185 S.W. 1064 (Tex. Civ. App. 1916); Anderson v. Spriestersbach, 69 Wash. 393, 125 Pac. 166 (1912); *see* Phoenix Title & Trust Co. v. Continental Oil Co., 43 Ariz. 219, 29 P.2d 1065 (1934).

71. United States v. Neustadt, 281 F.2d 596 (4th Cir. 1960) (federal housing appraisal).

72. American Indem. Co. v. Ernst & Ernst, 106 S.W.2d 763 (Tex. Civ. App. 1937).

73. Du Rite Laundry v. Washington Elec. Co., 263 App. Div. 396, 33 N.Y.S. 2d 925 (1942). The inspection was made for the buyer of the boiler, knowing that the seller expected to rely on it in giving warranties, on which he was held liable. *Cf.* Robitscher v. United Clay Products Co., 143 A.2d 99 (Mun. App. D.C. 1958), where a layout for air conditioning was prepared for a builder, knowing that he would rely on it in doing work on plaintiff's house.

Hopelessly out of line is Bilich v. Barnett, 103 Cal. App. 2d 921, 229 P.2d 492 (1951), where grade sheets were prepared for intended use by an identified contractor. To the contrary is M. Miller Co. v. Central Contra Costa Sanitary District, 198 Cal. App. 2d 305, 18 Cal. Rptr. 13 (1961), where the contractor was not even identified.

74. Cann v. Willson, 39 Ch. Div. 39 (1888); Brown v. Sims, 22 Ind. App. 317, 53 N.E. 779 (1899).

75. Bradley v. Bradley, 165 N.Y. 183, 58 N.E. 887 (1900).

76. Jeffery v. Hanson, *supra* note 61.

77. Lindroth v. Walgreen Co., 329 Ill. App. 105, 67 N.E.2d 595 (1946).

78. Westcliff v. Wall, 153 Tex. 271, 267 S.W.2d 544 (1954).

false statements about them to *A* in the presence of *B*, without any reason to believe that *B* had any interest in the lots. He was held not to be liable when *B* purchased a lot. There are a few others[79] in which the representation was made to *A* as an agent acting for *B*, with no reason to suppose that *A* had any personal interest in the matter, and it was held that there was no liability when *A* subsequently purchased the property in question from *B*. Cases of negligence and strict liability appear to be lacking; but if the intentional deceit is not actionable, there could scarcely be recovery on the other grounds.

D. *Plaintiff Is an Unidentified Member of a Group Or Class: Defendant's Purpose Is To Influence Any of Its Members*

There are a good many cases, all of them holding that the plaintiff can recover. As to intentional deceit, the simplest case[80] is that in which the defendant sent false statements to "Mr. Hadcock." There were two brothers named Hadcock, and the purpose was to influence either one of them who would be willing to make a loan. But the group or class need not be a small one, and may in fact be very large.[81] Thus a fraudulent seller of stock[82] or a manipulator of the market[83] has been held liable when he brought about publication of a newspaper story and a reader bought stock in reliance upon it.

There is liability for deceit when false statements as to credit are made to a commercial credit agency, for the purpose of reaching its subscribers,[84] or even others,[85] in order to obtain credit from them.

79. McCane v. Wokoun, 189 Iowa 1010, 179 N.W. 332 (1920); Walker v. Choate, 228 Ky. 101, 14 S.W.2d 406 (1929); Wells v. Cook 16 Ohio St. 67, 88 Am. Dec. 436 (1865); Butterfield v. Barber, 20 R.I. 99, 37 Atl. 32 (1897).

80. Hadcock v. Osmer 153 N.Y. 604, 47 N.E. 923 (1897).

81. Compare the cases of direct representation to the public by advertising, such as Rohrschneider v. Knickerbocker Life Ins. Co., 76 N.Y. 216, 32 Am. Rep. 290 (1879); De Kalb v. Hybrid Seed Co., 293 S.W.2d 64 (Tex. Civ. App. 1956).

82. Holloway v. Forsyth, 226 Mass. 358, 115 N.E. 483 (1917).

83. Willcox v. Harriman Securities Corp., 10 F. Supp. 532 (S.D.N.Y.) 1933).

84. Reliance Shoe Co. v. Manly, 25 F.2d 381 (4th Cir. 1928); *In re* Weissman, 19 F.2d 769 (2d Cir. 1927); Manly v. Ohio Shoe Co., 25 F.2d 384 (4th Cir. 1928); *In re* Epstein, 109 Fed. 874 (W.D. Ark. 1901); *In re* Weil, 111 Fed. 897 (S.D.N.Y. 1901); Fechheimer v. Baum, 37 Fed. 167 (S.D. Ga. 1889); Hulsey v. M. C. Kiser Co., 21 Ala. App. 123, 105 So. 913 (1925); Forbes v. Auerbach, 56 So. 2d 895 (Fla. 1952); P. Cox Shoe Co. v. Adams, 105 Iowa 402, 75 N.W. 316 (1898); Courtney v. William Knabe & Co. Mfg. Co., 97 Md. 499, 55 Atl. 614 (1903); Genesee Savings Bank v. Barge Co., 52 Mich. 164, 17 N.W. 790, 18 N.W. 206 (1883); Mooney v. Davis, 75 Mich. 188, 42 N.W. 802 (1889); Pier Bros. v. Doheny, 93 App. Div. 1, 86 N.Y. Supp. 971 (1904); Arnold v. Richardson, 74 App. Div. 581, 77 N.Y. Supp. 763 (1902); Tindle v. Birkett, 171 N.Y. 520, 64 N.E. 210 (1902); Gainesville Nat'l Bank v. Bamberger, 77 Tex. 48, 13 S.W. 959 (1890); National Bank v. Illinois Lumber Co., 101 Wis. 247, 77 N.W. 185 (1898); *cf.* Stevens v. Ludlum, 46 Minn. 160, 48 N.W. 771 (1891); Eaton Cole & Burnham Co. v. Avery, 83 N.Y. 31, 38 Am. Rep. 389 (1880).

85. Davis v. Louisville Times Co., 181 F.2d 10 (6th Cir. 1910); Jamestown Iron &

Also where a trustee falsely certifies an overissue of bonds,[86] or a bank officer makes a false report,[87] for the purpose of inducing the public to buy. And when a prospectus is found to be issued for the purpose, among others, of inducing the purchase of stocks or bonds on the market, there is liability to such a purchaser.[88] Likewise where *A* is given a letter saying that his credit is good, to be exhibited to anyone who may care to deal with him, the defendant is liable even though he never heard of *B*, who deals with *A*.[89] There has been recovery for personal injury when the maker of a product misrepresents it, for the purpose of reaching the ultimate user.[90]

The few negligence cases follow the same rule. The *Hedley Byrne* case[91] in England found liability where the information was negligently furnished for a particular customer of the recipient bank, but the defendant did not know his identify. In *Granberg v. Turnham*,[92] a California court found liability when the defendant negligently gave information concerning its lands to a real estate board, to be included in the board's multiple listing sent out to a large number of prospective buyers. In New York a trustee negligently certifying bonds for a corporation, in order to aid in their

Metal Co. v. Knofsky, 291 Pa. 60, 139 Atl. 611 (1927). In Irish Am. Bank v. Ludlum, 49 Minn. 344, 51 N.W. 1046 (1892), where the question was one of estoppel the court found no purpose to reach one who obtained the information from a subscriber.

86. Mullen v. Eastern Trust & Savings Bank, 108 Me. 498, 81 Atl. 948 (1911).

87. Taylor v. Thomas, 55 Misc. 411, 106 N.Y. Supp. 538 (1907). *Accord*, Leonard v. Springer, 197 Ill. 532, 64 N.E. 210 (1902) (false statements in trust deed to be recorded, liable to plaintiff who bought notes in reliance on the record); Stickel v. Atwood, 25 R.I. 456, 56 Atl. 687 (1903) (corporate officer representing bonds secured by all the property of corporation, liable to plaintiff lending money and taking bonds as security).

88. Andrews v. Mockford, [1896] 1 Q.B. 372; Sims v. Tigrett, 229 Ala. 486, 158 So. 326 (1934). A fortiori where the plaintiff buys from the defendant. *Accord*, Greene v. Mercantile Trust Co., 111 N.Y. Supp. 802 (Sup. Ct. 1908) (prospectus concerning bonds, intended also to reach purchasers of stock).

89. Young v. Hall, 4 Ga. 95 (1848); Diel v. Kellogg, 163 Mich. 162, 128 N.W. 420 (1910); Clopton v. Cozart, 11 Misc. 365 (1850); Williams v. Wood, 14 Wend. 126 (N.Y. 1835); Allen v. Addington, 7 Wend. 9 (N.Y. 1831), *aff'd*, 11 Wend. 374 (N.Y. 1833); *cf.* Strutzel v. Williams, 109 Cal. App. 2d 512, 240 P.2d 788 (1952) (statement intended to be repeated to others to secure additional investors). In Nash v. Minnesota Title Ins. & Trust Co., 159 Mass. 437, 34 N.E. 625 (1893), a letter concerning the title to land was given to its owner, to be used in the sale of mortgage bonds. It was held that there was liability to purchasers from the owner, but not to subpurchasers, since there was no purpose of aiding the first purchaser to resell.

90. Hruska v. Parke, Davis & Co., 6 F.2d 537 (8th Cir. 1925); Wechsler v. Hoffman-La Roche, Inc., 198 Misc. 540, 99 N.Y.S.2d 588 (1950) (false statements to druggists and physicians intended to reach users of the product). *Accord*, as to false labels on products: Graham v. John R. Watts & Son, 238 Ky. 96, 36 S.W.2d 859 (1931); Gold Kist Peanut Growers Ass'n v. Waldman, 377 P.2d 807 (Okla. 1962).

91. Hedley Byrne & Co. v. Heller & Partners, *supra* note 60.

92. 166 Cal. App. 2d 390, 333 P.2d 423 (1958).

sale, was held liable to a purchaser of the bonds.[93] There is one case[94] of a report negligently made to a mercantile credit agency and intended to reach its subscribers. And where the seller of chattels negligently mislabels them, in order that the label may reach the ultimate consumer, liability for physical harm has been imposed.[95]

As for strict liability, the seller's advertising usually can be found to be a representation made directly to the consumer;[96] but the liability has been found in the case of labels on the goods,[97] or manuals, brochures and other literature[98] supplied to a dealer for delivery to any purchaser, or an "insurance policy"[99] given him for the same purpose. It is apparently quite immaterial how the representation reaches the plaintiff, so long as it is intended to do so and does.

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93. Doyle v. Chatham & Phoenix Nat'l Bank, 253 N.Y. 369, 171 N.E. 574 (1930).

94. Durham v. Wichita Mill & Elevator Co., 202 S.W. 138 (Tex. Civ. App. 1918).

95. Hoskins v. Jackson Grain Co., 63 So.2d 514 (Fla. 1953); La Plant v. E.I. Du Pont de Nemours & Co., 346 S.W.2d 231 (Mo. App. 1961); Peterson v. Standard Oil Co., 55 Ore. 511, 106 Pac. 337 (1910); Wise v. Hayes, 58 Wash. 2d 106, 361 P.2d 171 (1961), *rehearing denied*, June 19, 1961.

96. Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961); Hansen v. Firestone Tire & Rubber Co., 276 F.2d 254 (6th Cir. 1960); Arfons v. E. I. Du Pont de Nemours & Co., 261 F.2d 434 (2d Cir. 1958); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897 (1963); Lane v. C. A. Swanson & Sons, 130 Cal. App. 2d 210, 278 P.2d 723 (1955); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958); Hamon v. Digliani, 148 Conn. 710, 174 A.2d 294 (1961); Connolly v. Hagi, 24 Conn. Supp. 198, 188 A.2d 884 (1963); Spiegel v. Saks 34th St., 252 N.Y.S.2d 852 (Sup. Ct. 1964); Inglis v. American Motors Corp., *supra* note 51; Baxter v. Ford Motor Co., *supra* notes 48 & 49.

97. Bonker v. Ingersoll Products Co., 132 F. Supp. 5 (D. Mass. 1955) ("boneless chicken"); Maecherlein v. Sealy Mattress Co., 145 Cal. App. 2d 275, 302 P.2d 331 (1956) (mattress, plaintiff stabbed by a spring in her "gluteal prominence"); Lane v. C. A. Swanson & Sons, 130 Cal. App. 2d 272, 278 P.2d 723 (1955) (canned chicken); Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953) (watermelon seed); Graham v. John R. Watts & Son, 238 Ky. 96, 36 S.W.2d 859 (1931) (seed); Worley v. Procter & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952) (detergent); Darks v. Scudder-Gale Grocery Co. 146 Mo. App. 246, 130 S.W. 430 (1910) (ginger extract); Simpson v. American Oil Co., 217 N.C. 542, 8 S.E.2d 813 (1940) (insecticide).

98. Hansen v. Firestone Tire & Rubber Co., 296 F.2d 264 (6th Cir. 1960) (tire); Arfons v. E. I. Du Pont de Nemours & Co., *supra* note 96 (dynamite, literature); Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939) (automobile); Brown v. Globe Lab., 165 Neb. 138, 84 N.W.2d 151 (1957) (sheep vaccine, circular); see Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946) (wire rope, manual). In Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E. 2d 399, 226 N.Y.S.2d 363 (1962), garment tags and labels, advertising and sales literature were all involved.

99. Studebaker Corp. v. Nail, 82 Ga. App. 779, 62 S.E.2d 198 (1950) (automobile); Beck v. Spindler, *supra* note 51 (house trailer); Bennett v. Richardson-Merrell, Inc., 231 F. Supp. 150 (E.D. Ill. 1964) (representations concerning drug to physicians, intended to reach users). *Cf.* Seely v. White Motor Co., *supra* note 51 (contract form for purchase of automobile); General Motors Corp. v. Dodson, 47 Tenn. App. 438, 338 S.W.2d 655 (1960) (written warranty of automobile).

E. *Plaintiff Is an Unidentified Member of a Group or Class: Defendant Has Special Reason To Expect That Any Member of It May Be Reached and Influenced*

There is quite definitely liability here for intentional deceit. One group of cases has involved embodiment of the representation in some document, such as a stock certificate,[100] a promissory note,[101] or a bill of lading,[102] which is by its nature intended to circulate, or even a label on a chattel expected to be resold.[103] Other courts have found liability where the information is furnished with the expectation that it will be published,[104] and of course all the more readily when the publication is required by law.[105] Likewise there has been recovery when the seller of goods intentionally misrepresents their character or safety to a dealer, knowing that he intends to resell them.[106]

As these cases indicate, the group may be a very large one. Where physical harm results from a misrepresentation as to chattels sold, it has been held to include any ultimate user of the chattel.[107] But

100. Shotwell v. Mali, 38 Barb. 445 (N.Y. 1862); Bruff v. Mali, 36 N.Y. 200 (1867); Merchants' Nat'l Bank v. Robison, 8 Utah 256, 30 Pac. 985 (1892); *cf.* Bank of Atchison County v. Byers, 139 Mo. 627, 41 S.W. 825 (1897) (bond); Bank of Montreal v. Thayer, 2 McCrary 1 (C.C. Iowa 1881) (receiver's cerificate).

101. National Shawmut Bank v. Johnson, 317 Mass. 485, 58 N.E.2d 849 (1945); People's Nat'l Bank v. Dixwell, 217 Mass. 436, 105 N.E. 435 (1914).

102. National Bank v. Kershaw Oil Mill, 202 Fed. 90 (4th Cir. 1912); *cf.* Baker v. Hallam, 103 Iowa 43, 72 N.W. 419 (1897) (false abstract and blank deed to be used).

103. Graham v. John R. Watts & Son, 238 Ky. 96, 36 S.W.2d 859 (1931).

104. Bedford v. Bagshaw, 4 H. & N. 538, 157 Eng. Rep. 951 (1859) (report to stock exchange to qualify as member); Morse v. Swits, 19 How. Pr. 275 (N.Y. 1859) (report by bank officer to bank, expecting it to be published).

105. Warfield v. Clark, 118 Iowa 69, 91 N.W. 833 (1902) (to state auditor); Ver Wys v. Vander Mey, 206 Mich. 499, 173 N.W. 504 (1919) (filed articles of incorporation, public right to rely); City Bank v. Phillips, 22 Mo. 85, 64 Am. Dec. 254 (1855) (to insurance authorities); Gerner v. Mosher, 58 Neb. 162, 122 N.W. 540 (1909) (report of financial condition to Secretary of State); Parsons v. Johnson, 28 App. Div. 1, 50 N.Y. Supp. 780 (1898); Mason v. Moore, 73 Ohio St. 275, 76 N.E. 932 (1906) (report by bank directors to Comptroller of the Currency); Coughlin v. State Bank, 117 Ore. 83, 243 Pac. 78 (1926) (report to Superintendent of Banks).

106. Sterchi Bros. Stores v. Castleberry, 236 Ala. 349, 182 So. 474 (1938); Quirici v. Freeman, 98 Cal. App. 2d 194, 219 P.2d 899 (1950); Lewis v. Terry, 111 Cal. 39, 43 Pac. 398 (1896); West Disinfecting Co. v. Plummer, 44 App. D.C. 345 (1916); State to Use of Hartlove v. Fox, 79 Md. 514, 29 Atl. 601 (1894); Skinn v. Reuter, 135 Mich. 57, 99 N.W. 152 (1903); Schubert v. J. R. Clark Co., 49 Minn. 331, 51 N.W. 1103 (1892); Kuelling v. Roderick Lean Mfg. Co., 183 N.Y. 78, 75 N.E. 1098 (1905); Maytag v. Arbogast, 42 Ga. App. 666, 157 S.E. 350 (1931). Usually these cases have called the cause of action one of negligence toward the plaintiff.

107. Johnson v. Ernest G. Beaudry Motor Co., 170 F. Supp. 164 (N.D. Ga. 1958) (wife driving car); Holland v. Sanfax Corp., 106 Ga. App. 1, 126 S.E.2d 442 (1962) (employee using chattel); Pullman Co. v. Ward, 143 Ky. 727, 137 S.W. 1047 (1911) (same); Jones v. Raney Chevrolet Co., 213 N.C. 775, 197 S.E. 757 (1938) (wife riding in car).

even in the cases of pecuniary loss the liability for intentional misrepresentation may be quite extensive. In *Ultramares Corp. v. Touche, Niven & Co.*,[108] which is still the great leading case in this field, accountants who certified a balance sheet for a corporation were held liable to a company which made a loan to it on the basis of conscious ignorance whether the balance sheet was correct. The defendants knew

> that in the usual course of business the balance sheet when certified would be exhibited by the [recipient] to banks, creditors, stockholders, purchasers or sellers, according to the needs of the occasion, as the basis of financial dealings. . . . The range of the transactions in which a certificate of audit might be expected to play a part was as indefinite and wide as the possibilities of the business that was mirrored in the summary.[109]

There was, in other words, mere expectation of some entirely unspecified business use of the certificate—it was not obtained to be thrown in the waste-basket. This approaches, although it does not quite reach, the general possibility of reliance by others from which the courts have recoiled.[110] The decision was reaffirmed in *State Street Trust Co. v. Ernst*,[111] where the accountants knew merely that the certificate was to be used "to obtain credit"; and there are a few other cases of such certificates apparently in accord.[112] There is also a California decision[113] where a certificate of termite clearance given to a buyer of land was held to inure to the benefit of a subpurchaser on the ground that it was intended for use by "such persons as were transacting business" with the buyer in connection with the property.

When the misrepresentation is only negligent, the liability for physical harm has been quite as extensive as in the case of deceit. The seller of goods expected to be resold has been held liable not only to the ultimate buyer,[114] but also to anyone making the expected

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If the liability for negligence is to extend to those in the vicinity of the expected use, *infra* note 116, it is probable that the liability for intentional misrepresentation would also be so extended. No cases have been found.

108. 255 N.Y. 170, 174 N.E. 441 (1931).

109. *Id.* at 173, 174 N.E. at 442. "To creditors and investors to whom the employer exhibited the certificate, the defendants owed a like duty to make it without fraud, since there was notice in the circumstances of its making that the employer did not intend to keep it to himself." *Id.* at 179, 174 N.E. at 444. A significant fact is that the defendant supplied the corporation with thirty-two copies certified with serial numbers as counterpart originals. *Id.* at 173, 174 N.E. at 442.

110. *Infra* notes 141-55.

111. 278 N.Y. 104, 15 N.E.2d 416 (1938).

112. Duro Sportswear, Inc. v. Cogen, 131 N.Y.S.2d 20 (1954), *aff'd mem.*, 285 App. Div. 867, 137 N.Y.S.2d 829 (1954) (it is not altogether clear that the plaintiff was not identified); Mutual Ventures, Inc. v. Barondess, 17 Misc. 2d 483, 186 N.Y.S.2d 308 (1939); see Fidelity & Deposit Co. v. Atherton, 47 N.M. 443, 268 P.2d 231 (1954).

113. Wice v. Schilling, 124 Cal. App. 2d 735, 268 P.2d 231 (1954).

114. Riggs v. Standard Oil Co., 130 Fed. 199 (D. Minn. 1904); Kentucky Inde-

use of the thing sold,[115] and even to one in the vicinity injured by such use.[116] The defendant who inspects a boiler or an elevator and reports it to be safe[117] becomes liable to those to whom injury may be foreseen if he is negligent in doing so.

It is when pecuniary loss is in question that difficulties begin to arise. Certainly there is a much narrower limitation of liability in pecuniary loss cases than in the cases of intentional deceit and those of physical harm. In the *Ultramares* case[118] Cardozo refused to extend the liability of accountants who were merely negligent to one who made a loan, but could claim nothing more in the way of special reason to anticipate his action than the general use of certified balance sheets for some kinds of business purposes. He raised a host of terrifying spectres:[119]

> 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, if they have overlooked a statute or a decision, to the same extent as if the controversy were one between client and adviser. Title companies insuring titles to a tract of land, with knowledge that at an approaching auction the fact that they have insured will be stated to the bidders, will become

pendent Oil Co. v. Schnitzler, 208 Ky. 507, 271 S.W. 570 (1925); Driekosen v. Black, Suvalls & Bryson, 158 Neb. 531, 64 N.W.2d 88 (1954);Marsh v. Usk Hardware Co., 73 Wash. 543, 132 Pac. 241 (1913); Peterson v. Standard Oil Co., 55 Ore. 511, 106 Pac. 337 (1910). There are also a good many cases such as Waters-Pierce Oil Co. v. Deselms, 212 U.S. 159 (1909), in which failure to disclose a known danger has been equated with negligent misrepresentation.

115. Johnson v. Ernest G. Beaudry Motor Co., *supra* note 107 (wife driving car); Davidson v. Montgomery Ward & Co., 171 Ill. App. 355 (1912) (employee); Fort Wayne Drug Co. v. Flemion, 93 Ind. App. 129, 175 N.E. 170 (1931) (same); La Plant v. E. I. Du Pont de Nemours & Co., *supra* note 95 (user); Cunningham v. C. R. Pease House Furnishing Co., 74 N.H. 435, 69, Atl. 120 (1908) (spouse using stove polish); Rosenbusch v. Ambrosia Milk Corp., 181 App. Div. 97, 168 N.Y. Supp. 505 (1917) (child of buyer); Crist v. Art Metal Works, 230 App. Div. 97, 168 N.Y. Supp. 505 (1917) (same).

116. Nichols v. Clark, McMullen & Riley, Inc., 261 N.Y. 118, 184 N.E. 729 (1933) (product misrepresented to engineers as proper covering for air duct, and used on plaintiff's house); Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928).

117. Van Winkle v. American Steam Boiler Ins. Co., 52 N.J.L. 240, 19 Atl. 472 (1899). Usually this is put on the ground of negligent performance of the assumed duty to inspect, without mention of the report to the owner which in all probability was made. Sheridan v. Aetna Cas. & Sur. Co., 3 Wash. 2d 423, 100 P.2d 1024 (1940); Smith v. American Employers' Ins. Co., 102 N.H. 530, 163 A.2d 564 (1960); Dickerson v. Shepard Warner Elevator Co., 287 F.2d 255 (6th Cir. 1961); Nelson v. Union Wire Rope Corp., 31 Ill. 2d 69, 199 N.E.2d 769 (1964); Wolfmeyer v. Otis Elevator Co., 262 S.W.2d 18 (Mo. 1953); Durham v. Warner Elevator Co., 166 Ohio St. 31, 139 N.E.2d 10 (1956); Evans v. Otis Elevator Co., 403 Pa. 13, 168 A.2d 573 (1961); Bollin v. Elevator Const. & Repair Co., 361 Pa. 7, 63 A.2d 19 (1949); see Mays v. Liberty Mut. Ins. Co., 323 F.2d 174 (3d Cir. 1963). See Note, 18 VAND. L. REV. 1615 (1965).

118. *Supra* note 108.

119. *Id.* at 173, 174 N.E. at 442.

> liable to purchasers who may wish the benefit of a policy without payment of a premium. These illustrations may seem to be extreme, but they go little, if any, farther than we are invited to go now. Negligence, moreover, will have one standard when viewed in relation to the employer, and another and at times a stricter standard when viewed in relation to the public. Explanations that might seem plausible, omissions that might be reasonable, if the duty is confined to the employer, conducting a business that presumably at least is not a fraud upon his creditors, might wear another aspect if an independent duty to be suspicious even of one's principal is owing to investors. 'Every one making a promise having the quality of a contract will be under a duty to the promisee by virtue of the promise, but under another duty, apart from contract, to an indefinite number of potential beneficiaries when performance has begun. The assumption of one relation will mean the involuntary assumption of a series of new relations, inescapably hooked together.'[120] 'The law does not spread its protection so far.'[121]

In two other decisions[122] other courts have reached the same conclusion as to the accountant negligently certifying a balance sheet.

But what if the defendant is informed that his representation is to be passed on to some more limited group, as a basis for action on the part of one or more of them? In *M. Miller Co. v. Central Contra Costa Sanitary District*,[123] a California decision, an engineering company was hired to prepare a soil report, knowing that it was intended to be made available to all bidders for work on a sewer system and to be used by the successful bidder to do the work. It prepared the report negligently and the bidder lost money; accordingly it was held liable for negligent misrepresentation. The same conclusion, upon quite similar facts, was reached by the district court in *Texas Tunneling Co. v. City of Chattanooga*;[124] but on appeal[125] the Sixth Circuit reversed the decision and held that there was no liability.

There are, however, three elements that tend to weaken the authority of the *Texas Tunneling Co.* case. One is that the court considered itself bound, as a matter of Tennessee law, by a Tennessee case[126] in which there was no special reason to expect the plaintiff's action. Another is that the court adopted a very narrow interpretation of the *Ultramares* case, saying that it held (as it assuredly did not) that the accounting firm was not liable for simple negligence "to a

120. Quoted from H. R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 168, 159 N.E. 896, 899 (1928).

121. Quoted from Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 309 (1927).

122. O'Connor v. Ludlam, 92 F.2d 50 (2d Cir. 1937); Landell v. Lybrand, 264 Pa. St. 406, 107 Atl. 783 (1919).

123. 198 Cal. App. 2d 305, 18 Cal. Rptr. 13 (1961).

124. 204 F. Supp. 821 (E.D. Tenn. 1962).

125. 329 F.2d 402 (6th Cir. 1964).

126. Howell v. Betts, 211 Tenn. 324, 362 S.W.2d 924 (1962).

plaintiff who was neither *specifically* foreseeable by it nor in privity with it."[127] The third is that the court laid considerable stress upon a disclaimer of accuracy and responsibility contained in the report itself. Other cases will no doubt have to resolve the conflict; but the writer would hazard the guess that of the two cases it is the *Miller* decision which is the more likely to be followed.

Strict liability is represented by one California case[128] in which representations made to a contractor concerning the suitability of plastic pipe for a particular heating system were held to constitute an express "warranty" to the plaintiff when the contractor used it in constructing his building. The case was one of pecuniary loss.

F. *The Effect of a Public Duty*

Statutes requiring information to be filed for public record,[129] and particularly those which require it to be published after filing, may considerably expand the class of persons whom the defendant has special reason to expect his representation to reach. Such statutes commonly are held to create a duty[130] to such members of the public as may enter into transactions of the kind in which the legislation is intended to protect them. There is, consequently, liability for intentional misrepresentations[131] and also for those which are merely negligent.[132] Strict liability is imposed under section 12(2) of the Securities Act of 1933,[133] as amended, a discussion of which is beyond the scope of this paper.[134]

It is apparently on the same basis that public officers who give out information in the performance of their public duties have been held liable for mere negligence to those members of the public who are intended to be protected by the creation of the office and the

127. 329 F.2d at 407. (Emphasis added.)

128. Corporation of Presiding Bishop v. Cavanaugh, 217 Cal. App. 2d 492, 32 Cal. Rptr. 144 (1963).

129. Ver Wys v. Vander Mey, 206 Mich. 499, 173 N.W. 504 (1919) (public right to rely).

130. Otherwise where the filing requirement was construed as not intended for the protection of the public. Hunnewell v. Duxbury, 154 Mass. 286, 28 N.E. 267 (1891) (statement as to paid-up capital stock); Webb v. Rockefeller, 195 Mo. 57, 93 S.W. 772 (1906) (articles of incorporation). It may be doubted that such an interpretation would be given to the requirement today.

131. See note 105 *supra.*

132. Vandewater & Lapp v. Sacks Builders, Inc., 20 Misc. 2d 677, 186 N.Y.S.2d 103 (1959) (certified map filed as public record; surveyors and engineers held liable); Mason v. Moore, *supra* note 105 (bank report to Comptroller of the Currency).

133. 48 Stat. 84 (1933), as amended, 15 U.S.C. § 771(2) (1958).

134. See 3 Loss, SECURITIES REGULATION 1719-42 (2d ed. 1961); Douglas, *The Federal Securities Act,* 43 YALE L.J. 171 (1933); Shulman, *Civil Liability and the Securities Act,* 43 YALE L.J. 227 (1933). See also, as to possible liability under section 10B of the amended act, Note, 74 YALE L.J. 658 (1965).

duty.[135] Thus an official food inspector who certifies that fish is fit for human consumption becomes liable to the ultimate purchasers of the food.[136] The same rule has been applied to recording clerks[137] who supply certified copies of their records, and to notaries taking acknowledgments and certifying the identity of the person who signs.[138] These cases are probably not to be classified as opening the door to mere general foreseeable possibility of reliance and action, but rather as statutory expansion of the class whose action there is special reason to expect.

G. *Plaintiff Is Unidentified: Defendant Has No Special Reason To Expect that he May Act in Reliance*

It is here that the line is definitely drawn. The defendant may well be aware that his representation is capable of being passed on to others, and that at some subsequent date it may come into the hands of someone who will rely on it, act upon it, and suffer loss if it is false.[139] But this amounts to nothing more than the general foresee-

135. There are occasional cases where no public duty has been found. New England Bond & Mortgage Co. v. Brock, 270 Mass. 107, 169 N.E. 803 (1930), where a notary's acknowldegment of the discharge of a first mortgage was held to involve a duty only to the register of deed, and not to a second mortgagee who relied on the record, appears quite indefensible. The same is true of the grain inspection in Gordon v. Livingston, 12 Mo. App. 267 (1882). But Kahl v. Love, 37 N.J.L. 5 (1874), where a tax collector gave a receipt, and Day v. Reynolds, 30 N.Y. (23 Hun) 131 (Sup. Ct. 1880), where a county clerk made a title search, and Houseman v. Girard Mut. Bldg. & Loan Ass'n, 81 Pa. 256 (1876), where a register of deeds did the same, are probably to be justified on the ground that this was no part of the officer's public duties.

136. Pearson v. Purkett, 32 Mass. (15 Pick) 264 (1834); Hickerson v. Thompson, 33 Me. 433 (1851); Tardos v. Bryant, 1 La. Ann. 199 (1846).

137. Mulroy v. Wright, 185 Minn. 84, 240 N.W. 116 (1907) (city clerk); *cf.* Cole v. Vincent, 229 App. Div. 520, 242 N.Y. Supp. 644 (1930) (county clerk erroneously docketing judgment); Commonwealth to Use of Green v. Johnson, 123 Ky. 437, 96 S.W. 801 (1906) (county clerk taking acknowledgement).

138. Anderson v. Aronsohn, 181 Cal. 294, 184 Pac. 12 (1919); Bellport v. Harkins, 104 Kan. 543, 180 Pac. 220 (1919); Curtiss v. Colby, 39 Mich. 456 (1878); Barnard v. Schuler, 100 Minn. 289, 110 N.W. 966 (1907); Gardner v. Webber, 177 Mo. App. 60, 164 S.W. 184 (1914); Harrington v. Vogle, 103 Neb. 677, 173 N.W. 699 (1919); Peterson v. Mahon, 27 N.D. 92, 145 N.W. 596 (1914); Erie County United Bank v. Berk, 73 Ohio App. 314, 56 N.E.2d 285 (1943); Clapp v. Miller, 56 Okla. 29, 156 Pac. 210 (1916); Figuers v. Fly, 137 Tenn. 358, 193 S.W. 117 (1917); Lowe v. Wright, 40 Tenn. App. 525, 292 S.W.2d 413 (1956). Mention should be made of statutes in a few states which have imposed a duty of care upon abstractors of title, for the benefit of those who take action in reliance upon the abstract. E. T. Arnold & Co. v. Barner, 91 Kan. 768, 139 Pac. 404 (1914); Gate City Abstract Co. v. Post, 55 Neb. 742, 76 N.W. 471 (1898); Sackett v. Rose, 55 Okla. 398, 154 Pac. 1177 (1916); Goldberg v. Sisseton Land & Title Co., 24 S.D. 49, 123 N.W. 266 (1909). These, of course, are more specific, but have the same effect.

139. "Any sophisticated surveyor will know that his survey, though prepared for a particular transaction, will become a part of the file containing the title papers to the land surveyed and will most likely be passed on from one owner to the next.

ability of transmission to others which is inseparable from the human word. In the face of the entirely indeterminate extent, magnitude and duration of the liability, the courts always have drawn back from its imposition.

Even for intentional deceit there is no liability to one who reads a letter concerning the credit of *A*, addressed only to *B* and not intended or expected to be transmitted.[140] Neither is there liability to subpurchasers of land,[141] stock,[142] or bonds,[143] or the assignees of mortgages[144] or leases,[145] whom the false representation was not intended or expected to reach. A prospectus sent out to induce the purchase of treasury stock from the defendant creates no liability to purchasers who buy from others on the open market.[146] The trustees of a bank who make statements as to its soundness are not liable to those who learn of them and go surety on the bond of the bank's treasurer.[147]

As might be expected, the cases are no less clear when the representation is only negligent. The outstanding object lesson is the case of *Jaillet v. Cashman*,[148] where a stock ticker service negligently sent out the report that the Supreme Court had held stock dividends

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Such successive owners often do rely upon such surveys even though they have no coutractual rights in them." Texas Tunneling Co. v. City of Chattanooga, *supra* note 124, at 407.

140. McCracken v. West, 17 Ohio 16 (1848). Compare Williamson v. Patterson, 106 S.W.2d 753 (Tex. Civ. App. 1937), where the statement was made to *A* before he became the agent of *B*.

141. Lembeck v. Gerken, 88 N.J.L. 329, 96 Atl. 577 (1916); Cohen v. Citizens Nat'l Trust & Sav. Bank, 143 Cal. App. 2d 480, 300 P.2d 14 (1956); Bechtel v. Bohannon, 198 N.C. 730, 153 S.E. 316 (1930); Ellis v. Hale, 13 Utah 2d 279, 373 P.2d 382 (1962). Even where the subpurchaser is the identified agent to whom the statement was made. See note 79 *supra*.

142. Abel v. Paterno, 245 App. Div. 285, 281 N.Y. Supp. 58 (1935).

143. Nash v. Minnesota Title Ins. & Trust Co., *supra* note 89.

144. *Ibid. Accord,* as to contracts to purchase land, Nearpark Realty Corp. v. City Investing Co., 112 N.Y.S.2d 816 (Sup. Ct. 1952); Puffer v. Welch, 144 Wis. 506, 129 N.W. 525 (1911). *Contra,* under statute, Jackson v. Meinhardt, 99 Cal. App. 283, 278 Pac. 462 (1929) (contract).

145. Pamela Amusement Co. v. Scott Jewelry Co., 190 F. Supp. 465 (D. Mass. 1960); Abel v. Paterno, *supra* note 142; *cf.* Simar v Canaday, 53 N.Y. 298 (1873) (donee of securities).

146. Compare, where there was an entirely different type of transaction, New York Title & Mortgage Co. v. Hutton, 63 App. D.C. 266, 71 F.2d 989 (1934); Cheney v. Dickinson, 172 Fed. 109 (7th Cir. 1909); Greenville Nat'l Bank v. National Hardwood Co., 241 Mich. 524, 217 N.W. 486 (1928); Peek v. Gurney, L.R. 6 Eng. & Ir. 377 (1873); King v. Livingston Mfg. Co., 180 Ala. 118, 60 So. 143 (1912); *cf.* Gillespie v. Hunt, 276 Pa. 119, 119 Atl. 815 (1923); Wollenberger v. Hoover, 346 Ill. 511, 179 N.E. 42 (1931).

147. Ashuelot Savings Bank v. Albee, 63 N.H. 152 (1884); *cf.* Cliftex Clothing Co. v. Di Santo, 88 R.I. 338, 148 A.2d 273, 754 (1959) (statement to buyer of stock of merchandise and fixtures that there were no creditors does not redound to benefit of creditors).

148. 235 N.Y. 511, 139 N.E. 714 (1923).

to be taxable income, and the plaintiff sold short on the market in reliance upon the report. Even the most enthusiastic partisans of the plaintiffs are likely to be somewhat startled at the prospect that everyone in the nation who did so could recover losses beyond estimation for an inadvertent error. Other cases have agreed. An abstractor of title,[149] a surveyor,[150] one reporting on the progress of a building,[151] an inspector of goods,[152] a telegraph company negligently transmitting a message,[153] one who signed a release of lien claims in the wrong place,[154] and even the seller of a chattel who the court found reasonably did not expect it to be used by a third person[155] have been held to be under no duty to a plaintiff who is merely a member of the world at large.

The same rule has been carried over, in a few cases, to strict liability, where the express "warranty" has been given to a dealer, or to a purchaser of the chattel, without any special reason to expect that it would be passed on to a third person.[156]

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149. Abstract & Title Guar. Co. v. Kigin, 21 Ala. App. 397, 108 So. 626 (1926); Phoenix Title & Trust Co. v. Continental Oil Co. 43 Ariz. 219, 29 P.2d 1065 (1934); Talpey v. Wright, 61 Ark. 275, 32 S.W. 1072 (1895); Hawkins v. Oakland Title Ins. & Guar. Co. 165 Cal. App.2d 116, 331 P.2d 742 (1958); Sickler v. Indian River Abstract & Guar. Co., 142 Fla. 528, 195 So. 195 (1940); Ohmart v. Citizens' Sav. & Trust Co., 82 Ind. App. 219, 145 N.E. 577 (1924); Symns v. Cutter 9 Kan. App. 210, 59 Pac. 671 (1900); Cole v. Vincent, *supra* note 138; Thomas Guarantee Title & Trust Co., 81 Ohio St. 432, 91 N.E. 183 (1910); Equitable Bldg. & Loan Ass'n v. Bank of Commerce & Trust Co., 118 Tenn. 678, 102 S.W. 901 (1907); Peterson v. Gales, 191 Wis. 137 210 N.W. 407 (1926). *Accord*, as to attorneys reporting on a title search, Savings Bank v. Ward, 100 U.S. 195 (1879); Dundee Mortgage & Trust Inv. Co. v. Hughes, 20 Fed. 39 (C.C. Ore. 1884).

150. Howell v. Betts, *supra* note 126.

151. Le Lièvre v. Gould, [1891] 1 Q.B. 491.

152. National Iron & Steel Co. v. Hunt, 312 Ill. 245, 143 N.E. 833 (1924). See also Anglo-American & Overseas Corp. v. United States, 144 F. Supp. 635 (S.D. N.Y. 1956), *aff'd*, 242 F.2d 236 (2d Cir. 1957).

153. Western Union Tel. Co. v. Schriver, 141 Fed. 538 (8th Cir. 1905).

154. Treadway v. Ingram, 102 Pa. Super. 450, 157 Atl. 4 (1931); *cf.* New York Title & Mortgage Co. v. Hutton, *supra* note 146 (letter written to reach customers of title insurance business relied on by purchaser of stock in the company).

155. Heggblom v. Wanamaker, 178 Misc. 792, 36 N.Y.S.2d 777 (1942), *aff'd mem.*, 266 App. Div. 916, 43 N.Y.S.2d 508 (1943). The case appears to be out of line with those holding the seller liable to the user of the chattel. *Supra* note 115.

156. Senter v. B. F. Goodrich Co., 127 F. Supp. 705 (D. Colo. 1954); Hermanson v. Hermanson, 19 Conn. Supp. 479, 117 A.2d 840 (1954); Barni v. Kutner, 45 Del. 550, 76 A.2d 801 (Del. Super. Ct. 1950); Pearl v. William Filene's Sons Co., 317 Mass. 529, 58 N.E.2d 825 (1945); Turner v. Edison Storage Battery Co., 248 N.Y. 73, 161 N.E. 423 (1928); Silverman v. Samuel Malinger Co., 375 Pa. 422, 100 A.2d 715 (1953); Berger v. Standard Oil Co., 126 Ky. 155, 103 S.W. 245 (1907).

A plaintiff whose injury is not caused by reliance upon the representation cannot recover on the basis of the express warranty. Torpey v. Red Owl Stores, Inc., 228 F.2d 117 (8th Cir. 1955); Sears, Roebuck & Co. v. Marhenke, 121 F.2d 598 (9th Cir. 1941); Randall v. Goodrich-Gamble Co., 238 Minn. 10, 54 N.W.2d 769; Dobbin v. Pacific Coast Coal Co., 25 Wash. 2d 190, 170 P.2d 642 (1946).

H. *The Different Transaction*

Where the transaction into which the plaintiff enters is of a substantially different kind from that which the defendant intended or expected to induce, the line is always sharply drawn. This has received frequent mention in the cases of subpurchasers,[157] particularly where stock is purchased on the open market instead of directly from the defendant.[158] But the same conclusion has been reached where the plaintiff buys the property securing bonds instead of the bonds,[159] or stock in a title insurance company instead of title insurance.[160] Somewhat analogous are one or two cases holding that the express "warranty" of the seller of a product does not extend to abnormal uses not intended or expected.[161]

III. SUMMARY

One who makes a false representation is liable, whether on the basis of intent, negligence or strict liability, to

1. Those whom he intends, for his own purposes, to reach and influence by the representation. This may be a very large group.[162]

2. Those to whom a public duty is found to have been created by statute, or pursuant to statute.[163]

3. Those members of a group or class whom he has special reason to expect to be influenced by the representation.[164] It is here that there is some uncertainty. In the cases of intentional misrepresentation, it has been held that knowledge that the recipient of the information intends to make some unspecified business use of it is sufficient special reason. Where there is only negligence, this is clearly not enough, and something more in the way of special likelihood that the representation will reach a limited group or class is at least required. The two cases[165] which have faced the problem have disagreed as to whether even this is enough.

One who makes a false representation is not liable, whether on the basis of intent, negligence or strict liability, to

157. *Supra* notes 142-45.
158. *Supra* note 146.
159. Wollenberger v. Hoover, 346 Ill. 511, 179 N.E. 42 (1931).
160. New York Title & Mortgage Co. v. Hutton, *supra* note 146; *cf.* Ashuelot Sav. Bank v. Albee, 63 N.H. 152 (1884), where oral statements as to the soundness of a bank induced the plaintiffs to become surety on the bond of its treasurer.
161. Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946) (wire rope put to wrong use); *cf.* Magee v. Wyeth Laboratories, Inc., 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (1963) (no implied warranty where drug sold without prescription).
162. See text accompanying notes 56-61, 80-99 *supra.*
163. See text accompanying notes 130-38 *supra.*
164. See text accompanying notes 62-77, 100-28 *supra.*
165. See text accompanying notes 123-25 *supra.*

1. Those whom he has no purpose to reach and influence, and as to whom he has no special reason to expect that it will do so.[166]

2. Those who enter into transactions of a substantially different kind from that which was intended or to be expected.[167]

166. See text accompanying notes 78-79, 139-56 *supra*.
167. See text accompanying notes 157-61 *supra*.