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PRODUCT LIABILITY: THE POTENTIAL LIABILITY OF THE ADVERTISING AGENCY

STEPHEN J. WERBER* AND WILLIAM L. TROMBETTA**

MADISON AVENUE WAS STUNNED when the Supreme Court ruled in 1965 on a Federal Trade Commission (FTC) challenge to a television commercial which purported to show the "sandpaper shaving" ability of Colgate-Palmolive's Rapid Shave.[1] The court held that even though Rapid Shave would soften sandpaper enough to make it possible to "shave" it, the advertisement was deceptive in that a plexiglass mock-up, which was purported to be the real thing, was used on television.[2] The holding was controversial and widely criticized,[3] but one aspect of the decision stirred little debate: the FTC was held to have properly joined both Colgate-Palmolive and its advertising agency, Ted Bates & Co., Inc., in the cease and desist order.[4]

The Supreme Court's stamp of approval was thus placed on the principle established by the court of appeals decision in the same case three years before: that federal regulators were free to move directly against the advertising agency where false and deceptive advertising was suspected.[5] A similar result was reached in 1963, when the court of appeals approved the joinder of the advertising agency which prepared commer-

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[1] FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965).

[2] *Id.* at 385-86. The challenged commercial purported to show a piece of sandpaper being smoothly shaved almost immediately after being coated with Rapid Shave. In fact, what the viewer saw was a specially prepared piece of plexiglass. *Id.* at 376. Rapid Shave will allow sandpaper to be "shaved," but it requires a soaking time of about 80 minutes and real sandpaper would appear on television as only plain, colored paper. *Id.* at 376-77.

[3] *See, e.g., The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 185 (1965); Note, 7 B. C. IND. & COM. L. REV. 170 (1965); 34 FORDHAM L. REV. 362 (1965).

[4] FTC v. Colgate-Palmolive Co., 380 U.S. 370, 394-95 (1965).

[5] Colgate-Palmolive Co. v. FTC, 310 F.2d 89, 92 (1st Cir. 1962). The court warned:

> we think there may well be a distinction between a principal and an agent in the permissible scope of an order. In some degree a principal may well be held to advertise at his peril. But we have reservations as to how far it is appropriate to go in the case of an agent, in the absence, at least, of any suspicion on its part that the advertisement is false. *Id.* at 95.

The FTC had joined other advertising agencies in cease and desist orders in the past and the legality of so doing had apparently gone largely unquestioned. Ted Bates & Co., for example, was named in two such orders in 1960: Brown & Williamson Tobacco Corp., 56 F.T.C. 956 (1960); Standard Brands, Inc., 56 F.T.C. 1491 (1960).

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cials for Rise shaving cream, although the Commission's order was set aside on other grounds.[6] In a decision which carefully detailed the depth of the agency's involvement in the deception, both agency and manufacturer were successfully joined in an attack by the FTC on the marketing scheme operated on behalf of Sucrets throat lozenges.[7]

I. A Case for Extending Liability

If the advertising agency is a proper target for the federal agency charged with protecting the consumer, why not for the consumer himself? Where the consumer relies to his detriment on a representation in an advertisement prepared by an agency, what is to keep him from suing the agency if injury results? For over ten years these questions have gone unanswered.

The consumer may desire to include the advertising agency as a defendant in a products liability action for a number of reasons. These include: the agency may be more economically attractive than its client; the activity giving rise to liability may have been the agency's "over-promotion," whether deliberate or negligent, rather than any act or omission of the client;[8] and the agency may be more attractive for jurisdictional or choice of law reasons.[9]

Product liability law varies widely from forum to forum.[10] So also do choice of law rules.[11] A plaintiff will naturally seek the forum

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[6] Carter Products, Inc. v. FTC, 323 F.2d 523 (5th Cir. 1963). The court stated that the criterion for determining whether to hold the agency responsible "should be the extent to which the advertising agency actually participated in the deception" and concluded that the "agency here was deeply involved." *Id.* at 534. The court cited these factors as evidence of the agency's involvement: the agency worked for years with Carter and handled the Rise account, even before the product had a name; it was the agency's idea to push the "wetness approach" in advertising Rise; and the agency concurred with Carter on the motif of the program, wrote the storyboards and assigned the job to the film producer. *Id.*

[7] Doherty, Clifford, Steers & Shenfield, Inc. v. FTC, 392 F.2d 921 (6th Cir. 1968), *affirming* Quinton Co., 69 F.T.C. 526 (1966). The court agreed that the standard should be as stated in Carter Products, Inc. v. FTC, 323 F.2d 523 (5th Cir. 1963), and concluded that the "advertising agency actually participated in the deception." *Id.* at 928.

[8] For example, "over-promotion" by drug company salesmen has led to liability of the manufacturer where the drug was prescribed improperly despite adequate warnings in the printed literature accompanying the drug. Incollingo v. Ewing, 444 Pa. 263, 282 A.2d 206 (1971); Love v. Wolf, 249 Cal. App. 2d 822, 58 Cal. Rptr. 42 (1967).

[9] It is true that a wise agency will contract any increased liability back to its client — but that fact does not weaken the consumer's interest in joining the agency. If the client is insolvent, no amount of contractual shuffling will help the agency. If the client is solvent, the agency's own culpability or jurisdictional and choice of law advantages may still motivate the consumer to join the agency even though the client may ultimately pay the judgement.

[10] Strict liability in tort is accepted in most jurisdictions, but the highest courts of at least eight states have not yet accepted the doctrine and in several others the highest court has accepted only the related theory of strict liability in warranty. 1 CCH Prod. Liab. Rep. ¶¶4050, 4060 (1974).

[11] *Compare* Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974); Schwartz v. Consolidated Freightways Corp., — Minn. —, 221 N.W.2d 665 (1974); Schlitz v. Meyer, 20 Ohio St. 2d 169, 280 N.E.2d 925 (1972); *with* Heidmann v. Rohl, 86 S.D. 250, 194 N.W.2d 164 (1972); St. Pierre v. St. Pierre, 158 Conn. 620, 262 A.2d 185 (1969);

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where the law likely to be applied will be most favorable and the level of recovery will likely be the highest. The presence of additional defendants may increase the number of forums from which the plaintiff may choose.

There are also public policy reasons for increasing the scope of agency liability; by providing the possibility of an additional solvent defendant, an expansion of agency liability would help to further spread the risk occasioned by dangerous consumer products and although increased agency liability may lead as much to an increase in vapidity as to an increase in responsible advertising,[12] it would certainly increase the pressure on agencies to avoid overselling products and to be more selective in the advertisers and products they choose to promote.[13]

Consider the following hypothetical situation. An independent advertising agency has been commissioned to research the market for a pain reliever and to design a promotional campaign for the drug manufacturer. The manufacturer has provided the agency with laboratory test results which indicate that the product is usually safe and effective for its intended purpose, namely relief from minor headache and muscle pain. The laboratory tests further show, however, that the drug may have dangerous side effects, particularly for pregnant women. The advertising agency promotes the drug as "super-safe" and the "best product on the market for relief from pain." The advertisement also makes the claim that the drug is "virtually free from side effects."[14] A pregnant woman notices the advertisement, purchases the product, consumes it, and shortly thereafter suffers the loss of her baby. Assuming that the woman can prove that the drug caused the loss of the baby, there is little doubt that the manufacturer would be held liable.

Although the manufacturer could be held liable, under theories such as negligence, warranty, strict liability, and deceit,[15] the assemblers, component suppliers, wholesalers and retailers could also be held liable.[16] Curiously missing from the list of defendants has been the advertising agency whose job it is to educate the buyer about the product and to in-

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Cook v. Pryor, 251 Md. 41, 246 A.2d 271 (1968) on the issue of modern choice of law theory versus the traditional approach. *See also* Kuehne, *Choice of Law in Products Liability*, 60 CALIF. L. REV. 1 (1972).

[12] In most, if not all cases, there would have to be a showing that the injured consumer reasonably relied on an advertisement before the agency could be held liable. Thus, the more rational and informative an advertisement is, the more reasonable will be the reliance. For example, Sunoco's innocuous suggestion that the use of its products will "turn winter into summer," contains no facts upon which a consumer could reasonably rely. A Sunoco "I can be very friendly" advertisement which implies that your friendly Sunoco dealer knows your driving habits and stands as a monitor of your car's driving condition, however, may go far enough to support a claim of detrimental reliance if a consumer's car were to pass violently from the friendly Sunoco station into a neighbor's yard as a result of a blow-out caused by bald tires.

[13] G. HOTCHKISS, AN OUTLINE OF ADVERTISING 38 (3rd ed. 1950).

[14] An additional interesting variation on this hypothetical might be to assume that the manufacturer had placed a prominent warning on the package which the woman did not notice in her rush to obtain relief.

[15] *See generally* W. PROSSER, LAW OF TORTS §§ 96-98 (4th ed. 1971).

[16] *Id.* at § 100.

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duce him to buy and use it. The authors have been unable to find a single reported case in which an advertising agency has been joined as defendant in a products liability action. That the agencies' merciful freedom from such actions should not last forever becomes apparent from an examination of the integral role the agency plays in the marketing process.

II. THE ADVERTISING AGENCY'S MARKETING ROLE

As a result of the agency's activity, a product generally enjoys greater sales than it would experience without the agency's involvement.[17] For many products, particularly undifferentiated products like toothpaste or aspirin, advertising is likely to be the single most significant factor in the consumer's choice of one product over another.[18] Often, a manufacturer entrusts a good deal of the entire marketing effort as well as the promotional responsibility to the agency. Most larger agencies offer a veritable smorgasbord of services in addition to advertising, such as marketing research, media analysis, market testing, product testing and concept testing.[19] In short, the agency, not the manufacturer or retailer, often has actual control of most aspects of the marketing process and has a range of discretion which goes far beyond simply preparing the text or film needed to illustrate the products' attributes.[20]

A case involving the deceptive advertising of Sucrets throat lozenges[21] aptly illustrates the agency's typical role. The manufacturer (Merck & Co.) entered an agreement with the advertising agency (Doherty, Clifford, Steers & Shenfield, Inc.) in which Merck retained a veto power but which obligated the agency to do, among other things:

> a. Study the products assigned by Merck, and the market for those products.
>
> b. Examine marketing opportunities for new products.
>
> c. Make recommendations covering development and promotion of new products.
>
> d. Offer general marketing consultation for both new and existing products.[22]

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[17] P. CONVERSE, H. HUEGY & R. MITCHELL, ELEMENTS OF MARKETING 494 (7th ed. 1965); E. MCCARTHY, BASIC MARKETING 404 (5th ed. 1975).

[18] P. KOTLER, MARKETING MANAGEMENT: ANALYSIS, PLANNING AND CONTROL 43-65, 452-54 (1st ed. 1967). *See also* Smith, *Product Differentiation and Market Segmentation of Alternative Marketing Strategies*, 21 J. OF MARKETING 3 (1956).

[19] *See generally* S. DUNN & A. BARBAN, ADVERTISING: ITS ROLE IN MODERN BUSINESS 135-38 (3rd ed. 1974).

[20] In a seminal article on advertising agencies, T. A. Wise said of the former chief executive of one leading agency, Interpublic, "[Marion] Harper believed that Interpublic should have the talent and means to advise clients not only on how to advertise but on what product to make, where to make it, how to price it, and how to stimulate the sales organization," Wise, *The Coup d'Etat at Interpublic*, FORTUNE, Feb. 1968, at 136.

[21] Doherty, Clifford, Steers & Shenfield, Inc. v. FTC, 392 F.2d 921 (6th Cir. 1968).

[22] Quinton Co., 69 F.T.C. 526, 534 (1966). Merck used the same Quinton Co. in manufacturing Sucrets.

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Pursuant to the agreement, the agency prepared a document entitled "Proposed 1962 Marketing Plan Sucrets Antiseptic Lozenges,"[23] and as the FTC noted:

> This advertising was aimed primarily at "self-medicating consumers" who, according to the agency, "depend upon advertising for product information, not upon the druggist or the physician." These consumers were regarded as "confused" and as "neither well-informed nor well-trained." The agency also believed that a " 'sore throat' is a real disease to consumers" and that "the potential seriousness should be exploitable."[24]

The FTC found, and the Sixth Circuit affirmed, that the advertising agency was primarily responsible for the deceptive advertising since the agency had expertise in the area.[25] In cases where the agency's role is so prominent, it would not seem unreasonable for a court in a products liability action to find more than just an incidental relationship connecting client, agency and consumer.

In addition to the FTC deceptive advertising cases,[26] two other analogous areas provide precedents which are potentially useful in building a case for agency liability: the independent testing agency experience and the independent accountant experience.

III. The Independent Testing Agency Experience

When an organization such as Good Housekeeping or Underwriters Laboratory confers its endorsement on a product, consumers tend to rely upon this certification as a reflection of quality.[27] To the extent that a manufacturer is able to incorporate the certification in his promotion, the endorsement becomes a form of advertising. Perhaps the most interesting case involving a testing agency is *Hanberry v. Hearst*.[28] The plaintiff, Mrs. Hanberry, purchased a pair of shoes from a retailer.

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[23] Substantial portions of the document appear as an appendix to the court of appeals decision at 392 F.2d at 931-34.

[24] 69 F.T.C. at 559 n.13.

[25] 392 F.2d at 928, n.4 where the court quoted approvingly the FTC finding that:
> The agency, more so than its principal, should have known whether the advertisements had the capacity to mislead or deceive the public. This is an area in which the agency has expertise.

[26] *E.g.*, FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965); Doherty, Clifford, Steers & Shenfield, Inc. v. FTC, 392 F.2d 921 (6th Cir. 1968); Carter Products, Inc. v. FTC, 323 F.2d 523 (5th Cir. 1963); Colgate-Palmolive Co. v. FTC, 310 F.2d 89 (1st Cir. 1962).

[27] Attesting to the effectiveness of this type of advertising, a study conducted by the New York City Department of Consumer Affairs found that the seals of such organizations as Good Housekeeping and Parents' Magazine are "highly prized by the public." Statement by the Hon. Bess Myerson Grant, Commissioner of the Department of Consumer Affairs of the City of New York, at 7 *Hearings Before the National Commission on Product Safety*, 32, 34 (1969). The study appears as an appendix to Mrs. Grant's testimony at 40-45.

[28] 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969); Annot., 39 A.L.R.3d 181 (1971). Another leading testing agency case is Hempstead v. General Fire Extinguisher Corp., 269 F. Supp. 109 (D. Del. 1967) (Underwriters Laboratory listing of fire extinguisher).

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Soon after the purchase, wearing the shoes, she slipped on the vinyl floor of her kitchen and sustained severe injuries. She claimed that a defect in the shoes was the cause of the fall.[29] In addition to the retailer and wholesaler, Mrs. Hanberry joined the Hearst Corporation (publisher of *Good Housekeeping*) in her action for damages, stating that she had relied upon the Good Housekeeping seal in selecting the shoes.[30]

The court held in *Hanberry* that the plaintiff's complaint had set forth a cause of action against Hearst on the theory of negligent misrepresentation and that Hearst was under a duty to exercise ordinary care in issuing its seal.[31] In reaching this conclusion, the court cited with approval Section 311 of the Second Restatement of Torts.[32] The Restatement's focus is on the reliance upon the information,[33] not necessarily the source. Thus the Restatement position could apply to a publicly known organization such as Good Housekeeping as well as to an unknown advertising agency.

Hanberry raised two other points with respect to Hearst's liability for negligent misrepresentation. First, the court brushed aside the contention that Hearst was only stating an opinion upon which the plaintiff had no right to rely in that the corporation "represented to the public it possessed superior knowledge and special information . . . ."[34] Second, and perhaps more disturbing for advertising agencies, is the court's statement of the issue presented:

> The basic question presented on this appeal is whether one who endorses a product for his own economic gain, and for the purpose of encouraging and inducing the public to buy it, may be liable to a purchaser who, relying on the endorsement, buys the product and is injured because it is defective and not as represented in the endorsement. We conclude such liability may exist . . . . In arriving at this conclusion, we are influenced more by public policy than by whether such cause of action can

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[29] *Id.* at 682, 81 Cal. Rptr. at 521.

[30] *Id.* To enhance the magazine's appeal to advertisers, Hearst issues the seal to its advertisers. The seal is called the "Good Housekeeping Consumers' Guaranty Seal" and is accompanied by the certification, "We have satisfied ourselves the products and services advertised in Good Housekeeping are good ones and the advertising claims made for them in our magazine are truthful." *Id.* at 683, 81 Cal. Rptr. at 521.

[31] *Id.* at 685, 81 Cal. Rptr. at 523.

[32] *Id.* at 685 n.1, 81 Cal. Rptr. at 523 n.1.

[33] RESTATEMENT (SECOND) OF TORTS § 311 (1965).

> (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable *reliance upon such information*, where such harm results
>
> (a) to the other, or
>
> (b) to such third person as the actor should expect to be put in peril by the action taken.
>
> (2) Such negligence may consist of failure to exercise reasonable care
>
> (a) in ascertaining the accuracy of the information, or
>
> (b) in the manner in which it is communicated. (Emphasis added).

[34] 276 Cal. App. 2d at 686, 81 Cal. Rptr. at 523.

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> be comfortably fitted into one of the law's traditional categories of liability.[35]

Again, the difference between Good Housekeeping and the agency is that the consumer identifies the former while the latter's existence remains obscured. The agency's role, however, is really no different than Good Housekeeping's promotion of the product. If the words "promotes" and "promotion" are substituted for "endorses" and "endorsement," the applicability of the court's language in *Hanberry* to advertising agencies becomes clear. Suppose that instead of relying upon the Good Housekeeping Seal, Mrs. Hanberry had relied upon a televised advertisement in which a cartoon character busily did housework while lauding the shoes as a boon to foot comfort and safety. Would the agency which created the cartoon character and which in fact had itself identified foot comfort and safety during housework as an important promotional factor be somehow less responsible for Mrs. Hanberry's accident than Hearst, which had only warranted that the shoes were a "good product"? The important factor upon which liability should hinge is the extent of the agency's participation in the marketing process and its resulting responsibility for the consumer's decision to acquire the product and to use it in the manner which caused the injury.

While upholding Mrs. Hanberry's right to press her cause of action in negligent misrepresentation against Hearst, the court in *Hanberry* declined to apply a strict liability or warranty theory against Hearst. The rationale was to protect Hearst from liability for a defectively made product as distinct from a flaw permeating the entire product line.[36] Significantly, the validity of this rationale was questioned in a later California Court of Appeals decision:

> Where it can be established that the defendant by its avowed testing was the responsible inducement for the purchase by plaintiff, we see no reason to hold that defendant was not a necessary instrument in the stream of commerce.[37]

The key question in a strict liability or warranty action should be: Is the agency, to borrow Chief Justice Traynor's phraseology in *Vandermark v. Ford Motor Co.*,[38] "an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting

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[35] *Id.* at 683, 81 Cal. Rptr. at 521.

[36] The court noted that

> [a]pplication of either warranty or strict liability in tort would subject respondent to liability even if the general design and material used in making this brand of shoes were good, but the particular pair became defective through some mishap in the manufacturing process. We believe this kind of liability for individually defective items should be limited to those directly involved in the manufacturing and supplying process, and should not be extended through warranty or strict liability to a general endorser who makes no representation it has examined or tested each item marketed. *Id.* at 687, 81 Cal. Rptr. at 524.

[37] Kasel v. Remington Arms Co., 24 Cal. App. 3d 711, 726-27, 101 Cal. Rptr. 314, 324 (1972).

[38] 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964).

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from defective products"?[39] Significantly, the *Vandermark* case extended strict liability to a retailer whose own culpability for the defect was minor at best. Justice Traynor rationalized the decision in these terms:

> Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. In some cases the retailer may be the only member of the enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety.[40]

The same terms can be shown to apply in many cases to the advertising agency as well as to the retailer. Agencies are in business to foster the distribution of goods. While they may not physically handle the goods, their activities are often more important in placing the goods in the hands of a consumer than the activities of anyone else. In some cases, to paraphrase Justice Traynor, the agency may be the only one reasonably available to the injured plaintiff. While the agency may not physically affect the product's safety, its activities may determine the manner in which the product is used by the plaintiff. Certainly, the agency, as well as the retailer, is in a position to put pressure on the advertiser (*e.g.*, by not handling the account) to produce a safe product. The end result: the agency's strict liability would serve as an added incentive to safety.

IV. The Independent Accountant Experience

Just as advertising agencies often rely on information submitted by their clients in preparing promotional campaigns, accounting firms also rely on information compiled by their clients in preparing reports or audits. There is a substantial body of law surrounding the responsibility of accountants for the accuracy of data provided by clients and much of this law is potentially useful in building a case for advertising agency liability.

The traditional rule, represented by *Ultramares v. Touche*,[41] was that an accountant could not be held liable in negligence to third parties for errors in preparation of a client's financial statements. While this rule still carries great weight,[42] it has come under such heavy fire in the legal literature[43] that a growing number of jurisdictions are casting *Ultramares*

[39] *Id.* at 262, 37 Cal. Rptr. at 899, 391 P.2d at 171.

[40] *Id.* at 262, 37 Cal. Rptr. at 899-900, 391 P.2d at 171-72 (citation omitted).

[41] 255 N.Y. 170, 174 N.E. 411 (1931). Even here though, liability for fraud and deceit was permitted.

[42] *See, e.g.*, MacNerland v. Barnes, 129 Ga. App. 367, 370, 199 S.E.2d 564, 566 (1973).

[43] *See, e.g.*, Hawkins, *Professional Negligence and Liability of Public Accountants*, Professional Negligence 256 (T. Roady & W. Andersen ed. 1960); Comment, 44

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aside in favor of the broader rule represented by *Shatterproof Glass v. James*.[44]

The modern rule of *Shatterproof Glass* is that accountants may be held liable in negligence to third parties, regardless of any privity concepts, if there has been detrimental reliance on financial reports.[45] The court in *Shatterproof Glass* relied heavily on the tentative drafts of the Second Restatement of Torts.[46] What is particularly interesting about the facts in *Shatterproof Glass* is that the plaintiff, in reliance on the defendant's audit, extended credit to a company that subsequently became insolvent. Thus if the plaintiff could not have turned to the accounting firm, it would have had no recovery. The same principle might lead an injured consumer to join an advertising agency in a product liability action.

Though the principle behind the accountant's liability may be equally applicable to the advertising agency, there exist two major distinctions. One, the accountant can usually guess with some degree of certitude who is likely to rely on his reports, whereas the agency broadcasts its material to a broad segment of the population at large; and, two, the accounting profession is plainly in the business of certifying the accuracy of information, whereas the agency is best known for simply disseminating information in a convincing manner. These are major distinctions which should not be discounted. Looked at in another way, however, the work product of both accountant and agency are intended to obtain identical results where third parties are concerned: convincing the third party to enter into a relationship with the accountant's or the agency's client. Is the creditor who relies on a faulty financial statement really in any different position than the pregnant woman who, in our hypothetical above, relied on a faulty advertisement?

V. Conclusion

In the typical products liability action, there is generally a solvent manufacturer or seller from whom the injured party may recover. One could speculate that this is the major reason why no agency has ever been joined — but should not the agency be called to account where there is no other solvent defendant, or where other reasons prevent an effective action against the principals, or where justice demands a proper sharing of liability? The authors believe that this must be answered affirmatively, and that the potential for advertising agency liability does in fact exist.

Wash. L. Rev. 139 (1968).

[44] 466 S.W.2d 873 (Tex. Civ. App. 1971). *See also* Hochfelder v. Ernst & Ernst, 503 F.2d 1100 (7th Cir. 1974); Rhode Island Hospital Trust Nat'l Bank v. Swartz, 455 F.2d 847 (4th Cir. 1972); Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D.R.I. 1968); Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969); Aluma Kraft Mfg. Co. v. Elmer Fox & Co., 493 S.W.2d 378 (Mo. App. 1973).

[45] 466 S.W.2d at 880.

[46] *Id.*

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