

This article appeared in slightly different form in the April 24, 2006 issue of the *National Law Journal*.

Out of the Freying Pan

Marc Ackerman

White & Case



Marc Ackerman
White & Case LLP

After a meteoric rise to the top of the best-seller (and book club) lists, a salacious Smoking Gun report worthy of Ken Starr, a very public tongue-lashing and, finally, an about-face by its contrite author, probably the only thing not surprising about the scandal surrounding James Frey's *A Million Little Pieces* is what is now left in its wake: the lawsuits. Perhaps even more predictable is the perceived deep-pocketed target of these lawsuits (other than Frey himself): the publisher, the Doubleday division of Random House.

Thanks primarily to the Oprah Winfrey factor (she had originally selected the book for her book club, but after the author's falsifications came to light, she chastised him on her television show), the problems faced by Doubleday have been magnified exponentially by the high-profile nature of the Frey scandal. But they raise important questions for both constitutional scholars and counsel at publishing houses: Is a publisher under a duty to check the truth of every factual claim made by its authors, or does the First Amendment protect a publisher when a statement made by one of its authors turns out to be false? And, perhaps most importantly from the industry perspective, does a publisher somehow lose the protection of the First Amendment when it includes false

statements in its advertising material for the book (covers, leaflets, print ads and the like) because such statements are considered advertising and therefore "commercial"?

From the "Frey"ing pan into... the courts

Not long after the revelation that significant portions of *A Million Little Pieces* were untrue, plaintiffs' class action lawyers swooped in. To date, at least 16 lawsuits have been filed around the country against Frey and Doubleday, in federal and state courts in New York, Illinois, Ohio, Washington and California. The suits, asserted both by individuals and on behalf of purported classes, include claims of consumer fraud, breach of contract, unjust enrichment, misrepresentation and deceptive business practices. In essence, the complaints are the same: that the claims of truth made by Frey and promoted by the publisher deceived readers into buying a book they otherwise would not have bought. While it's unlikely that any of these suits will ever go to trial, at the very least, Doubleday/Random House will spend a bundle on legal fees.

As things unraveled for Frey, it became clear that certain anecdotes he

Out of the Freying Pan

represented as factual accounts—such as a three-month jail term for attempting to hit a police officer with his car—were simply made up. Should the publisher have known this? Given that the work was being touted as nonfiction, did Doubleday have a duty to investigate each and every story that Frey represented as true? The short answer is “no,” but qualified.

Take the case of the unfortunate mushroom enthusiasts Wilhelm Winter and Cynthia Zheng. According to the published decision in *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033 (9th Cir. 1991), Winter and Zheng went “mushroom hunting” in 1988 after having consulted *The Encyclopedia of Mushrooms*, written by two British authors and published by G.P. Putnam’s Sons. “After cooking and eating their harvest, plaintiffs became critically ill. Both have required liver transplants.” *Id.* at 1034. And both, predictably, sued, claiming that the book contained erroneous information concerning a deadly species of mushroom, which led them to ingest it.

Despite the unfortunate series of events, the court found that the publisher had no duty to investigate the accuracy of the contents of the book: “[T]here is nothing inherent in the role of publisher or the surrounding legal doctrines to suggest that such a duty should be imposed on publishers. Indeed the cases uniformly refuse to impose such a duty. Were we tempted to create this duty, the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs.” *Id.* at 1037.

Among the many cases cited by the court also holding no duty on the part of the publisher to investigate were lawsuits involving investors who suffered financial losses due to reliance on inaccurate financial publications; a claim against the publisher of a book on how to make tools by an individual injured while doing so; and a claim against the publisher of a diet book brought after one of the diet’s adherents died.

The court in *Winter*, however, did note that publishers are not always off the hook. If, as has happened, a publisher takes on a duty of care,

such as by conducting an independent examination of the product at issue, it must abide by it. In one case, for example, The Hearst Corp. was held liable for a defective product it had given its “Good Housekeeping” seal of approval.

Thus, the law may actually have the ostensibly anomalous impact of discouraging publishers from verifying factual claims made by its authors. If the publisher attempts to independently verify the facts asserted, it may be seen as having assumed a duty of care to its readers. But what may on the surface seem like an undesired disincentive may, indeed, more fairly reflect the role of publishers: not to endorse or warrant any particular product or perspective, but to widely circulate thoughts and ideas so that they may be subject to rigorous scrutiny and public debate.

If publishers such as Doubleday are hesitant to bring a story such as *A Million Little Pieces* to press for fear that a “memoir” might contain a falsehood (indeed, this fear may have prompted Riverhead Books to cancel its two-book contract with Frey), the many public and private debates regarding, among other things, Frey’s claimed technique for overcoming substance abuse through sheer willpower may never have taken place.

But what about the argument that Doubleday should at least have to give up its profits from sales of the book based on its own arguable misrepresentation that the book was fact? Does the fact that Doubleday advertised the novel as a memoir (even though the term was merely a repetition of Frey’s claim, and despite the ongoing debate as to what it means to be a “memoir”) take away the First Amendment protection that otherwise would apply because such advertising was “commercial” in nature?

Mixed holdings in cases over ‘Beardstown Ladies’

Here, the law gets a bit more complicated. Take, for example, the high-profile case of *The Beardstown Ladies’ Common Sense Investment Guide*. In 1983, a group of retired women from Beardstown, Ill.,

Out of the Freying Pan

formed a financial investment club which garnered much publicity because, they claimed, their annual investment return over 10 years was 23.4% (versus a 14.9% Standard & Poor's 500 rate of return over the same period). Hyperion published the ladies' five investment books, which prominently touted their high rate of return on the front and back covers, as well as on the packaging of videotapes sold in conjunction with the books. An audit of the books determined, however, that the real rate of return was actually only 9.1%. The ladies admitted their error, issued an apology and the lawsuits against Hyperion followed.

Interestingly, the two most prominent lawsuits, one filed in New York, *Lacoff v. Buena Vista Publ'g Inc.*, 705 N.Y.S.2d 183 (New York Co., N.Y., Sup. Ct. 2000), and one in California, *Keimer v. Buena Vista Books Inc.*, 89 Cal. Rptr. 2d 781 (Calif. Ct. App. 1999), arrived at completely opposite results. Another interesting note is that the case in California—a state whose court system is generally perceived as being more protective of publishers and the press in general—came down on the side of the plaintiffs, while the New York case favored Hyperion.

Is a book promotion commercial speech?

Both cases asked the same key question: What is the nature of the speech contained on the book covers and packaging? Is it core, noncommercial speech subject to the highest degree of First Amendment protection? Is it commercial speech—which courts have defined as “speech which does no more than propose a commercial transaction”—deserving of a lesser degree of constitutional protection? Or is it a combination of commercial and noncommercial speech? The California court concluded that the language on the cover and packaging was designed solely to sell goods, and therefore commercial. The New York trial court, on the other hand, described the speech as “hybrid”—commercial in that one purpose was to sell the book, noncommercial in that it described the contents of the book. Because it found the commercial and noncommercial aspects to be “inextricably intertwined,” the New York court

held that Hyperion is entitled to the full protections of the First Amendment and dismissed the case.

The California Beardstown case ultimately settled (purchasers of the ladies' books were reportedly given gift certificates for any other Hyperion book), so there was no opportunity to challenge the California court's decision or attempt to resolve its clear conflict with the New York case.

Which brings us back to Frey. It's likely that most of the lawsuits will settle, if they even move forward at all. The mere usage of the term “memoir” by Doubleday when referring to the book is likely not even factually incorrect. Defined in one dictionary as “a narrative composed from personal experience,” a memoir necessarily reflects the writer's perspective, and readers do not have an expectation of complete devotion to fact. In any event, the use of the term “memoir” was simply a republication of Frey's own claim, and therefore even if not true, it will likely receive the complete protection of the First Amendment, both for Frey and Doubleday.

Marc Ackerman is an intellectual property and First Amendment lawyer with White & Case in New York.

The information in this article is for educational purposes only; it should not be construed as legal advice.

Copyright © 2006 White & Case LLP
