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## Application of Strict Product Liability to Aeronautical Chart Publishers

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# APPLICATION OF STRICT PRODUCT LIABILITY TO AERONAUTICAL CHART PUBLISHERS

ROBERT B. SCHULTZ\*

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## I. INTRODUCTION

**A**ERONAUTICAL CHARTS are the only communication media ever judged by any court to be "products" and the only communication media ever deemed subject to "strict product liability."<sup>1</sup> That is, while publishers may be held strictly liable for

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<sup>1</sup> This conclusion is based on the author's own research as of this date. But numerous courts have considered and rejected publisher liability for defective ideas and information. *See* Jones v. J.B. Lippincott Co., 694 F. Supp. 1216, 1217-18 (D. Md. 1988) (holding that the RESTATEMENT (SECOND) OF TORTS § 402A does not extend to dissemination of an idea or knowledge in case where nursing

publishing certain harmful and damaging information, such as defamatory falsehoods regarding private persons or publications that infringe a copyrighted work, such publications were never considered products subject to strict product liability. This unique legal status accorded aeronautical charts will be examined to determine whether aeronautical chart publishers should have the same legal protections afforded other publishers.<sup>2</sup>

## II. STRICT PRODUCT LIABILITY

The modern form of strict product liability was first enunciated by the California Supreme Court in *Greenman v. Yuba Power Products, Inc.* in 1962.<sup>3</sup> Before *Greenman*, strict product liability existed as express and implied warranty.<sup>4</sup> After briefly noting the evolution of strict product liability from contract warranty to tort, the California Supreme Court ruled that "[t]o establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the [product] in a way it was in-

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student was injured treating self with a constipation remedy listed in a nursing textbook); *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802, 803-04 (S.D. Tex. 1983) (refusing to apply strict product liability to a case in which a person died after imitating "autoerotic asphyxiation" described in magazine article because the court held that contents of magazines are not within meaning of RESTATEMENT (SECOND) OF TORTS § 402A); *Walter v. Bauer*, 439 N.Y.S.2d 821, 822 (N.Y. Sup. Ct. 1981) (holding that a textbook was not a defective product for purposes of product liability law because the intended use of a book is reading, and the plaintiff was not injured by reading but by doing a science project described in the textbook), *aff'd in part & rev'd in part on other grounds*, 451 N.Y.S.2d 533 (N.Y. App. Div. 1982); *Smith v. Linn*, 563 A.2d 123, 126 (Pa. Super. Ct. 1989) (holding a book is not a product under RESTATEMENT (SECOND) OF TORTS § 402A in a case where reader of Last Chance Diet book died from diet complications), *aff'd*, 587 A.2d 309 (Pa. 1991); *cf. Cardozo v. True*, 342 So. 2d 1053, 1056-57 (Fla. Dist. Ct. App. 1977) (holding that transmission of words is not the same as selling items with physical properties so that when a bookseller merely passes on a book without inspection, the thoughts and ideas within the book do not constitute a "good" for the purposes of a breach of implied warranty claim under the UCC). Publisher liability cases should not be confused with "failure to warn" cases in which a manufacturer may be held strictly liable for failure to provide adequate information or for providing false or misleading information in connection with a product. In those cases, the defective product caused the harm, not the defective information.

<sup>2</sup> It is important to note that this Article does not deal with the question of whether aeronautical chart publishers may be held liable for publication of false or misleading information when there is a finding of culpable conduct such as negligence.

<sup>3</sup> 377 P.2d 897 (Cal. 1962).

<sup>4</sup> *Id.* at 901.

tended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use.”<sup>5</sup> In reaching this conclusion, the court also noted that strict product liability was first applied to unwholesome food products and then extended to “a variety of other products that create as great or greater hazards if defective.”<sup>6</sup> Certainly, if information is considered a product, it is difficult to imagine anything potentially more hazardous than defective information. Yet, to date, application of strict product liability to publishers has been expressly rejected by every court considering the issue, except for aeronautical chart publishers.<sup>7</sup>

Two years after *Greenman*, the American Law Institute adopted strict product liability in section 402A of the *Restatement (Second) of Torts*.<sup>8</sup> Today, almost every state has adopted some form of strict product liability, either as common law or by statute.<sup>9</sup>

The doctrine of strict product liability eliminates the plaintiff's need to prove the fault or culpable conduct of the defendant manufacturer or seller.<sup>10</sup> Under section 402A, liability is imposed if a product that caused an injury is found to have been unreasonably dangerous regardless of the level of care taken by

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 900.

<sup>7</sup> See *supra* note 1.

<sup>8</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402A states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

<sup>9</sup> See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 98, at 694 (5th ed. 1984).

<sup>10</sup> [T]he fact that the manufacturer took reasonable precautions in an attempt to design a safe product or otherwise acted as a reasonably prudent manufacturer would have under the circumstances, while perhaps absolving the manufacturer of liability under a negligence theory, will not preclude the imposition of liability under strict liability principles if, upon hindsight, the trier of fact concludes that the product's design is unsafe to consumers, users, or bystanders.

*Barker v. Lull Engineering Co.*, 573 P.2d 443, 457 (Cal. 1978) (citations omitted).

the manufacturer.<sup>11</sup> Indeed, the manufacturer's conduct may not even be an issue in a strict product liability case.<sup>12</sup> Accordingly, imposition of strict product liability means a publisher that is completely without fault and who took every possible precaution to ensure that the information it published was accurate and safe, may still be held liable for any injury caused by the published information.

### III. BACKGROUND INFORMATION ON AERONAUTICAL CHARTS

Aeronautical charts convey information used by pilots in-flight and for pre-flight planning. Among other things, charts depict airways,<sup>13</sup> flight procedures,<sup>14</sup> navigation and communication frequencies, flight restrictions,<sup>15</sup> landmarks, and terrain. One type of aeronautical chart is called an instrument approach chart. This chart depicts instrument approach procedures—procedures used when attempting to land by reference to the aircraft's instruments during adverse weather conditions that make a visual approach difficult or impossible. Because the approach to land and landing are arguably the most dangerous parts of the flight, it is not surprising that most lawsuits against chart publishers allege defective instrument approach charts.

By international agreement, all types of flight procedures, including instrument approach procedures, are designed and promulgated by each governing authority having jurisdiction over the particular airspace.<sup>16</sup> In the United States, all flight procedures are designed and promulgated by the Federal Aviation Administration (FAA) and become Federal Aviation Regulations (FARs).<sup>17</sup> Any pilot instructed by Air Traffic Control to

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<sup>11</sup> *See id.*

<sup>12</sup> *See id.*

<sup>13</sup> Airways are designated routes between navigation fixes.

<sup>14</sup> Flight procedures are generally routine instructions to navigate along a predetermined route for the purpose of approaching to land at an airport or departing from an airport.

<sup>15</sup> Flight restrictions include limitations on flight over certain areas or above or below certain altitudes.

<sup>16</sup> *See* Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180, 1181, 15 U.N.T.S. 295, 296 [hereinafter *Chicago Convention*].

<sup>17</sup> *See* 14 C.F.R. pt. 97 (1998). Section 97.20 states:

This subpart prescribes standard instrument approach procedures based on the criteria contained in the U.S. Standard for Terminal Instrument Approach Procedures (TERPs). The standard instrument approach procedures adopted by the FAA and described on

follow a certain instrument approach procedure must comply with that procedure.<sup>18</sup>

Pilots are not required to carry any particular form of aeronautical chart, or indeed any charts at all. They are required only to have the necessary information in whatever form is most useful.<sup>19</sup> In the electronic age, the form of the information can vary widely. In the future it may not be unusual for a cockpit to be completely paperless. Thus, aeronautical charts are just one of many possible forms of communication of information to the pilot.

#### IV. AERONAUTICAL CHART DEFECTS

The law of product liability deals in dangerous products, that is, products that cause harm. If an aeronautical chart is considered to be a product, the publisher may be held strictly liable for harm caused by defects in the chart. But publications consist of two parts, the media itself and the information conveyed. While a person could be injured by a defect in the media, a paper cut for example, the issue of dangerous media defects is trivial and will not be considered.

Logically, defective information may be categorized in one of three groups according to whether the information is communicated accurately and whether the information is dangerous. That is, the information communicated by the chart may be (1)

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FAA Form 8260-3, 8260-4, or 8260-5 are incorporated into this part and made a part hereof as provided in 5 U.S.C. 552(a)(1) and pursuant to 1 C.F.R. part 20. The incorporated standard instrument approach procedures are available for examination at the Rules Docket and at the National Flight Data Center, Federal Aviation Administration, 800 Independence Avenue SW., Washington, D.C., 20590. Copies of SIAPs adopted in a particular FAA Region are also available for examination at the headquarters of that Region. Moreover, copies of SIAPs originating in a particular Flight Inspection District Office are available for examination at that Office. Based on the information contained on FAA Form 8260-3, 8260-4, and 8260-5, standard instrument approach procedures are portrayed on charts prepared for the use of pilots by the U.S. Coast and Geodetic Survey and other publishers of aeronautical charts.

*Id.*

<sup>18</sup> See 14 C.F.R. § 91.123 (1998) ("When an ATC clearance has been obtained, no pilot in command may deviate from that clearance unless an amended clearance is obtained, an emergency exists, or the deviation is in response to a traffic alert and collision avoidance system resolution advisory.").

<sup>19</sup> See 14 C.F.R. § 91.103 (1998).

accurate but misleading, (2) accurate but dangerous, or (3) simply inaccurate.

A chart is accurate but misleading when the information depicted is correct but the manner of its graphic depiction is alleged to have mislead the pilot into interpreting the information incorrectly. In *Aetna Casualty and Surety Co. v. Jeppesen & Co.*,<sup>20</sup> the plaintiffs alleged that an instrument approach chart was defective because two graphic views of the instrument approach procedure used different scales and that this discrepancy caused the pilot to become confused.<sup>21</sup> Instrument approach charts graphically depict instrument approach procedures in two views, an overhead view and a side view.<sup>22</sup> This particular chart used a different scale for the side view than it did for the overhead view, allegedly causing the pilot to think that the minimum allowable altitude near the crash location was lower than it actually was.<sup>23</sup> Accordingly, while all of the information communicated by the chart was accurate and the approach procedure was otherwise safe, the chart was found to be defective solely because it was misleading.

Another case involving an accurate but allegedly misleading instrument approach chart was *Fluor Corp. v. Jeppesen & Co.*<sup>24</sup> In that case, while maneuvering to land, the aircraft struck a hill that was not depicted on the chart.<sup>25</sup> The alleged defect was the failure to depict this hill even though it was higher than nearby terrain that was depicted. While such information is not part of the flight procedure, terrain is often depicted on charts to enhance the pilot's terrain awareness. In this case, it was alleged that the pilots believed they could descend below the minimum altitude prescribed by the approach procedure provided they remained above the highest depicted terrain. Accordingly, even though the approach procedure was accurately depicted and not dangerous, it was alleged that the terrain depiction and the associated terrain legend were misleading.<sup>26</sup>

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<sup>20</sup> 642 F.2d 339 (9th Cir. 1981).

<sup>21</sup> See *id.* at 342.

<sup>22</sup> These two views are referred to as the plan view and profile, respectively.

<sup>23</sup> See *Aetna*, 642 F.2d at 342.

<sup>24</sup> 216 Cal. Rptr. 68 (Cal. Ct. App. 1985).

<sup>25</sup> See *id.* at 70. The *Fluor* opinion contained no allegation of any defect in the flight procedure or the manner in which it was depicted. The allegations were solely directed at the depiction of terrain and the legend concerning terrain depiction.

<sup>26</sup> See *id.*

The second type of defect occurs when a chart accurately depicts a dangerous approach procedure. In *Brocklesby v. United States*, the chart was alleged to be accurate and not misleading, but the procedure that was designed and promulgated by the FAA was deemed dangerous because it did not provide for a transition routing from the en route phase to the instrument approach procedure.<sup>27</sup> Similarly, in *Times Mirror Co. v. Sisk*, an accurate, non-misleading chart was alleged to be defective because the minimum descent altitude specified by the instrument approach procedure was unsafe.<sup>28</sup>

The third type of defect, alleged in *Saloomey v. Jeppesen & Co.*, involved an area chart rather than an instrument approach chart.<sup>29</sup> An area chart depicts en route information such as airways rather than instrument approach procedures. This chart was defective because it incorrectly identified an instrument approach procedure as an Instrument Landing System (ILS)<sup>30</sup> procedure instead of a Localizer procedure.<sup>31</sup> The two types of procedures are similar except that the latter does not provide electronic altitude guidance. It was alleged that the pilot flew his aircraft into the ground thinking he had electronic altitude guidance.<sup>32</sup> The issue in this case was not the nature of the defect, which was not in dispute, but rather causation.

These five cases are the only reported aeronautical chart cases involving strict product liability. Moreover, a commercial publisher, Jeppesen Sanderson, Inc., was the publisher defendant in each case. There are also numerous reported cases against the United States for defects in its published aeronautical charts. Although the United States publishes virtually the same information as the commercial publishers, it cannot be held strictly liable because of sovereign immunity.<sup>33</sup> To date, there are no

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<sup>27</sup> 767 F.2d 1288, 1295 (9th Cir. 1985).

<sup>28</sup> 593 P.2d 924, 927 (Ariz. Ct. App. 1978).

<sup>29</sup> 707 F.2d 671, 672 (2d Cir. 1983).

<sup>30</sup> An ILS is a type of radio navigation system that provides both directional guidance and descending altitude guidance for landing.

<sup>31</sup> A Localizer system is similar to an ILS except that it does not provide descending altitude guidance. Thus a pilot using a Localizer must descend in steps at designated distances from the airport.

<sup>32</sup> See *Saloomey*, 707 F.2d at 672-73.

<sup>33</sup> For a more complete discussion of most reported and unreported aeronautical chart cases, see generally R. Schultz, *Navigation Charts on Trial: How Safe is Safe?*, J. OF NAVIGATION, Spring 1992, at 25.

reported cases alleging strict product liability against a publisher of aeronautical information in electronic form.<sup>34</sup>

#### V. CASES HOLDING THAT AN AERONAUTICAL CHART IS A PRODUCT SUBJECT TO COMMON LAW STRICT PRODUCT LIABILITY

Each of the four courts that ruled that aeronautical charts are products applied the common law of the appropriate jurisdiction. The first court to suggest that an aeronautical chart was a product subject to strict product liability was an Arizona trial court. In *Times Mirror Co. v. Sisk*, a case arising out of the crash of a Pan Am flight into Manila, Phillippines, the trial judge granted judgment notwithstanding the verdict (j.n.o.v.) for plaintiffs after the jury returned a verdict in favor of the publisher, Jeppesen Sanderson, Inc. (Jeppesen).<sup>35</sup> The appellate court reversed the trial court and reinstated the jury verdict. In granting j.n.o.v., the trial judge treated the chart as a product and applied strict liability. The appellate court said that, "[a]lthough we have serious misgivings about whether this is a products liability case, we need not decide this issue because we find that the court erred in granting judgment n.o.v. in any event."<sup>36</sup>

The aeronautical chart as a product issue was first considered by an appellate court in *Aetna Casualty and Surety Co. v. Jeppesen & Co.*<sup>37</sup> The court stated:

Jeppesen acquires this FAA form [the 8260]<sup>38</sup> and portrays the information therein on a graphic approach chart. This is Jeppesen's "product". . . .

[The Jeppesen chart] conveys information in two ways: by words and numbers, and by graphics. . . .

While the information conveyed in words and figures on the Las Vegas approach chart was completely correct, the purpose of the

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<sup>34</sup> As of this date, there is a case pending in United States District Court for the Southern District of Florida arising out of the crash of an American Airlines 757 near Cali, Colombia, wherein American Airlines contends that the information contained in its on-board Flight Management Computer was defective and dangerous. American seeks indemnification from the publishers Jeppesen Sanderson, Inc. and Honeywell, Inc. See *In re Air Crash Near Cali, Colombia* on Dec. 20, 1995, 985 F. Supp. 1106, 1147 (S.D. Fla. 1997).

<sup>35</sup> 593 P.2d 924 (Ariz. Ct. App. 1978).

<sup>36</sup> *Id.* at 927.

<sup>37</sup> 642 F.2d 339, 342-43 (9th Cir. 1981).

<sup>38</sup> Form 8260 is used by the FAA to officially publish flight procedures. It is a tabular textual format containing no graphics whatsoever.

chart was to translate this information into an instantly understandable graphic representation. This was what gave the chart its usefulness—this is what the chart contributed to the mere data amassed and promulgated by the FAA.<sup>39</sup>

The court provided no further explanation or justification for its finding that the graphic portrayal of FAA data was a product. It is analogous to finding that the design of a product, as opposed to the product, is itself a product. Furthermore, to say that the design of the words and numbers in a publication is a product was and remains unprecedented to this day.

The next court to consider this issue was the Second Circuit Court of Appeals in *Saloomey v. Jeppesen & Co.*<sup>40</sup> After correctly stating that the “Ninth Circuit has assumed, without discussion, that . . . portrayal of Federal Aviation Administration flight data on its charts is a ‘product’ for strict liability purposes,” this court attempted to justify this finding on the basis of the chart’s mass production and the publisher’s ability to purchase product liability insurance.<sup>41</sup> While mass production and product liability insurance are often touted as justification for the doctrine of strict product liability, they do not answer the question of whether the flight data communicated on a chart is a product or whether strict liability should apply.

Without question, the paper and chart binders produced by chart publishers are products, but the more difficult question is whether the information published is also a product. While the paper and chart binders are mass produced, they are the basis for liability. On the other hand, it is illogical to say the information that is the basis for liability is also mass produced. Only the media is mass produced, not the message. Indeed, in *Aetna*, the Ninth Circuit found only that the translation of the words and numbers into graphics was a product, not the information communicated, at least not yet.<sup>42</sup>

The Second Circuit also failed to mention that the *Saloomey* case involved neither the same type of chart, nor the same category of error as the *Aetna* case. *Saloomey* involved an alleged error on an area chart, a publication that depicts airways, not instrument approach procedures. Even though area charts are entirely different than the approach charts discussed in *Aetna*,

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<sup>39</sup> *Aetna*, 642 F.2d at 342.

<sup>40</sup> 707 F.2d 671 (2d Cir. 1983).

<sup>41</sup> *Id.* at 676-77.

<sup>42</sup> *Aetna*, 642 F.2d at 342.

the Second Circuit made no attempt to justify the imposition of strict liability on such charts. Moreover, in *Aetna*, plaintiffs alleged that the graphic depiction, Jeppesen's "product," was misleading. In *Saloomey*, as noted earlier, there was an actual error in the information on the chart. That is, it was alleged that Jeppesen incorrectly labeled an airport as having a full Instrument Landing System, labeled as "ILS" on the chart, when in fact it had only the more limited Localizer System that should have been labeled "LOC." The opinion does not explain the error's origin.

In *Brocklesby v. United States*, the Ninth Circuit took strict liability for approach charts a giant step further in finding that the information communicated was a "component" of the approach chart, making the publisher liable without fault for accurate depiction of a defective approach procedure.<sup>43</sup> Apparently, the court "forgot" its previous holding in *Aetna* that the translation of the words and numbers of the FAA's approach procedure from tabular form to graphic form was Jeppesen's "product," not the raw data.<sup>44</sup> The court said that "[t]he issue is whether Jeppesen's chart is a product, not whether the instrument approach procedure is a product."<sup>45</sup>

There is no dispute that a chart is a product. It is a mass produced, tangible item. But that was not the issue. The issue was whether information communicated by a chart is a product. More to the point, can a publisher be held liable for accurately communicating "defective" information? This is where the Ninth Circuit's logic collapsed. The court proclaimed that the information conveyed is a component part of a communication.<sup>46</sup> Thus, it concluded, if a party is strictly liable for inaccurate communication, it must also be strictly liable for accurate communication of "defective" information because a manufacturer is strictly liable for any defects in component parts.<sup>47</sup> The court instructed:

The manufacturer of a product is strictly liable for defects in that product even though the defect can be traced to a component part supplied by another. Thus if you find that Jeppesen's instrument approach chart is defective and that the defect was a proximate cause of the accident, you must find Jeppesen liable even if

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<sup>43</sup> 767 F.2d 1288, 1296 (9th Cir. 1985).

<sup>44</sup> *Aetna*, 642 F.2d at 342.

<sup>45</sup> *Brocklesby*, 767 F.2d at 1294.

<sup>46</sup> *See id.* at 1296.

<sup>47</sup> *See id.*

the defect exists only because you find that the F.A.A. designed an approach procedure that you find is itself defective.<sup>48</sup>

The Ninth Circuit apparently felt the need to rationalize its imposition of strict liability on an otherwise innocent aeronautical chart publisher. Three "justifications" were given: (1) the publisher has the ability to detect an error and a mechanism for seeking corrections; (2) the publisher has the right to seek indemnification from the government; and (3) in this case, the publisher, Jeppesen, advertised that its charts were complete in every detail.<sup>49</sup>

With respect to the first justification, the court said "Jeppesen had both the ability to detect an error and a mechanism for seeking corrections. Under these circumstances, we reject Jeppesen's argument that the Government's procedure was completely beyond Jeppesen's control."<sup>50</sup>

Instrument approach procedures, like most government regulations, are promulgated after notice and comment. This is the so-called mechanism for seeking corrections mentioned by the court. Jeppesen's so-called "mechanism for seeking corrections," therefore, is the same mechanism that every citizen has to comment on government regulations before they go into effect. Presumably, in a case involving an instrument approach procedure promulgated by another country when the publisher lacked a mechanism for seeking corrections, imposition of strict product liability would not be justified on this basis.

The court further justified its position by saying that, "[t]o the extent that Jeppesen is held liable for the Government's misfeasance, Jeppesen had a right to seek tort law indemnification."<sup>51</sup>

But two years later the same court found that the Government could not be sued for exercising its discretionary authority in designing instrument procedures.<sup>52</sup> Ironically, the United States, which published the same "defective" instrument approach chart for which Jeppesen was held liable in *Brocklesby*, would have been immune from liability despite the fact that it not only published the procedure, but designed it also.<sup>53</sup>

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<sup>48</sup> *Id.* at 1295.

<sup>49</sup> *See id.* at 1296-98.

<sup>50</sup> *Id.* at 1296.

<sup>51</sup> *Id.* at 1296-97.

<sup>52</sup> *See West v. F.A.A.*, 830 F.2d 1044, 1048-49 (9th Cir. 1987).

<sup>53</sup> *Brocklesby*, 767 F.2d at 1291-92 ("The [FAA] designs and publishes standard instrument approach procedures."). Most aeronautical charts used in the United States are published and sold by both an agency of the U.S. government and

Inexplicably, the court added that if the publisher merely published the original text form of the approach procedure, it would be immune from strict liability.<sup>54</sup> But the act of converting the text form to graphics somehow subjected the publisher to liability, not only for its form<sup>55</sup> but also for defects in the procedure itself.<sup>56</sup> The court does not justify this added burden by any policy argument. Rather, it appears to be based solely on the publisher's own advertising. The court quoted from its catalog, circa 1973, that stated:

When pilots compare approach plates . . . for information, for readability . . . they choose Jeppesen. Why? Because the format of Jeppesen charts was designed by pilots, for pilots, and has been time-tested and proven by instrument pilots throughout the world. Every necessary detail is clearly indicated. . . .

Jeppesen approach plates include . . . EVERYTHING you need for a smooth transition from enroute to approach segment of your flight.<sup>57</sup>

The court went on to say that "[i]t is true that the government's procedures are significant components of Jeppesen's charts. It is apparent, however, that Jeppesen's charts are more than mere republication of the government's procedures. Indeed, Jeppesen's charts are distinct products."<sup>58</sup>

According to the Ninth Circuit, reformatting government regulations to make them more readable and advertising that fact subjects the publisher to strict liability, not only for the manner in which it makes the regulation more readable, but also for defects in the government regulations themselves.<sup>59</sup> After the *Brocklesby* decision, the publisher removed the offending words quoted by the Ninth Circuit from its catalog. Presumably, in a future case, at least this justification for strict product liability is no longer applicable.

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Jeppesen, a private commercial publisher. If the pilots had purchased and used the government published chart instead of the privately published chart, sovereign immunity would have precluded the plaintiffs from suing the government for strict product liability. That is, the Federal Tort Claims Act, which provides a limited waiver of sovereign immunity, does not allow for strict liability. See 28 U.S.C. § 1346(a)(2) (1994 & Supp. II 1997).

<sup>54</sup> See *Brocklesby*, 767 F.2d at 1297-98.

<sup>55</sup> See *Aetna Cas. and Surety Co. v. Jeppesen & Co.*, 642 F.2d 339, 342 (9th Cir. 1981).

<sup>56</sup> See *Brocklesby*, 767 F.2d at 1298.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See *id.* at 1298.

Shortly after the *Brocklesby* opinion, a California appellate court also found that strict product liability applied to alleged defects in an instrument approach chart. In *Fluor Corp. v. Jeppesen & Co.*, the plaintiffs alleged that the chart failed to depict the highest terrain in the vicinity of the airport.<sup>60</sup> Terrain information is neither regulatory nor even required for the purpose of an instrument approach procedure. It is printed on instrument approach charts solely for the purpose of enhancing the pilot's terrain awareness. In an unabashedly result oriented decision, this court said:

[T]he policy reasons underlying the strict products liability concept should be considered in determining whether something is a product within the meaning of its use . . . rather than . . . to focus in the dictionary definition of the word.

When so viewed, characterizing [Jeppesen's] instrument approach charts as "products" serves "[T]he paramount policy to be promoted by the [doctrine]," i.e., "The protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them."<sup>61</sup>

The *Fluor* trial court refused to apply strict liability, explaining that "strict liability principles are applicable only to items whose physical properties render them innately dangerous."<sup>62</sup> The appellate court disagreed, stating:

[A]lthough a sheet of paper might not be dangerous, per se, it would be difficult indeed to conceive of a salable commodity with more inherent lethal potential than an aid to aircraft navigation that, contrary to its own design standards, fails to list the highest land mass immediately surrounding a landing site.<sup>63</sup>

In other words, the *Fluor* court found that strict liability applied to protect defenseless victims and because of the perceived lethal potential of errors—that is, the ends justify the means. Charts are deemed products so that victims will be compensated and because they are dangerous. But it would be difficult to imagine a more dangerous commodity, or one that affects more defenseless victims, than information and ideas.

Six years later, in 1991, the Ninth Circuit missed an opportunity to change its *Brocklesby* decision. In *Winter v. G.P. Putnam's*

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<sup>60</sup> 216 Cal. Rptr. 68, 70 (Cal. Ct. App. 1985).

<sup>61</sup> *Id.* at 71 (quoting *Lowrie v. City Evanston*, 365 N.E.2d 923, 928 (Ill. App. Ct. 1977) and *Campbell v. General Motors Corp.*, 649 P.2d 224, 230 (Cal. 1982) (citations omitted)).

<sup>62</sup> *Id.* at 71.

<sup>63</sup> *Id.* at 71-72.

*Sons*,<sup>64</sup> the court considered whether to impose liability on the publisher of a book titled *The Encyclopedia of Mushrooms* for allegedly publishing erroneous and misleading information concerning the identification of the most deadly species of mushrooms. The court affirmed the trial court's conclusion that "1) the information contained in a book is not a product for the purposes of strict liability under products liability law; and 2) . . . a publisher does not have a duty to investigate the accuracy of the text it publishes."<sup>65</sup> In reaching this conclusion, the Ninth Circuit stated:

A book containing Shakespeare's sonnets consists of two parts, the material and print therein, and the ideas and expression thereof. The first may be a product, but the second is not. The latter, were Shakespeare alive, would be governed by copyright laws; the laws of libel, to the extent consistent with the First Amendment; and the laws of misrepresentation, negligent misrepresentation, negligence, and mistake. These doctrines applicable to the second part are aimed at the delicate issues that arise with respect to intangibles such as ideas and expression. Products liability law is geared to the tangible world.<sup>66</sup>

Contrary to the *Fluor* decision, the court said:

The language of products liability law reflects its focus on tangible items. In describing the scope of products liability law, the Restatement (Second) of Torts lists examples of items that are covered. All of these are tangible items, such as tires, automobiles, and insecticides. The American Law Institute clearly was concerned with including all physical items but gave no indication that the doctrine should be expanded beyond that area.

The purposes served by products liability law also are focused on the tangible world and do not take into consideration the unique characteristics of ideas and expression. Under products liability law, strict liability is imposed on the theory that "[t]he costs of damaging events due to defectively dangerous products can best be borne by the enterprises who make and sell these products." Strict liability principles have been adopted to further the "cause of accident prevention . . . [by] the elimination of the necessity of proving negligence." Additionally, because of the difficulty of establishing fault or negligence in products liability cases, strict liability is the appropriate legal theory to hold manufacturers liable for defective products. Thus, the seller is subject to liability "even though he has exercised all possible care in the prepara-

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<sup>64</sup> 938 F.2d 1033, 1034 (9th Cir. 1991).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1034.

tion and sale of the product.” It is not a question of fault but simply a determination of how society wishes to assess certain costs that arise from the creation and distribution of products in a complex technological society in which the consumer thereof is unable to protect himself against certain product defects.

Although there is always some appeal to the involuntary spreading of costs of injuries in any area, the costs in any comprehensive cost/benefit analysis would be quite different were strict liability concepts applied to words and ideas. We place a high priority on the unfettered exchange of ideas. We accept the risk that words and ideas have wings we cannot clip and which carry them we know not where. The threat of liability without fault (financial responsibility for our words and ideas in the absence of fault or a special undertaking or responsibility) could seriously inhibit those who wish to share thoughts and theories. As a New York court commented, with the specter of strict liability, “[w]ould any author wish to be exposed . . . for writing on a topic which might result in physical injury? e.g. How to cut trees; How to keep bees?” One might add: “Would anyone undertake to guide by ideas expressed in words either a discrete group, a nation, or humanity in general?”

Strict liability principles even when applied to products are not without their costs. Innovation may be inhibited. We tolerate these losses. They are much less disturbing than the prospect that we might be deprived of the latest ideas and theories.<sup>67</sup>

Upon reading these eloquent words, one would believe that the Ninth Circuit reversed its previous ruling regarding strict liability for approach charts. That would be wrong. The court expressly considered and rejected the plaintiff’s argument that strict liability should be imposed on the publisher of *The Encyclopedia of Mushrooms* for the same policy reasons that had been applied to approach charts:

Several jurisdictions have held that charts which graphically depict geographic features or instrument approach information for airplanes are “products” for the purpose of products liability law. . . . Plaintiffs suggest that *The Encyclopedia of Mushrooms* can be compared to aeronautical charts because both items contain representations of natural features and both are intended to be used while engaging in a hazardous activity. We are not persuaded.

Aeronautical charts are highly technical tools. They are graphic depictions of technical, mechanical data. The best analogy to an aeronautical chart is a compass. Both may be used to guide an

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<sup>67</sup> *Id.* at 1034-35 (citations omitted).

individual who is engaged in an activity requiring certain knowledge of natural features. Computer software that fails to yield the result for which it was designed may be another. In contrast, *The Encyclopedia of Mushrooms* is like a book on how to use a compass or an aeronautical chart. The chart itself is like a physical "product" while the "How to Use" book is pure thought and expression.

Given these considerations, we decline to expand products liability law to embrace the ideas and expression in a book. We know of no court that has chosen the path to which the plaintiffs point.<sup>68</sup>

It is difficult to understand the Ninth Circuit's distinction between a book about mushrooms and a book of aeronautical charts. Both communicate information. Both may be used by persons engaged in an activity, such as, finding and cooking mushrooms, pre-flight planning, and flying. Both are original expressions of information and ideas. Moreover, a book of aeronautical charts is no more like a compass than a book of mushrooms is like a pot. Just as a cook needs a pot to cook mushrooms, a pilot needs a compass to fly an instrument approach procedure. Although both an aeronautical chart and a compass—and a book about mushrooms for that matter—convey information, no one would suggest that the information conveyed by the compass, magnetic directions, is a component of the compass.

The Ninth Circuit's other analogy to computer software<sup>69</sup> would have been more useful had the court distinguished between data and computer programs. The court referred to computer program software, that is, the instructions that run the computer. Computer program software, used only to run computers, is very similar to hardware and is an integral part of all modern day computer applications. Data software, however, is not only used by computers. Rather, it is merely a different media for information that would otherwise be published in books or on paper. Today, everyone is familiar with books published on CD-ROM, for example. Even *The Encyclopedia of Mushrooms* could be published on CD-ROM and would be considered software. Yet no one would distinguish between the book version and the CD-ROM version for purposes of liability. Similarly, aeronautical charts published on CD-ROM and other

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<sup>68</sup> *Id.* at 1035-36 (emphasis added).

<sup>69</sup> See *Actna Cas. and Sur. Co. v. Jeppesen & Co.*, 642 F.2d 339, 342 (9th Cir. 1981).

electronic media should be treated no differently than their printed counterparts.

The Ninth Circuit never defined the metaphysical concept of "pure thought and expression," but in the age of technology, a simple test will distinguish where a product ends and where "pure thought and expression" begins. Anything that can be photocopied, photographed, filmed, or electronically duplicated without any loss of substance is "pure thought and expression." That is, if the words, numbers, graphics, or pictures can be photographically or electronically cloned, the publisher's "product" is only the media, not the message. The thoughts and expressions communicated are intangible and therein belong to everyone, limited only by the laws of copyright.

An aeronautical chart may be easily photocopied. But aside from the rights a publisher may have to prevent such infringement, a photocopy that communicates the same information as the original chart is not, by any definition, the original publisher's product. In fact, all of the information on an aeronautical chart may be communicated verbally as well. But a verbal communication of the information contained on an aeronautical chart is not a product either. Indeed, in *Aetna*, the Ninth Circuit held that the publishers' product is the graphic depiction of the words and numbers, not the words and numbers themselves.<sup>70</sup>

In summary, three courts have interpreted the common law of three states to find that aeronautical charts are products subjecting the publisher to strict product liability for publication of "defective" information. The Second Circuit interpreted Colorado law in *Saloomey*; the Ninth Circuit interpreted Nevada law in *Aetna*; and the California Supreme Court interpreted California law in *Brocklesby*. At that time, all three courts had adopted the *Restatement* formulation of strict product liability.<sup>71</sup> Notwithstanding the obvious focus of section 402A on the tangible world, each court that imposed strict product liability on an aeronautical chart publisher resorted to the public policy originally stated in *Greenman v. Yuba Power Products, Inc.* to justify its position that information is a product.<sup>72</sup>

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<sup>70</sup> *Id.* at 342.

<sup>71</sup> See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

<sup>72</sup> 377 P.2d 897, 901 (Cal. 1962).

## VI. AERONAUTICAL CHARTS AS PRODUCTS UNDER STATUTORY PRODUCT LIABILITY LAW

To date, no court has considered whether an aeronautical chart is a product under any product liability statute. When it inevitably occurs, such an analysis will be very different from those previous decisions based on common law. When a legislature has spoken, the courts are limited to interpreting the law based on the rules of statutory construction, not based on their common law power to make and change the law. The primary issue will be legislative intent, not public policy. Indeed, the only legislative intent likely in states where common law strict product liability has been replaced by statutory product liability is to limit the application of the law, not expand it. That is, in every state where a product liability statute was enacted, it had been under the rubric of tort reform. Thus, restrictive readings of such statutes should be required.

To date, the United States Federal District Court of Connecticut is the only court to interpret a product liability statute in considering whether a publication is a product. In *L. Cohen & Co. v. Dun & Bradstreet, Inc.*,<sup>73</sup> the court was asked to consider whether a credit report publication was a product under the *Connecticut Product Liability Act*.<sup>74</sup> First, the court considered the definition of "product liability claim," i.e., "all claims or actions brought for personal injury, death or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, or labeling of any product."<sup>75</sup> Based on this definition, the court held that it "evinces no legislative intent to extend its coverage to reports, periodicals, books or other writings" and that it "appears to reflect a legislative concern with products of a more tangible nature."<sup>76</sup> Moreover, the *Connecticut Product Liability Act*, by its terms, was the exclusive remedy in Connecticut for personal injury, death, or property damage caused by a product. Therefore, if the legislature had intended its scope to include published information, it would effectively repeal the laws of defamation that also provide a remedy for

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<sup>73</sup> 629 F. Supp. 1425 (D. Conn. 1986).

<sup>74</sup> CONN. GEN. STAT. § 52-572 m-n (1997).

<sup>75</sup> *Id.* § 52-572 m(b).

<sup>76</sup> *L. Cohen Co.*, 629 F. Supp. at 1430.

harm caused by published information. The court found it unlikely that the legislature would have done so.<sup>77</sup>

Although *Salomey* was also tried in Connecticut, the court applied Colorado law.<sup>78</sup> Neither state had a product liability statute at the time of the accident, 1975. Colorado subsequently passed its *Product Liability Act*<sup>79</sup> in 1977. This act, which codified, modified, and supplemented *Restatement (Second) of Torts section 402A*,<sup>80</sup> defines a product liability action as "any action brought against a manufacturer or seller of a product . . . for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, or sale of any product."<sup>81</sup> This definition, which is almost identical to the Connecticut definition, similarly "evinces no legislative intent to extend its coverage to reports, periodicals, books or other writings."<sup>82</sup> While these words can be used in connection with the paper and binders for aeronautical charts, they make no sense in describing the information communicated on the paper.

Nor does it make sense to suggest that the Colorado legislature intended by its *Product Liability Act* to replace the law of defamation with strict product liability. That is, under defamation law, a person may be held strictly liable for publication of a defamatory falsehood.<sup>83</sup> Under strict product liability law, however, the publisher of information that causes harm is strictly liable, even if the publication is totally true and accurate. If Colorado's *Product Liability Act* were interpreted to include reports, periodicals, books, and other writings, all authors and publishers might be strictly liable for any harm they caused by any publication, whether accurate or not. Not only is this result not what the legislature intended, it would surely run afoul of the protection afforded by the First Amendment to the United States Constitution.<sup>84</sup>

Without analyzing every state product liability statute, it is unlikely that any such legislation could be interpreted to impose

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<sup>77</sup> See *id.*

<sup>78</sup> *Salomey v. Jeppesen & Co.*, 707 F.2d 671 (2d Cir. 1983).

<sup>79</sup> COLO. REV. STAT. ANN. §§ 13-21-401 to 406 (West 1997).

<sup>80</sup> See 7 MILLER, *Colo. Pers. Inj. Prac.* § 22.5 (1989).

<sup>81</sup> COLO. REV. STAT. ANN. § 13-21-401(2).

<sup>82</sup> *L. Cohen & Co.*, 629 F. Supp. at 1430.

<sup>83</sup> Strict liability applies only to defamation of a private person.

<sup>84</sup> See discussion *infra* Part VII.

strict product liability on aeronautical chart publishers unless it was drafted so narrowly that it covered aeronautical charts but not other publications. Because no state statute to date expressly covers aeronautical charts, any court considering the issue in a state where statutory strict product liability has replaced common law strict product liability is unlikely to ever interpret such a statute to include aeronautical charts.

## VII. APPLICATION OF THE FIRST AMENDMENT TO AERONAUTICAL CHART PUBLISHERS

To date, no court has considered whether aeronautical chart publishers should be afforded the same protection as other publishers under the First Amendment to the United States Constitution.<sup>85</sup> The First Amendment has been interpreted to protect the publication of words and ideas from infringement by the courts unless the speech in question falls into one of just a few categories for which there is less than complete constitutional protection.

The First Amendment, which states that Congress shall make no law "abridging the freedom of speech, or of the press," applies to the states through the Fourteenth Amendment.<sup>86</sup> It applies to product liability cases because the imposition of tort liability constitutes state action.<sup>87</sup> Thus, the First Amendment bars the imposition of civil liability on aeronautical chart publishers unless aeronautical charts fall within one of the well-defined and narrowly limited classes of speech that are unprotected by the First Amendment.<sup>88</sup> These include: (1) obscenity,<sup>89</sup> (2) fighting words,<sup>90</sup> (3) libel,<sup>91</sup> (4) commercial

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<sup>85</sup> In a footnote, Judge Cabranes said in *L. Cohen & Co. v. Dun & Bradstreet Inc.*, "[t]he navigational charts that Judge Eginton found in Halstead to be subject to the product liability laws, unlike the credit reports in the instant case, did not constitute speech protected by the First Amendment." 629 F. Supp. at 1431 n.8. But Judge Eginton said no such thing. In fact, he did not mention the First Amendment at all. See *Halstead v. United States*, 535 F. Supp. 782 (D. Conn. 1982).

A footnote in *Brocklesby v. United States* also mentioned the First Amendment defense but declined to consider it because it was raised for the first time on appeal. 767 F.2d 1288, 1295 n.9 (9th Cir. 1985).

<sup>86</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (Stewart, J., concurring).

<sup>87</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.").

<sup>88</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

<sup>89</sup> See *Miller v. California*, 413 U.S. 15, 23-24 (1973).

speech,<sup>92</sup> and (5) words likely to incite imminent, lawless action.<sup>93</sup>

Aeronautical charts do not fall into the obscenity, fighting words, or libel categories, and are not commercial speech that does "no more than propose a commercial transaction."<sup>94</sup> Commercial speech may also communicate information for purposes of inviting or enticing one to buy goods or services.<sup>95</sup> Although aeronautical charts are published for profit, they cannot be considered an effort to achieve the type of commercial result that an advertisement is designed to achieve. Therefore, the aeronautical charts cannot be characterized as commercial speech.

Notwithstanding the foregoing, publishers can be held liable for physical injury caused by their words. In *Weirum v. RKO General, Inc.*, the court affirmed an award of damages to the plaintiff in a wrongful death action against a radio station.<sup>96</sup> The decedent was negligently forced off a highway by a listener of defendant's radio station, which was conducting a contest rewarding the first contestant to locate a disc jockey traveling throughout the listening area. The court rejected the station's First Amendment defense, stating that "[d]efendant's contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. . . . The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."<sup>97</sup>

*Weirum* is distinguishable from aeronautical chart cases because the *Weirum* broadcasts actively and repeatedly encouraged listeners to speed to announced locations. Liability was imposed on the broadcaster for urging listeners to act in an inherently dangerous manner. The same cannot be said for aeronautical charts, which merely convey information. To the contrary, the use of aeronautical charts encourages inherently safe and necessary activities.

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<sup>90</sup> See *Chaplinsky*, 315 U.S. at 572.

<sup>91</sup> See *New York Times Co.*, 376 U.S. at 267.

<sup>92</sup> See *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978).

<sup>93</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

<sup>94</sup> *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

<sup>95</sup> See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (noting the informational function of commercial speech).

<sup>96</sup> 539 P.2d 36 (Cal. 1975).

<sup>97</sup> *Id.* at 40.

A publisher does not enjoy absolute immunity from tort liability. The critical issue is whether the publication is protected by the First Amendment.<sup>98</sup> For example, in *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court held that the First Amendment did not protect defendants from liability under the common-law tort of "appropriation" or "right of publicity" when news media filmed plaintiff's "human cannonball act at a county fair and broadcast the act without the plaintiff's permission, reasoning that it was enough that defendants knew that the plaintiff objected to the broadcast and went forward anyway."<sup>99</sup> In *Cohen v. Cowles Media Co.*, the Court held that the First Amendment does not bar application of ordinary principles of state contract and promissory estoppel law in a suit against a newspaper for breaching its promise of confidentiality and printing a source's name.<sup>100</sup> *Goldstein v. California* upheld California's "record piracy" law, noting that "no restraint has been placed on the use of an idea or concept."<sup>101</sup> In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the Court upheld a copyright infringement action against *The Nation* magazine for printing excerpts from President Gerald Ford's memoirs, holding that the First Amendment did not shield the magazine from the normal principles of copyright liability.<sup>102</sup> In *Snepp v. United States*, the Court upheld a constructive trust on defendants' royalties for a book published in violation of a preclearance agreement with the CIA.<sup>103</sup>

Decisions against the publishers of *Soldier of Fortune* are also distinguishable.<sup>104</sup> The courts in those cases upheld actions for damages against *Soldier of Fortune* magazine for deaths resulting from the magazine's "gun for hire" advertisements.<sup>105</sup> The defendants in these cases tried unsuccessfully to use the First Amendment as a defense.<sup>106</sup> These cases are inapposite because

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<sup>98</sup> See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982).

<sup>99</sup> 433 U.S. 562, 575-79 (1977).

<sup>100</sup> 501 U.S. 663, 667-72 (1991).

<sup>101</sup> 412 U.S. 546, 571 (1973).

<sup>102</sup> 471 U.S. 539, 569 (1985).

<sup>103</sup> 444 U.S. 507, 511-16 (1980).

<sup>104</sup> See, e.g., *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992); *Norwood v. Soldier of Fortune Magazine, Inc.*, 651 F. Supp. 1397 (W.D. Ark. 1987).

<sup>105</sup> See *Braun*, 968 F.2d at 1122; *Norwood*, 651 F. Supp. at 1403.

<sup>106</sup> See *Braun*, 968 F.2d at 1116; *Norwood*, 651 F. Supp. at 1398.

they involve commercial speech, which is afforded only limited First Amendment protection.<sup>107</sup>

A common thread running through most of the exceptions to First Amendment protection is the concept of fault. In almost every case in which liability has been imposed on the publisher of information that causes harm, there has been a showing of fault, either intentional or negligent. The only exceptions to this rule of no strict liability are defamation of a private person and infringement of intellectual property. Strict liability is imposed on a publisher of defamatory falsehood and one that infringes a copyright.

In *L. Cohen & Co., Inc. v. Dun & Bradstreet, Inc.*, the court addressed the application of strict product liability on a publisher:

The imposition of liability without fault on the publisher of a credit report . . . would be just a short step from the imposition of liability without fault on an investigative reporter, a political columnist or a documentary film maker. The constitutional constraints on the common law of defamation enunciated in *New York Times Company v. Sullivan*, . . . and its progeny, would effectively be nullified if writers, artists and publishers could be held strictly liable for their work under the product liability laws.<sup>108</sup>

Another common thread running through many exceptions to First Amendment protection is the lack of socially redeeming value for the publication. Aeronautical charts, however, are extremely valuable to both safety and economic well-being and are therefore worthy of First Amendment protection.

The United States has an extensive history of permitting the free, open, and competitive dissemination of information and ideas. This privilege (and concomitant shield against threats of civil suits) has long been an integral part of the fabric of this nation, and as such has been tenaciously protected by the courts. As explained in an often quoted statement:

The constitutional protection accorded to the freedom of speech and of the press is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.<sup>109</sup>

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<sup>107</sup> See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 384 (1973).

<sup>108</sup> 629 F. Supp. 1425, 1431 (D. Conn. 1986).

<sup>109</sup> *Herceg v. Hustler Magazine, Inc.* 814 F.2d 1017, 1019 (5th Cir. 1987).

## VIII. APPLICATION OF THE "ACT OF STATE" DOCTRINE TO AERONAUTICAL CHARTS

Most of the information published on aeronautical charts is promulgated by sovereign countries pursuant to their right to control the airspace over their own territory, a right that is jealously guarded by all countries. As stated in Chapter 1 of the *Chicago Convention*, "every State has complete and exclusive sovereignty over the airspace above its territory."<sup>110</sup> In fact, despite the efforts of the International Commercial Aviation Organization (ICAO), no international standard has ever been adopted to control or police sovereign air space.<sup>111</sup>

The "Act of State" doctrine is a judicially created doctrine of restraint that precludes courts from reviewing the validity of a foreign sovereign's public acts<sup>112</sup> committed within its own territory.<sup>113</sup> The doctrine evolved to address three specific concerns: (1) respect for foreign sovereigns; (2) separation of powers; and (3) justiciability.<sup>114</sup> It was first applied in *Underhill v. Hernandez* where the Court affirmed the dismissal of a suit brought by an American citizen, Underhill, who sought damages for wrongful

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<sup>110</sup> Chicago Convention, *supra* note 16, at 1180.

<sup>111</sup> See *id.* While the Chicago Convention and its annexes have the force of law on each contracting state, pursuant to Articles 37 and 38, contracting states are required only to secure the highest practicable degree of uniformity in regulations, standards and procedures. Where a state finds it impractical to comply with an international standard or procedure, or bring its own regulations in full accord, that state must file a "difference" with ICAO. ICAO will in turn notify all contracting states. But the Convention contains no enforcement mechanism or procedure.

<sup>112</sup> See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 (1987) (defining public act as constitutional amendments, statutes, decrees, and proclamations, and in certain circumstances as physical acts; an official government pronouncement describing a certain act as governmental is usually conclusive evidence of its official character); see also *Sharon v. Time, Inc.*, 599 F. Supp. 538, 544 (S.D.N.Y. 1984) (stating that the doctrine was limited to "laws, decrees, decisions, seizures and other officially authorized 'public acts.'"); Lynn E. Parseghian, Note, *Defining the "Public Act" Requirement in the Act of State Doctrine*, 58 U. CHI. L. REV. 1151, 1162 (1991) (stating that "the Court has said little about what constitutes a public act, and the courts have scrutinized this at a threshold level"); *id.* at 1165 (stating the more restrictive view requires the official to be authorized to bind the state).

<sup>113</sup> See *Banco de Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

<sup>114</sup> See Parseghian, *supra* note 112, at 1153. But see RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 (1987) (explaining that the rationale for the doctrine has been described in various ways, and the weight given to the different rationales may determine the possible limitations or exceptions).

imprisonment by a Venezuelan military leader.<sup>115</sup> Stating that the doctrine recognizes the respect one sovereign state owes to the independence of another state, the Court held that it would not sit in judgment of the acts of another country.<sup>116</sup>

In the most often cited Act of State doctrine case, *Banco de Nacional de Cuba v. Sabbatino*, the Court applied the doctrine to bar that suit against Cuba for the expropriation of U.S. owned assets in Cuba.<sup>117</sup> The Court explained that the doctrine arose out of the *relationship* between different branches of government in a system of separation of powers.<sup>118</sup>

In the most recent Supreme Court case that addresses the Act of State doctrine, *W.S. Kirkpatrick v. Environmental Tectonics*, Justice Scalia stated “[t]he act of state doctrine does not establish an exception for cases . . . that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.”<sup>119</sup>

At least one court found the Act of State doctrine to be applicable to strict product liability. In *Bynum v. FMC Corp.*, the plaintiff, a member of the Mississippi National Guard who was injured while operating a tracked army vehicle manufactured by FMC, sought to hold FMC strictly liable for defects in the vehicle.<sup>120</sup> FMC asserted the government contractor’s defense, which protects a government contractor from liability if its product was manufactured in accordance with government specifications.<sup>121</sup> Comparing the government contractor defense to the Act of State doctrine, the court said:

We find the present situation to be not unlike that of *Banco Nacional v. Sabbatino* . . . . At issue in *Banco Nacional* was the legal basis and scope of the “act of state” doctrine, which precludes judicial inquiry into the public acts of a recognized foreign sovereign power committed within its own territory. The Supreme Court held that, because of the essential political nature of foreign expropriation and its significance in international affairs, the basic relations between the judicial and political branches of

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<sup>115</sup> 168 U.S. 250, 250-51 (1897).

<sup>116</sup> *See id.* at 252.

<sup>117</sup> 376 U.S. 398 (1964).

<sup>118</sup> *See id.* at 423.

<sup>119</sup> 493 U.S. 400, 410 (1990).

<sup>120</sup> 770 F.2d 556, 558 (5th Cir. 1985).

<sup>121</sup> *See id.*

government required that the judiciary not pass on the validity of the expropriations.<sup>122</sup>

Similarly, in *Kern v. Jeppesen Sanderson, Inc.*, a case involving strict product liability against an aeronautical chart publisher, the court stated that foreign sovereigns' interest in regulating their airspace outweighs any interest the United States may have in applying its own air safety regulations.<sup>123</sup>

Even concerning decisions of the United States government with respect to regulation and control of its airspace, the courts may not be competent to pass judgment. Like the Act of State doctrine, this restriction could be justified on the basis of separation of powers, but in fact it is based on sovereign immunity. That is, the United States may not be sued for such decisions because they are considered discretionary acts to which the Federal Tort Claims Act waiver of sovereign immunity does not apply. In *West v. FAA*, the plaintiffs sued the United States for allegedly designing a defective instrument departure procedure, i.e., a flight procedure for leaving an airport during weather conditions that make visual flight difficult or impossible.<sup>124</sup> In finding that the discretionary function exception to the FTCA applied, the court said:

FAA employees consider safety in exercising their judgment whether to establish departure procedures for airports . . . . Determination of safety requirements involves a balancing of social, economic or political policies. In any safety decision, there are limits to the resources available to test and inspect the procedure and those who will be using it . . . .

The FAA employees who were responsible for the design of the departure procedures from Bishop Airport were given wide discretion. They were required to use their best judgment in deciding what tests were necessary to meet reasonable safety requirements. This required a balancing of social and economic interests and a tailoring of safety requirements to local conditions.<sup>125</sup>

Every sovereign state must exercise judgment in establishing flight procedures. Such judgment inevitably involves the balancing of safety against social, economic, and political policies and reality. The Act of State doctrine is a judicial recognition that

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<sup>122</sup> *Id.* at 570.

<sup>123</sup> 867 F. Supp. 525, 525-532 (S.D. Tex. 1994).

<sup>124</sup> 830 F.2d 1044, 1046 (9th Cir. 1987).

<sup>125</sup> *Id.* at 1047-49.

such balancing cannot and should not be second guessed by the courts.

The Act of State doctrine is particularly applicable to an action against an aeronautical chart publisher that seeks to hold the publisher strictly liable for “defects” in an accurately published flight procedure. In order to find liability in such a case, the court must necessarily rule on the validity of an act of state committed within a sovereign’s own territory. But such a ruling would violate the Act of State doctrine. Accordingly, this doctrine should bar any action from strict liability against an aeronautical chart publisher based on a “defective” flight procedure that was accurately published.

The Act of State doctrine also illustrates the invalidity of the application of strict product liability to a flight procedure published on an aeronautical chart. Whether a product is defective or not inevitably involves a balancing test between the risks associated with the use of the product and the benefits of its use. The benefit of an instrument approach procedure is the ability to land in adverse weather conditions. This benefit inures not only to the user, but also to the sovereign state that designed and promulgated the procedure. Instrument flight procedures increase airport utilization and thus boost the airport’s local and national economy.

With respect to instrument approach procedures, there is an inverse relationship between safety and utilization—the safer the procedure, the less useful, and vice versa. For example, every instrument approach procedure has a minimum altitude to which the aircraft may descend before it must either have the airport in sight or abandon the approach. The higher the minimum altitude, the safer the instrument approach procedure. However, as the minimum altitude is increased, the number of abandoned approaches also increases, thus decreasing the number of landings. The safest instrument approach procedure is one that requires visual contact with the airport at a high altitude. But the safest instrument approach procedure would not be a very useful instrument approach procedure. Accordingly, instrument approach procedure design involves judgment decisions and compromises that are quite different from product design decisions and not appropriate for second guessing by a court.

## IX. CONCLUSION

While several courts have found that aeronautical chart publishers are strictly liable for injuries caused by publication of "defective" information, those decisions are flawed in many respects. To date, however, no court has considered whether any strict product liability statute applies to aeronautical chart publishers. If and when such a case arises, it is unlikely that any statute that does not expressly single out aeronautical charts will be interpreted to apply to all publications. Such an interpretation would run afoul of defamation laws and the First Amendment to the United States Constitution. Furthermore, it is likely that strict product liability for aeronautical chart publishers is barred by either the First Amendment or the Act of State doctrine.