September 1994

Guns for Hire, Commercial Speech and Tort Liability: Making a Case for Preserving First Amendment Free Speech Rights

Stephen T. Raptis
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Constitutional Law Commons, First Amendment Commons, and the Torts Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol97/iss1/9

This Student Work is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
# GUNS FOR HIRE, COMMERCIAL SPEECH AND TORT LIABILITY: MAKING A CASE FOR PRESERVING FIRST AMENDMENT FREE SPEECH RIGHTS

## I. INTRODUCTION ........................................... 216

## II. DEVELOPMENT OF COMMERCIAL SPEECH PROTECTION .. 217
   A. *In The Beginning; The Traditional Commercial Speech Doctrine* .......................... 218
   B. *A Turning Point For Protection; The Modern Commercial Speech Doctrine* .............. 219
   C. *Fox and Posadas; Quietly Eroding the Protection Standard* .................................. 221
   D. *Some Limited State and Lower Federal Court Precedent* ...................................... 223

## III. ANATOMY OF A SPLIT .................................... 225
   A. *Eimann v. Soldier of Fortune* ................................................................. 225
      1. The Trial .............................................................. 226
      2. The Appeal ............................................................ 229
   B. *Braun v. Soldier of Fortune* ................................................................. 232
      1. The Trial .............................................................. 233
      2. The Appeal ............................................................ 235
   C. *Factually Indistinguishable Cases* ......................................................... 237
   D. *Fundamental Ambiguity of the Savage Advertisement* ....................................... 238
   E. *Two Distinct First Amendment Applications in Legally Indistinguishable Cases* ...... 241

## IV. RESOLVING THE SPLIT ................................. 243
   A. *First Amendment Considerations* .............................................................. 243
   B. *The Modern Commercial Speech Doctrine Revisited* .......................................... 247

## V. CONCLUSION .................................................. 251
I. INTRODUCTION

Freedom of the press is widely recognized as a bulwark of American constitutional democracy. The First Amendment guarantees the right of publishers to disseminate often controversial information. Our highest court has confirmed this right on numerous occasions. However, our judicial system has yet to delineate the precise limitations of that right.

In recent years, the issue has arisen as to whether the First Amendment should be interpreted to protect publishers from tort liability for the advertisements they print. Because publishers merely provide a forum for the dissemination of commercial information, they play a limited third-party role in transactions between advertisers and the public. Thus, the question of third-party tort liability is raised when a publisher, touting the products or services of another, prints an advertisement which subsequently results in injury to a member of the public.

This issue has been addressed by two recent federal circuit court cases, *Eimann v. Soldier of Fortune Magazine, Inc.*, and *Braun v. Soldier of Fortune Magazine, Inc.* As their names indicate, both cases involve the same defendant, *Soldier of Fortune Magazine* (SOF). Likewise, both cases share astounding factual similarities and were decided using identical legal standards. However, because the Supreme Court has never decided whether the First Amendment should be interpreted to protect publishers from tort liability for the products and services they advertise, a split of authority has developed between the Fifth and Eleventh Circuits on this issue.

The purpose of this Note is threefold. First, it will present a brief historical survey of the development of First Amendment protection for
commercial speech. Second, by examining the legal analysis applied by the Eimann and Braun courts, this Note will explain how the two circuits courts arrived at entirely inconsistent results from practically identical fact patterns. This explanation will expose the logical weaknesses inherent in the Eleventh Circuit’s overly restrictive interpretation of SOF’s First Amendment publishing rights. Finally, by applying the modern commercial speech precedent, this Note will propose how the U.S. Supreme Court should resolve the publisher liability issue if actually confronted with the Eimann/Braun split.

II. DEVELOPMENT OF COMMERCIAL SPEECH PROTECTION

The Supreme Court, through a rather lengthy line of cases, has developed what is generally recognized today as the commercial speech doctrine. Because this doctrine has undergone dramatic change since its inception, only the landmark cases will be addressed. Generally, the commercial speech doctrine addresses the level of protection that commercial speech, as opposed to core speech, should be afforded under the First Amendment. Unfortunately, the Supreme Court has “never squarely addressed the issue of what role editorial discretion plays in the commercial speech doctrine.” The result is a clear lack of precedent to which publishers can conform in choosing what advertisements to print. Instead, publishers and the lower courts have been forced to rely on Supreme Court precedent governing direct state restrictions of commercial speech under the commercial speech doctrine.

6. The Supreme Court has defined commercial speech as speech which “does no more than propose a commercial transaction.” Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 561-62 (1980).

7. Core speech has been defined as “political speech, or speech critical of policies and officials.” GERALD GUNTHER, CONSTITUTIONAL LAW, 972, 1128 (11th ed. 1985).

A. In the Beginning: The Traditional Commercial Speech Doctrine

The Supreme Court, in Valentine v. Chrestensen,\(^9\) announced the inception of what would become the traditional commercial speech doctrine. In ruling on the constitutionality of distributing printed advertisements in the streets of New York,\(^10\) the Valentine court held that the First Amendment does not protect commercial speech from government intrusion. Specifically, the Court stated that while one may lawfully “exercise . . . the freedom of communicating information and disseminating opinion” in the city streets, the Constitution does not forbid government from restraining the dissemination of “purely commercial advertising.”\(^11\) Curiously, the Court made little effort to explain why the two types of speech warrant such differing levels of First Amendment protection.

Twenty two years later, in New York Times Co. v. Sullivan,\(^12\) the Supreme Court began to dissolve the foundations of the traditional commercial speech doctrine. Specifically, the Court recognized that at least some types of commercial speech are entitled to First Amendment protection.\(^13\) At issue in Sullivan was a paid advertisement which both criticized public officials in various cities for alleged civil rights violations and solicited donations to further the civil rights movement.\(^14\) In the libel suit that followed, the Supreme Court focused its commercial speech analysis on the content of the disputed speech.\(^15\) Specifically, the Court held that the traditional commercial speech doctrine, allowing no First Amendment protection for advertisements, applied only to purely commercial advertising;\(^16\) conversely, advertising which communicates information “of the highest public interest and concern,” like

---

10. At issue was an anti-littering ordinance which city officials had cited in preventing handbills from being distributed. Id. at 53.
11. Id. at 54.
13. Id. at 266-67.
14. Id. at 256-59.
15. See Firenze, supra note 8, at 146.
16. Sullivan, 376 U.S. at 266.
the advertisement at issue in *Sullivan*, should be entitled to First Amendment protection.\(^\text{17}\)

Significantly, the Court further acknowledged that a state can restrict the exercise of commercial speech just as effectively through its tort laws as it can through direct governmental regulation.\(^\text{18}\) Thus, the Court clearly implied that when overly restrictive state tort laws threaten the public’s vital interest in receiving commercial information, those laws are constitutionally impermissible.\(^\text{19}\)

**B. A Turning Point for Protection; The Modern Commercial Speech Doctrine**

Commercial speech reached its height of First Amendment protection in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*\(^\text{20}\) This case involved a consumer advocate group’s protest of a Virginia statute prohibiting pharmacists from advertising prescription drug prices.\(^\text{21}\) The Supreme Court struck down the statute, explaining that merely because an “advertiser’s interest is a purely economic one . . . hardly disqualifies him from protection under the First Amendment.”\(^\text{22}\) Applying a balancing test, the Court held, specifically, that the free flow of commercial information to consumers outweighs the state’s paternalistic interest in promoting professionalism in the pharmacist/customer relationship.\(^\text{23}\) In fact, the Court confirmed that a “particular consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”\(^\text{24}\)

\(^{17}\) *Id.*

\(^{18}\) *Id.* at 277 (the Court specifically refers to direct government regulation through state criminal sanctions).

\(^{19}\) *Id.*


\(^{21}\) *Id.* at 749-50. The plaintiff Board argued that dissemination of prescription drug prices constitutes an unprofessional publication. *Id.* at 749-51. Because the Board is responsible for regulating the professional standards of all pharmacists in Virginia, it has the authority to discipline its members who advertise such prices. *Id.*

\(^{22}\) *Id.* at 762.

\(^{23}\) *Id.* at 769-70.

\(^{24}\) *Id.* at 763. The Court pointed out, however, that many commercial messages seem
While the Court did allow broad First Amendment protection for commercial speech, it did not grant it full protection. Instead, the Court reasoned that "commonsense" differences exist between types of commercial speech and that a "different degree of protection is necessary to insure that the flow of . . . commercial information is unimpaired." For instance, commercial speech is more easily verified, oftentimes, than news reporting because the advertiser presumably knows more about his product or service than do customers. Thus, advertisers presumably require less protection from the possible consequences of harmful advertising than news reporters need for faulty factual verification. Also, because advertising has an economic motive, there is less chance that commercial speech will be discouraged by state regulation. Thus, the Court concluded that commercial speech is far less susceptible to the chilling effects of state regulation than is core speech. Accordingly, it requires a slightly lesser degree of First Amendment protection.

The modern commercial speech doctrine was announced in *Central Hudson Gas & Electric Corp. v. Public Service Commission.* In this case, the Supreme Court struck down a New York Public Service Commission regulation prohibiting private electrical utilities from advertising to promote the use of electricity. In determining whether any commercial expression should receive First Amendment protection from state regulation, the Court combined a number of holdings from its previous commercial speech cases to arrive at a four-part test.

---

27. Id.
28. Id.
29. Id.
31. Id. at 561. The case arose when the Commission attempted to prevent electrical utilities from promoting the purchase of utility services. Id. at 558. The Commission contended that promotional advertising was contrary to the national policy of energy conservation. Id. at 559. Central Hudson opposed the ban, claiming a First Amendment privilege to advertise its product. Id. at 558-60.
32. Id. at 566.
First, the expression must be one that the First Amendment is able to protect, which means it "at least must concern lawful activity and not be misleading." 33 Second, the government’s interest in regulating the speech must be "substantial." 34 Third, the restriction at issue must directly advance "the government interest asserted." 35 Finally, the restriction must be no "more extensive than is necessary to serve that interest." 36 In applying the four-part test to the facts in Central Hudson, the Court found that the state’s interests in promoting energy conservation and fair rate structures represented "clear and substantial government[ ] interest[s]." 37 Additionally, the Court found a direct relationship between the Commission’s regulation and the state’s interest in energy conservation. 38 However, the Court ultimately invalidated the regulation when it found that the Commission’s "complete suppression of speech ordinarily protected by the First Amendment" was more extensive than necessary to promote the state’s interest in preserving energy. 39

C. Fox and Posadas; Quietly Eroding the Protection Standard

The practical effect of Central Hudson was to consolidate numerous commercial speech restriction holdings into a comprehensive test designed to consider the respective rights of both advertisers and the

33. Id.
34. Id.
35. Id.
36. Id. The Court explained that restrictions on speech must be "‘narrowly drawn.’" Id. at 565. Furthermore, regulations may not restrict speech "when narrower restrictions on expression would serve . . . [the state’s] interest as well.” Id. Nor may the state restrict speech that “poses no danger to the asserted state interest.” Id.
37. Id. at 569. The first part of the test concerning misleading or illegal communications was not substantially at issue. Id. at 566. The Court did, however, address the trial court issue of whether advertising by a company holding a service monopoly can claim First Amendment protection for its speech. Id. at 566-68. The Court answered affirmatively. Id.
38. Id. at 569. However, the Court did not accept the Commission’s rate fairness argument, reasoning that the connection "between the advertising prohibition and . . . [Central Hudson’s] rate structure is, at most, tenuous.” Id.
39. Id. at 569-72. The Commission could have prevailed had it demonstrated that its legitimate conservation goals could not be achieved with a less restrictive regulation. Id. at 571.
High court cases following Central Hudson, however, began to undermine much of the protection that advertisers gained in Virginia Pharmacy and Central Hudson. In Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, the Supreme Court applied Central Hudson's four-part test to governmental restrictions on casino gambling advertising aimed at Puerto Rican citizens.

Even though the citizens of Puerto Rico are legally permitted to gamble in its casinos, the Puerto Rican legislature imposed restrictions on domestic casino advertisements to lessen the impact of those advertisements on its citizens. The legislature believed that casino gambling could be adverse to the health and welfare of its citizens. Despite its rejection of purely paternalistic speech restrictions in Virginia Pharmacy and government overreaching in Central Hudson, the Court upheld the restrictions based primarily on the Puerto Rican government's assertion that the restrictions were in the best interests of the Puerto Rican people.

In Board of Trustees v. Fox, the Court used the Central Hudson test to determine if a state university's interest in promoting an educational atmosphere could prevent commercial enterprises from operating on its campus. In upholding the constitutionality of the ban, the Court found, consistent with its holding in Posadas, that the university's interest in promoting an educational atmosphere was substantial, and that the university had demonstrated a "reasonable" fit between its restriction and its educational interest. Therefore, Central

---

40. See Firenze, supra note 8, at 154-55.
42. Id. at 330.
43. Id. at 341.
44. Id.
45. Id. at 344. See also Donald B. Allegro & John D. Ladue, Case Comment, Eimann v. Soldier of Fortune and 'Negligent Advertising' Actions: Commercial Speech in an Era of First Amendment Protection, 64 Notre Dame L. Rev. 157, 162-63 (1989).
47. Id. at 475-81. The action was brought by students who were prevented from holding "Tupperware" parties on campus. Id. at 472.
48. Id. at 480. The Court specifically stated that government regulation need not necessarily meet the least restrictive means prong of the Central Hudson test. Id. Rather, the
Hudson is still the controlling test to be applied in commercial speech cases. However, as a result of Fox and Posadas, Central Hudson has lost much of its ability to curb state-imposed restrictions.49

All of the cases examined thus far have substantially shaped the government’s ability to restrict commercial speech. With the exception of Sullivan, however, all of the holdings are necessarily limited to state action against private advertisers.50 In fact, every decision, from Valentine through Central Hudson to Posadas and Fox, has involved the constitutionality of state-imposed restrictions against advertisers. In some cases, however, private citizens bring civil tort suits which indirectly threaten the free speech rights of third-party publishers to advertise the products and services of particular advertisers. Unfortunately, the Supreme Court has never addressed the issue of First Amendment protection for third-party publishers in the negligent advertising context. Consequently, the lower courts have often been restricted to the closest available precedent — the commercial speech restriction cases discussed above.

D. Some Limited State and Lower Federal Court Precedent

While the Supreme Court has been silent thus far on the issue of publisher liability for negligent advertising, not all courts have been equally passive. Although some state appeals courts and at least one lower federal court have ruled on the issue, the precedent remains scant and relatively untested. However, the currently existing authority indicates that most courts will not be overly receptive to negligent advertising claims against third-party publishers.

---

49. For a detailed analysis of the Supreme Court’s journey back toward the traditional commercial speech doctrine, see Mauro, supra note 25, at 1949-58.

50. Because the Bill of Rights was intended as a limitation upon the power of the state exclusively, First Amendment protections are not generally applicable when the state is not a party to the action. See, e.g., United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948). See also Laurence H. Tribe, American Constitutional Law §18-1 (1978).
For instance, in *Yuhas v. Mudge*, a New Jersey state appeals court held that *Popular Mechanics Magazine* had no duty to investigate and test the products it advertised, even if those products were inherently dangerous. Such a duty, the court held, would be "impractical and unrealistic" in light of the limited revenue generated by individual advertisers. In addition, such enormous potential for liability "would open the doors to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.""54

*Walters v. Seventeen Magazine* was a similar case in which two young women suffered from toxic shock as a result of using tampons they had seen advertised in *Seventeen*. Despite the plaintiffs' argument that the magazine's placement of the ad implied a specific endorsement of the product, a California appeals court believed otherwise. In upholding the trial court dismissal of the action, the *Walters* court held that the creation of a tort for "negligently failing to investigate the safety of an advertised product" would unfairly force advertisers to spend huge sums of money on product testing and liability insurance.59

Finally, in *Pittman v. Dow Jones & Co.*, a defrauded investor sued the *Wall Street Journal* to recover the money he had invested in a failed Texas financial institution. The plaintiff claimed that he had been induced to invest in the institution after reading its fraudulent advertisement which offered "'jumbo' interest rates on deposits" made

---

52. Id. at 825. This case arose after two small children were injured by fireworks advertised in defendant's magazine. Id. at 824.
53. Id. at 825.
56. Id. at 101.
57. Id. at 102.
58. Id. at 103.
59. Id.
60. 662 F. Supp. 921 (E.D. La.), aff'd, 834 F.2d 1171 (5th Cir. 1987).
61. Id.
with the institution. According to the plaintiff, the language of the ad should have alerted the publisher of the Journal to possible fraud against investors. In granting summary judgment for the publisher, the Pittman court held that the societal benefits accruing from the free flow of commercial information outweigh the potential harm to the individual interests of private citizens. Furthermore, the court held that a plaintiff must allege more than “mere negligence” to recover damages against a publisher for losses associated with the appearance of an advertisement in published material.

III. ANATOMY OF A SPLIT

During a period spanning at least nine years, Soldier of Fortune Magazine published several thousand personal service classified advertisements, many of which were highly controversial. Although none of the ads contained explicit solicitations for violent criminal activity, several of the ads were blamed in subsequent litigation for facilitating murder, aggravated assault, and other violent crimes. This section will focus on the split of authority that developed in the federal circuit courts as to whether SOF was liable for the violent criminal activity which occurred. The ultimate issue of third-party publisher liability will be explored extensively throughout the discussion.

A. Eimann v. Soldier of Fortune

On February 21, 1985, Sandra Black of Bryan, Texas, was murdered by John Wayne Hearn of Atlanta. Hearn had been paid $10,000 to commit the murder by Sandra Black’s husband, Robert, who had previously attempted to solicit others to murder his wife.

62. Id. The record indicates that the defendant publisher was unaware of the fraudulent nature of the advertisement before printing it.
63. Id.
64. Id. at 922.
65. Id. at 923 (quoting Gutter v. Dow Jones, Inc., 490 N.E.2d 898, 902 (Ohio 1986)).
67. Id. at 831.
68. Richard Luna, Family Wins Suit Over Ad Placed by Hit Man, PHILADELPHIA IN-
Robert Black, unable to find a willing assassin, contacted Hearn after reading a personal service classified advertisement that Hearn and a partner had placed in SOF. The complete ad, published in the September, October, and November 1984 issues of SOF read:


1. The Trial

Following the murder, Sandra Black’s son, Gary Wayne Black, and her mother, Marjorie Eimann, filed a federal diversity action against SOF in the United States District Court for the Southern District of Alabama. They alleged that the magazine had caused the wrongful death of Sandra by negligently publishing Hearn’s personal service ad. Eimann presented evidence that SOF had accepted classified ads for a number of years from persons offering services such as “Mercenary for hire,” “bounty hunter” and “dirty work.” Eimann also presented evidence that a number of SOF’s classifieds had been tied to actual or planned criminal activity, and that the media had regularly portrayed these criminal links. Eimann presented further evidence that law enforcement officials had contacted SOF on two separate occasions while investigating crimes linked with SOF’s personal service ads.

Quirer, Mar. 4, 1988, at A03. Robert Black had approached at least four friends and co-workers since 1982 in an attempt to solicit their assistance in the murder. Eimann, 880 F.2d at 831.

69. Eimann, 880 F.2d at 832.
70. Id. at 831. According to Hearn’s later trial testimony, “Ex-DI” meant ex-drill instructor and “M.E.” meant multi-engine planes. Id.
71. Id. at 832.
72. Id.
73. Id. Eimann offered into evidence approximately 36 such ads from SOF’s inception in 1975 until September 1984. Id.
74. Id. Accounts of criminal activity tied to SOF personal service ads had appeared in the Associated Press, United Press International, Time, and Newsweek. Also, the local media centered around SOF’s home city of Boulder, Colorado, including the Denver Post and the Rocky Mountain News, had carried a number of the stories. Id.
75. Id. One crime involved a Houston man later convicted of murdering his wife after
Finally, Eimann presented the expert testimony of Dr. Park Dietz, a forensic psychiatrist.76 Dr. Dietz testified that, given the context of SOF and its personal service ads, the average SOF subscriber "would understand some phrases in SOF's ads as solicitations for illegal activity . . . ."77 Dr. Dietz further testified that the connotation in which an SOF classified ad appears can be distinguished from the connotation of the average magazine ad because of SOF's distinctive paramilitary mystique.78 Dietz concluded his testimony by commenting that, foreseeably, any SOF classified ad, including the Hearn ad, could be related to the commission of domestic crimes. However, most of the SOF ads contained no words that would explicitly identify them as criminal solicitations with any level of certainty.79

SOF began its defense by calling John Hearn as a witness, who testified that he and his partner80 never intended to solicit criminal activity by placing the advertisement in the SOF classifieds. Rather, they hoped to secure employment as bodyguards or security specialists.81 However, instead of receiving calls for legitimate employment, over ninety percent of those responding to the ad sought Hearn's services for various illegal activities, most of them violent in nature.82 Hearn further testified that the ad did generate one legitimate employment offer.83 Hearn concluded by testifying that neither he nor his

---

76. Id.
77. Id. The average issue of SOF typically detailed dramatic episodes of political intrigue, as well as the exploits of guerilla warriors, foreign mercenaries, and soldiers involved in the Vietnam conflict. See generally SOLDIER OF FORTUNE MAGAZINE prior to September 1984.
78. Eimann, 880 F.2d at 883.
79. Id. Dietz noted, however, that crimes had been linked not only to SOF ads that appeared to solicit unlawful activity on their faces, but also to ads that "seemed relatively innocuous." Id. (quoting Dietz's trial testimony).
80. Hearn's partner quit the venture after the first advertisement ran and never participated in any ad-related ventures. Id. at 831.
81. Id.
82. Id. These illegal proposals included beatings, kidnappings, jailbreaks, bombings, and murder. Id.
83. Id. Hearn was paid a fee for placing bodyguards with a company providing security services for a Lebanese oil conglomerate. Id.
partner had a criminal record when they placed the ad and that neither one had received a dishonorable discharge from the military.

SOF relied more heavily, however, on the testimony of Colonel Robert K. Brown, its president. Brown testified that he had no knowledge of any criminal activity linked with SOF personal service classifieds prior to 1984, nor did he suspect any. Other SOF staff members testified that they understood “gun for hire” and “high risk assignments” to imply nothing but lawful activity.

At the conclusion of the trial, the jury was asked if Hearn’s ad was related to unlawful activity. It answered affirmatively. The jury was also asked whether SOF should be imputed with the knowledge that Hearn’s ad reasonably could be interpreted as an offer to engage in illegal activity. Such knowledge, the trial judge instructed, must be based on “(1) the relation to illegal activity appear[ing] on the ad’s face;” or (2) the ad, read in context, “would lead a reasonable publisher . . . to conclude that the advertisement could reasonably be interpreted as an offer to commit crimes.” Again, the jury answered affirmatively, and returned a verdict in favor of Eimann for $9.4 million.

84. Id. at 832. Hearn was later sentenced to three concurrent life sentences for the murders of Sandra Black and two others. Id.
85. Id. Also, Hearn included his real name, correct telephone number, and correct address in the ad. Id.
86. Id. at 833.
87. Id.
88. Id. Joan Steele, SOF’s advertising manager, testified that she understood Hearn’s ad to solicit employment as a “professional bodyguard or security consultant rather than a contract killer.” Id.
89. Id. (quoting the district court jury instructions).
90. Id.
91. Id.
92. Id. (quoting the district court jury instructions). The district court defined “context” as the “magazine’s (1)`nature’; (2) other advertisements; (3) articles; (4) readership; and (5) knowledge, if any, that other advertisements in the magazine could reasonably be interpreted as offers to engage in illegal activity.” Id.
93. Id. The award consisted of $1.9 million in compensatory damages and $7.5 million in punitive damages. Id.
2. The Appeal

On appeal, the Fifth Circuit questioned whether SOF, as a matter of law, owed any duty of reasonable care to the public; and if it did, whether SOF’s printing of the Hearn ad constituted a breach of that duty.\textsuperscript{94} For reasons it did not make entirely clear, the court assumed the existence of a duty to protect the public from unreasonable risks of harm.\textsuperscript{95} It then moved on to the potential breach analysis.\textsuperscript{96}

In determining whether SOF breached its assumed duty, the court applied the standard Texas risk-utility balancing test.\textsuperscript{97} This test balances liability “on whether the burden of adequate precautions . . . is less than the probability of harm . . . multiplied by the gravity of the resulting injury.”\textsuperscript{98}

In applying the risk-utility balancing test to the facts of the \textit{Eimann} case, the court first examined the probability/gravity of harm side of the equation.\textsuperscript{99} Citing the well-published links between SOF classifieds and criminal activity as well as the police investigations of SOF ad-related crimes, the court stated that the SOF ads “presented more than a remote risk” of causing harm to the public.\textsuperscript{100} Noting the serious and violent nature of the crimes linked to SOF personal service

\textsuperscript{94} \textit{Id.} at 834-36.

\textsuperscript{95} \textit{Id.} at 835.

\textsuperscript{96} \textit{Id.}

\textsuperscript{97} This test was first applied by Judge Learned Hand in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). For a Texas case applying this test, see Otis Eng’g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983) (employers owe a duty of reasonable care in protecting the public from unreasonable risks created by their employees). Neither the district court decision nor the Fifth Circuit holding offer an explanation why Texas law should be applied. However, the suit was based on diversity of citizenship, and the suit was originally filed in Texas. The Supreme Court has held that “in diversity cases the federal courts must follow conflicts of laws rules prevailing in the states in which they sit.” Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 494 (1941). It can most likely be assumed, therefore, that the Fifth Circuit looked to Texas conflicts of law rules in deciding to apply Texas tort law to this case.

\textsuperscript{98} \textit{Eimann}, 880 F.2d at 835 (citing \textit{Carroll Towing}, 159 F.2d at 173).

\textsuperscript{99} \textit{Id.}

\textsuperscript{100} \textit{Id.}
ads, including the murder of Sandra Black, the court further stated that “the prospect of ad-inspired crime represents a threat of serious harm.” Thus, the court concluded that the combined probability and gravity of harm posed by SOF in publishing personal service classified ads similar to that of Hearn’s was substantial.

On the other side of the risk-utility equation, the court focused on the tremendous burden publishers would be forced to encounter if they were required either to investigate or to refrain from publishing all ambiguous ads. While Eimann conceded that SOF had no affirmative duty to investigate its ads, she did contend that SOF had a duty to refrain from publishing any ad that was the least bit criminally suggestive.

Ultimately, the court agreed with SOF. Specifically, the court held that the duty the trial jury imposed upon SOF, a duty which would “require publishers to recognize ads that ‘reasonably could be interpreted as . . . offer[s] to engage in illegal activity’ based on their words or ‘context’ and to refrain from printing them,” was a duty more onerous even than a duty to investigate the ads. The court further explained that the burden placed on publishers to recognize, and to refrain from publishing, possible criminal solicitations on the face of highly ambiguous ads is an “especially heavy burden” that outweighs the probability and gravity of harm associated with printing the ads.

101. See supra notes 74-75 and accompanying text.
102. Eimann, 880 F.2d at 835.
103. Id.
104. SOF argued that upholding the district court verdict would impermissibly impose upon SOF and other publishers a duty to investigate their ads and advertisers for suggestions of criminal solicitation. The court agreed. Id. at 835-36. See also Yuhas v. Mudge, 322 A.2d 824 (N.J. Super. Ct. App. Div. 1974) (magazine had no duty to investigate the fireworks advertisement it published); Walters v. Seventeen Magazine, 241 Cal. Rptr. 101 (Ct. App. 1987) (negligence action against publisher for printing advertisements for tampons which led to toxic shock disallowed because advertisers cannot reasonably be expected to investigate the safety of the products they advertise).
105. Eimann, 880 F.2d at 835-36.
106. Id. at 835 (quoting the district court jury instructions).
107. Id. at 836-37.
Accordingly, the court specifically identified the Hearn ad as ambiguous in nature and facially innocuous. The court analyzed the most provocative phrase of the Hearn ad, "high risk assignments," as "plausibly encompass[ing] Hearn’s professed goal of recruiting candidates for bodyguard jobs." Thus, the court rejected Eimann’s argument that the Hearn ad was a "readily identifiable criminal solicitation" because "[i]ts bare terms reveal[ed] no identifiable offer to commit crimes." Finally, the court recognized that the general context in which an advertisement is printed is not sufficiently indicative of the nature of any particular ambiguous ad to impute that context upon the ambiguous ad. In other words, just because the Hearn ad, or any other ad, is published in the presence of ads and articles containing violent themes, that ad cannot also be assumed to connote violent themes when the ad is ambiguous on its face.

Thus, a unanimous Fifth Circuit reversed the district court decision, holding that, "[w]ithout a more specific indication of illegal intent than Hearn’s ad or its context provided, we conclude that SOF did not violate the required standard of conduct by publishing an ad that later played a role in criminal activity." Curiously, however, the court held that it did not need to specifically address SOF’s First Amendment commercial speech protection arguments in order to decide the case. Instead, the court reasoned that SOF’s First Amendment protections would receive adequate consideration if those rights were directly factored into the risk-utility balancing test. Thus, by omit-

108. Id. at 836.
109. Id. In support of its conclusion that the meaning and intent of the Hearn ad was ambiguous, the court referred to the legitimate bodyguard Hearn acquired through the ad. See supra note 83 and accompanying text.
110. Eimann, 880 F.2d at 836. The court pointed to the admission of Dr. Dietz, Eimann’s witness, that he could not identify specific code words of criminal intent in any SOF ads. See supra note 79 and accompanying text.
111. Eimann, 880 F.2d at 836.
112. Id.
113. Id. at 838.
114. Id. at 834. SOF argued that First Amendment protection of commercial speech precludes any negligence action against publishers arising from the products and services they advertise. Brief for Appellants at 24, Eimann, 880 F.2d at 830.
115. Eimann, 880 F.2d at 836.
ting a discussion of publishers’ free speech rights in advertising the products and services of third parties, the Eimann court failed to establish a proper standard of conduct for future publishing decisions.\textsuperscript{116} This omission would prove to be a costly one for SOF.

B. \textit{Braun v. Soldier of Fortune}\textsuperscript{117}

On August 26, 1985, Richard Braun was shot and wounded in an ambush as he pulled out of his driveway in suburban Atlanta.\textsuperscript{118} When he attempted to escape the gunfire by rolling out of his car, Braun was shot twice in the back of the head, killing him instantly.\textsuperscript{119} Braun’s sixteen year-old son, Michael, suffered a serious thigh wound in the attack.\textsuperscript{120}

The gunman was Sean Trevor Doutre, who had been hired to commit the assassination by Michael Savage, a self-described “37 year-old professional mercenary.”\textsuperscript{121} Savage had been hired to orchestrate the assassination by Bruce Gastwirth and John Horton Moore, two business associates of Braun who had made three previous attempts on his life.\textsuperscript{122} Moore and Savage accompanied Doutre to Braun’s home on the day of the shooting.\textsuperscript{123}

Gastwirth and Moore had hired Savage in response to a personal service advertisement Savage had placed in SOF’s classifieds.\textsuperscript{124} The ad, which ran from June, 1985 through March, 1986 read as follows:

GUN FOR HIRE: 37 year old professional mercenary desires jobs. Vietnam veteran. Discrete [sic] and very private. Body guard, courier, and other special skills. All jobs considered. Phone (615) 436-9785 (days) or

\begin{itemize}
  \item[116.] See Firenze, \textit{supra} note 8, at 138.
  \item[117.] 968 F.2d 1110 (11th Cir. 1992), \textit{cert. denied}, 113 S. Ct. 1028 (1993).
  \item[119.] \textit{Id.}
  \item[120.] \textit{Id.}
  \item[121.] \textit{Braun}, 968 F.2d at 1112.
  \item[122.] \textit{Id.}
  \item[123.] \textit{Id.} All four conspirators were eventually convicted of murder and sentenced to various prison terms. Kilpatrick, \textit{supra} note 118, at 7A.
  \item[124.] \textit{Braun}, 968 F.2d at 1112.
\end{itemize}
Based on the ad, Michael Braun and his brother, Ian Braun, filed a federal diversity suit against SOF in the U.S. District Court for the Middle District of Alabama, alleging the wrongful death of their father. Michael Braun filed a separate suit for the personal injuries he received in the attack. The district court consolidated the suits.

1. The Trial

At trial, the Brauns contended that, under Georgia law, SOF was liable for the shootings because SOF negligently published a personal service advertisement "that created an unreasonable risk of the solicitation and commission of violent criminal activity, including murder." The Brauns introduced evidence that SOF had, or should have had, prior knowledge of the likelihood that criminal activity would be a result of publishing ads similar to Savage's. This knowledge, the Brauns contended, was based on SOF's subscription to a clipping service which provided the magazine's staff with news accounts linking SOF ads similar to Savage's with a considerable number of criminal activities, including murder. The Brauns further argued that SOF had prior knowledge of criminal activities associated with its ads because the magazine's staff had been contacted twice, prior to...
Braun’s murder, by law enforcement officials investigating crimes linked to other SOF ads.\textsuperscript{133}

SOF staffers, on the other hand, denied having knowledge of criminal activities associated with the magazine’s personal service ads prior to Braun’s death.\textsuperscript{134} Also, the advertising manager who accepted Savage’s ad testified that she assumed the “Gun for Hire” portion of the ad referred to the legitimate services listed in the ad, rather than to any illegal activities which some respondents to the ad may have inferred.\textsuperscript{135} Finally, Savage testified that he placed the ad with the intention of obtaining nothing but legitimate jobs, but that the overwhelming majority of respondents to the ad sought his services for a variety of illegal activities, including murder.\textsuperscript{136} The ad did, however, produce one legitimate job offer as a bodyguard, which Savage accepted.\textsuperscript{137}

At the conclusion of the trial, the jury was instructed that SOF was liable to the Brauns if “the ad in question contained a clearly identifiable risk [and] that the offer in the ad is one to commit a serious violent crime, including murder.”\textsuperscript{138} The jury was also instructed that SOF was liable to the Brauns if, by publishing the Savage ad, SOF had ignored a “clear and present danger of causing serious harm to the public from criminal activity.”\textsuperscript{139} Finally, after being further instructed that it must consider the facts of the case in light of the First Amendment, the jury returned a verdict for the Brauns amounting to $12,375,000.\textsuperscript{140}

\textsuperscript{133} Id. The court does not discuss whether these were the same incidents entered into evidence in the Eimann trial. See supra note 75 and accompanying text.

\textsuperscript{134} Braun, 968 F.2d at 1113.

\textsuperscript{135} Id.

\textsuperscript{136} Id. at 1112. Respondents to the ad also solicited Savage’s services for illegal activities such as assault and kidnapping. Id.

\textsuperscript{137} Id.

\textsuperscript{138} Id. at 1113 (quoting the district court jury instructions).

\textsuperscript{139} Id.

\textsuperscript{140} Id. at 1114. The jury awarded $2 million in compensatory damages on the wrongful death action. Michael Braun was awarded $375,000 in compensatory damages and $10 million punitive damages on his personal injury claim. The Brauns later agreed to a reduction in the amount of punitive damages to $2 million in order to avoid a new trial. Id.
2. The Appeal

On appeal, the Eleventh Circuit affirmed the trial jury’s verdict against SOF, creating a split of authority between the Fifth and Eleventh Circuits on the issue of third-party publisher liability. In its decision, the court applied a risk-utility balancing test, identical to the test applied in Eimann, to determine whether SOF’s printing of the ad was indeed unreasonable. Under this test, a risk is unreasonable only if it is “of such magnitude as to outweigh what the law regards as the utility of the defendant’s negligent conduct.”

Thus, the Eleventh Circuit used a risk-utility balancing test to weigh the duty of care imposed on SOF, the duty of recognizing a “clearly identifiable risk of harm to the public,” against SOF’s First Amendment right to publish certain types of protected commercial speech.

Not surprisingly, SOF based its appeal largely on the Eimann precedent. SOF argued that Eimann had rendered the imposition of a risk-utility balancing test improper because the Fifth Circuit, in that case, held that no such liability can exist by applying a risk-utility type test to a negligent advertising case. The Eleventh Circuit disagreed, attempting to distinguish Eimann from Braun. Eimann differed from Braun, the court opined, in respect to the instructions given to the respective juries. Specifically, the Eimann jury was allowed to impose liability for an advertisement that “could reasonably be interpreted” as a criminal solicitation. Because any ad could involve il-

141. Id. at 1122.
143. Braun, 968 F.2d at 1115. For the Texas risk-utility balancing test applied in Eimann, see supra notes 97-98 and accompanying text.
144. Braun, 968 F.2d at 1115 (quoting Johnson, 143 S.E.2d at 53). Like the Eimann court before it, the Braun court measured the defendant’s burden in taking adequate precautions against the probability of harm multiplied by the potential gravity of the harm. Id.
145. Id.
146. Id.
147. Id.
148. Id. at 1115-16.
149. Id.
150. Id. at 1116 (emphasis in original).
legal activity, a publisher would be forced to reject all ambiguous ads.\textsuperscript{151} Allowing a jury to impose liability for an ad that merely \textit{could} involve an offer to commit crimes, the Eleventh Circuit held, was “a violat[ion of] risk-utility balancing principles” because it imposed too heavy a burden of care on SOF.\textsuperscript{152} Thus, it was properly discarded.\textsuperscript{153} The \textit{Braun} jury, on the other hand, was not permitted to impose liability for an advertisement that could reasonably be interpreted as an offer to commit crimes.”\textsuperscript{154} Instead, it was allowed to impose liability only “if the ad on its face contained a ‘clearly identifiable unreasonable risk’ . . . of harm to the public.”\textsuperscript{155} This standard, the court held, did not impose the undue burden of care on SOF demanded under the \textit{Eimann} standard.\textsuperscript{156}

The Eleventh Circuit further attempted to distinguish the standards of care imposed in both cases by reexamining the contextual argument asserted in \textit{Eimann}. The \textit{Eimann} jury was instructed that even if the ad in question “did not reveal its connection to illegal activity” on its face, the jury could hold SOF liable “if a reasonably prudent publisher would discover the connection to crime through investigation of the ad’s ‘context.’”\textsuperscript{157} In contrast, the \textit{Braun} jury was afforded no leeway to examine the context of the Savage ad. Rather, the district court allowed the jury to impose liability only if “Savage’s ad ‘on its face’ would convey to a reasonable publisher that the ad created a ‘clearly identifiable unreasonable risk of harm to the public.’”\textsuperscript{158} Thus, because the \textit{Braun} trial court supposedly imposed a more rigorous standard of liability than the \textit{Eimann} trial court, and because the \textit{Braun} trial court did not require investigation into the \textit{context} of the ad, the Eleventh Circuit believed it had meaningfully distinguished the two cases. However, as the following discussion will demonstrate, the factual and legal distinctions drawn between the cases are logically un-

\begin{itemize}
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} \textit{Id.}
\item \textsuperscript{153} \textit{Id.}
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} \textit{Id.} at 1116 (quoting the district court jury instructions).
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textit{Id.} (citing, in part, the \textit{Eimann} district court jury instructions, 880 F.2d at 883).
\item \textsuperscript{158} \textit{Id.}
\end{itemize}
sound. Furthermore, even if these distinctions are logically sound, they are far too trivial in nature to account for the complete disparity in outcomes.

C. Factually Indistinguishable Cases

Although many of the finer details vary between Eimann and Braun, the actual fact patterns of the cases are not significantly distinguishable. While both ads contained language which may have been somewhat suggestive of the advertiser's willingness to engage in criminal acts, each ad was fundamentally ambiguous in its overall meaning. Therefore, neither ad contained a facial solicitation for the commission of criminal activity.

Although both cases are factually indistinguishable, this did not prevent the Eleventh Circuit from attempting to distinguish Eimann from Braun. As previously noted, the Braun court considered the ad at issue in Eimann to be "ambiguous" and "facially innocuous" because it merely "listed the advertiser's qualifications and indicated a willingness to accept risky assignments . . . ."159 In contrast, the Eleventh Circuit pointed to the Braun advertiser's emphasis on his ability and willingness to "use his gun" in the commission of crimes.160 In reality, however, the ads convey the exact same meaning; the fact that one ad explicitly mentioned the use of a gun and the other merely implied it is not a meaningful distinction. In fact, the ad at issue in Eimann identified the advertiser as a "weapons specialist."161 The use of such explicit language indicated that the ad at issue in Eimann involved more than just implication. Rather, it indicated that the Eimann ad was every bit as explicit and suggestive of the advertiser's ability and willingness to use a gun as the ad at issue in Braun. Thus, the language contained in one ad could not be validly expressed as more or less ambiguous than the language contained in the other, and no significant factual distinctions are therefore possible.

159. Id. at n.3 (quoting Brief for Appellees at 27, Braun, 968 F.2d at 1110).
160. Id. See also supra note 125 and accompanying text.
161. See supra note 70 and accompanying text.
D. Fundamental Ambiguity of the Savage Advertisement

Even if one assumes, arguendo, that the Eleventh Circuit has drawn a valid factual distinction between the Braun and Eimann cases, the ad at issue in Braun is still far too ambiguous to render SOF liable. The Braun trial jury was permitted to impose liability on SOF only if the Savage ad presented a "clearly identifiable risk of harm to the public." However, even a cursory analysis of the language of the Savage ad reveals its fundamental ambiguity, whether it is read phrase-by-phrase or in its entirety.

For example, the Braun court described the phrase "gun for hire" as "sinister" and expressive of a "substantial danger of harm to the public." However, "gun for hire" is a common figure of speech often used to describe individuals engaged in professions which can hardly be considered "sinister" and certainly do not require the use of guns. For instance, the media has depicted trial lawyers, expert witnesses, and even fashion models as "guns for hire." Furthermore, even if "gun for hire" necessarily connotes the use of a gun, the phrase does not implicate an unlawful purpose. Rather, as SOF argued on appeal, "gun for hire" simply indicates that the advertiser is proficient in the use of guns and is seeking an employer who can utilize that skill. Many legitimate jobs fit this description, including bodyguard, courier, private detective, motorcade and armored car employee, security guard, and policeman. In fact, Savage was contacted with a legitimate job offer from an employer who obviously under-
stood his ad as soliciting lawful employment.170 In other words, "gun for hire" indicates a substantial danger of harm to the public "only if it is assumed that guns can only be used to commit crimes."171

The Eleventh Circuit also cited the phrase "professional mercenary desires jobs" as particularly suggestive of potential criminal intent.172 Even if Savage meant this phrase to be interpreted literally,173 its meaning is nonetheless innocuous. Professional mercenaries regularly seek a number of crucial jobs abroad, including security work in situations where conflict is all but imminent.174 Thus, there is no legitimate reason to impute a shadow of illegality over a phrase which does no more than seek employment in an entirely lawful profession.

Another phrase which alarmed the Braun court was Savage's assurance that his services would be "discreet and very private."175 Although the Eleventh Circuit arbitrarily assigned an aura of clandestine impropriety to this entirely innocuous phrase,176 the practical considerations surrounding the legitimate employment Savage was seeking dictate no such impropriety. For example, bodyguards must often "shadow" their employers at all times and in all situations.177 Accordingly, they become privy to conversations and transactions that require them to act with complete secrecy and discretion.178 Similarly, couriers are often entrusted with highly sensitive documents that require an identical standard of care.179 Therefore, any potential employee who was not willing to be "discrete and very private" in the performance of his duties would have little value to an employer in Savage's job market.

170. Id. at 28-29. See also supra note 137 and accompanying text.
171. Id. at 27.
172. Braun, 968 F.2d at 1121.
173. Savage could have used the term "professional mercenary" euphemistically in an attempt to add a measure of authority to the advertisement. Brief for Appellants at 29, Braun, 968 F.2d at 1110.
174. Id. For example, SOF points out that British mercenaries perform key roles in escorting much of Iran's oil tanker fleet out of the Persian Gulf. Id. n.27.
175. Braun, 968 F.2d at 1121.
176. Id.
177. Brief for Appellants at 30, Braun, 968 F.2d 1110.
178. Id.
179. Id.
Finally, the Eleventh Circuit was particularly disturbed by Savage’s “all jobs considered” language. Clearly, the advertiser was not proposing that he would accept any and every position offered. Instead, he was merely suggesting that he would consider any offer and select those he deemed most appropriate. Because this pick-and-choose technique is so common in other types of advertising, the Eleventh Circuit had no logical basis to assume any suggestion of impropriety in this context.

Thus, phrase by phrase, there is simply no language in the Savage ad which suggests the advertiser’s willingness to engage in criminal activity. The same is undoubtedly true when the ad is read in its entirety. In that context, as SOF argued, the ad says no more than:

I am a Vietnam vet in need of a job. I know how to handle guns, and I am discreet. I would like to hire out as a bodyguard, a courier, or some other position where my skills can be put to use. I will at least consider any job. Here is how to reach me.

It is entirely likely that the Eleventh Circuit ultimately upheld the trial court verdict against SOF because it read the ad in hindsight — after the murder occurred. Had the Braun court analyzed the Sav-

180. Braun, 968 F.2d at 1121.
181. Brief for Appellants at 31, Braun, 968 F.2d 1110.
182. Id.
183. Id.
184. The remaining phrases of the Savage ad are so innocuous as to warrant only cursory discussion. For example, “Vietnam veteran” denotes no more than prior military service. If anything else can be inferred from this simple term, it is only that “the advertiser had previously used firearms in an entirely lawful profession.” Id. at 29-30. “Body guard, courier, and other special skills” refers only to the types of jobs Savage was seeking. Id. at 30. Because “special skills” are “impliedly of the same nature as those required by a bodyguard or courier, there is certainly no implication that the special skills are unlawful ones.” Id. at 31. Finally, the rest of the ad lists Savage’s actual day and night phone numbers and address. Had Savage originally intended to solicit criminal activity, it seems highly doubtful that he would have offered his actual address and telephone numbers to law enforcement officials through publication. Id. at 32. Thus, any doubts SOF may have had “concerning the authentic and harmless nature of the Savage ad . . . would have been dispelled by the address and telephone numbers at the end.” Id.
185. Id. at 34.
186. See id.
age ad from the perspective of a reasonable publisher before the murder, the outcome would likely have been far different. From that perspective, the court could not have overlooked the ad’s fundamental ambiguity quite so easily. Thus, like the Eimann court, the Braun court should have held, as a matter of law, that SOF cannot be held liable for the publication of a fundamentally ambiguous advertisement.

E. Two Distinct First Amendment Applications in Legally Indistinguishable Cases

Because both Eimann and Braun proceeded to the appellate level on essentially identical factual and legal foundations, the discrepancy in outcomes resulted from each circuit’s distinct method of integrating SOF’s First Amendment arguments into each underlying negligence action. Had there been explicit High Court authority defining the extent to which publishers are protected by the First Amendment for the advertisements they print, both circuits would almost certainly have reached the same outcome. However, because each court was forced to improvise its own liability standard, each court also afforded SOF’s First Amendment arguments the weight it felt such arguments merit. As a result, the liability standards ultimately applied by each court were remarkably dissimilar.

Although the Eimann court never discussed SOF’s First Amendment arguments as a separate issue, it clearly did not ignore the defense. Instead, the Fifth Circuit in Eimann recognized “the important role” of First Amendment considerations “for purposes of the risk-benefit analysis.” Consequently, the Eimann court took the position that SOF’s First Amendment arguments should be factored directly into the benefit side of the risk-utility balancing test. Therefore, a court utilizing this factoring approach would not only calculate society’s overall benefit from exposure to the particular advertisement, but would also figure into the equation the publisher’s limited First Amendment

---

187. See id.
188. Eimann, 880 F.2d at 834.
189. Id. at 836
right to publish the ad in the first place. Because the Fifth Circuit overturned the *Eimann* trial court verdict without ever discussing SOF's First Amendment arguments, however, there is no way of knowing how much weight those arguments would have carried in the final analysis. Likewise, there is no way of determining what consideration any publisher's First Amendment arguments would merit in future Fifth Circuit decisions.

The Eleventh Circuit in *Braun*, on the other hand, took an entirely more restrictive approach toward SOF's First Amendment arguments. Rather than adopt the *Eimann* court's risk-utility factoring approach, the *Braun* court insisted that a modified negligence standard gives adequate consideration to SOF's First Amendment arguments. Under the Eleventh Circuit's modified negligence approach, the actual risk-benefit equation is not altered whatsoever by any First Amendment considerations. Instead, SOF is simply relieved of any duty to investigate essentially ambiguous advertisements that may be suggestive of the advertiser's criminal intent. However, other courts which have addressed the publisher liability issue prior to *Braun* have held almost unanimously that publishers have no duty to investigate the ads they print. Thus, the modified negligence standard provided SOF with no more First Amendment protection than what it likely already enjoyed. Rather, the standard merely purported to relieve SOF of a duty to investigate — a duty it likely did not bear anyway.

Furthermore, the *Braun* court's modified negligence standard is constitutionally inflexible. It offers no more First Amendment protection to an advertisement that is only slightly suggestive of an advertiser's criminal intent than to one that is blatantly suggestive. Thus, because the modified negligence standard is duplicative of other First Amendment protections and cannot be constitutionally adapted to individual cases, the Eleventh Circuit would have been wise to apply the factoring approach utilized previously in *Eimann*. Because the Eleventh Circuit chose to break with clearly established Fifth Circuit prece-

190. *Braun*, 968 F.2d at 1118-19.
191. *Id.* at 1119.
192. See supra notes 51-65 and accompanying text.
dent, however, *Eimann* and *Braun* were decided inconsistently, despite the obvious factual and legal similarities shared by the cases.

IV. RESOLVING THE SPLIT

Despite the Eleventh Circuit's suspect attempt to draw factual and legal distinctions between the *Eimann* and *Braun* cases, the two are practically indistinguishable in both respects. However, because the Supreme Court has denied certiorari in both *Eimann* and *Braun*, there is no High Court resolution to the issue of third-party publisher liability based on these two particular cases. Nonetheless, the following discussion of *Braun*'s First Amendment implications will shed considerable light on how the *Eimann/Braun* split should have been resolved.

A. First Amendment Considerations

In *Braun*, the Eleventh Circuit embarked on a rather lengthy but substantially misplaced analysis of the limitations to SOF's First Amendment protections. Initially, dicta within *Braun* suggests the Eleventh Circuit's willingness to acknowledge that SOF is entitled to at least some First Amendment commercial speech protection. Specifically, the court cited *Virginia Pharmacy* in acknowledging that the First Amendment protects speech that "does 'no more than propose a commercial transaction.'" The court also cited *Central Hudson* in noting that "society has an interest in commercial speech because it facilitates intelligent and well-informed economic decisions." The court further acknowledged that overly oppressive tort-law burdens on publishers regarding the advertisements those publishers choose to print may "impermissibly impose a form of self-censorship on publish-

---

195. See *Braun*, 968 F.2d at 1116-20.
196. 425 U.S. at 762. See also supra notes 20-29 and accompanying text.
198. 447 U.S. at 561-62. See also supra notes 30-39 and accompanying text.
ers,\textsuperscript{200} and that such a chilling effect could deprive protected speech "of a legitimate and recognized avenue of access to the public."\textsuperscript{201} Finally, the court acknowledged that publishers have a substantially lesser financial interest in the advertisements they print than do the advertisers themselves.\textsuperscript{202} Accordingly, imposition of liability on publishers for the commercial speech they print may indirectly threaten fully-protected core speech by forcing publishers to refrain from printing many ambiguous advertisements that financially support the accompanying core speech.\textsuperscript{203} In fact, such a restraint may ultimately force the source of the core speech out of business.\textsuperscript{204}

However, while the \textit{Braun} court was willing to acknowledge SOF’s entitlement to certain specific First Amendment commercial speech protections, it also recognized Georgia’s interest in imposing liability on publishers for printing advertisements related to criminal activity.\textsuperscript{205} Accordingly, the court purported to strike a balance by upholding the "modified" negligence standard utilized by the district court.\textsuperscript{206} When applied to the risk-utility balancing test, the modified negligence standard severely restricts the First Amendment protection of publishers. As applied by the Eleventh Circuit, the First Amendment plays no greater role in the risk-utility balancing test than to relieve SOF of any duty the magazine may have had to investigate the ads it printed.\textsuperscript{207}

In support of its decision to restrict SOF’s First Amendment protection solely to application of the modified negligence standard, the \textit{Braun} court made a dubious inferential leap. Specifically, the court compared the modified negligence standard to the Supreme Court’s prior First Amendment limitations on the rights of the individual states

\begin{itemize}
  \item \textsuperscript{200} \textit{Id.} See also \textit{New York Times Co.} v. \textit{Sullivan}, 376 U.S. at 277 (the threat of state tort law damages may be more chilling to free speech in the commercial context than the threat of criminal sanctions); \textit{supra} notes 12-19 and accompanying text.
  \item \textsuperscript{201} \textit{Id.} (quoting \textit{Manual Enters., Inc.} v. \textit{Day}, 370 U.S. 478, 493 (1962)).
  \item \textsuperscript{202} \textit{Id.} at 1117-18 (citing \textit{Firenze}, \textit{supra} note 8, at 167).
  \item \textsuperscript{203} \textit{Id.} at 1118.
  \item \textsuperscript{204} \textit{Id.}
  \item \textsuperscript{205} \textit{Id.}
  \item \textsuperscript{206} \textit{Id.}
  \item \textsuperscript{207} \textit{Id.} at 1118-19.
\end{itemize}
to impose liability on publishers in defamation cases.\(^\text{208}\) In its discussion, the court correctly looked to New York Times Co. v. Sullivan,\(^\text{209}\) in which the Supreme Court limited publisher liability to cases where the defamatory statement was made with “actual malice.”\(^\text{210}\) As soon as the Eleventh Circuit acknowledged the Sullivan rule, however, it reversed its logical direction, holding that “the First Amendment does not require this high level of protection for all speech in all contexts.”\(^\text{211}\) Specifically, the Braun court relied on Gertz v. Robert Welch, Inc.,\(^\text{212}\) in which the Supreme Court held that “the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood... as long as a state does not impose liability without fault.”\(^\text{213}\) Thus, the Eleventh Circuit in Braun attempted to justify its severe limitation of SOF’s First Amendment protections by adopting the Gertz liability standard, conceived exclusively for application in defamation cases, and superimposing its First Amendment implications directly onto a negligent advertising context.

In making such a broad inferential leap from one liability context to the other, however, the Eleventh Circuit misapplied the explicit liability condition stated in Gertz to the facts in Braun. As discussed

\(^{208}\) Id. at 1118.

\(^{209}\) 376 U.S. 254 (1964); supra notes 12-19 and accompanying text.

\(^{210}\) Id. at 279-81 (quoting Coleman v. MacLennan, 98 P. 231 (Kan. 1908)). A statement is made with “actual malice” when the speaker made the statement “with knowledge that it was false or with reckless disregard of whether it was false or not.” Id. at 280.

\(^{211}\) Braun, 968 F.2d at 1118.

\(^{212}\) 418 U.S. 323 (1974). In this case, a libel action was brought by a Chicago lawyer against the defendant publisher. The plaintiff alleged that the publisher had inaccurately titled him as a “Leninist” and a “Communist-fronter.” Id. at 326. Although the plaintiff was neither a public official nor a public figure, the defendant publisher claimed a First Amendment privilege against liability for the defamatory statements. Id. at 329. The Supreme Court held that there is no constitutional privilege to print defamatory statements about individuals who are not public figures or public officials. Id. at 345-46. The Court further held that states may define their own standards of publisher liability for printing defamatory statements against private citizens, but only where “the substance of the defamatory statement ‘makes substantial danger to reputation apparent’” and only where liability is “based on a showing of knowledge of falsity or reckless disregard for the truth.” Id. at 347-349 (quoting Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967)).

\(^{213}\) Id. at 347 (emphasis added).
previously, the *Braun* court relied heavily on the Supreme Court’s holding in *Gertz* that states may determine their own standards of liability in defamation cases, as long as they do not impose liability without fault.\(^{214}\) But in the very same paragraph, the Supreme Court limited its holding to cases where “the substance of the defamatory statement ‘makes substantial danger to reputation apparent.’”\(^{215}\) In fact, the *Gertz* court was rather insistent that no liability exists “if a state purport[s] to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential.”\(^{216}\)

While the Eleventh Circuit was obviously aware that *Gertz* conditions publisher liability in the defamation context upon “apparent” harm,\(^{217}\) its application of that condition to the facts in *Braun* indicate its unwillingness to enforce the condition in the negligent advertising context. Specifically, the *Braun* court took the position that a modified negligence standard adequately protects SOF’s First Amendment rights because the potential for harm to the public conveyed by the language of the Savage ad was indeed “apparent.”\(^{218}\) “Apparent” is defined as “[t]hat which is obvious, evident, or manifest . . . .”\(^{219}\) However, the language contained in the Savage ad, as discussed previously, is entirely ambiguous.\(^{220}\) Certainly there is no language whatsoever that, on its face, would make its danger *obvious, evident*, or especially *manifest* to any “reasonably prudent editor.”\(^{221}\) Rather, the *Braun* court appeared so determined to restrict SOF’s First Amendment rights to the modified negligence standard that it would be willing to classify the potential harm associated with even the most slightly suggestive ad as obvious, evident, or manifest. Thus, by attempting to shape the facts in *Braun* into a *Gertz* liability mold to which it clearly does not fit, the Eleventh Circuit unconstitutionally deprived SOF of its

\(^{214}\) *Id.*

\(^{215}\) *Id.* at 348 (quoting Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967)).

\(^{216}\) *Id.* (citing Time, Inc. v. Hill, 385 U.S. 374 (1967)).

\(^{217}\) *Braun*, 968 F.2d at 1119.

\(^{218}\) *Id.* at 1121.


\(^{220}\) See *supra* notes 163-83 and accompanying text.

\(^{221}\) *Gertz*, 418 U.S. at 348 (applying Black’s definition of “apparent”).
First Amendment rights. Clearly, therefore, the Eleventh Circuit should have focused its First Amendment discussion on the more closely related commercial speech precedent, rather than embarking on a dubious "fishing expedition" into defamation law.

B. The Modern Commercial Speech Doctrine Revisited

Despite all other factors discussed thus far, the Supreme Court could hardly resolve the Eimann/Braun split decisively without consulting the commercial speech cases. Although the commercial speech cases do not address the issue of third-party publisher liability, they do comprise the closest line of High Court precedent available.\(^222\) Central Hudson remains the definitive test arising from that line of precedent. Applying the four-part Central Hudson test to the issue of publisher liability may be problematic, however, because that decision appears to be limited to state action against advertisers themselves, as opposed to tort action against publishers who merely print the advertisers' messages.\(^223\)

However, other Supreme Court decisions have demonstrated that state control over the exercise of free speech is hardly limited to direct government regulation of various types of speech, including advertising. For instance, a state can effectively restrict the free dissemination of commercial information to an equal extent through its tort laws as it can through outright regulation of advertisers and publishers.\(^224\) Accordingly, because state tort law restrictions that "impose a form of self-censorship on publishers" are clearly impermissible, those restrictions must be subject to the same First Amendment scrutiny of governmental overreaching to which direct restrictions of commercial speech are subject.\(^225\) Therefore, because the Braun decision so strongly sug-

---

222. See infra notes 223-34 and accompanying text.
223. See supra note 50 and accompanying text.
224. See supra note 18 and accompanying text.
225. Braun, 968 F.2d at 1117. Both the Eimann and Braun courts seem to agree that the commercial speech cases discussed in Sections II.A.-C. are at least tangentially related to the discussion of third-party publisher liability for tortious advertising. Virginia State Bd. of Pharmacy and Central Hudson are cited throughout the Eimann and Braun opinions. See Eimann, 880 F.2d at 836-37; Braun, 968 F.2d at 1117-18. In addition, the Braun court cited
suggests the possibility of government overreaching through state tort law, the Central Hudson test should be applied to the facts in Braun to determine whether SOF’s First Amendment rights were violated.

Applying the Central Hudson test to the facts in Braun would require that the focus of the four-part test be adapted to the nature of the issue and factual circumstances of the parties involved. The substance of the test itself, however, would not be altered in the least. For instance, the first prong of the test requires that the expression of speech be one that the First Amendment is able to protect.226 This means it “at least must concern lawful activity and must not be misleading.”227 As applied to Braun, the expression of speech at issue is obviously the Savage advertisement. The ad was clearly not misleading, and whether it concerned lawful activity is generally not an issue. For instance, the plaintiffs in Braun never argued that the Savage ad, on its face, represented a solicitation to engage in unlawful activity. However, the Brauns did contend that the ad was suggestive enough to constitute an “unreasonable risk” that “violent criminal activity” would result from its publication.228 As discussed earlier, however, the Savage ad was both ambiguous and facially innocuous.229 Thus, despite the Brauns’ “unreasonable risk” contention, the ad clearly constitutes a commercial expression which the First Amendment is able to protect. Accordingly, the first prong of the Central Hudson test is satisfied.

The second prong requires that the government interest in regulating the commercial speech be “substantial.”230 If this prong of the test is applied to the facts in Braun, then the focus of the commercial speech regulation shifts from direct government regulation of advertisers to state tort law restrictions on publishers. Likewise, the government interest at issue is no longer direct regulation of commercial speech. Instead, in the context of publisher liability cases such as

---

*Sullivan* on numerous occasions. *Braun*, 968 F.2d at 1116 n.5, 1118, 1121 n.13, 1122. *Fox* is cited in *Eimann*, 880 F.2d at 836, and *Braun*, 968 F.2d at 1117.

226. *Central Hudson*, 447 U.S. at 566. See also Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. at 388; *supra* note 33 and accompanying text.

227. *Id.*

228. *See supra* note 130 and accompanying text.

229. *See supra* notes 163-83 and accompanying text.

Braun, the government interest at issue is the state’s ability to provide a civil remedy for its citizens who may be harmed by the tortious conduct of other citizens. It is highly unlikely that SOF or any other defendant publisher could make a persuasive argument that a state has no substantial interest in providing tort law remedies to its injured citizens.

The same is true for the third prong of the test. This prong requires that the government restriction at issue, the Georgia state tort law applied in Braun, must “directly advance[ ] the governmental interest asserted,” namely Georgia’s interest in providing civil remedies to its tortiously injured citizens. Any SOF argument that Georgia’s statutory and common law tort principles fail in general to directly advance that state’s interest in providing legal remedies in tort would not be only futile, but far beyond any judicial remedy.

Where the Braun decision fails to pass constitutional muster, however, is on the fourth prong of the Central Hudson test. In the context of third-party publisher liability, this prong requires that a state’s tort law be no more restrictive of protected commercial speech than is absolutely required to provide a civil remedy to its tortiously injured citizens. Accordingly, when applied to the facts in Braun, the Eleventh Circuit clearly violated SOF’s First Amendment rights by impermissibly overextending the First Amendment limitations of Georgia tort law. The overreaching is evident in Braun because, as discussed, the Savage ad was both fundamentally ambiguous and facially innocuous. While the Brauns argued that the Savage ad was highly suggestive of the advertiser’s willingness to commit criminal acts, no language on the face of the ad expressly communicated any criminal intent. Therefore, SOF had no affirmative duty to reject the facially innocuous ad, despite its being implicitly suggestive.

When third-party liability is legally based upon a guessing game of what a prospective advertiser may be implying when the advertiser

231. Id.
232. See id.
233. See supra notes 163-183 and accompanying text.
234. Id.
places an ad, a potentially ruinous slippery slope of liability is created for the publishing industry. As the Eimann court astutely observed, advertisements for high performance cars do not become solicitations for illegal activities simply because "buyers drive them beyond the speed limit."\textsuperscript{235} Nor does the publisher of the ad become liable to the driver when the ad appears in a "magazine that also contains ads for radar detectors."\textsuperscript{236} In other words, once courts like the Braun court allow publishers to be held liable in tort for what their advertisers may be implying, then advertising can no longer be a vital function of the publishing business. The publishing industry would be faced with financial disaster in the wave of liability claims that would inevitably confront it.\textsuperscript{237}

Furthermore, it is highly unlikely that the Supreme Court's holdings in Posadas and Fox would render a different result. In Fox, the Court demonstrated a willingness to relax the "no more restrictive than necessary" prong of the Central Hudson test if the government could demonstrate that the speech restriction at issue was "narrowly tailored to achieve the desired objective."\textsuperscript{238} Thus, if the Fox test were applied to the facts in Braun, the Court would determine whether Georgia's common law tort principles were narrowly tailored to its ultimate goal of compensating deserving plaintiffs.\textsuperscript{239}

Applying the narrowly tailored test to the facts in Braun, the Court would likely hold that the Braun liability standard is unconstitutionally restrictive of SOF's First Amendment free speech rights. As discussed previously, the liability standard applied in Braun, the modified negligence standard, fails to factor First Amendment rights of

\begin{footnotes}
\item 235. 880 F.2d at 836.
\item 236. Id.
\item 237. See id. at 837.
\item 238. 490 U.S. at 480. See also supra note 48 and accompanying text.
\item 239. Although the narrowly tailored test has traditionally been used to determine the constitutionality of statutes, see, e.g., Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589 (1967) (striking down an anti-subversive activities statute for failing to combat subversive activities with the requisite narrow specificity); United States v. Robel, 389 U.S. 258 (1967) (striking down another anti-subversive activities statute on constitutional grounds for similar reasons), its application to common law liability standards is not unforeseeable. For purposes of analysis, this Note will assume that the narrowly tailored test is adaptable to common law liability standard scrutiny.
\end{footnotes}
publishers directly into the risk-utility balancing test. For purposes of the risk-utility balancing test, therefore, First Amendment considerations are essentially ignored under *Braun*-type liability standards. By ignoring all First Amendment considerations, a significant amount of commercial speech, which would otherwise be privileged, is unconstitutionally stripped of First Amendment protection. As a result, the First Amendment rights of publishers to disseminate otherwise protected commercial information are subordinated to individual state common law remedies for tort victims.

Under the *Fox* test, however, state interests may trump otherwise protected speech only when applied with narrow specificity. Thus, any liability standard, such as the *Braun* court's modified negligence standard, which allows plaintiffs to recover for nontortious speech, cannot be narrowly tailored to a particular state's ultimate goal of compensating tort victims. Speech protected by the First Amendment is, by definition, nontortious. Accordingly, unless First Amendment principles are factored directly into the applicable liability standard, then otherwise privileged commercial speech is unconstitutionally chilled by state tort law. Therefore, the Supreme Court would likely hold that Georgia tort law, as applied in *Braun*, is unconstitutionally restrictive because it not only sanctions speech that the First Amendment is not intended to protect, but also that which it is.

V. CONCLUSION

The Eleventh Circuit's decision in *Braun* is disturbing. Despite being confronted with a factual setting nearly identical to that faced by the Fifth Circuit, the Eleventh Circuit purported to justify its departure from the *Eimann* precedent by distinguishing the cases factually. Nonetheless, the *Braun* court clearly failed to make any factual distinctions significant enough to justify its impetuous departure. Furthermore, the *Braun* court twisted traditional First Amendment analysis of commercial speech protection beyond recognition. Rather than rely on the available commercial speech precedent, the *Braun* court attempted to

---

240. *See supra* notes 186-87 and accompanying text.
241. *See supra* note 48 and accompanying text.
justify its constitutionally overrestrictive liability standard by comparing it to liability standards conceived exclusively for defamation cases. However, the obvious dissimilarities between the commercial speech context and the defamation context logically prevent the importation of liability standards from one area of law to the other. Thus, if the Supreme Court had agreed to resolve the Eimann/Braun split, it is unlikely that Braun would have survived the Court’s First Amendment scrutiny.

Why the Supreme Court declined to resolve the issue of third-party publisher liability based on these two cases is truly perplexing. The clearly defined split between the Fifth and Eleventh Circuits afforded the Court a golden opportunity to resolve a controversial issue which it had previously been unwilling to address. Increasingly, state and lower federal courts are being forced to wrestle with the First Amendment implications of third-party publisher liability.242 Accordingly, the Eimann/Braun split is, in all likelihood, indicative of the inconsistency with which other federal circuits will decide the issue if faced with similar cases. The implications of the Supreme Court’s failure to overturn Braun range, however, far beyond the federal circuit courts. The High Court’s indecisiveness has left publishers without a reliable standard of conduct with which to conform future publication decisions. If publishers choose to follow the Eimann standard, they risk potentially ruinous tort liability judgments. If they choose to conform to the Braun standard instead, they stand to lose considerable advertising revenue resulting from the legally mandated rejection of any and all ads that could possibly be interpreted by a jury as posing a “clearly identifiable risk of harm to the public.”243 As the Braun verdict demonstrates, even highly ambiguous ads may fall prey to such a seemingly unsubstantiated interpretation. Either way, SOF was clearly not the only losing party in the Braun decision. The ability of the publishing industry to freely disseminate vital commercial information has been

242. See supra notes 51-65 and accompanying text.
243. See supra note 145 and accompanying text.
seriously jeopardized, and the public's implied First Amendment right to receive that information[^244] has been severely compromised as well.

*Stephen T. Raptis*

[^244]: See, e.g., Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (the First Amendment "embraces the right to distribute literature . . . and necessarily protects the right to receive it"); Kleindeinst v. Mandel, 408 U.S. 753, 762 (1971) (the First Amendment "protects the right to receive information and ideas.")