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Books

First Amendment Does Not Protect Publisher From Product Liability Suit

The First Amendment does not bar a suit alleging a publisher marketed two unreasonably dangerous manuals intended to attract and assist criminals seeking information on how to commit murder, a federal appeals court ruled Nov. 10 (*Rice v. Paladin Enterprises Inc.*, CA 4, No. 96-2412, 11/10/97).

The U.S. Court of Appeals for the Fourth Circuit rejected the publisher's contention that the First Amendment's guarantees of free speech and free press conferred blanket immunity from suit. Reversing dismissal, it said those constitutional guarantees would not bar a federal jury in Maryland from finding Paladin Enterprises Inc. strictly liable in a suit by the survivors of three people assassinated by contract killer James Perry after Perry studied Paladin's books.

The court stressed that extensive case law suggests the First Amendment imposes a "heightened intent requirement" in civil cases so that the "preeminent values underlying that provision not be imperiled." That requirement was met here, the court said, by Paladin's

stipulation for purposes of the dismissal motion that it provided assistance to Perry with knowledge and intent that the book would immediately be used by criminals. But even absent the stipulation, the court said, a jury could reasonably find that the publisher acted with the degree of intent necessary to satisfy any heightened standard the First Amendment might require.

"This is the first time in our nation's history that a book publisher has been held legally responsible for the criminal acts of its readers," Paladin attorney Steve Zansberg told BNA Nov. 13. He said the publisher was "perplexed" and "disappointed" by the ruling and will ask the Fourth Circuit to review the case en banc. If that fails, Paladin will appeal to the U.S. Supreme Court, he said.

Zansberg said the appeals court was not sensitive enough to First Amendment concerns. "As far as we are concerned, the court committed a fundamental error. Speech does not lose its protection depending on the intent of the speaker. No court has ever upheld such a claim as to the ideas within a book," he said.

Complaint Says Book 'Unreasonably Dangerous.' According to the underlying complaint, Lawrence Horn hired Perry to kill his wife and 8-year-old quadriplegic son because Horn stood to inherit \$2 million from the boy's medical malpractice settlement. Perry shot the boy's mother and nurse and strangled the boy in 1993 after reading *Hit Man: A Technical Manual for Independent Contractors* and *How to Make a Disposable Silencer, Volume 2*.

The plaintiffs contended Paladin aided and abetted Perry in the commission of the murders through its publication of the books. According to the complaint, the manuals, part of the publisher's "Action Library," were unreasonably dangerous products "with no socially redeeming value, the principal purpose of which was to commit murder" (24 PSLR 94). The Fourth Circuit determined the complaint alleged a triable aiding and abetting claim under Maryland law and remanded the case to the U.S. District Court for the District of Maryland for trial.

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JUDGE J. MICHAEL LUTTIG

Perry, now on death row, meticulously followed instructions in the 132-page *Hit Man* mail-order manual, which the court said provided step-by-step instruction for assassins "so comprehensive and detailed that it is as if the instructor were literally present with the would-be murderer not only in the preparation and planning, but in the actual commission of, and follow-up to the murder."

Reversing a 1996 trial court ruling that the publisher was protected by the First Amendment (24 PSLR 815), the appeals court acknowledged the Constitution prevents the punishment or even the chilling of "innocent, lawfully useful speech" by those who publish to undifferentiated audiences, where the publisher lacks the specific knowledge that the information could be used for an impermissible purpose. However, the court said, "it would not relieve from liability those who would, for profit or other motive, intentionally assist and encourage crime and then shamelessly seek refuge in the sanctuary of the First Amendment.

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Otherwise, the court said, "one could publish, by traditional means or even on the Internet, the necessary plans and instructions for assassinating the President, for poisoning a city's water supply, for blowing up a building, or for similar acts of terror and mass destruction, with the specific, indeed even the admitted, purpose of assisting such crimes—all with impunity."

The murder instructions in *Hit Man* are "a textbook example of the type of speech that the Supreme Court has quite purposely left unprotected, and the prosecution of which, criminally or civilly, has historically been thought subject to few, if any, First Amendment constraints," the court said. "If there is a publication that can be found to have no other use than to facilitate unlawful conduct, then this would be it, so devoid is the book of any political, social, entertainment or other legitimate discourse."

Killer Followed Books' Instructions. The survivors of the three victims sued Paladin Enterprises and company president Peter C. Lund in 1995. According to the complaint, Perry followed the steps outlined in the books on choosing a weapon and making a silencer, removing the gun's serial number, and the "preferred method" for murder—shooting victims at close range in the eyes.

Paladin moved to dismiss the suit under the First Amendment. Solely for purposes of its First Amendment defense, Paladin conceded it published the books intending that readers like Perry would use them to commit murder. The publisher even stipulated that in selling the books to Perry, it assisted him in the preparation of the three killings for which he was convicted. The company reserved the right to retract its admissions in the event of trial.

Notwithstanding the admissions, the trial court granted the publisher's motion, refusing to create a new category of speech unprotected by the First Amendment—"speech that arguably aids and abets murder." The trial court said the Constitution protects even "morally repugnant" books like Paladin's, provided they do not fall within the recognized exceptions for obscenity, fighting words, or libel.

The victims' families appealed to the Fourth Circuit.

Proscribable Nonexpressive Conduct. On review, a three-judge panel said the book's sole instructional and communicative value was the "indisputably illegitimate one of training persons how to murder and engage in the business of murder for hire."

The court said *Hit Man* not only detailed how to commit murder, but:

through powerful prose . . . and imperative voice, it encourages readers . . . to murder. It reassures those contemplating the crime that they may proceed without fear of either personal failure or punishment. And at every point where the would-be murderer might yield either to reason or to reservations, it emboldens the killer, confirming not only that he should proceed, but that he must proceed, if he is to establish his manhood.

While speech "advocating lawlessness has long enjoyed protections under the First Amendment, it is equally well established that speech, which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct, may itself be legitimately proscribed, punished, or regulated incidentally to the enforcement of generally applicable statutes," the court said.

According to the opinion,

while there is considerably less authority on the subject, we assume that those speech acts which the government may criminally prosecute with little or no concern for the First Amendment, the government may likewise subject to civil penalty or make subject to private causes of action. Even if this is not universally so, we believe it must be true at least where the government's interest in preventing the particular conduct at issue is incontrovertibly compelling.

Court Discounts Chilling Effect. The appeals court said it was surprised by arguments from various free speech groups that a ruling against the publisher would have far-reaching effects. The national media's support for a constitutional right to intentionally and knowingly assist murderers is "breathtaking," the court said. "But be that as it may, it should be apparent . . . that indisputably important First Amendment values will not even arguably be adversely affected by allowing plaintiffs' action against Paladin to proceed. In fact, neither the extensive briefing by the parties nor the exhaustive research which this court has undertaken has revealed even a single case that we regard as factually analogous to this case."

The court stressed the unique facts of this case and predicted there will almost never be another situation in which a jury will be able to reasonably conclude that a publisher possessed the actual intent to assist criminal activity. According to the opinion:

In only the rarest cases, as here where the publisher has stipulated in almost taunting defiance that it intended to assist murderers and other criminals, will there be evidence extraneous to speech itself which would support a finding of the requisite intent: surely few will, as Paladin has, 'stand up and proclaim to the world that because they are publishers they have a unique constitutional right to aid and abet murder.'

The court added that while the "horribles" paraded before it by Paladin have "quite properly prompted us to examine and reexamine the established authorities on which plaintiffs' cases firmly rest, we regard them ultimately as but anticipatory of cases wholly unlike the one we must decide today."

Media law attorney Lawrence Savell said Paladin's stipulations basically took the plaintiffs' most biased allegations as true, creating a very extreme and one-sided set of facts that made it far easier for the court to rule for the plaintiffs.

Savell, with Chadbourne & Parke in New York, said Paladin chose not to raise in its defense that the book

had been available for 10 years before Perry obtained it, that the killer purchased it a year before the murders, or that Perry may have learned what he knew about murder while in prison. The book was also written in a tongue-in-cheek style, Savell added, and contained a disclaimer.

"Basically, Paladin's position is and was: 'Information doesn't kill, people do,' " Savell said.

Judge J. Michael Luttig wrote the opinion.

The plaintiffs are represented by Howard L. Siegel of Galt, Siegel & Doyle; and John Marshall of Moldawer and Marshall. Both attorneys practice in Rockville, Md. Paladin is represented by Zansberg and Thomas Kelly of Faegre & Benson in Denver, and Daniel C. Hale of Miller, Hale & Harrison in Boulder, Colo.