

# A Million Little Maybes: The James Frey Scandal and Statements on a Book Cover or Jacket as Commercial Speech

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## INTRODUCTION

In the wake of the James Frey scandal, one attorney remarked: “I’ve just come to assume that anything published under the memoir label in the twenty-first century is the modern-day equivalent of a Philip Roth novel that isn’t well-written enough to be successfully marketed as fiction.”<sup>1</sup> The recent lawsuits against James Frey and Random House with regard to Frey’s memoir *A Million Little Pieces*,<sup>2</sup> however, indicate that many members of

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<sup>1</sup> Ted Frank, *A Million Little Plaintiffs*, Overlawyered, [http://www.overlawyered.com/2006/01/a\\_million\\_little\\_plaintiffs.html](http://www.overlawyered.com/2006/01/a_million_little_plaintiffs.html) (last visited Aug. 30, 2006).

<sup>2</sup> On September 7, 2006, *The New York Times* announced that Frey and Random House have agreed to settle with the readers of *A Million Little Pieces* involved in the class action suits. Ten out of twelve plaintiffs have accepted the terms of the agreement which will become effective upon approval by a judge. Under the proposed settlement agreement, neither Frey nor Random House will admit any wrongdoing. Furthermore, Frey and Random House will pay out a sum of no more than \$2.35 million to cover the refunds for customers, lawyers’ fees for both sides and a donation to charity. Those individuals who purchased the book on or before January 26, 2006 will be eligible for a full refund if they satisfy two conditions: 1) they submit proof of purchase; and, 2) they submit a sworn statement declaring that they would not have purchased the book had they known that Frey had not been entirely straightforward in his account. Nonetheless, fulfilling the first condition will not be as simple as the submission of a dated receipt. In order to demonstrate proof of purchase, hardcover buyers must submit page 163;

society are either much more trusting or simply much less perceptive. In a decade virtually defined by reality television it seems hard to imagine that individuals fail to acknowledge the blurred line between fact and fiction, particularly when it comes to sources of entertainment and artistic expression. Thus, rather than appearing as an example of wronged consumers seeking much deserved vindication against the misdeeds of corporate America, the litigation based on the fabrications made by James Frey in his memoir *A Million Little Pieces* seemed more like a giant witch-hunt motivated by extraordinary greed that threatened to wreak havoc on the publishing industry, and possibly news, film, and television as well.

The *A Million Little Pieces* class actions addressed head-on the bicoastal dispute over whether statements on a book cover or jacket constitute actionable commercial speech. Frey and Random House's decision to settle the consolidated case without admitting any wrongdoing has left the question open for future courts to decide.<sup>3</sup> This Note will encourage courts to take an approach that would favor authors and publishers, rather than readers, when presented with this question in the future.

Part I of this Note discusses the events surrounding the James Frey scandal and compares it to another literary hoax that was uncovered around the same time, the JT LeRoy scandal. Part II of this Note outlines commercial speech doctrine and the conflicting approaches taken by the New York and California courts as to how to categorize statements on a book cover or jacket. Part III of this Note posits that courts should take the approach outlined by the New York Supreme Court in *Lacoff v. Buena Vista Publishing* and hold that statements on a book cover or jacket do not qualify as purely commercial speech because a holding that such statements constitute commercial speech will chill the First Amendment.

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paperback buyers must submit the book's front cover; individuals who purchased the audio book must submit a piece of the packaging, and those people who bought the e-book must submit some unspecified proof of purchase. The refunds will be as follows: \$23.95 for the hardcover edition, \$14.95 for the paperback, \$34.95 for the audio book, and \$9.95 for the e-book. See Mokoto Rich, *Publisher and Author Settle Suit Over Lies*, N.Y. TIMES, Sept. 7, 2006, § E, at 1.

<sup>3</sup> *Id.*

Furthermore, because statements on a book cover or jacket should not qualify as commercial speech, the readers of *A Million Little Pieces* did not have a cause of action for consumer fraud against Random House or James Frey under state consumer protection laws. Additionally, Part III argues that, in courts that follow the approach outlined by the California Court of Appeal in *Keimer v. Buena Vista Books*, cases like the *A Million Little Pieces* class action lawsuits should be distinguished on the grounds that the book involved in *Keimer* was a how-to book, not a book meant purely as a source of entertainment.

### I. BACKGROUND

On October 26, 2005, Oprah Winfrey aired an episode of her show entitled “The Man Who Kept Oprah Awake At Night.”<sup>4</sup> During this episode Oprah raved about James Frey’s book, *A Million Little Pieces*, and announced to her viewers that the book was “like nothing you’ve ever read before.”<sup>5</sup> According to Oprah, “[e]verybody at Harpo [was] reading it.”<sup>6</sup> As they had done time and time again in the past, following the show, Oprah’s viewers went out in droves and purchased *A Million Little Pieces*. Like *She’s Come Undone*,<sup>7</sup> *Where the Heart Is*,<sup>8</sup> and a number of other

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<sup>4</sup> See *The Man Who Conned Oprah, The Smoking Gun*, <http://www.thesmokinggun.com/archive/0104061jamesfrey1.html> (last visited Aug. 30, 2006).

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

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

<sup>7</sup> WALLY LAMB, *SHE’S COME UNDONE* (Washington Square Press 1996). It was the Oprah’s Book Club selection in January 1997. *She’s Come Undone* spent 54 weeks on the *New York Times* paperback fiction bestseller list. The book never appeared on the hardcover fiction bestseller list when it was originally published and therefore its popularity can be attributed to Oprah. E-mail from Elsa Dixler, Staff Editor, NEW YORK TIMES BOOK REVIEW, to Samantha J. Katze, Author (June 26, 2006, 11:47:18 EST) (on file with author).

<sup>8</sup> BILLIE LETTS, *WHERE THE HEART IS* (Warner Books 1998). It was the Oprah’s Book Club selection in December 1998. *Where the Heart Is* spent 30 weeks on the *New York Times* paperback fiction bestseller list. The book never appeared on the hardcover fiction bestseller list when it was originally published and therefore its popularity can be attributed to Oprah. E-mail from Elsa Dixler, Staff Editor, NEW YORK TIMES BOOK REVIEW, to Samantha J. Katze, Author (June 26, 2006, 11:47:18 EST) (on file with author).

books before it, Oprah's golden touch turned *A Million Little Pieces* from an unknown book into a bestseller.<sup>9</sup> In turn, like Wally Lamb<sup>10</sup> and Billie Letts<sup>11</sup> before him, James Frey became a household name and a literary star. However, while membership in Oprah's Book Club has typically resulted in fame for the author, never before has Oprah's Book Club spawned a figure so infamous as James Frey.

In *A Million Little Pieces*, Frey tells the story of his six weeks in rehab. According to his account, Frey was twenty-three years old, had been an alcoholic for ten years, and a crack addict for three years. Frey writes in the book's first paragraph:

I wake to the drone of an airplane engine and the feeling of something warm dripping down my chin. I lift my hand to feel my face. My front four teeth are gone, I have a hole in my cheek, my nose is broken and my eyes are swollen nearly shut. I open them and I look around and I'm in the back of a plane and there's no one near me. I look at my clothes and my clothes are covered with a colorful mixture of spit, snot, urine, vomit and blood. I reach for the call button and I find it and I push it and I wait and thirty seconds later an Attendant arrives.<sup>12</sup>

With this introduction, Frey signals to his readers that his story will be a harrowing tale. However, a six-week investigation by *The Smoking Gun*<sup>13</sup> exposed Frey as a fraud and revealed that the

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<sup>9</sup> *A Million Little Pieces* spent one week on the hardcover nonfiction bestseller list when it was originally published. *A Million Little Pieces* spent 34 weeks on the *New York Times* paperback nonfiction bestseller list. E-mail from Elsa Dixler, Staff Editor, NEW YORK TIMES BOOK REVIEW, to Samantha J. Katze, Author (June 26, 2006, 11:47:18 EST) (on file with author).

<sup>10</sup> Author of *She's Come Undone*.

<sup>11</sup> Author of *Where the Heart Is*.

<sup>12</sup> JAMES FREY, *A MILLION LITTLE PIECES 1* (Random House 2003).

<sup>13</sup> TheSmokingGun.com is a website that posts information about incidents that are either highly scandalous (such as celebrity arrests accompanied by their mugshots), extremely disturbing (the Wedgie Killer) or just simply amusing in their absurdity (Loogie Found in Trooper's Turkey Wrap). The Smoking Gun obtains the materials it posts from government and law enforcement sources, under the Freedom of Information Act, and from court files. The site was founded in 1997 and purchased by CourtTV in 2000. TheSmokingGun.com, About, <http://www.thesmokinggun.com/about.html> (last visited Aug. 30, 2006).

life over three million readers read about in his memoirs was not exactly the life Frey actually lived.<sup>14</sup> According to The Smoking Gun: “Frey appears to have fictionalized his past to propel and sweeten the book’s already melodramatic narrative and help convince readers of his malevolence.”<sup>15</sup>

The Smoking Gun investigation revealed that Frey “wholly fabricated or wildly embellished details of his purported criminal career, jail terms, and status as an outlaw.”<sup>16</sup> For example, the Smoking Gun revealed that Frey lied about his involvement in a train accident in which two female high school students died.<sup>17</sup> Furthermore, The Smoking Gun pointed to statements by various journalists, particularly Deborah Caulfield Rybak,<sup>18</sup> when it implied that Frey quite probably stretched the truth in other parts of the book, including the description of his condition in the book’s first paragraph (described *supra*) and the passage regarding his root-canal surgery without anesthesia.<sup>19</sup>

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<sup>14</sup> See *The Man Who Conned Oprah*, *supra* note 4. By the time The Smoking Gun published its expose, over 3.5 million copies of the book had been sold. According to the Nielsen BookScan, *A Million Little Pieces* sold 1.77 million copies in the United States in 2005. This is more books than any other aside from the latest Harry Potter book. *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* “A few journalists, most notably Deborah Caulfield Rybak of Minneapolis’s *Star Tribune*, have openly questioned the truthfulness of some book passages.” *Id.*

<sup>19</sup> *Id.* Frey writes:

The spray continues and the sander is turned on and as it comes in toward my mouth it gets louder and the noise is high and piercing and it hurts my ears and I start squeezing the balls and I try to prepare for the sander and the sander hits the fragment of my left outside tooth. The sander bounces slightly and white electric pain hits my mouth and the sander comes back and holds and pain spreads through my body from the top down and every muscle in my body flexes and I squeeze the balls and my eyes start to tear and the hair on the back of my neck stands straight and my tooth fucking hurts like the point of a bayonet is being driven through it. The point of a fucking bayonet.

The sander moves its way around the contour of the fragment and I stay tense and in pain and I can taste the grit of the bone on my tongue and the spray is spraying and it collects the grit and sends some of it down my throat and some of it into the space beneath my tongue. It continues, the sanding and the spraying and the grit and the pain, and the constant electricity of it keeps me tense and hard. I sit and I squeeze the tennis balls and my heart beats even and strong as if it needs the test of this ordeal to prove that it works correctly. The

The Smoking Gun first contacted Frey on December 1, 2005.<sup>20</sup> On December 14, 2005, after his second conversation with The Smoking Gun, Frey hired famed Los Angeles attorney Martin Singer.<sup>21</sup> On January 6, 2006, upon confrontation by The Smoking Gun regarding its findings, Frey refused to respond to the allegations, stating, “[t]here’s nothing at this point can come out of this conversation that, that is good for me.”<sup>22</sup> Furthermore, Singer sent a legal notice to The Smoking Gun, on behalf of Frey, urging them not to publish the story about *A Million Little Pieces*. In his letter, Singer wrote:

Be advised that to the extent that the Story falsely states or implies that my client is a liar and/or that he fabricated or falsified his background as reflected in *A Million Little Pieces*, such conduct will expose you and all involved in the creation and publication of the Story to substantial liability.<sup>23</sup>

Nonetheless, in a blatant disregard of Singer’s threats of legal action, The Smoking Gun published its findings on January 8, 2006.<sup>24</sup>

After the publication of The Smoking Gun’s story, Frey admitted his “memoir” contained a number of fabrications. Frey appeared on *Larry King Live* to explain his actions, and stated, “[a] memoir is a subjective retelling of events. In every case, I did the best I could to recreate my life according to my memory of it.”<sup>25</sup>

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sander stops and I relax and I take a deep breath. There are soft voices and there are instruments being picked up.

Frey, *supra* note 12, at 65–66.

<sup>20</sup> See *The Man Who Conned Oprah*, *supra* note 4.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> The letter Martin Singer sent on behalf of James Frey may be found on The Smoking Gun website. *A Million Little Lies*, The Smoking Gun, <http://www.thesmokinggun.com/jamesfrey/freysides/singerfrey1.html> (last visited Aug. 30, 2006).

<sup>24</sup> See *The Man Who Conned Oprah*, *supra* note 4.

<sup>25</sup> See Jesse Hicks, *James Frey and Memoir’s Addiction to Redemption*, PopMatters, <http://www.popmatters.com/books/features/060203-freyleroy-hicks.shtml> (last visited Aug. 30, 2006).

Frey justified his lies by reasoning that his readers should never have expected his book to be entirely true in the first place.<sup>26</sup>

Initially, Oprah Winfrey defended Frey. When he appeared on *Larry King Live* to explain his actions, Oprah called in, stating on air that she felt “that although some of the facts have been questioned—and people have a right to question, because we live in a country that lets you do that—that the underlying message of James Frey’s memoir still resonates with me.”<sup>27</sup> However, within weeks, Oprah changed her tune. In an episode of her show aired shortly after Frey’s appearance on *Larry King Live*, Oprah took James Frey “onto her stage and essentially beat[] him with a yardstick while [his] dunce cap bounded up and down to the rhythm of her vengeful strikes.”<sup>28</sup> Like many members of the American public, Oprah said she “felt duped.”<sup>29</sup> And as for Frey, despite his public explanation that a memoir<sup>30</sup> was by its very definition not entirely factually accurate, he subsequently added an author’s note in the book stating, among other things, that he “embellished many details about [his] past experiences, and altered others in order to serve what [he] felt was the greater purpose of the book.”<sup>31</sup>

James Frey was not the only party that responded to the allegations brought forth by *The Smoking Gun*. Doubleday & Anchor Books, the division of Random House Publishing responsible for publishing *A Million Little Pieces*, posted a statement concerning the book on its website. It stated that “it is not the policy or stance of this company that it doesn’t matter whether a book sold as nonfiction is true. A nonfiction book

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

<sup>27</sup> *Id.*

<sup>28</sup> Jodie Janella Horn, *Live and Let Frey*, PopMatters, <http://www.popmatters.com/books/features/060203-freyleroy-horn.shtml> (last visited Aug. 28, 2006).

<sup>29</sup> See Hicks, *supra* note 25.

<sup>30</sup> Oxford Dictionary defines a memoir as a “historical account or biography written from personal knowledge or special sources.” THE OXFORD AMERICAN DICTIONARY AND THESAURUS 934 (2003 Am. Ed.).

<sup>31</sup> James Frey, *Note to the Reader*, Random House, <http://www.randomhouse.biz/media/pdfs/AML020106.pdf> (last visited August 28, 2006).

should adhere to the facts *as the author knows them*.”<sup>32</sup> However, Random House defended itself stating that it is their “policy to stand with our authors when accusations are initially leveled against their work, and we continue to believe this is right and proper.”<sup>33</sup> In addition to apologizing to the reading public, Random House announced that a publisher’s note and a note by James Frey would appear in all future printings of the book.<sup>34</sup>

#### A. *The Lawsuits*

While both Frey and Random House took responsibility for their actions and apologized to the readers of *A Million Little Pieces*, not all the book’s readers were willing to forgive so quickly. Shortly following The Smoking Gun’s story, class action suits were filed in California, Illinois, Washington, Ohio and New York against Frey and Random House, among others.<sup>35</sup> In each of

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<sup>32</sup> *Publisher’s Note*, Random House, <http://www.randomhouse.biz/media/pdfs/AML012706.pdf> (last visited August 28, 2006).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* In addition to adding a publisher’s note and an author’s note, Random House announced that all future editions of the book would carry the line: “with new notes from the publisher and from the author;” that they would not be reprinting or fulfilling orders until they made the aforementioned changes; that they would post the publisher’s note and author’s note on the randomhouse.com website; that they would promptly send the publisher’s note and author’s note to booksellers for inclusion in previously shipped copies of the book; and that an advertisement would appear on national television and in trade publications concerning the events. *Id.*

<sup>35</sup> Under the Federal Rules of Civil Procedure:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23. The individual suits were as follows: 1) in the Central District of California, Rubenstein v. Frey, et al., C.A. No. 2:06-1029 and Hauenstein, et al. v. Frey, et al., C.A. No. 2:06-1030; 2) in the Northern District of Illinois, Strack v. Frey, et al., C.A. No. 1:06-933, More v. Frey, et al., C.A. No. 1:06-934, and Vedral v. Frey, et al., C.A. No. 1:06-935; 3) in the Southern District of New York, Snow v. Doubleday, et al., C.A. No. 1:06-669, Floyd v. Doubleday, et al., C.A. No. 1:06-693, and Marolda v. Frey, et al., C.A. No. 1:06-1167; 4) in the Southern District of Ohio, Giles v. Frey, et al., C.A. No. 1:06-58; and 5) in the Western District of Washington, Paglinawan, et al. v. Frey, et al., C.A. No. 2:06-99. See Transfer Order, *In Re “A Million Little Pieces” Litigation*, Judicial Panel on Multidistrict Litigation, No. 1771 (filed June 14, 2006) [hereinafter

the cases, plaintiffs made a number of allegations, including, but not limited to, the accusations that James Frey's book contained "material fabrications" and that the advertisements and marketing related to the book were "false and misleading" because the book was promoted as a work of nonfiction.<sup>36</sup> As grounds for recovery, plaintiffs asserted a number of state statutory and common law claims, including negligence, consumer fraud, breach of contract, unjust enrichment, false advertising, unfair competition, and misrepresentation.<sup>37</sup> Each of the cases sought millions of dollars in damages for the cost of the books. Some of them sought compensation for the time spent reading the book.<sup>38</sup> This Note focuses on the consumer fraud claims.<sup>39</sup>

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Transfer Order]. The federal courts have original jurisdiction pursuant to 28 U.S.C.A. § 1332(d)(2). See Amended Class Action Complaint at 4, *Floyd v. Doubleday, et al.*, No. 06 CV 0693 (GEL) (S.D.N.Y. Jan. 30, 2006) [hereinafter *Amended Complaint*].

<sup>36</sup> Transfer Order, *supra* note 35.

<sup>37</sup> *Id.* See also Courthouse News Service, <http://www.courthousenews.com/BlogArchive/frey1.htm>.

<sup>38</sup> See *Amended Complaint*, *supra* note 35, at 26. The complaint also stated:

[S]uch damages should include but may not be limited to: (1) An order requiring a complete accounting of all sales of the book "A Million Little Pieces"; (2) Appropriate damages to the plaintiff(s) for reimbursement of the purchase price of the Book; (3) Appropriate damages to the plaintiff(s) for the expenditure of their time in reading the Book; (4) An injunction against further representation, marketing and advertisement of the book "A Million Little Pieces" as a work of autobiography, nonfiction or personal memoir; (5) Costs and expenses including attorneys' fees; (6) Such other and further relief as this Court deems appropriate.

*Id.* at 28.

<sup>39</sup> On June 14, 2006, the Judicial Panel on Multidistrict Litigation ordered the coordination and consolidation of the pretrial proceedings of the ten actions in the Southern District of New York, under 28 U.S.C. § 1407, as a means to "eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary." See Transfer Order, *supra* note 35. 28 U.S.C. § 1407 provides, in part:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, that the panel may separate any claim, cross-claim, counter-claim, or third-

### B. *The Contrasting Case of JT Leroy*

Members of the public appeared outraged at James Frey's actions. However, the literary hoax certainly did not begin with James Frey; nor will it end with him. That the situation was hardly novel is not the only factor that points to the outrageousness of the *A Million Little Pieces* class actions. Moreover, the fabrications created by James Frey in *A Million Little Pieces* do not hold a candle to another literary hoax uncovered around the same time. The tales of JT LeRoy were at least as sensational if not more so than those of James Frey, and the truth of JT LeRoy is that much more astounding. Yet, the public reaction to the JT LeRoy scandal was decidedly different.

JT LeRoy is the credited author of three books: *Sarah*;<sup>40</sup> *The Heart is Deceitful Above All Things*;<sup>41</sup> and *Harold's End*.<sup>42</sup> In "his" books, JT LeRoy claimed (1) to be a male prostitute who started turning tricks at age twelve; (2) to have been pimped out by his mother to various truckers and the like; (3) to be a drug addict; and (4) to be HIV positive.<sup>43</sup> However, JT LeRoy is none of these things, because JT LeRoy is not a real person. In reality, LeRoy's books were written by Laura Albert, a woman in her forties. While ghostwriters and pen-names are hardly novel to the literary world, Albert never served as anyone's ghostwriter, nor was she a modern day Samuel Clemens. Instead, Albert created the character of JT LeRoy, and with the help of a number of co-conspirators (including Winona Ryder)<sup>44</sup> convinced the public that "he" was a

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party claim and remand any of such claims before the remainder of the action is remanded.

28 U.S.C. § 1407.

<sup>40</sup> JT LEROY, *SARAH* (Bloomsbury USA 2001).

<sup>41</sup> JT LEROY, *THE HEART IS DECEITFUL ABOVE ALL THINGS* (Bloomsbury USA 2002).

<sup>42</sup> JT LEROY, *HAROLD'S END* (Last Gasp 2005).

<sup>43</sup> James Withers, *My LeRoy Tale: The Truth and Nothing But*, PopMatters, <http://www.popmatters.com/books/features/060203-freyleroy-withers.shtml> (last visited Aug. 30, 2006).

<sup>44</sup> *Stars Backed JT Book Fraud*, N.Y. POST, Feb. 24, 2006, at 10. "Winona Ryder and other celebrity 'intimates' of fictitious writer JT LeRoy were part of the conspiracy that pulled off the biggest literary hoax this side of James Frey. Courtney Love, Rosario Dawson, Tatum O'Neal and Susan Dey all claimed they were friends of the made-up teen hooker-turned-bard. And Italian actress Asia Argento even once told PAGE SIX that she was having LeRoy's baby. . . . No celeb was more complicit in the scheme than Ryder,

real person, even going so far as to parade Savannah Knoop, her husband's twenty-something half sister, around in public with a blonde wig and sunglasses as JT LeRoy.<sup>45</sup>

The JT LeRoy scandal seemed to be based on lies larger than any that James Frey could ever imagine telling. While "[i]t would be easy to dismiss the LeRoy charade as just good old fun that tweaked the literati . . . the family affair used a lot of people who believed in the stories and the person they thought wrote them."<sup>46</sup> For example, David Eggers, the acclaimed author of *A Heartbreaking Work of Staggering Genius*,<sup>47</sup> not only supported and celebrated LeRoy's work, but also spent hours editing one of "his" stories.<sup>48</sup> Furthermore, in addition to the various books credited to him, JT LeRoy received an associate producer credit for Gus Van Sant's film "Elephant."<sup>49</sup>

Despite the extravagant fabrications behind the persona of JT LeRoy, neither the public nor the literary community showed the same wrath towards those behind JT LeRoy as it did to James Frey. As a result of the various class action suits filed against Frey and Random House, Penguin books reportedly withdrew a two-book offer from Frey.<sup>50</sup> However, no lawsuits have been filed against the JT LeRoy team and LeRoy's publisher is going forward with the publication of LeRoy's new book, *Labour*. Furthermore, a movie based on the life of JT LeRoy, which takes its title from LeRoy's book, *The Heart is Deceitful Above All Things*, was

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who spun a tall tale to Steve Garbarino for his 2003 Vanity Fair piece, 'The Divine JT Sisterhood,' about how she befriended LeRoy when he was a teenage street urchin right after her breakup with Johnny Depp." *Id.*

<sup>45</sup> See Withers, *supra* note 43.

<sup>46</sup> *Id.*

<sup>47</sup> DAVID EGGERS, *A HEARTBREAKING WORK OF STAGGERING GENIUS* (Vintage 2001).

<sup>48</sup> See Withers, *supra* note 43.

<sup>49</sup> IMDB.com, Full Cast and Crew for Elephant (2003), <http://www.imdb.com/title/tt0363589/fullcredits> (last visited August 30, 2006). Nabbing the associate producer credit was hardly a minor accomplishment considering the film won the Palme d'Or, the highest honor at the Cannes Film Festival, in 2003. IMDB.com, Awards for Elephant (2003), <http://www.imdb.com/title/tt0363589/awards> (last visited August 30, 2006).

<sup>50</sup> *Author James Frey's Book Deal Nixed After Scandal*, Tiscali Film & TV, [http://www.tiscali.co.uk/news/newswire.php/news/reuters/2006/02/24/entertainment/authorjamesfrey39sbookdealnixedafterscandal.html&template=/entertainment/feeds/story\\_template.html](http://www.tiscali.co.uk/news/newswire.php/news/reuters/2006/02/24/entertainment/authorjamesfrey39sbookdealnixedafterscandal.html&template=/entertainment/feeds/story_template.html) (last visited Sept. 13, 2006).

released in March of 2006.<sup>51</sup> Instead of trying to minimize any acknowledgement of the tremendous fraud perpetrated by the individuals behind JT LeRoy, the film celebrates it with a tagline stating, “[b]ehind the greatest hoax of our time is the heartbreaking story that started it all.”<sup>52</sup>

## II. LEGAL ISSUES

### A. *False Statements of Fact*

False statements of fact, whether published in a newspaper or book, broadcast on television or featured in a film, are not “worthy” of First Amendment protection.<sup>53</sup> Nonetheless, our founding fathers recognized back in the 18th Century that the presence of “erroneous” statements of fact would be “inevitable” in an atmosphere of free debate.<sup>54</sup> Some might believe that punishment for making factually inaccurate statements might help ensure the reliability and truthfulness of free debate. However, imposing penalties upon individuals who commit such errors threatens to chill speech because people will be more cautious in what they say, and in fear of retaliation might choose to say nothing at all, even if what they intend to say has great social importance.<sup>55</sup> In *Gertz*, the Supreme Court recognized that “a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.”<sup>56</sup>

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<sup>51</sup> RottenTomatoes.com, *The Heart is Deceitful Above All Things*, [http://www.rottentomatoes.com/m/heart\\_is\\_deceitful\\_above\\_all\\_things/about.php](http://www.rottentomatoes.com/m/heart_is_deceitful_above_all_things/about.php) (last visited Sept. 13, 2006).

<sup>52</sup> IMDB.com, *The Heart Is Deceitful Above All Things* (2004), <http://imdb.com/title/tt0368774/> (last visited August 30, 2006).

<sup>53</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

<sup>54</sup> *Id.* “As James Madison pointed out in the Report on the Virginia Resolutions of 1798: ‘Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.’” *Id.* (citing *Debates on the Federal Constitution of 1787* at 571 (1876)).

<sup>55</sup> *See id.* at 341.

<sup>56</sup> *Id.* at 340.

Despite the fact that false statements of fact are not worthy of First Amendment protection, books, whether they are works of artistic expression, works arguably lacking in artistic qualities, but nonetheless entertaining, or simply works espousing opinions or relating facts, are “fully safeguarded by the First Amendment.”<sup>57</sup> In turn, book publishers are pure first amendment speakers, and their speech may not be restricted based on content in the absence of a compelling state interest.<sup>58</sup> Consequently, the First Amendment prevented the readers of *A Million Little Pieces* from bringing a cause of action against Random House or James Frey based on the inaccuracies within the memoir itself.<sup>59</sup> As the readers of *A Million Little Pieces* had no claim against Random House or James Frey for the misrepresentations within the memoir they had to look elsewhere for a means to redress their grievances.

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<sup>57</sup> *Muzikowski v. Paramount Pictures Corp.*, No. 01 C 6721, 2005 U.S. Dist. LEXIS 13127, \*37–38 (N.D. Ill. June 10, 2005) (holding that plaintiff failed to show that advertising a film as true instead of as “based on a true story” did not mislead viewers into believing that the film accurately portrayed the plaintiff or induced the viewing of the film). *See* *Schad v. Bor. of Mt. Ephraim*, 452 U.S. 61, 65 (1981) (holding that the imposition of criminal penalties under an ordinance prohibiting all live entertainment was an unconstitutional violation of freedom of speech). The Court stated, “[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.” *Id.* at 65.

<sup>58</sup> *See* *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., et al.*, 502 U.S. 105, 123 (1991) (holding that New York’s Son of Sam Law violated the Constitution because although the statute’s goal of compensating crime victims from crime profits served a compelling state interest, the law was not narrowly tailored to further that purpose). The Court stated:

[T]he Son of Sam law is such a content-based statute. It singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content. Whether the First Amendment “speaker” is considered to be Henry Hill, whose income the statute places in escrow because of the story he has told, or Simon & Schuster, which can publish books about crime with the assistance of only those criminals willing to forgo remuneration for at least five years, the statute plainly imposes a financial disincentive only on speech of a particular content.

*Id.* at 116.

<sup>59</sup> *See* *Schad*, 452 U.S. at 65.

*B. Book Contents v. Statements on a Book Cover or Jacket*

While the First Amendment unquestionably protects the contents of *A Million Little Pieces*, it is less clear that the First Amendment protects statements made on the book's cover or jacket. According to the individuals who brought class action suits against Random House and James Frey, the statements on a book's cover or jacket qualify as commercial speech; in turn, false statements on a book's cover or jacket, as in the case of *A Million Little Pieces*, amount to consumer fraud, under state consumer protection laws.<sup>60</sup> For example, the Illinois complaint alleged that "Defendants . . . engaged in unfair and deceptive practices by promoting, advertising, asserting, and endorsing the book *A Million Little Pieces* as a true and honest work of non-fiction."<sup>61</sup> The complaint further alleged that "[t]he practice is unfair and deceptive because (a) consumers relied on these untrue assertions to motivate the purchase of the subject book and (b) consumers relied upon these untrue assertions as basis for an emotional investment, interest, and empathy for the central character."<sup>62</sup> In order to have held Random House and the other named defendants liable for consumer fraud, however, the courts would have first had to determine whether the assertions made on the book covers or jackets qualify as commercial speech.

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<sup>60</sup> For example, the plaintiffs in the Illinois case brought a cause of action for consumer fraud under the Illinois Consumer Fraud Act. Section 2 of the Illinois Consumer Fraud Act, 815 ILCS 505/2, provides:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, . . . are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

<sup>61</sup> Complaint at 13, *More v. Frey*, No. 06CH00772 (Ill. Cook County Cir. Ct. filed Jan. 12, 2006).

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

### C. Commercial Speech Doctrine

Commercial speech is speech “which does ‘no more than propose a commercial transaction.’”<sup>63</sup> In other words, this speech has no purpose other than to encourage the sale of a product. Assuming they had been given the opportunity, if the courts determined that the statements on the book covers or jackets do not qualify as commercial speech, then James Frey and Random House would not have been liable for consumer fraud under state consumer protection laws because state consumer protection laws do not create liability for factual inaccuracies in noncommercial speech. However, if the courts determined that the false statements on the book covers or jackets qualify as commercial speech, then Random House would have been held liable for consumer fraud because commercial speech receives less constitutional protection than noncommercial speech.

The Supreme Court addressed the question of how much First Amendment protection to accord to commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.<sup>64</sup> In *Virginia State Board of Pharmacy*, the plaintiffs, a Virginia resident who used prescription drugs on a daily basis, and two non-profit organizations, sued the Virginia State Board of Pharmacy and its board members on the grounds that a Virginia statute violated the First Amendment. The statute provided that a pharmacist licensed in Virginia was guilty of unprofessional conduct if he published, advertised, or promoted any price for prescription drugs.<sup>65</sup> Plaintiffs argued that the First Amendment granted the users of prescription drugs the right to receive information from pharmacists regarding the prices of prescription drugs. Defendants argued that the prohibition against commercial advertising of prescription drug information was necessary in order to uphold the integrity of the pharmacological profession.<sup>66</sup>

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<sup>63</sup> Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 760 (1976).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 749–51.

<sup>66</sup> *Id.* at 751.

The Supreme Court ultimately ruled in favor of plaintiffs, holding that the First Amendment accords commercial speech with limited protection. The Court justified its holding that the First Amendment protects a consumer's interest in the free flow of commercial information on the grounds that the free flow of commercial information is indispensable to well-informed private economic decisions.<sup>67</sup> However, before the Court came to this conclusion, it was forced to determine what speech fell outside the purview of the First Amendment.<sup>68</sup>

According to the Court in *Virginia State Board of Pharmacy*, the mere fact that the speech in question has some monetary backing does not render it commercial speech.<sup>69</sup> To the Court, "[i]t is clear . . . that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another."<sup>70</sup> Furthermore, the Court concluded that speech does not become classified as commercial simply because it allows for the procurement of monetary profit, stating, "[s]peech likewise is protected even though it is carried in a form that is 'sold' for profit, and even though it may involve a solicitation to purchase or otherwise pay or contribute money."<sup>71</sup> While the Court established that the First Amendment protects commercial speech, it also made clear that commercial speech was not without limitations, stating, "In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible."<sup>72</sup>

### 1. False Commercial Speech

One permissible regulation of commercial speech is the regulation of false commercial speech through consumer

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<sup>67</sup> *Id.* at 763.

<sup>68</sup> *Id.* at 760–61.

<sup>69</sup> *Id.* at 761.

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

<sup>71</sup> *Id.* (citations omitted).

<sup>72</sup> *Id.* at 770.

protection statutes.<sup>73</sup> In *Central Hudson Gas & Electric Company v. Public Service Commission*, the Supreme Court outlined a four-part test to determine whether commercial speech receives First Amendment protection.<sup>74</sup> The Court stated that

For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.<sup>75</sup>

Unlike truthful commercial speech, which receives some First Amendment protection, albeit less than other forms of speech, false commercial speech falls outside the purview of the First Amendment.<sup>76</sup> Consequently, the state and federal government may freely regulate such statements through the enactment of consumer protection statutes.<sup>77</sup> For example, in *Native American Arts, Inc. v. Village Originals*, the United States District Court for the Northern District of Illinois affirmed the constitutionality of the Indian Arts and Crafts Act of 1990, which imposes civil liability upon an individual who offers or displays for sale, or sells a good, in a manner that falsely suggests that the good is of Indian origin.<sup>78</sup>

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<sup>73</sup> See *infra* notes 77–78 and accompanying text. The United States Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

<sup>74</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

<sup>75</sup> *Id.*

<sup>76</sup> *See id.*

<sup>77</sup> *See Native Am. Arts, Inc. v. Vill. Originals, Inc.*, 25 F. Supp. 876, 882 (1998).

<sup>78</sup> *Id.* The court stated:

Village Originals allegedly attached tags to its products which induced consumers to believe that the products were authentic in the sense that they were manufactured by Native Americans. Village Originals erroneously contends that the IACA regulates the content of its crafts to prohibit it from utilizing “Southwest” designs which resemble, in part, Native American design. To the contrary, IACA does not restrict the artistic quality of Village Originals’ merchandise. Rather, it merely regulates the means through which such merchandise is marketed. Simply put, Village Originals cannot represent to the public that its merchandise was made by Native Americans when, in fact, it was not.

Assuming that they had been given the opportunity, if the courts in the *A Million Little Pieces* class actions determined that statements on a book cover or jacket constitute commercial speech, then the statements that falsely, or misleadingly, indicated that *A Million Little Pieces* is based on James Frey's true-life story would have been as actionable under consumer protection statutes as statements that purport the authenticity of unauthentic Native American goods.

*D. Do Statements on a Book Cover or Jacket Constitute Commercial Speech?*

The central question in the *A Million Little Pieces* class actions was whether the statements on the book's cover or jacket qualify as commercial speech. While a definitive answer to this question would allow for a prompt ruling, a lack of unity among the courts indicated that these cases would not be resolved so swiftly, unless of course the parties settled. The federal courts have not been presented with this question, and state courts disagree as to whether statements on a book cover or jacket constitute commercial speech or noncommercial speech. If the statements amount to commercial speech, they receive the qualified First Amendment protection, whereas if the statements constitute noncommercial speech, they receive the same level of protection as the book's contents.

*The Beardstown Ladies'* cases<sup>79</sup> serve as the best model to analyze the issues presented by *A Million Little Pieces*. In the *Beardstown Ladies'* cases, plaintiffs brought consumer class actions in New York and California against the publishers of *The Beardstown Ladies' Common-Sense Investment Guide*. *The Beardstown Ladies' Common-Sense Investment Guide* was a book

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*Id.* at 880. For further discussion of the issue, see Jennie D. Woltz, Note, *The Economics of Cultural Misrepresentation: How Should the Indian Arts and Crafts Act of 1990 Be Marketed?*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. (2007) (forthcoming Winter 2007).

<sup>79</sup> *Lacoff v. Buena Vista Publ'g, Inc.*, 183 Misc. 2d 600 (Sup. Ct. N.Y. County 2000); *Keimer v. Buena Vista Books*, 75 Cal. App. 4th 1220 (Ct. App. 1999).

purportedly based upon the experiences of 16 women who formed a highly successful investment club in the early 1980s.<sup>80</sup>

The cover of *The Beardstown Ladies' Common-Sense Investment Guide* stated that the book was an “investment guide” based upon the secret investment strategy developed by the Beardstown Ladies.<sup>81</sup> The book implied that individuals would receive a 23.4% annual return over a ten-year period on investments if they followed the information presented in the book.<sup>82</sup> This suggestion appeared both on the book’s cover and in the text.<sup>83</sup>

The plaintiffs in the *Beardstown Ladies'* cases alleged that the claims made on the book’s cover and its text induced them to purchase the book.<sup>84</sup> Furthermore, Plaintiffs asserted that *The Beardstown Ladies' Common-Sense Investment Guide* did not in fact contain any secret strategy, and that the knowledge it imparted was highly unsophisticated.<sup>85</sup> In addition, Plaintiffs claimed that an audit of the Beardstown Ladies investment portfolio from 1984–1993, conducted in 1998 by Price Waterhouse, indicated that the *Beardstown Ladies'* annual return for that period was merely 9.1%, not 23.4% as the book claimed.<sup>86</sup>

Two lawsuits were filed against Disney-owned Buena Vista Publishing, the publisher of the *Beardstown Ladies' Common-Sense Investment Guide*, one in New York and the other in California. Interestingly enough, the two courts came to different conclusions as to whether the book’s publisher should be liable for damages to the book’s readers under the relevant state statutes protecting against consumer fraud. The fact that the New York court and the California court reached different results in their respective *Beardstown Ladies'* cases indicates that the suits filed against Random House could have very well reached different outcomes.

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<sup>80</sup> *Lacoff*, 183 Misc. 2d at 602.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 601.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 602.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

### 1. New York: *Lacoff v. Buena Vista Publishing*

*Lacoff v. Buena Vista Publishing* supports the argument that Random House should not be liable to the readers of *A Million Little Pieces*.<sup>87</sup> In *Lacoff*, the plaintiffs alleged four causes of action: (1) deceptive trade practices; (2) false advertising; (3) fraud; and, (4) unjust enrichment.<sup>88</sup> Plaintiffs rested their claim of fraud on grounds that they purchased the book

[I]n reliance upon the various statements, claims, representations and omissions regarding the annual return and the secret investment strategy used by the Beardstown Ladies, which defendants allegedly knew were false and misleading, and upon which defendants intended plaintiffs and other purchasers of the Book to rely.<sup>89</sup>

Defendants sought to dismiss plaintiffs' complaint arguing that: (1) the First Amendment protects the contents of the book, the cover and the flyleaf; (2) as the publisher, they cannot be made the guarantor of the accuracy of the factual statements in the book; (3) publishers have no duty to investigate or verify the factual statements made in the book; (4) the constitutional protection for the book's contents cannot be evaded by characterizing the book or the material on the book's cover or flyleaf as commercial speech; and (5) the book's contents do not lose their constitutional protection simply because excerpts are used on the book's flyleaf and cover.<sup>90</sup>

The New York Supreme Court ruled in favor of Buena Vista Publishing. The court held that the First Amendment protects the book, its cover, the flyleaf and the introduction,<sup>91</sup> and that the statements on the cover, on the flyleaf and in the introduction do

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<sup>87</sup> *See id.*

<sup>88</sup> *Id.* at 603.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 603–04. *Cf. Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991) (holding that a publisher of a reference book about mushrooms was not liable where plaintiff mushroom enthusiasts became seriously ill after picking and eating mushrooms after relying on information in the book because the book publisher did not have a duty to investigate and verify the information in the book it published).

<sup>91</sup> *See Lacoff*, 183 Misc. 2d at 604.

not qualify as purely commercial speech.<sup>92</sup> Furthermore, the *Lacoff* court held that the publishing company did not have a duty to investigate the accuracy of the contents of the Book.<sup>93</sup>

According to the court in *Lacoff*, “the First Amendment strictly limits the imposition of liability on publishers for the contents of books” in order “[t]o promote society’s overriding interest in the untrammelled dissemination of knowledge and free expression.”<sup>94</sup> The court relied on the old rationale that even though false statements of fact do not deserve constitutional protection, their existence is unavoidable in a society that promotes free speech.<sup>95</sup> However, the court concluded that, despite the fact that false statements of fact are not worthy of constitutional protection, the First Amendment mandates the protection of some falsehoods so as to protect the speech that actually deserves protection.<sup>96</sup>

The *Lacoff* court also held that the statements on the book’s cover, on the flyleaf and in the introduction did not qualify as purely commercial speech.<sup>97</sup> The court explained that the mere fact that a publisher has an economic motivation does not turn protected expression into commercial speech.<sup>98</sup> If this were the case, then every article published in a newspaper or periodical would qualify as commercial speech simply because those articles are sold for a profit.<sup>99</sup>

Certainly, all publishers have some sort of economic motivation. Nonetheless, to qualify as commercial speech, the speech can do “no more than propose a commercial transaction.”<sup>100</sup> The publisher’s economic motivation is simply one factor to be

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 605 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 608.

<sup>98</sup> *Id.* at 606. “To permit a publisher’s economic motivation to convert protected expression into commercial speech would turn every article published in the newspapers and periodicals into commercial speech, because they are sold for profit.” *Id.*

<sup>99</sup> *Id.* (citing *City of New York v. Am. Sch. Publ’ns.*, 119 A.D.2d 13, 18 (1st Dept. 1986), *aff’d*, 69 N.Y.2d 576 (1987)).

<sup>100</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976).

considered in determining whether statements qualify as commercial speech.<sup>101</sup> Therefore, while a television advertisement about newspaper subscriptions may arguably qualify as commercial speech, if the television advertisement “also communicates information, expresses opinion, recites grievances, protests claimed abuses or solicits financial support on behalf of a movement whose existence and objectives are matters of public concern, it is not purely commercial.”<sup>102</sup> Based on the decision in *Lacoff*, the fact that James Frey and the publishers of *A Million Little Pieces* sought to propose a commercial transaction by placing statements on the book’s cover or jacket does not render the statements commercial speech because the statements did more than simply propose a commercial transaction.

## 2. California: *Keimer v. Buena Vista Books*

*Keimer v. Buena Vista Books* supports the contention that Random House should be liable under consumer protection statutes to the readers of *A Million Little Pieces*.<sup>103</sup> In *Keimer*, the California Court of Appeals reached a verdict in stark contrast to

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<sup>101</sup> See *id.* at 761–63.

<sup>102</sup> *City of New York v. Am. Sch. Publ’ns, Inc.*, 119 A.D.2d 13, 18 (1st Dep. 1986) (holding that *The Learning Annex Magazine* did not qualify as purely commercial speech even though its main purpose was to advertise the courses offered by The Learning Annex because it included various stories, articles and reviews which were unrelated to The Learning Annex courses). The court stated:

In the city’s opinion, the textual material which defendants have put into their magazine is nothing but a pretext for advertising defendants’ product. Unlike other publications, the city claims, the articles exist for the sole purpose of disseminating the advertisements instead of the advertisements being utilized as a means to support the informational content. Indeed, under this scenario, plaintiff, in effect, asserts a right to judge the content based upon the motives of the publishers. The United States Supreme Court, however, has held that the mere fact that something is an advertisement does not render it commercial speech, and economic motivation is also insufficient to turn material into commercial speech. In fact, all publishers have an economic motivation to a greater or lesser extent, those of the *New York Times* and the *Washington Post* no less than those of *The Learning Annex Magazine*. [However] defendants’ purposes in issuing their magazine cannot be the exclusive factor in determining whether or not the publication constitutes commercial or noncommercial speech.

*Id.* at 18.

<sup>103</sup> *Keimer v. Buena Vista Books*, 75 Cal. App. 4th 1220 (Ct. App. 1999).

that of the *Lacoff* court.<sup>104</sup> The *Keimer* court held that the advertising statements made on the book's cover were commercial speech and did not qualify for First Amendment protection.<sup>105</sup>

In reaching this result, the *Keimer* court relied on the Supreme Court's holding in *Bolger v. Youngs Drug Products Corporation*.<sup>106</sup> In *Bolger*, the Court determined that informational pamphlets regarding contraception, created by the manufacturer, seller and distributor of contraceptives, qualified as commercial speech.<sup>107</sup> The *Bolger* Court identified three characteristics that, taken together, allow the determination that the speech in question is commercial in nature: (1) the speech is conceded to be an advertisement; (2) the speech makes reference to a specific product; and (3) the speaker has an economic motivation for making the speech.<sup>108</sup> According to the *Bolger* Court, while the individual facts did not alone determine that the pamphlets constituted commercial speech, "[t]he combination of *all* these characteristics . . ." supported the conclusion that the pamphlets qualified as commercial speech.<sup>109</sup>

The court in *Keimer* concluded that the statements on the books' covers were advertisements that constituted commercial speech because Disney conceded that the book covers were advertisements, which praised the content of the material inside the book.<sup>110</sup> Additionally, the court found that Disney had an economic motive for making the statements on the book covers praising the content of the books.<sup>111</sup> Consequently, the *Keimer* court held that the statements were not entitled to full First Amendment protection, but rather qualified protection.<sup>112</sup> Nonetheless, in relying on the three-factor test outlined in *Bolger*,

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<sup>104</sup> *See id.*

<sup>105</sup> *Id.* at 1226.

<sup>106</sup> *Id.* at 1228 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (holding that a federal statute that criminalized the sending of information concerning contraceptives through the mail was unconstitutional)).

<sup>107</sup> *Bolger*, 463 U.S. at 69.

<sup>108</sup> *Id.* at 66–67.

<sup>109</sup> *Id.*

<sup>110</sup> *Keimer*, 75 Cal. App. 4th at 1230.

<sup>111</sup> *Id.* at 1229.

<sup>112</sup> *Id.* at 1230.

the *Keimer* court ignored the Court's dicta that indicated that advertisements for pure First Amendment speech would receive full constitutional protection.<sup>113</sup>

### III. ANALYSIS

Decisions by future courts regarding the question presented by the *A Million Little Pieces* class actions have implications that reach far beyond James Frey and Oprah's Book Club. If the courts choose not to follow *Lacoff* and instead to follow the *Keimer* decision, they will open the floodgates to an onslaught of litigation directed not only towards the publishing industry, but towards newspapers, magazines, films and television as well. Such litigation threatens to chill the First Amendment, and, therefore, should not be tolerated.

#### A. *Why the Courts Should Follow Lacoff*

Certainly, books such as *A Million Little Pieces* do not qualify as commercial speech because their purpose is to tell a story; they are not designed as a means to sell another product.<sup>114</sup> Neither the fact that James Frey and Random House sold *A Million Little Pieces* for a profit (and a big one at that) nor the fact that James Frey and Random House had an economic motivation, transformed the book into commercial speech.<sup>115</sup> The question for future courts involved in litigation like that concerning *A Million Little Pieces*, however, is not whether a book's contents qualify as commercial speech, but rather whether the statements on a book's cover or jacket constitute commercial speech.<sup>116</sup>

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<sup>113</sup> *Bolger*, 463 U.S. at 67 n.14. Justice Marshall stated, "Of course, a different conclusion may be appropriate where the pamphlet advertises an activity itself protected by the First Amendment." *Id.* See generally, Tara Kole, *Advertising Entertainment: Can Government Regulate Advertising of Fully-Protected Speech Consistent with the First Amendment?*, 9 UCLA ENT. L. REV. 315, 333-34 (2002) (stating the majority of courts have followed Marshall's footnote).

<sup>114</sup> See *Lacoff v. Buena Vista Publ'g, Inc.*, 183 Misc. 2d 600, 608 (Sup. Ct. N.Y. County 2000).

<sup>115</sup> See *id.*

<sup>116</sup> See *supra* Part II.D.

Courts deciding the outcomes in cases similar to the *A Million Little Pieces* class actions should follow New York's *Lacoff* court and hold that statements on a book's cover or jacket do not qualify as commercial speech. Although the statements on a book's jacket and cover "have a commercial element—to entice readers to buy the Book, they also have artistic or content-related expression . . ." <sup>117</sup> As the artistic or content-related expression receives full First Amendment protection, words taken from that protected expression should not be stripped of their First Amendment shield simply because they are placed on the book's cover or jacket. <sup>118</sup>

Advertising that promotes noncommercial speech should receive the same amount of protection as the speech it advertises. <sup>119</sup> While the Supreme Court has yet to rule conclusively on this idea, many lower courts have followed the dicta in *Bolger* <sup>120</sup> implying that speech advertising fully protected speech receives the same amount of protection as the fully protected speech it advertises. <sup>121</sup> For example, in *Lane v. Random House*, the D.C. Circuit Court stated that "[t]he critical question is whether the promotional material relates to a speech product that is itself protected. . . . [T]he challenged advertisement is not about laundry detergent; it cannot be divorced from the book *Case Closed* . . ." <sup>122</sup> Statements on a book jacket or cover should not be actionable under state consumer protection laws because

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<sup>117</sup> *Lacoff*, 183 Misc. 2d at 608.

<sup>118</sup> *See id.* (holding artistic or content-related expression to be entitled to full First Amendment protection).

<sup>119</sup> *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 n.14 (1983).

<sup>120</sup> *Id.*

<sup>121</sup> *Lane v. Random House*, 985 F. Supp. 141, 152 (D.D.C. 1995) (holding that the promotion of a book was not commercial speech and would receive the same level of First Amendment protection as the book itself.); *People v. Fogelson*, 577 P.2d 677 (Cal. 1978) (holding that an ordinance that purported to regulate a broad range of solicitation activities, including many forms of constitutionally protected solicitation, was unconstitutional). The court stated that "[a]lthough 'commercial speech' has not traditionally enjoyed constitutional protection, commercial solicitation or promotion of constitutionally protected written works is protected as an incident to the First Amendment value of the underlying speech or activity." *Id.* at 681 n.7. *See Kole, supra* note 113.

<sup>122</sup> *Lane*, 985 F. Supp. at 152.

advertising that promotes fully protected speech should be held to the same strict scrutiny standard as the speech it promotes.

It is understandable that people felt wronged by James Frey's fabrications. People purchased his book based on the assumption that the book told the true-life story of a man who made an astounding comeback. The revelation that Frey's memoir was not entirely true completely dashed readers' hopes of rising out of the depths of crack addiction to earn millions of dollars writing stories about their own triumphant recoveries. More damaging to the psyches of many readers than the fact that the story of James Frey is not as inspiring as they may have thought initially, however, may be the fact that they can no longer place their utmost trust in Oprah Winfrey, the woman who has guided their literary choices since the birth of her Book Club.

In reality, the damage done by James Frey and Random House was extremely minimal. Frey is not Jayson Blair.<sup>123</sup> And *A Million Little Pieces* is hardly the *New York Times*.<sup>124</sup> While this does not justify what James Frey did, it hints to the Pandora's Box that could be opened if future courts hold defendants like Frey and Random House liable. If courts are willing to hold that statements on a book cover or jacket constitute commercial speech, there seems to be no obvious reason why newspaper headlines and the statements on magazine covers will not be next.

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<sup>123</sup> Jayson Blair was a reporter for *The New York Times* who among other misdeeds lied to editors that he interviewed particular individuals in person for his stories when in actuality he never met them. See Jayson-Blair.com, <http://www.jayson-blair.com> (last visited Sept. 21, 2006).

<sup>124</sup> The James Frey scandal has prompted many individuals to urge publishers to verify the facts in books they intend to publish. Writer Lee Siegel, however, put the James Frey situation in perspective best. Siegel wrote, "Let us, then, put the question of written accuracy in perspective. Let us imagine for a moment what Western intellectual history would be if the awesome figure of The Fact-Checker had stood astride culture from (almost) the beginning." Lee Siegel, *Memorandum From: Mike in Fact-Checking To: Yahweh Re: One Small Question About 'Exodus'*, N.Y. TIMES, March 12, 2006, § 7, at 35. In his article, Siegel refers to the writings of some of history's most famous figures, including St. Luke, the authors of the Declaration of Independence and Marx, as he ridicules societal outrage over the lack of accuracy in publishing. *Id.*

*B. Distinguishing A Million Little Pieces from The Beardstown Ladies*

In the absence of a settlement, even if the courts followed *Keimer* and held that statements on a book cover or jacket qualify as commercial speech, the class actions involving *A Million Little Pieces* should have been distinguished from the Beardstown Ladies' cases on their facts. *The Beardstown Ladies' Common-Sense Investment Guide* was essentially a how-to book—how to profit through the use of an investment strategy. Buyers of *The Beardstown Ladies' Common-Sense Investment Guide* arguably purchased the book because they were seeking advice on how to make a wise investment. While not all of the books' readers inevitably relied on the books' advice, some of the readers must have followed the strategy outlined by the book.

In contrast, *A Million Little Pieces* was meant purely for the enjoyment of its readers (this of course leaves aside the motivation for making a monetary profit). Although many individuals purchased *A Million Little Pieces* based on the assumption that the book told James Frey's true-life story, the book, true or false, did not induce its readers' detrimental reliance, for that was not the book's intended purpose.

Some may argue that *A Million Little Pieces* did induce detrimental reliance because one of its purposes was to inspire individuals to seek rehabilitation. While certainly James Frey's story did inspire some to go to rehab and was actually used in some rehabilitation facilities, it seems that the inspirational purpose may be credited more to Oprah Winfrey than to James Frey and Random House. Of course, had it not been for Oprah Winfrey, *A Million Little Pieces* would not have been a bestseller, and, in turn, neither would it have been the subject of numerous class action suits. At the end of the day, however, it seems more likely that James Frey and Random House had two major purposes: to make a lot of money and to provide an entertaining read. Although James Frey and Random House did not stand up and shout, "our purpose is not to inspire individuals to go to rehab," they would have been foolish to refuse the benefits of Oprah's praise and proselytization, as ultimately that is what allowed them to make money in the first place. Therefore, even if

the courts were to follow the *Keimer* approach, James Frey and Random House should not have been liable for damages because *A Million Little Pieces* served its intended purposes: to make money and to provide readers with an enjoyable reading experience.

#### IV. CONCLUSION

Nobody likes to be duped. And, certainly, James Frey duped a number of people. The only other thing that can be certain when it comes to James Frey and *A Million Little Pieces* is that if the courts had chosen to make an example of Frey and Random House and had held them liable under consumer protection statutes by declaring statements on a book cover or jacket to constitute commercial speech, they would have chilled the First Amendment and potentially caused tremendous damage to the publishing industry and others.

Aside from these few certainties, the James Frey scandal was surrounded by a number of maybes. Maybe Frey should have been more honest. Maybe Frey actually told his story as he remembered it. Maybe Frey's memory was affected by his addiction and difficult recovery. Maybe Random House should have done a better job fact checking. Maybe Oprah should stick to sappy fiction when it comes to her book club. But maybe the most obvious maybe to be gleaned from the James Frey scandal is that maybe we shouldn't believe everything we read.