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Constitutional Law: Reputation versus Defamation: An Application of New York Times and Gertz to Private Speech

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CASENOTES

CONSTITUTIONAL LAW: REPUTATION VERSUS DEFAMATION: AN APPLICATION OF *New York Times* AND *Gertz* TO PRIVATE SPEECH—*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

I. INTRODUCTION

The publication of false statements that injure reputation was traditionally unprotected by the first amendment.[1] However, since the 1964 landmark decision *New York Times Co. v. Sullivan*,[2] the United States Supreme Court has held that defamatory statements are entitled to some constitutional protection. The Court's initial concern in *New York Times* that "debate on public issues should be uninhibited, robust, and wide-open"[3] has resulted in broad first amendment protection for defamatory statements involving some type of public issue.

Today, twenty years after its decision in *New York Times*, the United States Supreme Court has acted to limit the constitutional protection previously afforded to defendants in defamation actions. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[4] the Court decided whether defamatory statements of a private nature are entitled to first amendment protection. In concluding that such statements do not warrant constitutional protection, the Court has created an important precedent in defamation law.

This note will examine the approach that the United States Supreme Court has taken in defamation law. Through an analysis of Supreme Court decisions, including *Dun & Bradstreet*, the note will evaluate the Court's reaction to the inherent conflict between the plaintiff's reputation and the defendant's freedom of expression. Finally, this note will conclude that the Supreme Court should have applied an actual malice standard in *Dun & Bradstreet*.

II. FACTS AND HOLDING

The defendant, Dun & Bradstreet, Inc., is a credit reporting agency which falsely reported to five subscribers that the plaintiff,

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1. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
2. 376 U.S. 254 (1964).
3. *Id.* at 270.
4. 105 S. Ct. 2939 (1985).

Greenmoss Builders, Inc., was insolvent.[5] Greenmoss Builders learned of the false reports through its bank.[6] Greenmoss Builders immediately asked Dun & Bradstreet for a corrective notice and requested the names of the five subscribers who had received the false information.[7] Dun & Bradstreet initially denied these requests. However, eight days later, after determining that its initial report was indeed false, Dun & Bradstreet sent a corrective notice to the five subscribers.[8] In the corrective notice, Dun & Bradstreet stated that Greenmoss Builders had been mistaken for one of Greenmoss Builder's former employees who had filed for bankruptcy.[9] Dun & Bradstreet would not, however, reveal the names of the five subscribers.[10] Dissatisfied with the refusal, Greenmoss Builders repeated its request for the names of the subscribers, but again Dun & Bradstreet refused.[11]

Greenmoss Builders then brought a defamation action in the Vermont Superior Court for Washington County.[12] Seeking both compensatory and punitive damages, Plaintiff alleged that Defendant's false report had injured Plaintiff's reputation.[13] Following a jury trial, the superior court awarded Plaintiff $50,000 in compensatory or presumed damages and $300,000 in punitive damages.[14] Subsequently, Defendant moved for a new trial on the grounds of an improper jury instruction.[15] While the superior court granted Defendant a new trial, the Vermont Supreme Court reversed and denied Defendant a new trial.[16]

On writ of certiorari, a sharply divided United States Supreme Court affirmed the decision of the Vermont Supreme Court.[17] In attempting to define the possible first amendment protection of defamatory statements of a private nature, namely a credit report, the Supreme Court sought to maintain a balance between the competing interests of reputation and freedom of expression.[18] Thus, in *Dun &*

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5. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 2941 (1985).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 2941–42.
10. *Id.*
11. *Id.* at 2942.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* Defendant argued that the judge's instructions permitted the jury to award both presumed and punitive damages absent a showing of actual malice. *See supra* text accompanying note 32.
16. *Id.*
17. *Id.* Justice Powell wrote the decision with which Justices Rehnquist and O'Connor concurred. Chief Justice Burger and Justice White concurred with the holding but wrote separate opinions. Justices Brennan, Marshall, Blackmun, and Stevens dissented.
18. *Id.*

Bradstreet, the United States Supreme Court examined the possibility of extending first amendment protection to defamatory statements of a private nature.

III. BACKGROUND

The United States Supreme Court initially viewed defamation as defined by state law, as not being entitled to first amendment protection.[19] The Court has traditionally classified defamatory statements as words which are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth . . . ."[20] Any benefit derived from such words was outweighed by society's interest in order and morality.[21] Therefore, defamatory statements were not considered a form of freedom of expression and consequently were not protected under the first amendment.

A. New York Times Co. v. Sullivan—*The Beginning of Constitutional Protection*

In the 1964 landmark decision of *New York Times Co. v. Sullivan*,[22] the United States Supreme Court held that defamatory statements are entitled to limited constitutional protection.[23] The plaintiff, a public official in charge of supervising the Police Department of Montgomery, Alabama, alleged that the defendant, New York Times, had libeled him by printing an advertisement concerning the police department's alleged efforts to terrorize Martin Luther King and his followers.[24] Although the plaintiff's name did not appear in the advertisement, he indicated that the reference to police in general reflected on his reputation by virtue of his position as supervisor.[25]

The Supreme Court held that the libel law of Alabama was constitutionally deficient in that it failed to safeguard freedom of speech as required by the first amendment of the United States Constitution.[26] In reaching its conclusion, the Supreme Court made several important determinations. First, the Court viewed the advertisement as a criticism

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19. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

20. *Id.* at 572. "Defamation is made up of the twin torts of libel and slander—the one being, in general, written while the other in general is oral. . . . In either form, defamation is an invasion of the interest in reputation and good name." W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 771 (5th ed. 1984). *See also* RESTATEMENT (SECOND) OF TORTS § 559 (1977) ("A communication is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community . . . .").

21. *Chaplinsky*, 315 U.S. at 572.

22. 376 U.S. 254 (1964).

23. *Id.* at 283.

24. *Id.* at 256–58.

25. *Id.* at 258.

26. *Id.* at 264.

of official conduct rather than mere factual statements about an individual.[27] Second, since the advertisement concerned civil rights, a major public issue, the Court determined that protection of the advertisement was consistent with the "profound national commitment that . . . debate on public issues should be uninhibited, robust, and wide-open."[28] Third, the Court held that requiring a critic of official conduct to guarantee the truth of all statements would inevitably lead to self-censorship, which the first amendment is designed to deter.[29] Fourth, given the role of the New York Times in communicating information on matters of the highest public concern, the Court found that the advertisement was not merely a commercial one.[30] Finally, the Court established an actual malice standard.[31] This standard precludes recovery of damages by a public official for defamatory statements relating to his or her official conduct absent a showing of actual malice, that is, knowledge of falsity or reckless disregard of whether the statements were false.[32] Finding that there was no actual malice on the part of the New York Times Company,[33] the United States Supreme Court created a constitutional privilege for good faith criticism of government officials.

B. Constitutional Protection Extended

Following the *New York Times* decision, the United States Supreme Court extended first amendment protection of defamatory statements. In *Curtis Publishing Co. v. Butts*,[34] the Supreme Court held that the first amendment of the Constitution protects defamatory statements about public figures as well as public officials.[35] The Court found that just as in the case of a public official, a public figure may not recover presumed or punitive damages for defamatory statements of a

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27. *Id.* at 273.

28. *Id.* at 270–71. *See* Roth v. United States, 354 U.S. 476, 484 (1957) (freedom of expression was designed to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (debate on public issues may well include unpleasantly sharp attacks on government and public officials).

29. *New York Times*, 376 U.S. at 279.

30. *Id.* at 266. *See also* Valentine v. Chrestensen, 316 U.S. 52 (1942).

31. *New York Times*, 376 U.S. at 279–80.

32. *Id.*

33. *Id.* at 285–86.

34. 388 U.S. 130 (1967).

35. *Id.* at 150. The University of Georgia football coach brought a defamation action alleging that the defendant's magazine had falsely accused the plaintiff of conspiring to fix a football game. *Id.* at 135. The Supreme Court found that both the public's and the publisher's interests in the circulation of the magazine were the same as the interests found in *New York Times*. *Id.* at 154. Moreover, the plaintiff's position as university football coach commanded a "sufficient continuing public interest." *Id.* at 155.

public nature absent a showing of actual malice.[36]

While the constitutional protection of defamatory statements declared in *New York Times* and *Curtis Publishing* was premised upon both the public nature of the statement and the public status of the plaintiff, a later United States Supreme Court decision focused solely on the public nature of the statement. In *Rosenbloom v. Metromedia*,[37] the Supreme Court indicated that first amendment protection should extend to any defamatory statement which involves "matters of public or general concern."[38] The Court found that a matter of great public interest, such as the proper enforcement of criminal laws in deterring obscenity, cannot suddenly become less important because a private individual is involved.[39] The Supreme Court's interpretation of the first amendment's commitment to robust debate on public issues extends to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[40] The Supreme Court left open, however, the question of whether the first amendment protects defamatory statements outside the area of public or general interest, and whether it protects purely commercial communications made in the course of business.[41]

C. Gertz v. Robert Welch, Inc.—*Private Plaintiffs*

The United States Supreme Court's determination in *Rosenbloom* that all defamatory statements of a public nature are entitled to constitutional protection was put to a stringent test in *Gertz v. Robert Welch, Inc.*[42] Backing away from its earlier view in *Rosenbloom*, the Supreme Court found that in a defamation action brought by a private figure, there is no constitutional requirement that the plaintiff demonstrate actual malice on the part of the defendant in order to establish liability for actual damages.[43]

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36. *Id.* at 154–55.

37. 403 U.S. 29 (1971).

38. *Id.* at 44. Plaintiff, a distributor of nudist magazines, brought suit against Defendant, a radio station, which had broadcast several news reports of the plaintiff's arrest for possession of obscene literature. *Id.* at 32–33.

39. *Id.* at 43.

40. *Id.* at 43–44.

41. *Id.* at 44 n.12.

42. 418 U.S. 323 (1977). The plaintiff, Gertz, was a locally well-known lawyer who represented the family of a youth who was killed by a policeman. The defendant, the publisher of a John Birch Society magazine, falsely accused Gertz of having helped "frame" the policeman and of being a communist. *Id.* at 325.

43. *Id.* at 348. Instead, the Supreme Court allowed the use of a simple negligence standard which examined whether the content of a factual misstatement would warn a reasonably prudent editor or broadcaster of its defamatory potential. *Id.* In *Gertz*, the Supreme Court permitted states

In distinguishing between defamation actions brought by private individuals and public figures, the Supreme Court explained that the outcome in *New York Times* and *Curtis Publishing* was derived by weighing the competing interests of plaintiff's reputation against defendant's freedom of expression.[44] Applying the balancing of competing interests in *Gertz*, the Supreme Court recognized the strong and legitimate state interest in compensating private individuals for injury to their reputation.[45] This interest was considered more threatened in cases involving private individuals than in those dealing with public officials or public figures.[46] Consequently, the Supreme Court held that a private individual may establish liability for damages for actual loss on the basis of a negligence standard instead of having to meet the *New York Times* actual malice standard. However, a private individual, like public officials and public figures, may not recover presumed or punitive damages absent a showing of actual malice.[47] Permitting juries to award presumed and punitive damages absent a showing of actual malice, the Court reasoned, might result in the selective punishment of unpopular views.[48] The Supreme Court determined that the state's interest in allowing broader protection to private individuals is justified only to the extent that such protection compensates for actual injury.[49] Accordingly, since presumed damages are awarded without proof of actual loss while seeking to redress injury to an individual's reputation, and punitive damages seek to deter conduct which results in injury to reputation, both types of damages may "inhibit the vigorous exercise of First Amendment freedoms"[50] if awarded without a showing of actual malice.

Beginning with *New York Times* and continuing through *Gertz*, the United States Supreme Court has afforded constitutional protection to defamatory statements of a public nature. In doing so, the Court has

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to define the appropriate standard of liability in defamation actions brought by private individuals. *Id.* at 347. *See also* Note, *Private Lives and Public Concerns: The Decade Since* 'Gertz v. Robert Welch', 51 BROOKLYN L. REV. 425, 426–28 n.11 (1985).

44. *Gertz*, 418 U.S. at 343.

45. *Id.* at 348–49.

46. *Id.* at 345. The basis for this distinction was that private individuals are more vulnerable to defamatory statements because private individuals lack meaningful access to the media to counteract such statements. *Id.* at 344–45. Moreover, public officials and public figures generally have voluntarily exposed themselves to an increased risk of harm to their reputations by entering the public limelight. *Id.* at 345. Therefore, a private individual is deserving of greater protection than a public official or public figure.

47. *Id.* at 349.

48. *Id.* at 350.

49. *Id.*

50. *Id.* at 349. For a detailed explanation of presumed damages as relating to defamation actions, see RESTATEMENT OF TORTS § 621, comment a (1934).

attempted to balance the plaintiff's and state's interest in reputation with the defendant's interest in first amendment protection of freedom of expression. While the status of the plaintiff may affect the extent of protection from defamation, such protection is merely directed toward the right to compensation for actual injury. In order to obtain presumed and punitive damages, the plaintiff must prove that the defendant made such defamatory statements with actual malice. However, in pronouncing the *New York Times* and *Gertz* decisions, the Supreme Court allowed the possibility of permitting such damages in the absence of actual malice when the defamatory statements are not of a public nature, but rather involve matters of private concern. The Supreme Court's decision in *Dun & Bradstreet v. Greenmoss Builders*[51] addresses this issue.

IV. ANALYSIS

In *Dun & Bradstreet*, the United States Supreme Court decided whether first amendment protection previously afforded to defamation should extend to private speech by determining if the rule of *Gertz* was applicable to the facts of *Dun & Bradstreet*[52]. Specifically, the Supreme Court determined whether a false credit report issued by a credit reporting agency, which on its face involved no matter of great public interest, is entitled to constitutional protection.[53] A sharply divided Court concluded that the credit report was not entitled to first amendment protection.[54] Applying the balancing-of-interests standard established in *Gertz*, the Supreme Court found that a credit report is similar to other forms of private speech which have traditionally been deserving of less constitutional protection.[55] Furthermore, based upon the "content, form, and context"[56] of the credit report, it was truly speech of a private nature.[57] Therefore, the Supreme Court held that in a defamation action involving speech of a private nature, the state interest in providing effective remedies for defamation adequately supported recovery of both presumed and punitive damages without a showing of actual malice.[58]

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51. 105 S. Ct. 2939 (1985).

52. *Id.* at 2941.

53. *Id.* at 2944.

54. *Id.* at 2954. *See supra* note 17 for the Justices' positions.

55. *Dun & Bradstreet*, 105 S. Ct. at 2945–46.

56. *Id.* at 2947 (quoting Connick v. Myers, 461 U.S. 138, 147–48 (1983) (a public employee's private speech has limited constitutional protection the degree of which will be based on the content of the statement)).

57. *Id.*

58. *Id.* at 2948.

A. *Reputation Versus Freedom of Expression*

The United States Supreme Court, in *Dun & Bradstreet*, declared that the constitutional protection of defamatory statements found in previous landmark decisions, such as *New York Times* and *Gertz*, focused upon a balancing of the competing interests of reputation and freedom of expression.[59] Relying on this balance test, the Supreme Court found that the reason for allowing presumed and punitive damages only upon a showing of actual malice on the part of the defendant was to maintain an equilibrium between the plaintiff's and the state's interest in reputation and the defendant's interest in freedom of expression.[60] While the interest in reputation is often strong and legitimate,[61] the interest in freedom of expression concerning matters of public interest is at least equally important.[62] Speech on matters of public concern is at the core of first amendment values.[63]

In balancing reputation with freedom of expression, the Supreme Court determined that the interest of Plaintiff Greenmoss Builders, Inc. and the state of Vermont in maintaining Plaintiff's reputation was strong and legitimate.[64] On the other hand, the Supreme Court found that the interest of Defendant Dun & Bradstreet in freedom of expression was deserving of less constitutional protection.[65] Unlike previous defamation actions which involved statements of a public nature, the Supreme Court considered the credit report in *Dun & Bradstreet* speech of a merely private concern.[66] In terms of the reputation/freedom-of-expression balance, which has traditionally served as a guideline for the constitutionality of defamation, the Court in *Dun & Bradstreet* establishes that when the defamation at issue involves mere private speech, the balance tips in favor of reputation. Therefore the defendant issuing the defamatory private statement is entitled to less

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59. *Id.* at 2944 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974)).

60. *Id.* at 2945-46.

61. *See* Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (the protection of reputation reflects upon the essential dignity of every human being). *Id.*

62. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (speech on public issues occupies the highest rung of the hierarchy of first amendment values); First Nat'l Bank v. Bellotti, 435 U.S. 765, 776 (1978) (it is speech on public issues that is at the heart of first amendment protection).

63. *See* Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) (speech involving public interest is at the essence of self-government); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–8 (1970) (freedom of expression is essential as a means to self-realization, the discovery of truth, participation in government decision making, and as an overall check on government processes). *See also* A. MEIKLEJOHN, POLITICAL FREEDOM 8–9, 20–21, 25–27, 55 (1960); Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 617 (1982).

64. *Dun & Bradstreet*, 105 S. Ct. at 2944–45.

65. *Id.*

66. *Id.*

constitutional protection than when speech of a public nature is involved. Under these circumstances, presumed and punitive damages are properly recoverable without the plaintiff's proving actual malice.

By permitting presumed and punitive damages in *Dun & Bradstreet*, the United States Supreme Court has eliminated the actual malice standard from defamation actions involving private speech. However, a strong argument can be made that this rationale is inconsistent with the Supreme Court's rationale in *Gertz*.[67] The Court in *Gertz* specifically held that a jury may not award presumed or punitive damages absent a showing of actual malice.[68] Restrictions on such damages were deemed necessary to uphold the first amendment value of freedom of expression.[69] Moreover, in *Gertz*, the Supreme Court found that presumed and punitive damages were "wholly irrelevant" to the furtherance of any valid state interest in reputation since the state's interest was only valid to the extent of "actual injury."[70] The Court further found that *Gertz* did not apply to *Dun & Bradstreet* since *Gertz* involved public speech and *Dun & Bradstreet* involved private speech. Because the Supreme Court did not apply *Gertz* when deciding *Dun & Bradstreet*, it has resurrected the dangers addressed in *Gertz*, namely that permitting presumed and punitive damages would chill conduct involving speech.[71] This is most alarming in light of the fact that the state's interest in reputation in *Dun & Bradstreet* is identical to the one weighed in *Gertz*.[72] This fact alone makes the Supreme Court's decision not to apply *Gertz* questionable. Perhaps a correct reading of *Gertz* requires the use of the actual malice standard in all defamation actions, regardless of whether the statement is of a public or private nature.[73]

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67. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975); Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645 (1977); Comment, Gertz *and the Public Figure Doctrine Revisited*, 54 TUL. L. REV. 1053 (1980); Note, *Private Lives and Public Concerns: The Decade Since* Gertz v. Robert Welch, 51 BROOKLYN L. REV. 425 (1985).

68. *Gertz*, 418 U.S. at 350.

69. Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41 (1974).

70. *Gertz*, 418 U.S. at 350.

71. *Id. See also* Wiley & Frank, *Complications for Libel Defense Increased by Greenmoss Ruling*, Nat'l L.J., Oct. 7, 1985, at 35, col. 1.

72. *Dun & Bradstreet*, 105 S. Ct. at 2944.

73. *See* Utt, *Defamation and the Supreme Court—A Rare Plaintiff Victory or a New Trend Toward Allowance of Reputation Vindication?*, Equitable Relief, Nov., 1985, at 11, col. 3 (on file with University of Dayton Law Review).

B. *Public Speech/Private Speech Distinction*

1. Defining Private Speech

The majority in *Dun & Bradstreet* permitted the recovery of both presumed and punitive damages absent actual malice since the defamatory statements at issue were of a mere private concern.[74] Looking specifically to the credit report's "content, form, and context . . . as revealed by the whole record," the Supreme Court concluded for four reasons that the credit report was not speech of a public nature and thereby was entitled to less constitutional protection.[75] First, the credit report was regarded as speech solely in the individual interest of Defendant, a credit reporting agency, and the credit report's specific business audience.[76] Second, the report was clearly false and damaging to Plaintiff's business reputation.[77] Third, since the credit report was distributed to only five subscribers who were not able to disseminate the information, the report did not involve any "strong interest in the free flow of commercial information."[78] Fourth, the Supreme Court found that in regard to advertising, the credit report was unlikely to be deterred by state regulation since it was motivated solely by profit.[79] For these reasons the United States Supreme Court has limited the first amendment protection afforded to defamatory statements when those statements are classified as private speech.

2. Content Regulation

Not only is the rationale of the majority in *Dun & Bradstreet* inconsistent with the rationale of *Gertz*,[80] the majority in *Dun & Bradstreet* may also be criticized as prohibiting speech on the basis of its content. Traditionally, the United States Supreme Court has held that content-based regulations on speech must be narrowly tailored to ad-

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74. *Dun & Bradstreet*, 105 S. Ct. at 2947.

75. *Id. See also* Connick v. Myers, 461 U.S. 138, 147–48 (1983).

76. *Dun & Bradstreet*, 105 S. Ct. at 2947. *See also* Central Hudson Gas & Elec. v. Public Serv. Comm., 447 U.S. 557, 561 (1980); Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 455–56 (1978); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 38–39 (1979).

77. *Dun & Bradstreet*, 105 S. Ct. at 2947. *See also* Virginia State Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 771–72 (1976) (commercial speech which is wholly false or misleading warrants no constitutional protection); Konigsberg v. State Bar, 366 U.S. 36, 49 (1961); VA. CODE ANN. § 18.2-216 (1982).

78. *Dun & Bradstreet*, 105 S. Ct. at 2947 (quoting *Virginia State Bd.*, 425 U.S. at 764). *See generally* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

79. *Dun & Bradstreet*, 105 S. Ct. at 2947. *See also* Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898 (1971).

80. *See supra* text accompanying notes 67–70.

vance a legitimate government interest.[81] Since the regulation in *Dun & Bradstreet* limits protection of publishing the credit report because of its economic content, the question arises as to whether such regulation is narrowly tailored to further a legitimate government interest.

This regulation is not narrowly tailored since the Supreme Court has previously stated that presumed and punitive damages are too blunt a regulatory instrument.[82] The threat posed by this fear of a broadly based regulation is increased by eliminating the requirement of actual malice. Furthermore, in light of *Gertz*, the present regulation does not further a legitimate government interest since the state's interest in reputation is identical to the one weighed in *Gertz*.[83]

3. Credit Report as Private Speech

The majority's characterization of the false credit report as private speech is questionable since the characterization was apparently based on the economic content of the speech.[84] The United States Supreme Court has consistently rejected the argument that economic speech is entitled to less constitutional protection.[85] The dissenting Justices argued that a credit report may be regarded as speech of a public nature.[86] An announcement of bankruptcy is potentially of great concern to residents of the community where the allegedly bankrupt company is located. Additionally, bankruptcy involves various judicial mechanisms which are implemented by federal law and which inevitably require the fact of a bankruptcy to become a matter of public record.[87] Therefore, the credit report in *Dun & Bradstreet* might be characterized as public speech.

4. Traditional Protection of Economic Speech

Even if the credit report is private speech, its economic content allows the report to be classified as commercial speech which has traditionally received substantial first amendment protection.[88] The United States' economy is primarily based upon a free enterprise system.[89] In

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81. *See In re* Primus, 436 U.S. 412, 438 (1978); First Nat'l Bank v. Bellotti, 435 U.S. 765, 794–95 (1978); Broadrick v. Oklahoma, 413 U.S. 601, 612–13 (1973). *See also* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 853–58 (1970).

82. *See Gertz*, 418 U.S. at 350.

83. *Dun & Bradstreet*, 105 S. Ct. at 2945.

84. *Id.* at 2942.

85. *See, e.g.*, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984).

86. *Dun & Bradstreet*, 105 S. Ct. at 2961 (Brennan, J., dissenting).

87. *See* Cox Broadcasting Co. v. Cohn, 420 U.S. 469, 476–87, 495 (1975) (28 U.S.C.A. § 1257(2) establishes federal jurisdiction for bankruptcy cases).

88. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265 (1985); Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60 (1983); *In re* R.M.J., 455 U.S. 191 (1982).

89. *Virginia State Bd.*, 425 U.S. at 765. *See also* Maurer, *Common Law Defamation and*

order to further numerous private economic decisions, courts should regard the free flow of commercial information as indispensable.[90] The financial data contained within Dun & Bradstreet's credit report certainly falls within the national system of commercial communication. The credit report in *Dun & Bradstreet* should be entitled to substantial first amendment protection.

Recognizing the importance of commercial speech in a predominantly free enterprise economy, most states have created a qualified privilege for credit reports.[91] Based on the common law, this privilege requires a plaintiff to demonstrate actual malice on the part of the defendant.[92] The occasional harm to the plaintiff was considered to be slight in comparison to the benefit resulting to the free flow of commercial information.[93] The rationale supporting the common-law privilege for credit reports is reflected in the United States Supreme Court's opinion in *Gertz*, which indicates that permitting damages absent a showing of actual malice would in effect chill the press.[94] By eliminating the actual malice requirement from defamation actions involving speech of a private nature, the Supreme Court in *Dun & Bradstreet* has disregarded the traditional common law recognition that credit reporting is susceptible to chilling damages.

C. *The Effect of* Dun & Bradstreet

1. Vague Public Speech/Private Speech Distinction

The Supreme Court's standard for distinguishing public speech from private speech is that of "content, form, and context of the speech, as revealed by the whole record."[95] The factors included in this standard warrant the conclusion that future rulings on defamation actions involving private speech will be extremely fact-sensitive. While the standard used in *Dun & Bradstreet* will allow the Supreme Court flexibility in deciding future defamation actions on a case-by-case basis, it also has a devastating chilling effect on commercial communications.

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the Fair Credit Reporting Act, 72 GEO. L.J. 95, 96 (1983).

90. *Virginia State Bd.*, 425 U.S. at 765.

91. *See* Note, *Protecting the Subjects of Credit Reports*, 80 YALE L.J. 1035, 1050 nn.86–87 (1971).

92. Datacon, Inc. v. Dun & Bradstreet, 465 F. Supp. 706, 708 (N.D. Tex. 1979), *aff'd*, 601 F.2d 584 (5th Cir. 1979).

93. Maurer, *supra* note 89, at 101.

94. *Gertz*, 418 U.S. at 350.

95. *Connick*, 461 U.S. at 147–48 (1983). *See also* Jacobellis v. Ohio, 378 U.S. 184, 190 (1964) (first amendment freedom of expression requires a court to make an independent constitutional judgment on the facts of each case); Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (the Constitution enables a court to determine the meaning and application of the particular state-

By providing a vague standard for distinguishing between public speech and private speech, the Court managed to chill the numerous reports of commercial credit which are a vital component to a thriving credit-oriented, commercial economy.[96] Furthermore, the public speech/private speech distinction is arguably constitutionally void for vagueness.[97] The Supreme Court's vague judicial definition of the common-law crime of defamation is similar to other ambiguous standards which traditionally have been prohibited as void for vagueness.[98]

Additionally, by failing to provide an effective public speech/private speech distinction, the United States Supreme Court has left defamation law wide open for future plaintiffs' abuse as they attempt to classify the speech at issue as mere private speech. This unfortunate result poses two immediate problems which the Court must ultimately address. First, permitting presumed and punitive damages absent a showing of actual malice renews the fear expressed by the Court in *Gertz* of jury censorship of unpopular views.[99] Second, the vague standard set forth has a chilling effect on the defendant's ability to disseminate information to the public. Such an effect is contrary to first amendment values which the Supreme Court has traditionally attempted to safeguard in its previous landmark defamation decisions.[100]

2. The Hidden Factor: A Media/Non-Media Distinction

The vagueness of the public speech/private speech distinction in *Dun & Bradstreet* suggests that the underlying reason for the new standard is due to some other factor left unaddressed by the Supreme Court. The Court's previous defamation decisions declared that in addition to the nature of the speech at issue and the status of the plaintiff, another important consideration was the status of the defendant.[101] In *New York Times* the Supreme Court found that given the role of the defendant, New York Times Company, in communicating information to a large number of people, the defendant was clearly a speaker which the first amendment sought to protect.[102] In *Dun & Bradstreet*, the defendant, a credit reporting agency, was not involved in communicating information to a wide audience. In fact, the false credit report issued by the defendant was distributed to only five subscribers who under the

96. *See* Hood v. Dun & Bradstreet, 486 F.2d 25, 32 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1984) (discussing credit transactions and empirical studies).

97. R. LAFAVE & W. SCOTT, HANDBOOK ON CRIMINAL LAW § 11 (1972).

98. *Id.*

99. *Gertz*, 418 U.S. at 350.

100. *See, e.g., Gertz*, 418 U.S. at 343; *New York Times*, 376 U.S. at 254. *See generally* T. EMERSON, *supra* note 63, at 6–8.

101. *New York Times*, 376 U.S. at 266.

102. *Id.*

terms of the arrangement were not able to disseminate the credit information.[103] The effect of the Court's decision in *Dun & Bradstreet* was to deny constitutional protection to a non-media defendant, thus creating a media/nonmedia distinction.

Media defendants, such as The New York Times Company, have traditionally been afforded constitutional protection in order to preserve the vitality of first amendment values.[104] However, while allowing media defendants significant first amendment protection, the United States Supreme Court has never specifically declared that such protection is limited to media defendants.[105] Moreover, the Supreme Court has consistently rejected the idea that a defendant is entitled to greater constitutional protection by virtue of its role in the media.[106] However, the Supreme Court in *Dun & Bradstreet* has decided to afford less constitutional protection to a defendant by virtue of the defendant's position as a credit reporting agency.

Since both the status of the plaintiff—private corporation—and the nature of the speech—credit report—are arguably similar to those found in the Supreme Court's previous defamation decisions, it would seem that the Court has decided *Dun & Bradstreet* on the basis of a media/nonmedia defendant distinction. This distinction is alarming in that had a media defendant, such as The New York Times Company, issued false information about a corporation, the media defendant would have been entitled to first amendment protection.[107] Therefore, even if the Supreme Court decided *Dun & Bradstreet* on the basis of a media/nonmedia distinction, the decision would still violate the first amendment right of freedom of expression.

3. Alternative: Preservation of the Actual Malice Standard

The actual malice standard remains the most effective means of resolving defamation disputes because it prevents both plaintiffs' and defendants' abuse of defamation actions. On one hand, the actual malice standard limits plaintiffs to recovering presumed and punitive damages only upon a showing of actual malice, or in the case of private plaintiffs, to the extent of actual injury. On the other hand, because large presumed and punitive damages can be awarded upon a showing

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103. *Dun & Bradstreet*, 105 S. Ct. at 2947.

104. *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592–93 (1983); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974); Branzburg v. Hayes, 408 U.S. 665, 707 (1972).

105. Hutchinson v. Proxmire, 443 U.S. 111, 133–34 n.16 (1979) (The Court has never decided whether the *New York Times* standard can apply to a non-media defendant.).

106. *See Branzburg*, 408 U.S. at 683–84.

107. *See* Wilson, *supra* note 27, at 33, col. 3.

of actual malice, the standard deters defendants from speaking with impunity. In contrast, without the actual malice standard, defamation litigation will become plaintiff oriented. If there were no actual malice standard but rather a limit placed on the liability that could be incurred,[108] defamation litigation would become pro defendant by allowing the future defendant to calculate the cost versus the benefit of disseminating a malicious, false statement. Justice White's concurrence in *Dun & Bradstreet* raises the notion that the actual malice standard is detrimental to the essential dignity of the person in that an injured plaintiff may not recover any damages until a showing of actual malice.[109] But in *Gertz*, the Supreme Court specifically declared that a private plaintiff may establish liability on the basis of a negligence standard.[110] Therefore, a "private plaintiff" would be able to receive damages for actual loss and the opportunity to clear his or her name.[111] This makes the actual malice standard less oppressive than a limited liability standard since under limited liability a defendant could publish malicious and false information with a limited penalty for doing so. At the same time the *Gertz* actual malice standard avoids the dangerous consequences of defamation actions without such a standard.

D. Summation of Court's Present Position on Defamation Litigation: The Three-Prong Analysis

The United States Supreme Court's present position on defamation litigation may be properly characterized as a "three-prong" analysis. Up to and including *Dun and Bradstreet*, the Court has analyzed defamation actions in light of three distinct characteristics, namely, (1) the status of the plaintiff, i.e. public v. private; (2) the status of the defendant, i.e. media v. non-media; and (3) the nature of the speech at issue, i.e. public v. private.

The three-prong analysis may be best explained by emphasizing the three landmark defamation decisions. The first decision, *New York Times*, involved a public plaintiff, a media defendant, and public speech.[112] The Court adopted an actual malice standard, which requires a public plaintiff to demonstrate actual malice on the part of the defendant in order to recover any form of damages.[113] The second decision, *Gertz*, involved a private plaintiff, a media defendant, and public

108. *See Dun & Bradstreet*, 105 S. Ct. at 2952 (White, J., concurring).

109. *Id.*

110. *Gertz*, 418 U.S. at 343–47.

111. *Id.*

112. *New York Times*, 376 U.S. at 254. *See supra* note 24 and accompanying text.

113. *New York Times*, 376 U.S. at 279–80.

speech.[114] Here, a private plaintiff is able to establish liability on the basis of negligence, which enables the recovery of nominal damages in order to clear reputational harm.[115] However, by preserving the actual malice standard, a private plaintiff may not recover presumed and punitive damages absent a showing of actual malice.[116] But unlike the public plaintiff, the private plaintiff may still be compensated for actual injury.[117] The third decision, *Dun & Bradstreet*, involved a private plaintiff, a non-media defendant, and private speech.[118] In this situation the private plaintiff may recover presumed and punitive damages absent a showing of actual malice.[119] Thus, given the existence of three separate prongs of analysis, the public/private distinction within each prong, and the difference in outcome resulting among the three landmark defamation decisions, it is clear that the United States Supreme Court is applying a three-prong analysis in attempting to resolve defamation disputes.

In light of *Dun & Bradstreet*, the three-prong analysis is of paramount importance to litigants of future defamation actions. The obvious distinction between the first two decisions, *New York Times* and *Gertz*, and the most recent decision, *Dun & Bradstreet*, is the "speech" prong. Unlike the earlier two decisions, the speech at issue in *Dun & Bradstreet* is of a private nature.[120] However, closer scrutiny of the three prongs reveals another difference between the earlier two cases and *Dun & Bradstreet*, namely, Dun & Bradstreet, Inc., is a non-media defendant. Thus, in *Dun & Bradstreet*, all three prongs of the analysis are arguably of a private nature. Therefore, based upon a three-prong analysis of defamation actions, it is plausible to contend that the private nature of the three prongs in *Dun & Bradstreet* was the motivating force for the Court's allowance of presumed and punitive damages absent actual malice,[121] or in the alternative, the private or non-media nature of the defendant was significant enough to persuade the Court to characterize the speech at issue as merely private.[122]

V. CONCLUSION

The United States Supreme Court's elimination of the actual malice standard in *Dun & Bradstreet*, a defamation case involving speech

114. *Gertz*, 418 U.S. at 323. *See supra* note 42.
115. *See supra* note 43.
116. *Gertz*, 418 U.S. at 349–50.
117. *Id.*
118. *Dun & Bradstreet*, 105 S. Ct. at 2941.
119. *Id.* at 2948.
120. *Id.* at 2944–45.
121. *See supra* notes 101–107 and accompanying text.
122. *See supra* notes 84–87 and accompanying text.

of a private nature, creates an ill-conceived precedent. By establishing an extremely vague, fact-sensitive public speech/private speech distinction, the Supreme Court has in effect chilled communication in a predominantly commercial national economy. Furthermore, by apparently favoring media defendants over non-media defendants, the Court has inevitably hindered the free speech value of the first amendment. The best method for maintaining the delicate balance between reputation and freedom of expression is the actual malice standard. Had this standard been applied to the present action, Plaintiff, a private corporation, would still have been able to recover any economic damages it suffered and also Plaintiff could have cleared its reputation. The recovery of presumed and punitive damages would have been available only upon a showing of actual malice in order to protect Defendant's interest in freedom of expression. Unfortunately for future litigants of defamation actions, the United States Supreme Court has erroneously decided to abandon the actual malice standard in defamation actions involving speech on so-called private matters, a standard which uniquely preserves the vital interests of reputation and freedom of expression.

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