Western New England Law Review

Volume 1 *1 (1978-1979)*
Issue 4

Article 4

1-1-1979

CORPORATE PLAINTIFFS IN LIBEL ACTIONS: ROSENBLOOM RESURRECTED?

John P. James

CORPORATE PLAINTIFFS IN LIBEL ACTIONS: *ROSENBLOOM* RESURRECTED?

Corporations, like natural persons, have always desired redress from unwarranted assaults on their good names. Maintenance of a good reputation is a necessary component of a corporation's potential for profit, since customers' decisions are often influenced by their perceptions of the corporation's image. The vast amounts of money expended on corporate advertising indicate the importance which corporations attach to maintaining an exemplary public profile. The approach taken by one federal district court decision involving a corporate libel action, however, handicaps many small corporations in defending their reputations against unwarranted assaults. *Martin Marietta Corp. v. Evening Star Newspaper*[1] resurrected the *Rosenbloom v. Metromedia, Inc.*[2] issue-based test for determining the applicability of the actual malice standard to a corporate plaintiff.

The *Rosenbloom* test, totally rejected by the United States Supreme Court as it applies to natural persons, demands that a plaintiff in a libel action prove that the defendant published the alleged libelous statement with actual malice whenever matters of general or public interest are involved. Because the *Rosenbloom* test ignores the status of the defamed plaintiff as either public or private figure, the *Martin Marietta* decision imposes the almost insurmountable actual malice standard on corporate plaintiffs based solely on their corporate status and the presence of a public controversy. Important factors such as the corporation's size, purpose, or activities do not enter into the decision. This judicial approach to the defamation of corporations, if extensively followed, could damage the continued vitality of many such entities.

The common law presumed damages in actions for libel from the fact of publication.[3] Courts applied this rule to individuals and

1. 417 F. Supp. 947 (D.D.C. 1976).

2. 403 U.S. 29 (1971). The status oriented public figure standard established by Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), supposedly superseded the issue-based standard of *Rosenbloom*. The court in *Martin Marietta*, however, distinguished *Gertz* as applying only to private persons. It found the *Rosenbloom* test best suited to simultaneously protect both first amendment considerations and corporate reputations. *See* 417 F. Supp. at 956. *See also* Comment, *In Search of the Corporate Private Figure: Defamation of the Corporation*, 6 HOFSTRA L. REV. 339, 358-60 (1978).

3. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 262 (1964).

corporations alike. In *New York Times Co. v. Sullivan*,[4] however, the United States Supreme Court held that under the first amendment, public officials cannot recover damages in a libel action unless the defendant's publication was found to have been made with actual malice.[5] Actual malice was defined as publication "with knowledge that it was false or with reckless disregard of whether it was false or not."[6] The Court required that actual malice be proved with "convincing clarity."[7]

Since *New York Times*, the Court has had occasion to expand and further clarify the situations in which a plaintiff must prove actual malice before recovery will be permitted. One of the most significant extensions was the inclusion of "public figures"[8] within the structures of the standard.[9] This comment seeks to determine if the opinion in *Martin Marietta*, to the extent it relies on the *Rosenbloom* test, comports with the Supreme Court decisions after *New York Times*. The difficulties encountered by the Court in fashioning and applying a proper constitutional test for libel actions will be analyzed as they particularly relate to corporations. Two other

---

4. 376 U.S. 254 (1964).

5. *Id.* at 279-80.

6. *Id.*

7. *Id.* at 285-86. In St. Amant v. Thompson, 390 U.S. 727 (1968), the Supreme Court refined its definition of actual malice by explaining: "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731-32.

8. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). The Court in *Butts* defined public figures as those persons who are "intimately involved in the resolution of important public questions or [who], by reason of their fame, shape events in areas of concern to society at large." *Id.* at 164 (Warren, C.J., concurring).

9. *New York Times Co.* announced that a person who held a position in the governmental structure (a public official) was required to prove publication with actual malice as a prerequisite to recovery in a libel action against a mass media defendant. 376 U.S. 254. In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), the actual malice standard was extended to those persons classified as public figures. In *Rosenbloom*, a plurality of the Court determined that the protection of the *New York Times* rule should apply to any statement concerning "a matter . . . of public or general interest," whether involving a private or public individual. 403 U.S. at 43. Three years later, however, in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court returned to a test based on the status of the plaintiff as public official or public figure. Finally, in Time, Inc. v. Firestone, 424 U.S. 448 (1976), the Court's most recent decision concerning the actual malice standard, an effort was made to more clearly define the standards a plaintiff must meet in order to qualify as a public figure. The Court held that to be considered a public figure requires the person to be prominent in the affairs of society or exert influence over public controversies. *Id.* at 453. The Court's success in its attempted clarification is the subject of present debate.

federal district court cases[10] dealing with the application of the actual malice standard to a corporate plaintiff will be compared with the *Martin Marietta* opinion. Finally, the comment proposes criteria to be used in a court's determination of the proper classification of the corporate plaintiff.

In *Martin Marietta*, an article in the Washington Star reported that the Martin Marietta Corporation, a defense contractor, had given a "stag" party for a soon to be married "top Air Force official" at which one-third of the forty to fifty guests were Department of Defense personnel.[11] The article stated that one of two prostitutes attending the party was paid $3,000 "by a Martin Marietta representative."[12] The article claimed that one of the prostitutes "reportedly swung naked from the antlers of an animal head mounted on one of the lodge's walls."[13] Martin Marietta instituted a libel action against the newspaper seeking $5,000,000 in compensatory damages, $10,000,000 in punitive damages, and an injunction requiring the Star to print a retraction admitting the falsity of the story.[14] In finding for the defendant, the district court held that the contents of the article involved matters of "public or general interest"[15] or, alternatively, that Martin Marietta was a "public figure"[16] for the purposes of the issue involved because it had thrust itself into a matter of public controversy.[17] On either

---

10. Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977); Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977).

11. 417 F. Supp. at 950.

12. *Id.*

13. *Id.*

14. *Id.* at 949. These figures were not based on any lost revenues, but were instead based purely on what counsel considered to be just compensation for the harm done.

15. *Id.* at 954. The use of the public or general interest standard was based on *Rosenbloom*. The Supreme Court held there that publications which concerned matters of general interest were constitutionally protected unless the plaintiff could prove publication with actual malice. 403 U.S. 29.

The district court relied on the public or general interest standard despite the Supreme Court's decision in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), repudiating *Rosenbloom* without qualification. The court justified its application of the *Rosenbloom* test on the grounds that the *Gertz* decision was directed solely at individuals and that, "[T]he values considered important enough to merit accommodation with interests protected by the first amendment are associated solely with natural persons, and that corporations, while legal persons for some purposes, possess none of the attributes the Court sought to protect." 417 F. Supp. at 955.

16. *Id.* at 956. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

17. 417 F. Supp. at 957. Martin Marietta had voluntarily decided to compete for defense contracts and to entertain persons associated with the military to enhance its chances of obtaining defense contracts. By so doing, Martin Marietta had voluntarily

basis, Martin Marietta was required to prove actual malice as a prerequisite to recovery. The plaintiff, as a matter of law, was unable to meet this burden.[18]

The *Martin Marietta* decision is not significant because of the result reached by the court. The actual malice standard clearly applies under the public figure approach mandated for natural persons. The decision's importance arises from its reliance, albeit by way of an alternative holding, on the issue-based *Rosenbloom* test. The *Martin Marietta* court's assumption that the issue-based test adequately protects all corporation bears close examination. Because libel cases require courts to balance the plaintiff's right to protect its reputation against the competing right of a defendant to speak freely, the law of libel necessarily embraces the first amendment.

Before the Supreme Court's decision in *New York Times*,[19] libelous publications were considered to be a "class of speech wholly unprotected by the First Amendment. . . ."[20] In *New York Times*, however, the Court recognized the competing interests at issue in libel actions. The Court held that insofar as public officials are concerned, the balance must be struck in favor of free speech and press.[21] The United States Supreme Court applied the same rationale in *Curtis Publishing Co. v. Butts*,[22] holding that public figures must prove publication with actual malice. In *Rosenbloom v. Metromedia, Inc.*,[23] the plurality decision of the Court went still further, by holding that the actual malice standard applied to defamations of those involved in matters of public or general interest.[24]

More recently, however, one federal district court has ruled "that the *Rosenbloom* plurality failed, for constitutional purposes at least, to allow the states sufficient latitude to protect private individuals from libel."[25] In *Gertz v. Robert Welch, Inc.*,[26] the United

---

thrust itself into the ongoing controversy regarding improper procurement of defense work. The act of thrusting oneself into a matter of public controversy was one of the bases for classification as a public figure enunciated in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). *See also* note 35 *infra*.

18. 417 F. Supp. at 949.
19. 376 U.S. 254 (1964).
20. Gertz v. Robert Welch, Inc., 418 U.S. 323, 370 (1974).
21. 376 U.S. at 268. *See also* note 8 *supra*.
22. 388 U.S. 130 (1967). *See also* notes 8-9 *supra*.
23. 403 U.S. 29 (1971).
24. *Id.* at 44. *See also* note 8 *supra*.
25. Wolston v. Reader's Digest Ass'n, Inc., 429 F. Supp. 167, 172 (D.D.C. 1977).
26. 418 U.S. 323 (1974).

States Supreme Court ruled that the Constitution does not require application of the actual malice standard when a private individual commences a libel suit. It held that the states' legitimate interest in protecting the reputations of private individuals is strong enough to justify permitting such persons to recover damages from publishers or broadcasters under any standard short of liability without fault.[27] The Court in *Time Inc. v. Firestone*,[28] neither specifically expanded nor contracted the scope of the standard, but instead attempted a further refinement of the ambit of the public figure classification. In determining the status of the plaintiff, the Court looked to whether the defamed party voluntarily thrust itself into a controversy which itself constitutes an area of legitimate public interest.[29]

In *Gertz*, the Supreme Court sought to achieve a more "proper accommodation between the law of defamation and the freedom of speech and press"[30] when a private individual was the object of a libelous statement. The *Gertz* Court felt that the plurality test proposed in *Rosenbloom*,[31] which made no differentiation between public and private individuals, did not adequately consider the state's legitimate interest in protecting private individuals

---

27. *Id.* at 347.

28. 424 U.S. 448 (1976).

29. *Id.* at 453. Although the *Gertz-Firestone* formula potentially takes the subject matter of the libellous statement into account, its primary focus remains on the private versus public character of the plaintiff. This totally opposes the *Rosenbloom* test as advocated by the court in *Martin Marietta*. *Rosenbloom* fails to differentiate between the public and private plaintiff, but imposes a malice standard solely on the basis of the newsworthiness of the statement.

30. 418 U.S. at 325. The case has been extensively noted. *See* Comment, *Defamation—Corporation Held a "Person" Subject to the* Gertz *Test for Determining Liability in a Defamation Case*, 46 FORDHAM L. REV. 1287, 1291 n.42 (1977), listing discussions of the opinion including: Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777 (1975); Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976); Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199 (1976); Comment, *Reply and Retraction in Actions Against the Press for Defamation: The Effect of* Tornillo *and* Gertz, 43 FORDHAM L. REV. 223 (1974); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 139 (1974). *Gertz* also constituted the first attempt by the Supreme Court to establish guidelines for lower courts as to the determination of a public figure. For a discussion of these guidelines, see Comment, *Defamation—Corporation Held a "Person" Subject to the* Gertz *Test for Determining Liability in a Defamation Case, supra* at 1292-93.

31. 403 U.S. at 43. *See* text accompanying note 24 *supra*.

from the harm inflicted upon them by libelous publications.[32] To accommodate these goals, the *Rosenbloom* test of the public or general interest was abandoned.[33] In its place, the *Gertz* Court substituted a standard which made the status of the plaintiff, as either public official or public figure,[34] the determinative factor.[35] Under the new test, the subject matter or issue of the publication was not decisive.

Several factors prompted the Court to abandon the *Rosenbloom* test. First, the Court recognized that "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."[36] As a result of their lack of "effective opportunities for rebuttal,"[37] private individuals are more vulnerable to in-

---

32. 418 U.S. at 341. The Court quoted Justice Stewart, concurring in Rosenblatt v. Baer, 383 U.S. 75 (1966), to emphasize that the individual's interest in the protection of his good name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Id.* at 92. *See also* text accompanying note 27 *supra*.

33. 418 U.S. at 346.

34. The Court defined those subject to public figure status as "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures. . . ." *Id.* at 342.

35. *Id.* at 343. In his opinion for the majority, Justice Powell stated that the status as public figure or public official was dependent upon the following:

> That designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes in all contexts. More commonly, an individual voluntarily injects himself . . . for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Id. at 351.

36. *Id.* at 344 (footnote omitted). The remedy of self-help was recognized as a function of access to available opportunities to refute the libelous statement and thereby undo or minimize any harm done to reputation. The Court, however, stated in a footnote:

> Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.

Id. at 344 n.9. This language indicates the Court's astute pragmatism in recognizing the difficulty in erasing the harm caused by a libelous statement. The effect is similar to that upon a jury when it hears or sees evidence; no matter how strong the admonition to disregard, the fact remains that the evidence has been seen and is seldom forgotten.

37. *Id.* at 344.

jury and, therefore, require greater protection. "[T]he state interest in protecting them is correspondingly greater."[38]

Second, the Court determined that public officials and public figures "must accept certain necessary consequences"[39] of their involvement in public affairs or matters placing them in the public spotlight. In both instances, "they invite attention and comment."[40] The Court considered that public officials and public figures had voluntarily exposed themselves to the increased risks of defamatory falsehoods concerning them. It found no similar justification for such an assumption with respect to private individuals since they had "not accepted public office or assumed an 'influential role in ordering society.' "[41] Therefore, the Court reasoned that not only are private individuals more vulnerable to injury, but also they are more deserving of recovery.[42]

Third, the Court feared that the *Rosenbloom* test would force "state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not—to determine, in the words of Mr. Justice Marshall, 'what information is relevant to self-government.' "[43] The Court "doubt[ed] the wisdom of committing this task to the conscience of judges."[44]

Finally, the Supreme Court determined that the *Rosenbloom* test inadequately served "both of the competing values at stake"[45] in a libel action. It considered, on the one hand, that a private individual would face the difficult task of proving actual malice if

---

38. *Id.*

39. *Id.*

40. *Id.* at 345.

41. *Id.* (citation omitted). Although the quotation refers to "private individual," the specific rationales deemed important have application to corporations as well. Nothing in the quoted language limits its relevance to the corporate plaintiff except for the Court's phraseology, namely, "private individual." Yet it seems clear that this title is capable of broad meaning.

The broad scope of *Gertz* was emphasized by the Court when it stated:

> Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.

418 U.S. at 343-44.

42. The Court stated, "He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood." *Id.* at 345.

43. 418 U.S. at 346 (quoting Marshall, J., dissenting in *Rosenbloom*).

44. *Id.*

45. *Id. See also* note 21 *supra* and accompanying text.

matters of public or general interest were concerned. This result would ignore the greater state interest in protecting private individuals than public persons. On the other hand, the Court reasoned that the careful broadcaster or publisher who happened to make an error in a situation where matters of public or general interest were not involved could be held liable in damages. Such a result could unduly inhibit vigorous, aggressive journalism. As a consequence of these factors, the Court in *Gertz* held that so long as liability is not imposed without fault, states could determine their own standard of liability for libelous publications injurious to private individuals.[46]

The *Rosenbloom* test has been replaced by a more equitable standard that emphasizes the public figure-private individual distinction. The premises which served as a foundation for the Court's holding in *Gertz* have similar utility when applied to corporations.[47] Continued reliance on the principles of *Rosenbloom* in libel

---

46. *Id.* at 347.

47. Despite the Court's failure to address the issue of corporate applicability, lower courts, both state and federal, had applied the actual malice standard to corporations in a significant number of pre-*Gertz* cases. Where a corporation was found to be involved in activities closely related to a governmental function, it was held to be a public official. Doctors Convalescent Center v. East Shore Newspapers, 104 Ill. App. 2d 271, 244 N.E.2d 373 (1968) (nursing home which was licensed by state department of health and some of whose patients were mentally retarded children placed in the home as wards of the state held to be public official).

Another group of cases held that the actual malice standard applied because the involved corporation was a public figure. *See, e.g.*, Gospel Spreading Church v. Johnson Publishing Co., 454 F.2d 1050 (D.C. Cir. 1971) (church criticized for its real estate investments, held to be a public figure); Bavarian Motor Works, Ltd. v. Manchester, 61 Misc. 2d 309, 305 N.Y.S.2d 593 (Sup. Ct. 1969) (court held that the status as a public figure or not was the determinative factor); *see also* Stevens, *Private Enterprise and Public Reputation: Defamation and the Corporate Plaintiff*, 12 AM. BUS. L.J. 281, 285 (1975).

More often, however, the courts required a showing of actual malice because the corporation was found to be involved in matters of public or general interest. *See, e.g.*, Robinson v. American Broadcasting Cos., 441 F.2d 1396 (6th Cir. 1971); Bel Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970); United Medical Laboratories, Inc. v. Columbia Broadcasting Sys., Inc., 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969); Lewis v. Reader's Digest Ass'n, 366 F. Supp. 154 (D. Mont. 1973); Steak Bit of Westbury, Inc. v. Newsday, Inc., 70 Misc. 2d 437, 334 N.Y.S.2d 324 (Sup. Ct. 1972). Many of the cases which applied the public or general interest rule to corporations, *e.g.*, Beatty v. Ellings, 285 Minn. 293, 173 N.W.2d 12 (1968), *cert. denied*, 398 U.S. 904 (1970); Kruteck v. Schimmel, 27 App. Div. 2d 837, 278 N.Y.S.2d 25 (1967), predated *Rosenbloom* where that rule was first announced. This apparently resulted from the lower court's erroneous interpretation of language in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), which seemed to indicate that matters of public interest had to be involved before a person could be found to be a public figure. The Court in *Butts* defined public figures as those who are "intimately

actions commenced by a corporate plaintiff would leave many small corporations weaponless against libel merely because the subject matter of the libel was in the public or general interest.

Martin Marietta marked the first post-*Gertz* judicial encounter with the issue of the proper standard to apply to corporate plaintiffs in libel actions.[48] According to the court, the actual malice standard applied because the alleged libelous article published by the Washington Star concerned matters of public or general interest.[49] This approach rendered the public figure standard as refined in *Gertz* inapplicable to corporations.[50]

The values which the district court considered important to the *Gertz* decision, namely "the essential dignity and worth of every human being" and "the protection of private personality,"[51] were held to be solely attributable to natural persons.[52] The *Mar-*

---

involved in the resolution of important public questions or [who], by reason of their fame, shape events in areas of concern to society at large." *Id.* at 164. *See also* note 8 *supra*. The reliance of lower courts on the public or general interest rule is significant because it indicates that the scope of the application of the actual malice standard was not at all clear after *Butts*. Furthermore, the large number of decisions applying the public or general interest rule may have added credence and support to the Court's adoption of that rule in *Rosenbloom*. For a good discussion of the standards applied by the courts and a wealth of citations for the period 1967 to 1974, see Stevens, *Private Enterprise and Public Reputation: Defamation and the Corporate Plaintiff*, *supra* at 283-86.

The courts had little difficulty applying the actual malice standard to corporations in the pre-*Gertz* era. Although the bases upon which the decisions were based often differed, the results most often were the same; the corporation involved was required to prove publication with actual malice as a prerequisite to recovery.

48. As Judge Schwargen noted in Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977), "The instant motion requires the Court to determine the First Amendment standard applicable where the plaintiff is a corporation rather than a natural person. Only one reported decision appears to have considered the issue. *Martin Marietta* . . . ." *Id.* at 819. The difficulty of the issue was also recognized by the court in Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977), when it stated, "In attempting to apply this 'public figure' analysis to corporations as opposed to natural persons, courts have differed in their method of analysis." *Id.* at 1347.

49. 417 F. Supp. at 955. *See also* note 15 *supra* and accompanying text.

50. *Id.* The decision requiring proof of publication with actual malice was also based on the alternative ground that Martin Marietta was a public figure. *See* text accompanying note 16 *supra* and notes 82-83 *infra*. The court stated, "[i]f, however, higher courts, which have yet to consider the problem, should find it necessary to fit corporate plaintiffs into this ill-fitting mold, this court concludes that Martin Marietta is a public figure for the purposes of the instant action and, consequently, must prove actual malice." *Id.* at 956. Thus, the standard applied to Martin Marietta did not vary the result. *Id.*

51. 418 U.S. at 341.

52. As the court stated:

It is quite clear from the Court's [*Gertz*] opinion, however, that the values

tin Marietta court relied on the premise that a corporation, regardless of its size, nature, or activities, possessed no personal life.[53] According to Judge Flannery, the traditional distinction "between corporate and human plaintiffs . . . limit[s] corporate recovery to actual damages in the form of lost profits."[54] Unlike an action for li-

---

considered important enough to merit accommodation with interests protected by the first amendment are associated solely with natural persons, and that corporations, while legal persons for some purposes, possess none of the attributes the Court sought to protect.

417 F. Supp. at 955.

53. As a final justification for rejecting the *Gertz* standard in the case of the corporate libel plaintiff, the court cited the recently decided case of Time, Inc. v. Firestone, 424 U.S. 448 (1976). 417 F. Supp. at 955-56. *Firestone* constituted a refinement of the public figure classification by requiring that a party voluntarily thrust himself into a controversy and that the controversy itself be of legitimate public interest. *See* note 28-29 *supra* and accompanying text. The *Martin Marietta* court concluded that, since "no event in the life of a corporation involves such sacred and personal events as marriage and divorce," the highly personal controversies the court sought to protect in *Gertz* could never be associated with corporate activity. 417 F. Supp. at 955-56.

54. 417 F. Supp. at 955. On the other hand, natural persons have always been allowed recovery of special and punitive damages for harm to their personal reputations and damage to their psyches.

At common law, a corporation traditionally had a right to protect its good name from libelous attack. *See, e.g.*, Trenton Mut. Life and Fire Ins. Co. v. Perrine, 23 N.J.L. 402 (Sup. Ct. 1852); Shoe and Leather Bank v. Thompson, 18 Abb. Pr. 413 (N.Y. Sup. Ct. 1865). Although a corporation had no personal reputation and could not be subject to mental anguish, as a natural person could (*see, e.g.*, Diplomat Elec. Inc. v. Westinghouse Supply Co., 378 F.2d 377 (5th Cir. 1967); Golden Palace, Inc. v. NBC, Inc., 386 F. Supp. 107 (D.D.C. 1974); Eason Publication v. Atlanta Gazette, 141 Ga. App. 321, 233 S.E.2d 232 (1977)), it did have prestige and standing in the business community which could be injured by a defamatory attack. *E.g.*, Pullman Standard Car Mfg. Co. v. Local 2928, United Steel Workers, 152 F.2d 493 (7th Cir. 1945), Digiorgio Fruit Corp. v. AFL-CIO, 215 Cal. App. 2d 560, 30 Cal. Rptr. 350 (1963). It has been said, "language which casts an aspersion upon [a corporation's] honesty, credit, efficiency or other business character may be actionable." W. PROSSER, LAW OF TORTS § 111, at 745 (4th ed. 1971); *see also* RESTATEMENT (SECOND) TORTS, § 561(1) (1977). Further, corporations were permitted to allege that defamations aimed at them were libelous *per se*. This meant an action was maintainable without proof of special damages if the charge was defamatory and if it injuriously and directly affected the credibility of the corporation thereby causing pecuniary loss. *E.g.*, Brayton v. Crowell Publishing Co., 205 F.2d 644 (2d Cir. 1953). *See also* Pullman Standard Car Mfg. Co. v. Local 2928, United Steel Workers, 152 F.2d 493 (7th Cir. 1945), where the court stated, "[in] determining what constitutes libel per se, the courts have often asked: Will the defamatory matter injure the credit, property, or business of the corporation?" *Id.* at 496. The court added that a matter attacking a person's reputation for honesty and veracity is also libelous *per se* and the same standard should be applied to the corporate plaintiff. *Id. But see* Note, *Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation*, 75 COLUM. L. REV. 963, 983 (1975). Courts have agreed that the only manifestation of the injury suffered by a corporation is a loss of business and the commensurate decrease in income. *E.g.*, Digiorgio Fruit Corp. v. AFL-CIO, 215 Cal.

bel brought by a private individual, it concluded that a corporate libel action was devoid of matters " 'basic [to] our constitutional system,' and need not force the first amendment to yield as far as it would be [*sic*] in a private libel action."[55]

Judge Flannery reasoned, however, that it would be unjust to apply the malice standard to any libel action brought by a corporate plaintiff.[56] Instead, he believed that the *Rosenbloom* standard of requiring proof of actual malice "where issues of legitimate public concern are discussed,"[57] afforded corporations sufficient protection from libelous attacks. Thus, he held that the issue-based standard of *Rosenbloom* properly balanced the interests of first amendment rights and the protection of the corporate reputation in libel actions instituted by a corporation.[58]

Although the *Martin Marietta* opinion is well reasoned in some respects, it fails in several crucial aspects to confront the full impact of *Gertz* and the practicalities of corporate existence. *Gertz* recognized the protection of the reputation of private individuals as a legitimate interest of the state.[59] Similarly, a state desires to protect the reputations of "corporate individuals" whom it has fostered, because corporations occupy an important position in the structure of modern society.

Although a corporation cannot suffer mental anguish,[60] it can suffer harm to its business reputation in the community as a consequence of a libel. The ability of a corporation to function within a community rests largely on its ability to develop goodwill within that community. Furthermore, the economic damage suffered by a corporation grows in significance in light of the fact that corporations have only an economic component. Economic damage to a corporation threatens its continued existence.

App. 2d 560, 30 Cal. Rptr. 350 (1963). *Cf.* Stov v. Chase Manhattan Bank, 407 F.2d 1318 (3d Cir. 1969) (bank wrongfully dishonored one of plaintiff's checks which resulted in harm to plaintiff's reputation and subsequent loss of business, court awarded damages equaling two years' lost profits).

55. 417 F. Supp. at 955. Justice Stewart, concurring in Rosenblatt v. Baer, 383 U.S. 75, 95 (1966), had observed that one of the basic goals of our constitutional system is to protect individuals' reputations. *See also* note 32 and text accompanying note 29 *supra*.

56. 417 F. Supp. at 956.

57. *Id. See also* text accompanying notes 23-24 *supra*.

58. The court stated, "[t]his approach grants some deference to the values underlying corporate libel actions grounded in state law, while at the same time resulting in only a minor encroachment on the first amendment, which was designed primarily to defend the market place of ideas." *Id.*

59. *See* text accompanying note 27 *supra*.

60. *See* note 54 *supra*.

Corporate libel actions are justified by the need for a corporate recovery. Although a libelous statement aimed at a corporation often reflects directly on the corporate officers who may also have individual causes of action against the libellant, individual recovery does not compensate the corporation. A libelous attack on the corporation would result in economic losses to that corporation. These losses would probably be sustained by the stockholders who would remain uncompensated through actions brough by individuals. Because the stockholders have no individual cause of action, their only recovery is through a corporate libel suit. The nexus between individual reputations and corporate defamation militates toward similar treatment for corporations and natural persons. This nexus is especially strong when the defamatory statement is directed against the mom and pop-type corporation. In this situation, the public is likely to equate the corporate reputation of Mom & Pop, Inc. with that of mom and pop. Consequently, a judgment against the corporation is, in effect, a judgment against those who direct the company. In this respect, the consequences of libel against a corporation can approximate those suffered by an individual more than the *Martin Marietta* court recognized.

Another similarity between corporations and individuals concerns the ability to adequately reply to the alleged libel. Many small corporations lack the financial ability to purchase space in the local newspaper or time on the community radio station to refute the alleged defamatory remarks directed at them. Others are without sufficient "news glamour" necessary to convince the local editor or station manager that they deserve equal time or space to retort. All in all, this type of corporation is subject to practical limitations equivalent to those facing individuals.

Of course, Martin Marietta Corporation is not a Mom and Pop enterprise. No attempt is made here to equate the two. Neither is the point advanced that Martin Marietta should be allowed to freely wield a corporate libel suit under a rule designed to protect Mom and Pop. However, the vast differences between the two enterprises cannot be given proper effect by the issue-based *Rosenbloom* test. The shortcomings of the *Rosenbloom* test were recognized by the court in *Trans World Accounts v. Associated Press*,[61] which openly criticized the *Rosenbloom* test as adopted by *Martin Marietta* and applied the status-based test of *Gertz* and *Firestone*.

---

61. 425 F. Supp. 814 (N.D. Cal. 1977).

In *Trans World Accounts*, the alleged libel arose out of an erroneous report published by the Associated Press (AP). The article mistakenly indicated that Trans World was being charged with four types of unfair and deceptive trade practices by the Federal Trade Commission (FTC).[62] In fact, only two types of illegal activity were asserted by the FTC.[63] In granting the defendant's motion for summary judgment, the court held that Trans World was a public figure as a result of having been "drawn into a particular public controversy."[64]

In basing its holding on the *Gertz* public figure rationale, the *Trans World* court explicitly disagreed[65] with the reasoning employed in *Martin Marietta*. In its view, the public or general interest test had been rejected by the Supreme Court without qualification.[66] More important, however, it found a basic flaw in the corporate-individual dichotomy relied upon in *Martin Marietta*. The court reasoned that although the libel cases decided by the Supreme Court had been premised on the idea of protecting the rights of individuals, "it is also true that the line between the interests of natural persons and corporations is frequently fuzzy and ill-defined."[67] The various legal considerations which lead to decisions to incorporate often result in organizations being called corporations while they actually behave as either a partnership or sole proprietorship. For this reason, the court found that for the purposes of applying the first amendment to libel actions "the distinction between corporation and individuals is one without a difference."[68]

---

62. *Id.* at 817. Specifically, the article indicated that the FTC was charging Trans World with (1) the use of collection forms in the form of urgent telegraphic messages, (2) the use of forms falsely stating that legal action was about to be instituted, (3) the use of letters threatening debtors with damage to their credit ratings unless bills were promptly paid, and (4) falsely holding themselves out as bona fide collection agencies when, in fact, the companies were only mailing services engaged in sending out form letters to debtors.

63. *Id.* The FTC noted that charges three and four were not being directed at Trans World.

64. The court stated:

> [Trans World] cannot be said to have become a public figure by having achieved "pervasive fame or notoriety." Nor can it be said that it "voluntarily inject[ed] [it]self . . . into a particular public controversy." But *Gertz* recognizes that a person may become a public figure for a limited range of issues by having been "drawn into a particular public controversy."

Id. at 819-20. *See also* note 35 *supra*.

65. 425 F. Supp. at 819.

66. *Id.*

67. *Id.*

68. *Id.*

The *Rosenbloom* test might suffice if all corporate entities were as large as General Motors or IBM. The *Trans World* court noted, however, that there are thousands of businesses incorporated in the United States, all varying in size and notoriety. To revert to a test that failed to appreciate such differences would allow libel cases to turn on the *ad hoc* determinations regarding which items were matters of general or public interest.[69] *Gertz* condemned this methodology.

The bankruptcy of the *Rosenbloom* test was also recognized by the court in *Reliance Insurance Co. v. Barron's*.[70] In that case, an article appearing in Barron's[71] analyzed the plaintiff's proposed public stock offering and the accounting incident to it. Barron's reported that the purpose of the public offering was to serve the plaintiff's parent organization.[72] The article implied that the parent "was employing certain 'creative accounting' concepts and engaging in improprieties, bad business judgment and breach of fiduciary duties, all of which led to its decision to market" the stock issue.[73] While the court found the article to be libelous, it granted Barron's motion for summary judgment, holding that as a result of the public stock offering, Reliance had voluntarily thrust itself into the public arena thereby becoming a public figure.[74] Since the plaintiff could not prove publication with actual malice, it could not recover.[75]

---

69. *See* text accompanying note 43 *supra*.

70. 442 F. Supp. 1341 (S.D.N.Y. 1977).

71. Barron's is a highly regarded publication in financial circles. The publication of the article in Barron's was likely to be widely read and relied upon by both brokerage houses and the investing public. *Id.* at 1345.

72. The financial organization of the plaintiff was stated to be as follows: "Plaintiff Reliance Insurance Company . . . is engaged in the property and casualty insurance and life insurance businesses. Of the common stock of Insurance, 96.9% is owned by Reliance Financial Services Corporation . . . , the common stock of which in turn is wholly owned by Reliance Group Incorporated . . . ." *Id.* at 1344.

73. *Id.* at 1345.

74. *Id.* at 1348. The court explained the basis of its holding as follows:

> Filing a preliminary or red herring prospectus, a matter of public record, is theoretically *not* an offer to sell securities, which can be made only when the registration becomes final. But by doing so, an issuer thrusts itself into the public eye, indicating by its action that it intends to have the registration become complete and that the preliminary prospectus will mature into a final one, with resultant distribution of securities to the public.

Id. n.1.

75. The holding in *Reliance* vividly illustrates the difficult burden imposed upon a plaintiff when the actual malice standard applies. The inequity of enlarging the scope of such an onerous rule was one of the determinative factors in the *Gertz* decision. To argue, as the *Martin Marietta* court does, that a plaintiff should be sub-

Although the court did not explicitly disagree with the reasoning of *Martin Marietta*, it did note that courts have differed in their analyses.[76] The *Reliance* court held: "[T]he standard for determining whether or not a person or *corporate* entity is a public figure is set forth in *Gertz v. Robert Welch, Inc.*. . . ."[77] The court concluded that the reasoning of *Gertz* should apply to corporations as well as to natural persons. Implicit in this statement is a rejection of the reasoning in *Martin Marietta*.

The approach taken by the *Reliance* and *Trans World* courts regarding corporate plaintiffs in libel actions has much to commend it. Focusing on the status of the plaintiff can spare a Mom and Pop corporation the rigors of proving actual malice on the part of a libellant. At the same time, the status test of *Gertz* by no means lets corporations off easily. Indeed, the plaintiffs in both *Reliance* and *Trans World* had to prove actual malice and failed. The status-based test allows a court to consider the quality and quantity of corporate activity. The issue-based test, on the other hand, restricts a court to evaluating the subject matter of the libelous statement.

Further support for applying the status-based test to all plaintiffs, individual and corporate, can be found by examining the refinements added to the test in recent years. The United States Supreme Court has expressly recognized, in *Time, Inc. v. Firestone*,[78] that a party can be classified as a public figure by having placed itself in a legitimate public controversy.[79] This avenue for

---

jected to the public or general interest standard with its concomitant greater likelihood of application of the actual malice rule, merely because the party happens to be a corporation, is both unfair and illogical.

76. *Id.* at 1347. The judge cited only the *Martin Marietta* and *Trans World* cases and briefly discussed those courts' holdings. He also stated, "It appeared preferable on this motion for summary judgment to follow *Trans World Accounts*, and consider whether Insurance is a public figure in accordance with the terms set forth in *Gertz*. See also, *Time, Inc. v. Firestone*, ..." *Id.* at 1347-48.

77. *Id.* at 1347 (emphasis added).

78. 424 U.S. 448 (1976).

79. 424 U.S. at 453. In contrast, the dissent reasoned:

> Having thus rejected the appropriateness of judicial inquiry into 'the legitimacy of interest in a particular event or subject,' *Gertz* obviously did not intend to sanction any such inquiry by its use of the term 'public controversy.' Yet that is precisely how I understood the Court's opinion to interpret *Gertz*.

Id. at 488 (Marshall, J., dissenting) (footnote omitted) (quoting Rosenbloom, 403 U.S. at 78, 79). Justice Marshall's concern about the Court's seeming retreat to a *Rosenbloom* type analysis has also been expressed by other commentators. *See, e.g.*, McKenna, *Time, Inc. v. Firestone: More Than A New Public Figure Standard?*, 20 ST. LOUIS U.L.J. 625 (1976); Comment, *Time, Inc. v. Firestone: The Supreme Court's*

becoming a public figure acknowledges that the subject matter of the libelous statement is germane to the resolution of a libel action. This refinement of the *Gertz* approach limits the impact of the subject matter of the statement to the extent that the subject matter affects the plaintiff's status. In *Reliance*, for example, the resolution of plaintiff's status as a public figure partially turned on the fact that the libelous statement concerned a matter of legitimate public concern, a stock offering.[80]

Rosenbloom fails to adequately serve "the competing values at stake" in a corporate libel action. *Gertz* properly recognizes those values, namely the protection of the private reputation and freedom of speech and press.[81] If, as *Martin Marietta* commands, proof of actual malice is required of corporate plaintiffs solely because matters of public or general interest are involved, the corporation's fate may have been determined upon incorporation.

Countless small or obscure corporations invite little attention and comment, just as few individuals seek notoriety. To the small and relatively obscure corporation which often does not possess the financial reserves to recover from the harm following a libelous publication, such libel may literally threaten its future existence. Under the flexible status-based test outlined in *Gertz*, a deserving corporation has a chance of vindicating its good name.

All corporations are not the same merely because they constitute the same basic type of legal entity. Since substantive differences exist among corporations, similarity in treatment is not justifiable, at least in the libel context. The *Martin Marietta* court ignored these substantive differences when it applied the public or general interest standard. By its holding, the court grouped all corporate plaintiffs together and imposed the inflexible and unreasonably broad subject matter standard upon them. A far more equitable result would have been obtained if the court had based its conclusion solely on the flexible rationale of *Gertz*, a standard which forces courts to individualize rather than generalize.

Restrictive New Libel Ruling, 14 SAN DIEGO L. REV. 435 (1976); Note, *Time, Inc. v. Firestone: Is* Rosenbloom *Really Dead?*, 31 U. MIAMI L. REV. 216 (1976).

80. *See* Comment, *In Search of the Corporate Private Figure: Defamation of the Corporation*, 6 HOFSTRA L. REV. 339 (1977). This comment concludes that the corporate plaintiff is subject to the same judicial result regardless of whether the *Gertz* or the *Rosenbloom* test is used.

81. *See* text accompanying notes 45-46 *supra*. *See also* Comment, *supra* note 80, at 358-59. The author, however, concludes that the *Gertz* balance is "insufficiently sensitive to first amendment considerations when applied to corporate plaintiffs." *Id.* at 358.

Corporations can be classified as public or private figures in nearly the same manner as individuals are presently classified. The Court in *Gertz* defined the group subject to public figure status as "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures. . . ."[82] It further divided that category into two groups: public figures for all purposes and public figures for limited circumstances.[83] This approach serves corporate plaintiffs as well as natural persons by providing a standard which judges can apply with a certain degree of consistency. There are admittedly some differences between corporations and natural persons, the most significant being that a corporation is purely a legal and intangible entity. It may be helpful, therefore, to identify certain factors which a court could consider in applying the public figure classification to corporations.

In certain instances, "the large corporation may merit classification as a 'public figure' simply on the basis of its impact on the lives of its own employees. . . ."[84] Moreover, such large corporations have such a pervasive effect on most aspects of our lives that they could be considered public figures under any circumstance.[85]

Other factors which have been suggested to aid judges in their determination whether a corporation is a public figure are annual sales of the corporation, total assets held, nature of the business the corporation is involved in, extent to which public exposure has been sought or avoided, and pervasiveness of the corporation's influence on society.[86] Also involved are the questions whether the corporation is stock or nonstock and whether the stock is publicly or privately held. The amount of public interest in the activities of the corporation would also be relevant, but by no means should it be the sole factor as commanded by *Rosenbloom*. The task of applying the public figure standards of *Gertz* to corporations is not beyond the capacity of judges or juries.

---

82. 418 U.S. at 342.

83. *Id.* at 343. *See also* note 35 *supra*.

84. Note, *Libel and the Corporate Plaintiff*, 69 COLUM. L. REV. 1496, 1507 (1969).

85. *See generally* Curtis Publishing Co. v. Butts, 388 U.S. 130, 193 (1967) (Warren, C.J., concurring).

86. Note, *Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation*, 75 COLUM. L. REV. 963, 990 (1975).

While recognizing that the question of corporate defamation and product disparagement may often involve similar and interrelated legal inquiries, due to the nature of the court decision under analysis, the scope of this note is purposely limited to a discussion of the field of corporate libel.

Application of these criteria will result in many corporations being classified as public figures. On the other hand, a significant number of corporations, particularly smaller ones, would not qualify under any of these considerations. Absent a sound basis warranting classification as public figures, corporations should be allowed to protect their reputations free of the burdens mandated by the actual malice standard.

John P. James