In Search of the Corporate Private Figure: Defamation of the Corporation

Nessa E. Moll
NOTES

IN SEARCH OF THE CORPORATE PRIVATE FIGURE: DEFAMATION OF THE CORPORATION

Corporations are considered persons for certain legal purposes. Nevertheless, they are regarded as having no reputation in the personal sense. A corporation's interest in protecting its good name, often referred to as its goodwill, is solely economic. A corporation cannot experience pain and suffering, and it has no private life to shield. Thus, a defamation action brought by a corporation may be maintained only for language which, as variously defined by state law, casts aspersion on the corporation's honesty, credit, efficiency, or other business character.

Under the United States Constitution, state law may not impose liability on the press for defamation without fault. Thus,


3. A corporation's goodwill is commonly equated with its reputation. More accurately, goodwill is a property right, an element of value, such as an advantage or a benefit that is the consequence of, inter alia, a reputation for skill, affluence, or punctuality. Metropolitan Bank v. St. Louis Dispatch Co., 149 U.S. 436, 446 (1893); Piggly Wiggly Corp. v. Saunders, 1 F.2d 572, 590 (W.D. Tenn. 1924).


5. W. PROSSER, supra note 2, at 745 & nn.11-13. E.g., New York law provides "[t]hat a corporation may maintain an action for libel where the publication assails its management, credit or business, or holds it up to ridicule, contempt or disgrace." Hornell Broadcasting Corp. v. A.C. Nielsen Co., 8 App. Div. 2d 60, 63, 185 N.Y.S.2d 945, 949 (4th Dep't 1959), aff'd and appeal dismissed on other grounds, 8 N.Y.2d 767, 168 N.E.2d 115, 201 N.Y.S.2d 781 (1960) (two cases were consolidated). See generally W. FLETCHER, supra note 1, § 4255, at 75 nn.10 & 11, 76 n.12 (rev. perm. ed. 1976).

6. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). The communications media, which include broadcasters as well as publishers, are referred to herein as "the press." Prior to the Court's decision in Gertz, state libel law often provided recovery for libel per se, that is, strict liability for publication of any untruthful statement, regardless of the goodwill or reasonable care of the publisher, or the damage to the plaintiff. Id. at 346. The Court reasoned in Gertz that strict liability,
courts afford recovery for injury to reputation (or goodwill) not merely because a false defamatory statement was published, but because it was published without requisite care. The Supreme Court, in *Gertz v. Robert Welch, Inc.*, set out the plaintiff's burden, and discussed this issue with regard to natural persons, not corporations.

The burden for an individual to prove lack of requisite care in a defamation action is prescribed by the holding in *Gertz* with reference to a constitutionally mandated privilege for the press. This privilege protects the press from defamation actions based on negligence which are brought by certain plaintiffs. *Gertz* employed a status-based analysis, distinguishing between plaintiffs who are "public figures" and those who are "private figures." *Gertz* designated plaintiffs who have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood" as public figures; these plaintiffs are required to prove "actual malice." On the other hand, where plaintiff is a private figure, recovery is based upon a less demanding burden, usually negligence.

Until recently, cases applying the *Gertz* status-based standard to corporate plaintiffs have done so without distinguishing between

---

8. *See* text accompanying notes 26-39 *infra*.
11. Id. at 345.
14. *See* note 6 *supra* and accompanying text.
natural persons and corporations.\textsuperscript{15} Two recent decisions\textsuperscript{16} have recognized this difference, but have reached conflicting results regarding its significance. A third decision\textsuperscript{17} chose between the two methods of analysis.

In \textit{Martin Marietta Corp. v. Evening Star Newspaper Co.},\textsuperscript{18} the District Court for the District of Columbia held that \textit{Gertz} applies only to natural persons and that the burden for corporations is to be determined solely by the nature of the subject matter in controversy.\textsuperscript{19} \textit{Martin Marietta} required all corporations, regardless of their nature or activities, to prove actual malice when the defendant's publication concerned a matter of public or general interest.

Six months later, in \textit{Trans World Accounts, Inc. v. Associated Press},\textsuperscript{20} the District Court for the Northern District of California rejected the issue-based analysis of \textit{Martin Marietta}.\textsuperscript{21} \textit{Trans World Accounts} held that the public-figure/private-figure analysis of \textit{Gertz} is appropriate for corporations as well as for individuals since "for purposes of applying [the constitutionally mandated privilege] to defamation claims, the distinction between corporations and individuals is one without a difference."\textsuperscript{22} This holding determined a corporation's burden by focusing exclusively on the \textit{Gertz} status-based analysis.

In September 1977, the District Court for the Southern District of New York followed \textit{Trans World Accounts}. In \textit{Reliance Insurance Co. v. Barron's},\textsuperscript{23} the court decided, without further elaboration, that the status-based standard of \textit{Gertz} "appeared preferable."\textsuperscript{24}

As a result of these decisions, courts facing this issue will have

\textsuperscript{19} See id. at 955-56. The court followed the plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). See text accompanying notes 40-44 infra.
\textsuperscript{20} 425 F. Supp. 814 (N.D. Cal. 1977).
\textsuperscript{21} See id. at 819.
\textsuperscript{22} Id.
\textsuperscript{24} Id., slip op. at 11.
to choose between these conflicting methods of analysis or formulate a new rule. The issue-based standard of Martin Marietta, which would treat all corporations alike, is supported by the first amendment and favors the public's interest in receiving full information. The status-based standard of Trans World Accounts and Reliance designates corporations as public or private figures on the basis of their actions. This approach distinguishes among corporations on equitable grounds in an attempt to reconcile first amendment interests and traditional common law tort concepts embodied in state law. This note analyzes the three decisions and examines an alternative rule to indicate that first amendment considerations provide the preferable approach to the applicable burden for a corporate plaintiff in a defamation action.

**Evolution of the Gertz-Firestone Standard Regarding Defamation of Natural Persons**

In Gertz v. Robert Welch, Inc.,26 the United States Supreme Court sought to reconcile a constitutionally protected area for the press with traditional tort law concepts regarding defamation. This protection was first established in New York Times Co. v. Sullivan,27 which held that the first amendment provides the press with a qualified privilege against libel actions brought by public officials for criticism of official conduct.28 The Court in Gertz established this privilege in recognition that the governed should be able to criticize their governors29 and that "debate on public issues should be uninhibited, robust . . . , wide-open,"30 and free of unnecessary self-censorship by the press. Since publishers could not predict what a particular state jury would find to be negligently published, and because liability was often imposed without fault,31 the threat of liability could result in an inhibited and self-censored press. As Justice Powell stated in a later decision: "Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liber-

---

28. See id. at 283.
29. Id. at 272.
30. Id. at 270.
31. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the common law of Alabama which imposed strict liability for defamatory statements concerning public officials was held to violate the United States Constitution.
ties.” To provide the press with necessary “breathing space,” the Court ruled that a newspaper could not be held liable for a false story about the official conduct of a public official unless the plaintiff could prove with convincing clarity that publication was made with “actual malice.”

Actual malice, the standard for culpable behavior or, alternatively, the plaintiff’s burden, became a term of art. Actual malice is present when a statement is made with knowledge of its falsity or with reckless disregard of the truth. The Supreme Court later defined reckless disregard of the truth as publication with actual and serious doubts concerning the story’s accuracy.

A similarly demanding burden was extended to libel suits brought by public figures in Curtis Publishing Co. v. Butts and its companion case, Associated Press v. Walker, thus further expanding the area of press protection. In Butts and Walker the Court found both plaintiffs to be public figures because they “commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able ‘to expose through discussion the falsehood and fallacies’ of the defamatory statements.”

In Rosenbloom v. Metromedia, Inc., the plurality opinion abandoned a status-based determination of liability. Justice Brennan’s plurality decision extended New York Times protection for free and robust debate of public issues to publications concerning matters of general or public interest, regardless of the plaintiff’s status. Extending the rationale of New York Times, Justice Brennan stated: “The public’s primary interest is in the event; the public focus is on the conduct of the participant and the content, ef-

---

34. Id. at 279-80.
35. Id. at 280.
38. 388 U.S. 130 (1967).
39. Id. at 155 (citing Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).
40. 403 U.S. 29 (1971).
41. See id. at 52.
fect, and significance of the conduct, not the participant's prior anonymity or notoriety.”

Five opinions were written by the eight participating Justices in *Rosenbloom*, none commanding more than three votes. Read together, these *Rosenbloom* opinions illustrate the prevailing tension between conflicting values in the prior cases: a democracy's need for full and uninhibited debate of important public issues versus traditional tort law concepts which permit the individual to recover when harmed by the acts of another.

Recognizing the uneasy coexistence of these values, the Court in *Gertz* rejected the issue-based privilege of *Rosenbloom* because it extended *New York Times* protection to suits brought by private individuals. The Court concluded “that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.” By limiting the *New York Times* privilege to public officials and public figures, *Gertz* preserved the individual's right to protect his private life and good name from negligent defamation.

The distinction between public and private figures drawn by the Court in *Gertz* was based on the conclusion that public figures voluntarily expose themselves to increased risk of injury and have greater access to the media for purposes of rebuttal. Therefore, *New York Times* malice is the appropriate standard. In contrast, the private figure, who has not relinquished his interest in the protection of his own good name, has “a more compelling call on the courts,” thus justifying the less demanding negligence standard.

The Court in *Gertz* established a third status classification, the limited public figure:

In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects

---

42. Id. at 43 (footnote omitted).

43. It is generally overlooked that plaintiff Rosenbloom was doing business as a partnership which distributed literature alleged to be obscene. Id. at 34 n.7. Only Justice Brennan's plurality opinion reflected this business aspect of plaintiff's role in the suit and addressed the public's interest in corporate activities. See id. at 42; note 114 infra.


45. See id. at 341.

46. Id. at 344-45.

47. Id. at 345.
himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.48

Although Gertz established a two-tiered test to distinguish between public and private figures, that is, voluntary exposure to increased risk of defamation (consent) and access to the media for purposes of rebuttal (self-protection), the limited public figure is not subject to these same criteria. Thus, an individual who would be a private figure under the dual criteria of consent and self-protection may nonetheless be required to meet the actual malice standard as a limited public figure because he has been drawn into a particular public controversy.

In Time, Inc. v. Firestone,49 application of the Gertz formula resulted in denial of New York Times protection to a defamatory publication which had incorrectly reported details of a wealthy socialite’s divorce proceedings. The Court held that plaintiff Firestone had not voluntarily shed the protection afforded by her private figure status. Lapsing into issue-based analysis, the Court held that plaintiff’s personal divorce action was not a subject of general interest.50 Thus, although Gertz imposed “a variable standard of fault by exclusive focus on the public or private character of the plaintiff,”51 Firestone implied that Rosenbloom’s issue-based analysis might be relevant as well.52

DEFAMATION OF THE CORPORATION

Martin Marietta Corp. v. Evening Star Newspaper Co.53 was the first decision to offer a thoughtful analysis of the corporation’s place in contemporary case law regarding defamation.54 This case

48. Id. at 351.
50. See id. at 454.
involved one in a series of articles on the attempts by defense contractors to secure government contracts. The article reported that the corporate plaintiff had hosted a stag party for an Air Force official at its privately leased hunting lodge, that one-third of the forty to fifty guests were Defense Department personnel, and that two prostitutes had been hired for the weekend. The defense contractor brought suit for compensatory and punitive damages, and for injunctive relief requiring a retraction. District Judge Flannery granted the defendant's motion for summary judgment, holding that the issue-based standard of *Rosenbloom v. Metromedia, Inc.*, 55 applies to a corporation which, by its nature, does not possess the personal interests protected by *Gertz*. 56 *Martin Marietta* rejected the rationale of *Gertz*:

It is quite clear from the Court's opinion [in *Gertz*], however, that the 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. Justice Powell's detailed explanation of the personal values deserving deference from the first amendment leaves no doubt that corporations must be excluded from the *Gertz* holding. 57

The court in *Martin Marietta* also noted that although the *Gertz* public figure standards were designed to ascertain whether a person has lost claim to his private life, the corporation, regardless of its activities, never had a private life to lose. 58

*Martin Marietta* held that the *Rosenbloom* issue-based standard is appropriate for corporations not only because of their lack

---

55. 403 U.S. 29 (1971).
57. *Id.* at 955.
58. See *id.*
of private interests, but also because the Rosenbloom rule requires the actual malice standard only when issues of legitimate public concern are discussed. Mere incorporation does not automatically impose the higher burden in all situations. Accordingly, the court found that the publication at issue concerned matters of legitimate public interest and that the actual malice standard applied.

Judge Flannery provided an alternative rationale for imposing the actual malice standard in this case. Noting that higher courts might attempt to fit corporate plaintiffs into the ill-fitting mold of the Gertz formula, he concluded that even under that unsatisfactory mode of analysis, Martin Marietta Corporation was a public figure for the purpose of affording New York Times protection to the press. Accordingly, Judge Flannery reshaped the Gertz status-based formula as expanded by Time, Inc. v. Firestone, applying it to corporate plaintiffs. Under this alternative rationale, the actual malice burden is imposed only upon a finding that the corporation is a public figure and that the alleged defamatory statement involved a public issue.

Trans World Accounts, Inc. v. Associated Press, decided after Martin Marietta, held that the corporate plaintiff in that action had to prove New York Times malice, but reached that result by applying the status-based formula of Gertz. Trans World Accounts, Inc., a debt collection agency, charged the defendant with incorrectly reporting a Federal Trade Commission release which named the plaintiff, along with others, as subject to several Commission enforcement efforts. The defendant represented plaintiff as subject to all, rather than some, enforcement efforts. Judge Schwarzer rejected the holding of Martin Marietta, stating that where small single proprietorships as well as large business enterprises may be corporations, "the line between the interests of natural persons and corporations is frequently fuzzy and ill-defined. . . . [F]or purposes of applying the First Amendment to defamation

59. See id. at 956.
60. No higher court has decided whether the standards set forth in Gertz for determining whether a libel plaintiff is a public figure must be applied to a corporation.
65. See id. at 819-21.
claims, the distinction between corporations and individuals is one without a difference.” Judge Schwarzer held, therefore, that the Gertz status-based analysis was appropriate.

The court in Trans World Accounts stated that although the plaintiff neither had achieved pervasive fame or notoriety nor had voluntarily injected itself into a particular public controversy, it was nonetheless a public figure under Gertz and Firestone because “participants in some litigation may be legitimate ‘public figures,’ either generally or for the limited purpose of that litigation.” The court then found plaintiff to be a limited public figure, explaining:

Trans World may not have been a “public figure” until the proposed complaint issued but when it did it was clearly drawn into a particular controversy having its origin in Trans World’s own conduct and activities and thereby became a public figure for the limited range of issues relating to the FTC’s complaint. The defendants’ publication, derived from the press release issued by the FTC as a part of its enforcement effort, reported on alleged practices of Trans World which the FTC considered to create a sufficient risk of harm to the public to warrant issuance of a complaint and public notice.

The court reasoned that plaintiff’s voluntary practices and activities were in an area subject to governmental regulation, and because plaintiff had been named in the public notice of a proposed complaint, plaintiff had been drawn into a public controversy.

Trans World Accounts holds that New York Times protection will be extended to the press in suits based on false and defamatory statements concerning regulated activity. By focusing on governmental regulation and publicity, the court established a principle that may confer limited public figure status on a wide range of business plaintiffs, including single proprietors and partnerships. The rule established in Martin Marietta is narrower because it applies issue-based analysis only to corporations.

Since Trans World Accounts, Inc., “may not have been a public figure until the proposed complaint issued,” the basis of plaintiff’s public figure status was solely the government’s decision to publicize its role as a participant in a specific enforcement proceed-

66. Id. at 819.
67. Id. at 820 (quoting Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976)).
68. Id. at 821 (footnote omitted).
69. See id. at 820.
70. Id. at 821.
Thus, the nature of the litigation conferred public figure status and the court, sub silentio, applied Rosenbloom's issue-based analysis under the guise of Gertz's status-based language. Although Trans World Accounts held that the Gertz status-based analysis should determine the appropriate standard of care for corporations, this decision did not apply the Gertz dual criteria of consent and self-protection to determine plaintiff's status. Reliance Insurance Co. v. Barron's, on the other hand, applied the Gertz criteria to the corporate plaintiff. In Reliance defendant, a well-known financial magazine, published an article criticizing plaintiff's preliminary prospectus, a document that had provided information to the public in connection with a proposed offering of preferred stock. The article charged that the plaintiff had employed "creative accounting" concepts, that the plaintiff had engaged in improper business practices, and that the proceeds of the proposed sale would flow upstream from plaintiff to its parent corporation to the detriment of plaintiff, its policyholders, and its minority shareholders.

The district court held that the article was "clearly defamatory" and concluded without discussion that it was preferable to "follow Trans World Accounts, and consider whether [plaintiff] is a public figure in accordance with the terms set forth in Gertz." Judge Brieant found plaintiff in Reliance to be "a public figure with respect to issues involving its offering of securities to the public" because it had voluntarily thrust itself into a public controversy by offering a new issue of stock and by filing a registration statement with the Securities and Exchange Commission. The court also found plaintiff to be "a public figure in the general sense" based on the fact that the Commission's enforcement effort is the publicity which attends the issuance of proposed complaints. Id.

Similarly, in Time, Inc. v. Firestone, 424 U.S. 448 (1976), the plaintiff's status was determined by an inquiry into the term "public controversy" despite the Court's specific rejection of issue-based analysis in Gertz. Id. at 487 (Marshall, J., dissenting). See 5 Hofstra L. Rev. 635, 646 (1977).


Id., slip op. at 4.

Id. Plaintiff's common stock was 96.9% owned by Reliance Financial Services Corp., the common stock of which was wholly owned by Reliance Group, Inc. Id. at 2.

Id. at 5.

Id. at 11.

Id. at 11-12.

See id. at 11-12 & n.1.

Id. at 12.
on its role in society. The district court noted that plaintiff was a large publicly held corporation whose shares were traded on the New York Stock Exchange, that plaintiff was a member of the closely regulated insurance industry, and that there was considerable public interest in plaintiff because of its parent corporation's prior financial activities. The designation of Reliance Insurance Co. as a public figure thus rested on both the public interest considerations of Rosenbloom and the notoriety and voluntary activity required by Gertz.

THE CORPORATE PRIVATE FIGURE AND PROTECTION FROM NEGLIGENT DEFAMATION

While in Martin Marietta Corp. v. Evening Star Newspaper Co., Trans World Accounts, Inc. v. Associated Press, and Reliance Insurance Co. v. Barron's each corporate plaintiff was required to prove actual malice, the reasoning behind the result differed from case to case. Martin Marietta's use of the Rosenbloom v. Metromedia, Inc. standard imposes the actual malice burden only in connection with an issue of public or general interest. Absent such issue, the applicable burden is negligence. Trans World Accounts and Reliance, by using the public-figure/private-figure analysis of Gertz v. Robert Welch, Inc., imply the general existence of corporate private figures for whom the negligence standard would always be appropriate, even in the context of a public issue. These later cases also imply that the criteria established by Gertz to distinguish between public and private individuals are equally useful in identifying corporate private figures.

Drotzmanns, Inc. v. McGraw-Hill, Inc. and El Meson Espanol v. NYM Corp. imposed the negligence standard on corporations and thus, by definition, were concerned with the claims of corporate private figures. However, these decisions did not offer

81. See id.
86. 403 U.S. 29 (1971).
89. 500 F.2d 830 (8th Cir. 1974).
91. Plaintiff bar and grill in El Meson Espanol was found to be a private figure,
any justification for equating the corporations' interest in their reputations with that of the purely private person. These decisions did not examine the nature of the corporate reputation generally, the public's interest in corporate activity, or the appropriate balance between the two. Only by comparing the Gertz accommodation of reputation interests and first amendment interests regarding individuals with the appropriate accommodation of those interests regarding corporations can one determine whether the corporation should be subject to the Gertz status-based analysis.

**Protection of the Corporate Reputation**

The corporate reputation is devoid of personal qualities. But it was precisely these personal values that the Supreme Court sought to protect by the private figure designation in Gertz.92

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as Mr. Justice STEWART has reminded us, the individual's right to the protection of his own good name

"reflects no more than our basic concept of essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."93

The court in Martin Marietta reasoned that since the corporation's interest in its reputation lacks the personal element described in Gertz, the resulting nonpersonal interest would be insufficient to justify protection from negligence when there is an issue

---

93. Id. at 341 (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)) (emphasis added).
of public interest.\textsuperscript{94} This court stated that the law of libel tradition-
ally distinguished between corporate and natural person plaintiffs
in that a corporation "has no personal reputation"\textsuperscript{95} and that the
District of Columbia affords limited recovery to corporations as
compared with individuals.\textsuperscript{96} The court relied upon these estab-
lished doctrines in concluding that "a corporate libel action is not 'a
basic of our constitutional system,' and need not force the first
amendment to yield as far as it would . . . in a private libel ac-
tion."\textsuperscript{97}

Although the court reasoned that \textit{Gertz} offered no justification
for protecting the corporation from the negligence of the press,\textsuperscript{98} it
noted that the alternative public figure designation would impose
the actual malice burden on corporate plaintiffs in all situations.\textsuperscript{99}
Accordingly, the court held that the issue-based analysis of \textit{Rosen-
bloom v. Metromedia, Inc.},\textsuperscript{100} is appropriate for corporations.\textsuperscript{101}
Thus, \textit{Martin Marietta} rejected private figure analysis as a means of
protecting the corporate reputation from negligent defamation. 
\textit{Martin Marietta} adopted an issue-based analysis which offers such
protection from negligence when the subject matter of the de-
famatory material is not an issue of public interest.

\textit{Trans World Accounts} found that the corporation is analogous
to the private figure of \textit{Gertz}, implying that although the nonper-
sonal corporate reputation may be different from, or even less than

\textsuperscript{94} See \textit{Martin Marietta Corp. v. Evening Star Newspaper Co.}, 417 F. Supp.

\textsuperscript{95} \textit{Id. (emphasis in original)}.

\textsuperscript{96} \textit{See id.}

\textsuperscript{97} \textit{Id. This conclusion was also based upon the Supreme Court's holding in
Time, Inc. v. Firestone, 424 U.S. 448 (1976), which indicated that "the type of pri-
vate controversies the Court sought to protect in \textit{Gertz} were those of a highly per-
sonal nature, and not the type which could be associated with corporate activity."
1976).

\textsuperscript{98} \textit{Martin Marietta} held, in effect, that the protection which is afforded by
private figure status is limited to human beings. In dicta, the court narrowed the
scope of this protection to personal events in their lives. This refinement of the
private figure status established in \textit{Gertz} is consistent with the definition of the term
"private figure" that has been provided by Justice Harlan: "simply a private citizen,
a purely private individual," \textit{see Rosenbloom v. Metromedia, Inc.}, 403 U.S. 29, 65-72
(1971) (Harlan, J., dissenting); and Justice Marshall: "an anonymous person, an
obscure private life," \textit{see id.} at 78 (Marshall, J., dissenting).


\textsuperscript{100} 403 U.S. 29 (1971).

\textsuperscript{101} See \textit{Martin Marietta Corp. v. Evening Star Newspaper Co.}, 417 F. Supp.
the individual’s personal reputation, it is nonetheless entitled to protection from negligence.\textsuperscript{102} The court based its conclusion on the ability of the corporation to recover damages as would an individual under California law.\textsuperscript{103} However, \textit{Di Giorgio Fruit Corp. v. AFL-CIO},\textsuperscript{104} the authority relied on for this proposition, was decided prior to \textit{New York Times Co. v. Sullivan},\textsuperscript{105} and thus failed to consider the differences between corporations and individuals regarding the first amendment privilege established by that decision.

Neither \textit{Trans World Accounts, Reliance}, nor the alternative rationale offered by \textit{Martin Marietta} defined the corporate interest to be protected from negligent defamation by private figure status, although all the decisions recognized that this interest differs from an individual’s privacy interest.\textsuperscript{106} Moreover, none of these decisions recognized the compelling first amendment considerations concerning all corporations, but which do not apply to private natural persons, and were not, therefore, considered in \textit{Gertz}.

In \textit{Trans World Accounts} the court rejected \textit{Martin Marietta}’s subject matter approach which was based on the public’s general interest in corporate activities. Judge Schwarzer indicated that the Supreme Court in \textit{Gertz} had rejected \textit{Rosenbloom}’s issue-based analysis without qualification.\textsuperscript{107} For this reason, Judge Schwarzer refused to be bound by \textit{United Medical Laboratories v. CBS, Inc.},\textsuperscript{108} a post-\textit{New York Times} decision by the Ninth Circuit. That decision held that public interest in the plaintiff corporation’s mail-order medical laboratory business justified the imposition of the

\footnotesize{
\begin{itemize}
  \item \textsuperscript{103} See id.
  \item \textsuperscript{105} 376 U.S. 254 (1964).
\end{itemize}
}
actual malice burden, even though the corporation was neither a public official nor a public figure as defined in *Curtis Publishing Co. v. Butts*109 and *Associated Press v. Walker.*110 Nevertheless, the decision in *Trans World Accounts* turned, ironically, on public interest considerations. The court emphasized the protective function of the government’s policy of publicizing certain enforcement measures and held plaintiff to be a limited public figure because of the public’s interest in the pending litigation.111 Similarly, the public figure designations in *Martin Marietta*112 and *Reliance*113 were based on the special public interest in corporate affairs.

The entry of a private person into the business world through the act of incorporation gives rise to the public’s legitimate interest in corporate activities. The corporation is a creature of the state. It is subject to state and federal regulation which are sensitive to the political process. The public, therefore, has a legitimate interest in corporate activities. The corporation exists both in the political world,114 in which cases arise dealing with defamation of natural

---

110. 388 U.S. 130 (1967).
112. In *Martin Marietta* the court held plaintiff to be a limited public figure for the range of issues discussed in defendant’s article on the ground that, inter alia, “the public has an interest in the manner by which defense contracts are awarded.” *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 957 (D.D.C. 1976).
113. In *Reliance* the court held plaintiff to be a public figure in the general sense because of its role in society as well as a limited public figure with respect to its offering of securities. See *Reliance Ins. Co. v. Barron’s*, No. 76 Civ. 4094-CLB, slip op. at 11-12 (S.D.N.Y. Sept. 14, 1977).
114. The plurality decision in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), recognized that:

[None of the text is quoted here, but the context suggests it discusses the blurring of distinctions between governmental and private sectors and the public's legitimate interest in corporate activities.]

Id. at 41-42 (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 163-64 (1967) (Warren, C.J., concurring)) (emphasis added). Contemporary political issues of general public interest which involve corporations are, for example, intervention in foreign politics by American multinational corporations, political contributions, lobbying efforts, and discriminatory hiring or business practices.
persons, for example, civil rights and Communist affiliation, and in the financial world.

In the financial context, the corporation is arguably analogous to the public official of New York Times for purposes of stockholder suffrage or the decisions to be made by potential investors, lenders, or consumers. Just as shareholders cast votes for corporate officers, the public casts economic votes by choosing among competing goods, services, and financial opportunities. For this reason, the court in Reliance, which concerned a corporate plaintiff's offering of preferred stock, stated that "the public interest is well served by encouraging the free press to investigate and comment on business and corporate affairs in the same manner as it would report on other public issues." 117

As indicated in Trans World Accounts, Inc. v. Associated Press118 and in Reliance Insurance Co. v. Barron's, 119 disclosure of information to alert the public to potential harm or merely to provide full information is an integral part of the government's regulatory policy. 120 Publication of consumer information serves to educate generally as well as to identify those who abuse the public's trust. This is true for all corporations, even the closely held "mom and pop" businesses, albeit the size of the interested public will be smaller. For example, the public is as concerned with the practices of a small check-cashing business operating in a storefront as it is with those of a major credit institution. 121 Designating a small vocational school, a restaurant, or a home improvement firm as a corporate private figure exposes the press to liability for negli-

121. In Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), where the defamatory statement concerned distribution of allegedly obscene magazines, the plurality opinion stated: "Whether the person involved is a famous large-scale magazine distributor or a 'private' businessman running a corner newsstand has no relevance in ascertaining whether the public has an interest in the issue." Id. at 43.
gence. The threat of liability, imposed by unpredictable juries, can only result in the self-censorship by the press that New York Times sought to avoid when important public issues are involved.

Legitimate public scrutiny of the corporation, therefore, precludes protection of the corporate reputation by analogy to the private life of a natural person. A better explanation for why such analogy is used in Trans World Accounts and Reliance may be found in the courts’ reluctance to apply generally the demanding actual malice burden to future corporate plaintiffs who may be as defenseless as the private individuals protected by Gertz. The level of “clear and convincing proof required . . . to show ‘actual malice’ in a defamation case”122 was characterized by the court in Reliance as “almost insuperable.”123 These decisions, therefore, did not identify a corporate interest to be protected from negligence, but turned on considerations of fairness in distinguishing among corporations.

**Identifying the Corporate Private Figure**

Gertz stated that private figures are both more vulnerable to harm from defamation, because they are unable to contradict or correct the defamatory statement, and are more deserving of protection because they have not consented to greater public scrutiny.124 Accordingly, the Court established two general standards to distinguish among defamation plaintiffs: plaintiff’s “access to the channels of effective communication” for the purpose of rebuttal,125 and plaintiff’s voluntary exposure to “increased risk of injury from defamatory falsehood.”126

A requirement that the corporation have access to the media for rebuttal is rooted in tort law’s focus on a plaintiff’s ability to protect itself.127 That requirement is also essential for the democratic debate of ideas envisioned in New York Times Co. v. Sullivan.128 Here, tort and first amendment interests meet in providing an apparently useful standard for distinguishing among corporate plaintiffs. However, a rule that would distinguish among corporate plaintiffs on the basis of their access to the media as perceived by

---

123. Id. at 2.
125. Id. at 344.
126. Id. at 345.
the press at the time of publication provides neither simplicity of application nor certainty of result. More importantly, such a rule is entirely insensitive to variations in the public's need for information based on the particular issue or industry involved. In Reliance the court held that although the corporate plaintiff's ability to rebut was greatly inhibited by government regulations, it was nonetheless a public figure because of its voluntary activities.\textsuperscript{129} Thus a corporation's lack of access to the media would not determine the appropriate burden when the corporation has satisfied the voluntary activity requirement of Gertz.\textsuperscript{130}

But a focus solely on voluntary and visible corporate activities does not identify vulnerable corporations. A corporation's entry into the marketplace is a voluntary act that invites customers as well as greater public scrutiny and comment.\textsuperscript{131} All corporations are thereby distinguished from purely private persons. Moreover, a requirement of visible voluntary activity is irrelevant where secret or unknown corporate activities may be a proper subject for public information in, for example, price-fixing agreements and illegal payments. For this reason, the court in Reliance encouraged the press to investigate as well as to comment on business and corporate affairs.\textsuperscript{132}

Although Gertz suggested that status should be determined by the nature and extent of plaintiff's actions,\textsuperscript{133} neither a corporation's size nor the manner in which its stock is held provides an accurate and consistent standard for identifying corporate private plaintiffs.\textsuperscript{134}

\textsuperscript{130} Justice Brennan argued that the ability to respond through the media "seems too insubstantial a reed on which to rest a constitutional distinction." Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 47 (1971) (plurality opinion), quoted in Gertz v. Robert Welch, Inc., 418 U.S. 323, 363-64 (1974) (Brennan, J., dissenting).
\textsuperscript{131} Under the alternative rationale in Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (D.D.C. 1976), the plaintiff corporation's decision to compete for defense contracts was found to be a requisite voluntary act and thereby conferred public figure status. See id. at 957.
\textsuperscript{134} It has been suggested that questions involving corporations which have most of their outstanding shares in the hands of the public should be resolved by
Gertz also provided that even where the two general standards, consent and self-protection, have not been met, a corporation may still be required to prove actual malice if it is found to be a limited public figure. As illustrated in Trans World Accounts, this limited status designation turns on public interest considerations. Thus, under Gertz, it is the public's legitimate interest that will ultimately determine the appropriate burden, rather than plaintiff's activities, size, or vulnerability.

Since it is inevitable that the burden to be imposed on a corporation will be based on public interest considerations, it is preferable to reach that issue-based result through the issue-based analysis of Rosenbloom rather than the status-based approach required by Gertz. For even under Gertz, when the public has a legitimate interest in full information concerning a corporation's activities, the courts will protect that interest by providing the press with appropriate first amendment protection; this will preclude the finding of corporate private figures.

CONCLUSION

Gertz v. Robert Welch, Inc., established a balance between the state's interest in protecting the reputations of private individuals and the first amendment guarantee of freedom of the press. The state interest in affording recovery for injury to a corporation's reputation is, however, less compelling than in the case of a natural person's reputation. The public's legitimate need for information concerning corporate activities exceeds its interest in private individuals. Thus, the balance established by Gertz, which permitted a lower burden for private natural persons, is insufficiently sensitive to first amendment considerations when applied to corporate plaintiffs. A better balance would favor the flow of information to the

consideration of relevant issues of public or general concern. See Hill, supra note 51, at 1217. However, this standard would not support judicial consideration of the public interest in Reliance. In that case, 96.9% of plaintiff's common stock was owned by a second corporation which was entirely owned by a third. Nonetheless, Judge Brieant held that plaintiff was a public figure generally because of the public's interest in plaintiff and its role in society.


136. See text accompanying notes 67-71 supra.


public when an issue of general interest is involved. The issue-based rule in *Rosenbloom v. Metromedia, Inc.*,\(^{139}\) protects the press by imposing the more demanding actual malice burden on plaintiff only when there is an issue of general interest, and only with respect to that issue. *Martin Marietta v. Evening Star Newspaper Co.*,\(^{140}\) therefore, applied the *Rosenbloom* standard.

Application of *Gertz* to corporate plaintiffs in *Trans World Accounts, Inc. v. Associated Press*\(^{141}\) and *Reliance Insurance Co. v. Barron’s*\(^{142}\) can be explained by the courts’ reluctance to impose the almost insurmountable actual malice burden on future vulnerable plaintiffs solely because of the act of incorporation. However, the traditional tort law analysis required by *Gertz* to confer public figure or private figure status fails to identify vulnerable corporations.

Since *New York Times Co. v. Sullivan*,\(^{143}\) the law of defamation has provided two methods of analysis. Under first amendment analysis as presented in *Rosenbloom*, the constitutional privilege established by *New York Times* is an absolute bar to press liability for negligence when the alleged defamation concerns matters of legitimate public interest. By contrast, under traditional tort analysis,\(^{144}\) plaintiff’s voluntary activities which knowingly increase the risk of defamation, and plaintiff’s ability to contradict the defamatory statement justify denying recovery to public officials and public figures for negligent injury to reputation. Thus, for the *Gertz* private figure who neither has consented nor has the ability to protect himself, tort law affords recovery for negligent injury regardless of the nature of the defamatory subject matter.

However, when these unreconcilable methods of analysis are applied to defamation of the corporation, the courts have found tort law analysis inadequate, if not irrelevant. The cases discussed in this note indicate that the corporation consents when it decides to compete or to offer stock to the public. Thus, all corporations consent when entering the marketplace. These decisions also stand for

---

\(^{139}\) 403 U.S. 29 (1971).


\(^{143}\) 376 U.S. 254 (1964).

the proposition that a corporation's lack of ability to contradict the defamatory statement is immaterial to its ability to recover for negligence. More importantly, each of these decisions found the corporate plaintiff to be a limited public figure, a designation devoid of tort law requirements, being determined instead by first amendment considerations, that is, the involvement of a public controversy.

Since first amendment analysis is insensitive to plaintiff's vulnerability, continued recourse to limited public figure status will permit courts to apply that designation to any corporate plaintiff involved in a legitimate public controversy. Courts will, therefore, reach the same result under Gertz or Rosenbloom, but only the first amendment method of analysis is relevant and should be applied to corporate defamation plaintiffs.

Nessa E. Moll