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# NOTES

## THE FIRST AMENDMENT AND THE CORPORATE PLAINTIFF: APPLICABILITY OF THE NEW YORK TIMES STANDARD TO CORPORATE DEFAMATION AND PRODUCT DISPARAGEMENT

### I. INTRODUCTION

The law of personal defamation<sup>1</sup> exists to protect the reputation of individuals from false statements. The United States Supreme Court's recognition of the competing interests of free speech and press<sup>2</sup> in the personal defamation context has resulted in a constitutional privilege for media-defendants.<sup>3</sup> This constitutional privilege requires that plaintiffs deemed "public officials"<sup>4</sup> or "public figures"<sup>5</sup> prove that the defendant made the defamatory statement with "actual malice"<sup>6</sup> before recovery is available. By analogy to personal defamation, lower federal courts have applied the actual malice standard to defamation

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1. The term "personal defamation," for purposes of this note, will refer to defamation actions where the plaintiff is a natural person, as distinguished from a corporation. The term "defamation" will be used to refer to personal and corporate defamation collectively. Defamation is a term describing the twin torts of libel and slander. Generally, libel is a written defamation, while slander is oral. Prosser has defined defamation as a false statement which tends to "injure reputation, diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him." W. PROSSER, *LAW OF TORTS* § 111, at 739 (4th ed. 1971). See generally Eaton, *The American Law of Defamation Through Gertz v. Robert Welsh, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603 (1983).

2. The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

3. See *infra* notes 12-18 and accompanying text.

4. *New York Times v. Sullivan*, 376 U.S. 254 (1964). See *infra* notes 12-18 and accompanying text.

5. *Curtis Publishing v. Butts*, 388 U.S. 130 (1967). See *infra* notes 19-20 and accompanying text.

6. Actual malice means "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 280. The Supreme Court later 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 doubt as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968). Actual malice must be proved by "clear and convincing proof." *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323, 342 (1974).

actions where a corporation was the plaintiff.<sup>7</sup> Further, two federal district courts have applied the actual malice standard to corporate plaintiffs in product disparagement actions.<sup>8</sup> This note will focus on whether the actual malice standard should be applied to corporate defamation and product disparagement actions, and if so, what analysis should be used in determining its applicability.

First, there is an examination of the history behind the first amendment in personal defamation cases. The next section addresses the implications of the commercial speech doctrine.<sup>9</sup> This is followed by an examination of the tort common law that has developed in the area of corporate defamation and product disparagement. Whether corporate defamation and product disparagement actions should receive first amendment protection, and how lower federal courts have decided the issue, then is discussed. Finally, an approach for determining first amendment protection for these two torts is suggested.

## II. THE FIRST AMENDMENT AND DEFAMATION LAW

The history of the first amendment in the personal defamation context must be examined to determine whether the actual malice standard applied in personal defamation actions should also apply to corporate defamation and product disparagement. Prior to 1964, the United States Constitution was not interpreted to protect libel.<sup>10</sup> Libelous statements were not considered an essential part of the exposition of ideas and were of such slight social value that any benefits which could be derived from them were clearly outweighed

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7. A defamation action where the plaintiff is a corporation is referred to as corporate defamation. See RESTATEMENT (SECOND) OF TORTS § 561 (1981). Partnerships and unincorporated associations may also bring defamation actions. See *id.* at § 562 and W. PROSSER, LAW OF TORTS, § 111, at 745 n.14-15.

8. See, e.g., *Bose Corp. v. Consumers Union of the United States, Inc.*, 508 F. Supp. 1249 (D. Mass.), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1981), *aff'd*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 1949 (1984); *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*, 516 F. Supp. 742 (S.D.N.Y. 1981). Product disparagement refers to defamatory statements which "depreciate or disparage the merits, utility or value of any person's property." See Smith, *Disparagement of Property*, 13 COLUM. L. REV. 13, 132 (1913) (quoting G. BOWER, CODE OF THE LAW OF ACTIONABLE DEFAMATION 242 (1908)). Product disparagement is also referred to as trade libel, slander of title, slander of goods, disparagement of title, disparagement of goods, unfair competition, interference with prospective advantage or injurious falsehood. See Prosser, *Injurious Falsehood: The Basis of Liability*, 59 COLUM. L. REV. 425 (1959).

9. Commercial speech has been defined as expression related solely to the economic interests of the speaker and its audience. *Central Hudson Gas & Elec. v. Public Serv. Comm'n.*, 447 U.S. 557, 561 (1980).

10. See *Konigsberg v. State Bar of California*, 366 U.S. 39, 49 n.10 (1961); *Roth v. U.S.*, 354 U.S. 476, 486-87 (1957); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); *Near v. Minnesota*, 283 U.S. 697, 715 (1931).

by the social interest in order and morality.<sup>11</sup> However, the landmark case of *New York Times v. Sullivan*,<sup>12</sup> held that the first amendment guarantees of free speech and press provide some constitutional protection to libelous statements.<sup>13</sup>

To safeguard first amendment rights, the Court in *New York Times* implemented the actual malice standard. This standard requires plaintiffs who are public officials<sup>14</sup> to prove that the defendant made a defamatory statement with knowledge that it was false or with reckless disregard as to whether or not it was false.<sup>15</sup> Since most states had used a strict liability standard in libel actions,<sup>16</sup> the actual malice

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11. See *Chaplinski v. New Hampshire*, 315 U.S. 568, 572 (1942).

12. 376 U.S. 254 (1964). In *New York Times*, a full page advertisement was taken out by a civil rights group which made a number of allegations about the Montgomery, Alabama police department. Some of these allegations were inaccurate. L.B. Sullivan, one of three elected commissioners of the City of Montgomery, whose duties included supervision of the police department, filed suit against the *New York Times*. Although Sullivan was not mentioned by name in the advertisement, he relied on Alabama law which presumes the reputation of a public official is injured when statements are made about the agency he controls. The jury found for the plaintiff and awarded \$500,000 in damages, but the United States Supreme Court reversed. The Court felt that the common law fair comment doctrine, which protected speech concerning public officers and employees, justified giving constitutional protection to the media when the defendant is a public official. Although the common law fair comment doctrine applied the privilege only to opinions, criticism and comment, see W. PROSSER, *LAW OF TORTS* § 118, at 819, the Court extended the privilege to false assertions of fact. *New York Times*, 376 U.S. at 283.

13. The first amendment protects the press from liability for libelous statements unless knowledge or reckless disregard for the truth can be shown. *New York Times*, 376 U.S. at 280.

14. The Court left open the parameters regarding who is a public official. Justice Brennan in a footnote of the opinion said: "We have no occasion to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of the rule, or otherwise specify categories of persons who would or would not be included." *Id.* at 283 n.23. Two years later the Court defined the term "public official" as all government employees "who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

15. The actual malice standard was being used by a number of state courts at the time of its adoption by the Supreme Court. The Kansas Supreme Court case of *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908), was cited in the *New York Times* opinion as support for the standard. The Kansas standard was applicable to matters of "public concern, public men, and candidates for office." *New York Times*, 376 U.S. at 285.

16. The Alabama state law used in the lower courts in *New York Times*, would deem a publication "libelous *per se*" if the words tend to injure the reputation of the plaintiff. Once libel *per se* is established, unless the defendant proves truth, general damages are presumed without a showing of pecuniary loss. However, punitive damages were recoverable only upon a showing of actual malice. In 1974, the Court expressly rejected strict liability in personal defamation actions. *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323 (1974). At common law, a plaintiff need only put into evidence a statement which tends to injure his reputation and prove that the defendant was responsible

standard placed a greater burden on the plaintiff. The Court recognized that erroneous statements are inevitable in free debate and, therefore, this "breathing space" was necessary to protect the freedom of expression.<sup>17</sup> Without this Constitutional standard, criticism of official conduct would be "chilled" and result in self-censorship, due to the defendant's difficulty and expense in proving the truth of the alleged libelous statement. Therefore, this Constitutional standard was necessary to preserve "uninhibited, robust and wide-open debate" on public issues.<sup>18</sup>

This interest in free speech was furthered three years later when the class of plaintiffs required to show actual malice was expanded. In *Curtis Publishing Co. v. Butts*,<sup>19</sup> the Court extended the constitutional privilege to "public figures." A plaintiff could be deemed a public figure due to his position in society, or where he voluntarily thrusts himself into the vortex of a public issue.<sup>20</sup>

The ultimate extension of the constitutional privilege occurred in *Rosenbloom v. Metromedia*.<sup>21</sup> In *Rosenbloom*, the trial court determined that the *New York Times* standard was not applicable to a magazine distributor.<sup>22</sup> However, the Supreme Court held that the *New York Times* standard did apply.<sup>23</sup> The Court concluded that the constitutional privilege would apply even to a private person if the defamatory statement concerned matters of public or general interest.<sup>24</sup>

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for uttering or publishing it. This strict liability standard did not require the plaintiff to prove the statement was false or to show he suffered any actual injury. The defendant could escape strict liability either by proving the statement was true or that it was privileged. See Eaton, *supra* note 1, at 1352-54.

17. *New York Times*, 376 U.S. at 271-72.

18. *Id.* at 270-71.

19. 388 U.S. 130 (1967) (consolidated cases).

20. In *Curtis Publishing Co.*, the plaintiff, Butts, was athletic director of the University of Georgia. A defamatory statement printed in the Saturday Evening Post alleged that Butts and University of Alabama football coach Paul "Bear" Bryant had "fixed" a game between their respective schools. The Court held that Butts had attained the status of public figure due to his position. In the companion case to *Curtis Publishing Co.*, *Associated Press v. Walker*, 388 U.S. 130 (1967), the plaintiff was retired Major General Edwin Walker. The defendant had falsely characterized Walker's activities at a riot at the University of Mississippi. The Court held that Walker's activities amounted to a thrusting of his personality into the vortex of an important public issue—school desegregation—and that was sufficient reason to classify him as a public figure.

21. 403 U.S. 29 (1971) (plurality opinion).

22. The defendant's radio station defamed the plaintiff by erroneously reporting that the plaintiff was a "girlie book peddler" and was in the "smut literature racket." *Id.* at 34.

23. *Id.* at 52.

24. *Id.* at 33-34. Matters of "public or general interest," which will be referred to in this note as the *Rosenbloom* public interest test, was a phrase originating in

The public interest test shifted the focus from the status of the plaintiff to the public's right to be informed about certain issues. In *Rosenbloom*, the public had a vital interest in the proper enforcement of its criminal obscenity laws.<sup>25</sup> Justice Brennan noted that if a matter is in the public interest, it cannot suddenly become less important because a private plaintiff is involved or because the plaintiff did not voluntarily choose to become involved.<sup>26</sup> The Court did not decide what constituted a matter of public interest, but this point was mooted in 1974 when the Court rejected the public interest test.<sup>27</sup>

In rejecting the *Rosenbloom* public interest test, the Court returned to the status approach of determining public figures. In *Gertz v. Robert Welsh, Inc.*,<sup>28</sup> the Court held that there are three classes of public figures. First, there are those individuals who have general fame and notoriety in the community. Since the constitutional privilege extends to statements about all aspects of these plaintiff's lives, they are referred to as "all purpose public figures."<sup>29</sup> Second, there are those who have thrust themselves into the forefront of a particular public controversy in order to influence the resolution of the issues

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Barndeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 214 (1890). The concept of public interest was behind the adoption of the actual malice standard in *New York Times*. "Debate on public issues should be uninhibited, robust and wide-open." *New York Times*, 376 U.S. at 270-71 [emphasis added]. Public interest was also important in *Time, Inc. v. Hill*, 385 U.S. 374 (1967). In *Time, Inc.*, a private plaintiff could not recover for invasion of privacy which placed the victim in a false light, without a showing of actual malice, where the publication related to a "matter of public interest." *Id.* at 387-88. Justice Brennan's opinion in *Rosenbloom* specifically rejected the public figure test in favor of the public interest test. He claimed that there was no logic in distinguishing between public and private figures. The reason the *New York Times* standard was applied to public officials and public figures was to encourage the ventilation of public issues. *Rosenbloom*, 403 U.S. at 46 [emphasis added].

25. The petitioner conceded that the police campaign to enforce the obscenity laws was an issue of public interest. *Rosenbloom*, 403 U.S. at 40.

26. *Id.* at 43. One factor which led the Court to reject the *Rosenbloom* test was the difficulty it imposed upon state and federal judges who had to decide on an *ad hoc* basis which publications were of general or public interest. *Gertz*, 418 U.S. 323 (1974). Justice Marshall referred to this task as determining "what information is relevant to self-government." *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting).

27. See *Gertz*, 418 U.S. 323.

28. 418 U.S. 323 (1974).

29. In *Gertz*, the plaintiff was the attorney for the family of a boy shot by a policeman. The defendant published an article describing the plaintiff as a "Communist-fronter" and "Leninist." Since the plaintiff was not well known, the Court refused to characterize him as an all purpose public official. In fact, none of the prospective jurors had ever heard of the plaintiff. Evidence that the plaintiff had authored several books and articles on legal subjects and was active in professional and community affairs, had little impact on the Court. *Id.* at 325-26, 351-52.

involved. This class is the "limited purpose public figure."<sup>30</sup> This person is a public figure only in regard to the specific public controversy. Third, there are those deemed "involuntary public figures,"<sup>31</sup> who have exhibited no purposeful activity of their own, yet nevertheless, are involved in a public controversy. The Court returned to the status approach because it believed that the reputation of private individuals was not adequately protected by the public interest test.<sup>32</sup>

The government's interest in protecting the reputation of private individuals was determined to be superior to the interest in the reputation of public officials and public figures, and therefore, required greater protection.<sup>33</sup> The reasons for the protection are two-fold. The first remedy of any victim of defamation is self-help: using channels of communication to rebut or correct the lie.<sup>34</sup> Since the private person has less access to the media than a public official or public figure, he has less opportunity to rebut the defamatory statement and is more vulnerable to injury.<sup>35</sup> Furthermore, public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory statements.<sup>36</sup> A private individual who has not voluntarily stepped into the limelight of public office, nor thrust himself into a public controversy, cannot be said to have assumed the risk of such an injury.<sup>37</sup> Therefore, the private individual is more deserving of

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30. The plaintiff in *Gertz* was not a limited purpose public figure. The plaintiff played no part in the criminal prosecution of the policeman and he never discussed any aspect of the criminal or civil litigation with the press. His minimal role at a coroner's inquest was not enough to say that he had thrust himself into the vortex of a public controversy. *Id.* at 351-52.

31. The Court noted that instances of involuntary public figures are extremely rare. *Id.* at 345.

32. "The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest [in protecting the reputation of a private person] to a degree that we find unacceptable." *Id.* at 346.

33. "[T]he individual's right to protection of his own 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 341, (quoting *Rosenblatt*, 383 U.S. 75, 92 (Stewart, J., concurring)).

34. *Id.* at 344.

35. *Id.* at 344. Justice Brennan's dissent suggests that access to the media to rebut is not a viable argument to support the proposition that public figures need less protection than private individuals. Very few people can command the media to rebut a defamatory article. Further, "denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story." *Id.* at 363 (Brennan, J., dissenting) (quoting from *Rosenbloom*, 403 U.S. at 46). The majority opinion recognizes Justice Brennan's argument in a footnote, "Of course the 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 the lie." *Id.* at 344 n.9.

36. *Id.* at 345.

37. Justice Brennan discounts the assumption of risk argument also. The idea that public figures have assumed the risk of public exposure, while private individuals

recovery. Since the private individual is more vulnerable to injury and more deserving of recovery, the Court reasoned that, as a plaintiff in a defamation action, he should not be held to the same standard as a public official or public figure.<sup>38</sup> Rather, the states were left to determine the evidence that a private individual would be required to show in order to recover.<sup>39</sup>

Deferring to the states to establish the standard of liability in a private individual's defamation action was not done without some guidance. Although the states could set their own standard, liability could not be imposed without fault.<sup>40</sup> In addition to the fault requirement, *Gertz* also affected state remedies in defamation actions.<sup>41</sup>

*Gertz* constitutionalized areas of state defamation law concerning damages. Under the *Gertz* ruling states cannot permit recovery of presumed or punitive damages if liability is predicated on a standard less than actual malice.<sup>42</sup> Also, where liability is not based on actual malice, the plaintiff's damages are limited to "actual injury."<sup>43</sup> Although the Court did not define actual injury, the opinion noted that it is not limited to out-of-pocket loss and could include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.<sup>44</sup> Limiting recovery to actual injury was intended to reduce the arbitrariness and magnitude of damage awards.<sup>45</sup> The constitutionalizing of state defamation law in the area of damages and fault requirement has also resulted in some confusion in the courts.<sup>46</sup>

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have not, is deemed by Justice Brennan to be a "legal fiction." He feels that all people, voluntarily or not, are "public men" to a degree. This risk of exposure is an essential incident of life in a society which places a primary value on freedom of speech and press. *Id.* at 363 (Brennan, J., dissenting).

38. *Id.* at 345-46.

39. A majority of jurisdictions have adopted a negligence standard for personal defamation actions. Four states have adopted the more media-protective standards of gross negligence or actual malice. See Note, *Defamation and State Constitutions: The Search for a State Law Based Standard After Gertz*, 19 WILLAMETTE L. REV. 665, 670 & n.27-28 (1983).

40. *Gertz*, 418 U.S. at 347. The elimination of strict liability in *Gertz* impacted many state defamation laws. See *supra* note 16.

41. See *infra* notes 42-45 and accompanying text.

42. The Court left open the question of whether presumed or punitive damages were constitutional if liability is predicated on actual malice. *Gertz*, 418 U.S. at 349-50.

43. *Id.*

44. *Id.*

45. The Court attempted to reconcile the state damages law with the competing first amendment interests by limiting defamation damages to actual injury. The first amendment interest was also emphasized by barring punitive damages absent a showing of actual malice. *Id.*

46. See *infra* notes 47-52 and accompanying text.



The *Gertz* requirement that individuals deemed to be limited purpose public figures and involuntary public figures thrust themselves into a public controversy<sup>47</sup> has caused some confusion. Specifically, the pertinent issue involves defining a public controversy. The post-*Gertz* cases seem to indicate that the quality of the controversy is important, not the quantity of people interested.<sup>48</sup> In one case, a wealthy Palm Beach socialite was involved in a highly publicized divorce proceeding.<sup>49</sup> The Court refused to characterize the plaintiff as a limited purpose public figure, on the grounds that this was not the type of public controversy referred to in *Gertz*.<sup>50</sup> The Court said that if it were to equate "public controversy" with all matters of interest to the public, it would be reinstating *Rosenbloom*.<sup>51</sup> The Court has also held that although a matter is admittedly of public interest, that is not enough for public figure status.<sup>52</sup> The Court is suggesting that a qualitative analysis of the controversy is required. However, until the Court more narrowly defines "quality," inconsistency will reign. Inconsistency also arises because of the difficulty in balancing the opposing interests.

An analysis of *New York Times* and its progeny illustrates the Court's balancing of the individual's reputation interest with the free speech and press interest of the media. Since similar interests are considered in corporate defamation and product disparagement actions, the lower federal courts have analogized to personal defamation actions in reaching their decisions.<sup>53</sup> However, determining first amendment

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47. "More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345.

48. See, e.g., *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979) (held that petitioner's failure to appear before the grand jury concerning his alleged Soviet espionage activities was newsworthy, but was not sufficient to render petitioner a public figure); See also *infra* note 50.

49. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

50. The Florida Supreme Court characterized the Firestone divorce as a "cause celebre." There was evidence of 88 press clippings concerning the divorce proceedings and numerous press conferences were given by the plaintiff. However, the Supreme Court said that while the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public, this is not the sort of public controversy referred to in *Gertz*. *Id.* at 453.

51. *Id.* at 454. Justice Marshall's dissent said that the conclusion reached by the majority that this is not the public controversy referred to in *Gertz* can only be reached if the Court felt these facts were not relevant to the "affairs of society," and therefore not in the public interest. *Id.* at 488 (Marshall, J., dissenting). In effect, Justice Marshall is saying that by addressing the issue of public controversy, the Court is reviving *Rosenbloom*.

52. See *Wolston*, 443 U.S. at 167.

53. See *infra* notes 115-16.

protection in the corporate defamation and product disparagement context requires an initial inquiry into the implications the commercial speech doctrine may have in this area.

### III. IMPACT OF THE COMMERCIAL SPEECH DOCTRINE

The common law tort of product disparagement has usually been applied in the context of a dispute between business competitors. While an advertisement disparaging a competitor's product is an example, a product disparagement action may also lie where the disparaging party is the media. This usually occurs in the context of a consumer magazine evaluating products on the marketplace.<sup>54</sup> These two different scenarios may result in different levels of first amendment protection, depending on whether the statement is pure speech or commercial speech.

Commercial speech at one time was thought to have no first amendment protection. In 1942, the Supreme Court held that a handbill soliciting customers to a commercial enterprise was commercial speech and that the Constitution imposed no restraint on governmental regulation of such speech.<sup>55</sup> The Court's analysis centered on the motive of the speaker in its characterization of the handbill as commercial speech.<sup>56</sup> This approach suggests that if a speaker's motive is to advance his own commercial interests, the statement would be commercial speech.<sup>57</sup> But if the speaker is expressing an idea, it is pure speech.<sup>58</sup> This dichotomy leads to different levels of protection. Where the defendant in a product disparagement action is a member of the media and his intent is to inform the public about a product, there is full first amendment protection for the speech.<sup>59</sup> On the other

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54. See, e.g., *Bose Corp.*, 692 F.2d 189; *Simmons Ford, Inc.*, 516 F. Supp. 742; *General Products Co. Inc. v. Meredith Corp.*, 562 F. Supp. 546 (E.D. Va. 1981).

55. See *Valentine v. Chrestenson*, 316 U.S. 52 (1942).

56. In *Valentine*, plaintiffs double-faced handbill conveyed on one side a political message, while the other side was commercial speech. The Court recognized plaintiffs' attempt to subterfuge the municipal ordinance banning commercial speech and held that the handbills could be regulated. Addressing the motive of the speaker to determine whether an expression is commercial speech has been referred to as a "motive-based test." See Note, *Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation*, 75 COLUM. L. REV. 963 (1975).

57. See *infra* note 58.

58. Communications expressing ideas or opinions about social, political, artistic or religious matters are pure speech, while communications which are about products and services offered for sale are commercial speech. Full first amendment protection is afforded the former, but not the latter. See Note, *supra*, note 56, at 974. See also *Central Hudson Gas & Elec.*, 447 U.S. 557 (speech related solely to economic interests of speaker is commercial speech).

59. See Note, *supra* note 56, at 976.

hand, if a trade competitor disparages the plaintiff's product for his own commercial interests, the statement would be commercial speech and unprotected.<sup>60</sup> However, later cases have found that even commercial speech is entitled to some first amendment protection.<sup>61</sup>

Commercial speech which contains factual material of clear public interest is protected by the first amendment.<sup>62</sup> The Supreme Court has held that an advertisement in a newspaper which informed readers of a placement service which arranged low-cost abortions in New York hospitals and clinics was protected speech.<sup>63</sup> The fact that the statement appeared in the form of a paid advertisement was of no consequence.<sup>64</sup> The Court found that some commercial speech is entitled to first amendment protection.<sup>65</sup> This extension of first amendment protection to some commercial speech still did not answer the question of whether a competitor's disparaging statement should receive any degree of protection. However, the 1976 case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>66</sup> indicates how the Court would treat such an issue.

The Court in *Virginia State Board of Pharmacy* extended first amendment protection to speech which "does no more than propose a commercial transaction."<sup>67</sup> This decision invalidated a statute which made it unprofessional conduct for a licensed pharmacist to advertise the price of prescription drugs.<sup>68</sup> Since there was a strong consumer interest in the price of drugs, it was deemed commercial speech and entitled to some first amendment protection.<sup>69</sup> Because disparaging statements by a trade competitor would clearly be commercial speech, this decision would appear to provide some first amendment protection in this area.

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60. *Id.*

61. *See, e.g.,* *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia States Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

62. *Bigelow v. Virginia*, 421 U.S. 809 (1975).

63. Since abortions were legal in New York, this is not unprotected speech proposing an illegal transaction. *See generally* *Central Hudson Gas & Elec.*, 447 U.S. 557.

64. Speech in the form of paid advertisement was found to have first amendment protection eleven years before *Bigelow*. *See New York Times*, 376 U.S. 254.

65. "The relationship of speech to the marketplace of products or services does not make it valueless in the marketplace of ideas." *Bigelow*, 421 U.S. at 826.

66. 425 U.S. 748 (1976).

67. *Id.* at 762.

68. *Id.* at 749-50 n.2.

69. Justice Blackmun noted that the consumer's interest in the free flow of commercial information, "is keen, if not keener by far, than his interest in the days most urgent political debate." *Id.* at 763.

However, the Court also said that not all commercial speech is entitled to the same degree of protection.<sup>70</sup> In fact, commercial speech which is not truthful appears to be unprotected.<sup>71</sup> Since the speech in a product disparagement or corporate defamation action must be false in order for the plaintiff to recover, this false speech would not be protected. This point was enunciated in a later commercial speech case which held that misleading commercial speech is not protected at all by the first amendment.<sup>72</sup> Therefore, commercial speech disparaging a competitor's product would not be protected and would be subject to the common law principle of fault. If the same disparaging speech came from the media, it would probably be classified as pure speech and entitled to full first amendment protection.<sup>73</sup> Whether first amendment protection should be available to media-defendants in either corporate defamation or product disparagement actions requires an examination of the characteristics of these two torts.

#### IV. NATURE OF THE TORTS: CORPORATE DEFAMATION AND PRODUCT DISPARAGEMENT

##### A. *Introduction*

A statement which falsely criticizes the quality of a corporation's product may result in two different causes of action. If the false accusation is that the product does not possess desirable qualities, an action may lie for product disparagement.<sup>74</sup> However, if the statement concerning the quality of the product clearly maligns the corporation itself, an action may lie for corporate defamation.<sup>75</sup> Although

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70. *Id.* at 770-71.

71. The Court said that it could foresee no obstacle to the state's dealing effectively with the problem of false commercial speech. *Id.* at 771. Different degrees of protection for false commercial speech is necessary to ensure that truthful and legitimate commercial information is unimpaired. Two factors justify this conclusion: First, the advertiser disseminating the information about his product knows more about it than anyone else and has the ability to verify truth. Second, commercial speech is more durable than other forms of speech. Since advertising is the *sine qua non* of profits, there is less likelihood of a chilling effect. Therefore, greater objectivity and hardness of commercial speech make it less necessary to tolerate false commercial speech. *Id.* at 771-72 n.24.

72. *Central Hudson Gas & Elec.*, 447 U.S. 557.

73. See *supra* note 58. The issue of disparaging statements by a competitor and its first amendment ramifications will not be further developed in this note. Rather, this note will focus on corporate defamation and product disparagement actions and their first amendment implications when the speaker is the media.

74. See W. PROSSER, *LAW OF TORTS*, § 128, at 917-18.

75. A false statement directed at a corporation without regard to a product may also result in a corporate defamation action.

the two torts had different common law origins, several similarities exist between them.<sup>76</sup> Furthermore, if the constitutional changes in the law of personal defamation are applicable to these two torts, their differences are significantly narrowed.<sup>77</sup> Therefore, to discuss product disparagement, it is necessary to include a discussion of corporate defamation.

### B. Corporate Defamation

The law of defamation grew out of the twin torts of libel and slander.<sup>78</sup> At common law, a libelous publication was actionable *per se*.<sup>79</sup> This meant that the publisher was liable without proof of special harm.<sup>80</sup> A slanderous publication was actionable *per se* only in certain instances.<sup>81</sup> If none of the circumstances were present, a plaintiff would have to show special harm to recover for a slanderous publication.<sup>82</sup> Therefore, in both libel or slander the plaintiff could recover special damages if he proved them.<sup>83</sup> These common law torts were later referred to collectively as defamation.<sup>84</sup>

The law of defamation, which is designed to protect the individual's reputation, has been used to protect the reputation of corporations.<sup>85</sup> Although a corporation does not have a personal reputation,<sup>86</sup> it may be defamed by statements which cast aspersions on

76. See *infra* notes 88-105 and accompanying text.

77. See *infra* notes 96-113 and accompanying text.

78. See W. PROSSER, LAW OF TORTS, § 111, at 737. A defamation is a communication which tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating with him. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

79. RESTATEMENT (SECOND) OF TORTS § 569 (1977).

80. Special harm refers to damages in the form of pecuniary loss. At common law, general damages were always awarded upon a showing of actionable *per se*, unless the defendant could prove truth or some other privilege. See also *id.* comment b.

81. Publication of a slander is actionable *per se* at common law if it imputes: a) a criminal offense, b) a loathsome disease, c) a matter incompatible with plaintiff's business, trade, profession, or office, or d) serious sexual misconduct. *Id.* § 570. Product disparagement actions were not considered in exception (c) above and thus, required a showing of special damages. *Id.* § 573 & comment g.

82. *Id.* § 575.

83. Special damages were awarded only upon proof of loss of something having economic or pecuniary value. Mere loss of reputation was not sufficient to prove special harm, unless such a loss also reflected some kind of economic or pecuniary loss. *Id.*

84. Although the term "defamation" refers to both libel and slander, the law has continued to treat these two torts as different causes of action. See generally W. PROSSER, LAW OF TORTS § 112.

85. See *supra* note 7.

86. W. PROSSER, LAW OF TORTS § 111, at 745.

its honesty, credit, efficiency or its prestige or standing in its field of business.<sup>87</sup> A statement which degrades the quality of a corporation's product, but also reflects on the corporation itself, may be corporate defamation or product disparagement.<sup>88</sup> A statement that a butcher's meats are poisonous<sup>89</sup> or that a painting bought from a dealer is an obvious forgery,<sup>90</sup> reflects on both the product and the business entity. The plaintiff may therefore bring suit on behalf of the business entity for defamation or for product disparagement.<sup>91</sup> Which action is pursued will depend on the nature of the statement,<sup>92</sup> as well as the burden of proving falsity, recoverable damages, and degree of fault, which vary between these two torts. The distinction between these two torts can be seen by focusing on the elements of product disparagement.

### C. *Product Disparagement*

Product disparagement is intended to protect a plaintiff from interference with prospect of sale or some other advantageous relation.<sup>93</sup> Thus, the tort is intended to protect from pecuniary loss. In contrast, defamation is intended to protect a reputation interest.<sup>94</sup> Due to the historical association with defamation, the tort of corporate defamation is thought to protect an interest in reputation.<sup>95</sup> These

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87. *Id.* For example, a corporate defamation action would arise where a statement imputes that a corporation traded with the enemy in time of war. *Den Norske Ameriekalinje Actieselskabet v. Sun Printing & Publishing Ass'n*, 226 N.Y. 1, 122 N.E. 463 (1919).

88. W. PROSSER, *LAW OF TORTS* § 128, at 918.

89. *See Mowry v. Raabe*, 89 Cal. 606, 27 Pac. 157 (1891); *Blumhardt v. Rohr*, 70 Md. 328, 17 Atl. 266 (1889).

90. *See Freisinger v. Moore*, 65 N.J.L. 286, 47 A. 432 (N.J. 1900).

91. These facts may also give rise to an action for personal defamation.

92. For a discussion of the distinction between defamation and product disparagement, see Hirschman, *Defamation or Disparagement?*, 24 MINN. L. REV. 625 (1940).

93. The common law of product disparagement was originally intended to protect a person's property or title. In tracing the history of product disparagement, Prosser referred to the tort under the broader concept of "injurious falsehood." Injurious falsehood originally concerned oral aspersions cast upon the plaintiff's ownership of land. When these statements hindered the plaintiff's efforts of selling or leasing his land, a cause of action arose. This seventeenth century tort was known as "slander of title." During the nineteenth century, the tort of injurious falsehood was expanded to encompass written aspersions reflecting upon the title of property other than land. This concept later included statements referring to the quality of the plaintiff's property, rather than mere title. This extension has become known as product disparagement, when the property referred to is a product. *See W. PROSSER, LAW OF TORTS* § 128, at 915.

94. *See supra* note 1.

95. This interest is in protecting a business reputation. However, a corporation is not defamed by communications defamatory of its officers, agents, or

different interests and distinct origins between product disparagement and corporate defamation are reflected in the elements of each cause of action.

The burden of proving the truth or falsity of the statement is one distinction between the two torts. Both torts required proof of publication and of the disparaging or defamatory nature of the statements involved.<sup>96</sup> In an action for product disparagement, the plaintiff must plead and prove the statement is false, whereas in an action for corporate defamation, falsity is presumed and truth is a defense which must be proved by the defendant.<sup>97</sup> Supreme Court decisions constitutionalizing state defamation laws have no effect in this area, although there have been some implications on the common law concerning the distinction of recoverable damages.

The plaintiff in a product disparagement action must plead and prove special damages in order to recover.<sup>98</sup> Special damages require a showing of pecuniary loss, usually lost profits.<sup>99</sup> However, in defamation actions the plaintiff rarely has to prove special damages.<sup>100</sup> At common law, damages were presumed, at least to the extent of the awarding of general damages.<sup>101</sup> Damages were presumed in defamation actions because it was so likely that psychological injury would occur to the individual. Another justification for presumed damages was the uncertainty in calculating the extent of the injury.<sup>102</sup> Due to corporate defamation's origin in the law of defamation, damages were also presumed.<sup>103</sup> However, a corporation cannot be said to suffer the

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shareholders, unless the communication discredits the method by which the corporation conducts its business. RESTATEMENT (SECOND) OF TORTS § 561 comment a (1977).

96. See W. PROSSER, LAW OF TORTS § 128, at 920.

97. See RESTATEMENT (SECOND) OF TORTS § 581A comment b (1977).

98. *Marlin Firearms Co. v. Shields*, 171 N.Y. 384, 64 N.E. 163 (1902). RESTATEMENT (SECOND) OF TORTS § 633 (1977).

99. Although lost profits are the most common special damages recoverable in product disparagement action, some courts have allowed recovery for the plaintiff's legal proceedings expenses and other expenses in counteracting the disparagement. See W. PROSSER, LAW OF TORTS § 128, at 922-23.

100. See *supra* notes 79-82 and accompanying text.

101. See *infra* notes 106-08 and accompanying text for constitutional changes in this area of the law.

102. General damages were presumed at common law since the defamation was so likely to cause injury to reputation and because affixing an exact monetary amount for present and future injury to the plaintiff's reputation, wounded feelings and humiliation and consequential physical illness or pain was an impossible task. See *Gertz*, 418 U.S. 323 (White, J., dissenting).

103. See *Bose Corp.*, 508 F. Supp. 1249, 1260.

same psychological injury as a person.<sup>104</sup> Also, it would not be difficult to calculate the extent of the injury, since these damages would be pecuniary, much like those in product disparagement actions.<sup>105</sup> Although the common law damage distinctions appear to be misplaced, the differences have been narrowed by changes in constitutional interpretation.

A constitutional restriction was placed on damage awards in defamation actions by *Gertz*. The *Gertz* decision held that awarding damages was not permissible without proof of actual injury, at least where liability is predicated on fault less than actual malice.<sup>106</sup> This decision would appear to abandon presumed damages in defamation actions. This rule should apply to corporate defamation actions as well.<sup>107</sup> Therefore, a corporate defamation plaintiff will be required to show actual injury to recover damages. This rule has no effect on product disparagement, since plaintiffs were always required to meet the stricter test of proving special damages.<sup>108</sup> Constitutional changes which have narrowed the distinction between corporate defamation and product disparagement in the damages area have also affected the requisite fault distinction.

A defendant in a product disparagement action is subject to liability if: (1) he knew of the falsity or acted with reckless disregard concerning it, (2) he acted with ill will, or (3) he intended to interfere with the economic interests of the plaintiff in an unprivileged manner.<sup>109</sup> In contrast, the common law fault requirement for defamation was strict liability.<sup>110</sup> However, *Gertz* eliminated strict liability when the Court held that liability for personal defamation could not

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104. Psychological injury may be incurred by a human, but a corporate entity can only incur injury to its business reputation. *See supra* note 95.

105. At least one author has recognized the inconsistency in treating corporate defamation and product disparagement actions differently. This author suggests a mistake may have been made when corporations were recognized as being able to bring a suit for defamation. *See Development of the Law, Competitive Torts*, 77 HARV. L. REV. 885, 895 (1964).

106. *See supra* note 16.

107. Presumed damages were allowed at common law since a defamatory statement was so certain to cause psychological injury to a person and due to the difficulty in calculating damages. However, a corporation cannot suffer psychological injury and the pecuniary damages would not be difficult to calculate. Therefore, the case for abandoning presumed damages in personal defamation actions would be even stronger in the corporate defamation and product disparagement context.

108. *See supra* notes 98-99.

109. *See* RESTATEMENT (SECOND) OF TORTS § 623A (1977).

110. *See supra* note 16.



be imposed without fault.<sup>111</sup> This holding requiring proof of fault should be equally applicable to corporate defamation.<sup>112</sup> However, it is unknown what impact the decision has on product disparagement. If *Gertz* is applicable to product disparagement, then the second and third prongs listed above, acting with ill will and intending to interfere in the plaintiff's economic interests would not be sustainable as a basis for liability if the plaintiff is a public figure. This is because knowledge or reckless disregard is not a part of these requirements.<sup>113</sup> However, the first prong requirement of knowledge of falsity or reckless disregard, is very similar to the *New York Times* actual malice standard. Since product disparagement and corporate defamation are both protecting a pecuniary interest, both causes of action may arise by the same defamatory statement, and other common law distinctions have narrowed, it would be consistent to apply the same fault requirement to both actions. Therefore, if the actual malice standard is applied to a plaintiff bringing a corporate defamation action, the same standard will be assumed to apply to the plaintiff as if it were a product disparagement action.

## V. APPLICABILITY OF THE NEW YORK TIMES STANDARD TO CORPORATE DEFAMATION AND PRODUCT DISPARAGEMENT

### A. Introduction

Application of the *New York Times* standard by lower federal courts to corporate defamation suggests that the actual malice standard is not limited to personal defamation actions.<sup>114</sup> This logic has prompted two District Courts to extend the *New York Times* standard to product disparagement actions.<sup>115</sup> The courts have justified

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111. See *supra* note 40 and accompanying text.

112. The rationale for eliminating strict liability in personal defamation actions would be even stronger in corporate defamation actions, since the interest in protecting the reputation of a person would be greater than the corresponding interest in the corporation's reputation.

113. The Restatement expresses no view as to the constitutionality in product disparagement actions for the state of mind of ill will and intent to interfere. See RESTATEMENT (SECOND) OF TORTS § 623A comment d (1977). These two states of mind may have viability if the plaintiff is not a public figure, since *Gertz* requires only that liability not be imposed without a finding of fault.

114. See, e.g., corporate defamation actions requiring showing of actual malice, *Steaks Unlimited v. Deaner*, 623 F.2d 264 (3d Cir. 1980); *Reliance v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977); *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814 (N.D. Cal. 1977); *Martin-Marietta Corp. v. Evening Star Newspaper*, 417 F. Supp. 947 (D.D.C. 1976); *F & J Enterprises, Inc. v. Columbia Broadcasting Systems, Inc.*, 373 F. Supp. 292 (N.D. Ohio 1974).

115. See *Bose Corp.*, 692 F.2d 189 (stereo loudspeaker manufacturer required to show actual malice); *Simmons Ford, Inc.*, 516 F. Supp. 742 (electric car manufacturer required to show actual malice).

these extensions by balancing the interests involved.<sup>116</sup> In personal defamation, the individual's interest in his personal reputation is at stake.<sup>117</sup> However, the interest in protecting the reputation of a corporation or product is not as important as the individual's reputation.<sup>118</sup> Further, the public's interest in information about corporations or products may be greater than its corresponding interest in individuals.<sup>119</sup> This is especially true when the corporation is involved in matters which significantly impact the public, or when product information concerns health and safety matters. Therefore, the *New York Times* standard should apply to corporate defamation and product disparagement actions. Determining the applicability of the standard on a case-by-case basis however, presents some problems.

### B. Corporate Defamation Plaintiffs

In determining whether a corporate plaintiff is subject to the *New York Times* standard in a corporate defamation action, the courts have used two tests. Some courts have used the *Gertz* public figure test,<sup>120</sup> while others have used the *Rosenbloom* public interest test.<sup>121</sup> The first opportunity for a court to determine whether a corporation fit into one of the three public figure categories outlined in *Gertz* was in *Martin-Marietta Corp. v. Evening Star Newspaper*.<sup>122</sup> The court in *Martin-Marietta* held that the *Gertz* public figure test was inapplicable to corporations.<sup>123</sup> The court reasoned that implicit in the public figure concept was the conclusion that society had an interest in the plaintiff and his activities.<sup>124</sup> Since not all corporate plaintiffs and their activities would be of interest to society, it would be unfair to categorize corporations as public figures.<sup>125</sup> The court also determined that the purpose of the *Gertz* public figure test was to protect

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116. See *infra* notes 117-19 and accompanying text.

117. See *supra* note 33.

118. The individual's interest in protecting his reputation "reflects no more than our basic concept of the essential dignity and worth of every human being. . . ." *Bose Corp.* 508 F. Supp. at 1270 (quoting *Rosenblatt*, 383 U.S. at 92) (Stewart, J., concurring). However, damage to a product's reputation, unlike damages to the reputation of an individual, can always be measured in terms of monetary loss. Also, the manufacturer almost always has access to the media to rebut the disparaging statement. *Id.* But see *Bruno & Stillman Inc. v. Globe Newspapers Co.*, 633 F.2d 583, 590 (1st Cir. 1980) (the assumption that the corporation's interest in protecting its own reputation is less important than that of an individual is overbroad).

119. See *Bose Corp.*, 508 F. Supp. at 1270-71.

120. See *infra* note 135.

121. See, e.g., *Martin-Marietta*, 417 F. Supp. 947. See also *infra* note 132.

122. 417 F. Supp. 947 (D.D.C. 1976).

123. *Martin-Marietta*, 417 F. Supp. at 955-56.

124. *Id.* at 956.

125. *Id.*

the reputation and private lives of individuals.<sup>126</sup> Since a corporation does not have a personal reputation or private life, and an action on behalf of a corporate plaintiff certainly does not involve the essential dignity of every human being, the court limited *Gertz* to its facts.<sup>127</sup>

In rejecting *Gertz*, the court adopted the *Rosenbloom* public interest test.<sup>128</sup> The court felt that this analysis would protect corporations when their activities were of little interest to society.<sup>129</sup> Using this test, the court found that Martin-Marietta's entertainment of defense department personnel at a privately funded stag party was in the public interest.<sup>130</sup> Therefore, the corporate plaintiff was required to prove actual malice.<sup>131</sup> The analysis used by the *Martin-Marietta* court, however, has not become the majority view.<sup>132</sup>

The next court to address whether a corporation must show actual malice chose not to follow the lead established by the *Martin-Marietta* court. In *Trans World Accounts, Inc. v. Associated Press*,<sup>133</sup> the corporate plaintiff charged the defendant with incorrectly reporting a Federal Trade Commission release.<sup>134</sup> The court adopted the *Gertz* public figure test to determine the applicability of the *New York Times* standard.<sup>135</sup> The court rejected the distinction *Martin-Marietta* made

126. *Id.* at 955-56.

127. *Id.*

128. The court approvingly cited Justice Brennan's *Rosenbloom* opinion in reaching its decision: "The public's primary interest is in the event; the public focus is on the conduct of the participants and the context, effect, and significance of the conduct, not on the participant's prior anonymity or notoriety." (quoting *Rosenbloom*, 403 U.S. at 43). *Id.* at 955.

129. *Id.* at 956.

130. The court found in the alternative that *Martin-Marietta* was a limited purpose public figure under the *Gertz* test. *Id.* at 956.

131. The court held there was no evidence of actual malice and granted summary judgment for the defendant. *Id.* at 961.

132. Another court used the *Rosenbloom* test in a corporate defamation action. *F & J Enterprises, Inc.*, 373 F. Supp. 292. This pre-*Gertz* decision held that a disparaging statement about the plaintiff's product was a matter of public interest and required a showing of actual malice.

133. 425 F. Supp. 814 (N.D. Cal. 1977). An FTC release stated the agency's intent to issue a complaint against the plaintiff and seven other companies due to unfair and deceptive practices. The defendant's failure to note the limited nature of the charges against the plaintiff precipitated the corporate defamation action.

134. *Id.* at 817.

135. For other corporate defamation actions using the *Gertz* test see *Steaks Unlimited*, 623 F.2d 264 (held meat producer to be a limited purpose public figure); *Bruno & Stillman Inc.*, 633 F.2d 583 (held boat manufacturer not to be a public figure); *General Products Co. Inc.*, 526 F. Supp. 546 (held manufacturer of chimneys not to be a public figure); *Barron's*, 442 F. Supp. 1341 (held insurance underwriter to be an

between an individual and a corporation, since under California law, the protectable interests of both are the same.<sup>136</sup> Also, the court felt that *Gertz* had overruled *Rosenbloom* without qualification.<sup>137</sup>

In applying the *Gertz* status approach in *Trans World Accounts, Inc.*, the court, without setting forth its reason, held that the plaintiff was not an all purpose public figure, nor a limited purpose public figure.<sup>138</sup> The plaintiff did fall within the third "rare" category<sup>139</sup> of an involuntary public figure, because it was drawn into the particular controversy.<sup>140</sup> The court held that the issuance of the FTC proposed complaint drew the plaintiff into a particular controversy having an origin in the plaintiff's own conduct.<sup>141</sup> Thus, the plaintiff was a public figure for the limited range of issues relating to the FTC complaint.<sup>142</sup> However, the requirement that a corporate plaintiff show actual malice has not been limited to plaintiffs deemed involuntary public figures.

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all purpose public figure); *Vegood Corp. v. American Broadcasting, Etc.*, 25 Cal. 3d 763, 603 P.2d 14, 160 Cal. Rptr. 97 (1979), *cert. denied*, 449 U.S. 886 (1980) (held corporation engaged in closing out stores not to be a public figure).

136. The court said that the protectable interests in reputation of corporations and individuals are the same, since under California law, both may recover special, general and punitive damages. *Trans World Accounts, Inc.*, 425 F. Supp. at 819. Reliance for this proposition was placed on *D. Giorgio Fruit Corp. v. American Federation of Labor*, 215 Cal. App. 2d 560, 30 Cal. Rptr. 350 (1963), which was decided prior to *Gertz* which held that damages are limited to actual injury. The court in *Trans World Accounts, Inc.* refused to distinguish corporations and individuals since both corporations and individuals have the same protectable interests, and because of the difficulty in distinguishing them.

The line between the interests of natural persons and corporations is frequently fuzzy and ill-defined. Various legal considerations have long led to the incorporation of businesses that are in economic reality but individual proprietorships or partnerships. For that additional reason, it seems for the purpose of applying the first amendment to defamation claims, the distinction between corporations and individuals is one without a difference.

*Trans World Accounts, Inc.*, 425 F. Supp. at 819. *But see Martin-Marietta*, 417 F. Supp. 947 (the law of libel distinguishes between corporations and human plaintiffs by limiting corporate recovery to actual damages in the form of lost profits).

137. *Trans World Accounts, Inc.*, 425 F. Supp. at 819.

138. *Id.* at 819-20.

139. *Id.* at 821.

140. The holding in *Trans World Accounts, Inc.* that the corporate plaintiff was an involuntary public figure since it was "drawn into a public controversy" is now questionable. A more recent Supreme Court case, *Wolston*, 443 U.S. 157, refused to characterize the plaintiff as a public figure on the grounds that plaintiff was "dragged into a public controversy." Therefore, it is questionable what kind of involuntary conduct the Court will require to be deemed an involuntary public figure.

141. *Trans World Accounts, Inc.*, 425 F. Supp. at 821.

142. *Id.*

In *Reliance Insurance Company v. Barron's*,<sup>143</sup> the court adopted the *Gertz* public figure test and said that corporate plaintiffs deemed all purpose public figures and limited purpose public figures would also be required to show actual malice.<sup>144</sup> In *Barron's*, the corporate plaintiff, an insurance underwriter, instituted a libel action against the defendant financial magazine.<sup>145</sup> The complaint alleged that an article concerning plaintiff's proposed stock offering was libelous.<sup>146</sup> The court found that the plaintiff was both an all purpose public figure and a limited purpose public figure.<sup>147</sup>

The court determined that the plaintiff was an all purpose public official, that is, one who has assumed "especial prominence in the affairs of society,"<sup>148</sup> because the plaintiff's assets exceeded one billion dollars and its common stock was publicly traded.<sup>149</sup> Also, the court said that there was "great interest" during the past several years in the plaintiff corporation and its activities.<sup>150</sup> Although the court said it was adopting the *Gertz* status approach, the finding that the public had a "great interest," is an inquiry only *Rosenbloom* would require. This justification for the court's public figure determination indicates the difficulty in adhering to a strict *Gertz* status approach. In addition, the court found the plaintiff to be a limited purpose public figure.<sup>151</sup> The plaintiff's proposed \$50 million stock offering was sufficient for the court to conclude that the plaintiff was "thrusting itself into the public arena."<sup>152</sup> Therefore, the plaintiff would be required to show actual malice under this theory at least to the extent of issues concerning the stock offering.<sup>153</sup>

The decisions in *Martin-Marietta*, *Trans World Accounts, Inc.*, and *Barron's* indicate the struggle courts have in determining whether a plaintiff in a corporation defamation action must show actual malice. These courts have used both the *Rosenbloom* public interest test and the *Gertz* public figure test. Furthermore, the courts have tried to

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143. 442 F. Supp. at 1341 (S.D.N.Y. 1977).

144. *Id.* at 1348.

145. *Id.* at 1344.

146. *Id.* at 1345-46.

147. *Id.* at 1348.

148. *Id.* at 1347 (quoting *Gertz*, 418 U.S. at 345).

149. *Id.* at 1348.

150. The "great interest" the court found was the circumstances surrounding the acquisition of the corporate plaintiff by another corporation some eight years before the defamation. *Id.* at 1344, 1348.

151. *Id.* at 1348.

152. *Id.*

153. *Id.*

fit the corporate defamation plaintiff into each of the three public figure categories developed in *Gertz*. Since plaintiffs in product disparagement actions are frequently corporations or similarly situated businesses,<sup>154</sup> and there are several similarities between product disparagement and corporate defamation, the corporate defamation decisions can be a source of guidance in product disparagement actions.

### *B. Product Disparagement Plaintiffs*

Although the product is the object of a defamatory statement in a product disparagement action, the courts have looked to the status of the product's manufacturer to see if the plaintiff is a public figure.<sup>155</sup> This approach is consistent with the approach in corporate defamation actions. However, since the disparaging statement about a product concerns only the limited issues related to the product itself, and not to the manufacturer as a whole, the courts have centered their analysis on the *Gertz* limited purpose public figure category.<sup>156</sup> This analysis requires the existence of a public controversy.<sup>157</sup> To interpret what the Supreme Court means by "public controversy," as distinguished from "an issue of public or general concern,"<sup>158</sup> the federal district court in *Bose Corp. v. Consumer Union of the United States, Inc.*,<sup>159</sup> opted to make two inquiries.<sup>160</sup> The first inquiry is whether there is a public controversy preceding the alleged defamation.<sup>161</sup> The second

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154. See, e.g., *Bose Corp.*, 692 F.2d 189 (where plaintiff is a corporate manufacturer of stereo loudspeakers); *Systems Operations, Inc. v. Scientific Games Development Corp.*, 555 F.2d 1131 (3rd Cir. 1977) (where plaintiff is a corporate lottery consulting firm); *Charles Atlas, Ltd. v. Time-Life Books, Inc.*, 570 F. Supp. 150 (S.D.N.Y. 1983) (where plaintiff is a limited partnership selling exercise equipment); *Simmons Ford, Inc.*, 516 F. Supp. 742 (where plaintiff is a corporate manufacturer of electric cars); *General Products Co., Inc.*, 526 F. Supp. 546 (where plaintiff is a corporate manufacturer of chimneys).

155. See, e.g., *Simmons Ford, Inc.*, 516 F. Supp. 742 (automobile retailer cannot assert product disparagement claim on behalf of manufacturer).

156. See, e.g., *Bose Corp.*, 692 F.2d 189; *Simmons Ford, Inc.*, 516 F. Supp. 742.

157. See *supra* notes 47-52 and accompanying text.

158. "Distinguishing what would be 'an issue of public or general concern' under *Rosenbloom*, from 'public controversy' under *Gertz* is not a clearcut task. To the extent we distinguish, we find ourselves returning to the job which the court in *Gertz* felt it had liberated us from." *Bruno & Stillman, Inc.*, 633 F.2d at 590.

159. 508 F. Supp. 1249 (D. Mass.), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1981), *aff'd*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 1949 (1984).

160. The two inquiries originated in *Bruno & Stillman, Inc.*, 633 F.2d 583, which was framed as a corporate defamation action, although the defamatory statements concerned the quality of boats manufactured by the plaintiff.

161. *Gertz* requires public figures, other than all purpose public figures, to have thrust themselves to the forefront of a public controversy. This implies a pre-existing controversy. This implication is reinforced by the ruling that, "Those charged with

is what the nature and extent of the plaintiff's participation is in the particular controversy giving rise to the defamation.<sup>162</sup>

In *Bose Corp.*, the defendant, a consumer magazine, published an article evaluating stereo loudspeakers.<sup>163</sup> The defendant's statement that "individual instruments . . . tended to wander about the room," was found to have attributed a grotesque quality to the product and was therefore harmful to its reputation.<sup>164</sup> The court found the plaintiff to be a public figure and required a showing of actual malice.<sup>165</sup> In its determination of public figure status, the court first looked to whether a public controversy preceded the defamation.<sup>166</sup> Since the plaintiff was emphasizing the unique design of the Bose 901 speaker,

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defamation cannot by their own conduct, create their own defense by making the claimant a public figure." *Hutchison*, 443 U.S. at 135. See *Steaks Unlimited, Inc.*, 623 F.2d 264 (a pre-existing controversy exists when complaints to a television station about quality and price of plaintiff's meats preceded the broadcast of the allegedly defamatory statement).

162. Thrusting oneself into the vortex of a public controversy to influence its outcome suggest voluntary conduct by the plaintiff. See *Bruno v. Stillman, Inc.*, 633 F.2d 583 (activity and success of middle-echelon manufacturer-merchant is not sufficient to make it a public figure). But see *Steaks Unlimited, Inc.*, 623 F.2d 264 (evidence of voluntary conduct where advertising blitz invited public attention, comment, and criticism); *Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932 (2d Cir. 1980) (voluntary conduct where plaintiff was active opponent of fluoridation, had written 15 articles, testified in Congress, and obtained wide publicity for himself and his views).

163. *Bose Corp.*, 692 F.2d at 190.

164. *Id.* at 192-93. The defendant attempted to characterize the statement in the article as a non-actionable opinion, rather than a statement of fact. The Supreme Court has held that opinions are constitutionally privileged. "Under our constitution, there is no such thing as a false idea. However pernicious an opinion may seem we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz*, 418 U.S. at 339-40. The Court of Appeals recognized that an opinion is not actionable and can be neither true nor false, but shed no light on the nature of this statement. An opinion may be actionable if undisclosed defamatory facts are implied as the basis for the opinion. RESTATEMENT (SECOND) OF TORTS § 566 (1977). See generally Titus, *Statement of Fact Versus Statement of Opinion—Dispute in Fair Comment*, 15 VAND. L. REV. 1203 (1962).

165. The finding for the plaintiff was reversed by the Court of Appeals due to lack of clear and convincing evidence of actual malice. Bose Corporation conceded on appeal the district court's public figure finding. The Court of Appeals stated that its holding in no way passed upon the merits of the district court's public figure determination. See *Bose Corp.*, 692 F.2d at 197 (Campbell, J., concurring). The United States Supreme Court heard the case to determine whether the clearly-erroneous standard of review pursuant to Federal Rule of Civil Procedure 52(a) was applicable to a determination of actual malice. *Bose Corp.*, \_\_\_\_ U.S. \_\_\_\_, 104 S. Ct. 1949. The Supreme Court likewise did not pass on the question of whether the Bose Corporation was a public figure. *Id.* at 1955 n.8.

166. See *supra* note 161 and accompanying text.

had been extensively promoting the speaker, and was soliciting reviews of the product, the court found a controversy existing at the time of the defendant's article.<sup>167</sup> The court went on to say that the controversy was "public" rather than "private," since loud speaker manufacturers and reviewers for nationally published magazines were involved in the controversy, and that "a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution."<sup>168</sup> Since the number of people impacted was the key to the finding of a "public" controversy, which is a quantitative approach, rather than a qualitative one, this decision would appear to contradict post-*Gertz* decisions.<sup>169</sup>

After a finding of a pre-existing public controversy, the next inquiry involves the nature and extent of the plaintiff's participation in the controversy. In *Bose Corp.*, the court characterized the plaintiff's participation as "extensive."<sup>170</sup> The extensive advertising and solicitation of reviews, which clearly invited public attention, comment and criticism, was evidence of voluntary conduct by the plaintiff.<sup>171</sup> Thus, the findings that a public controversy preceded the defamation and that the plaintiff voluntarily engaged in the controversy satisfied the court that the Bose Corporation was a limited purpose public figure and required to show actual malice.<sup>172</sup>

### C. Determining Public Figure Status of Corporate Plaintiffs

The application of the *New York Times* standard to corporate defamation and product disparagement actions is inevitable. The con-

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167. *Bose Corp.*, 508 F. Supp. at 1273.

168. *Id.*

169. See *supra* notes 47-52 and accompanying text.

170. *Bose Corp.*, 508 F. Supp. at 1273.

171. *Id.*

172. *Id.* at 1274. The court in *Simmons Ford, Inc.*, 516 F. Supp. 743, found the corporate plaintiff in a product disparagement case to be a public figure and required to show actual malice. The court did not address the plaintiff's activities or the issues involved in making this determination. The court did cite *Bose Corp.* in its decision, but this reliance appears misplaced. *Bose Corp.*, held that the actual malice standard applies to product disparagement actions, "at least when plaintiff is a public figure." See *Simmons Ford, Inc.*, 516 F. Supp. at 744 n.4 [Emphasis added.]. In comparison, *Simmons Ford, Inc.*, appears to have adopted a *per se* rule that corporations are public figures in product disparagement actions. The court in *Simmons Ford, Inc.*, may have made its actual malice determination based on the common law standard of fault for product disparagement actions, which does not address the status of the plaintiff. The common law standard requires plaintiff to show actual malice, ill will, or intent to interfere. See RESTATEMENT (SECOND) OF TORTS § 623A (1977) and *supra* notes 109-113 and accompanying text. For product disparagement cases basing liability upon the common law principles of fault, see *General Products Co., Inc.*, 526 F. Supp. 546; *Systems Operations, Inc.*, 555 F.2d 1131.



tinued expansion of *New York Times* and its progeny and the emphasis on free speech and press suggest this expansion.<sup>173</sup> The balancing of the interests in personal defamation, as compared to corporate defamation and product disparagement, would also suggest this result.<sup>174</sup> However, application of the *New York Times* standard to the corporate plaintiff on a case-by-case basis has not been consistent.<sup>175</sup>

Application of the *Rosenbloom* public interest test to corporate plaintiffs has merit since it encourages the ventilation of issues which the public finds important. Information about a corporation or product may be more important to the public than information about a candidate running for office. This raises the question of what is in the public interest. A pure quantitative approach would suggest that movie stars would be the group the greatest number of people would want to know about.<sup>176</sup> Certainly this would not reflect the underlying rationale of *New York Times*, which was to protect political speech.<sup>177</sup> This approach would also be ineffective in protecting the reputation of a corporation or product. The inadequacy of the *Rosenbloom* test is also apparent due to the ease with which courts find a corporation or a product to be in the public interest.<sup>178</sup> Subjecting the small corporation to the *New York Times* standard upon a finding that the issue was in the public interest would render such a plaintiff remediless

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173. See *supra* notes 10-52 and accompanying text.

174. See *supra* notes 116-19 and accompanying text.

175. See *supra* notes 120-54 and accompanying text.

176. One commentator suggests that the *Gertz* status based approach would also find movie stars to be all purpose public figures, since they are the best known public figures in the country and *Gertz* removed the subject matter of the controversy from the test. Whether an inquiry into the subject matter has been in fact removed from the *Gertz* test is questionable. Rather, the Court appears to have failed in addressing what type of subject matter will constitute a public controversy. In any event, finding well known people like movie stars to be public figures without regard to society's interest in the subject matter has little relevancy to the central meaning of the first amendment. See Lewis, *supra* note 1, at 623-24.

177. Speech critical of government and public officials was given first amendment protection in *New York Times*. Justice Brennan's seditious libel analysis was the crux of his opinion. See *New York Times*, 376 U.S. at 273. Justice White also emphasizes in his dissent in *Gertz* that the central meaning of the first amendment is that libel law as it relates to criticism of government and public officials is beyond the police power of the State. *New York Times* and its progeny was never intended to deprive private citizens of recourse to redress injury to reputation. Justice White noted that raising the threshold liability standard and limiting damages to actual injury is not the course envisioned by the Court in *New York Times*. *Gertz*, 418 U.S. at 387 (White, J., dissenting).

178. One commentator suggests that the public interest test is a bootstrap expression, since anything published may be said to be in the public interest. See Eaton, *supra* note 1, at 624.

to rebut the falsity. The small corporation could not rebut the falsity due to the lack of resources necessary for media access and the difficulty in proving actual malice. Therefore, the public interest test would result in harsh and arbitrary decision making.

Some courts have applied the *Gertz* all purpose public figure category to corporate plaintiffs.<sup>179</sup> This may result in a strong tendency to deem all corporations public figures.<sup>180</sup> Although a *per se* rule of this type is attractive to the courts because of its broad and clear definition, it also results in arbitrary decision making. A *per se* rule would place the small or close corporation on the same level as a multi-billion dollar corporation.<sup>181</sup> Certainly a small business does not give up its reputation and privacy rights by the mere act of incorporation. Although such a result is clearly arbitrary, one may argue that at least the very large corporations should be public figures.

Addressing corporate characteristics such as volume of sales, amount of assets, or influence on society would be an alternative to determining public figure status of corporations. It could be argued that the larger corporations have greater access to the media and are more likely to have assumed the risk of public exposure.<sup>182</sup> However, the *Gertz* status-based approach does not consider the public's interest in the information. As Justice Brennan noted in his dissent in *Gertz*, a *Gertz* status approach leads to the paradoxical result of dampening issues of interest to the public because they happen to involve private citizens, while encouraging discussion of issues involving public figures, even though no one is interested in such information.<sup>183</sup> Finding large corporations to be public figures would encourage the discussion of issues in which the public may have little interest. An additional danger where corporate plaintiffs are public figures is the difficulty these plaintiffs have in overcoming the actual malice standard. The imposition of the *New York Times* standard, which has been referred to as an "insurmountable barrier,"<sup>184</sup> has resulted in "near-immunity"<sup>185</sup> from defamation judgments. Fortunately, few courts have applied the all purpose public figure category to the corporate plaintiff.

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179. See, e.g., *Barron's*, 442 F. Supp. 1341.

180. See Note, *supra* note 56, at 990.

181. *Id.*

182. The access to the media rationale has been criticized by one court as "no more than makeweight." *Barron's*, 442 F. Supp. at 1348. Another court has held that most corporations have no more access to the media than a private person. See *Bruno & Stillman, Inc.*, 633 F.2d at 589. See also *supra* notes 35, 37.

183. *Gertz*, 418 U.S. 364 (Brennan, J., dissenting).

184. *Id.* at 338.

185. See *Eaton*, *supra* note 1, at 1394.

One other approach the courts have used in determining whether corporate plaintiffs must show actual malice is the *Gertz* involuntary public figure category.<sup>186</sup> An involuntary public figure is one who, through no purposeful activity of his own, is drawn into a public controversy. The validity of this category is in doubt. In one post-*Gertz* case, the court refused to classify a plaintiff who failed to appear in court and was linked to Soviet espionage as a public figure.<sup>187</sup> The court reasoned that the plaintiff was "dragged unwillingly into a public controversy."<sup>188</sup> When the court will find involuntary conduct sufficient for a public figure determination is unknown. This type of activity is certainly not in agreement with the assumption of risk rationale for public figure status.<sup>189</sup> Therefore, application of this category to corporate plaintiffs should be avoided. Courts could find this category to be a convenient catch-all when there is no evidence of voluntary conduct by the corporate plaintiff.

The limited purpose public figure category is the rationale most widely used when corporate plaintiffs in corporate defamation and product disparagement actions are found to be public figures.<sup>190</sup> Since this category requires one to have thrust himself into a public controversy, the difficulty courts have found is in defining "public controversy." Post-*Gertz* cases in the personal defamation area suggest that the quality of the issue is important.<sup>191</sup> However, the Supreme Court has given no indication of what is a quality issue. Furthermore, some courts, in addressing public controversy involving corporate plaintiffs, have looked to the number of people involved.<sup>192</sup> This quantitative approach closely resembles the *Rosenbloom* public interest test.<sup>193</sup> Therefore, in order to curb this confusion, courts should give greater substance to the term "public controversy" in both personal defamation actions and actions for corporate defamation and product disparagement.

A suggested approach to defining public controversy in the corporate defamation and product disparagement area would include both

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186. See, e.g., *Trans World Accounts, Inc.*, 425 F. Supp. 814.

187. See *Wolston*, 443 U.S. 157.

188. *Id.* at 157. See *supra* note 140.

189. See *infra* note 193.

190. For cases finding corporate plaintiff to be a limited purpose public figure, see *Bose Corp.*, 692 F.2d 189; *Steaks Unlimited, Inc.*, 623 F.2d 264; *Trans World Accounts, Inc.*, 425 F. Supp. 814; *Martin-Marietta*, 417 F. Supp. 947.

191. See *supra* notes 48-52 and accompanying text.

192. See, e.g., *Bose Corp.*, 508 F. Supp. at 1273.

193. See *supra* notes 51-52 and accompanying text.

a qualitative and quantitative analysis. This approach would be a compromise between the strict *Gertz* status test and the *Rosenbloom* public interest test. By balancing these two factors to determine whether a public controversy exists, the court would be considering both the importance of the issue and the number of people interested in the issue.

The importance of the issue, or the qualitative analysis, could be more widely defined than the corresponding definition in the personal defamation context. A quality issue should be more than those issues related to government. A product deficiency which relates to health and safety matters or corporate activities related to environmental hazards would certainly be a quality issue. However, a slight deficiency in a product which merely renders the product a "poor buy" should not be a qualitative issue because this would subject the corporate plaintiff to the *New York Times* standard in nearly all instances of false criticism. This qualitative determination should be balanced with a quantitative determination to see if there is a public controversy.

The number of people interested or affected by an issue relating to a corporation or product is a relevant inquiry in determining whether a corporate plaintiff must show actual malice. This approach was used by the *Rosenbloom* Court and implicitly by courts using the *Gertz* test.<sup>194</sup> This inquiry encourages the ventilation of issues in which the public has an interest. Since this inquiry is balanced with the qualitative approach, the danger of subjecting small corporations to the actual malice standard is minimized. Therefore, in determining whether a public controversy exists in the corporate defamation and product disparagement area, both quality and quantity inquiries should be balanced. The courts should also address whether the public controversy was existing at the time of the defamation and whether the corporate plaintiff's activities were voluntary.

A pre-existing controversy requirement ensures that the issue is of interest to the public prior to the defamation. Otherwise, the media defendant could create its own defense by bringing the corporate plaintiff into the center of attraction. This requirement would also disregard the corporate plaintiff's activities after the defamation, such as the rebuttal efforts, which are a result of the defamation. Therefore, only activities by the corporate plaintiff prior to the defamation would be addressed.

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194. *Id.*

The plaintiff's activities prior to the defamation should also be voluntary. Voluntary activity by the corporate plaintiff is the only activity consonant with the assumption of risk rationale.<sup>195</sup> What constitutes voluntary activity would be for the courts to determine, but several decisions provide guidance. Merely placing a product on the market<sup>196</sup> or being a successful business<sup>197</sup> has not been sufficient to constitute voluntary conduct, while promotional activities described as an advertising blitz have.<sup>198</sup>

Therefore, courts should address whether the corporate plaintiff's activities were voluntary, whether a controversy preceded the defamation, and whether the controversy is public, by balancing both the quality of the issue involved with the quantity of people interested. This modification of the limited purpose public figure category would give courts in corporate defamation and product disparagement actions greater guidance in evaluating the relevant interests and would result in more equitable and consistent decision making.

### CONCLUSION

Balancing the interests of free speech with protection of reputation suggests that corporate defendants in corporate defamation and product disparagement actions should be given first amendment protection. This first amendment protection is afforded by requiring the corporate plaintiff to show actual malice in order to recover. However, a threshold examination of the source and purpose of the defamatory or disparaging statement is necessary. If the statement is made by a trade competitor advancing his own economic interests, the expression will be deemed commercial speech and unprotected due to its falsity. If the statement is by the media whose intent is to inform the public, the expression is pure speech and entitled to full first amendment protection. However, the determination on a case-by-case basis of whether the corporate plaintiff must show actual malice is in a state of confusion.

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195. The common law defense of assumption of risk required that the plaintiff know and understand the risk and that the choice to incur the risk be free and voluntary. See W. PROSSER, *LAW OF TORTS* § 68, at 447. However, due to the lack of voluntary activity by an involuntary public figure, this plaintiff cannot be said to have assumed the risk of public exposure. Since part of the underlying rationale for requiring public figures to show actual malice is not evident, the involuntary public figure category should not be a basis of requiring the plaintiff to show actual malice.

196. See *Vegood Corp.*, 25 Cal. 3d 763, 603 P.2d 14, 160 Cal. Rptr. 97.

197. See *Bruno & Stillman, Inc.*, 633 F.2d 583.

198. See *Steaks Unlimited, Inc.*, 623 F.2d 264.

Some courts have used the *Rosenbloom* public interest test in determining whether actual malice must be shown. This broadsweeping rule gives little deference to the small corporation who may not have access to the media to rebut or resources to prove falsity. Other courts have used the various *Gertz* public figure categories. The all purpose public figure category produces arbitrary results because it fails to consider the public's interest. The involuntary public figure category is inequitable because it does not require voluntary conduct by the corporate plaintiff. The limited purpose public figure category appears appropriate for corporate defamation and product disparagement actions, but the confusion over what is a public controversy has led to inconsistent results. This note suggests that public controversy should be determined by balancing the quality of the issue with the number of people interested in or impacted by the issue. By also requiring voluntary conduct by the corporate plaintiff and the existence of the public controversy prior to the defamation, the courts will have more guidance in applying the actual malice standard to these actions. This will result in more consistent decision making by the courts and less of a chilling effect upon information about corporations and their products.

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