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Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.:
Does the Actual Malice Standard of *Gertz v.*
***Robert Welch, Inc.* Apply to Speech on Matters**
of Purely Private Concern?

I. INTRODUCTION

In June of 1985, the United States Supreme Court ruled that the first amendment protections outlined in *Gertz v. Robert Welch, Inc.*¹ do not apply to cases involving speech on purely private matters.² In so doing, the Court bypassed "[t]he issue debated in legal briefs and in oral arguments—whether a non-media defendant had the same First Amendment protections as media defendants."³ The Court returned instead to the content-based analysis of *Rosenbloom v. Metromedia, Inc.*⁴ The *Rosenbloom* plurality decision was supported by a mere trio of Justices and was repudiated by a six-justice majority less than three years later in the *Gertz* ruling.⁵

*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*⁶ arose when the credit-reporting company, Dun & Bradstreet, issued a false report to five subscribers that Greenmoss Builders had filed a petition for bankruptcy. Although a correction notice was issued to the subscribers, Greenmoss was not completely satisfied with the actions of Dun & Bradstreet and brought suit for defamation in a Vermont state court. The jury returned a verdict for the plaintiff for \$50,000 compensatory and \$300,000 punitive damages which was upheld by the

1. 418 U.S. 323 (1974).

2. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

3. Denniston, *The Supreme Court strikes off in a new direction in libel law, exposing media and nonmedia defendants to greater risk*, 6 CAL. LAW. 39 (Jan. 1986).

4. 403 U.S. 29 (1971). Justice Brennan, in his dissent, stated:

Justice Powell's opinion in *Dun & Bradstreet* can be fairly read to support the approach taken by the *Rosenbloom* plurality in deciding when and where the Constitution should restrict state defamation law. The limits previously imposed, however, are less stringent than . . . under the approach of the *Dun & Bradstreet* plurality opinion. Speech regarding matters of public or general interest is to receive the minimal *Gertz* protections against unrestrained presumed or punitive damages instead of the full *New York Times v. Sullivan* protections against any recovery, absent a showing of actual malice.

Dun & Bradstreet, 105 S. Ct. at 2957 (Brennan, J., dissenting).

5. *Id.* See also *Gertz*, 418 U.S. at 323.

6. 105 S. Ct. 2939 (1985).

Vermont Supreme Court.⁷ *Dun & Bradstreet* petitioned the United States Supreme Court for certiorari. When certiorari was granted,⁸ it appeared that a ruling was forthcoming on whether *Gertz* applied to non-media defendants. However, the plurality decision stated that the determinative factor was whether the speech involved a matter of public interest or purely private concern.⁹

The ruling in *Dun & Bradstreet* has left attorneys and academicians second-guessing the significance of the Court's holding. The surprising result was that the Court's plurality opinion did not attempt to apply *Gertz*.¹⁰ Some commentators suggested that this has signaled a shift in the Court which could have such far-reaching implications as a reconsideration of *New York Times Co. v. Sullivan*.¹¹ Nonetheless, while *Gertz* remains intact, it is inapplicable to cases involving private speech, such as *Dun & Bradstreet*.¹² Furthermore, the media-nonmedia distinction that appeared to be so important before *Dun & Bradstreet* has now been rejected for a content-based analysis similar to that in *Rosenbloom*,¹³ which proved extremely problematic and was apparently overruled by *Gertz*. The severely divided *Dun & Bradstreet* ruling¹⁴ points to one conclusion: now that

7. *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 461 A.2d 414 (1983).

8. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 464 U.S. 959 (1983).

9. The long awaited decision was expected to resolve whether the

First Amendment limits on libel suits against news media were also available to nonmedia defendants like *Dun & Bradstreet*. Although five different Justices went on record eschewing a media-nonmedia distinction and concluding that the press enjoyed no greater protection than any other speaker under the First Amendment, that position did not provide the common ground of decision, because four of the Justices were in dissent Instead, the Court . . . held that the special limitations on excessive damage awards in defamation suits did not apply in suits brought by private individuals or entities over defamatory statements on 'matters of purely private concern.'

Supreme Court Report, 71 A.B.A. J. 116, 123 (Nov. 1985).

10. "It is interesting to note that Justice Powell declines to follow the *Gertz* approach in this case. I had thought that the decision in *Gertz* was intended to reach cases that involve any false statements of fact injurious to reputation." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2952 (1985) (White, J., concurring).

11. 376 U.S. 254 (1964).

Floyd Abrams, the noted First Amendment advocate from New York City, sees the ruling as the latest and strongest of several indications that Burger, White, Rehnquist and O'Connor share 'a willingness to reconsider *Sullivan* itself. Anytime you are up to four Justices, you are talking about perilous times.' And Jonathan Lubell, a New York City attorney who represents libel plaintiffs, says he also perceives a shift on the court [sic]. 'There is much more of an articulated minority for doing away with *Sullivan* entirely,' he says.

Denniston, *supra* note 3, at 41.

12. *Dun & Bradstreet*, 105 S. Ct. at 2946.

13. *Id.*

14. Justice Powell wrote the opinion of the Court, joined by Justices Rehnquist and O'Connor. The Chief Justice filed a separate concurring opinion, as did Justice

the Court has asserted its influence in the field of libel law, related decisions will likely be forthcoming.¹⁵

This note begins by laying the necessary foundation, both legal and factual, for a thorough understanding of the Supreme Court's opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*¹⁶ Next follows an analysis of the four opinions filed in the case—the plurality opinion, the two separate concurring opinions, and the dissenting opinion. The note will conclude by examining the possible repercussions and impact of the case on future libel cases.

II. THE DEVELOPMENT OF FEDERAL LIBEL LAW

The early common law of England imposed strict liability for libel, as was the case with most tort causes of action. However, the courts soon adopted the rule that a "plaintiff must plead and prove not only that the defendant intended to defame him, but also that he was inspired by malice, [that is,] a desire to cause harm."¹⁷ This was an attempt by the courts to discourage actions for defamation, both slander and libel. Yet, by the nineteenth century, the English courts were implying malice by law where a "statement was false and defamatory, and was made intentionally."¹⁸

As with other areas of the law, the early American courts adopted the common law's basic principles concerning libel. To recover in a

White. Justice Brennan wrote a dissenting opinion, joined by Justices Marshall, Blackmun, and Stevens.

15. At about the time the court [sic] issued its far-reaching opinion in *Dun & Bradstreet v. Greenmoss Builders* . . . it agreed to hear two other libel cases next term which could have significant impact on the media. In *Anderson v. Liberty Lobby*, the court [sic] has been asked to decide how much evidence a libel plaintiff must produce before trial to overcome a defense summary judgment motion.

In *Philadelphia Newspapers v. Hepps* the sole issue before the Court is whether a plaintiff must prove that an allegedly libelous statement is false or a libel defendant must prove the statement is true.

Libel & Privacy, 9 NEWS MEDIA & THE LAW 3, 3 (1985).

16. 105 S. Ct. 2939 (1985).

17. W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 1020 (7th ed. 1982) [hereinafter cited as W. PROSSER].

18. *Id.* at 1021.

In 1825 the historic case of *Bromage v. Prosser*, 4 B. & C. 247, 107 Eng. Rep. 1051 (K.B.) was decided. It drew a distinction between 'malice in fact and malice in law.' Malice is necessary, it held, but in the ordinary defamation case, if the statement is false and defamatory and it was made intentionally, 'the law implies such malice as is necessary to maintain the action' . . . [T]he effect of the case was that malice in fact was no longer a requisite to a prima facie case of defamation.

Id.

libel case, the rule developed that a plaintiff merely had to prove that the defendant intentionally uttered a false statement about the plaintiff.¹⁹ However, the defendant could shift the burden of proof by asserting the affirmative defense of privilege, that is, truthfulness.²⁰ Furthermore, the state courts had strict jurisdiction over libel law, in spite of the first amendment freedom of speech and freedom of the press guarantees.²¹

The first half of the twentieth century saw the Supreme Court issue opinions which allowed more freedom of discussion. The Court first asserted its power to review state law in the area of libel and freedom of speech in 1925,²² thereby eradicating the old view espousing the inapplicability of first amendment constitutional protections to state libel laws. By 1959, the Court had created libel law exclusions for officials²³ and for the broadcast media,²⁴ but on both occasions had denied the privilege to members of the print media.

Finally, in 1964, the Supreme Court held in *New York Times Co. v. Sullivan*²⁵ that a state cannot, under the first and fourteenth amendments, award damages to a public official for libel concerning his official conduct absent a showing of "actual malice," which was defined as either the knowledge of falsity or a reckless disregard for the truth.²⁶ The decision was a first, in many respects, in American libel law: it was the first time that the Court had used a due process analysis to review a civil libel judgment; the first time that first amendment protections had been extended to an editorial advertisement; and, the first time that the Court had recognized that the Constitution protected defamatory and false statements.

The *New York Times* "actual malice" standard was extended beyond public officials to include public figures in *Curtis Publishing Co.*

19. See, e.g., *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260 (1920) (book publisher liable for publishing a supposedly fictional work which defamed a New York City magistrate).

20. See, e.g., *Kilian v. Doubleday & Co.*, 367 Pa. 117, 79 A.2d 657 (1951) (affirmative defense to prove statements substantially true).

21. W. Prosser, *supra* note 17, at 1024.

22. *Gitlow v. New York*, 268 U.S. 652 (1925).

23. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (overruled state law as placing prior restraint on libels of public officials).

24. *Farmers Educ. & Coop. Union of Am., N. Dakota Div. v. WDAY, Inc.*, 360 U.S. 525 (1959) (state libel laws do not apply to equal-time statements over the electronic media).

25. 376 U.S. 254 (1964). The Court in *New York Times* stated that "[t]he constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice . . .'" *Id.* at 280. "We hold today that the constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." *Id.* at 283.

26. *Id.*

v. Butts.²⁷ Although the Court did not specifically define "public figure," it went to considerable effort to standardize the term as including individuals who, by fame, position, or involvement in public affairs, were influential in shaping issues of concern to the public.²⁸

Four years after *Curtis* came the multifaceted and short-lived ruling in *Rosenbloom v. Metromedia, Inc.*,²⁹ wherein the *New York Times* "knowing-or-reckless-disregard" standard was expanded beyond public officials and public figures to include any statement concerning matters of public or general interest.³⁰ It appeared that first amendment protections of free speech and free press had been extended to the logical extreme, but the Court was sharply divided and the decision rested on a tenuous plurality opinion written by Justice Brennan, in which Chief Justice Burger and Justice Blackmun joined. Justice Black concurred in the judgment while adhering to his view that the first amendment provides absolute immunity to the news media. Justice White also concurred in the judgment, but only because he viewed the facts such that the allegedly libelous statement was covered by the *New York Times* rule. More importantly, Justice White voiced strong opposition to the notion of expanding that rule.³¹ In the dissenting opinion, Justices Harlan, Marshall, and Stewart felt that a more stringent rule was not necessary, but proposed that damages be limited to those actually incurred, excluding

27. 388 U.S. 130 (1967). Although *Curtis* stands for the simple proposition that the *New York Times* rule extends to "public figures," the case itself was not so simple. Actually, two cases were involved: (1) Coach Wally Butts of the University of Georgia sued the *Saturday Evening Post* for charging him with "fixing" a football game, and (2) Edwin A. Walker, a retired army general, sued the Associated Press for a story implicating him in a racial disturbance at the University of Mississippi. Both were held to be public figures. Justice Harlan delivered the opinion of the Court, joined by Justices Clark, Fortas, and Stewart. This opinion established a different standard for public figures, reversing *Walker* and affirming *Butts*. Chief Justice Warren wrote a separate opinion arguing that the *New York Times* rule should apply, but concurred in the judgment.

28. C. LAWHORNE, *THE SUPREME COURT AND LIBEL* 56 (1981).

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

30. We thus hold that a libel action . . . relating to . . . involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 52.

31. I prefer at this juncture not to proceed on such a broad front. I am quite sure that *New York Times Co. v. Sullivan* was the wiser course, but I am unaware that state libel laws with respect to private citizens have proved a hazard to the existence or operations of the communication industry in this country.

Id. at 60 (White, J., concurring).

punitive damages.³² Besides being the product of a fractured Court, *Rosenbloom* was immediately plagued by lower court difficulties in deciding what was a "matter of public concern"—it seemed that almost any publication or communication could qualify, given the proper circumstances, and consequently courts were flooded with litigation.³³

The problematic *Rosenbloom* interpretation was addressed by the Court in 1974 in *Gertz v. Robert Welch, Inc.*,³⁴ where the Court "granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen."³⁵ The holding denied a publisher or broadcaster the first amendment protections outlined in *New York Times* where the publication involved defamatory falsehoods about an individual who was neither a public official nor a public figure, even if the defamatory communication was of public or general interest.³⁶ Thus, the Court not only put the *Rosenbloom* rule to an early grave, but further held that the states may not permit a recovery of presumed or punitive damages, absent a showing of actual knowledge or reckless disregard. This decision allowed private plaintiffs to recover only actual damages where the *New York Times* test was not met.³⁷ In disavowing the plurality view of *Rosenbloom*, the *Gertz* Court had essentially adopted the dissenting opinions in *Rosenbloom*.

Significantly, one of the new members of the Court, Justice Powell, authored the *Gertz* opinion, joined by Justice Rehnquist, another new member. Also, it is worth noting that the fifth member of the majority, Justice Blackmun, had been a member of the plurality in *Rosenbloom*. What caused the shift? Justice Blackmun stated two reasons in his separate concurring opinion: first, he felt that removing the possibility of presumed and punitive damages would leave "sufficient and adequate breathing space" for the press; and second, he realized that the division of the Court in *Rosenbloom* had led to uncertainty and confusion, and he felt that it was important for the Court to lay down a bright-line rule.³⁸ Finally, the Court allowed the states to determine the appropriate standard of liability for a pub-

32. *Id.* at 67 (Harlan, J., dissenting).

33. Within a year, for example, federal and state appellate courts applied the public-issue standard to publications about individuals involved in electronic eavesdropping, gun fights, organized crime, sports, backpacking overseas, pollution control, quality of restaurant food, service on private bus systems, suspension from school, selling liquor to minors, private divorce, published books, housing eviction, jail escapes, political campaign work, and credit bureau practices. C. LAWHORNE, *supra* note 28, at 79.

34. 418 U.S. 323 (1974).

35. *Id.* at 325.

36. *Id.* at 339-48.

37. *Id.* at 348-50.

38. *Id.* at 354 (Blackmun, J., concurring).

lisher of libel in actions involving a private plaintiff, so long as the states did not impose liability without fault.³⁹

Of the four Justices in dissent, Justices Douglas and Brennan concluded that the Constitution imposed greater restrictions on libel suits,⁴⁰ while Chief Justice Burger and Justice White felt that the Constitution imposed less stringent restrictions than those adopted in *Gertz*.⁴¹

Even though the *Gertz* majority was established by Justice Blackmun's reluctant vote, the holding proved to be stable and workable over the next decade. However, the Court's opinion left unanswered the question whether first amendment protections of free speech apply equally to media and non-media defendants.⁴² Yet, a different Court would decide this question; in 1975, John Paul Stevens replaced Potter Stewart, and Sandra Day O'Connor replaced William O. Douglas in 1981. When the Court granted certiorari in *Dun & Bradstreet*, it appeared that the media-nonmedia issue would finally be resolved.

III. BACKGROUND OF THE CASE

A. Facts

On July 26, 1976, Dun & Bradstreet issued to five subscribers a credit report which erroneously stated that Greenmoss Builders, Inc. had declared bankruptcy. The error came to light that same day while Greenmoss' president was at a local bank trying to secure a loan. The bank officer informed him of a Dun & Bradstreet "special notice" which stated that Greenmoss had filed a voluntary bankruptcy petition.⁴³

Greenmoss' president immediately contacted Dun & Bradstreet's regional officer and explained that there had been an error, asked for a correction, and also asked for the names of the firms that had received the false report. Dun & Bradstreet agreed to look into the matter, but refused to divulge the names of its subscribers, per company policy. After an investigation, Dun & Bradstreet concluded that

39. *Id.* at 347.

40. *Id.* at 355-68 (Douglas, J., Brennan, J., dissenting).

41. *Id.* at 354-55 (Burger, C.J., dissenting), 369-404 (White, J., dissenting).

42. A majority of the states declined to impose a requirement of knowledge or reckless disregard in an action by a private person. However, at least three states—Colorado, Indiana, and New York—required knowledge or reckless disregard in any matter of public or general interest. W. PROSSER, *supra* note 17, at 1045.

43. *Dun & Bradstreet*, 105 S. Ct. at 2941.

the report was indeed false. Dun & Bradstreet then issued a corrective notice on August 3, 1976, eight days after the erroneous report was circulated.⁴⁴

Greenmoss Builders, Inc. is a moderately sized residential and commercial building contractor located in Waitsfield, Vermont. It is a Vermont corporation with no parent companies, subsidiaries, or affiliates.⁴⁵

Dun & Bradstreet, Inc. is a New York based credit reporting agency with a regional office in Manchester, New Hampshire. It provides financial information about businesses to its subscribers who pay for the service. All information is confidential—subscribers are not to reveal the information to others and Dun & Bradstreet has a policy of not revealing the identity of its subscribers to outsiders. The error in the report on Greenmoss' financial condition arose when a seventeen-year-old high school student, employed by Dun & Bradstreet to review Vermont bankruptcy proceedings,⁴⁶ had mistakenly attributed to Greenmoss a bankruptcy petition filed by a former employee. Dun & Bradstreet failed to verify the information before circulating the false report.⁴⁷

B. Procedural History

Dissatisfied with Dun & Bradstreet's corrective action, Greenmoss filed a libel lawsuit in the superior court of Washington, Vermont.⁴⁸ The complaint alleged that the false report had been published with reckless disregard for the truth and had damaged Greenmoss' business reputation, resulting in loss of profits and requiring expenditures to correct the error. In responding, Dun & Bradstreet asserted

44. *Id.* at 2941-42. Actually, there was some disagreement as to how long it took Dun & Bradstreet to issue a correction. Greenmoss' statement of facts alleges that it took eight days, from July 26 to August 3. However, Dun & Bradstreet contended that the error was not reported until August 3 and that it issued a corrected report the same day. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985) (citing Brief for Respondent at 6). Also, the disagreement between the two parties was not resolved by the corrective notice which stated that Greenmoss "continued in business as usual." Besides contending that the notice was vague, Greenmoss insisted on knowing the names of the five subscribers who had received the erroneous report. When Dun & Bradstreet continued in its refusal to divulge the names, Greenmoss refused to provide any further financial information, resulting in Dun & Bradstreet issuing a "blank rating" on the contractors. *Dun & Bradstreet*, 143 Vt. at 71-72, 461 A.2d at 416.

45. Brief for Respondent at 4; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

46. Prior to this controversy, the clerk of the U.S. District Court in Burlington, Vermont had been Dun & Bradstreet's bankruptcy correspondent, but fearing a conflict of interest, he resigned. The clerk suggested as his replacement a sixteen-year-old high school student whom he knew. She was hired without an interview for \$200 per year. Brief for Respondent at 7.

47. *Dun & Bradstreet*, 105 S. Ct. at 2942.

48. *Dun & Bradstreet*, 143 Vt. at 69, 461 A.2d at 415.

both common law and constitutional privileges because the report had been issued in good faith. At the conclusion of the trial, the jury rendered a verdict in favor of Greenmoss and awarded \$50,000 in compensatory damages and \$300,000 in punitive damages.⁴⁹

Dun & Bradstreet petitioned the court for a judgment notwithstanding the verdict or, in the alternative, a new trial on the issues of liability and damages. The trial judge denied the motion for judgment notwithstanding the verdict, but granted the motion for a new trial when he reviewed the jury instructions and concluded that they incorrectly stated the standard of liability enunciated in *Gertz*.⁵⁰

The Vermont Supreme Court heard the case on interlocutory order to resolve five questions of law, all pertaining to the appropriateness of the trial court's grant of a new trial based on the jury instructions.⁵¹ The Vermont Supreme Court rejected Dun & Bradstreet's claim to the media protections defined in *Gertz* and upheld the jury verdict of the trial court. Further, the court held that *Gertz* was not applicable to non-media defendants and that, while the jury instructions did not contain the *Gertz* standard, the instructions were nevertheless harmless error which did not require a new trial.⁵²

Dun & Bradstreet petitioned the United States Supreme Court for certiorari on the basis of the same issue it had presented to the Vermont Supreme Court—that *Gertz* protections should extend to this situation. Certiorari was granted on November 7, 1983,⁵³ and oral argument was scheduled for March 21, 1984. In both petitioner's and respondent's briefs, as well as those filed by amici, the *Gertz* issue was treated as central to the case: do the first amendment protections of free speech apply to non-media defendants in libel actions? Did Greenmoss have to prove actual malice to recover punitive damages?

The Supreme Court, however, saw the issues differently, posing

49. *Id.*

50. *Id.* at 69-70, 461 A.2d at 415. The malice instruction to the jury read:

If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, or that Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton, or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. Further, if the Report was made with reckless disregard of the possible consequences, or if it was made with the knowledge that it was false or with reckless disregard of its truth or falsity, it was made with malice.

Dun & Bradstreet, 105 S. Ct. at 2943 n.3.

51. *Dun & Bradstreet*, 143 Vt. at 70, 461 A.2d at 415.

52. *Id.* at 79, 461 A.2d at 421.

53. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 464 U.S. 959 (1983).

questions on whether the credit report was "commercial speech," which enjoys less protection than "political speech."⁵⁴ Unable to reach a decision before its term ended in July, the Court ordered the case reargued and requested the parties to brief and argue two more questions:⁵⁵ whether the *Gertz* rule of punitive damages applied to non-media defendants, and whether *Gertz* applied to libel where the communication was "commercial speech." The first question appeared to be only a variation of the issues presented at the former argument. Nevertheless, with the issues thus defined, the case was reargued on October 3, 1984.⁵⁶

IV. ANALYSIS

A. *The Plurality Opinion*

Authored by Justice Powell, and joined by Justices Rehnquist and O'Connor, the Court's opinion held that, although their decision permitted recovery of presumed or punitive damages on a lesser showing than "actual malice," there was no first amendment violation, because the first amendment protects only matters of public concern; a credit report is a matter of purely private concern. For the first time, *Gertz* was limited to cases involving public speech. Surprisingly, the opinion failed to discuss both the media-nonmedia distinction and the issue of commercial speech.

1. The jury instructions given by the trial court permitted a recovery of presumed or punitive damages on a showing of less than actual malice.

Greenmoss argued that a determination of whether *Gertz* applied was not required to decide the case because the jury instructions did indeed require the jury to find "actual malice" before awarding presumed or punitive damages. The *Dun & Bradstreet* opinion summarily rejected this argument based on the trial court's broad use of the terms "actual malice," "lack of good faith," and "malice" in its jury instructions. This overbroad definition, the opinion said, would allow

54. Much of the Justices' questioning during oral argument focused on [counsel for respondent] Heilmann's contention that the case should be treated as one involving 'commercial speech' which enjoys less First Amendment protection than 'political speech.' About 10 minutes into Heilmann's argument, Justice Sandra Day O'Connor asked: 'Well, in view of the development of the law about commercial speech and the movement toward limiting it to advertising, would it make sense to try to draw distinction between public speech or private speech instead?'

It was the first time in the case anyone had suggested that the focus shift away from the nature of the defendant to the content of the statement.

Denniston, *supra* note 3, at 40.

55. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 468 U.S. 1214 (1984).

56. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

an award of presumed or punitive damages on a lesser showing than the "actual malice" standard.⁵⁷ Therefore, the Vermont Supreme Court's holding that *Gertz* was inapplicable to the case was essential in the decision to reverse the trial court's grant of a new trial. The Court stated that it must decide, therefore, whether *Gertz* would indeed apply.⁵⁸

2. When the libelous communication does not involve a matter of public concern, it does not violate the first amendment to permit recovery of presumed or punitive damages on a showing of less than actual malice.

The plurality opinion reviewed the three major libel decisions before *Gertz*: *New York Times*, *Curtis*, and *Metromedia*. It then reviewed the reinterpreted *Gertz*, noting first that the *New York Times* protections represented a balancing test between first amendment concerns and the state's interest in protecting public persons from libel.⁵⁹ Further, the Court found that the state's interest in protecting the average private individual from libelous publications was stronger than the first amendment interest in protecting free speech. Although *Gertz* held that the stronger state interest prevented punitive or presumed damages absent "actual malice," nothing in that case indicated that the same balance would be struck regardless of the type of speech involved.⁶⁰

Since the Court had never considered whether *Gertz* applied in the context of purely private speech, it set out to balance the state's interest against first amendment protections. The state's interest in compensating plaintiffs for libel was found to be identical to that found in *Gertz*—"strong and legitimate."⁶¹ The first amendment interest, however, was found to be weaker than in *Gertz*, for the speech here involved a matter of purely private concern. While such speech was not totally unprotected by the first amendment, its protections

57. The jury instructions defined malice as reckless disregard of possible consequences, knowledge of falsity, or reckless disregard of truth or falsity. *Id.* at 2943 n.3. *Gertz* limited presumed and punitive damages to cases of knowledge of falsity or reckless disregard for the truth. *Gertz*, 418 U.S. at 348-50.

58. *Dun & Bradstreet*, 105 S. Ct. at 2943.

59. "These protections, we found, were not 'justified solely by reference to the interest of the press and broadcast media in immunity from liability.' Rather, they represented 'an accommodation between [First Amendment] concern[s] and the limited state interest present in the context of libel actions brought by public persons.'" *Id.* at 2944 (citation omitted) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974)).

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

61. *Id.* at 2945.

were held to be less stringent in *Connick v. Myers*.⁶² Based on the “reduced constitutional value of speech involving no matters of public concern,” the Court held that an award of presumed or punitive damages, absent “actual malice,” was supported by the strong state interest.⁶³

3. The false credit report issued by Dun & Bradstreet did not involve matters of public concern.

Again citing *Connick v. Myers*, the plurality stated that whether a communication involves a matter of public concern is to be determined by the statement’s “content, form, and context . . . as revealed by the whole record.”⁶⁴ The opinion then advanced three rationales for why the particular communication in *Dun & Bradstreet* did not involve any issue of public concern.

First, the Court stated that the speech was solely in the “individual” interest of Dun & Bradstreet and its specific audience. This type of speech, the Court reasoned, warrants no special protection where it is obviously false and damaging.⁶⁵ The plurality did not expound on what it meant by “individual” interest or even how it concluded that this speech was indeed only of import to Dun & Bradstreet. However, in a footnote, it did eschew the hypothesis that this speech was not of public interest because it was economic speech.⁶⁶

Next, the plurality pointed out that the report had only been made available to five subscribers who were not allowed to release the information to other parties. This type of credit reporting, Justice Powell wrote, does not require special first amendment protection to ensure open, robust debate on public issues, and therefore, the plurality’s holding would not prevent the free flow of commercial information.⁶⁷

Finally, the opinion reasoned that this type of speech, based solely on economic incentive, is unlikely to be deterred by the prospect of

62. 461 U.S. 138 (1983) (assistant district attorney’s communication about internal office policies was not a matter of public concern so that employees’ free speech rights were not violated, barring suit under 42 U.S.C. § 1983). Greenmoss’ attorney, Thomas F. Heilmann, said that, in preparing the case, he discussed *Connick* with his colleagues but decided that it “was irrelevant, and that the Court was more interested in drawing ‘bright-line’ distinctions between types of libel defendants, not categories of information.” Denniston, *supra* note 3, at 40. However, he did rely on a few short passages from the case in his brief on the “commercial speech issue.” *Id.*

63. *Dun & Bradstreet*, 105 S. Ct. at 2946.

64. *Id.* at 2947 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)).

65. *Id.*

66. “We also do not hold, as the dissent suggests we do, . . . that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech.” *Id.* at 2947 n.8.

67. *Id.* at 2947.

higher damage awards in the case of a libel suit.⁶⁸ Another incentive for credit reporting companies to be accurate is that false reports will cause reduced subscriptions—thus lowering profits—so that any “chilling” effect on credit reporting due to this holding is likely to be of “decreased significance.”⁶⁹

B. *The Concurring Opinions*

1. Chief Justice Burger

In his opinion, the Chief Justice first emphasized the fact that he had dissented in *Gertz*, stating that he would have preferred to let the area of libel law concerning private citizens evolve along the lines of pre-*Gertz* decisions. However, he asserted that until *Gertz* was specifically overruled, principles of stare decisis required that it be applied by the Court.⁷⁰

The only issue, in Chief Justice Burger's view, was whether *Gertz* applied to the instant case. Since he felt that *Gertz* was limited to statements involving matters of public concern, he stated that it did not apply here because the communication was one involving purely private matters. In his opinion, this was sufficient to dispose of the *Dun & Bradstreet* case.⁷¹

More important than his reasons for concurrence in this case, however, were the Chief Justice's thoughts in regard to *Gertz* and *New York Times*. Not surprisingly, he believed *Gertz* should be overruled. More importantly, he believed that it was time to re-examine *New York Times*, because “[t]he great rights guaranteed by the First Amendment carry with them certain responsibilities as well.”⁷²

2. Justice White

The second concurring opinion in *Dun & Bradstreet*, authored by

68. *Id.* See also *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 771-72 (1976).

69. *Dun & Bradstreet*, 105 S. Ct. at 2947. Although the plurality appears convinced that the credit reporting was not a matter of public interest, lower federal courts are split on the issue. See, e.g., *Credit Bureau of Dalton, Inc., v. CBS News*, 332 F. Supp. 1291 (N.D. Ga. 1971) (practices of credit bureau are related to public interest); *Hood v. Dun & Bradstreet, Inc.*, 335 F. Supp. 170 (N.D. Ga. 1971) (credit company reports are not in the public interest).

70. *Dun & Bradstreet*, 105 S. Ct. at 2948 (Burger, C.J., concurring). Chief Justice Burger was not on the Court when *New York Times* or *Curtis* were decided. He joined the plurality in *Rosenbloom*.

71. 105 S. Ct. at 2948 (Burger, C.J., concurring).

72. *Id.*

Justice White, agreed with the plurality for either of two stated reasons: First, *Gertz* should be overruled; or second, the defamatory publication did not concern a matter of public importance.⁷³ As with Chief Justice Burger's opinion, the significance of Justice White's concurrence was his attitude regarding the *New York Times* and *Gertz* decisions.

Although he joined the majority opinion in *New York Times*, Justice White now expressed a change of heart.⁷⁴ He wrote that, in his opinion, the rule had tipped the scales so far in favor of the press that the free flow of information necessary to assess the performance of our public officials had been polluted by false and misleading information. Further, he proposed that the holding of *New York Times* made it too difficult for a public plaintiff to clear his name of admittedly false publications, since a public official's complaint must allege and establish a prima facie case showing that the media defendant acted with knowledge or reckless disregard for the truth. The balance between the first amendment and the rights of defamed individuals struck in *New York Times* was considered by Justice White to be void of reasonable foresight. Presumably, like the Chief Justice, he would approve a re-examination of its principles.

Although Justice White, who had dissented in *Gertz*, wrote that he would now like to see *Gertz* overruled, he admitted that he was surprised at the plurality's failure to apply it in *Dun & Bradstreet*, stating that he thought it applied to any false statement that injures reputation.⁷⁵ He also added that he agreed with the dissenters that no distinction should be drawn between media and non-media defendants—the first amendment protections of free speech and free press are of equal force.⁷⁶

In the wake of the badly divided *Dun & Bradstreet* Court, Justice White's opinion offered perhaps the most pragmatic look at balancing the first amendment and state interests in libel suits when he discussed possible remedies. Instead of escalating the plaintiff's burden of proof, which prevents a libel victim from clearing his name, Justice White argued that damages should be limited to a level that

73. *Dun & Bradstreet*, 105 S. Ct. 2953-54 (White, J., concurring).

74. The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehood, that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interest at stake, these seem grossly perverse results.

Id. at 2951.

75. *Id.* at 2952-53 (White, J., concurring).

76. "[T]he First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech." *Id.* at 2953 (White, J., concurring).

would not threaten a free press. Presumed and punitive damages could have been limited, or even forbidden, without the concomitant increase in the plaintiff's burden of proof engendered by *New York Times* and *Gertz*.⁷⁷ Alternatively, a solution could have been reached through legislation providing appropriate limits to damages; because libel plaintiffs are more concerned with a clear reputation than a monetary recovery, both sides would be in a better position.⁷⁸

C. *The Dissenting Opinion*

The dissenting opinion of Justice Brennan was joined by Justices Marshall, Blackmun, and Stevens. Of the four, Justices Marshall and Blackmun⁷⁹ joined the majority opinion in *Gertz*, Justice Brennan dissented, writing that *Gertz* prohibited the robust debate necessary to protect first amendment freedom,⁸⁰ and Justice Stevens was not yet a member of the Court when *Gertz* was decided. The dissenters reaffirmed their allegiance to the principles enunciated in *New York Times* and *Gertz*, and framed the only issue in *Dun & Bradstreet* as whether it was constitutional to allow presumed and punitive damages absent a showing of actual malice.⁸¹

1. The *Gertz* holding best accommodates the balance between free speech and the states'⁸² interest in protecting reputation.

The dissenters began by asserting that all libel law implicates first amendment protections because of the possible chilling effect on free speech. Therefore, they argued, states must be careful to ensure the adequate breathing space required to protect freedom of expression;

77. *Id.* at 2952 (White, J., concurring). It appears that Justice White approved of the limitations on damages set out in *Gertz*, but not of the "actual malice" standard which it perpetuated.

78. Justice White wrote that "[a] legislative solution to the damages problem would also be appropriate." *Id.* at 2953 (White, J., concurring). In saying this he has subtly proposed a return to common law principles which allow the individual states to determine what the law will be.

79. Justice Blackmun concurred with the opinion of the majority only for the purpose of establishing a bright-line test. See *supra* note 38 and accompanying text.

80. "I cannot agree, however, that free and robust debate—so essential to the proper functioning of our system of government—is permitted adequate 'breathing space,' when, as the Court holds, the States may impose all but strict liability for defamation. . . ." *Gertz*, 418 U.S. at 361 (citations omitted) (Brennan, J., dissenting).

81. *Dun & Bradstreet*, 105 S. Ct. at 2957 (Brennan, J., dissenting).

82. Interestingly, the plurality opinion referred to the "State's" interest while Justice Brennan wrote of the "states'" interest. One possible interpretation of this is that, unlike the plurality, the dissenters do not recognize any federal constitutional interest in protection of reputation.

the availability of presumed and punitive damages awards in libel actions is inconsistent with these ideals.⁸³

2. *Gertz* does not allow punitive damages absent a showing of actual malice.

The dissenting opinion asserted that *Gertz* provides a definite negative answer to the central issue, whether the punitive damages award in *Dun & Bradstreet* was constitutional.⁸⁴ The respondent's contention of a media-nonmedia distinction was quickly rejected by the dissenters who suggested that the first amendment applies equally to each citizen. Justice Brennan pointed out that, although the plurality failed to address this issue, the remaining six Justices each embraced the view of the dissent on this matter.⁸⁵

Next, the dissent attacked the plurality's reasoning in setting forth a content-based analysis for libel cases. First, they pointed out that the opinion of the Court established no guidelines for determining what was and was not a matter of public concern, yet still managed to determine that the speech at issue was not of public concern.⁸⁶ By reviewing the Court's own precedent, the dissenters concluded that "[t]he credit reporting of *Dun & Bradstreet* falls within any reasonable definition of 'public concern'"⁸⁷ Furthermore, by applying the same balancing test as the plurality, the dissenters argued that first amendment protections should apply in this case because the subject matter of credit reporting directly implicated matters of public concern.⁸⁸ Finally, the dissenting opinion questioned the increased protection provided a private plaintiff, when the plaintiff was not an individual, but a corporation.⁸⁹

83. *Dun & Bradstreet*, 105 S. Ct. at 2955 (Brennan, J., dissenting).

84. *Id.* at 2957 (Brennan, J., dissenting).

85. [A]t least six Members of this Court (the four who join this opinion and JUSTICE WHITE and THE CHIEF JUSTICE) agree today that, in the context of defamation law, the rights of the institutional media are no greater or no less than those enjoyed by other individuals or organizations engaged in the same activities.

Id. at 2959 (Brennan, J., dissenting). Although the opinion of the Court failed to address the media-nonmedia issue, it will apparently be recognized now that first amendment protections are equal for media and non-media defendants.

86. *Id.* at 2960 (Brennan, J., dissenting).

87. *Id.* at 2961 (Brennan, J., dissenting).

88. It is worth noting in this regard that the common law of most states, although apparently not of Vermont . . . , recognizes a qualified privilege for reports like that at issue here The privilege typically precludes recovery for false and defamatory credit information without a showing of bad faith or malice, a standard of proof which is often defined according to the *New York Times* formulation.

Id. at 2963 (citations omitted) (Brennan, J., dissenting).

89. *Id.* at 2964 n.16 (Brennan, J., dissenting).

V. IMPACT

A. *Effect on Prior Case Law*

The holding in *Dun & Bradstreet*, although cutting into the protections of *Gertz*, did not overrule it. As a result, *Gertz* is now limited to situations where the alleged libel involves a matter of public concern, while the *Dun & Bradstreet* rule will cover cases involving a matter of purely private concern.

In addition, it appears that the position of *New York Times* may not be as secure as that of *Gertz*. The majority of the Court—Chief Justice Burger, and Justices Powell, Rehnquist, Stevens, and O'Connor—has been appointed since the historic 1965 decision. Most of them have expressed their dissatisfaction with the *New York Times* rule.⁹⁰ This, coupled with Justice White's change of heart since he voted with the majority in *New York Times*, could spell trouble for a holding which has been the backbone of American libel law for over twenty years.

Floyd Abrams and Jonathan Lubell, libel attorneys in New York City, see *Dun & Bradstreet* as the latest indication that Chief Justice Burger, and Justices White, Rehnquist, and O'Connor are willing to reconsider *New York Times*.⁹¹ Conversely, Marc Franklin, Professor of Law at Stanford University, considers the case "untouchable," and John Carne, a libel defense attorney from Oakland, California, is of the opinion that this particular alignment of Justices is "fleeting" and that the case does not lend itself well to any conclusions.⁹² Nonetheless, the seeds of discontent have been sown.

B. *Legal Effects*

The most obvious effect of the Court's holding is that damage awards in libel suits involving purely private matters will be larger and more easily obtainable due to the possibility of presumed and pu-

90. Chief Justice Burger and Justice White openly voiced their discontent in separate concurring opinions in *Dun & Bradstreet*. Justices Powell, Rehnquist, and O'Connor could be considered at least partly at odds with *New York Times*, based on their interpretation of it in *Dun & Bradstreet*. However, Justice Stevens remains firmly in support of the *Times* rule.

91. Denniston, *supra* note 3, at 41. Speculation on the approach which newly appointed Justice Scalia will take is somewhat premature. However, it is likely that he will join the new Chief Justice together with Justices White and O'Connor should the opportunity for reconsideration arise in the near future.

92. *Id.* at 41-42.

nitive damages.⁹³ "[A] private-figure libel plaintiff can collect . . . damages without proving that he or she suffered actual injury or that the publisher was reckless or knew the statement was false."⁹⁴ Although, as a general rule, a plurality opinion establishes no binding precedent, five members of the Court did agree that it was permissible to award presumed or punitive damages on a lesser showing than the *Gertz* actual malice standard. The plurality reached this conclusion based on the purely private nature of the speech, while the Chief Justice and Justice White concurred separately, stating their feelings that *Gertz* should be overruled.

Also, media defendants should be prepared to litigate the issue of public-private concerns in upcoming lawsuits.⁹⁵ This could become a serious problem for the press when it reports on the private lives of public figures.⁹⁶ Although the question was not addressed by the Court in *Dun & Bradstreet*, most experts agree that the decision will be held inapplicable to the media.⁹⁷

Lower courts will also be affected by the *Dun & Bradstreet* holding because the plurality opinion, while establishing a content-based analysis of libel cases, failed to define what constitutes a "matter of public concern." The only guideline provided by the opinion is a citation to *Connick v. Myers*⁹⁸ which states that such determinations must be based on the whole record. It can be inferred, therefore, that the decision will be made by the trial judge since *Connick* states that this is a decision of law, not fact.⁹⁹ Yet, as history teaches, almost anything is likely to be treated as a matter of public concern by the trial courts; that was the *Rosenbloom* lesson.¹⁰⁰

C. Practical Effects

Will the *Dun & Bradstreet* decision have the undesirable effect of "chilling" free speech? There could, at a minimum, be a temporary

93. *Supreme Court Report*, *supra* note 9, at 123.

94. *Private Figures Standard Lowered*, 9 NEWS MEDIA & THE LAW 3, 3 (Summer 1985).

95. Denniston, *supra* note 3, at 42.

96. By failing to apply *Gertz* to the *Dun & Bradstreet* case, the Court has, in effect, created four categories of libel cases. A public figure/public issue case is covered by the *New York Times* rule. A private figure/public issue case comes under *Gertz*. A private figure/private issue case is now in the domain of *Dun & Bradstreet*. And the public figure/private issue situation does not seem to be controlled by any of the three scenarios. Until the Court rules on such a case, defendants going to trial under those circumstances should be prepared to litigate the issue. *The Supreme Court—Leading Cases*, 99 HARV. L. REV. 212, 217-19 (1985).

97. Denniston, *supra* note 3, at 42.

98. *Dun & Bradstreet*, 105 S. Ct. at 2947 (citing *Connick v. Myers* 461 U.S. at 147-48 (1983)).

99. *Connick*, 461 U.S. at 148 n.7.

100. *See supra* note 33.

"chilling effect" on the media, at least until the public/private figure issue arises and is decided by the Court. G. Lee Garrett, Jr., attorney for Dun & Bradstreet, thinks that the ruling will limit the media, both in its coverage of private figures and of "limited-purpose" public figures.¹⁰¹ Floyd Abrams agrees that the decision will have the effect of limiting the public-figure concept.¹⁰² However, depending on future decisions of the Court, these ill effects could be diminished.

VI. CONCLUSION

While the Court's holding in *Dun & Bradstreet v. Greenmoss Builders* that *Gertz* does not apply to matters of purely private concern is straightforward, the decision raises many questions. What can justifiably be considered a matter of public concern? Will *Gertz* apply to matters of private concern if the plaintiff is a public figure? Is the Court shifting toward a reconsideration of the decision in *New York Times v. Sullivan*?

Although answers to these questions must await future decisions, one thing is certain. Now that the Court has left its mark in the area of libel law and the first amendment, more decisions will be forthcoming. The Court this term will rule on who has the burden of proof of falsity and what the proper standard of evidence is to get a libel case to trial. With those two issues decided, a much clearer picture of the Court's attitude toward libel law will come into focus.

JEFF BOYKIN

101. Denniston, *supra* note 3, at 42. A "limited-purpose" public figure is one recognized as a public figure only for a limited time under certain circumstances. *Id.*

102. *Id.*

