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Not “The World’s Shortest Editorial”: Why the First Amendment Does Not Shield the Rating Agencies From Liability for Over-Rating CDOs

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The general counsel of Fitch famously told the Senate committee investigating the collapse of Enron that the letter rating that his agency assigns a security is “the world’s shortest editorial.”¹ By this, the hopeful lawyer seems to have meant that the rating agencies are members of the press and therefore protected from liability by the mandate of the First Amendment that there shall be “no law . . . abridging the freedom . . . of the press.” Indeed, for years the rating agencies have invoked the First Amendment in statements to Congress,² the courts,³ and the investing public.⁴

The reliance of the rating agencies on the First Amendment will face its toughest test yet as purchasers of collateralized debt obligations and other structured securities backed by subprime mortgages sue (and Congress, the SEC, and state attorneys general investigate) the rating agencies, investment banks, and others involved in structuring and selling these initially highly-rated but now collapsing securities. Purchasers of these securities will assert various claims, including securities fraud under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, claims under various state statutes, common-law fraud, and common-law negligent misrepresentation.⁵ Apart from the usual defenses to such claims, which the rating agencies will share with their co-defendants, the rating agencies will play what they hope is their own trump card, the First Amendment.

Two courts have rejected as “a waste of paper”⁶ the argument that the First Amendment protects the rating agencies. Our view is not quite so dismissive, but for the reasons that follow, we think the First Amendment will not protect the rating agencies in the massive litigation likely to ensue from their role in the subprime debacle.

To tell whether the First Amendment protects the rating agencies, one must first determine whether (and, if so, when) the rating agencies are members of “the press,” whose freedom the First Amendment guarantees. The answer depends on the facts of each transaction. (It follows that the rating agencies are unlikely to win motions to dismiss complaints against them before having to give discovery.⁷) In CDO and similar transactions, public information and our own private interviews suggest that rarely, if ever, did the rating agencies act as members of the press.

If in a particular transaction a rating agency did not act as a member of the press, then it is “game over” for its First Amendment defense. If the agency did act as a member of the press, then its First Amendment defense will confront the long-standing doctrine that “laws of general application” apply to the press as to anyone else, unless there is a specific reason in First Amendment jurisprudence why they should not.⁸ Laws against fraud and negligent misrepresentation are certainly “laws of general application,” so the rating agencies will have to adduce a reason grounded in the First Amendment why they should be exempt from these laws in their rating of CDOs and the like. There are two candidates: the famous doctrine of *The New York Times Company v. Sullivan* that in certain circumstances a member of the press may not be held liable unless it acted with “actual malice,” and the constitutional protection of “opinions.” In our view, neither will help the rating agencies in litigation for over-rating CDOs and similar securities.

When Are the Rating Agencies Members of “The Press”?

The rating agencies have often claimed the First Amendment as a protective blanket over all of their activities.⁹ But the courts have rejected this wholesale approach.¹⁰ Instead, they have decided case-by-case whether a rating agency was acting as a member of the press, and they will doubtless continue to do so in suits against rating agencies for over-rating structured securities. From these cases, one can glean how the courts are likely to make this important threshold decision.

Differentiating Rating from Publishing

The first step is to differentiate the rating of securities from other businesses that some rating agencies are also in, mainly publishing indices, databases, or periodicals. As publishers of periodicals and the like, the rating agencies certainly are members of the press.¹¹ In that role, they enjoy the protection not only of the First Amendment, but also of the common-law rule that publishers are not liable to their subscribers for negligent errors of fact in their publications. The theory of this rule is that publishers would be driven out of business if they were liable to each of their many readers for whatever losses those readers suffered by acting in reliance on a negligent report of fact. In the first of these cases, *Jaillet v. Cashman*¹² in 1921, for example, Dow Jones erroneously reported a court decision on the taxation of dividends. The plaintiff thought the decision would drive down the price of shares and sold. Dow Jones then corrected its error, the price of shares rose on the corrected news of the decision, and the plaintiff sued for his losses. The court sided with Dow Jones, writing that unless an error is intentional or there is some contractual or fiduciary relationship between the parties other than the subscription to the periodical, there is no “liability by the defendant to every member of the community who was misled by the incorrect report.”¹³ But the courts have rejected the argument that, because the rating agencies enjoy the protection of the First Amendment and the *Jaillet* doctrine when they publish periodicals, they enjoy the same protection when they rate securities.¹⁴

When Rating Is Journalism, When it Is Not

The next step is to determine whether a rating agency acted as a member of the press when actually rating a security. This issue has been decided in two types of cases. In the first, the rating agency is not a party to the suit, but receives a subpoena for information it gathered in rating securities issued by a party. In these cases, the rating agencies have invoked the “journalist’s privilege.” Under the First Amendment and the so-called “shield laws” of many states,¹⁵ journalists enjoy greater protection than other citizens from having to give discovery in litigation. Deciding whether a rating agency qualifies for the journalist’s privilege in any given case is to decide whether the agency acted in that case as a member of the press.¹⁶

In the second type of case, the rating agencies themselves have been sued for damages. As one would expect, these include a suit by investors for over-rating securities they bought,¹⁷ and at least two for over-rating securities they did not buy.¹⁸ These cases also include one in which the complaint of over-rating was made by the *issuer* (Orange County, California, which sued S&P for

over-rating bonds that it later wished its rogue treasurer, Robert L. Citron, had been prevented from selling),¹⁹ and several cases in which companies sued rating agencies for defaming their credit.²⁰ As in the cases on the journalist's privilege, the rating agencies invoked the First Amendment, so the court in each case had to decide whether the rating agency acted as a member of the press.

There is a pattern in these decisions, and it augurs poorly for the rating agencies in litigation about their over-rating of privately-placed structured securities. One important factor is whether the agency rates most or all securities of a particular kind for the benefit of the investing public, or instead rates only those securities it is hired to rate.²¹ A second is whether the rating agency merely gathered information about the security it rated or also participated in structuring the security.²² And a third is whether the security was offered to the public or placed privately.²³ In the arena of structured finance (as opposed to the traditional rating of corporate or governmental debt), all of these factors weigh against the rating agencies. They rarely if ever rate securities they are not hired to rate; reliable information suggests that they often commented (or did until recently) on how a security could be structured to achieve a desired rating; and almost all CDOs and similar instruments are placed privately and confidentially.

The most pertinent of these cases is *In re Fitch, Inc.*,²⁴ decided in 2003 by the United States Court of Appeals for the Second Circuit in New York. In that case, a savings bank purchased several securities based on collateralized loan obligations, which were devised by one of its brokers. Its regulator concluded that the CLOs were not investment grade and ordered the bank to dispose of them. When the broker refused to take them back, the bank sued. Discovery of the broker persuaded the bank that the broker and Fitch “had extensive communications about the structure of the transactions.”²⁵ Because the broker's records of its communications with Fitch were incomplete, the bank subpoenaed Fitch. Both the lower court and the Court of Appeals concluded that Fitch was not a member of the press. Two reasons were especially persuasive. First, Fitch rates only transactions it has been hired to rate. “Unlike a business newspaper or magazine, which would cover any transactions deemed newsworthy, Fitch only ‘covers’ its own clients. We believe this practice weighs against treating Fitch like a journalist.”²⁶ The fact that Fitch posts all of its ratings on its website did not dissuade the court from this conclusion.²⁷ Second, emails and other documents submitted under seal persuaded the Court of Appeals that an employee of Fitch took “a fairly active role . . . in commenting on proposed transactions and offering suggestions about how to model the transactions to reach the desired ratings.”²⁸ This role revealed “a level of involvement with the client's transactions that is not typical of the relationship between a journalist and the activities upon which the journalist reports.”²⁹

S&P's Defense of its Role

To address concerns like these, on August 23, 2007, S&P published a thoughtful essay, *The Fundamentals of Structured Finance Ratings*.³⁰ A principal theme of the essay is the value of “Transparency of Ratings, Methodology, and Analysis” and the cognate value of “dialogue” between the arranger of a structured security and the agency that will rate it.³¹ S&P takes exception

to the charge of “secrecy” in its ratings process, especially its rating of CDOs.³² It notes that its ratings model, CDO Evaluator, and the accompanying technical manual are available to anyone who cares to download them.³³ In its “dialogue” with arrangers of CDOs, S&P notes, it “will never tell an arranger what it should or should not do. We merely react to the proposals made by arrangers and in each case only to the extent of telling them the likely impact of these proposals on the rating outcome.”³⁴ Its work, S&P insists, “is incompatible with almost any definition of ‘advisory’ or ‘consultancy’ work.”³⁵

However valuable S&P’s points may be in the discussion of its larger business and regulatory environment, they are unlikely to persuade the courts that S&P or its competitors act as members of the press for purposes of the First Amendment when they rate CDOs. First, CDO Evaluator is indeed public, but it is not self-explanatory or self-applying. If it were, arrangers of CDOs would not need the “dialogue” that S&P describes, and S&P would not need its cadre of CDO analysts. Second, “transparency” is not an essential attribute of a journalist. Journalists investigate and then write what they think best. There is no expectation that they will be “transparent” to their subjects or sources, much less that they will comment about how they will change their stories if the subject changes his or her conduct. And finally, one does not have to tell someone “what it should or should not do” or be an “advisor” or “consultant” to lose one’s status as a member of the press. As *In re Fitch* makes clear, it is enough to participate in the structuring of a security by commenting on its various iterations.

In their traditional role of rating and writing for their subscribers about all debt securities offered and traded publicly, the rating agencies may well have acted as members of the press. But in rating structured securities like CDOs, which the agencies normally rate only for a fee, often participate in the structuring of, and which are usually sold and traded privately, the reverse is true: the rating agencies are not journalists gathering information and reporting to the public, but rather participants in the transactions that they rate.

What Protection Does the First Amendment Give a Rating Agency That Did Act as a Member of the Press?

But what if we are wrong, or if there is a transaction in which the factors that have swayed the courts in cases like *In re Fitch* are absent, so a rating agency actually did act as a member of the press? What protection would the First Amendment then give the agency?

Laws against fraud and negligent misrepresentation, under which investors in CDOs will sue the rating agencies, are laws of general application, so they apply to the press as to anyone else unless the First Amendment dictates otherwise. There are two doctrines under the First Amendment that the rating agencies will probably invoke, the “actual malice” doctrine of *The New York Times Co. v. Sullivan*³⁶ and the protection of “opinions.” We think neither will protect the agencies.

New York Times and “Actual Malice”

New York Times was a landmark, unanimous decision of the Supreme Court in 1964. A committee of civil rights activists placed an advertisement in *The New York Times* in which they criticized the police of Montgomery, Alabama, for its conduct in demonstrations there. The elected city commissioner who supervised the police, although not named in the advertisement, sued the activists and *The Times* for libel and won a judgment for \$500,000. The Supreme Court reversed. Reaffirming the country’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,”³⁷ the Court held:

The constitutional guarantees [of the First Amendment] 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’³⁸ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Thus, *New York Times* encircled an area (criticism of public officials in the conduct of their duties) in which the First Amendment constrains a law of general application (the law of defamation) in order to give “breathing space”³⁹ to the values of free expression embodied in the First Amendment.

In decisions over the next seven years, the Supreme Court expanded that encircled area. But as the circle expanded, the unanimity of the justices broke down.⁴⁰ The tide turned in *Gertz v. Robert Welch, Inc.*⁴¹ in 1974. The Court distinguished between defamation actions brought by “public” and “private” persons. Public persons include public officials and “public figures,” “[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classed as public figures,”⁴² either for all purposes or at least for purposes of the events about which they were allegedly defamed. *The New York Times* standard – that the defamatory statement must have been made “with knowledge that it was false or with reckless disregard of whether it was false or not” – applies across the board to defamation actions against the press by public persons.⁴³ In such actions by private persons, however, *New York Times* applies only to the extent that plaintiffs seek “presumed or punitive damages.”⁴⁴ Otherwise, the First Amendment leaves the states free to apply whatever standard they choose in defamation actions against the press by private persons “so long as they do not impose liability without fault.”⁴⁵

The circle contracted further in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*⁴⁶ in 1985. There a credit reporting (not rating) agency falsely reported to five subscribers that a company had filed for bankruptcy. The company sued for defamation and recovered both presumed and punitive damages. The Supreme Court affirmed. It held that the limits *Gertz* put on private defamation actions (specifically that claims for presumed or punitive damages must satisfy the *New York Times* standard) do not apply “when the false and defamatory statements do not involve matters of public concern.”⁴⁷ The false report of bankruptcy was of no public concern, the Court held, because the report “was speech solely in the individual interest of the speaker and its specific

business audience”⁴⁸ and was distributed confidentially to only five subscribers.⁴⁹ Therefore, the Court thought, quoting *New York Times*, “[t]here is simply no credible argument that this type of credit reporting requires special protection to ensure that ‘debate on public issues [will] be uninhibited, robust, and wide-open.’”⁵⁰

The Court concluded by observing that speech motivated by profit needs the protection of the First Amendment less than do other forms of speech:

In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others Arguably, the reporting here was also more objectively verifiable than speech deserving of greater protection In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental “chilling” effect of libel suits would be of decreased significance.⁵¹

New York Times and its many progeny (of which the cases discussed above are only a few of the more prominent) may indeed protect the rating agencies, but most likely only when the agencies are downgrading or otherwise commenting negatively on a security that is offered or traded publicly. This is so for three reasons.

First, it is a misconception that any plaintiff in any action against the press must satisfy the *New York Times* standard of knowledge of falsity or reckless disregard of truth or falsity. As described above, that standard applies across the board to actions for defamation by public officials and by persons who are public figures for all purposes; to such actions by persons who are public figures for limited purposes if the action arises out of their limited roles as public figures; and to such actions by private persons only if the action relates to a matter of public concern and even then only to claims for presumed or punitive damages or of liability without fault. Certainly issuers of securities to the public are public figures, and the courts have applied the *New York Times* standard to protect rating agencies as well as other journalists when issuers have sued them for downgrading or otherwise criticizing their public securities.⁵² But one does not become a public figure by buying a CDO, nor is the purchase of a CDO a matter of public concern.

Second, the *New York Times* line of cases puts constitutional limits on actions for defamation (and in some cases on actions for invasion of privacy⁵³). But cases against the rating agencies will not be for defamation. If the rating agencies are to find shelter from the doctrine that laws of general application apply to the press as to anyone else, they will have to find it elsewhere than in a doctrine that limits actions for defamation.

Third, in actions by investors for too-favorable ratings, the interests protected by the First Amendment are much weaker than in the *New York Times* paradigm of defamation actions by subjects of unflattering speech. As expressed in *Greenmoss*, the rating agencies have a strong financial interest in rating securities (the source of their income) and in doing so accurately (the foundation of their reputations). Actions against them for over-rating securities will not discourage the rating agencies

from rating securities, only from doing so negligently or fraudulently. And, as the Supreme Court has made clear many times, there is no constitutional value in false or fraudulent expression. As it wrote in *Gertz*: “Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”⁵⁴

The Constitutional Protection of Opinions

The rating agencies believe that their ratings are “opinions” and as such are protected by the First Amendment.⁵⁵ But like the misconception that any plaintiff in any action against the press must satisfy the *New York Times* standard, it is also a misconception that the First Amendment protects all opinions.

The seminal case in the Supreme Court on the protection of opinions is *Milkovich v. Lorain Journal Co.*⁵⁶ in 1990. A high-school wrestling coach sued the local paper and its sports columnist for libel after the columnist wrote that the coach had perjured himself in a court case about whether his team should be disciplined for its role in an altercation. The paper and columnist urged the Supreme Court to recognize a “First-Amendment-based protection for defamatory statements which are categorized as ‘opinion’ as opposed to ‘fact.’”⁵⁷ But the Court refused.

The Court distinguished between opinions that do not “contain a provably false factual connotation”⁵⁸ and those that do. The former “receive full constitutional protection,”⁵⁹ but the latter are subject to suits under the common law of defamation, constrained only by *New York Times*, *Gertz*, and kindred cases.

“In my opinion, Jane Doe is a fool” contains no factual connotation; everyone understands that it is just the opinion of the speaker. If Ms. Doe sued the speaker for defamation, her complaint would be dismissed. On the other hand, “In my opinion, Jane Doe is cheating on her taxes” does contain a provably false factual connotation and could damage the reputation of Ms. Doe just as surely as the same statement without the preface “in my opinion.”⁶⁰ If Ms. Doe sued this speaker for defamation, then she would have to satisfy the *New York Times* standard if she were a public official, or a public figure for all purposes (like a candidate for public office), or a public figure for a limited but relevant purpose (like a syndicated columnist on personal finance). But if Ms. Doe were a private person and her taxes a matter of no public interest, then her suit would be decided under just the common law of defamation. In none of these scenarios would it matter that the speaker started with the three words “in my opinion.”

The principles of *Milkovich* were applied to rating agencies by the Court of Appeals for the Tenth Circuit in *Jefferson County School District v. Moody’s Investor’s Services, Inc.*⁶¹ in 1999. In that case, a school district sold bonds. Moody’s did not rate the bonds, but two hours into the offering period wrote in its electronic publication *Rating News* that “[t]he outlook on the district’s general obligation debt is negative, reflecting the district’s ongoing financial pressures.”⁶² Interest in the bonds quickly waned; the district had to reprice them; and it sued Moody’s for defamation to recover its increased interest expense.

The court dismissed the school district's complaint for two reasons. First, the phrases "negative outlook" and "ongoing financial pressures" are themselves too vague to be "provably false."⁶³ Second, the district could not "identify a specific false statement reasonably implied from Moody's article."⁶⁴ Thus, the sentence in *Rating News* was an opinion protected by *Milkovich* from an action for defamation.

The decision in *Jefferson County* will give the rating agencies only cold comfort in litigation against them by investors in over-rated CDOs. As with most progeny of *New York Times*, the protection of some opinions by *Milkovich* applies to actions for defamation, which investors will not be alleging. Moreover, calling one's statement an "opinion" does not make it so under *Milkovich*. As the court wrote in *Jefferson County*:

[T]he fact that Moody's article describes its evaluation as an opinion is not sufficient, standing alone, to establish that Moody's statements are protected. See *Milkovich*, 497 U.S. at 19 If such an opinion were shown to have materially false components, the issuer [of the opinion] should not be shielded from liability by raising the word "opinion" as a shibboleth.⁶⁵

Five years after *Jefferson County*, all three rating agencies tried to persuade the state courts of Oklahoma that their actual ratings, not just their journalistic comments, are "opinions" protected by the First Amendment.⁶⁶ But the intermediate appellate court rejected this argument. It drew a "crucial distinction" between the cases: in *Jefferson County*, Moody's was writing for its subscribers and did not rate the school district's bonds, whereas in the Oklahoma case the agencies actually rated the bonds and were paid to do so.⁶⁷ The Supreme Court of Oklahoma refused to hear a further appeal.

Most fundamentally, though, in the current credit crisis the rating agencies simply cannot argue that their ratings are too subjective or vague to "contain a provably false factual connotation," as *Milkovich* would require to protect their ratings as opinions. Each level on a rating scale denotes a fine gradation in the risk of a security. In its brief to the Tenth Circuit, Moody's emphasized "*the proven objectivity*"⁶⁸ of its ratings, and in its recent essay, S&P stated forthrightly: "Do ratings have the same meaning across sectors and asset classes? The simple answer is 'yes'."⁶⁹ If ratings had no "provably false factual connotation," then they would have no commercial value.

Conclusion

The exponential growth of structured finance has been a boon to the rating agencies. But their abandonment of their former practice of rating most or all securities whether or not hired to do so, their involvement in the structuring of complex securities like CDOs, and the private nature of the market for those securities, all combine to denude the rating agencies of whatever protection the First Amendment may give them in their more traditional role.

- ¹ REP. OF THE STAFF TO THE S. COMM. ON GOV'T AFFAIRS, FINANCIAL OVERSIGHT OF ENRON: THE SEC AND PRIVATE-SECTOR WATCHDOGS, 123 (2002), available at hsgac.senate.gov/100702watchdogsreport.pdf [hereinafter ENRON REPORT]. The lawyer seems not to have coined the catchy phrase, though; apparently, a law student coined it. See Gregory Husisian, Note, *What Standard of Care Should Govern the World's Shortest Editorials?: An Analysis of Bond Rating Agency Liability*, 75 Cornell L. Rev. 411 (1990).
- ² See, e.g., Cahill Gordon & Reindel LLP, *A Constitutional Analysis of H.R. 2990* (July 2005), available at http://www2.standardandpoors.com/spf/pdf/media/Exhibit_2.pdf [hereinafter *Constitutional Analysis of H.R. 2990*] (arguing on behalf of Standard & Poor's that the proposed Credit Rating Agency Duopoly Relief Act of 2005 violated S&P's First Amendment rights); ENRON REPORT, at 123 ("[T]he raters stated a number of times in interviews with Committee staff . . . that their ratings were just opinions, protected by the First Amendment.").
- ³ Many of these cases are discussed below.
- ⁴ See Moody's Corp., Annual Report (Form 10-K), at 11 (Feb. 28, 2007) ("[C]laims [concerning ratings actions] may increase because foreign jurisdictions may not have legal protections or liability standards comparable to those in the U.S. (such as protections for the expression of credit opinions as is provided by the First Amendment).").
- ⁵ Few if any CDO transactions are registered with the SEC, but actions against the rating agencies under the Securities Act of 1933 would in any case have to overcome Rule 436(g)(1) under the Securities Act, under which the rating of a security is not considered part of its registration statement. See 17 C.F.R. § 230.436(g)(1) ("[T]he security rating assigned to a class of debt securities, a class of convertible debt securities, or a class of preferred stock by a nationally recognized statistical rating organization . . . shall not be considered a part of the registration statement prepared or certified by a person within the meaning of sections 7 and 11 of the Act.").
- ⁶ *First Fin. Sav. Bank, Inc. v. Am. Bankers Ins. Co. of Fla., Inc.*, No. CIV.A.88-33-CIV-5 (E.D.N.C. Aug. 4, 1989); see *In re Taxable Mun. Bond Sec. Litig.*, No. Civ. A. MDL No. 863 (E.D. La. Dec. 29, 1993).
- ⁷ Even if a rating agency did act as a member of the press, the First Amendment would not preclude discovery into its state of mind when rating a transaction. *Herbert v. Lando*, 441 U.S. 153 (1979).
- ⁸ E.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991). Laws directed at the press in particular, such as prohibitions on publishing editorials on election day in which a newspaper endorses candidates for office, e.g., *Mills v. Alabama*, 384 U.S. 214 (1966), or special taxes on paper and ink, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), are scrutinized much more rigorously under the First Amendment than are laws of general application.
- ⁹ E.g., *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, No. Civ. 03-70247 (S.D. Tex. Feb. 16, 2005); *County of Orange v. McGraw-Hill Cos., Inc.*, 203 B.R. 983, 988 (C.D. Cal. 1996); *In re Taxable Mun. Bond Sec. Litig.*, supra note 6.
- ¹⁰ E.g., *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, supra note 9; *County of Orange*, 203 B.R. at 989; *In re Taxable Mun. Bond Sec. Litig.*, supra note 6.
- ¹¹ See, e.g., *Jefferson County School Dist. v. Moody's Investor's Servs. Inc.*, 175 F.3d 848 (10th Cir. 1999).
- 1215 Misc. 383, 189 N.Y.S. 743 (Sup. Ct. 1921), *aff'd mem.*, 235 N.Y. 511 (1923).
- ¹³ *Jalliet*, 189 N.Y.S. at 744. The same logic has exonerated publishers of incorrect statements about how accrued interest would be paid on conversion of a note, *First Equity Corp. v. Standard & Poor's Corp.*, 869 F.2d 175 (2d Cir. 1989); acceleration of the exercise date of a warrant, *Gale v. Value Line, Inc.*, 640 F. Supp. 967 (D.R.I. 1986); the currency in which a security was quoted, *Daniel v. Dow Jones & Co.*, 137 Misc. 2d 94, 520 N.Y.S.2d 334 (Civ. Ct. 1987); and interest on bonds, *Gutter v. Dow Jones, Inc.*, 22 Ohio St. 3d, 490 N.E.2d 898 (1986).
- ¹⁴ *In re Taxable Mun. Bond Sec. Litig.*, supra note 6.
- ¹⁵ See, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972), especially the concurring opinion of Justice Powell, 408 U.S. at 709-10 (discussing First Amendment); *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136 (2d Cir. 1987) (same); *N.Y. Civil Rights Law § 79-h(b)* (granting "[a]bsolute protection for confidential news"); *id.* § 79-h(c) (providing "[q]ualified protection for nonconfidential news").
- ¹⁶ Rating agencies won the early cases on journalist's privilege, including *In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366 (E.D. Pa. 1992); *In re Burnett*, 269 N.J. Super. 493, 635 A.2d 1019 (Super. Ct. 1993); *In re Pan Am Corp.*, 161 B.R. 577 (S.D.N.Y. 1993); and *Stephens v. Am. Home Assur. Co.*, No. 91 Civ. 2898 (JSM) (KAR) (S.D.N.Y. Apr. 17, 1995). But one of them lost the most important case, *In re Fitch, Inc.*, 330 F.3d 104 (2d Cir. 2003). See also *Nat'l Med. Care, Inc. v. Home Med. of Am., Inc.*, Index No. 103030/02 (N.Y. Sup. Ct. May 20, 2002) (ordering special referee to investigate and report "[i]f Fitch's rating was privately contracted for and intended for use, for example, in a private Offering Memorandum, or other document intended solely for a limited group of investors, rather than for publication in a general publication, [in which case] Fitch would not be entitled to the qualified journalist privilege").
- ¹⁷ *LaSalle Nat'l Bank v. Duff & Phelps Credit Rating Co.*, 951 F. Supp. 1071, 1095-96 (S.D.N.Y. 1996). There are also two cases by investors in which rating agencies were not defendants, but were added as third-party defendants. *In re Taxable Mun. Bond Sec. Litig.*, supra note 6; *First Fin. Sav. Bank, Inc.*, supra note 6. The rating agencies lost the First Amendment argument in all three cases.
- There are also three cases that rating agencies won without the First Amendment issue being reached. *Quinn v. McGraw-Hill Cos., Inc.*, 168 F.3d 331 (7th Cir. 1999); *Mallinckrodt Chem. Works v. Goldman Sachs & Co.*, 420 F. Supp. 231 (S.D.N.Y. 1976); and *In re Republic Nat'l Life Ins. Co.*, 387 F. Supp. 902 (S.D.N.Y. 1975).
- ¹⁸ *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, supra note 9; *In re Towers Fin. Corp. Noteholders Litig.*, No. 93 Civ. 0810 (WK) (AJP) (S.D.N.Y. July 15, 1996).
- ¹⁹ *County of Orange v. McGraw-Hill Cos., Inc.*, 245 B.R. 138 (C.D. Cal. 1997).
- ²⁰ *Moody's* won the most recent of these. See *Compuware Corp. v. Moody's Investor's Servs., Inc.*, 222 F.R.D. 124 (E.D. Mich. 2004), *reconsideration denied in part*, 324 F. Supp. 2d 860 (E.D. Mich. 2004). Credit reporting (not rating) services lost the First Amendment issue in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Oberman v. Dun & Bradstreet, Inc.*, 460 F.2d 1381 (7th Cir. 1972); and *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433 (3d Cir. 1971), *cert. denied*, 404 U.S. 898 (1971).

- ²¹ Compare, e.g., *In re Fitch, Inc.*, 330 F.3d at 109 (“Fitch only ‘covers’ its own clients.”) with *In re Pan Am Corp.*, 161 B.R. at 583 (“‘S&P as a matter of policy and fact rates practically all public debt financings and preferred stock issues with or without a request or a fee from the issuer.’”) (quoting affidavit submitted by S&P).
- ²² Compare, e.g., *In re Fitch, Inc.*, 330 F.3d at 110-11 (finding that communications between rating agency and arranger “reveal a level of involvement with the client’s transactions that is not typical of the relationship between a journalist and the activities upon which the journalist reports”), with *Compuware Corp. v. Moody’s Investors Servs., Inc.*, 222 F.R.D. at 131 (“Compuware has not alleged that Moody’s was so involved with the companies here that it stepped outside newsgathering activities.”). See also *Compuware Corp. v. Moody’s Investors Servs., Inc.*, 324 F. Supp. 2d 860, 862 (E.D. Mich. 2004) (“[T]he most important factor in determining whether [Moody’s] is qualified to assert the journalist’s privilege is the nature of [Moody’s] relationship with the alleged ‘source.’”); *Compuware Corp. v. Moody’s Investors Servs., Inc.*, 371 F. Supp. 2d 898, 904 n.7 (E.D. Mich. 2005) (“Moody’s was in the business of publishing ratings, not the business of advising the subjects of those ratings about how to obtain favorable publications.”).
- ²³ Compare, e.g., *LaSalle Nat’l Bank v. Duff & Phelps Credit Rating Co.*, 951 F. Supp. at 1095 (“[T]he report at issue was not disseminated to the public at large. Rather, it was distributed to a select group of qualified investors.”), and *Nat’l Med. Care, Inc.* (quoted in note 19 above), with *In re Pan Am Corp.*, 161 B.R. 577, and *In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366 (agencies successfully claimed journalist’s privilege against subpoenas for information they gathered in rating publicly traded debt).
- ²⁴ 330 F.3d 104 (2d Cir. 2003).
- ²⁵ *Id.* at 107.
- ²⁶ *Id.* at 109; see also *id.* at 110.
- ²⁷ *Id.* at 106.
- ²⁸ *Id.* at 110.
- ²⁹ *Id.* at 111.
- ³⁰ Ian Bell & Joanne Rose, *The Fundamentals of Structured Finance Ratings*, STANDARD & POOR’S STRUCTURED FINANCE COMMENTARY, August 23, 2007, available at http://www2.standardandpoors.com/spf/pdf/media/082307_ian_op_ed_brt.pdf [hereinafter *Fundamentals of Structured Finance Ratings*].
- ³¹ *Id.* at 14, 1.
- ³² *Id.* at 14.
- ³³ *Id.* at 15.
- ³⁴ *Id.* at 2.
- ³⁵ *Id.*
- ³⁶ 376 U.S. 254 (1964).
- ³⁷ *Id.* at 270.
- ³⁸ *Id.* at 279-80. The shorthand “actual malice” for the standard “with knowledge that [the statement] was false or with reckless disregard of whether it was false or not” was unfortunate because “malice” has so many other meanings in common law. We refer to the standard instead as the *New York Times* standard.
- ³⁹ *Id.* at 272.
- ⁴⁰ The immediate progeny of *New York Times* were *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Henry v. Collins*, 380 U.S. 356 (1965); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 819 (1967); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Greenbelt Cooperating Pub. Ass’n v. Bresler*, 398 U.S. 6 (1970); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971); and *Rosenbloom v. Metromedia, Inc.* 403 U.S. 29 (1971). In *Rosenbloom* the justices wrote five opinions, none of which garnered more than three votes.
- ⁴¹ 418 U.S. 323 (1974).
- ⁴² *Id.* at 342.
- ⁴³ *Id.*
- ⁴⁴ *Id.* at 349.
- ⁴⁵ *Id.* at 347.
- ⁴⁶ 472 U.S. 749 (1985).
- ⁴⁷ *Id.* at 751.
- ⁴⁸ *Id.* at 762.
- ⁴⁹ *Id.*
- ⁵⁰ *Id.*
- ⁵¹ *Id.* at 762-63 (citations omitted).
- ⁵² E.g., *Compuware Corp. v. Moody’s Investors Servs., Inc.*, 222 F.R.D. 124 (E.D. Mich. 2004).
- ⁵³ See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374 (1967).
- ⁵⁴ 418 U.S. at 340; see also *Illinois v. Telemktg. Assocs., Inc.*, 538 U.S. 600, 612 (2003).
- ⁵⁵ See, e.g., ENRON REPORT, at 123 (“[T]he raters stated a number of times in interviews with Committee staff . . . that their ratings were just opinions, protected by the First Amendment.”); *Constitutional Analysis of H.R. 2990*, at 3 (“S&P and other rating agencies, as publishers of opinions about matters of public concern, are fully protected by the First Amendment to the United States Constitution.”); Moody’s Corp., Annual Report (Form 10-K), at 11 (Feb. 28, 2007) (“[C]laims [concerning ratings actions] may increase because foreign jurisdictions may not have legal protections or liability standards comparable to those in the U.S. (such as protections for the expression of credit opinions as is provided by the First Amendment).”).
- ⁵⁶ 497 U.S. 1 (1990).
- ⁵⁷ *Id.* at 17.
- ⁵⁸ *Id.* at 20.
- ⁵⁹ *Id.*
- ⁶⁰ *Id.* at 19.
- ⁶¹ 175 F.3d 848 (10th Cir. 1999).
- ⁶² *Id.* at 850.
- ⁶³ *Id.* at 855.
- ⁶⁴ *Id.* at 856.
- ⁶⁵ *Id.*
- ⁶⁶ *Commercial Fin. Servs., Inc. v. Arthur Andersen LLP*, 94 P.3d 106 (Okla. Civ. App.), cert. denied (2004).
- ⁶⁷ *Id.* at 110.
- ⁶⁸ *Jefferson County*, 175 F.3d at 856 (emphasis by the court).
- ⁶⁹ *Fundamentals of Structured Finance Ratings*, at 10.