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The New York Times and Credit Rating Agencies: Indistinguishable under First Amendment Jurisprudence

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The New York Times and Credit Rating Agencies: Indistinguishable under First Amendment Jurisprudence

THE *NEW YORK TIMES* AND CREDIT RATING AGENCIES:
INDISTINGUISHABLE UNDER FIRST AMENDMENT
JURISPRUDENCE

DORI K. BAILEY[†]

ABSTRACT

Much has been said about the importance of the First Amendment to our society. This very first amendment to our Constitution may be the most significant piece of legislation ever written by our legislators. The First Amendment not only shapes the political discourse in our country, it informs who we are as citizens of a democracy. The First Amendment is the foundation of a society in which freedom of speech and of the press are fundamental rights. Yet, the safeguards of the First Amendment have, in some cases, been misapplied. Rather than simply protecting the right to freely express honestly believed opinions, the First Amendment has been used as a shield against liability for falsity. In particular, the credit rating agencies have used the First Amendment to avoid liability for false or misleading credit ratings. Hence, this Article will question the theoretical underpinnings of applying the protections of the First Amendment in the context of the credit rating agencies.

TABLE OF CONTENTS

| | |
|---|-----|
| INTRODUCTION | 276 |
| I. THE JUDICIARY PROTECTIONS..... | 280 |
| <i>A. The First Amendment</i> | 280 |
| 1. The Journalist's Privilege | 283 |
| 2. Fully Protected Speech v. Commercial Speech..... | 287 |
| 3. Statements of Opinion | 296 |
| a. The Actual Malice Standard | 296 |
| b. Application of the Actual Malice Standard to Credit Rating Agencies | 309 |
| c. When the Actual Malice Standard Does Not Apply | 319 |
| d. Statements of Opinion by Professionals..... | 325 |
| <i>B. Are the First Amendment Protections Justified?</i> | 331 |
| II. THE REGULATORY PROTECTIONS | 337 |
| <i>A. Nationally Recognized Statistical Rating Organizations</i> | 337 |
| <i>B. Statutory Liability and Regulatory Exemption</i> | 338 |

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| | |
|---|-----|
| C. Accountability and Elimination of the Regulatory Exemption.... | 340 |
| D. Reestablishment of the Regulatory Shield | 342 |
| E. Credit Ratings and Section 11 | 345 |
| III. CONFLICTS OF INTEREST | 347 |
| A. Issuer-Pays Rating Agency Model | 348 |
| B. Dodd–Frank Act Reforms..... | 350 |
| C. Credit Rating Agency Reform Rules of 2014 | 351 |
| D. Do the Reforms Effect Any Real Change? | 352 |
| CONCLUSION | 353 |

INTRODUCTION

If one were to ask the public which two are analogous—the *New York Times*, a credit rating agency, or an auditor—I venture most people would believe the credit rating agency and the auditor are the apples, and the newspaper is the orange. Yet, according to the courts, those people would be mistaken. Under First Amendment jurisprudence as applied by the lower courts, credit rating agencies are indistinguishable from the *New York Times*.¹

Credit rating agencies are bond market professionals paid to provide an assessment regarding the creditworthiness of a debt security, or the issuer of a debt security, based on factual information.² Nevertheless, both the judiciary and the regulatory branches of our government have afforded the credit rating agencies protections from liability.³ The judiciary has considered credit ratings to be pure statements of opinion and

1. See *Newby v. Enron Corp.* (*In re Enron Corp. Sec., Derivative & “ERISA” Litig.*), 511 F. Supp. 2d 742, 818 (S.D. Tex. 2005) (observing that some courts have characterized credit rating agencies as “publishers or journalists” and provided the rating agencies with protection under the First Amendment); *Cty. of Orange v. McGraw Hill Cos.*, 245 B.R. 151, 154–57 (Bankr. C.D. Cal. 1999) (considering Standard & Poor’s to be a “financial publisher” and applying the protections of the First Amendment); *Pan Am Corp. v. Delta Air Lines, Inc.* (*In re Pan Am Corp.*), 161 B.R. 577, 586 (Bankr. S.D.N.Y. 1993) (holding that the credit rating agency functioned as a publisher of publicly disseminated ratings and, thus, “as a matter of law,” should be afforded “the full breadth of First Amendment safeguards”).

2. *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 888 F. Supp. 2d 431, 455 (S.D.N.Y. 2012) (explaining that a “[credit] rating agency . . . analyze[s] data, conduct[s] an assessment, and [provides] a *fact-based* conclusion as to creditworthiness”); *Commercial Fin. Servs., Inc. v. Arthur Andersen LLP*, 94 P.3d 106, 110 (Okla. Civ. App. 2004) (finding that the rating agencies provided their opinions regarding the creditworthiness of the plaintiff’s bonds “as professionals being paid to provide their opinions to a client”); U.S. SEC. & EXCH. COMM’N, REPORT ON THE ROLE AND FUNCTION OF CREDIT RATING AGENCIES IN THE OPERATION OF THE SECURITIES MARKETS 5 (2003) [hereinafter *ROLE & FUNCTION*] (“For almost a century, credit rating agencies have been providing opinions on the creditworthiness of issuers of [debt] securities and their financial obligations.”).

3. See STAFF OF S. COMM. ON GOVERNMENTAL AFFAIRS, 107TH CONG., REP. ON FINANCIAL OVERSIGHT OF ENRON: THE SEC AND PRIVATE-SECTOR WATCHDOGS 96–98 (Comm. Print 2002) [hereinafter *PRIVATE-SECTOR WATCHDOGS*] (noting the courts have shielded the credit rating agencies from legal accountability by affording the agencies with protections under the First Amendment and that the Securities and Exchange Commission has permitted the credit rating agencies to “escape[] regulation”).

provided the rating agencies with First Amendment protections.⁴ These protections are the same First Amendment protections provided to journalists.⁵ In the words of the credit rating agencies, a credit rating has been deemed “the world’s shortest editorial” and, thus, entitled to First Amendment protection.⁶ However, credit rating agencies should not be viewed as journalists impartially reporting the news or providing an objective opinion regarding the current issues of our society. Credit ratings are not pure statements of opinion akin to a statement of opinion regarding a social or political matter. Moreover, the issuer of a security hires and pays the rating agencies to assign a credit rating.⁷ Thus, credit rating agencies function very differently than newspapers. Furthermore, in the years preceding the recent financial crisis, the credit rating agencies were significantly involved in structuring mortgage-backed securities, “placing the [a]gencies in the [conflicting] position of ‘rating their own work.’”⁸

Simply stated, credit ratings are not editorials. Rather, credit ratings are “fact-based opinions” made by professionals.⁹ Thus, as providers of a commercial service, credit rating agencies should be subject to the same liability as other businesses. For example, security analysts that evaluate equity securities and auditors that provide opinions concerning financial

4. See *Jefferson Cty. Sch. Dist. No. R-1 v. Moody’s Inv’r’s Servs., Inc.*, 175 F.3d 848, 855–56 (10th Cir. 1999) (holding that a credit rating agency’s article regarding the creditworthiness of an issuer of bonds “constitutes a protected expression of opinion” under the First Amendment); *Enron Corp.*, 511 F. Supp. 2d at 816–17 (finding that the courts generally have afforded the credit rating agencies protection under the First Amendment in cases of alleged fraud or professional negligence); *Pan Am Corp.*, 161 B.R. at 586 (holding that the rating agency functioned as a publisher of credit ratings that are publicly disseminated and, thus, should receive the full protections of the First Amendment “as a matter of law”).

5. See *Enron Corp.*, 511 F. Supp. 2d at 818 (noting that some courts have viewed the credit rating agencies as “publishers or journalists” and provided the rating agencies with First Amendment protection); *Cty. of Orange*, 245 B.R. at 154–57 (referring to Standard & Poor’s as a “financial publisher” and applying the safeguards of the First Amendment); *Pan Am Corp.*, 161 B.R. at 581–82 (finding a credit rating agency “functions as a journalist when gathering information in connection with its rating process . . . with the intent to use the material to disseminate information to the public”).

6. PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 96 (quoting Statements of Charles Brown, Fitch General Counsel).

7. *Commercial Fin. Servs., Inc.*, 94 P.3d at 110 (finding that the credit rating agencies assigned a rating concerning the creditworthiness of the bonds “as professionals being paid to provide their opinions to a client”); see also *infra* notes 577–78 and accompanying text.

8. *Ohio Police & Fire Pension Fund v. Standard & Poor’s Fin. Servs. LLC*, 700 F.3d 829, 833–34 (6th Cir. 2012) (quoting Complaint para. 80, *Ohio Police & Fire Pension Fund v. Standard & Poor’s Fin. Servs., LLC*, 813 F. Supp. 2d 871 (S.D. Ohio 2011) (No. 2:09-cv-1054)) (“[T]o attract the significant rating fees paid by [mortgage-backed securities] arrangers, the [a]gencies ‘became intimately involved in the issuance of [mortgage-backed securities]’ by assisting arrangers in structuring their securities to achieve certain credit ratings, turning the process into a form of negotiation and placing the [a]gencies in the position of ‘rating their own work.’” (quoting Complaint, *supra*, paras. 56, 80)).

9. *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 888 F. Supp. 2d 431, 455 (S.D.N.Y. 2012) (emphasis omitted) (“Ratings should best be understood as *fact-based opinions*. When a rating agency issues a rating, it is not merely a statement of that agency’s unsupported belief, but rather a statement that the rating agency has analyzed data, conducted an assessment, and reached a *fact-based* conclusion as to creditworthiness.”).

statements are held liable for any damages.¹⁰ Why should the credit rating agencies, which occupy a role analogous to security analysts and auditors,¹¹ be regarded in a different light? Yet, the misapplication of First Amendment protections by the courts has shielded the credit rating agencies from liability in actions for fraudulent or negligently prepared ratings.¹²

Moreover, the Securities and Exchange Commission (the Commission) has provided the credit rating agencies with regulatory protections by exempting the rating agencies from liability for false or misleading statements in a registration statement.¹³ These protections afforded to the credit rating agencies are even more incongruous when one considers the conflicts of interest inherent in the “issuer-pays” model of the credit rating agencies.¹⁴ In response to this issue and many others that ultimately culminated in the financial crisis,¹⁵ Congress enacted the Dodd–Frank Wall Street Reform and Consumer Protection Act (the Dodd–Frank Act).¹⁶ The Dodd–Frank Act was intended “[t]o promote the financial stability of the United States by improving accountability and transparency.”¹⁷ However, despite the express intention of Congress to hold the credit rating agencies accountable,¹⁸ the Commission has, to a large extent, nullified those intentions.¹⁹

Accordingly, this Article will argue that the legal and regulatory protections provided to the credit rating agencies are misguided. As we consider the factors that contributed to the financial crisis, the evidence is clear that the credit rating agencies inaccurately rated “tens of billions” of structured securities, such as mortgage-backed securities.²⁰ Many in-

10. See *infra* notes 387–88, 483 and accompanying text.

11. See *infra* notes 332, 498–502 and accompanying text.

12. See *Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & “ERISA” Litig.)*, 511 F. Supp. 2d 742, 815–18 (S.D. Tex. 2005) (explaining that “while there is no automatic, blanket, absolute First Amendment protection” for publications issued by the credit rating agencies, the majority of courts have historically shielded the rating agencies from liability for the allegedly fraudulent or negligent ratings disseminated in those publications); see also PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 96 (finding that courts have shielded the credit rating agencies from liability by affording the rating agencies protection under the First Amendment).

13. See SEC Written Consents Rule, 17 C.F.R. § 230.436(g)(1) (2015) (providing the credit rating agencies with an exemption from liability under Section 11 of the Securities Act of 1933 for false or misleading statements in a registration statement).

14. See *infra* Section III.A.

15. See John Rogers, *A New Era of Fiduciary Capitalism? Let’s Hope So*, FIN. ANALYSTS J., May/June 2014, at 6 (“[T]he causes of the . . . financial crisis were many and complex.”).

16. Dodd–Frank Wall Street Reform and Consumer Protection (Dodd–Frank) Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

17. *Id.* pmb1.

18. See *id.* § 939G (repealing the Commission’s Rule 436(g) exemption from Section 11 liability for credit rating agencies); see also 17 C.F.R. § 230.436(g)(1) (2015).

19. See Ford Motor Credit Co. LLC, SEC No-Action Letter, 2010 WL 2882538, at *1–2 (Nov. 23, 2010) [hereinafter SEC No-Action Letter] (reestablishing the credit rating agencies’ exemption from Section 11 liability).

20. Dodd–Frank Wall Street Reform and Consumer Protection (Dodd–Frank) Act, Pub. L. No. 111-203, title IX, § 931(5), 124 Stat. 1872 (“In the recent financial crisis, the ratings on structured financial products have proven to be inaccurate.”); Martin Pfinsgraff, Deputy Comptroller for

vestors relied upon these inaccurate ratings, which ultimately contributed to substantial losses.²¹ Yet, the misapplication of the First Amendment has provided the credit rating agencies with “absolute immunity” from legal actions.²² Moreover, the regulatory protections provided by the Commission²³ have further shielded the credit rating agencies from liability. Instead, the courts should hold credit rating agencies liable for fraudulent or negligently prepared credit ratings that are false or misleading. Similarly, the Commission should respect the express intentions of Congress and eliminate the exemption from liability provided to the credit rating agencies for false or misleading statements in a registration statement. Finally, while Congress has attempted to address the conflicts involved in the credit rating agencies, the recently issued Credit Rating Agency Reform Rules of 2014²⁴ fail to eliminate the inherent conflicts of interest in a business model in which the issuer of the security hires and pays the fee of the agency that determines the rating of the security.

This Article will begin by exploring some of the basic protections of the freedom of speech embodied in the First Amendment. Part I will first discuss the protections afforded to the press, including the “journalist’s privilege” and the extension of this privilege to the credit rating agencies. This Article will then explore the protections provided to fully protected speech, as compared to commercial speech, and consider the level of protection that courts should afford to speech by a credit rating agency. Next, this Article will discuss the contours of protection provided to statements of opinion, including the actual malice standard, and the context in which the actual malice standard has been applied to the credit rating agencies. This part will then examine statements of opinion by professionals and the application of this concept to cases involving the credit rating agencies. Finally, this part will consider whether the First Amendment protections afforded to the credit rating agencies are justified and conclude that the First Amendment should not shield the credit rating agencies.

Credit and Market Risk, Office of the Comptroller of the Currency, Remarks Before the Risk Magazine Credit Risk Conference 2 (May 22, 2012), <http://www.occ.treas.gov/news-issuances/speeches/2012/pub-speech-2012-81.pdf> (stating the proposition that credit rating agencies “mis-rate[d] tens of billions of subprime securitizations and their derivative [collateralized debt obligations]”).

21. See OFFICE OF THE COMPTROLLER OF THE CURRENCY, TESTIMONY OF JOHN WALSH ACTING COMPTROLLER OF THE CURRENCY BEFORE THE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, U.S. SENATE Att. A at 2 (2010) [hereinafter TESTIMONY OF JOHN WALSH], <http://www.occ.treas.gov/news-issuances/congressional-testimony/2010/pub-test-2010-119-written.pdf> (“Issues surrounding credit ratings were a significant factor in market overconfidence that contributed to subsequent losses in the markets for mortgage-backed securities in 2008-2009.”).

22. See *Ohio Police & Fire Pension Fund v. Standard & Poor’s Fin. Servs., LLC*, 813 F. Supp. 2d 871, 877 & n.1 (S.D. Ohio 2011) (noting the rating agencies’ argument that credit “ratings enjoy absolute immunity under the First Amendment” and explaining that “[c]ourts have traditionally extended First Amendment protection to credit ratings”).

23. See, e.g., SEC No-Action Letter, *supra* note 19, at *1-2.

24. Nationally Recognized Statistical Rating Organizations, 79 Fed. Reg. 55,078, 55,078 (Sept. 15, 2014) (to be codified at 17 C.F.R. pts. 232, 240, 249 & 249b).

In Part II, this Article will examine the regulatory protections provided to the credit rating agencies. This part will argue that, despite the attempts of Congress to hold the credit rating agencies accountable for false or misleading statements in a registration statement, the Commission has persisted in shielding the agencies from liability. Finally, in Part III, this Article will discuss the conflicts of interest inherent in the issuer-pays model and the minimal reforms implemented to address this significant issue.

I. THE JUDICIARY PROTECTIONS

The freedom of speech, established by the First Amendment,²⁵ is a right that many may take for granted, but few may realize the extent of its use in protecting the credit rating agencies. The following part will explore the doctrine of free speech in the context of the credit rating agencies.

A. *The First Amendment*

The First Amendment of the United States Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press."²⁶ Thus, in its simplest form, the First Amendment protects the right of citizens and of the press to free speech.²⁷ However, this right to free speech is not absolute.²⁸ For exam-

25. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

26. *Id.*

27. *See id.*; *see also* *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." (alteration in original) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964))); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) ("The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions."); *Roth v. United States*, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939) (noting that the Supreme Court has considered free speech and a free press to be "fundamental personal rights and liberties").

28. *Lowe v. SEC*, 472 U.S. 181, 233 (1985) (White, J., concurring) ("Not all restrictions on speech are impermissible."); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 150 (1967) ("Federal securities regulation, mail fraud statutes, and common-law actions for deceit and misrepresentation are only some examples of our understanding that the right to communicate information of public interest is not 'unconditional.'" (footnotes omitted)); *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 708 (1931) ("Liberty of speech and of the press is also not an absolute right, and the state may punish its abuse."); *see also* WILLIAM B. LOCKHART ET AL., *CONSTITUTIONAL LAW* 614 (8th ed. 1996) ("Laws forbidding speech . . . are commonplace."). *But see* *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 61 (1961) (Black, J., dissenting) ("[T]he First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech . . . shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field. . . . [T]he very object of adopting the First Amendment . . . was to put the freedoms protected there completely out of the area of any congressional control . . .").

ple, a citizen is “not free to yell ‘fire’ falsely in a crowded theater.”²⁹ Likewise, laws against fraud effectively limit free speech.³⁰ Moreover, the Supreme Court has noted that the constitutionality of laws that prohibit fraud is “beyond question.”³¹ Notwithstanding the qualified nature of the right to free speech, the credit rating agencies have successfully used the First Amendment as a shield against liability for issuing what many would consider fraudulent or, at the very least, negligent credit ratings.³²

The First Amendment protection of credit rating agencies emanates from the “freedom of . . . the press”³³ clause. This clause was intended “to preserve an untrammelled press as a vital source of public information.”³⁴ While a credit rating agency does not issue a daily newspaper reporting on a wide variety of information ranging from world news to sports, the Supreme Court has found that “[t]he liberty of the press is not confined to newspapers and periodicals . . . [t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.”³⁵ Courts have found that the role of a credit rating agency is to gather information and to use that information to publish a credit rating.³⁶ Thus, some courts have characterized credit rating

29. LOCKHART ET AL., *supra* note 28, at 614 (explaining that notwithstanding the freedom of speech protections of the first amendment, citizens are not “free to say anything, anywhere, at any time”); *see also* Schenk v. United States, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”).

30. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012) (“Where false claims are made to effect a fraud . . . it is well established that the Government may restrict speech without affronting the First Amendment.” (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (noting that the government may prohibit misleading or deceptive speech))); *see also* LOCKHART ET AL., *supra* note 28, at 614 (noting that laws prohibiting fraud restrict free speech).

31. *Alvarez*, 132 S. Ct. at 2561 (“Laws prohibiting fraud . . . were in existence when the First Amendment was adopted, and their constitutionality is now beyond question.” (citing Donaldson v. Read Magazine, Inc., 333 U.S. 178, 190 (1948) (explaining that the power of the government “to protect people against fraud . . . has always been recognized in this country and is firmly established”))).

32. *See* Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & “ERISA” Litig.), 511 F. Supp. 2d 742, 815–18 (S.D. Tex. 2005) (“[T]his Court finds that generally the courts have not held credit rating agencies accountable for alleged professional negligence or fraud and that plaintiffs have not prevailed in litigation against them.”); *see also* PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 96 (“[C]ourts have extended First Amendment protections to credit ratings, shielding the agencies from liability.”).

33. *See* U.S. CONST. amend. I.

34. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250–51 (1936) (holding that a license tax imposed upon the press is unconstitutional); *see also* *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 713 (1931) (Butler, J., dissenting) (explaining the “chief purpose” of the constitutional guarantee of “liberty of the press” is “to prevent previous restraints upon publication”); *von Bulow ex rel. Auer-sperg v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987) (noting “the strong public policy supporting the unfettered communication of information by the journalist to the public”).

35. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (holding a city ordinance prohibiting the distribution of handbooks, circulars, literature, or advertising without a permit to be void on its face).

36. *Pan Am Corp. v. Delta Air Lines, Inc. (In re Pan Am Corp.)*, 161 B.R. 577, 581–82 (Bankr. S.D.N.Y. 1993) (describing Standard & Poor’s “gathering of a wide range of information from a variety of sources . . . for the purpose and with the intent of publishing a [credit] rating”).

agencies as “publishers or journalists” and provided the rating agencies with First Amendment protection.³⁷

However, the First Amendment does not provide publishers with automatic protection from liability when there is a violation of laws generally.³⁸ The Supreme Court has found that “[a] business ‘is not immune from regulation’” simply because it is a member of the press.³⁹ “The publisher of a newspaper has no special immunity from the application of general laws.”⁴⁰ Moreover, the “enforcement of . . . general laws against the press is not subject to stricter scrutiny than [what] would be applied to . . . other [entities].”⁴¹ Thus, a publisher must abide by “nondiscriminatory, neutral laws” that do not have an impact on the “impartial distribution of news.”⁴² For example, a publisher has no First Amendment protection for libel.⁴³ A publisher also may be subject to penalties for contempt of court.⁴⁴ Therefore, “[t]he First Amendment does not grant the press . . . limitless protection.”⁴⁵ Similarly, a credit rating agency is not entitled to protection under the First Amendment simply because of its “status as a financial publisher.”⁴⁶ Thus, a publisher’s First Amendment protection is qualified.⁴⁷

37. *Enron Corp.*, 511 F. Supp. 2d at 818 (citing *Pan Am Corp.*, 161 B.R. at 581–82 (finding that a credit rating agency “functions as a journalist when gathering information in connection with its rating process . . . with the intent to use the material to disseminate information to the public”)); *Cty. of Orange v. McGraw Hill Cos.*, 245 B.R. 151, 154–56 (Bankr. C.D. Cal. 1999) (referring to Standard & Poor’s as a “financial publisher” and applying the protections of the First Amendment).

38. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 150 (1967); *see also* *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring) (“[T]he First Amendment does not ‘belong’ to any definable category of persons or entities . . .”).

39. *Curtis Publ’g Co.*, 388 U.S. at 150 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937) (“[T]he Associated Press is not immune from regulation because it is an agency of the press.”)).

40. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) (quoting *Associated Press*, 301 U.S. at 132–33 (“[The publisher of a newspaper] has no special privilege to invade the rights and liberties of others.”)).

41. *Compuware Corp. v. Moody’s Inv’rs Servs., Inc.*, 499 F.3d 520, 529 (6th Cir. 2007) (quoting *Cohen*, 501 U.S. at 670).

42. *Cty. of Orange*, 245 B.R. at 154 (citing *Cohen*, 501 U.S. at 670 (holding that newspaper publishers must abide by general laws)); *Associated Press*, 301 U.S. at 130–33 (holding that publishers are subject to the National Labor Relations Act).

43. *Associated Press*, 301 U.S. at 132–33 (noting that a newspaper publisher “must answer for libel”); *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (“[T]he freedom of speech and of the press . . . does not permit the publication of libels . . .”).

44. *Associated Press*, 301 U.S. at 132–33 (noting that a newspaper publisher “may be punished for contempt of court”).

45. *Cohen*, 501 U.S. at 665, 671 (finding that the First Amendment does not protect a newspaper from liability for “breach of a promise of confidentiality”).

46. *Cty. of Orange*, 245 B.R. at 154 (“[T]he question is not whether the defendant is a publisher but whether the cause of action impacts expression.” (quoting *Cty. of Orange v. McGraw-hill Cos.* (*In re Cty. of Orange*), 245 B.R. 138, 144 (Bankr. C.D. Cal. 1997))).

47. *Newby v. Enron Corp.* (*In re Enron Corp. Sec., Derivative & “ERISA” Litig.*), 511 F. Supp. 2d 742, 818 (S.D. Tex. 2005) (“The journalist privilege is a qualified one.” (quoting *Am. Sav. Bank, FSB v. UBS Painewebber, Inc.*, No. M8–85, 2002 WL 31833223, at *3 (S.D.N.Y. Dec. 16, 2002))); *Pan Am Corp. v. Delta Air Lines, Inc.* (*In re Pan Am Corp.*), 161 B.R. 577, 584 (Bankr. S.D.N.Y. 1993) (finding “the journalist’s privilege [to be] a qualified one”); *In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366, 370 (E.D. Pa. 1992) (“The journalist privilege is a qualified one . . .”).

1. The Journalist's Privilege

One example of a qualified privilege is the journalist's privilege to withhold "confidential sources and information in judicial proceedings."⁴⁸ The qualified First Amendment right to engage in the "process of newsgathering" forms the basis of the journalist's privilege.⁴⁹ The intent of the person or entity at the very beginning of the "information-gathering process" determines whether that person or entity is considered a journalist and, therefore, entitled to the protection of the journalist's privilege.⁵⁰ In particular, the ability to invoke the journalist's privilege is based on the established intent to gather information and material for public dissemination, and that specific intent must be present from the start of the "newsgathering process."⁵¹ Thus, at the point when the information is received, the person or entity must be "professionally engaged in newsgathering."⁵² Moreover, the journalist's privilege may be available if the individual or entity is engaged in traditional newsgathering and dissemination functions even if the individual or entity is not usually considered a part of the "institutionalized press."⁵³

Credit rating agencies generally have been afforded the journalist's privilege in cases concerning the subpoena of information.⁵⁴ For example, in *In re Pan Am Corp.*,⁵⁵ the U.S. District Court for the Southern District of New York held that Standard & Poor's was entitled to invoke the journalist's privilege to withhold information sought through a sub-

48. *von Bulow ex rel. Auersperg v. von Bulow*, 811 F.2d 136, 141 (2d Cir. 1987); *see also Pan Am Corp.*, 161 B.R. at 584 ("[T]he journalist's privilege is a qualified one and may be overcome by a showing of need by the party seeking disclosure.").

49. *von Bulow*, 811 F.2d at 142 ("[T]he process of newsgathering is a protected right under the First Amendment, albeit a qualified one. This qualified right, which results in the journalist's privilege, emanates from the strong public policy supporting the unfettered communication of information by the journalist to the public."); *see also Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (acknowledging that "without some protection for seeking out the news, freedom of the press could be eviscerated").

50. *von Bulow*, 811 F.2d at 142 (explaining the standards of the journalist's privilege).

51. *Id.* at 144 ("We hold that the individual claiming the privilege must demonstrate . . . the intent to use material—sought, gathered or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process.").

52. *Pan Am Corp.*, 161 B.R. at 580 (quoting *Don King Prods., Inc. v. Douglas*, 131 F.R.D. 421, 424 (S.D.N.Y. 1990)).

53. *von Bulow*, 811 F.2d at 142. *But cf. Am. Sav. Bank, FSB v. UBS PaineWebber, Inc. (In re Fitch, Inc.)*, 330 F.3d 104, 111 (2d Cir. 2003) (per curiam) (finding that a credit rating agency was not acting in the role of "professional journalist" engaged in "newsgathering activities" when it gathered information used to publish ratings and, thus, was not entitled to assert the journalist's privilege and not addressing the question of whether a credit rating agency "could ever be" afforded the journalist's privilege).

54. PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 96–97 ("Courts have even refused to require that credit rating agencies produce records in connection with their work, citing the 'journalist's' privilege."); *see, e.g., Pan Am Corp.*, 161 B.R. at 582, 586 (finding "the journalist's privilege to be applicable" in quashing a subpoena seeking information from Standard & Poor's in connection with its credit rating of Pan Am).

55. 161 B.R. 577 (Bankr. S.D.N.Y. 1993).

poena.⁵⁶ The court found that Standard & Poor's gathered information and communicated it to the public by means of several periodicals that were circulated on a regular basis to the general public.⁵⁷ Standard & Poor's included in its publications not only information provided by the issuers of securities rated by Standard & Poor's but also information based on the agency's own research with the intention of publishing "objective ratings for the [public's] benefit."⁵⁸ Thus, the court found that Standard & Poor's possessed the "requisite newsgathering intent" from the inception of the process; therefore, the agency should be accorded the journalist's privilege.⁵⁹ The fact that some of the information sought through the subpoena was gathered on a confidential basis and, thus, without the intent to disseminate to the public, did not eviscerate the applicability of the journalist's privilege.⁶⁰ The privilege extends to confidential information as well as to other nonpublished information that is used for resource purposes.⁶¹

Moreover, the district court rejected the bankruptcy court's conclusion that Standard & Poor's issues credit ratings primarily for economic gain and, thus, was not entitled to "heightened First Amendment protection."⁶² The district court found that Standard & Poor's does not issue

56. *Id.* at 581-82, 586; *accord In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366, 367-71 (E.D. Pa. 1992) (finding the journalist's privilege applicable to Standard & Poor's with respect to documents associated with Standard & Poor's credit rating of Scott Paper Co.'s debt securities).

57. *Pan Am Corp.*, 161 B.R. at 579, 584 ("[S&P] publishes its ratings and other financial information in periodicals like *CreditWeek*, *High Yield Quarterly*, and *Ratings Handbook*. . . S&P . . . regularly publishes [these] periodicals containing subjective financial analysis and commentary for widespread distribution to the public at large."); *see also Scott Paper Co.*, 145 F.R.D. at 370 ("S&P publishes periodicals with a regular circulation to a general population.").

58. *Pan Am Corp.*, 161 B.R. at 583 ("S&P does not merely depend on information provided by issuers to fill its publications, but rather conducts its own independent research with an eye toward publishing objective ratings for the benefit of the public."); *see also Scott Paper Co.*, 145 F.R.D. at 370 ("S&P publishes information for the benefit of the general public.").

59. *Pan Am Corp.*, 161 B.R. at 581-83, 586 ("As a publisher of publicly distributed financial ratings, analysis and commentary, S&P is, as a matter of law, deserving of the full breadth of First Amendment safeguards."); *see also Scott Paper Co.*, 145 F.R.D. at 370 ("S&P falls within [the First Amendment's] umbrella of protection.").

60. *Pan Am Corp.*, 161 B.R. at 582-83 ("Thus, the fact that S&P may not have accepted all of the information Pan Am seeks with specific intent to disclose that particular information does not render the privilege inapplicable because . . . the information sought by the subpoena was received as part of S&P's newsgathering process with the intent to disseminate information to the public.").

61. *von Bulow ex rel. Auersperg v. von Bulow*, 811 F.2d 136, 143-44 (2d Cir. 1987) ("Journalists who seek to guard information that has not been published likewise have been accorded the protective shroud. 'Like the compelled disclosure of confidential sources, [the compelled production of a reporter's resource materials] may substantially undercut the public policy favoring the free flow of information to the public that is the foundation of the privilege.'" (alteration in original) (quoting *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980))); *see also Am. Sav. Bank, FSB v. UBS PaineWebber, Inc. (In re Fitch, Inc.)*, 330 F.3d 104, 108-09 (2d Cir. 2003) (*per curiam*) (noting that the journalist's privilege prevents the discovery of confidential information and "unpublished nonconfidential information" (citing *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 32 (2d Cir. 1998) (agreeing that the journalist's privilege "applies to nonconfidential as well as to confidential materials"))).

62. *Pan Am Corp.*, 161 B.R. at 583 ("[T]he Bankruptcy Court's findings . . . that S&P receives a fee for its ratings activity and its conclusion that economic factors predominate in its ratings activities are clearly erroneous.").

ratings only when requested by an issuer for a fee; rather, the rating agency typically provides unsolicited ratings without any fee.⁶³ For example, Standard & Poor's assigns credit ratings to nearly all issues of preferred stock and debt securities regardless of whether the rating agency has been hired to do so and irrespective of receiving a fee.⁶⁴ Moreover, the court found that the journalist's privilege is fully applicable to publications of a financial nature.⁶⁵ Thus, the court held that Standard & Poor's acted in the role of a journalist when it gathered information to produce its ratings with the specific intent to use that material to circulate information to the general public and, thus, was entitled to invoke the journalist's privilege to withhold information sought by a subpoena.⁶⁶

However, some courts have declined to extend the journalist's privilege to the credit rating agencies.⁶⁷ For example, the Second Circuit has held that the journalist's privilege is inapplicable when the credit rating agency is unable to demonstrate that it gathered the subpoenaed information as part of the "newsgathering activities of a professional journalist."⁶⁸ *In re Fitch, Inc.*,⁶⁹ provides a case in point concerning the "outer boundaries" of the journalist's privilege and the limits to asserting the privilege by an entity that is not regarded as part of the traditional media.⁷⁰

In examining the nature of the information gathering activities at issue, the Second Circuit found that Fitch gathered information to publish ratings based on the needs of its clients rather than on the basis of the

63. *Id.* ("The record is uncontradicted that S&P does not merely provide ratings to issuers who pay a fee.")

64. *Id.* ("Similarly, even without a request or fee from an issuer, S&P revises, updates and reviews a prior rating or analysis of an issuer or debt instrument on S&P's determination that such information is important to its readers or subscribers.")

65. *Id.* at 584 ("[S]ubstantial authority [has held] that the financial press is fully shielded by the umbrella of the First Amendment." (citing *McGraw-Hill, Inc. v. Arizona (In re Petroleum Prods. Antitrust Litig.)*, 680 F.2d 5, 7-8 (2d Cir. 1982) (finding the journalist's privilege applicable to a division of McGraw-Hill, Inc. with respect to documents regarding the "names of confidential sources of information")); see also *In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366, 369-71 (E.D. Pa. 1992) (finding the journalist's privilege applicable to Standard & Poor's with respect to documents associated with Standard & Poor's credit rating of Scott Paper Co.'s debt securities).

66. *Pan Am Corp.*, 161 B.R. at 581-86. The court also found that Pan Am was unable to "pierce the journalist's privilege" because Pan Am failed to show that the information it sought was unavailable through other sources. *Id.* at 586.

67. *Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & "ERISA" Litig.)*, 511 F. Supp. 2d 742, 818 (S.D. Tex. 2005) (noting that other courts "have questioned in particular the extension of the 'journalist's privilege' recognized by some courts to extend to credit rating agencies").

68. *Am. Sav. Bank, FSB v. UBS PaineWebber, Inc. (In re Fitch, Inc.)*, 330 F.3d 104, 111 (2d Cir. 2003) (per curiam) (holding that the journalist's privilege is inapplicable to quash a subpoena against a credit rating agency where the agency failed to show that it gathered the requested information "pursuant to the newsgathering activities of a professional journalist").

69. 330 F.3d 104 (2d Cir. 2003) (per curiam).

70. *Id.* at 105 (noting that the court was deciding the "outer boundaries" of the journalist's privilege "and the extent to which information-gathering organizations that are not traditionally considered part of the media may claim that privilege").

“newsworthiness” of the information.⁷¹ Distinguishing the *Pan Am* case, in which Standard & Poor’s published ratings for “virtually all public debt financing and preferred stock issues” regardless of whether or not the issuers were clients, the court found that “Fitch only ‘covers’ its own clients.”⁷²

Moreover, the court found that Fitch was actively engaged in helping the client structure the relevant transaction.⁷³ For example, an employee of Fitch offered suggestions to the client regarding changes to the transaction that would be necessary to obtain the ratings desired by the client.⁷⁴ The Second Circuit concluded that the “level of involvement” Fitch displayed with respect to its client’s transaction was not characteristic of the relationship normally observed between a “professional journalist” and the news reported by the journalist.⁷⁵

Based on the foregoing analysis, the Second Circuit held that Fitch failed to establish that it functioned in the role of a professional journalist engaged in “newsgathering activities” when it gathered the requested material, and thus, the rating agency could not use the journalist’s privilege to prevent the discovery of the information.⁷⁶ Additionally, the Second Circuit explained that it was not determining whether, as a general matter, the journalist’s privilege is applicable to a credit rating agency under New York law.⁷⁷ As the court stated, the question of whether a credit rating agency “could ever be entitled to assert the . . . privilege” in New York is yet to be determined.⁷⁸ While the Second Circuit expressly maintained that it was not deciding the larger question of whether the journalist’s privilege is generally applicable to a credit rating agency under New York law, the emphasis of the word “ever” in the court’s

71. *Id.* at 109–10 (“Fitch’s information-disseminating activity does not seem to be based on a judgment about newsworthiness, but rather on client needs.”).

72. *Id.* (noting the lack of evidence “to support Fitch’s claim that it regularly analyzes or publishes a rating for a transaction it is not paid to rate” and contrasting “Standard & Poor’s practice . . . of rating nearly all public debt issuances regardless of whether it was hired to do so or not”); see also *Pan Am Corp. v. Delta Air Lines, Inc. (In re Pan Am Corp.)*, 161 B.R. 577, 583 (Bankr. S.D.N.Y. 1993) (explaining that Standard & Poor’s regularly publishes ratings regardless of whether it receives a fee).

73. *Fitch*, 330 F.3d at 110–11 (“Fitch played an active role in helping [the client] decide how to structure the transaction.”).

74. *Id.* (noting that a Fitch employee commented on the potential transactions and offered “suggestions about how to model the transactions to reach the desired ratings”).

75. *Id.* (“Fitch has an extremely close relationship with the companies it rates. . . . [Its] level of involvement with the client’s transactions . . . is not typical of the relationship between a journalist and the activities upon which the journalist reports.”).

76. *Id.* at 111 (concluding that “the district court did not abuse its discretion in finding that Fitch was not entitled to assert the journalist’s privilege” for the subpoenaed information).

77. *Id.* (“For the sake of clarity, we note that we are not deciding the general status of a credit rating agency like Fitch under New York’s [journalist’s privilege] . . .”).

78. *Id.* (“Whether Fitch, or one of its rivals, could ever be entitled to assert the newsgathering privilege is a question we leave for another day.”).

statement appears to imply that the ability of a credit rating agency to assert the privilege in the future may be somewhat limited.⁷⁹

The Supreme Court has not yet determined whether it would consider credit rating agencies to be members of the press and, therefore, entitled to the same protections under the First Amendment.⁸⁰

2. Fully Protected Speech v. Commercial Speech

As noted in Section I.A.1, the First Amendment protects publications specifically concerning economic or business matters.⁸¹ However, the courts have recognized that the First Amendment does not fully protect every type of publication.⁸² For example, the Supreme Court has distinguished commercial speech from other types of speech and found that commercial speech is deserving of a different level of protection under the First Amendment.⁸³ Accordingly, the Supreme Court has developed two canons of law in this area, namely the doctrine of fully protected speech and the commercial speech doctrine.⁸⁴ A restriction on fully protected speech may be permitted “only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.”⁸⁵

79. See *id.* (emphasizing the word “ever” in its statement regarding whether a credit rating agency would be able to assert the journalist’s privilege in the future).

80. *In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366, 369 (E.D. Pa. 1992) (noting that the Supreme Court has yet to analyze whether the credit rating agencies “constitute the press under the First Amendment”).

81. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (finding that “commercial speech . . . is protected”); *Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & “ERISA” Litig.)*, 511 F. Supp. 2d 742, 810 (S.D. Tex. 2005) (“First Amendment protections reach publications related to business or economic issues.”); *Scott Paper Co.*, 145 F.R.D. at 369 (“[D]isseminators of corporate financial information should . . . have as strong a claim to First Amendment protection as do disseminators of other kinds of information. . . . Economic . . . information, for example, has as great a claim to First Amendment protection as does political discourse.”); see also *supra* note 65 and accompanying text.

82. *Scott Paper Co.*, 145 F.R.D. at 369 (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 771–72 & n.24 (finding that commercial speech is not fully protected by the First Amendment)) (“[N]ot every publication which purports to disclose information automatically qualifies as the press with full First Amendment protection.”); see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985) (“[N]ot all speech is of equal First Amendment importance.”).

83. *Scott Paper Co.*, 145 F.R.D. at 369 (“[T]he Supreme Court has held that commercial speech is only afforded limited First Amendment protection.” (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 771–72 & n.24 (clarifying that while “commercial speech enjoys First Amendment protection . . . it is [not] wholly undifferentiable from other forms” of speech))).

84. See *Lowe v. SEC*, 472 U.S. 181, 233–35 (1985) (White, J., concurring) (acknowledging the doctrine of fully protected speech and the commercial speech doctrine); see also *Va. State Bd. of Pharmacy*, 425 U.S. at 771–72 & n.24 (discussing commercial speech).

85. *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 540 (1980); see, e.g., *People v. Foley*, 257 A.D.2d 243, 246, 252 (N.Y. App. Div. 1999) (holding that a statute prohibiting dissemination of “indecent material to minors” over the Internet “is a precisely drawn means of serving a compelling [state] interest” and “is thus constitutional under the First Amendment”); cf. *Consol. Edison Co. of N.Y.*, 447 U.S. at 540, 544 (holding that a government proscription of “bill inserts that discuss controversial issues of public policy” is not “a narrowly drawn prohibition justified by a compelling state interest” and, thus, “directly infringes the freedom of speech protected by the First . . . Amendment[.]”).

Under the commercial speech doctrine, the government may prevent commercial speech when it is "false, deceptive, or misleading,"⁸⁶ or when it "proposes an illegal transaction."⁸⁷ In the case of commercial speech that is not false, deceptive, or misleading and does not involve an unlawful transaction, the government may still restrict such speech but only when "a substantial governmental interest" exists and the restrictions "directly advance that interest."⁸⁸ Thus, the First Amendment protects commercial speech; however, the protections afforded to such speech are relatively less than the safeguards provided for fully protected or noncommercial speech.⁸⁹ Accordingly, the government may regulate commercial speech by means that might not be deemed tolerable in the context of noncommercial speech.⁹⁰

The commercial speech doctrine was developed in the context of advertisements in that such communications suggest a commercial transaction between the receiver of the communication and the speaker.⁹¹

86. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 638 (1985); see also *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980) (noting that the government may prohibit commercial speech "likely to deceive the public"); *Friedman v. Rogers*, 440 U.S. 1, 9 (1979) (noting that restrictions on deceptive, misleading, or false commercial speech are permissible); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) ("[T]he public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena."); *Va. State Bd. of Pharmacy*, 425 U.S. at 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake. . . . [M]uch commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem." (citations omitted)).

87. *Zauderer*, 471 U.S. at 638 (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973) ("Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.")); see also *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563-64 (noting the government may prohibit "commercial speech related to illegal activity").

88. *Zauderer*, 471 U.S. at 638; *Lowe*, 472 U.S. at 233 (White, J., concurring) ("Under the commercial speech doctrine, restrictions on commercial speech that directly advance a substantial governmental interest may be upheld."); see also *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564 ("The State must assert a substantial interest to be achieved by restrictions on commercial speech. . . . [T]he restriction must directly advance [that] . . . interest . . .").

89. *Zauderer*, 471 U.S. at 637 ("There is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.'"); see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985) (noting that "[i]n the area of protected speech," commercial speech is deserving of "reduced protection" because "[s]uch speech . . . occupies a 'subordinate position in the scale of First Amendment values'" (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978))); *Lowe*, 472 U.S. at 233-34 (White, J., concurring) (acknowledging that commercial speech is afforded less protection than fully protected speech); *Va. State Bd. of Pharmacy*, 425 U.S. at 770-71 & n.24 (explaining that commercial speech is protected under the First Amendment but is afforded a "different degree of protection" than other forms of speech).

90. *Greenmoss Builders Inc.*, 472 U.S. at 758 n.5 (explaining that commercial speech "may be regulated in ways that might be impermissible in the realm of noncommercial expression" (citing *Ohralik*, 436 U.S. at 456)).

91. See *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561, 563 (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience" and finding that "promotional advertising" constitutes commercial speech (citing *Va. State Bd. of Pharmacy*, 425

However, the commercial speech doctrine has been considered in other contexts as well.⁹² For example, in *Lowe v. SEC*,⁹³ the Supreme Court granted certiorari to address the question of whether a securities newsletter containing commentary and investment advice constituted protected speech under the First Amendment.⁹⁴ The majority of the Court decided the case on statutory grounds⁹⁵ and, thus, did not squarely address the constitutional question.⁹⁶ However, the majority noted that the newsletter and a securities chart service offered by the petitioner would constitute protected communications under the First Amendment to the extent that the publications contained “factual information” and commentary regarding the securities market.⁹⁷ Thus, without directly deciding the issue, the majority indicated that a financial newsletter may constitute an “expression of opinion” that should be protected under the First Amendment.⁹⁸ The Court’s use of the language “expression of opinion” appears to imply that, if squarely addressing the issue, the Court would consider a financial newsletter containing commentary regarding the securities market to be fully protected speech under the First Amendment.⁹⁹

U.S. at 761–62 (finding that “speech which does ‘no more than propose a commercial transaction’ is commercial speech protected under the First Amendment and, thus, an advertisement containing the prices of prescription drugs is considered commercial speech (quoting *Pittsburgh Press Co.*, 413 U.S. at 385)); see also *Bates*, 433 U.S. at 363–64, 384 (noting that commercial speech should not be excluded from protection under the First Amendment “merely because it propose[s] a mundane commercial transaction [and] . . . the speaker’s interest is largely economic”; therefore, advertising by attorneys is commercial speech protected by the First Amendment).

92. See *Lowe*, 472 U.S. at 233–35 (White, J., concurring) (discussing the commercial speech doctrine in the context of financial newsletters); see also *In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366, 369–70 (E.D. Pa. 1992) (discussing the commercial speech doctrine in the context of the journalist’s privilege).

93. 472 U.S. 181 (1985).

94. *Id.* at 185, 188–89 (“A typical issue of the [newsletter] . . . contained general commentary about the securities . . . market[], reviews of market indicators and investment strategies, and specific recommendations for buying, selling, or holding stocks . . .”).

95. *Id.* at 183, 211 (concluding that the “publications fall within the statutory exclusion for bona fide publications” under the Investment Advisors Act of 1940; thus, the petitioners were not “investment adviser[s]” under the Act, and the newsletters could not be enjoined for failure to register as investment advisers); see also *Scott Paper Co.*, 145 F.R.D. at 369–70 (discussing *Lowe* and explaining that “[t]he majority of the court, as a matter of statutory interpretation, held that an investment newsletter was not subject to regulation by the Securities and Exchange Commission under the Investment Advisor’s Act of 1940”).

96. *Lowe*, 472 U.S. at 211 (stating that the Court “need not specifically address the constitutional question”); see also *Scott Paper Co.*, 145 F.R.D. at 369–70 (discussing *Lowe* and noting that “the Supreme Court considered, but declined to determine, whether investment newsletters fell within the definition of the press for First Amendment purposes”).

97. *Lowe*, 472 U.S. at 210 (“To the extent that the chart service contains factual information about past transactions and market trends, and the newsletters contain commentary on general market conditions, there can be no doubt about the protected character of the communications . . .”).

98. *Id.* at 210 n.58 (“[W]e have squarely held that the expression of opinion about a commercial product such as a loudspeaker is protected by the First Amendment; [therefore,] it is difficult to see why the expression of an opinion about a marketable security should not also be protected.” (citation omitted) (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984))).

99. See *Scott Paper Co.*, 145 F.R.D. at 370 (“[T]he Supreme Court would be likely to hold, if squarely faced with the issue, that the investment newsletters . . . would . . . be protected by the free press clause of the First Amendment.”); see also *Lowe*, 472 U.S. at 210 & n.58; *R&W Tech. Servs. Ltd. v. Commodity Futures Trading Comm’n*, 205 F.3d 165, 175 (5th Cir. 2000) (“[T]he publication

The concurring opinion authored by Justice White, and joined by Chief Justice Burger and Justice Rehnquist, directly considered the constitutional issue of whether the financial newsletters were protected speech under the First Amendment.¹⁰⁰ Justice White sidestepped the more narrow issue of whether the newsletters contained commercial speech or fully protected speech maintaining that it was unnecessary to determine the specific type of speech in order to resolve the primary issue of whether the First Amendment protected the newsletters.¹⁰¹ If the newsletters contained fully protected speech, then the government prohibition, which extended not only to deceptive, manipulative, or fraudulent speech but also to "legitimate, disinterested advice," is "presumptively invalid" as a "flat prohibition or prior restraint on speech."¹⁰² Alternatively, if the newsletters were commercial speech, then any restrictions on such speech must be "narrowly tailored to advance a legitimate governmental interest."¹⁰³ While the interest in this case was legitimate in that the government desired to protect investors from unscrupulous individuals that may publish misleading or fraudulent advice, the means used by the government to achieve its objective were "extreme."¹⁰⁴ The government restriction was intended to prevent the petitioner from publishing advice altogether, irrespective of whether or not the advice was misleading or fraudulent.¹⁰⁵ Even with the "reduced level of scrutiny" employed with restrictions concerning commercial speech, Justice White

of impersonal advice about specific investments is fully protected speech under the First Amendment.").

100. *Lowe*, 472 U.S. at 211 (White, J., concurring) ("I concur in the judgment . . . because to prevent petitioner from publishing at all is inconsistent with the First Amendment.").

101. *Id.* at 234 (maintaining that the determination of whether financial newsletters constitute commercial speech or fully protected speech is unnecessary).

102. *Id.* (citing *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("Both the history and language of the First Amendment support the view that the press must be left free to publish news . . . without censorship, injunctions, or prior restraints.")) (finding that a ban on "legitimate, disinterested advice" is "a flat prohibition or prior restraint on speech" and, "as applied to fully protected speech, [is] presumptively invalid and may be sustained only under the most extraordinary circumstances"); *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939) ("To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees."); *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 713 (1931) (noting that the "chief purpose" of the "constitutional protection" is "to prevent previous restraints upon publication").

103. *Lowe*, 472 U.S. at 234 (White, J., concurring) ("[E]ven where mere 'commercial speech' is concerned, the First Amendment permits restraints on speech only when they are narrowly tailored to advance a legitimate governmental interest."); *see also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 565 (1980) (recognizing that the First Amendment requires restrictions on speech to be "narrowly drawn" (quoting *In re Primus*, 436 U.S. 412, 438 (1978))).

104. *Lowe*, 472 U.S. at 234-35 (White, J., concurring) (finding a legitimate government interest in desiring "to prevent investors from falling into the hands of scoundrels and swindlers" while also finding "[t]he means chosen [to be] extreme").

105. *Id.* ("Based on petitioner's past misconduct, the Government fears that he may in the future publish advice that is fraudulent or misleading; and it therefore seeks to prevent him from publishing *any* advice, regardless of whether it is actually objectionable.").

found the government's prohibition to be "too blunt an instrument to survive" constitutional scrutiny.¹⁰⁶

Similarly, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,¹⁰⁷ the Supreme Court did not directly address the issue of whether a credit report issued by a credit reporting agency would be considered fully protected speech or commercial speech.¹⁰⁸ However, the Court appeared to imply that it would deem such speech to be commercial speech.¹⁰⁹ The Court explained that, similar to advertising, a credit report that provides subscribers with financial information regarding businesses "is hardy and unlikely to be deterred by incidental state regulation."¹¹⁰ Moreover, such speech is "motivated by the desire for profit" and, therefore, is not as easily deterred as other forms of speech.¹¹¹ The Court also explained that the market creates a strong incentive for a credit reporting agency to issue an accurate report because an inaccurate report would have no value.¹¹² Therefore, the possibility of an "incremental 'chilling' effect" on such speech because of the potential for a lawsuit merits a reduced level of concern.¹¹³

The Supreme Court has yet to address the issue of whether speech by a credit rating agency regarding the credit rating of an issuer or issue of securities is fully protected speech or commercial speech. Notably, in *Lowe*, the majority's use of the language "expression of opinion" when referring to a financial newsletter containing commentary regarding securities may imply that the Court would consider credit ratings to be fully protected speech under the First Amendment.¹¹⁴ Conversely, in *Greenmoss Builders*, the Court's comparison of a credit report issued by a credit reporting agency to commercial advertising may imply that the Court would view a credit rating issued by a credit rating agency as

106. *Id.* at 235 (reasoning that "less drastic remedies than outright suppression . . . are [likely] available to achieve the Government's asserted purpose of protecting investors").

107. 472 U.S. 749 (1985).

108. *See id.* at 762-63.

109. *See id.* (explaining how the speech at issue is similar to advertising); *see also* *Oberman v. Dun & Bradstreet, Inc.*, 460 F.2d 1381, 1384 (7th Cir. 1972) (expressing a lack of acceptance of the proposition that a "credit rating . . . was entitled to the same treatment that the Supreme Court has afforded newspapers and magazines").

110. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762-63 (1985) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 & n.24 (1976) ("[T]he greater objectivity and hardness of commercial speech[] may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.")).

111. *Id.* at 762-63 (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 771-72 & n.24 (noting that since commercial speech is inextricably linked to "commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely").

112. *Id.* ("[T]he market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors.").

113. *Id.* at 763 (noting that "any incremental 'chilling' effect of libel suits would be of decreased significance" with respect to speech contained in a credit report).

114. *See* *Lowe v. SEC*, 472 U.S. 181, 210 & n.58 (1985) (referring to the commentary contained in a financial newsletter as an "expression of opinion").

commercial speech.¹¹⁵ A financial newsletter and a credit report issued by a credit reporting agency are substantially similar in that they both provide an assessment of creditworthiness. However, a credit report, such as that provided by Dun & Bradstreet (D&B) in *Greenmoss Builders*,¹¹⁶ contains not only financial information but also a rating that provides an “indicator of financial strength and viability” of a business¹¹⁷ similar to a credit rating issued by a credit rating agency.¹¹⁸ The D&B Rating provides a “composite credit appraisal” of the credit risk of a business.¹¹⁹ Moreover, D&B provides “predictive scores” of the future financial health of a business.¹²⁰ Thus, the speech contained in a credit rating assigned by a credit reporting agency, such as D&B, and the speech included in a credit rating issued by a credit rating agency, such as Standard & Poor’s, appear to be strikingly similar if not virtually the same. Therefore, courts should treat the speech of a credit rating agency the same as the speech of a credit reporting agency: as commercial speech.

Although a credit rating does not propose a commercial transaction between the credit rating agency (as the speaker) and its audience (the investing public), a credit rating, in effect, proposes a commercial transaction between the issuer of the security and the investing public. As the issuer of the rating, the credit rating agency is, effectively, the speaker. Thus, a credit rating could certainly be considered a form of commercial speech. Moreover, credit ratings assigned for a fee paid by the issuer of the security contain the attributes of commercial speech. A credit rating issued for a fee is clearly “motivated by the desire for profit.”¹²¹ Furthermore, when the issuer of the security pays the fee, an inherent conflict of interest is present,¹²² which defies the concept of a pure expression of opinion.

115. See *Greenmoss Builders, Inc.*, 472 U.S. at 762–63 (comparing a credit report to advertising).

116. See *id.* at 751 (explaining the general information contained in a credit report).

117. *Samples and Descriptions, DUN & BRADSTREET, INC.*, <https://www.dnb.com/product/availrpt.htm> (last visited Jan. 7, 2016) (explaining that the “D&B Rating” is a “widely-used indicator of financial strength and viability” of a company).

118. See *infra* notes 145, 303 and accompanying text.

119. *Samples and Descriptions, supra* note 117 (noting that the “D&B Rating” is “[a] powerful indicator of a firm’s . . . composite credit appraisal that can help assess credit risk quickly and effectively”).

120. *Id.* (“Predictive scores [are] based on statistically proven mathematical models that indicate the likelihood of a firm paying in a severely delinquent manner . . . and the likelihood of a company experiencing financial stress within an 18 month period . . .”).

121. *Greenmoss Builders, Inc.*, 472 U.S. at 762–63 (noting that commercial speech “is hardy and unlikely to be deterred by incidental state regulation” and that “[i]t is solely motivated by the desire for profit, which . . . is a force less likely to be deterred than others”).

122. See *Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & “ERISA” Litig.)*, 511 F. Supp. 2d 742, 823 & n.81 (S.D. Tex. 2005) (“[T]here is a potential conflict of interest created by compensation of credit rating agencies.”); Steven L. Schwarcz, *Private Ordering of Public Markets: The Rating Agency Paradox*, 2002 U. ILL. L. REV. 1, 15 (noting the “conflict of interest inherent” in

Nevertheless, as discussed in Section I.A.3.b, many courts have treated the credit ratings assigned by the credit rating agencies as opinions, and as such, fully protected by the First Amendment.¹²³ However, the classification of credit ratings as statements of opinion by the lower courts should not end the analysis. If the Supreme Court ultimately determines that credit ratings are fully protected speech, then a government prohibition extending only to false, deceptive, or misleading speech would not be analogous to any kind of “flat prohibition or prior restraint on speech” that would be “presumptively invalid” in the context of fully protected speech.¹²⁴ In contrast, such a prohibition on fully protected speech would appear to be “a precisely drawn means of serving a compelling [state] interest”¹²⁵: the protection of investors.

The Supreme Court has not yet addressed the issue of whether it considers the protection of investors a compelling state interest in the context of fully protected speech. However, in the Dodd–Frank Act, Congress determined that credit ratings have “systemic importance.”¹²⁶ Congress further found that the appropriate functioning and accuracy of the credit rating agencies “are matters of national public interest.”¹²⁷ Thus, the Supreme Court may determine that the protection of investors may be reasonably considered a compelling state interest. Moreover, the means used would be precisely drawn in that the restriction would prohibit only those credit ratings that are false, deceptive, or misleading.¹²⁸ Therefore, a prohibition against false, deceptive, or misleading credit ratings would not infringe the safeguards of the First Amendment.

the fact that credit rating agencies are “virtually always paid their fee by the issuer of securities”); see also *infra* Section III.A.

123. See, e.g., *Jefferson Cty. Sch. Dist. No. R-1 v. Moody’s Inv’ts Servs., Inc.*, 175 F.3d 848, 855–56 (10th Cir. 1999) (holding that a credit rating agency’s article regarding the creditworthiness of an issuer of bonds “constitutes a protected expression of opinion” under the First Amendment); *In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366, 370–71 (E.D. Pa. 1992) (asserting that the credit rating issued by Standard & Poor’s is not commercial speech; yet, finding that “the importance of S & P’s ratings to an issuer’s ability to market its commercial paper and debt instruments suggests that the possibility of disclosure may not chill the continued flow of financial information” and, thus, “the danger to the First Amendment . . . may be less than in other situations”).

124. *Lowe v. SEC*, 472 U.S. 181, 234 (1985) (White, J., concurring) (citing *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam)) (finding that a ban extending not only to “fraudulent, deceptive, or manipulative speech” but also to “legitimate, disinterested advice” is “a flat prohibition or prior restraint on speech” and, “as applied to fully protected speech, [is] presumptively invalid and may be sustained only under the most extraordinary circumstances”); see also *supra* notes 14–15 and accompanying text.

125. See, e.g., *People v. Foley*, 257 A.D.2d 243, 246, 252 (N.Y. App. Div. 1999) (holding that a statute prohibiting dissemination of “indecent material to minors” over the Internet “is a precisely drawn means of serving a compelling [state] interest” and “is thus constitutional under the First Amendment”); cf. *Consol. Edison Co. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 540, 544 (1980) (holding that a government proscription of “bill inserts that discuss controversial issues of public policy” is not “a narrowly drawn prohibition justified by a compelling state interest” and, thus, “directly infringes the freedom of speech protected by the First . . . Amendment[.]”).

126. Dodd–Frank Act, Pub. L. No. 111-203, title IX, § 931(1), 124 Stat. 1872 (2010).

127. *Id.* (“[C]redit rating agencies are central to capital formation, investor confidence, and the efficient performance of the United States economy.”).

128. See *supra* note 125 and accompanying text.

Alternatively, if the Supreme Court determines that credit ratings are commercial speech, then the restrictions on such speech must be "narrowly tailored to advance a legitimate governmental interest."¹²⁹ As the concurring opinion found in *Lowe*, the protection of investors is a legitimate governmental interest.¹³⁰ Thus, with respect to credit ratings, the interest may be considered legitimate in that the government desires to protect investors from false, deceptive, or misleading credit ratings in a registration statement. Moreover, the means used would be narrowly tailored since the restriction would prohibit only those credit ratings that are false, deceptive, or misleading.¹³¹

One of the rationales for affording commercial speech a lower level of protection under the First Amendment is that such speech is less likely to be "chilled" by appropriate regulation because advertising is considered closely associated with profits.¹³² Thus, disseminators of commercial speech have a financial incentive to continue to advertise even though subject to restrictions.¹³³ Moreover, as the issuers of the information, disseminators of commercial speech will be knowledgeable as to the truth of such speech.

In the context of credit rating agencies, the necessity of obtaining a credit rating in order to issue debt securities¹³⁴ suggests that restrictions on the journalist's privilege that may result in disclosure of financial information will not chill the issuer's provision of that information to the rating agency.¹³⁵ Likewise, the necessity of earning a profit by the credit rating agencies suggests that regulation prohibiting the issuance of false, deceptive, or misleading ratings will not chill the assignment of credit ratings. In Part II, the issues confronting this assertion will be discussed.

Moreover, even though the credit rating agencies obtain financial information from the issuers of the securities, the agencies are certainly

129. *Lowe*, 472 U.S. at 234 (White, J., concurring) ("[E]ven where mere 'commercial speech' is concerned, the First Amendment permits restraints on speech only when they are narrowly tailored to advance a legitimate governmental interest."); see also *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 565 (1980) (recognizing that the First Amendment requires restrictions on speech to be "narrowly drawn" (quoting *In re Primus*, 436 U.S. 412, 438 (1978))).

130. *Lowe*, 472 U.S. at 234 (White, J., concurring) (finding a legitimate government interest in desiring "to prevent investors from falling into the hands of scoundrels and swindlers").

131. See *supra* notes 129-30 and accompanying text.

132. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) ("[A]dvertising is the [s]ine qua non of commercial profits, [thus,] there is little likelihood of its being chilled by proper regulation and foregone entirely.")

133. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380-81 (1977) ("Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation."); see also *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24 (noting that "commercial speech may be more durable than other kinds" due to the associated profits and, thus, proper regulations are less likely to "silenc[e] the speaker").

134. *Compuware Corp. v. Moody's Inv'rs Servs., Inc.*, 499 F.3d 520, 522 (6th Cir. 2007) ("Often, a company seeking to borrow funds must, as part of the loan process, ask Moody's, or a similar company, to publish its credit rating.")

135. *In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366, 370-71 (E.D. Pa. 1992).

knowledgeable as to whether the provided information represents creditworthiness of a stronger or a weaker character. For example, a debt security, such as a mortgage-backed security,¹³⁶ with an underlying cash flow derived from subprime mortgages would appear to have a much weaker level of creditworthiness than a corporate bond issued by a Fortune 500 company such as Johnson & Johnson.¹³⁷ Individuals who received subprime mortgage loans generally had “impaired or limited credit histories, or high debt relative to their income.”¹³⁸ A layering of risk, including a weak borrower, a high loan-to-value, and inadequate structuring of the security,¹³⁹ should not result in a credit rating of AAA.¹⁴⁰ Yet, the assignment of the highest credit rating to a corporate bond issued by Johnson & Johnson and to a mortgage-backed security secured by subprime debt¹⁴¹ appears to indicate a false, or at the very least misleading, credit

136. *N.J. Carpenters Vacation Fund v. Royal Bank of Scot. Grp., PLC*, 720 F. Supp. 2d 254, 258 (S.D.N.Y. 2010) (explaining mortgage-backed securities as securities whose cash flow is derived from underlying mortgage loans that are “pooled together” in the form of a security and subsequently sold on the secondary market to investors).

137. *Fortune 500 2014*, FORTUNE, <http://fortune.com/fortune500/2014/Johnson-johnson-39/> (last visited Oct. 24, 2015) (listing Johnson & Johnson as thirty-ninth on the list of Fortune 500 companies).

138. U.S. DEP’T OF TREASURY & U.S. DEP’T OF HOUSING & URBAN DEV., JOINT REPORT ON RECOMMENDATIONS TO CURB PREDATORY HOME MORTGAGE LENDING 26 (2000), <http://archives.hud.gov/reports/treasrpt.pdf>; see also *Till v. SCS Credit Corp.*, 541 U.S. 465, 471 (2004) (explaining that subprime loans are made “to borrowers with poor credit ratings”); *N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 260 (noting that subprime loans involved “a higher risk of default based on weak credit history and personal finances, or fraud because borrowers either self-reported their income or were allowed to provide less information than in a typical loan”).

139. Many mortgage-backed securities suffered from inadequate subordination in the structure of the security. These securities failed to have a sufficiently large enough subordinate (i.e., lowest or most junior) tranche, which would absorb the first defaults that occurred in the pool of mortgages. This subordination was intended to insulate the highest or most senior tranches of the security from default. However, the level of subordination in these structured securities was clearly inadequate. See generally ADAM ASHCRAFT ET AL., FED. RESERVE BANK OF N.Y., MBS RATINGS AND THE MORTGAGE CREDIT BOOM 2–3, 6 (2010) (noting subordination “declines significantly between the start of 2005 and mid-2007” and “[d]uring this . . . period, the average riskiness of new [mortgage-backed security] deals increases significantly”).

140. AAA is the highest credit rating that Standard & Poor’s may assign to a financial obligation. *Standard & Poor’s Ratings Definitions*, STANDARD & POOR’S RATINGS SERVS. (Nov. 20, 2014, 6:46 AM), https://www.standardandpoors.com/en_US/web/guest/article/-/view/sourceId/504352. According to Standard & Poor’s, when an obligation is assigned a credit rating of AAA, the capacity of the issuer to satisfy its “financial commitment” on the security is “extremely strong.” *Id.* Similarly, AAA is the highest credit rating that Moody’s may assign to a financial obligation. MOODY’S INV. SERV., RATING SYMBOLS AND DEFINITIONS 5 (2016), https://www.moody.com/researchdocumentcontentpage.aspx?docid=PBC_79004. According to Moody’s, obligations that are assigned a credit rating of AAA are considered to be the “highest quality” obligations with the “lowest level of credit risk” or risk of default. *Id.*

141. See John Morgan, *Path to Extinction: Only 3 US Companies Still Have AAA Credit Ratings*, NEWSMAX (Apr. 15, 2014, 11:48 AM), <http://www.moneynews.com/Economy/S-P-rating-companies-Moodys/2014/04/15/id/565714/> (noting that Johnson & Johnson is one of only three companies that Standard & Poor’s still rates as “AAA, which is reserved for companies with the unassailable financial strength and discipline”); Patrick Kingsley, *How Credit Ratings Agencies Rule the World*, GUARDIAN (Feb. 15, 2012, 3:00 PM), <http://www.theguardian.com/business/2012/feb/15/credit-ratings-agencies-moodys> (“In the run-up to 2008, a staggering proportion of mortgage-based debts were rated AAA, when in fact they were junk.”); Thomas J. Curry, Comptroller of the Currency, Office of the Comptroller of the Currency, Remarks Before the American Securitization Forum 2 (Jan. 28, 2013), <http://www2.occ.gov/news->

rating in the case of the mortgage-backed security backed by subprime debt. Such speech, whether ultimately deemed commercial speech or not, should be subject to regulation restricting the issuance of false, deceptive, or misleading ratings.

3. Statements of Opinion

As noted by Justice Brennan, ever since the Supreme Court “first hinted that the First Amendment provides some manner of protection for statements of opinion . . . courts and commentators have struggled with the contours of this protection . . . within our First Amendment jurisprudence.”¹⁴² This part will explore the relevant standards established by the Supreme Court in the context of statements of opinion and the application of those standards to the credit rating agencies.

a. The Actual Malice Standard

In *New York Times Co. v. Sullivan*,¹⁴³ the Supreme Court first addressed the issue of whether the First Amendment protections of freedom of speech and of the press restrict the power of a state to provide damages in an action for libel against critics of a public official with respect to his official conduct.¹⁴⁴ The *New York Times* printed allegedly false statements in an advertisement.¹⁴⁵ Upon review of the evidence, the Court determined that some of the statements printed in the newspaper were not accurate portrayals of certain events occurring in Montgomery, Alabama, during the civil rights movement.¹⁴⁶

issuances/speeches/2013/pub-speech-2013-19.pdf (noting that the “flawed credit ratings” assigned to mortgage-backed securities “suggest[ed] that the mortgage securities in question were as safe as investment-grade corporate bonds”).

142. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 23 (1990) (Brennan, J., dissenting) (footnote omitted); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974) (“[The] Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment.”). *Milkovich* held that state libel laws are not prohibited by the First Amendment in a case where a newspaper article implied that the coach of a high school wrestling team lied while under oath in the course of a judicial proceeding. *Milkovich*, 497 U.S. at 3.

143. 376 U.S. 254 (1964).

144. *Id.* at 256 (noting that this case is the first time the Court will determine “the extent to which the constitutional protections for speech and press limit a State’s power to award damages in a libel action brought by a public official against critics of his official conduct”); see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755 (1985) (stating that the *N.Y. Times* case was the first time the Supreme Court “held that the First Amendment limits the reach of state defamation laws”).

145. *N.Y. Times Co.*, 376 U.S. at 256, 258 (discussing a libel complaint by a city Commissioner of Montgomery, Alabama, based on statements in an advertisement published by the *New York Times*); see also *Greenmoss Builders, Inc.*, 472 U.S. at 755 (describing the *N.Y. Times* case in which a public official sought “damages for the publication of an advertisement criticizing police conduct in a civil rights demonstration”); *Gertz*, 418 U.S. at 334 (“The Times ran a political advertisement endorsing civil rights demonstrations by black students in Alabama and impliedly condemning the performance of local law-enforcement officials.”).

146. *N.Y. Times Co.*, 376 U.S. at 258–59 (“It is uncontroverted that some of the statements contained in the [advertisement] . . . were not accurate descriptions of events which occurred in Montgomery. . . . [For example,] [a]lthough nine students were expelled by the State Board of Edu-

Nevertheless, the Court held that the Constitution prohibits awarding damages to a public official for defamatory statements concerning his official conduct even when those statements are shown to be false unless the public official can prove that the false statements were “made with ‘actual malice.’”¹⁴⁷ The Supreme Court defined “actual malice” as making a statement with knowledge that the statement is false or with reckless disregard concerning whether or not the statement is false.¹⁴⁸ Applying the actual malice standard, the Court held that the *New York Times* did not publish the false statements with actual malice.¹⁴⁹ The Court found that even if the defamatory statements were not shown to be “substantially correct,” the contrary opinion held by one of the newspaper’s employees “was at least a reasonable one.”¹⁵⁰

Moreover, the Supreme Court held that the statements do not lose constitutional protection because they were contained in a “paid advertisement.”¹⁵¹ As the Court noted, the advertisement contained expressions of opinion and provided information concerning the civil rights movement, the “existence and objectives [of which] are matters of the highest public interest and concern.”¹⁵² Furthermore, the fact that the

cation, this was not for leading [a] demonstration at the Capitol [as the advertisement stated], but for demanding service at a lunch counter in the Montgomery County Courthouse on another day.”).

147. *Id.* at 279–80 (“The constitutional guarantees require . . . 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’”); see also *Cty. of Orange v. McGraw Hill Cos.*, 245 B.R. 151, 154–55 (Bankr. C.D. Cal. 1999) (noting that a publisher will not be liable for printing false statements unless those statements were “made with ‘actual malice’” (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (concluding that “public figures and public officials may not recover for the tort of intentional infliction of emotional distress . . . without showing . . . that the publication contains a false statement of fact that was made with ‘actual malice’”))).

148. *N.Y. Times Co.*, 376 U.S. at 280 (defining actual malice); see also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14 (1990); *Hustler Magazine, Inc.*, 485 U.S. at 56; *Gertz*, 418 U.S. at 328; *Compuware Corp. v. Moody’s Inv’ts Servs., Inc.*, 499 F.3d 520, 526 (6th Cir. 2007); *Jefferson Cty. Sch. Dist. No. R-1 v. Moody’s Inv’ts Servs., Inc.*, 175 F.3d 848, 857 (10th Cir. 1999); *Cty. of Orange*, 245 B.R. at 155.

149. *N.Y. Times Co.*, 376 U.S. at 286–88 (“[T]he facts do not support a finding of actual malice. . . . [T]he evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.”).

150. *Id.* at 286 (noting that the *Times*’ Secretary stated that “he thought the advertisement was ‘substantially correct’”); see also *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964) (noting that “utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth”).

151. *N.Y. Times Co.*, 376 U.S. at 266 (holding that “allegedly libelous statements” do not sacrifice First Amendment protections simply due to the statements being disseminated in a “paid advertisement”); see also *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (“That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.”); *Cty. of Orange v. McGraw-Hill Cos. (In re Cty. of Orange)*, 245 B.R. 138, 143 (Bankr. C.D. Cal. 1997) (noting the protections of the First Amendment are “not diminished when the expression at issue is published and sold for profit” (citing *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967))).

152. *N.Y. Times Co.*, 376 U.S. at 266 (citing *NAACP v. Button*, 371 U.S. 415, 428–29, 433–36 (1963) (holding “that the activities of the NAACP, its affiliates and legal staff . . . are modes of expression and association protected by the First . . . Amendment[]” and, therefore, striking down a state statute that prohibits advising individuals that their rights have been infringed and referring

newspaper received a payment to publish the advertisement is no different than the payments received when selling newspapers and books, and thus, the payment is similarly "immaterial" to whether the statements contained therein are deserving of constitutional protection.¹⁵³

Thus, the actual malice standard protects false statements unless it can be proven that the speaker made those statements with knowledge of the falsity of the statements or with a reckless disregard concerning whether or not the statements were accurate.¹⁵⁴ Notably, the Supreme Court has plainly stated that false statements concerning factual matters are bereft of any value under the Constitution.¹⁵⁵ Such false statements "interfere with the truth-seeking function of the marketplace of ideas."¹⁵⁶ However, the Court has also recognized that, despite the lack of value in false statements, such statements are "inevitable in free debate."¹⁵⁷ Thus, the Court was concerned that a strict liability standard for publishers of false factual statements would likely have the unwanted effect of "chilling" speech that possessed "constitutional value."¹⁵⁸ As expressed by the Court, "Freedoms of expression require 'breathing space.'"¹⁵⁹

them to a specific attorney for representation because such a statute "could well freeze out of existence" all activities in support of the civil rights movement)).

153. *Id.* at 266 (citing *Smith v. California*, 361 U.S. 147, 150 (1959) (noting that it is "no matter that the dissemination [of books and other forms of the printed word] takes place under commercial auspices"))).

154. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 153 (1967) (explaining that recovery is permitted under the actual malice standard only when the plaintiff can "prove that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probably falsity" (citing *N.Y. Times Co.*, 376 U.S. at 279-80 (finding that the constitution protects false statements unless the petitioner can prove that the statements were "made with 'actual malice'" in that the speaker made the statements knowing they were false or with a reckless disregard concerning the falsity of the statements))).

155. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless . . ."); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (finding "no constitutional value in false statements of fact").

156. *Hustler Magazine, Inc.*, 485 U.S. at 52 (citing *Gertz*, 418 U.S. at 340 ("[False statements] belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (noting that, *inter alia*, obscene, profane, and libelous speech are not protected under the First Amendment)))) (finding that false statements "cause damage to an individual's reputation that cannot easily be repaired by counterspeech").

157. *Id.* at 52 (quoting *Gertz*, 418 U.S. at 340 ("Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate.")); see also *Curtis Publ'g Co.*, 388 U.S. at 152 (stating that the Court has "recognized 'the inevitability of some error in the situation presented in free debate'" (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 406 (1967))); *N.Y. Times Co.*, 376 U.S. at 271-72 (acknowledging that false speech is "inevitable in free debate").

158. *Hustler Magazine, Inc.*, 485 U.S. at 52 ("[A] rule that would impose strict liability on a publisher for false factual assertions would have an undoubted 'chilling' effect on speech relating to public figures that does have constitutional value."); see also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14 (1990) (explaining that the actual malice standard was grounded on the concern that a state law requiring the speaker to warrant that all factual statements were true would have the effect of deterring speech deserving of First Amendment protection (citing *Gertz*, 418 U.S. at 334)).

159. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986) (quoting *N.Y. Times Co.*, 376 U.S. at 271-72 (recognizing that false statements are "inevitable in free debate" and that such statements "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'" (alteration in original) (quoting *NAACP v. Button*, 371 U.S. 415,

Thus, the Supreme Court established the actual malice standard to avoid chilling valuable speech.¹⁶⁰ Accordingly, the actual malice rule provides publishers with protection from liability for innocent misstatements as well as for negligent falsehoods.¹⁶¹

Although the Supreme Court has observed that both the “intentional lie” and the “careless error” lack constitutional value,¹⁶² the Court has defined the reckless disregard prong of the actual malice rule to require more than simply a “failure to investigate.”¹⁶³ Reckless disregard under the actual malice standard means the publisher has a “high degree of awareness” that the statements are likely false.¹⁶⁴ For example, in *New York Times*, the evidence did not support a finding that the publisher was “aware of the likelihood” that the information was false; thus, the plaintiff failed to prove reckless disregard.¹⁶⁵ Reckless disregard of the truth

433(1963)); see also *Gertz*, 418 U.S. at 341 (“The First Amendment requires that we protect some falsehood in order to protect speech that matters.”); *Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & “ERISA” Litig.)*, 511 F. Supp. 2d 742, 822 (S.D. Tex. 2005) (observing the need “to preserve the ‘breathing space’ essential for freedom of expression” (quoting *Hustler Magazine, Inc.*, 485 U.S. at 52)).

160. *Hustler Magazine, Inc.*, 485 U.S. at 52 (explaining that the needed “breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove both that the statement was false and that the statement was made with the requisite level of culpability”); see also *Milkovich*, 497 U.S. at 14 (noting that this rule was based on a concern that constitutionally protected speech regarding public officials would be deterred if the speaker was required to certify the truth of every statement of fact (citing *Gertz*, 418 U.S. at 334)); *Cty. of Orange v. McGraw Hill Cos.*, 245 B.R. 151, 154–55 (Bankr. C.D. Cal. 1999) (“To accommodate the ‘breathing-space’ the First Amendment requires, a publisher will not incur liability for a false statement unless the statement was made with ‘actual malice’” (quoting *Hustler Magazine, Inc.*, 485 U.S. at 52)).

161. *Enron Corp.*, 511 F. Supp. 2d at 811 (explaining that the actual malice rule “protects publishers from liability for ‘either innocent or negligent misstatement’ so as not to chill the press’ exercise of constitutional guarantees” (quoting *Time, Inc.*, 385 U.S. at 389)).

162. *Gertz*, 418 U.S. at 340 (“Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.” (quoting *N.Y. Times Co.*, 376 U.S. at 270)); see also *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (“Neither lies nor false communications serve the ends of the First Amendment”); *Time, Inc.*, 385 U.S. at 390 (“[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.” (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964))).

163. *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (“[F]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard.”); *Gertz*, 418 U.S. at 332 (“[M]ere proof of failure to investigate, without more, cannot establish reckless disregard for the truth.”); see also *St. Amant*, 390 U.S. at 733 (“Failure to investigate does not in itself establish bad faith.” (citing *N.Y. Times Co.*, 376 U.S. at 287–88 (“[N]egligence in failing to discover the misstatements . . . is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.”))); *Curtis Publ’g Co. v. Associated Press*, 388 U.S. 130, 153 (1967) (noting that “[i]nvestigatory failures alone” are not sufficient to meet the actual malice standard); *Compuware Corp. v. Moody’s Inv’rs Servs., Inc.*, 499 F.3d 520, 526 (6th Cir. 2007) (“[A] defendant’s failure to investigate, without more, does not establish a reckless disregard of the truth.”).

164. *Gertz*, 418 U.S. at 332 (noting reckless disregard requires that “the publisher must act with a ‘high degree of awareness of . . . probable falsity’” (alteration in original) (quoting *St. Amant*, 390 U.S. at 731)); see also *Garrison*, 379 U.S. at 74 (“[O]nly those false statements made with [a] high degree of awareness of their probable falsity . . . may be the subject of either civil or criminal sanctions.”).

165. *St. Amant*, 390 U.S. at 731 (citing *N.Y. Times Co.*, 376 U.S. at 287 (“The mere presence of . . . stories in the files does not . . . establish that the Times ‘knew’ the advertisement was false.”))

or falsity of a statement is a "subjective standard."¹⁶⁶ As expressed by the Supreme Court, the measure of reckless behavior is not founded on the "reasonably prudent man" standard.¹⁶⁷ Whether or not a reasonably prudent man would have investigated or would have decided to publish is not the touchstone applied when determining reckless disregard.¹⁶⁸ Rather, to prove reckless disregard, "more than a departure from reasonably prudent conduct" is needed.¹⁶⁹ Reckless disregard requires proof that the publisher "entertained serious doubts" regarding the truth of the information.¹⁷⁰ If a publisher ignores these doubts and nevertheless publishes the information, then the plaintiff can show a reckless disregard for whether the information was true or false, and prove actual malice.¹⁷¹ Moreover, if a publisher purposely avoids the truth, this "may be sufficient" to show actual malice.¹⁷² However, it is not necessary for a publisher to "include every relevant and potentially positive detail" to prevent liability.¹⁷³

The Supreme Court has acknowledged that the high bar of the reckless disregard standard may prove insurmountable for many plaintiffs.¹⁷⁴ However, the overriding interest in protecting freedom of expression concerning public matters against the possibility of self-censorship necessitates a rejection of the reasonably prudent man standard.¹⁷⁵ Thus, the First Amendment inevitably will protect some false publications in

(explaining that the plaintiff in the *N.Y. Times* case "did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information").

166. *Compuware Corp.*, 499 F.3d at 526 (citing *Harte-Hanks Commc'ns, Inc.*, 491 U.S. at 688).

167. *St. Amant*, 390 U.S. at 731.

168. *Compuware Corp.*, 499 F.3d at 526 (citing *St. Amant*, 390 U.S. at 731 ("[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.")).

169. *Harte-Hanks Commc'ns, Inc.*, 491 U.S. at 688 (citing *St. Amant*, 390 U.S. at 731).

170. *Compuware Corp.*, 499 F.3d at 526 (quoting *St. Amant*, 390 U.S. at 731 ("There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.")).

171. *St. Amant*, 390 U.S. at 731 (noting that publishing with "serious doubts" regarding whether or not the information is true "shows reckless disregard for truth or falsity and demonstrates actual malice").

172. *Compuware Corp.*, 499 F.3d at 526 (citing *Harte-Hanks Commc'ns, Inc.*, 491 U.S. at 692 (noting that "purposeful avoidance of the truth is in a different category" than a "failure to investigate")).

173. *Id.* at 527 (citing *Perk v. Reader's Digest Ass'n*, 931 F.2d 408, 412 (6th Cir. 1991) (observing that a publisher does not have a "legal obligation to present a balanced view")).

174. *See St. Amant*, 390 U.S. at 731 ("Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher."); *see also* PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 96 (observing that the actual malice rule "poses such a high barrier that it virtually insulates the speaker from liability").

175. *See St. Amant*, 390 U.S. at 731-32 ("[T]he stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies.").

order to guarantee the protection of truthful publications regarding matters of public interest.¹⁷⁶

However, the Supreme Court has rejected the idea that a statement that may be characterized as an opinion automatically deserves full constitutional protection.¹⁷⁷ The Court has recognized that “expressions of ‘opinion’ may often imply an assertion of objective fact.”¹⁷⁸ For example, suppose a newspaper article makes the following assertion: “In my opinion, the Governor is a liar.” This statement implies knowledge of certain facts, which led to the conclusion that the Governor is a liar.¹⁷⁹ If the statement is based on incomplete or inaccurate facts, or if the article’s evaluation of the facts is incorrect, then the statement may imply an assertion of fact that is false.¹⁸⁰ Moreover, expressing the statement in words that appear to indicate that an opinion is being proffered, such as using the words “in my opinion” or “I think,” does not negate the possibility that “the statement may . . . imply a false assertion of fact.”¹⁸¹ For example, the fact that a credit rating agency refers to its evaluation of a bond issue as an opinion does not, in and of itself, establish that the rating agency’s statements are entitled to constitutional protection.¹⁸² If the credit rating agency’s statements were proven to have “materially false components,” the rating agency would not be protected from liability simply by using the word “opinion.”¹⁸³

176. *Id.* at 732 (“[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.”).

177. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990) (explaining that the Court did not intend “to create a wholesale defamation exemption for anything that might be labeled ‘opinion’”); *see also* *Jefferson Cty. Sch. Dist. No. R-1 v. Moody’s Inv’t’s Servs., Inc.*, 175 F.3d 848, 852 (10th Cir. 1999); *Cty. of Orange v. McGraw-Hill Cos. (In re Cty. of Orange)*, No. SA CV 96-0765-GLT, 1997 U.S. Dist. LEXIS 22459, at *12 (C.D. Cal. June 2, 1997).

178. *Milkovich*, 497 U.S. at 18–19 (rejecting “the creation of an artificial dichotomy between ‘opinion’ and fact”); *see also* *Jefferson Cty. Sch. Dist.*, 175 F.3d at 852; *Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & “ERISA” Litig.)*, 511 F. Supp. 2d 742, 819 (S.D. Tex. 2005); *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *12–13 (“[T]he threshold question is whether a ‘reasonable fact-finder could conclude that the statement implies an assertion of objective fact.’” (quoting *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990))).

179. *See Milkovich*, 497 U.S. at 18–19.

180. *Id.* (“Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.”).

181. *Id.* (explaining that “[s]imply couching . . . statements in terms of opinion does not dispel” the implication of “a false assertion of fact”); *Jefferson Cty. Sch. Dist.*, 175 F.3d at 854 (“[C]ourts have . . . applied *Milkovich* to conclude that certain statements, even though couched as expressions of opinion, are provably false and therefore are not protected from defamation claims by the First Amendment.”).

182. *Jefferson Cty. Sch. Dist.*, 175 F.3d at 856 (“[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 also Milkovich*, 497 U.S. at 19.

183. *Jefferson Cty. Sch. Dist.*, 175 F.3d at 856 (noting that if a statement expressed as “an opinion were shown to have materially false components, the issuer should not be shielded from liability by raising the word ‘opinion’ as a shibboleth”); *Enron Corp.*, 511 F. Supp. 2d at 822 (“[A] publisher may be liable for a statement of opinion if that statement reasonably implies false facts or relies on stated facts that are provably false.”); *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at

However, the statement "in my opinion, the Governor is making a mistake by painting the Governor's mansion orange," would be fully protected.¹⁸⁴ Thus, a "statement of opinion" concerning public matters, which does not imply an assertion of fact that may be proven as false, will be fully protected under the First Amendment.¹⁸⁵ In contrast, a statement of opinion regarding a matter of public concern, which implies an assertion of fact that may be proven as false or depends on stated facts that may be proven as false, may be subject to liability under the actual malice standard.¹⁸⁶

As intimated above, the actual malice standard is generally applied to false statements regarding "matters of public concern."¹⁸⁷ As stated by the Supreme Court, the First Amendment protects "the free flow of ideas and opinions on matters of public interest and concern."¹⁸⁸ Thus, in *New York Times*, the Court applied the actual malice rule to false statements against a public official.¹⁸⁹ Shortly thereafter, in *Curtis Publishing Co. v. Butts*,¹⁹⁰ the Supreme Court first considered whether the actual malice standard should be extended to defamatory statements against individuals who are not public officials but nevertheless are considered public figures because these individuals have some type of involvement in a matter of public interest.¹⁹¹ As an initial matter, the Court explained the need to consider "the factors which arise in the particular context" rather than engage in a "blind application" of the *New York Times* actual malice

*12-13 (explaining that a statement of opinion is actionable if the statement contains a factual assertion that may be proven as false).

184. See *Milkovich*, 497 U.S. at 20.

185. *Id.* (discussing *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69 (1986) (holding that "where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false"); *Enron Corp.*, 511 F. Supp. 2d at 819 ("[I]f a statement 'cannot reasonably [be] interpreted as stating actual facts,' it is shielded by the First Amendment." (alteration in original) (quoting *Milkovich*, 497 U.S. at 20)).

186. *Milkovich*, 497 U.S. at 20 ("[W]here a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts . . . [the plaintiff] must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth.").

187. *Cty. of Orange v. McGraw Hill Cos.*, 245 B.R. 151, 155 (Bankr. C.D. Cal. 1999) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 281-82 (1964)); see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755 (1985) (explaining that the advertisement in *N.Y. Times* "concerned 'one of the major public issues of our time'" and, thus, the Court in that case applied the actual malice standard to the issue of whether a public official may recover damages for false statements contained in the advertisement (quoting *N.Y. Times Co.*, 376 U.S. at 271)).

188. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."); see also *Greenmoss Builders, Inc.*, 472 U.S. at 755 (explaining "that 'freedom of expression upon public questions is secured by the First Amendment,' and that 'debate on public issues should be uninhibited, robust, and wide-open'" (citation omitted) (quoting *N.Y. Times Co.*, 376 U.S. at 269-70)); *N.Y. Times Co.*, 376 U.S. at 264-66 (finding that an advertisement containing expressions of opinion and information concerning the civil rights movement, "whose existence and objectives are matters of the highest public interest and concern," was protected under the First Amendment).

189. *N.Y. Times Co.*, 376 U.S. at 279-80.

190. 388 U.S. 130 (1967).

191. *Id.* at 134.

standard.¹⁹² In reviewing the circumstances of this case, the Court found that the individuals involved had a sufficient degree of “continuing public interest” as a result of their position or activities as well as “sufficient access to the [channels] of counterargument” to have the ability to expose the falsity of the defamatory assertions.¹⁹³ Therefore, the Court considered the individuals to be “public figures.”¹⁹⁴ As expressed by Chief Justice Warren in concurrence, the importance of permitting “uninhibited debate” concerning the involvement of such individuals in public matters “is as crucial as it is in the case of ‘public officials.’”¹⁹⁵ Thus, “a majority of the Court” agreed to apply the actual malice standard to defamatory actions brought by public figures.¹⁹⁶ Hence, the actual malice rule has been applied to false statements against public officials as well as to falsehoods against public figures.¹⁹⁷ Moreover, both a public official and a public figure must show actual malice by “a clear and convincing standard of proof.”¹⁹⁸

However, the Supreme Court has found that the actual malice standard is inappropriate in the case of a defamatory false statement that causes injury to a private person even when the statement concerns a

192. *Id.* at 148 (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 390–91 (1967) (applying the actual malice standard “not through blind application” of *N.Y. Times*, but upon considering “the factors which arise in the particular context of the application of the New York [Right to Privacy] statute in cases involving private individuals”)).

193. *Id.* at 135, 140, 154–55 (explaining that one of the consolidated cases involved the University of Georgia athletic director who was accused “of conspiring to ‘fix’ a football game” and the other involved “a man of some political prominence” who had been present at the University of Mississippi during a “massive riot”).

194. *Id.* at 154 (noting that both individuals “commanded a substantial amount of independent public interest at the time of the publications” and, therefore, would be considered “public figures”).

195. *Id.* at 164 (Warren, C.J., concurring) (“Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of ‘public officials.’”).

196. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14 (1990) (stating that in *Curtis*, “a majority of the Court” concluded that the actual malice standard should be applied in defamatory actions brought by public figures); see also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (asserting that since the decision in *N.Y. Times*, the Court has “consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if” the plaintiff can show that the statement was made with actual malice); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 336 & n.7 (1974) (“[A] majority of the [*Curtis*] Court agreed . . . that the *New York Times* test should apply to criticism of ‘public figures’ as well as ‘public officials.’”).

197. *Hustler Magazine, Inc.*, 485 U.S. at 56–57 (applying the actual malice standard to false statements against a public figure); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (applying the actual malice rule to false statements against a public official); *Jefferson Cty. Sch. Dist. No. R-1 v. Moody’s Inv’ts Servs., Inc.*, 175 F.3d 848, 852 (10th Cir. 1999) (“[T]he First Amendment prohibits public officials and public figures from recovering damages for false and defamatory statements unless they demonstrate that the statement was made with actual malice.”).

198. *Milkovich*, 497 U.S. at 15, 20 (citing *Gertz*, 418 U.S. at 342) (explaining that “where a statement of ‘opinion’ on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with” actual malice and the showing of actual “malice is subject to a clear and convincing standard of proof”); *Compuware Corp. v. Moody’s Inv’ts Servs., Inc.*, 499 F.3d 520, 525 (6th Cir. 2007) (“A plaintiff who qualifies as a public official or public figure may recover for defamation only if he produces *clear and convincing evidence* that the defendant acted with actual malice.”).

public matter.¹⁹⁹ For example, in *Gertz v. Robert Welch, Inc.*,²⁰⁰ the Supreme Court held that a publisher of false defamatory statements concerning a private individual was not entitled to a constitutional privilege to avoid liability for any harm caused by the false statements.²⁰¹ The Court overturned its earlier ruling in *Rosenbloom v. Metromedia, Inc.*,²⁰² in which the Court extended the actual malice standard to false defamatory statements against a private individual concerning a matter of public interest.²⁰³

In *Gertz*, the Court reasoned that the actual malice standard is a very high bar to overcome, and a private individual normally would not have the same opportunity as a public official or public figure to correct a defamatory falsehood.²⁰⁴ Moreover, the Court acknowledged the normative concern that, in contrast to a public official or a public figure, a private individual has not voluntarily exposed himself or herself to public scrutiny and to the corresponding enhanced risk of a false defamatory statement injurious to that individual.²⁰⁵ Thus, weighing the competing interests between freedom of speech and of the press, on the one hand, and the legitimate state interest in compensating a private individual who is harmed by a defamatory falsehood, on the other hand, the Court held that the *New York Times* actual malice standard does not apply to false defamatory statements that cause injury to private individuals.²⁰⁶ The fact

199. *Milkovich*, 497 U.S. at 15 (noting the actual malice rule "was inappropriate for a private person attempting to prove he was defamed on matters of public interest" (citing *Gertz*, 418 U.S. at 345-47 (finding the actual malice standard inapplicable in cases concerning a defamatory falsehood injurious to a private individual despite the statement concerning a matter of public interest))).

200. 418 U.S. 323 (1974).

201. *Id.* at 326-27, 345-46 (concluding "that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to . . . a private individual").

202. 403 U.S. 29 (1971), *abrogated by Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

203. *See Gertz*, 418 U.S. at 337, 345-46 (explaining the reasoning of the plurality of the Court in the *Rosenbloom* decision and finding "unacceptable" the extension of the actual malice standard to defamatory false statements that harm a private person's reputation); *see also Rosenbloom*, 403 U.S. at 43-44.

204. *Gertz*, 418 U.S. at 342-44 ("[M]any deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test. . . . Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than [sic] private individuals normally enjoy."); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985) (explaining that private individuals "generally lack effective opportunities for rebutting" defamatory statements).

205. *Gertz*, 418 U.S. at 344-45 (distinguishing between public and private individuals and noting "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood[s]" whereas the same assumption does not obtain in the case of private individuals); *see also Greenmoss Builders, Inc.*, 472 U.S. at 756 (explaining that private individuals "have not voluntarily exposed themselves to increased risk of injury from defamatory statements").

206. *Gertz*, 418 U.S. at 342-49 (holding that the States are free to determine the "appropriate standard of liability" to be applied in the case of a publisher of a false defamatory statement that causes harm to a private individual); *see also Greenmoss Builders, Inc.*, 472 U.S. at 756 (explaining that the state's interest in compensating a private individual for an injurious falsehood is stronger than the First Amendment interest in protecting free speech (citing *Gertz*, 418 U.S. at 348-49)).

that a statement concerns a public matter, in and of itself, is not sufficient to justify the application of the actual malice standard to a private person.²⁰⁷

However, the Court limited the recovery to compensatory damages for injury actually suffered and did not provide for recovery of presumed or punitive damages absent a showing of actual malice.²⁰⁸ Moreover, the state may not hold a defendant liable absent some fault.²⁰⁹ Thus, the states may not impose a strict liability standard.²¹⁰ Further, the Supreme Court has held that in the case of a public matter concerning a private person, the plaintiff also must prove the statements are false, at least when a media defendant is implicated.²¹¹ Hence, a plaintiff must show both falsity and fault in order to recover damages.²¹²

Later, in *Greenmoss Builders*, the Supreme Court addressed the issue of whether the actual malice standard applies to false statements injurious to a private person in a private matter.²¹³ The Court employed the balancing approach of *Gertz* and found that the state's legitimate interest in providing compensation to a private person who is harmed by a defamatory falsehood is stronger than the constitutional interest in pro-

207. *Greenmoss Builders, Inc.*, 472 U.S. at 756 (noting that speech regarding “a public issue [does] not by itself entitle the libel defendant to the constitutional protections of *New York Times*” (citing *Gertz*, 418 U.S. at 343 (explaining that a test which bases the application of the actual malice standard solely on whether the statement concerns a public matter does not adequately address the competing concerns))).

208. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990) (noting that “recovery of presumed or punitive damages [was not permitted] on less than a showing of *New York Times* malice” (citing *Gertz*, 418 U.S. at 349–50 (finding a plaintiff may be compensated only for “actual injury” when actual malice is not shown))).

209. *Id.* at 20 (noting that where a statement of opinion implies facts that are defamatory and false and such statement “involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault”); *Greenmoss Builders, Inc.*, 472 U.S. at 766 (White, J., concurring) (explaining that in *Gertz*, the Court “for the first time [held] that [private individuals in defamation actions] could no longer recover by proving a false statement They must, in addition, prove some ‘fault,’ at least negligence” (citing *Gertz*, 418 U.S. at 347 (“[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher . . . of defamatory falsehood injurious to a private individual.”))).

210. *Gertz*, 418 U.S. at 347–48 (“This approach . . . recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press . . . from the rigors of strict liability for defamation.”).

211. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768–69 (1986); see also *Milkovich*, 497 U.S. at 19–20 (“*Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations . . . where a media defendant is involved.”); *Jefferson Cty. Sch. Dist. No. R-1 v. Moody’s Inv’t’s Servs., Inc.*, 175 F.3d 848, 852 (10th Cir. 1999) (“[I]n defamation actions against media defendants, the First Amendment requires that a plaintiff bear the burden of proving that the statement in question was false . . .”).

212. *Hepps*, 475 U.S. at 776 (“We believe that the common law’s rule on falsity—that the defendant must bear the burden of proving truth—must . . . fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.”).

213. *Greenmoss Builders, Inc.*, 472 U.S. at 751.

protecting speech concerning private matters.²¹⁴ The Court explained that “not all speech is of equal First Amendment importance.”²¹⁵ Speech concerning public matters is “at the heart of the First Amendment’s protection.”²¹⁶ Such speech inhabits “the highest rung of the hierarchy of First Amendment values.”²¹⁷ Accordingly, speech regarding matters of public concern is due “special protection.”²¹⁸ In contrast, speech concerning private matters is less important, and thus, its protections are not as strict.²¹⁹ Permitting state law remedies for such speech does not interfere with the “uninhibited, robust, and wide-open” discussion and “debate on public issues” nor is there any concern that possible liability might cause the press to engage in self-censorship.²²⁰ Thus, balancing the state’s substantial interest in awarding damages for a defamatory falsehood compared to the reduced First Amendment value of speech concerning purely private matters, the Supreme Court held that presumed and punitive damages may be awarded even though actual malice is not shown.²²¹

The question then becomes whether the statements concern a public or a private matter. As the Supreme Court has held, in order to determine the type of speech involved, the court must review “the content, form, and context” of the speech as shown by the entire record before the court.²²² Applying these factors to the case of *Greenmoss Builders*, the Court found that the credit report did not concern a public matter.²²³ The

214. *Id.* at 757–58 (finding the constitutional interest in protecting speech regarding private matters “is less important than” the interest in protecting speech concerning public matters (citing *Gertz*, 418 U.S. at 348)).

215. *Id.* at 758 & n.5 (“[The Supreme] Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others. . . . In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech.” (citations omitted)); see also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (noting certain types of speech are not deserving of absolute protection under the First Amendment (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978))).

216. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978) (“[F]reedom of speech and of the press guaranteed by the Constitution embraces . . . the liberty to discuss publicly and truthfully all matters of public concern” (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940))).

217. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

218. *Greenmoss Builders, Inc.*, 472 U.S. at 759 (citing *Claiborne Hardware*, 458 U.S. at 913).

219. *Id.* at 759–60 (noting speech regarding private matters is less of a constitutional concern and even though “such speech is not totally unprotected by the First Amendment, its protections are less stringent” (citation omitted)); see also *Oberman v. Dun & Bradstreet, Inc.*, 460 F.2d 1381, 1384 (7th Cir. 1972) (finding a lack of justification for providing First Amendment protection in a libel action brought by a private individual on a private matter).

220. *Greenmoss Builders, Inc.*, 472 U.S. at 760–62 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (finding the State’s interest in providing presumed and punitive damages is substantial compared to the “incidental effect” such remedies might have on speech concerning private matters which is of “significantly less” First Amendment interest).

221. *Id.* at 760–61 (“[T]he reduced constitutional value of speech involving no matters of public concern . . . adequately supports awards of presumed and punitive damages—even absent a showing of ‘actual malice.’”).

222. *Connick v. Myers*, 461 U.S. 138, 147–48 (1983) (“Whether . . . speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.”).

223. *Greenmoss Builders, Inc.*, 472 U.S. at 761–62 (finding the form, content, and context of the speech show that the “credit report concerns no public issue”).

credit report contained speech that was in the specific interest of D&B, the commercial speaker, and a particular business audience.²²⁴ The credit report was provided to five subscribers who were not permitted to further disseminate the information.²²⁵ The Court found that the credit report did not involve any matter of public concern; there was no “strong interest in the free flow of commercial information.”²²⁶ Thus, the actual malice standard did not apply.²²⁷

Similarly, in *Oberman v. Dun & Bradstreet, Inc.*,²²⁸ the Seventh Circuit found that First Amendment protection was not justified in a private matter concerning a private person.²²⁹ Notably, the Seventh Circuit initially expressed its lack of acceptance of the notion that a credit rating is due the same protection that the Supreme Court has provided to newspapers.²³⁰ However, assuming so for the sake of argument, the Seventh Circuit found that the private nature of this case did not justify the protection. The Seventh Circuit further explained that under Illinois law, if a “publisher does not believe in the truth of the . . . [statement], or has no reasonable grounds for believing it to be true,” then the publisher’s “qualified . . . privilege was abused,” and the publisher may be liable.²³¹ A court may infer such abuse based on a lack of appropriate investigation.²³² Thus, D&B may incur liability if it failed to properly investigate before issuing its credit rating.²³³

The *Oberman* case exemplifies the divergence in viewpoints among the lower courts. Here, the Seventh Circuit did not accept the idea that a credit rating should receive the same First Amendment protection afforded to newspapers.²³⁴ This case also illustrates the high bar of the Su-

224. *Id.* at 762 (finding the speech at issue was “solely in the individual interest of the speaker and its specific business audience”); see also *Oberman*, 460 F.2d at 1384 (observing that the plaintiff’s financial affairs delineated in the credit report were not “of any interest” to anyone other than those involved in the specific business transaction at issue, those who provide credit to his business, or those who receive “his trade paper”).

225. *Greenmoss Builders, Inc.*, 472 U.S. at 762 (“[T]he credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further.”); see also *Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & “ERISA” Litig.)*, 511 F. Supp. 2d 742, 819 (S.D. Tex. 2005) (explaining the credit report in *Greenmoss* “was sent to only five subscribers who were under agreement to keep the information confidential”).

226. *Greenmoss Builders, Inc.*, 472 U.S. at 762 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976)).

227. *Id.* at 761–63; see also *Oberman*, 460 F.2d at 1382–85 (finding the actual malice standard inapplicable in a libel case brought by a private person concerning a private matter).

228. 460 F.2d 1381 (7th Cir. 1972).

229. *Id.* at 1384 (finding First Amendment protection in a “case brought by a private person upon a matter not of public interest can[not] be justified”).

230. *Id.* (stating that the court was “not persuaded that the credit rating of [a] business was entitled to the same treatment that the Supreme Court has afforded newspapers and magazines”).

231. *Id.* at 1385.

232. *Id.*; see also *Cook v. E. Shore Newspapers, Inc.*, 64 N.E.2d 751, 765 (Ill. App. Ct. 1945) (“All circumstances surrounding the transaction are proper for consideration, including the failure to make a proper investigation.”).

233. See *Oberman*, 460 F.2d at 1385.

234. *Id.* at 1384.

preme Court's actual malice standard²³⁵ relative to the "less rigorous" state law.²³⁶ As discussed earlier in this section, the Supreme Court has stated that a "failure to investigate" is insufficient to prove reckless disregard under the actual malice standard.²³⁷ Yet, under Illinois law, liability may be inferred from a "failure to make a proper investigation."²³⁸

The actual malice standard emanated from the laws of defamation and libel.²³⁹ The defamation laws serve to protect an individual's reputation and provide for a cause of action when false statements have caused damage to that reputation.²⁴⁰ The libel laws similarly provide for compensation when a published defamatory false statement has injured an individual.²⁴¹ The actual malice standard also has been applied in other types of actions for compensatory damages resulting from false statements.²⁴² In particular, many courts have applied the actual malice standard in various causes of action against the credit rating agencies.²⁴³ The next section will explore the application of the actual malice standard to actions involving the credit rating agencies.

235. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 337, 342 (1974) (acknowledging that "many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test"); see also *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) ("Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher.").

236. See *Oberman*, 460 F.2d at 1382-85.

237. *Gertz*, 418 U.S. at 332 ("[M]ere proof of failure to investigate, without more, cannot establish reckless disregard for the truth."); see also *St. Amant*, 390 U.S. at 733 ("Failure to investigate does not in itself establish bad faith." (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 287-88 (1964) ("[N]egligence in failing to discover the misstatements . . . is constitutionally insufficient to show the recklessness that is required for a finding of actual malice."))).

238. *Oberman*, 460 F.2d at 1385 (quoting *Cook v. E. Shore Newspapers*, 64 N.E.2d 751, 765 (Ill. App. Ct. 1945)).

239. See generally *Cty. of Orange v. McGraw Hill Cos.*, 245 B.R. 151, 155 (Bankr. C.D. Cal. 1999) (noting that issues regarding false statements "traditionally arise" in actions for defamation or libel).

240. *Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Inv'r's Servs.*, 175 F.3d 848, 852 (10th Cir. 1999) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11-14 (1990) ("Defamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements.")).

241. *Gertz*, 418 U.S. at 341-42 ("The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. . . . [L]ibel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy." (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 152 (1967))).

242. *Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & "ERISA" Litig.)*, 511 F. Supp. 2d 742, 811 (S.D. Tex. 2005) (explaining the actual malice rule has been applied to causes of action beyond defamation, slander, and libel, such as breach of contract and negligent misrepresentation); *Cty. of Orange*, 245 B.R. at 155 (noting the actual malice standard has been applied to causes of action other than defamation and libel (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (applying the actual malice standard in cause of action regarding intentional infliction of emotional distress))).

243. See, e.g., *Compuware Corp. v. Moody's Inv'r's Servs., Inc.*, 499 F.3d 520, 525-29 (6th Cir. 2007) (applying the actual malice standard in a case involving a publicly held corporation); *Enron Corp.*, 511 F. Supp. 2d at 825 (concluding the actual malice rule applies "because the nationally published credit ratings focus upon matters of public concern, a top Fortune 500 company's creditworthiness"); *Cty. of Orange*, 245 B.R. at 156-57 (finding the actual malice standard applies to a breach of contract action and a professional negligence action against a credit rating agency).

b. Application of the Actual Malice Standard to Credit Rating Agencies

The lower courts generally have treated the credit rating agencies as publishers and their credit ratings as statements of opinion entitled to full First Amendment protection.²⁴⁴ For example, in *Jefferson County School District Number R-1 v. Moody's Investor's Services, Inc.*,²⁴⁵ the Tenth Circuit employed a First Amendment analysis in reviewing claims against Moody's arising from its unsolicited article referring to the "negative outlook" of bonds issued by a school district and the district's "ongoing financial pressures."²⁴⁶ According to the school district, the article falsely implied that it was not a creditworthy issuer, and this "implied assertion" may be proven as false; thus, the article was not a protected expression of opinion.²⁴⁷

According to the Tenth Circuit, neither the implied assertion that the school district was not creditworthy, nor the express statements regarding the negative outlook of the bonds and the school district's ongoing financial pressures, was sufficiently specific to be provable as false.²⁴⁸ Nevertheless, the court "emphasize[d] that the phrases [such as] 'negative outlook' [and] 'ongoing financial pressures' are not necessarily too indefinite to imply a false statement of fact."²⁴⁹ If those phrases were combined with "specific factual assertions," then those statements may not be entitled to constitutional protection.²⁵⁰ However, based on the school district's inability to identify a "specific false statement" that could be "reasonably implied" from the article and the indefiniteness of the express "phrases 'negative outlook,' and 'ongoing financial pressures,'" the credit rating agency's article was deemed "a protected expression of opinion."²⁵¹

244. See, e.g., *Compuware Corp.*, 499 F.3d at 522 ("Moody's is a financial publisher . . . [and its] rating is a predictive opinion of a company's future creditworthiness."); *Jefferson Cty. Sch. Dist.*, 175 F.3d at 855-56 (holding that a credit rating agency's article regarding the creditworthiness of an issuer of bonds "constitutes a protected expression of opinion" under the First Amendment); *Cty. of Orange*, 245 B.R. at 154 (referring to Standard & Poor's as a "financial publisher").

245. 175 F.3d 848 (10th Cir. 1999).

246. *Id.* at 850 (noting the rating agency "had not been asked to rate the bonds" and was not paid a fee); see also *Commercial Fin. Servs., Inc. v. Arthur Andersen LLP*, 94 P.3d 106, 110 (Okla. Civ. App. 2004) (discussing *Jefferson Cty. Sch. Dist.* and explaining that "[t]he article gave the bonds and the school district's financial condition negative evaluations").

247. *Jefferson Cty. Sch. Dist.*, 175 F.3d at 850, 854.

248. *Id.* at 855 ("Like the statement of a product's value, a statement regarding the creditworthiness of a bond issuer could well depend on a myriad of factors, many of them not provably true or false.").

249. *Id.* at 856.

250. *Id.* ("If coupled with specific factual assertions, such statements might not be immunized from defamation claims by the First Amendment.").

251. *Id.*; see also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (finding a "statement of 'opinion'" concerning public matters which does not imply an assertion of fact that may be proven as false will be fully protected under the First Amendment).

As the lower courts generally consider credit rating agencies to be publishers and their ratings to be statements of opinion, these courts generally have applied the actual malice standard in actions against the rating agencies.²⁵² The bankruptcy case of *County of Orange v. McGraw Hill Cos., Inc.*,²⁵³ provides an example of the application of the actual malice rule in both a professional negligence action and a breach of contract action against Standard & Poor's.²⁵⁴ As an initial matter, the district court accepted, without discussion, that Standard & Poor's merits the status of a "publisher" under First Amendment jurisprudence.²⁵⁵ However, the district court acknowledged that an entity's "status as a financial publisher" does not automatically provide that entity with heightened First Amendment protection in the form of the actual malice standard.²⁵⁶

The County argued that a breach of contract action falls under the rubric of a "law of general applicability," and thus, the general laws of contract should govern this action.²⁵⁷ Moreover, the County argued that the rating agency was subject to an implied duty under contract law to competently perform the analytical services upon which the rating is based and, thus, breached the agreement by providing an inaccurate rating.²⁵⁸ Despite these arguments, the district court employed a First Amendment analysis in considering the breach of contract claim.²⁵⁹ The court found that the debt securities were matters of "public concern" because either party was free to make the rating public.²⁶⁰ As a result, the court concluded that the actual malice rule applies to the breach of contract action unless a "special circumstance" was present, that is, if the rating agency "voluntarily waived" the protections of the First Amendment.²⁶¹ Upon reviewing the agreements, the court found no evidence that the rating agency expressly waived its constitutional protections.²⁶²

252. See *supra* Section I.A.3.b.

253. 245 B.R. 151 (Bankr. C.D. Cal. 1999).

254. *Id.* at 156–57 ("The actual malice standard will apply to the County's breach of contract claim . . . unless the Court finds S&P voluntarily waived its First Amendment protection. . . . [T]he actual malice standard applies to any professional negligence claim concerning S&P's protected speech.").

255. *Id.* at 154 (referring to Standard & Poor's as a "financial publisher").

256. *Id.* at 154–55; see also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring) ("[T]he First Amendment does not 'belong' to any definable category of persons or entities . . .").

257. *Cty. of Orange*, 245 B.R. at 156 (citing the standard of *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) (holding "that 'the publisher of a newspaper has no special immunity from the application of general laws'" (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937)))).

258. *Compuware Corp. v. Moody's Inv'ts Servs., Inc.*, 499 F.3d 520, 530–31 (6th Cir. 2007) (citing *Cty. of Orange*, 245 B.R. at 154 (noting the County's argument that Standard & Poor's "assumed a duty to adequately perform the services called for in the contract")).

259. *Cty. of Orange*, 245 B.R. at 155–56 (noting the ability of either party to "publicize the rating" and, thus, finding the rating to be a matter of public concern potentially subject to the actual malice rule).

260. *Id.* at 155.

261. *Id.* at 156.

262. *Id.* ("A waiver of a constitutional right 'is not to be implied and is not lightly to be found.'" (quoting *Gete v. INS*, 121 F.3d 1285, 1293 (9th Cir. 1997))); see also *Marilyn Manson, Inc.*

The court noted that if the rating agency had expressly agreed to provide the County with analytical services, separate from the rating itself, such an undertaking would be viewed as a special circumstance that “might have avoided” the application of the actual malice rule.²⁶³ However, in this case, there was no separate agreement to provide financial services; there was only an agreement to provide the rating.²⁶⁴ Thus, the court held that the actual malice standard applied to the County’s breach of contract claim because the rating was a matter of public concern and no special circumstances were present.²⁶⁵

Additionally, the district court held that the actual malice standard applied to the County’s claim for professional negligence.²⁶⁶ The court found that the County’s injury resulted from the rating agency’s “expressive activity”; therefore, the professional negligence action also was subject to the actual malice rule.²⁶⁷

Similarly, in *Compuware Corp. v. Moody’s Investors Services, Inc.*,²⁶⁸ the Sixth Circuit stated, without analysis, that “Moody’s is a financial publisher.”²⁶⁹ The court further stated that Compuware is a public corporation and, thus, would be considered a “public figure” under a First Amendment analysis.²⁷⁰ Therefore, the Sixth Circuit applied the actual malice rule in a defamation action against Moody’s concerning statements in its rating report.²⁷¹ The court also noted that, in contrast to the rating report, a defamation claim could not even be recognized with respect to the actual rating.²⁷² As expressed by the Sixth Circuit, a “credit rating is a predictive opinion” regarding the expected creditworthiness of a company and is based upon “a subjective and discretionary weighing of complex factors.”²⁷³ As a result, the court found that the credit rating

v. N.J. Sports & Exposition Auth., 971 F. Supp. 875, 889 (D.N.J. 1997) (explaining the waiver of a constitutional right needs to be “voluntary, knowing, and intelligent” (quoting *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1094 (3d Cir. 1988))).

263. *Cty. of Orange*, 245 B.R. at 156.

264. *Id.* (“Since there is no claim or showing S&P undertook a separate duty to provide a competent rating, the only element of the County’s breach of contract claim is the providing of the rating itself. Any duty to perform competently would be part of the Constitutionally—protected rendering of a rating, not a separate obligation.”).

265. *Id.* (“A claim that S&P breached its duty to provide a rating in a competent manner is subject to the actual malice standard.”).

266. *Id.* at 157.

267. *Id.*

268. 499 F.3d 520 (6th Cir. 2007).

269. *See id.* at 522.

270. *Id.* at 525.

271. *Id.* at 525–26.

272. *Id.* at 529 (“To the extent Compuware alleges that the *credit rating itself* was defamatory, as opposed to the facts or implications in the report, Compuware has failed to assert a cognizable defamation claim.”).

273. *Ohio Police & Fire Pension Fund v. Standard & Poor’s Fin. Servs. LLC*, 700 F.3d 829, 842 (6th Cir. 2012) (quoting *Compuware Corp.*, 499 F.3d at 529) (dismissing claims against credit rating agencies for negligent misrepresentation because credit ratings do not communicate a factual statement that may be proven as false and, thus, “credit ratings are not actionable misrepresentations”).

does not imply any factual assertions that could be proven as false.²⁷⁴ The court stated that even if the rating conveyed a factual implication, the “inherently subjective nature of Moody’s ratings” determination makes it impossible to prove as false any such factual inference.²⁷⁵

The Sixth Circuit also considered a breach of contract claim in which Compuware alleged that Moody’s breached the implied duty under contract law to perform the agreement in a skillful, diligent, and workmanlike manner.²⁷⁶ As an initial matter, the court noted that “[o]rdinarily, ‘enforcement of . . . general laws against the press is not subject to stricter scrutiny than [what] would be applied [in the case of other entities].’”²⁷⁷ Moreover, the Sixth Circuit observed that the Supreme Court has never applied the actual malice rule to a breach of contract action, nor has any circuit court.²⁷⁸ The only precedent in which a court applied the actual malice standard to a breach of contract claim was the California bankruptcy case of *County of Orange v. McGraw Hill Co.*, discussed earlier in this section.²⁷⁹ Nevertheless, the Sixth Circuit held that the actual malice rule applied to the breach of contract action in the instant case.²⁸⁰

The Sixth Circuit found that the contract at issue involved matters that concern the First Amendment.²⁸¹ The parties contracted for Moody’s to evaluate Compuware’s creditworthiness and to issue a credit rating and a rating report.²⁸² The Sixth Circuit considered the credit rating and the contents of the rating report to be Moody’s opinion.²⁸³ Thus, the court found that the “very subject matter and corresponding duties” of the agreement implicate speech that is protected by the First Amendment.²⁸⁴ Moreover, the court found the parties contracted for Moody’s to provide

274. *Id.* (citing *Compuware Corp.*, 499 F.3d at 529 (finding “no basis . . . [to] conclude that the credit rating itself communicates any provably false factual connotation”)); see also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

275. *Compuware Corp.*, 499 F.3d at 529 (“Even if [the court] could draw any fact-based inferences from this rating, such inferences could not be proven false because of the inherently subjective nature of Moody’s ratings calculation.”).

276. *Id.* at 531 (“Compuware contends that Moody’s breached this contract by incompetently compiling, investigating, and evaluating Compuware’s credit position, and by publishing an erroneous report.”).

277. *Id.* at 529 (alteration in original) (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991)).

278. *Id.* at 530.

279. See *id.*; *Cty. of Orange v. McGraw Hill Cos.*, 245 B.R. 151, 154–56 (Bankr. C.D. Cal. 1999) (applying the actual malice standard to a breach of contract claim).

280. *Compuware Corp.*, 499 F.3d at 531.

281. *Id.* (“Moody’s contracted to publish a credit rating for Compuware, which . . . involves activities protected by the First Amendment.”).

282. *Id.*

283. *Id.* (finding the agreement “consists of Moody’s promise to provide its opinion of Compuware’s creditworthiness and to publish a report of that opinion”).

284. *Id.* (“Moody’s opinion and its publication are matters protected by the First Amendment; thus the whole of this agreement—the very subject matter and corresponding duties—is intimately tied to speech, expression, and publication.”).

“a credit rating;” the agreement did not expressly state that Moody’s would provide *an accurate* credit rating.²⁸⁵

The Sixth Circuit found Compuware’s argument, that Moody’s breached the implied duty under contract law to competently perform under the contract, based in negligence.²⁸⁶ As a result, the court considered this breach of contract claim to be a claim for negligence and, as such, to be essentially the same as a tort claim for defamation.²⁸⁷ The Sixth Circuit further found that the harm suffered was an injury to the reputation of Compuware rather than an injury due to a lack of performance of the contract.²⁸⁸ Ultimately, the court viewed Compuware’s breach of contract claim as a defamation claim and held that the actual malice rule applied.²⁸⁹

The Sixth Circuit emphasized that its holding was limited to the circumstances of this case.²⁹⁰ In contrast to the instant case, if the agreement provided that the parties were to perform an obligation that did not implicate protected speech, then the actual malice rule would not apply.²⁹¹ Similarly, if Compuware had alleged that the credit rating agency failed to perform an express provision of the agreement, then the actual malice rule would not be applicable.²⁹²

In this author’s opinion, the extension of the actual malice rule to breach of contract actions against the credit rating agencies is completely unjustified and inappropriate.²⁹³ The application of the actual malice standard in *Compuware* was “entirely unprecedented” with the exception of the *County of Orange* bankruptcy case.²⁹⁴ Moreover, requiring a public figure plaintiff to show actual malice to recover on a breach of contract claim effectively eliminates the ability of that plaintiff to contract for a credit rating agency to provide an accurate evaluation of that plain-

285. *Id.* at 531–32 (“Moody’s agreed only to publish a credit rating; it did not agree to publish a . . . correctly appraised rating.”).

286. *Id.* (arguing that “Moody’s breached an implied contractual covenant to perform skillfully and diligently”); see also *Nash v. Sears, Roebuck & Co.*, 174 N.W.2d 818, 821 (Mich. 1970) (noting the implied duty in all contracts for services to perform the obligations “skillfully, carefully, diligently, and in a workmanlike manner”).

287. *Compuware Corp.*, 499 F.3d at 532 (seeing “no material difference between” Compuware’s claim for breach of contract and a tort claim for defamation).

288. *Id.* at 532–33.

289. *Id.* at 533 (concluding Compuware’s “only injuries are defamation-type harm resulting from Moody’s publication of protected speech, and application of the actual-malice standard to [the] breach of contract claim is appropriate”).

290. *Id.*

291. *Id.* at 533–34 (“[T]his holding would not apply to any breach of contract claim where . . . the parties [were required] to do something other than publish protected expression.”).

292. *Id.* at 534 (explaining that this holding would not be applicable “if Compuware alleged that Moody’s breached the express terms of the contract by, for example, failing to provide a rating at all”).

293. See *id.* at 535 (Rogers, J., concurring in part and dissenting in part) (“The extension of First Amendment tort law principles to contract cases is unwarranted . . .”).

294. *Id.* at 535; see also *Cty. of Orange v. McGraw Hill Cos.*, 245 B.R. 151, 156 (Bankr. C.D. Cal. 1999).

tiff's creditworthiness.²⁹⁵ Instead, the actual malice standard grants the credit rating agency the right to breach the agreement so long as the rating agency did not act with malice.²⁹⁶

The Sixth Circuit noted that the actual malice standard would not apply if the credit rating agency failed to perform an express provision of the agreement and stated that "failing to provide a rating at all" would be an example of such a breach.²⁹⁷ Moreover, the court stated that a party could contract for a specific result (for example, a positive result), and a breach of that express obligation would not require the application of the actual malice rule.²⁹⁸ However, this line of reasoning is not relevant to agreements with credit rating agencies. A credit rating agency is not in the business of providing a specific result. Instead, a credit rating agency is in the business of evaluating the financial condition of a business and its debt securities and providing a rating that conveys the agency's assessment of the creditworthiness of that business and its debt securities.²⁹⁹ Thus, following the reasoning of the Sixth Circuit, the only relevant circumstance in which a credit rating agency could be found to have breached an agreement to provide a credit rating, free of the actual malice standard, is if the agency failed to provide the rating at all; the standard contract law principle of an implied duty to use reasonable care in performing an agreement is not applicable to credit rating agencies.³⁰⁰ Instead, in stark contrast to other businesses, credit rating agencies may act negligently in performing agreements without the fear of any liability.³⁰¹ The fact that a credit rating agency's business is to publish a rating

295. See *Compuware Corp.*, 499 F.3d at 535 (Rogers, J., concurring in part and dissenting in part) ("Requiring a showing of actual malice to prevail on a contract claim . . . effectively destroys the ability of public figures to . . . contract [for the other party to make accurate statements about the public figure].").

296. See *id.* (arguing that the actual malice requirement imposes into "such contract[s] the right to violate the contractual obligation as long as there is no malice").

297. *Id.* at 534 (majority opinion).

298. *Id.*

299. ROLE & FUNCTION, *supra* note 2, at 5 ("For almost a century, credit rating agencies have been providing opinions on the creditworthiness of issuers of [debt] securities and their financial obligations."); *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 888 F. Supp. 2d 431, 455 (S.D.N.Y. 2012) (explaining that a credit rating agency "analyze[s] data, conduct[s] an assessment, and [provides] a fact-based conclusion as to creditworthiness"); *Commercial Fin. Servs., Inc. v. Arthur Andersen LLP*, 94 P.3d 106, 110 (Okla. Civ. App. 2004) (finding the rating agencies provided their opinions regarding the creditworthiness of the plaintiff's bonds "as professionals being paid to provide their opinions to a client").

300. See *Compuware Corp.*, 499 F.3d at 535-37 (Rogers, J., concurring in part and dissenting in part) (noting the "implied term" to perform an agreement with reasonable care and asserting that "it is not clear why the First Amendment should . . . deprive parties of the ability to contract that a certain standard of care be exercised").

301. See *id.* at 537 ("[R]equiring malice to recover for breach of contract in this case elevates the protection Moody's enjoys against breach of contract claims above what other contracting parties . . . would enjoy. . . . Under the majority's reasoning, Moody's is free to assign ratings based solely on any nonmalicious basis, and a customer would have no recourse against the company at all. Such freedom from contractual obligation is not provided generally to contracting parties.").

should not eviscerate contractual obligations that are owed to the other party and that other businesses must observe.³⁰²

Moreover, as the dissent noted, it does not follow that a claim for breach of the implied duty to perform a contract using reasonable care is the same as a tort claim for negligence.³⁰³ In a tort case, the obligation to use reasonable care derives from a government-imposed duty to act in a reasonable manner.³⁰⁴ In a contract case, the duty to use reasonable care is derived from the contract itself and is a duty that the parties voluntarily undertake.³⁰⁵ Thus, the difference between a tort action and a breach of contract action is the source of the parties' obligations.³⁰⁶ The fact that a contractual obligation uses the same terms as a duty in tort should not preclude the validity of that contractual obligation.³⁰⁷

In *County of Orange*, the court found that the actual malice standard applied to the breach of contract claim unless the plaintiff could show the presence of a special circumstance such as if the rating agency expressly waived the protections of the First Amendment.³⁰⁸ One may query why the tort protections of the First Amendment are inherent in a contract and must be expressly waived; yet, the established contractual duty to perform obligations with reasonable care is completely disregarded.³⁰⁹

The freedom to contract is a fundamental legal principle. In expressing the value of the freedom to enter into contracts, Professor Farnsworth has noted, "From a utilitarian point of view, freedom to contract maximizes the welfare of the parties and therefore the good of society From a libertarian point of view, it accords to individuals a sphere of influence in which they can act freely."³¹⁰ As the Supreme Court has noted, "The parties themselves . . . determine the scope of their legal obligations" in the context of a contract.³¹¹ If the parties did not wish to undertake the established duty under contract law to perform their obligations with reasonable care, then the parties were free to explicitly agree

302. See *id.* at 537 ("The fact that Moody's is in the business of publishing does not eliminate any and all contractual obligations the company has towards those paying real money for its services.").

303. *Id.* at 536 ("The fact that a contract requires 'reasonable care' does not mean that a claim for breach of contract is the equivalent of a tort claim for negligence.").

304. *Id.* ("In tort cases the obligation comes from a duty imposed by the government to act reasonably on pain of paying the costs of acting unreasonably.").

305. *Id.* ("In contract cases the obligation comes from a voluntarily entered-into undertaking.").

306. *Id.*

307. *Id.* ("Contracting parties should not be precluded from entering into . . . contracts merely because the obligation is stated in terms that the tort law also uses.").

308. *Cty. of Orange v. McGraw Hill Cos.*, 245 B.R. 151, 156 (Bankr. C.D. Cal. 1999).

309. See *Compuware Corp.*, 499 F.3d at 535 (Rogers, J., concurring in part and dissenting in part); *Cty. of Orange*, 245 B.R. at 156.

310. 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 1.7, at 25 (1990) (discussing the value of the freedom to contract).

311. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671-72 (1991) (holding that where a reporter promised not to reveal the identity of a source and then revealed that source's identity, the First Amendment did not bar a promissory estoppel claim).

that the implied contractual provision would not be applicable.³¹² Yet, the fundamental freedom to contract has been virtually eliminated in the case of contracts with credit rating agencies.³¹³

The professional negligence case of *In re Enron Corp. Secs. Derivative & "ERISA" Litig.*³¹⁴ provides a further example of the misguided protections afforded by the lower courts. In this action against Standard & Poor's and Moody's for negligently assigning false and misleading credit ratings to Enron's debt securities, the court initially found the speech of a credit rating agency to be the same type of speech as that of a credit reporting agency: commercial speech.³¹⁵ The court then distinguished credit rating agencies by finding that rating agencies "do not profit from the sale of the bonds" of companies that are rated.³¹⁶ However, the court did not consider that the profit derives not from the actual sale of the bonds but instead from the fees paid to provide the rating.³¹⁷ Moreover, whether the profit is made from the sale of the bonds or from the assignment of a rating is immaterial to whether the credit rating agencies should be held liable for negligently prepared credit ratings that are false or misleading.

The court further found that the actual malice rule applied because Enron was a Fortune 500 company, and thus, the ratings involved "matters of public concern."³¹⁸ Moreover, the credit ratings were publicly distributed.³¹⁹ Despite acknowledging that protections under the First Amendment have not been universally applied to the credit rating agencies, the court applied "what appears to be a policy of heightened protection for credit reports under the First Amendment . . . even if negligently prepared."³²⁰ Although the court found the credit rating reports to be "a combination of subjective, nonactionable evaluation and verifiable facts," the court determined that the plaintiff did not identify any factual statements that could be proven as false and did not show that the agen-

312. *Compuware Corp.*, 499 F.3d at 537 (Rogers, J., concurring in part and dissenting in part) (asserting that "[t]he parties could have explicitly contracted away [the] implied term" to perform the agreement with reasonable care).

313. *See id.* (arguing that the court should not apply "a newly created legal doctrine that effectively makes unenforceable a wide swath of perfectly legitimate contracts").

314. 511 F. Supp. 2d 742 (S.D. Tex. 2005).

315. *Id.* at 820 (noting "the long established reduced protection for commercial speech"); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762-63 (1985).

316. *Enron Corp.*, 511 F. Supp. 2d at 820.

317. *See* RICHARD SCOTT CARNELL ET AL., *THE LAW OF BANKING AND FINANCIAL INSTITUTIONS* 372-73 (4th ed. 2009) ("Most credit rating agencies, particularly Moody's, Standard & Poor's . . . and Fitch, earn money by charging issuers a fee in exchange for assigning a credit rating to the debt obligations marketed by the issuer.").

318. *Enron Corp.*, 511 F. Supp. 2d at 825 (asserting that the creditworthiness of a "top Fortune 500 company" is a "matter[] of public concern").

319. *Id.* at 820, 825 (explaining the credit rating reports "were not private or confidential," rather the reports were "nationally published").

320. *Id.* at 825 ("First Amendment protection for credit rating agencies as members of the 'financial press' performing 'traditional journalistic functions' is not universally acknowledged . . .").

cies “knew or had significant suspicions” regarding the truth of their statements; thus, the plaintiff failed to prove actual malice.³²¹ The court further noted that under the actual malice rule, the reasonable person standard does not apply; thus, the credit rating agencies did not have a duty to investigate.³²²

Given the lack of a duty to investigate under the actual malice rule,³²³ whether the credit rating agencies would have uncovered the fraud occurring at Enron³²⁴ had the rating agencies investigated will never be known. Yet, these circumstances further belie the judicial wisdom of applying the actual malice rule to the credit rating agencies. Had the rating agencies been required to investigate, there is a possibility that the agencies would have uncovered the fraud at Enron, and many investors would have avoided significant losses.³²⁵

Moreover, even if the plaintiff was able to show that the rating reports contained false factual statements made with actual malice and, thus, that the credit rating agencies were not deserving of First Amendment protection, the plaintiff would face another stumbling block: the court would need to find, as a matter of law, the existence of a duty of care owed by the rating agencies to the plaintiff.³²⁶ While acknowledging that the plaintiff’s harm was a foreseeable consequence of the allegedly misleading rating reports, the court found the relationship between the rating agencies’ alleged negligent misrepresentation and the harm suffered by the plaintiff was “too remote, as a matter of public policy, to impose a duty.”³²⁷ The court did not address the plaintiff’s claim that it had specifically hired Standard & Poor’s and Moody’s to rate the bonds; instead, the court focused on the fact that the credit reports were publicly distributed.³²⁸ The court also appeared to find it significant that the plaintiff did not purchase the bonds; rather, the plaintiff loaned money to En-

321. *Id.*

322. *Id.* at 825–26 (noting credit rating “[a]gencies are not held to a reasonable person standard that might require investigation”); *see also supra* notes 163–69 and accompanying text.

323. *See supra* note 163 and accompanying text.

324. Alexei Barrionuevo, *Enron Chiefs Guilty of Fraud and Conspiracy*, N.Y. TIMES (May 25, 2006), http://www.nytimes.com/2006/05/25/business/25cnd-enron.html?pagewanted=all&_r=0 (reporting that Kenneth Lay and Jeffrey Skilling, chief executives of Enron, were found guilty of fraud and conspiracy following the company’s “sudden collapse . . . and revelation as little more than a house of cards”).

325. *See id.* (noting losses associated with the fraud at Enron resulted in “billions of dollars” in civil suits).

326. *Enron Corp.*, 511 F. Supp. 2d at 826 (“[A] crucial prerequisite for stating a negligent misrepresentation claim is a court determination that under the facts and circumstances alleged, there exists a duty of care owed to the plaintiff by the defendant.”); *see also* *Gomes v. Commercial Union Ins. Co.*, 783 A.2d 462, 469–70 (Conn. 2001).

327. *Enron Corp.*, 511 F. Supp. 2d at 826–27 (explaining that imposing a duty of care requires the court to find that the harm was foreseeable and that, on the basis of public policy, “the defendant’s responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in [the] case” (quoting *Gomes*, 783 A.2d at 470)).

328. *See id.* at 827 (“The credit reports were distributed to the world at large.”).

ron separate from the issuance of the bonds.³²⁹ While the court acknowledged that new regulation of the credit rating agencies may be appropriate to protect market participants, the court determined that it would not be “beneficial to society” to permit anyone who claimed reliance on rating reports and suffered a loss “in any endeavor” to recover from the credit rating agencies.³³⁰

However, many ancillary credit decisions are made based upon the credit rating assigned by a rating agency to a particular issuer of debt securities.³³¹ Whether the plaintiff purchased the bonds is immaterial to the fact that the plaintiff justifiably relied upon the credit rating in its decision to make Enron a loan to the plaintiff’s foreseeable detriment.³³² Moreover, the plaintiff in this case is not just “anyone” who relied on the rating reports and incurred a loss; the plaintiff in this case specifically hired the rating agencies to provide a credit rating for the bonds issued by Enron.³³³ Thus, it would appear that the plaintiff in this case had a “relationship of privity” with the credit rating agencies and, therefore, was owed a duty of care.³³⁴

As demonstrated above, “while there is no automatic, blanket, absolute First Amendment protection” for publications issued by the credit rating agencies, the majority of courts have historically shielded the rating agencies from liability for the allegedly fraudulent or negligent ratings disseminated in those publications.³³⁵

329. *Id.*

330. *Id.* (“While new regulation of the agencies may well be in order to [protect] the safety of the participants, allowing anyone to sue credit rating agencies who had read the credit rating reports and claimed to have relied upon them and lost money in any endeavor that person undertook would be far more deleterious than beneficial to society as a whole.” (alteration in original) (citation omitted) (quoting *Jaworski v. Kiernan*, 696 A.2d 332, 337 (Conn. 1997))).

331. Many loan contracts include triggers based on debt ratings assigned by the credit rating agencies. *Pepa Kraft, Do Rating Agencies Cater? Evidence from Rating-Based Contracts 2* (May 3, 2011) (unpublished manuscript), https://business.nd.edu/uploadedFiles/Academic_Centers/Study_of_Financial_Regulation/pdf_and_documents/2011_conf_Pepa_Kraft.pdf (“Private loan agreements increasingly use public debt ratings as manifestations of a borrower’s credit risk in order to calibrate pricing.”), reprinted in 59 J. ACCT. & ECON. 264 (2015).

332. *See Enron Corp.*, 511 F. Supp. 2d at 809, 827 (noting the plaintiff relied on the credit information published by the rating agencies in deciding to make a loan to Enron and that the harm to the plaintiff could be considered foreseeable).

333. *Id.* at 824 (acknowledging that the plaintiff claims to have “specifically retained” the credit rating agencies to assign a rating to Enron’s bond issue).

334. *See id.* at 824–25 (noting the question of whether there is a “relationship of privity” that would limit or bar the protections of the First Amendment but failing to specifically address the issue); *see also* *Commercial Fin. Servs., Inc. v. Arthur Andersen LLP*, 94 P.3d 106, 110 (Okla. Civ. App. 2004) (noting the plaintiff had asked the rating agencies to rate the bonds and had paid the agencies for the rating and, thus, were in privity with the rating agencies and owed a duty of care).

335. *Enron Corp.*, 511 F. Supp. 2d at 815–17; *see also* PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 96 (finding courts have shielded the credit rating agencies from liability by affording the rating agencies protection under the First Amendment).

c. When the Actual Malice Standard Does Not Apply

While the majority of courts have applied the heightened First Amendment protections of the actual malice standard in actions involving the credit rating agencies,³³⁶ there are some cases in which the courts have rejected the actual malice rule. For example, in *Commercial Financial Services, Inc. v. Arthur Andersen LLP*,³³⁷ the court found that the First Amendment protections reserved for journalists did not apply to claims against the credit rating agencies for negligent misrepresentation and negligence.³³⁸ According to the court, credit ratings “fall somewhere between” opinions that are entitled to First Amendment protection and opinions that do not deserve protection.³³⁹ The court distinguished between an editorial writer, who is entitled to full First Amendment protection with respect to speech concerning the conduct of public officials, and an attorney providing title opinions, who is “not automatically exempt” when there is a claim of negligence just because the attorney is issuing an opinion.³⁴⁰

Following this line of reasoning, the court made a “crucial distinction” between the instant case and *Jefferson County*, in which the credit rating agency was not asked to assign a rating to the bonds and was not paid a fee to rate the bonds.³⁴¹ In contrast, the plaintiff in this case had requested the credit rating agencies to provide a bond rating and had paid a fee to the rating agencies for that bond rating.³⁴² Thus, the court found that the rating agencies provided their opinions regarding the creditworthiness of the plaintiff’s bonds “as professionals being paid to provide their opinions to a client.”³⁴³ As a result, the plaintiff and the credit rating agencies are considered to be “in privity” based on an agreement enforceable by both parties.³⁴⁴ As expressed by the court, the relationship

336. See *supra* Section I.A.3.b.

337. 94 P.3d 106 (Okla. Civ. App. 2004).

338. *Id.* at 110 (finding the First Amendment does not “shield[] the agencies from potential liability”).

339. *Id.* at 109.

340. *Id.* at 109–10.

341. *Id.* at 110; see also *Jefferson Cty. Sch. Dist. No. R-1 v. Moody’s Inv’r’s Servs., Inc.*, 175 F.3d 848, 850 (10th Cir. 1999) (noting Moody’s “had not been asked to rate the bonds” and had not been paid a fee).

342. *Commercial Fin. Servs.*, 94 P.3d at 110 (“[I]n the instant case the Rating Agencies [i.e., S&P, Moody’s, and Fitch] had been asked to rate the bonds, at CFS’s request and at CFS’s expense.”).

343. *Id.* (“If a journalist wrote an article for a newspaper about the bonds, the First Amendment would presumably apply. But if CFS hired that journalist to write a company report about the bonds, a different standard would apply.”).

344. *Id.*; cf. *Ohio Police & Fire Pension Fund v. Standard & Poor’s Fin. Servs. LLC*, 700 F.3d 829, 840–42 (6th Cir. 2012) (finding purchasers of mortgage-backed securities rated by the credit rating agencies failed to show a “special relationship” with the agencies necessary to be in privity and, thus, were not owed a duty of care); *Anschutz Corp. v. Merrill Lynch & Co.*, 690 F.3d 98, 114–15 (2d Cir. 2012) (holding that the purchaser of securities rated by the credit rating agencies failed to state a claim for negligent misrepresentation against the credit rating agency because the purchaser did not satisfy the element of duty by showing privity of contract or a close relationship that would indicate privity).

between the plaintiff and the credit rating agencies “goes beyond a relationship between a journalist and subject, and is more analogous to that of a client and the client’s certified public accountant.”³⁴⁵ Therefore, the court found that the credit rating agencies are not shielded from liability by the First Amendment.³⁴⁶

The court further found that the credit rating agencies, “having agreed to rate the bonds for a fee,” owed a duty of care to the plaintiff, “the entity paying for the rating.”³⁴⁷ Thus, although the rating agencies did not agree to provide a particular rating, “it is implicit” in the “business relationship” of the parties that the agencies would determine the rating “in a non-negligent” manner.³⁴⁸ The court found that the parties had “a special relationship” as delineated in dealings and communications between the parties, including a letter outlining the rights and obligations of the parties.³⁴⁹ Thus, the court reasoned that, unlike the readers of a general interest newspaper or the subscribers of a financial newsletter, the rating agencies owed a duty to the plaintiff.³⁵⁰

Notably, even though the securities were issued in a private placement, the credit rating agencies had the right to disseminate the rating to the public.³⁵¹ Thus, the rating could be circulated to “a potentially limitless audience.”³⁵² Nonetheless, the Restatement’s requirement that the negligent misrepresentation must be intended for “a limited group of persons” does not bar the plaintiff’s recovery.³⁵³ As expressed by the court, “[N]o matter who else might eventually learn of the rating, the rating was clearly intended for [the plaintiff].”³⁵⁴ The credit rating agen-

345. *Commercial Fin. Servs.*, 94 P.3d at 110. *But cf.* *First Equity Corp. of Fla. v. Standard & Poor’s Corp.*, 869 F.2d 175, 179 (2d Cir. 1989) (noting a credit rating agency that issues a securities newsletter falls “somewhere between” a newspaper publisher and an accountant and finding the First Amendment protections of a newspaper publisher should apply).

346. *Commercial Fin. Servs.*, 94 P.3d at 110 (“We do not believe the First Amendment shields the agencies from potential liability.”).

347. *Id.* (noting the court “cannot accept the argument that having agreed to rate the bonds for a fee, the Rating Agencies owed no duty of care to CFS, the entity paying for the rating”).

348. *Id.* at 111.

349. *Id.* at 110–12 (“A typical letter from a rating agency to CFS outlines the parties’ relationship. It states that the rating of the certificates was being made pursuant to a request by CFS; . . . that the rating could be disseminated to interested parties[;] . . . that the agency retained the right to advise the public of the rating; . . . and that a bill for the agency’s work would be sent to CFS.”).

350. *Id.* at 112 (“The Rating Agencies cannot be said to have no greater duty than that owed to a reader of a general interest newspaper or a subscriber of a specialist newsletter.”); *see also* *Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & “ERISA” Litig.)*, 511 F. Supp. 2d 742, 824 (S.D. Tex. 2005) (discussing *Commercial Financial* and explaining “the special relationship of privity between the parties . . . created a duty of care not owed to a general reader or a subscriber” (citing *Commercial Fin. Servs.*, 94 P.3d at 112)).

351. *Commercial Fin. Servs.*, 94 P.3d at 111 (explaining that “(though the certificates were to be placed privately) . . . the agency retained the right to advise the public of the rating”).

352. *Id.* at 113.

353. *Id.* (explaining the RESTATEMENT (SECOND) OF TORTS § 552 provides that “the tort of negligent misrepresentation is limited . . . to losses suffered ‘by the person or one of a limited group of persons’ who the supplier of the false information intends to supply” (quoting RESTATEMENT (SECOND) OF TORTS § 552(2)(a) (AM. LAW INST. 1977))).

354. *Id.*

cies prepared the rating at the request of the plaintiff and provided the information regarding the rating to the plaintiff.³⁵⁵ Moreover, the plaintiff hired the agencies to provide the rating and paid the agencies a consideration for the rating.³⁵⁶ Thus, the Restatement's tort of negligent misrepresentation is applicable to the credit rating agencies.³⁵⁷

This court did not squarely address the belief held by other courts that the rating agencies' right to disseminate the rating to the public caused the rating to be a matter of public concern and, thus, appropriate for the application of the actual malice rule.³⁵⁸ Rather, this court acknowledged the possible dissemination of the rating to the public and nevertheless found that the First Amendment did not shield the rating agencies from potential liability.³⁵⁹

The court observed that the rating agencies, by providing a rating, "also serve the public interest."³⁶⁰ Moreover, the court acknowledged the public policy concern that the use of a negligence standard may cause the agencies to provide ratings designed to avoid lawsuits.³⁶¹ Nevertheless, the court rejected the notion that an exception should be made to the traditional law of negligence in order to shield the credit rating agencies from liability and held that the credit rating agencies owed a duty to the plaintiff to provide an accurate rating for the securities.³⁶²

355. *Id.* ("[T]he communications between the parties unquestionably show the rating was done at CFS's request, and the information concerning the rating was communicated by the agencies to CFS.")

356. *Id.* (noting comment g to the RESTATEMENT (SECOND) OF TORTS § 552 provides that "[t]he person for whose guidance the information is supplied is often the person who has employed the supplier to furnish it, in which case, if it is supplied for a consideration paid by that person, he has at his election either a right of action under the rule stated in this Section [552] or a right of action upon the contract under which the information is supplied" (quoting RESTATEMENT (SECOND) OF TORTS § 552 CMT. g (AM. LAW INST. 1977))).

357. *See id.* at 113–14 (rejecting the argument that the Restatement is not applicable); *see also* RESTATEMENT (SECOND) OF TORTS § 552(1) (AM. LAW INST. 1977) ("One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.")

358. *See, e.g.,* *Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & "ERISA" Litig.)*, 511 F. Supp. 2d 742, 820, 825 (S.D. Tex. 2005) (applying the actual malice rule because, among other things, the credit rating reports "were not private or confidential," rather the reports were "nationally published"); *Cty. of Orange v. McGraw Hill Cos.*, 245 B.R. 151, 155–56 (Bankr. C.D. Cal. 1999) (finding the debt securities were "matters of public concern" because either party was free to make the rating public and, thus, the actual malice rule applies).

359. *Commercial Fin. Servs.*, 94 P.3d at 110–12 (finding the First Amendment does not shield the credit rating agencies from liability).

360. *Id.* at 111.

361. *Id.* at 112 ("A legitimate concern exists that applying the negligence standard may pressure the agencies into issuing a more favorable rating than is deserved . . . out of fear of a lawsuit brought by the security's issuer.")

362. *Id.* (finding the rating agencies owed a duty to CFS "to issue the rating the securities deserved"); *see also Enron Corp.*, 511 F. Supp. 2d at 822–23 (discussing the holding in *Commercial Financial Services*: "that the First Amendment does not protect rating agencies from liability for alleged inaccuracies where they were asked to rate [securities] . . . by a . . . company, . . . were paid a

Although the court in *Commercial Financial* found that the actual malice rule did not apply despite the rating agencies' right to disseminate the rating to the public, other cases in which courts found the actual malice rule to be inapplicable are limited to circumstances in which the issuer of the securities is not a public figure and the securities are intended to be sold to a limited group of purchasers.³⁶³ *In re National Century Financial Enterprises, Inc.*³⁶⁴ provides such an example of a district court's rejection of the actual malice rule.³⁶⁵ The securities in this case were not issued by a public company and were sold to a targeted group of investors in a private placement.³⁶⁶ Moreover, the ratings were listed only in the offering documents that were provided to the particular group of investors.³⁶⁷ Thus, the ratings did not involve a matter of public concern, and the actual malice rule did not apply.³⁶⁸

In considering a claim for negligent misrepresentation alleged by the purchaser of the securities, the Southern District of Ohio also rejected the rating agency's argument that a duty does not exist unless there is a special relationship.³⁶⁹ The district court explained that a special relationship is not "a formal element" of a claim for negligent misrepresentation.³⁷⁰ Rather, a special relationship is more aptly a characterization of the necessary requirements of negligent misrepresentation; that is, the defendant has given "false information in a business transaction for plaintiff's guidance" and the plaintiff is a member "of a limited class for whom defendant intended to supply the information."³⁷¹ In this case, the plaintiff sufficiently pled that it was a member of a limited group of purchasers who foreseeably relied on the credit ratings.³⁷² The rating agency

fee by that company, were therefore in privity with that company, and thus owed a duty of care to that company to provide accurate ratings" (footnote omitted)).

363. See *Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs., LLC*, 813 F. Supp. 2d 871, 877 n.1 (S.D. Ohio 2011) ("Recently, courts have declined to extend [First Amendment] protection at the motion to dismiss stage where the rating is allegedly the product of the issuer pays model and is meant only for a select few investors." (citing *In re Nat'l Century Fin. Enters., Inc., Inv. Litig.*, 580 F. Supp. 2d 630, 639-40 (S.D. Ohio 2008); and *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 651 F. Supp. 2d 155, 175-76 (S.D.N.Y. 2009))); see also *Anschutz Corp. v. Merrill Lynch & Co.*, 785 F. Supp. 2d 799, 830-32 (N.D. Cal. 2011).

364. 580 F. Supp. 2d 630 (S.D. Ohio 2008).

365. See *id.* at 639-40 (finding the actual malice rule does not apply where the securities were not "a matter of public concern"); see also *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (holding that a credit report provided to five subscribers did not concern a public matter because it was intended for a particular business audience).

366. *Nat'l Century Fin. Enters.*, 580 F. Supp. 2d at 634, 639-40 (finding the securities "were issued by a privately-held company, and . . . targeted to a select class of institutional investors").

367. *Id.* at 640 ("[T]he only place that the ratings are alleged to have appeared were in the offering materials given to the select class of investors.").

368. *Id.* at 639-40 (noting the complaint does not characterize the ratings "as a matter of public concern").

369. *Id.* at 646-48.

370. *Id.* at 647 (quoting *Nat'l Mulch & Seed, Inc. v. Rexius Forest By-Prod., Inc.*, 2007 U.S. Dist. LEXIS 24904, at *29-30 (S.D. Ohio Mar. 22, 2007)).

371. *Id.* ("[M]isrepresentations to a person or limited category of people whom the speaker or supplier intends to benefit or guide are actionable.").

372. *Id.* at 648.

issued the credit ratings with the knowledge that the ratings would be viewed on the offering documents provided to a limited group of investors.³⁷³

Moreover, the district court rejected the rating agency's argument that there was no basis for justifiable reliance because the credit ratings were "predictive opinions."³⁷⁴ As the Sixth Circuit has determined, opinions can be actionable if "the opinion is not factually well-grounded."³⁷⁵ The *National Century* court found that the plaintiff sufficiently alleged that the credit rating agency failed to exercise reasonable care in determining whether its ratings were factually well-grounded and, thus, failed to exercise reasonable care in providing information to the plaintiff for its guidance in determining whether to purchase the securities.³⁷⁶ It is important to note that under the actual malice standard applied in other cases, the credit rating agencies do not have a duty to exercise reasonable care.³⁷⁷

Similarly, in *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*,³⁷⁸ the Southern District of New York rejected the argument of Moody's and Standard & Poor's that the First Amendment provides the agencies with absolute immunity.³⁷⁹ This case concerned an action for common law fraud alleged by the purchasers of the securities.³⁸⁰ The court found that the ratings were provided only to a "select group of investors" as part of a private placement; thus, the ratings were not a matter of public concern, and the First Amendment did not shield the agencies from liability.³⁸¹

373. *Id.* ("Moody's prepared the bond ratings knowing that its ratings would be seen on the offering materials given to only a select class of qualified investors, of whom [the plaintiff] was one.").

374. *Id.*

375. *Mayer v. Mylod*, 988 F.2d 635, 639 (6th Cir. 1993) ("[S]tatements which contain the speaker's opinion are actionable . . . if the speaker does not believe the opinion and the opinion is not factually well-grounded.").

376. *Nat'l Century Fin. Enters.*, 580 F. Supp. 2d at 648 (finding the plaintiff sufficiently pled that Moody's failed to exercise reasonable care because "if Moody's [had] used reasonable care in assigning its ratings, it would have discovered multiple violations of the Master Indenture and could not have legitimately given the [securities] the favorable ratings that it did").

377. *See, e.g., Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & "ERISA" Litig.)*, 511 F. Supp. 2d 742, 825-26 (S.D. Tex. 2005) (observing that credit rating "[a]gencies are not held to a reasonable person standard"); *see also supra* note 300 and accompanying text.

378. 651 F. Supp. 2d 155 (S.D.N.Y. 2009).

379. *Id.* at 175-76.

380. *Id.* at 163-64 (noting that plaintiffs are institutional investors that purchased the securities at issue).

381. *Id.* at 175-76 ("[W]here a rating agency has disseminated their ratings to a select group of investors rather than to the public at large, the rating agency is not afforded [First Amendment] protection." (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761-62 (1985) (holding that a credit report provided to five subscribers did not concern a public matter because it was intended for a particular business audience); and *In re Nat'l Century Fin. Enters., Inc., Inv. Litig.*, 580 F. Supp. 2d 630, 640 (S.D. Ohio 2008) (finding the actual malice rule did not apply where the securities were "targeted to a select class of institutional investors"))).

Addressing the fraud claim in a separate proceeding, the district court considered whether credit ratings are statements of fact or opinions.³⁸² The court found that although credit “ratings are not objectively measurable statements of fact, neither are they mere puffery or unsupported statements of belief.”³⁸³ As expressed by the court, credit ratings are “fact-based opinions.”³⁸⁴ A credit rating is a statement that the credit rating agency has performed an analysis and assessment of the data and made a “fact-based” determination regarding the issuer’s creditworthiness.³⁸⁵ If a credit rating agency assigns a credit rating that it knows is either not based on a “reasoned analysis” or lacks a factual basis, then the agency has “stat[ed] a fact-based opinion that it does not believe” is accurate.³⁸⁶ Thus, the court found that the rating agencies may be held liable for common law fraud if the credit ratings were false or misleading regarding the subject matter at issue and the ratings did not accurately state the beliefs or opinions of the credit rating agency.³⁸⁷ As found by the court, the plaintiffs provided sufficient evidence to permit a jury to infer that the credit ratings were both “misleading and disbelieved” by the credit rating agencies at the time they were assigned and, thus, may be found to be “actionable misstatements.”³⁸⁸

Moreover, the district court found that the plaintiffs provided sufficient evidence to permit a jury to infer scienter.³⁸⁹ The plaintiffs’ evidence permitted an inference that the individuals on the rating committees assigned the credit ratings in a reckless manner or did not believe the assigned ratings were correct.³⁹⁰ For example, recklessness could be in-

382. *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 888 F. Supp. 2d 431, 453 (S.D.N.Y. 2012).

383. *Id.* at 454–55 (footnotes omitted).

384. *Id.* at 455 (emphasis removed) (“Ratings should best be understood as *fact-based opinions*.”).

385. *Id.* (emphasis removed) (“When a rating agency issues a rating, it is not merely a statement of that agency’s unsupported belief, but rather a statement that the rating agency has analyzed data, conducted an assessment, and reached a *fact-based* conclusion as to creditworthiness.”).

386. *Id.* (“If a rating agency *knowingly* issues a rating that is either unsupported by reasoned analysis or without a factual foundation, it is stating a fact-based opinion that it does not believe to be true.”).

387. *Id.* at 456; *cf.* *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095 (1991) (finding statements of belief or opinion can be the basis for a federal securities fraud action); *Mayer v. Mylod*, 988 F.2d 635, 639 (6th Cir. 1993) (finding in a securities fraud action that “statements which contain the speaker’s opinion are actionable under Section 10(b) of the Securities Exchange Act if the speaker does not believe the opinion and the opinion is not factually well-grounded”).

388. *Abu Dhabi Commercial Bank*, 888 F. Supp. 2d at 456–58 (noting that plaintiffs had submitted “expert testimony that the ratings were not justified by the underlying facts when they were issued,” statements from rating agency employees explaining how the ratings should be determined and the how the practices of the agencies did not meet the stated standard, and other statements from rating agency employees indicating concern with the “paucity of data and the adequacy of the models used to rate” the securities at issue).

389. *See id.* at 458–62 (noting the scienter requirement may be satisfied with evidence of recklessness or conscious misbehavior); *see also* *Gould v. Winstar Commc’ns, Inc.*, 692 F.3d 148, 158 (2d Cir. 2012).

390. *Abu Dhabi Commercial Bank*, 888 F. Supp. 2d at 459–60 (“Plaintiffs have offered extensive evidence from which a jury could infer that the ratings were either disbelieved when made or issued in a manner that was ‘highly unreasonable and which represent[ed] an extreme departure from

ferred from expert testimony indicating that the credit “ratings were highly unreasonable when made” and from an e-mail by a Moody’s analyst stating that the model assumptions for the securities were not supported by actual data.³⁹¹ Furthermore, while a plaintiff is not required to demonstrate motive in order to prove scienter, there is evidence that the rating agencies had a monetary incentive to provide high ratings irrespective of whether those ratings were warranted.³⁹² Thus, the evidence indicated that the credit rating agencies “compromised the quality of their ratings in pursuit of profits.”³⁹³ In addition, as noted in the court’s earlier decision, the plaintiffs sufficiently pled reasonable reliance on the credit ratings because the rating agencies were privy to information that was not publicly available.³⁹⁴

Although these courts did not apply the actual malice rule in actions against the rating agencies, none of these cases involved a public figure or the public dissemination of a credit rating; thus, these cases were generally consistent with First Amendment jurisprudence among the lower courts with respect to credit rating agencies. However, a divergence from other courts is seen in *Commercial Financial* where the rating agencies had the right to disseminate the rating to the public, and the court nevertheless found the actual malice rule to be inapplicable.

d. Statements of Opinion by Professionals

Another series of cases addresses statements of opinion by professionals. As recognized by the Supreme Court, certain statements of opinion are actionable when made by professionals.³⁹⁵ In *Virginia Bankshares, Inc. v. Sandberg*,³⁹⁶ the Supreme Court found that certain statements, in particular those that are commercial in nature, “are reasonably understood to rest on a factual basis that justifies them as accurate.”³⁹⁷ Hence, if such statements were issued without a factual basis, the state-

the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.” (alterations in original) (quoting *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 269 (2d Cir. 1996))).

391. *Id.* at 459.

392. *Id.* at 460–61 (noting the issuer could take its business to another agency if it did not receive the desired high rating, the fees earned by the rating agencies would be substantially less if the securities did not issue, and a statement by a Moody’s analyst that “ratings on structured financial products . . . were ‘cash cows.’”).

393. *Id.* at 461.

394. *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 651 F. Supp. 2d 155, 181 (S.D.N.Y. 2009) (“[T]he market at large, including sophisticated investors, have come to rely on the accuracy of credit ratings and the independence of rating agencies because of their NRSRO status and, at least in this case, the [r]ating [a]gencies’ access to non-public information that even sophisticated investors cannot obtain.”).

395. See *Cty. of Orange v. McGraw-Hill Cos. (In re Cty. of Orange)*, No. SA CV 96-0765-GLT, 1997 U.S. Dist. LEXIS 22459, at *13 (C.D. Cal. June 2, 1997) (“[F]ederal and California state courts recognized certain statements of opinion made by professionals are actionable.”).

396. 501 U.S. 1083 (1991).

397. *Id.* at 1093; see also *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *13.

ments would be considered misleading.³⁹⁸ According to the Supreme Court, certain statements of opinion may be considered factual based on the context of the statements.³⁹⁹ For instance, the context may include the subject of the statement, the speaker's identity, and the likely audience of the statement.⁴⁰⁰ As acknowledged by the Supreme Court, "An opinion is a fact When the parties are so situated that the buyer may reasonably rely upon the expression of the seller's opinion, [thus,] it is no excuse to give a false one."⁴⁰¹

Consistent with Supreme Court doctrine, California federal district courts have found that where a speaker is "specially qualified" and the audience may be such to have reasonably relied on the speaker's "superior knowledge," a statement of opinion made by that speaker may be actionable fraud or misrepresentation.⁴⁰² For example, California federal district courts have found statements of opinion made by financial advisors and auditors to be actionable.⁴⁰³ In *Bily v. Arthur Young & Co.*,⁴⁰⁴ the court found an auditor who prepared an audit and audit opinion of a corporation's financial statements liable to third-party investors for negligent misrepresentation.⁴⁰⁵ The elements of a claim of negligent misrepresentation are (i) the assertion of a fact (ii) which is false (iii) by a person who does not have a reasonable basis for believing the assertion to be true.⁴⁰⁶ The *Bily* court noted that in certain cases, a statement of "professional opinion" is treated as a statement of fact.⁴⁰⁷ For example, if a statement, even if couched "in the [guise] of an opinion, is 'not a casual expression of belief' but [instead] 'a deliberate affirmation of the matters stated,'" then such statement may be viewed as a factual assertion.⁴⁰⁸ Additionally, if a person has or professes to have "superior knowledge or special information or expertise" concerning the subject of the statement and a plaintiff is such that it "may reasonably rely" on the defendant's

398. *Va. Bankshares, Inc.*, 501 U.S. at 1093 ("[T]he absence [of a factual basis] renders [certain statements made by professionals] misleading.").

399. *Id.*; see also *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *14 ("*Virginia Bankshares* indicates the context of certain statements . . . renders some statements of opinion essentially 'factual.'").

400. See *Va. Bankshares, Inc.*, 501 U.S. at 1091-94; see also *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *14

401. *Va. Bankshares, Inc.*, 501 U.S. at 1094 (first alteration in original) (quoting *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918)).

402. *Moore v. Jogert, Inc. (In re Jogert, Inc.)*, 950 F.2d 1498, 1507 (9th Cir. 1991) (quoting *Borba v. Thomas*, 138 Cal. Rptr. 565 (Cal. Ct. App. 1977)); see also *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *14 (noting this exception to the general rule in California that opinions and future predictions are not actionable as fraud or misrepresentation).

403. *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *14-15.

404. 834 P.2d 745 (Cal. 1992) (en banc).

405. *Id.* at 747, 768-770.

406. *Id.* at 768.

407. *Id.* ("Under certain circumstances, expressions of professional opinion are treated as representations of fact.").

408. *Id.* (quoting *Gagne v. Bertran*, 275 P.2d 15, 21 (Cal. 1954)).

expertise, information, or knowledge, then the defendant's statement of professional opinion may be regarded as an assertion of fact.⁴⁰⁹

Although the *Bily* case is instructive regarding whether a statement of professional opinion should be considered an assertion of fact, this case did not involve a First Amendment issue because the corporation was a private company at the time the audit opinion was issued.⁴¹⁰ Nevertheless, a California federal district court found the reasoning underlying the professional opinion cases regarding financial advisors and auditors, such as *Bily*, is similarly applicable to the cases concerning credit ratings.⁴¹¹ Accordingly, the federal district court found that credit "ratings do imply statements of fact even" when First Amendment issues are implicated.⁴¹²

The Ninth Circuit's First Amendment analysis employed in *Unelko Corp. v. Rooney*⁴¹³ provides further enlightenment regarding whether a statement implies a factual assertion.⁴¹⁴ The three-part test under *Unelko* requires an assessment of whether (i) the "general tenor of the [entire work]" indicates the assertion was not one of "objective fact;" (ii) the use of "figurative or hyperbolic language" indicates the statement was not an assertion of objective fact; and (iii) the statement is provably false or true.⁴¹⁵ Moreover, in assessing the "general tenor" of the work, the court must evaluate the subject of the statement, the speaker's identity, and the audience of the statement;⁴¹⁶ these same factors are considered in the professional opinion cases⁴¹⁷ along with the professional status of the speaker and the relationship of the speaker to its audience.⁴¹⁸

In *Unelko*, the Ninth Circuit held that a statement made by Andy Rooney on the television show *60 Minutes* was not protected opinion

409. *Id.* (citing *Gagne*, 275 P.2d at 21); see also *Ashley v. Church (In re Ashley)*, 903 F.2d 599, 604 (9th Cir. 1990) (finding a defendant who professed to have financial knowledge made statements of fact rather than opinion).

410. See *Cty. of Orange v. McGraw-Hill Cos. (In re Cty. of Orange)*, No. SA CV 96-0765-GLT, 1997 U.S. Dist. LEXIS 22459, at *15-16 (C.D. Cal. June 2, 1997); *Bily*, 834 P.2d at 747.

411. See *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *16; see also *Bily*, 834 P.2d at 768-73.

412. *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *16 ("[F]or reasons similar to those developed in the professional opinion cases, it is reasonable to conclude the [credit] ratings do imply statements of fact even under the First Amendment cases.").

413. 912 F.2d 1049 (9th Cir. 1990).

414. See *id.* at 1053-55 (finding a statement made by Andy Rooney on the television show "60 Minutes" was not protected under the First Amendment).

415. *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *16-17; see also *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990).

416. *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *17.

417. See *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1091-96 (1991); see also *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *14.

418. *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *17; see also *Va. Bankshares, Inc.*, 501 U.S. at 1094.

under the First Amendment.⁴¹⁹ The Ninth Circuit found Mr. Rooney's statement that a particular item of merchandise "didn't work" may be regarded "as implying an assertion of objective fact" based on the speaker's identity, the likely audience reactions, and the content of the speech even though the general tenor of the segment was set in a humorous or satirical context.⁴²⁰

In *County of Orange v. McGraw-Hill Cos.*,⁴²¹ a federal district court applied the *Unelko* framework in a case concerning a credit rating agency.⁴²² The federal district court found the subject of the credit ratings was the "likely creditworthiness of [particular issues] of debt [securities]," and the audience for these credit ratings was comprised of the "issuers and potential investors" in the securities who are respectively deciding whether or not to offer the debt securities or purchase them.⁴²³ The district court noted that when courts found similar circumstances in the professional opinion cases, the courts held the statements of opinion in those cases to be actionable.⁴²⁴ Moreover, based on the *Unelko* framework, "the professional opinion cases imply the general tenor of opinions such as [Standard & Poor's] ratings is to support, not negate, the impression the rating is an assertion of fact, or at least substantially based on facts assessed by [Standard & Poor's]."⁴²⁵ The rating agency requested that the County provide specific information and then employed a particular methodology to establish the credit rating; thus, the general tenor of the credit rating "implies statements of objective fact."⁴²⁶

The court noted the lack of hyperbolic or figurative language that would otherwise indicate the credit rating was not a factual assertion.⁴²⁷ Finally, in assessing whether the credit ratings, which "were predictions of creditworthiness," could be proven false, the federal district court considered Standard & Poor's professional status in the municipal bond industry, the County's allegations of reasonable reliance on the credit ratings, and the professional opinion cases (including the Supreme Court's

419. *Unelko*, 912 F.2d at 1054-55 (finding "the statement 'It didn't work' is not shielded from liability" because the statement "is essentially factual"); see also *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *18.

420. *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *18 (quoting *Unelko*, 912 F.2d at 1054).

421. No. SA CV 96-0765-GLT, 1997 U.S. Dist. LEXIS 22459 (C.D. Cal. June 2, 1997).

422. See *id.* at *18 (alleging Standard & Poor's to be "an expert" in rating municipal bonds).

423. *Id.* at *18-19.

424. *Id.* at *18-19; see also *Va. Bankshares, Inc.*, 501 U.S. at 1093-94; *Bily v. Arthur Young & Co.*, 834 P.2d 745, 768-72 (Cal. 1992).

425. *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *19 (noting the County's allegation that "S&P knew or could reasonably anticipate reliance on the ratings it prepared" because of "S&P's superior knowledge and expertise in evaluating the creditworthiness of the proposed debt offerings"); see also *Unelko*, 912 F.2d at 1054-55.

426. *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *19-20 & n.5 (noting the County retained Standard & Poor's to issue a credit rating).

427. *Id.* at *21 (noting the second prong of the *Unelko* test); see also *Unelko*, 912 F.2d at 1053-54.

Virginia Bankshares), and concluded that “the predictive nature of the ratings does not, as a matter of law, permit S&P to escape liability.”⁴²⁸ Thus, the credit ratings were actionable.⁴²⁹

*Anschutz Corp. v. Merrill Lynch & Co. Inc.*⁴³⁰ provides another example of a professional opinion case in which a federal district court found the First Amendment protections, including the actual malice rule, did not bar claims against the credit rating agencies for negligent misrepresentation.⁴³¹ This case concerned unregistered securities that could be sold only to a circumscribed group of investors.⁴³² The credit rating agencies argued that credit ratings are statements of opinion, and thus, the agencies cannot be liable for common law claims for negligent misrepresentation.⁴³³ However, the Northern District of California noted that in certain cases, “expressions of professional opinion are treated as representations of fact.”⁴³⁴ For example, if the defendant has superior knowledge or special information or expertise concerning the matters at issue and the plaintiff is deemed to “reasonably rely” on the defendant’s expertise, information, or knowledge, then the alleged misrepresentation, albeit in the form of an opinion, “may be treated as one of material fact.”⁴³⁵ Moreover, if the defendant does not honestly believe the statement of opinion, then such statement is actionable.⁴³⁶ Thus, if the rating agencies “helped structure the securities” and, therefore, possessed superior knowledge of the securities, then the agencies’ representations concerning those securities are actionable.⁴³⁷ Additionally, if the rating agencies did not honestly believe the credit ratings when the agencies assigned them, then the agencies may be liable for negligent misrepresentation.⁴³⁸

428. *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *21 (noting the third prong of the *Unelko* test); see also *Va. Bankshares, Inc.*, 501 U.S. at 1093–94; *Unelko*, 912 F.2d at 1054–55.

429. See *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *21.

430. 785 F. Supp. 2d 799 (N.D. Cal. 2011).

431. *Id.* at 824–25, 830–32.

432. *Id.* at 807 (“[The securities] at issue were not available to the public in general. Instead, because these securities were unregistered, they were available only to a limited group of ‘qualified institutional buyers.’”).

433. *Id.* at 823 (“The Rating Agencies’ overriding argument is that their ratings cannot be subject to a common law negligent misrepresentation claim because the ratings are opinions and not statements of fact.”).

434. *Id.* at 823–24 (quoting *Bily v. Arthur Young & Co.*, 834 P.2d 745, 768 (Cal. 1992)).

435. *Id.* at 824 (quoting *Bily*, 834 P.2d at 768).

436. *Id.* at 824 (quoting *Ogier v. Pac. Oil & Gas Dev. Corp.*, 282 P.2d 574, 580–81 (Cal. Dist. Ct. App. 1955)).

437. *Id.* at 825 (citing *Bily*, 834 P.2d at 768); see also *Ogier*, 282 P.2d at 581.

438. *Anschutz Corp. v. Merrill Lynch & Co.*, 785 F. Supp. 2d 799, 824 (N.D. Cal. 2011) (“[P]laintiff may bring negligent misrepresentation claims against the [r]ating [a]gencies if plaintiff alleges that the [a]gencies did not honestly entertain the opinions about the ratings at the time they were issued.”); cf. *Anschutz Corp. v. Merrill Lynch & Co. (In re Merrill Lynch Auction Rate Sec. Litig.)*, No. 09 MD 2030, 2011 WL 536437, at *12 (S.D.N.Y. Feb. 9, 2011) (dismissing negligent misrepresentation claims against credit rating agencies because plaintiff did not make a factual allegation that the credit ratings were inaccurate when they were offered).

Moreover, the court found that the plaintiff sufficiently pled that the credit rating agencies had a duty to the purchasers of the securities.⁴³⁹ The rating agencies allegedly assisted in structuring the particular securities, knew that these securities needed to be “investment-grade” in order to be sold to the intended group of purchasers, and knew that sale of the securities was limited solely to that select group of purchasers.⁴⁴⁰ Thus, the credit rating agencies specifically undertook the responsibility to provide information and guidance to the intended group of purchasers concerning the purchase of the particular securities and, therefore, may be subject to liability.⁴⁴¹ Further, as the rating agencies were allegedly privy to information that was not made available to the public, the plaintiff’s reliance on the credit ratings could be considered to be reasonable.⁴⁴²

The district court also found that the First Amendment does not shield the rating agencies from liability.⁴⁴³ In contrast to *Compuware*, *Jefferson Cnty.*, and *In re Enron*, the plaintiff in this case “specifically identified” the allegedly negligent misstatements, and there is no indication that the credit ratings are predictive opinions that are “too indefinite” to connote a statement of fact that may be proven as false.⁴⁴⁴ Moreover, the district court rejected the rating agencies’ argument that the actual malice standard applies.⁴⁴⁵ Here, private figures issued the securities and distributed them only to a select class of investors; thus, the ratings were not a matter of public concern.⁴⁴⁶ Notably, the court considered the credit ratings to be a form of commercial speech.⁴⁴⁷

439. *Anschutz Corp.*, 785 F. Supp. 2d at 825–26 (“[A] defendant may be held liable for negligent misrepresentation ‘in the dissemination of commercial information to persons who were “intended beneficiaries” of the information.’” (quoting *Bily*, 834 P.2d at 770)).

440. *Id.* at 826 (noting the securities could be marketed and sold only to “the select group of [qualified institutional buyers]”).

441. *Id.* at 825–26 (“[If] a supplier of information has [specifically] undertaken to inform and guide a third party with respect to an identified transaction . . . [then] liability is imposed on the supplier.” (quoting *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1200 n.3 (9th Cir. 2001))); *see also Bily*, 834 P.2d at 769–70.

442. *Anschutz Corp.*, 785 F. Supp. 2d at 826–27.

443. *Id.* at 830–32.

444. *Id.* at 830–31 (“[P]laintiff has specifically identified the alleged misstatements at issue, and nothing in the record at this stage suggests that the structured [securities] ratings at issue are, in fact, predictive opinions by their nature ‘too indefinite’ to imply a false statement of fact.”); *cf. Compuware Corp. v. Moody’s Inv’rs. Servs., Inc.*, 499 F.3d 520, 522, 528–29 (6th Cir. 2007) (finding the credit rating did not imply any factual statement that may be proven as false); *Jefferson Cty. Sch. Dist. No. R–1 v. Moody’s Inv’r’s Servs., Inc.*, 175 F.3d 848, 855 (10th Cir. 1999) (finding the credit rating agency article not sufficiently specific to be proven as false); *Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & “ERISA” Litig.)*, 511 F. Supp. 2d 742, 825 (S.D. Tex. 2005) (finding the plaintiff did not identify any factual statements that could be proven as false).

445. *Anschutz Corp.*, 785 F. Supp. 2d at 831.

446. *Id.* at 831–32 (citing *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 651 F. Supp. 2d 155, 175–76 (S.D.N.Y. 2009) (finding the actual malice standard did not apply to credit ratings for a structured security that was available only to a select group of purchasers)); *see also In re Nat’l Century Fin. Enters., Inc., Inv. Litig.*, 580 F. Supp. 2d 630, 639–40 (S.D. Ohio 2008) (finding the actual malice rule did not apply where the securities were “issued by a privately-held company, and . . . targeted to a select class of institutional investors”); *cf. Enron Corp.*, 511 F. Supp. 2d at

Nevertheless, while the professional opinion cases and *Unelko* indicate that a credit rating agency does not have absolute immunity under the First Amendment for its ratings, if those ratings are disseminated to the public, then the rating agency's expression will have the First Amendment protection of the actual malice rule.⁴⁴⁸

B. Are the First Amendment Protections Justified?

As discussed in Section I.A.3.b, the credit rating agencies generally have been afforded protection under the First Amendment for the credit ratings assigned to debt securities.⁴⁴⁹ While the credit rating agencies have maintained that a credit rating is "the world's shortest editorial" and, thus, entitled to First Amendment protection,⁴⁵⁰ one may query whether this protection is warranted. For example, a report issued by the staff of the Senate Committee on Governmental Affairs has questioned whether credit ratings are truly "the equivalent of editorials" printed in a newspaper.⁴⁵¹ The staff found that the market appears to use credit ratings primarily as a certification of whether or not a particular security is investment grade rather than as a form of information.⁴⁵² Thus, the staff asserted that the use of credit ratings as certifications indicates that the "ratings are not the equivalent of editorials" published in a newspaper.⁴⁵³ Further, as maintained by the staff, the First Amendment protections provided to the credit rating agencies "should not preclude greater accountability."⁴⁵⁴

Moreover, the case law has held that when the credit rating agency steps outside the traditional newsgathering activities of a journalist and instead "plays an active role in structuring" a security that it rates, then the credit rating agency is not entitled to the protections of the journal-

825 (applying the actual malice standard because Enron was a Fortune 500 company and, thus, the ratings concerned a public matter).

447. See *Anschutz Corp.*, 785 F. Supp. 2d at 822 (noting that, in a case against the credit rating agencies for negligent misrepresentation, "California has a strong interest . . . in deterring misconduct with respect to commercial speech").

448. *Cty. of Orange v. McGraw-Hill Cos.* (*In re Cty. of Orange*), No. SA CV 96-0765-GLT, 1997 U.S. Dist. LEXIS 22459, at *21-22 (C.D. Cal. June 2, 1997) (noting S&P "is a publisher which renders opinions about certain debt issues and disseminates those opinions to the public; thus,] S&P's expression is entitled to protection under the First Amendment" and the actual malice rule will apply); see also *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1093-94 (1991); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1054-55 (9th Cir. 1990).

449. See discussion *supra* Section I.A.

450. PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 96 (quoting Statements of Charles Brown, Fitch General Counsel).

451. *Id.* at 97 ("[T]he fact that the market seems to value the agencies' ratings mostly as a certification [of whether the security is investment grade] . . . and not as information . . . seems to indicate that their ratings are not the equivalent of editorials in *The New York Times*." (footnote omitted)).

452. *Id.*

453. *Id.*

454. *Id.*

ist's privilege.⁴⁵⁵ Yet, in the case of structured securities in the recent financial crisis, such as mortgage-backed securities,⁴⁵⁶ the credit rating agencies "stepped outside" the role of a newsgatherer and instead "played a[n] . . . [active] role in . . . structuring" those securities.⁴⁵⁷ The issuers worked with the credit rating agencies in order "to ensure" that the securities were structured in a manner that would result in high ratings.⁴⁵⁸ Inevitably, the credit rating agencies' high level of involvement in structuring mortgage-backed securities resulted in the agencies being in the incongruous "position of 'rating their own work.'"⁴⁵⁹ While it is

455. *Am. Sav. Bank, FSB v. UBS PaineWebber, Inc. (In re Fitch, Inc.)*, 330 F.3d 104, 110–11 (2d Cir. 2003) (per curiam) (concluding the journalist's privilege is not applicable when the credit rating agency issues ratings based on "client needs" rather than as part of the traditional activities of a newsgatherer and the "level of involvement with the client's transactions . . . is not typical of the relationship between a journalist and the activities upon which the journalist reports"); *cf. Compuware Corp. v. Moody's Inv'rs Servs., Inc.*, 324 F. Supp. 2d 860, 862 (E.D. Mich. 2004) (finding the journalist's privilege is applicable when the credit rating agency "did not participate in the structuring of the debt it was rating" and, thus, did not "step[] outside its role as an information gatherer").

456. *See N.J. Carpenters Vacation Fund v. Royal Bank of Scot. Grp., PLC*, 720 F. Supp. 2d 254, 258 (S.D.N.Y. 2010) (explaining mortgage-backed securities as securities whose cash flow is derived from underlying mortgage loans that are "pooled together" in the form of a security and subsequently sold on the secondary market to investors (quoting Consolidated First Amended Securities Class Action Complaint at para. 40, *N.J. Carpenters Vacation Fund v. Harborview Mortg. Loan Trust*, No. 08-CV-5093, 2009 WL 1455319 (S.D.N.Y. May 19, 2009))).

457. *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 651 F. Supp. 2d 155, 166 (S.D.N.Y. 2009) ("Although a rating agency's role as an unbiased reporter of information typically requires the rating agency to remain independent of the issuers for which it rates notes, the [rating] [a]gencies played a more integral role in the structuring and issuing of [structured securities]."); *Compuware*, 324 F. Supp. 2d at 862; *accord Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC*, 700 F.3d 829, 834 (6th Cir. 2012) (alleging that the credit rating agencies "assist[ed] arrangers in structuring their securities to achieve certain credit ratings"); *Wyo. State Treasurer v. Moody's Inv'rs Serv., Inc. (In re Lehman Bros. Mortg.-Backed Sec. Litig.)*, 650 F.3d 167, 172 (2d Cir. 2011) (alleging that the credit rating agencies "exceeded their traditional roles by actively aiding in the structuring and securitization process"); *N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 259 (alleging the credit rating agencies "played a substantial role in the securitization process" by assisting in the decision of which "loans were to be included in the mortgage pools underlying the [securities] and thereafter [in] the structure of [those securities]"); *In re Nat'l Century Fin. Enters., Inc., Inv. Litig.*, 580 F. Supp. 2d 630, 644 (S.D. Ohio 2008) ("[W]ith asset-backed securities, rating agencies commonly instruct how the [securities] . . . should be structured in order to get the desired bond rating."); *CARNELL ET AL.*, *supra* note 317, at 374 ("Rating agencies began to participate in an unprecedented way in the actual structuring of financings."); *see also Fitch*, 330 F.3d at 110–11 (finding the credit rating agency was not entitled to the journalist's privilege because the agency was not engaged in traditional newsgathering activities and instead was actively involved in structuring the security); *cf. Compuware*, 324 F. Supp. 2d at 862 (finding the credit rating agency was entitled to the journalist's privilege because the agency was not involved in structuring the security and, therefore, did not step outside the role of newsgatherer).

458. *CARNELL ET AL.*, *supra* note 317, at 374 ("[C]redit rating agencies helped issuers decide how many layers of rated debt and how much of an equity cushion would be best, and, most important what sort of steps should be taken (called 'credit enhancement') to improve the rating, and hence the marketability of a particular issue. Issuers might, for example, purchase insurance, increase the size of the equity cushion, or provide more than 100% collateral . . ."); *see also Morgan Stanley & Co.*, 651 F. Supp. 2d at 166 (noting credit rating agencies "worked directly" with the investment bank "to structure the [securities] in such a way that they could qualify for the [rating] [a]gencies' highest ratings").

459. *See Ohio Police & Fire Pension Fund*, 700 F.3d at 834 ("[T]o attract the significant rating fees paid by [mortgage-backed securities] arrangers, the [a]gencies 'became intimately involved in the issuance of [mortgage-backed securities]' by assisting arrangers in structuring their securities to achieve certain credit ratings, turning the process into a form of negotiation and placing the

unlikely that the journalist's privilege to withhold information requested by a subpoena would be available to the rating agencies under these circumstances, the lower courts have still shielded the rating agencies from liability for fraudulent or negligent credit ratings under the guise that the ratings are opinions and, thus, fully protected speech under the First Amendment.⁴⁶⁰

However, the lower courts have misapplied this First Amendment protection. The lower courts have employed the *New York Times* case and its progeny to shield the credit rating agencies from liability in cases where the rating is disseminated to the public unless the plaintiff can prove actual malice.⁴⁶¹ One of the primary rationales for the Supreme Court's rulings was that the press will be "unduly chilled" if it has to worry about liability for damages caused by defamatory statements even if the damages were limited to actual damages.⁴⁶² However, as Justice White has stated, "[O]ther commercial enterprises in this country not in the business of disseminating information must pay for the damage they cause as a cost of doing business . . ." ⁴⁶³ As noted by the Supreme Court, "The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected . . . activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others."⁴⁶⁴ Moreover, the necessity of the *New York Times* actual malice rule is debatable since the press was certainly "free and vigorous" before that decision was laid down.⁴⁶⁵ Furthermore, "[n]othing in the central rationale behind *New York Times* demands an absolute immunity from suits . . . where the plaintiff cannot make out a jury case of actual malice."⁴⁶⁶

These arguments ring exceedingly true in the case of the credit rating agencies. As one scholar has maintained, "If the agencies truly are private entities . . . they should be susceptible to the same sorts of

[a]gencies in the position of 'rating their own work.'" (quoting Complaint, *supra* note 8, at paras. 56, 80)).

460. See *supra* notes 73–76 and accompanying text; see also discussion *supra* Section I.A.3.b.

461. See discussion *supra* Section I.A.3.b.

462. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 771–72 (1985) (White, J., concurring) (explaining that "the *New York Times* standard was formulated to protect the press from the chilling danger of numerous large damages awards" and noting the proposition "that even without the threat of large presumed and punitive damages awards, press defendants' communication will be unduly chilled by having to pay for the actual damages caused" by their defamatory statements).

463. *Id.* at 772.

464. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 150 (1967).

465. See *Greenmoss Builders, Inc.*, 472 U.S. at 772 (White, J., concurring) ("[I]t is difficult to argue that the United States did not have a free and vigorous press before the rule in *New York Times* was announced.")

466. *Id.*

lawsuits any similarly-situated private entity would be.”⁴⁶⁷ For example, auditors that prepare and provide opinions with respect to financial statements and security analysts that evaluate equity securities must pay for damages they cause.⁴⁶⁸ Why should the credit rating agencies, which occupy a role very similar to auditors and security analysts,⁴⁶⁹ be treated any differently? While the credit rating agencies have argued in recent times that holding the agencies liable for their credit ratings would have a chilling effect on the dissemination of financial information,⁴⁷⁰ can an independent, credible argument be made that the credit rating agencies were even slightly chilled by the threat of liability prior to the *New York Times* decision? Further, when *New York Times* itself does not demand an absolute immunity in defamation cases where actual malice is not shown,⁴⁷¹ why do the lower courts feel obliged to provide an absolute immunity to the credit rating agencies?⁴⁷²

Moreover, the Supreme Court has recognized that newspapers and magazines are profit-making enterprises.⁴⁷³ Thus, similar to other businesses that cause damage, newspapers and magazines must pay for such injury, and the injured party should not be forced to accept remedies that are “difficult or impossible” to attain “unless strong policy considerations demand.”⁴⁷⁴ While many arguments have been made regarding the important public policy concerns involved in the protection of a free press,⁴⁷⁵ the same cannot be said regarding protection of the credit rating agencies. What exactly is the policy consideration in providing absolute

467. Frank Partnoy, *The Siskel and Ebert of Financial Markets?: Two Thumbs Down for the Credit Rating Agencies*, 77 WASH. U.L.Q. 619, 711 (1999) (“[A]gencies should not simultaneously benefit from ratings-dependent regulation and be insulated from lawsuits alleging negligence or misrepresentation.”).

468. See *supra* notes 387–388 and accompanying text; see also *infra* note 523 and accompanying text.

469. See *supra* note 345 and accompanying text; see also *infra* notes 518–522 and accompanying text.

470. See, e.g., *In re Nat’l Century Fin. Enters., Inc., Inv. Litig.*, 580 F. Supp. 2d 630, 639 (S.D. Ohio 2008) (“Moody’s argues that holding a credit rating agency liable for its bond ratings would have an oppressive effect on the publication of important financial information to the public.”).

471. See *Greenmoss Builders, Inc.*, 472 U.S. at 772 (White, J., concurring).

472. See *Ohio Police & Fire Pension Fund v. Standard & Poor’s Fin. Servs., LLC*, 813 F. Supp. 2d 871, 877 & n.1 (S.D. Ohio 2011) (noting the rating agencies’ argument that credit “ratings enjoy absolute immunity under the First Amendment” and explaining that “[c]ourts have traditionally extended First Amendment protection to credit ratings of publicly-held companies, where the ratings were offered to the investing public at large as an informational service” (citing *Compuware Corp. v. Moody’s Inv’rs Servs., Inc.*, 499 F.3d 520, 525–26 (6th Cir. 2007); and *Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & “ERISA” Litig.)*, 511 F. Supp. 2d 742, 826–27 (S.D. Tex. 2005))), *aff’d*, 700 F.3d 829 (6th Cir. 2012).

473. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 147 (1967) (“Newspapers, magazines, and broadcasting companies are businesses conducted for profit and often make very large ones.” (quoting *Buckley v. N.Y. Post Corp.*, 373 F.2d 175, 182 (2d Cir. 1967))).

474. *Id.* (“Like other enterprises that inflict damage in the course of performing a service highly useful to the public . . . [newspapers and magazines] must pay the freight; and injured persons should not be relegated (to remedies which) make collection of their claims difficult or impossible unless strong policy considerations demand.” (first alteration in original) (quoting *Buckley*, 373 F.2d at 182)).

475. See *supra* notes 27, 34 and accompanying text.

immunity to the credit rating agencies? As the cases indicate, the credit rating agencies have cloaked themselves in the blanket of First Amendment protection by claiming they are publishers providing opinions of public interest.⁴⁷⁶ However, the issuer of a security hires and pays the credit rating agencies to provide a credit rating.⁴⁷⁷ This is a very different function than that of a newspaper. Moreover, why is the public interest in a credit rating regarding a debt security any different than the public interest regarding the evaluation of an equity security? I would argue that there is no difference. Yet, security analysts and auditors are subject to liability while the credit rating agencies are not.⁴⁷⁸

One commentator has argued against extending the tort of negligent misrepresentation to the credit rating agencies based on the concern that “any showing less than recklessness” would have a “potential chilling effect” on the publication of credit ratings.⁴⁷⁹ This commentator argues that “the state’s interest in compensating relying investors must give way to the first amendment’s concern for the free flow of commercial information.”⁴⁸⁰ Thus, this commentator believes that our “[s]ociety must rely on the market and competition to keep rating agencies operating at their negligence threshold, not on courts and juries.”⁴⁸¹ This contention echoes that of the credit rating agencies that have argued that “the market should be the appropriate means for ensuring the reliability of credit opinions and of rating agencies.”⁴⁸² Even the courts have defended the position of the credit rating agencies by acknowledging the public policy interest in the efficient operation of the capital markets and the “significant role” played by the credit rating agencies in those markets, which at least one court believed “would be chilled by unlimited potential liability” from assigning credit ratings.⁴⁸³

However, the financial crisis has proven that the market and competition are not suitable adversaries for an oligopolistic industry⁴⁸⁴ in which the players have been permitted to play with no rules and no conse-

476. See discussion *supra* Section I.A.3.b.

477. *Commercial Fin. Servs., Inc. v. Arthur Andersen LLP*, 94 P.3d 106, 110 (Okla. Civ. App. 2004) (finding the credit rating agencies issued a rating regarding the creditworthiness of bonds “as professionals being paid to provide their opinions to a client”); see also *infra* notes 577–78 and accompanying text.

478. See *supra* notes 12, 402–03 and accompanying text; see also *infra* note 503.

479. *Jefferson Cty. Sch. Dist. No. R–1 v. Moody’s Inv’t’s Servs., Inc.*, 175 F.3d 848, 856 n.3 (10th Cir. 1999) (quoting 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, 460 (1990)).

480. Husisian, *supra* note 479.

481. *Id.*

482. *Newby v. Enron Corp (In re Enron Corp. Sec., Derivative & “ERISA” Litig.)*, 511 F. Supp. 2d 742, 814–15 (S.D. Tex. 2005).

483. *Id.* at 827.

484. See U.S. SEC. & EXCH. COMM’N, REP. TO CONGRESS ON ASSIGNED CREDIT RATINGS 8 (2012) (estimating “that, as of December 31, 2011, approximately 91% of the outstanding credit ratings for structured finance products were determined by the three largest” credit rating agencies, Standard & Poor’s, Moody’s, and Fitch).

quences. Moreover, the credit rating industry is not the press. The constitutional amendment to protect a free press could not have been intended to protect an industry in which the information that is being publicly disseminated is plagued by inherent conflicts of interest as discussed in Part III.⁴⁸⁵ The notion that credit ratings are pure expressions of opinion akin to speech regarding political matters,⁴⁸⁶ such as the civil rights movement,⁴⁸⁷ is clearly misguided. The state's interest in protecting relying investors (and our society's interest in protecting the economy) is stronger than the constitutional concern in protecting this type of speech.

It is not in the best interests of our society to provide credit rating agencies with First Amendment protection in the form of the actual malice rule—a standard that “poses such a high barrier that it virtually insulates the speaker from liability.”⁴⁸⁸ Even the Supreme Court has cautioned “against ‘blind application’” of the actual malice rule.⁴⁸⁹ Yet, the lower courts have engaged in such blind application of the actual malice standard⁴⁹⁰ and, thus, inappropriately shielded the credit rating agencies from liability.

In sum, credit rating agencies should not be treated as journalists entitled to the heightened protection of the actual malice standard when hired to provide a rating even if that rating is disseminated to the public. Credit ratings are not pure statements of opinion entitled to full constitutional protection. Rather, credit ratings are a form of commercial speech that expresses a fact-based opinion; credit ratings are based on factual information and convey a factual assertion regarding the creditworthiness of the subject of the rating whether a particular security issue or a specific company. Moreover, credit ratings are statements of fact-based opinion made by professionals. Thus, credit rating agencies should be subject to liability for fraudulent or negligently prepared credit ratings that are false or misleading.

485. See U.S. CONST. amend. I; see also *infra* Part III.

486. See *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

487. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 (1974) (“The Times ran a political advertisement endorsing civil rights demonstrations by black students in Alabama and impliedly condemning the performance of local law-enforcement officials.” (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (finding the advertisement contained expressions of opinion and provided information concerning the civil rights movement, “whose existence and objectives are matters of the highest public interest and concern”))).

488. PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 96.

489. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 148 (1967) (noting the Court has “counseled against ‘blind application of *New York Times Co. v. Sullivan*’ and considered ‘the factors which arise in the particular context’” (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967))).

490. See discussion *supra* Section I.A.3.b.

II. THE REGULATORY PROTECTIONS

This part will first explain the business model of the credit rating agencies and the regulatory designation of certain rating agencies. This part will then examine the regulatory protections afforded to the credit rating agencies.

A. Nationally Recognized Statistical Rating Organizations

Credit rating agencies have been providing ratings regarding the creditworthiness of debt securities and the issuers of those securities for close to a century.⁴⁹¹ Prior to 1975, credit rating agencies gathered and employed information that was publicly available to provide unsolicited credit ratings regarding the creditworthiness of various corporations, and the agencies charged a fee to investors who wished to receive the rating.⁴⁹² Then, in 1975, the Commission designated specific credit rating agencies as “nationally recognized statistical rating organization[s]” also known as “NRSROs.”⁴⁹³ For example, the Commission has designated Standard & Poor’s, Moody’s Investors Services, Inc., and Fitch, Inc. as NRSROs.⁴⁹⁴ Among other requirements, the credit rating agency must be “nationally recognized” in order to obtain the NRSRO designation.⁴⁹⁵ As explained by the Commission, this requirement was intended to ensure that the agency’s ratings “were credible and reasonably relied upon by the marketplace.”⁴⁹⁶ Thereafter, the credit rating agencies began working directly for the issuers of the securities; thus, the rating agencies were

491. ROLE & FUNCTION, *supra* note 2, at 5 (“For almost a century, credit rating agencies have been providing opinions on the creditworthiness of issuers of securities and their financial obligations.”).

492. *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 651 F. Supp. 2d 155, 164 (S.D.N.Y. 2009) (noting the information was obtained from publicly available sources such as filings with the Commission).

493. *Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & “ERISA” Litig.)*, 511 F. Supp. 2d 742, 817 n.77 (S.D. Tex. 2005) (quoting PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 105) (“[I]n 1975 . . . the SEC developed an informal procedure for designating certain rating agencies as NRSROs.”); accord ROLE & FUNCTION, *supra* note 2, at 5 (explaining the Commission used the “no-action letter process” to recognize certain credit rating agencies as “nationally recognized statistical rating organizations,” or “NRSROs”); PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 79 (explaining that, in 1975, the SEC promulgated Rule 15c3-1 requiring the securities held by broker-dealers to be rated by NRSROs); see also 15 U.S.C. § 78o-7 (2012) (providing for formal registration of nationally recognized statistical rating organizations); 17 C.F.R. § 240.17g-1 (2015) (discussing application procedures for registration as a nationally recognized statistical rating organization).

494. ROLE & FUNCTION, *supra* note 2, at 5; see also *Am. Sav. Bank, FSB v. UBS PaineWebber, Inc. (In re Fitch, Inc.)*, 330 F.3d 104, 106 (2d Cir. 2003) (noting that the Commission has designated Standard & Poor’s, Moody’s Investors Services, Inc., and Fitch, Inc. as NRSROs).

495. ROLE & FUNCTION, *supra* note 2, at 6.

496. *Id.* at 6; see also *Morgan Stanley & Co.*, 651 F. Supp. 2d at 164 (“[T]he SEC created a special status to distinguish the most credible and reliable rating agencies . . . to help ensure the integrity of the ratings process.”).

able to obtain nonpublic information to be employed in the ratings assessment and were paid directly by the issuer of the securities.⁴⁹⁷

The Second Circuit has observed that issuers will obtain ratings for their securities because investors rely on the assessment of creditworthiness made by the rating agency, and thus, the sale of the security will be easier if the security receives a favorable rating.⁴⁹⁸ Moreover, the ratings assigned by the NRSROs had “regulatory significance” because, prior to the Dodd–Frank Act, many regulated institutional investors were limited in the choice of investment securities based on the ratings assigned by the NRSROs.⁴⁹⁹

B. Statutory Liability and Regulatory Exemption

In Section 11 of the Securities Act of 1933, Congress provided for civil liability for false or misleading statements of material fact in a registration statement.⁵⁰⁰ Specifically, Section 11 prohibits making “an untrue statement of a material fact” in a registration statement or “omitt[ing] to state a material fact” that is required to be included in the registration statement or otherwise necessary in order to make the information included in the registration statement “not misleading.”⁵⁰¹ Purchasers of securities issued under such false or misleading registration statements may bring a private action against certain categories of potential defendants, including anyone who was a signer of the registration statement, any director or partner of the issuer, any underwriter of the security, and certain experts.⁵⁰²

With respect to experts, the statute expressly provides for liability for accountants, appraisers, and engineers, as well as any other professional who has given consent to be named as a preparer or certifier of any portion of the registration statement or of “any report or valuation which is used in connection with the registration statement.”⁵⁰³ Based on the statute, a credit rating agency had potential expert liability under

497. See *Morgan Stanley & Co.*, 651 F. Supp. 2d at 164 (noting that after 1975, issuers began hiring the credit rating agencies to rate their securities and provided nonpublic information to the rating agencies); see also *infra* notes 577–78 and accompanying text.

498. *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 888 F. Supp. 2d 431, 441 (S.D.N.Y. 2012) (citing *Fitch*, 330 F.3d at 106).

499. *Fitch*, 330 F.3d at 106 (“[M]any regulated institutional investors are limited in what types of securities they may invest based on the securities’ NRSRO ratings.”). Notably, the Dodd–Frank Act has required the removal of reliance on credit ratings from federal statutes and regulations, such as banking regulations. See Dodd–Frank Act, Pub. L. No. 111-203, § 939A(b), 124 Stat. 1376, 1887 (2010).

500. 15 U.S.C. § 77k (2012) (codifying Section 11 of the Securities Act of 1933); see also William K. Sjostrom, Jr., *The Due Diligence Defense Under Section 11 of the Securities Act of 1933*, 44 BRANDEIS L.J. 549, 549 (2006) (explaining Section 11 civil liability and the due diligence defense); Krista L. Turnquist, Note, *Pleading Under Section 11 of the Securities Act of 1933*, 98 MICH. L. REV. 2395, 2395 (2000) (discussing Section 11 pleading requirements).

501. 15 U.S.C. § 77k.

502. *Id.* § 77k(a); Sjostrom, *supra* note 500, at 549; Turnquist, *supra* note 500, at 2395.

503. *Id.* § 77k(a)(4).

Section 11 for false or misleading credit ratings that were contained in a registration statement provided the agency gave “consent [to be] named” in the registration statement as an expert.⁵⁰⁴

However, in 1981, the Commission issued a “new policy” in order to encourage credit ratings to be disclosed in registration statements.⁵⁰⁵ To facilitate this policy, the Commission promulgated Rule 436(g)(1) which provided the credit rating agencies with an exemption from liability for Section 11 claims.⁵⁰⁶ The rule provides that the credit rating for certain securities, including debt securities, assigned by an NRSRO “shall not be considered a part of the registration statement prepared or certified by a person within the meaning of [S]ection[] . . . 11 of the [Securities] Act of 1933.”⁵⁰⁷ The Commission expressly stated that the purpose of the new rule was to exclude from Section 11 civil liability “any nationally recognized statistical rating organization whose security rating is disclosed in a registration statement.”⁵⁰⁸ Thus, Rule 436(g)(1) exempted these credit rating agencies from liability for false or misleading credit ratings listed in a registration statement.⁵⁰⁹

Even the courts have expressly acknowledged the Rule 436(g)(1) exemption from liability for the credit rating agencies.⁵¹⁰ For example, the district court in *In re Enron* cited to the exemption in analyzing whether the credit rating agencies were generally subject to liability either under the case law or by federal regulation.⁵¹¹ The court concluded that the Rule 436(g)(1) exemption was a further indication of the lack of authority to hold the credit rating agencies liable.⁵¹² Moreover, in a 2002 report issued by the staff of the Senate Committee on Governmental Af-

504. *See id.*

505. *Wyo. State Treasurer v. Moody’s Inv’rs Serv., Inc. (In re Lehman Bros. Mortg.-Backed Sec. Litig.)*, 650 F.3d 167, 183 n.11 (2d Cir. 2011); *see also* Disclosure of Security Ratings in Registration Statements, 46 Fed. Reg. 42,024, 42,024 (proposed Aug. 18, 1981) (issuing a policy statement and proposals “to permit the voluntary disclosure of security ratings assigned by nationally recognized statistical rating organizations . . . in registration statements”).

506. *See Wyo. State Treasurer*, 650 F.3d at 183 n.11 (citing SEC Written Consents Rule, 17 C.F.R. § 230.436(g)(1) (2015)); Disclosure of Security Ratings in Registration Statements, 46 Fed. Reg. at 42,028 (explaining that under Rule 436(g), “the rating organization would not be subject to civil liability as an expert pursuant to Section 11 of the Securities Act”).

507. 17 C.F.R. § 230.436(g)(1).

508. Disclosure of Security Ratings in Registration Statements, 46 Fed. Reg. at 42,024.

509. *See* 17 C.F.R. § 230.436(g)(1); 15 U.S.C. § 77k(a) (2012); *see also* PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 82 (“SEC Rule 436, promulgated under the Securities Act, expressly shields NRSROs from liability under Section 11 of the Securities Act in connection with an offering of securities.”).

510. *See, e.g.,* Newby v. Enron Corp. (*In re Enron Corp. Sec., Derivative & “ERISA” Litig.*), 511 F. Supp. 2d 742, 816–17 (S.D. Tex. 2005) (“[T]here is even a statutory exemption under the Securities Act of 1933 for Section 11 claims against credit rating agencies . . . that have been designated ‘nationally recognized statistical rating agencies’ or ‘NRSROs.’”); *see also id.* at 817 n.77 (explaining that “[r]ule 436(g)(1) of the Securities Act of 1933, 17 C.F.R. § 230.436(g)(1) provides for exemption of liability” with respect to the credit ratings issued by an NRSRO included in a registration statement).

511. *Id.* at 815–17 & n.77.

512. *Id.* (acknowledging “the absence of authority to impose liability” with respect to the credit rating agencies).

fairs, the staff noted that the liability of the credit rating agencies “traditionally has been limited both by regulatory exemptions and First Amendment protections” provided by reviewing courts.⁵¹³

C. Accountability and Elimination of the Regulatory Exemption

However, in the Dodd–Frank Act, Congress found that credit ratings have “systemic importance.”⁵¹⁴ The investing public, including both institutional and individual investors as well as financial regulators, rely on credit ratings.⁵¹⁵ Moreover, the credit rating agencies occupy a significant role in the capital markets by promoting confidence in the markets, facilitating the growth in capital, and furthering economic efficiency.⁵¹⁶ Thus, the functioning and accuracy of the rating agencies “are matters of national public interest.”⁵¹⁷

Congress further found that credit rating agencies occupy “a critical ‘gatekeeper’ role” in the market for debt securities.⁵¹⁸ This role is “functionally similar” to the role of other “financial ‘gatekeepers’” that include the auditors who prepare a company’s financial statements and the security analysts who occupy a role in the equity markets that is very comparable to the role of the rating agencies in the debt markets.⁵¹⁹ Credit rating agencies and security analysts analyze and evaluate the relative quality of the securities in their respective markets for the benefit of clients.⁵²⁰ Thus, the issuance of a credit rating is “fundamentally commercial in character” akin to the services other “financial ‘gatekeepers’” provide.⁵²¹ Accordingly, Congress found that credit rating agencies, including NRSROs, “*should be subject to the same standards of liability and oversight*” that are applicable to securities analysts, investment bankers, and auditors.⁵²²

In particular, Congress found that the credit ratings assigned to structured securities, such as collateralized debt obligations, were “inaccurate.”⁵²³ Moreover, the “inaccuracy” of these credit ratings “contribut-

513. ROLE & FUNCTION, *supra* note 2, at 17–18 (citing PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 90 (“It is difficult not to wonder whether lack of accountability—the agencies’ practical immunity to lawsuits and non-existent regulatory oversight—is a major problem.”)).

514. Dodd–Frank Act, Pub. L. No. 111-203, § 931(1), 124 Stat. 1376, 1872 (2010).

515. *Id.*

516. *Id.* (“[C]redit rating agencies are central to capital formation, investor confidence, and the efficient performance of the United States economy.”).

517. *Id.*

518. *Id.* § 931(2).

519. *Id.* § 931(2)–(3).

520. *Id.*

521. *Id.* § 931(3).

522. *Id.* (emphasis added).

523. *Id.* § 931(5) (“In the recent financial crisis, the ratings on structured financial products have proven to be inaccurate.”); *see also* Curry, Remarks Before the American Securitization Forum, *supra* note 141, at 2 (noting the “flawed credit ratings” assigned to mortgage-backed securities “suggest[ed] that the mortgage securities in question were as safe as investment-grade corporate bonds”); Pfingraff, Remarks Before the Risk Magazine Credit Risk Conference, *supra* note 20, at 2

ed significantly” to the failure of investors to appropriately manage the risks of these highly complex structured securities; these investors included financial institutions such as banks that relied on these inaccurate ratings in their investment decisions.⁵²⁴ Thus, Congress determined that the credit rating agencies should be subject to “increased accountability.”⁵²⁵

In accordance with its mandate, Congress attempted to increase the accountability of the credit rating agencies by providing that, in a private action, “[t]he enforcement and penalty provisions of [the securities laws] shall apply to statements made by a credit rating agency in the same manner and to the same extent as such provisions apply to . . . a registered public accounting firm or a securities analyst.”⁵²⁶ Thus, Congress determined that credit rating agencies should be held accountable for their statements to the same extent, and in the same manner, as accountants and securities analysts.⁵²⁷ Moreover, any such statements made by a credit rating agency will not be considered “forward-looking statements” under the safe harbor rules of Section 21E of the Securities Exchange Act.⁵²⁸ Thus, the credit rating agencies cannot use this safe harbor to avoid liability for false or misleading statements.⁵²⁹

With the intention of providing meaningful reform, Congress concluded that Rule 436(g), which shielded the credit rating agencies

(stating the proposition that credit rating agencies “mis-rate[d] tens of billions of subprime securitizations and their derivative [collateralized debt obligations]”).

524. See Dodd–Frank Act § 931(5) (“[T]he mismanagement of risks by financial institutions and investors . . . in turn adversely impacted the health of the economy in the United States and around the world.”); see also TESTIMONY OF JOHN WALSH, *supra* note 21, at attachment A, 2 (“Issues surrounding credit ratings were a significant factor in market overconfidence that contributed to subsequent losses in the markets for mortgage-backed securities in 2008-2009.”); Curry, Remarks Before the American Securitization Forum, *supra* note 141, at 2 (“[I]nvestors . . . placed undue reliance on flawed credit ratings . . .”); Letter from Mary Frances Monroe, Vice President, Office of Regulatory Policy, to Office of the Comptroller of the Currency et al., at 1 (Oct. 25, 2010), http://www.federalreserve.gov/SECRES/2010/November/20101104/R-1391R-1391_102510_54036_533969644112_1.pdf (recognizing “that inadequacies in the issuance and use of credit ratings contributed to recent financial disruptions in the U.S. markets”).

525. Dodd–Frank Act § 931(5).

526. 15 U.S.C. § 78o-7(m)(1) (2012). The Dodd–Frank Act further provides that, with respect to any state of mind that is required in a particular action, it is sufficient to plead facts that provide “a strong inference” that the rating agency “knowingly or recklessly failed” to perform a “reasonable investigation” of the facts that it relied upon in evaluating the credit risk of the security or to obtain from other sources a “reasonable verification” of the facts. *Id.* § 78u-4(b)(2)(A)–(B). Thus, in a private suit against a credit rating agency, a plaintiff will not need to plead scienter in any cause of action under the securities laws that otherwise would require this higher level of pleading, such as a fraud action under Section 10(b) of the Securities Exchange Act and Rule 10b-5. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976) (finding an allegation of scienter is required in a private cause of action under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 and defining scienter as the “intent to deceive, manipulate, or defraud”).

527. See 15 U.S.C. § 78o-7(m)(1).

528. See *id.*; see also *id.* § 78u-5(c), (i)(1)(C) (providing a safe harbor for “forward-looking statement” defined *inter alia* as “a statement of future economic performance”).

529. See 15 U.S.C. § 78o-7(m)(1); see also *id.* § 78u-5(c)(1).

from liability, would no longer have any “force or effect.”⁵³⁰ By repealing the Rule 436(g) exemption, Congress provided authority to hold the credit rating agencies liable under Section 11 of the Securities Act of 1933 for false or misleading credit ratings contained in a registration statement.⁵³¹ Congress’s repeal of Rule 436(g) became effective July 22, 2010.⁵³²

D. Reestablishment of the Regulatory Shield

On the same day that the repeal of Rule 436(g) went into effect, the Commission’s Division of Corporation Finance issued a no-action letter⁵³³ regarding the disclosure requirements in a prospectus that forms part of a registration statement for the offering of asset-backed securities.⁵³⁴ The Commission’s asset-backed securities rule known as Regulation AB requires the issuer of asset-backed securities to disclose whether a sale or issuance of such “securities is conditioned on the assignment of a rating by one or more rating agencies.”⁵³⁵ If the sale or issuance of an asset-backed security is conditioned on such assignment of a credit rating, then Regulation AB requires the issuer to disclose the identity of every credit rating agency that has provided a rating as well as the minimum credit rating necessary for the sale or issuance of the asset-backed securities.⁵³⁶ Regulation AB also requires the issuer to explain any arrangements for the credit rating to be monitored during the period in which the securities are outstanding.⁵³⁷

530. Dodd–Frank Act § 939(G) (“Rule 436(g), promulgated by the Securities and Exchange Commission under the Securities Act of 1933, shall have no force or effect.”); *see also* Wyo. State Treasurer v. Moody’s Inv’rs Serv., Inc. (*In re* Lehman Bros. Mortg.-Backed Sec. Litig.), 650 F.3d 167, 183 n.11 (2d Cir. 2011) (noting the Dodd-Frank Act “recently nullified” Rule 436(g)).

531. *See* Act § 939(G); 15 U.S.C. § 77k(a); *see also* Letter from Martha Coakley, Mass. Att’y Gen., to Mary Schapiro, Chairman, Sec. & Exch. Comm’n 1 (Mar. 1, 2011) [hereinafter Coakley Letter], <http://www.mass.gov/ago/docs/press/2011/2011-03-07-sec-letter-attachment1.pdf> (“We believe that Congress rescinded the rating agencies’ exemption from liability with the expectation that this would result in rating agency liability.”).

532. Dodd–Frank Act § 4 (“Except as otherwise specifically provided in this Act or the amendments made by this Act, . . . this Act and such amendments shall take effect 1 day after the date of enactment of this Act.”). The date of enactment of the Dodd–Frank Act was July 21, 2010; thus, the effective date of the repeal of Rule 436(g) was July 22, 2010. *See* Dodd–Frank Act pmbl..

533. *No-Action Letters*, U.S. SEC. & EXCH. COMM’N (Sept. 21, 2012), <http://www.sec.gov/answers/noaction.htm> (“An individual or entity who is not certain whether a particular product, service, or action would constitute a violation of the federal securities law may request a ‘no-action’ letter from the SEC staff. Most no-action letters describe the request, analyze the particular facts and circumstances involved, discuss applicable laws and rules, and, if the staff grants the request for no action, conclude[] that the SEC staff would not recommend that the Commission take enforcement action”); *see also* Coakley Letter, *supra* note 531, at 1–2 (“Legally, no-action letters are expressions of enforcement policy. In practice, they are public statements by SEC staff often taken to imply legal interpretations and administrative action they do not contain.”).

534. SEC No-Action Letter, *supra* note 19, at *2.

535. SEC Asset-Back Securities Rules, 17 C.F.R. § 229.1103(a)(9) (2015); *see also* 17 C.F.R. § 229.1120 (mandating this disclosure requirement is applicable “whether or not” the rating agencies are NRSROs); SEC No-Action Letter, *supra* note 19, at *2.

536. 17 C.F.R. § 229.1103(a)(9); 17 C.F.R. § 229.1120; SEC No-Action Letter, *supra* note 19, at *1–2.

537. 17 C.F.R. § 229.1120; SEC No-Action Letter, *supra* note 19, at *1–2.

The repeal of Rule 436(g) results in the need to obtain the consent of the credit rating agency to list its name “as an expert” in order to disclose the agency’s credit rating in the registration statement.⁵³⁸ However, the credit rating agencies refused to provide the necessary consent.⁵³⁹ In response, the Division of Corporation Finance issued the July 22, 2010, no-action letter indicating that it “will not recommend” bringing an enforcement action against an issuer of asset-backed securities if the disclosure regarding credit ratings required under Regulation AB is not included in the registration statement.⁵⁴⁰ This no-action letter was issued for the purpose of “facilitat[ing] a transition for asset-backed issuers” and was initially scheduled to expire on January 24, 2011.⁵⁴¹

Nevertheless, on November 23, 2010, the Division of Corporation Finance issued a second no-action letter regarding the disclosure requirements under Regulation AB with respect to credit ratings.⁵⁴² In this second no-action letter, the Division of Corporation Finance extended the no-action status regarding the omission of credit rating disclosures required under Regulation AB indefinitely.⁵⁴³ The Division of Corporation Finance cited to the continued unwillingness of the credit rating agencies to provide the needed consent and stated that an extension of the initial no-action letter is necessary in order to permit asset-backed securities to continue to be offered as registered securities.⁵⁴⁴ In balancing the benefits to investors achieved through the registration of asset-backed securities under the Securities Act with the omission of the credit rating information required under Regulation AB, the Division of Corporation Finance decided to extend the initial no-action letter and permit registered offerings of asset-backed securities without the required

538. SEC No-Action Letter, *supra* note 19, at *1–2; *see also* Wyo. State Treasurer v. Moody’s Inv’rs Serv., Inc. (*In re* Lehman Bros. Mortg.-Backed Sec. Litig.), 650 F.3d 167, 183 n.11 (2d Cir. 2011) (“[A]ny potential ‘expert’ liability requires satisfaction of the naming and consent requirements.” (citing 15 U.S.C. § 77k(a)(4) (2012))).

539. *See* SEC No-Action Letter, *supra* note 19, at *1–2.

540. *Id.* at *2; *see also* 17 C.F.R. § 229.1103(a)(9) (providing disclosure requirements required under Regulation AB with respect to credit ratings); 17 C.F.R. § 229.1120 (providing additional disclosure requirements required under Regulation AB regarding credit ratings).

541. SEC No-Action Letter, *supra* note 19, at *2 (“This no-action position will expire with respect to any registered offerings of asset-backed securities commencing with an initial bona fide offer on or after January 24, 2011.”).

542. *Id.* at *1.

543. *Id.* at *1 (“Pending further notice, . . . [an enforcement action will not be recommended] if an asset-backed issuer . . . omits the ratings disclosure required by Item 1103(a)(9) and 1102 of Regulation AB from a prospectus that is part of a registration statement relating to an offering of asset-backed securities.”); *see also* Coakley Letter, *supra* note 531, at 6 (referring to the Nov. 23, 2010 No-Action Letter extending “the no-action position indefinitely”).

544. SEC No-Action Letter, *supra* note 19, at *1 (“[W]ithout an extension of our no-action position, offerings of asset-backed securities would not be able to be conducted on a registered basis.”). The Division of Corporation Finance also stated that its decision to extend the initial no-action letter was further necessitated by the time needed to accomplish the regulatory initiatives mandated by the Dodd–Frank Act. *Id.*

disclosures with respect to credit ratings.⁵⁴⁵ Thus, with the use of an informal no-action letter,⁵⁴⁶ the Commission continued to shield the credit rating agencies from liability in direct contravention of the express intent of Congress and the reforms enacted under the Dodd–Frank Act.⁵⁴⁷

In the statute, Congress clearly expressed its intent to subject the credit rating agencies to the penalty and enforcement provisions of the securities laws to the same extent and in the same manner as accountants and securities analysts.⁵⁴⁸ Pursuant to this statutory provision and the repeal of Rule 436(g), credit rating agencies would be subject to Section 11 liability.⁵⁴⁹ However, as a result of the no-action letter issued by the Commission, credit rating agencies are not subject to Section 11 liability, and therefore, rating agencies are not subject to the enforcement and penalty provisions of the securities laws to the same extent and in the same manner as accountants and securities analysts.⁵⁵⁰ Thus, with the issuance of the no-action letter, the Commission has nullified the express intent of Congress.

The credit rating agencies should be subject to Section 11 civil liability for false or misleading statements in a prospectus. As noted by the courts, experts under Section 11 may be found “liable for mere negligence.”⁵⁵¹ However, the currently in force no-action letter continues the

545. See *id.* (“Given the . . . benefits to investor protection resulting from Securities Act registration, the Division is extending the relief issued . . . by letter dated July 22, 2010.”). The Division of Corporation Finance also referred to the “current state of uncertainty” in the market for asset-backed securities as an additional reason for extending the initial no-action letter. *Id.*

546. See Procedures Utilized by the Division of Corp. Fin. for Rendering Informal Advice, Securities Act Release No. 6235, 21 SEC Docket 315, 320–21 & n.4 (Nov. 11, 1980), <http://www.sec.gov/rules/interp/33-6253.pdf> (explaining that the Division of Corporation Finance may issue no-action letters in response “to requests for informal advice concerning the application of the federal securities laws administered by it. . . . [M]any members of the public have come to rely on the informal advice provided in this manner. . . . Such letters, however, set forth staff positions only and do not constitute an official expression of the Commission’s views.” (quoting 17 C.F.R. § 202.1(d) (2015))).

547. See SEC No-Action Letter, *supra* note 19, at *1–2; Coakley Letter, *supra* note 531, at 1, 10 (“[W]e believe the SEC’s decision to take no action in this area undermines recent Congressional reform and is inconsistent with Congressional intent. . . . In the Dodd–Frank Act, the clear intent of Congress was to provide investors with a much-needed requirement of rating agency competence. We are concerned that the SEC has defeated this intent.”); see also Dodd–Frank Act, Pub. L. No. 111-203, § 931(C), 124 Stat. 1376, 1872 (2010) (finding the credit rating agencies should be held to the same standards of accountability and liability as other “financial ‘gatekeepers’”); Dodd–Frank Act § 939(G) (repealing the Commission’s Rule 436(g) exemption from Section 11 liability for credit rating agencies).

548. See 15 U.S.C. § 78o-7(m) (2012).

549. *Id.*; *id.* § 77k(a) (providing for liability for accountants, appraisers, and engineers as well as any other professional who has given consent to be named as a preparer or certifier of any portion of the registration statement or of “any report or valuation which is used in connection with the registration statement”); Dodd–Frank Act § 939(G).

550. See 15 U.S.C. § 77k(a); SEC No-Action Letter, *supra* note 19, at *1–2.

551. N.J. Carpenters Vacation Fund v. Royal Bank of Scot. Grp., PLC, 720 F. Supp. 2d 254, 268 (S.D.N.Y. 2010) (quoting *Lindsay v. Morgan Stanley (In re Morgan Stanley Info. Fund Sec. Litig.)*, 592 F.3d 347, 359 (2d Cir. 2010) (explaining that with the exception of issuers, “potential defendants under section[] 11 . . . may be held liable for mere negligence.”)).

practice of “officially shield[ing]” the credit rating agencies from all liability under the securities laws except for fraud.⁵⁵² Therefore, consistent with the First Amendment protections provided by the courts, this regulatory exemption continues to provide the credit rating agencies with the ability to avoid liability for negligently prepared credit ratings.⁵⁵³

E. Credit Ratings and Section 11

Alas, even if the Commission were to rescind its no-action letter,⁵⁵⁴ and even if a credit rating agency were to provide the necessary consent to list its name as an expert in the registration statement,⁵⁵⁵ the likelihood of liability under Section 11 is uncertain. At least one court has stated that a credit rating would not be actionable under Section 11.⁵⁵⁶ According to the Southern District of New York, “credit ratings . . . are statements of opinion, as they are predictions of future value.”⁵⁵⁷ In dismissing claims against the credit rating agencies for underwriter liability, the court found that such statements of opinion are not actionable under Section 11 of the Securities Act.⁵⁵⁸ However, “the Supreme Court has ‘rejected the argument that statements containing . . . opinions or beliefs . . . could not be a basis for’ an action for securities fraud.”⁵⁵⁹ As acknowledged by the Southern District of New York, a statement of opinion is actionable if the opinion is “objectively untrue” and “not believed by the speaker.”⁵⁶⁰ Other courts have similarly found that state-

552. See PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 82; SEC No-Action Letter, *supra* note 19, at *1–2; see also *Wyo. State Treasurer v. Moody’s Inv’rs Serv., Inc. (In re Lehman Bros. Mortg.-Backed Sec. Litig.)*, 650 F.3d 167, 185 (2d Cir. 2011) (explaining that plaintiffs “may bring securities fraud claims against the [rating] [a]gencies pursuant to § 10(b) of the Securities Exchange Act of 1934 . . . although liability under that section is . . . subject to scienter, reliance, and loss causation requirements not applicable to § 11 claims”). Notably, the Dodd-Frank Act permits plaintiffs to avoid pleading scienter in any action that has a state of mind requirement, such as a fraud action under Section 10(b). See 15 U.S.C. § 78u-4(b)(2).

553. PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 82 (noting the regulatory exemption “means that NRSROs are not held even to a negligence standard of care for their work”); see also discussion *supra* Section I.A.3.b.

554. See *supra* Section II.D.

555. See 15 U.S.C. § 77k(a).

556. See *N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 271–72.

557. *Id.* at 271; see also *Ohio Police & Fire Pension Fund v. Standard & Poor’s Fin. Servs. LLC*, 700 F.3d 829, 842 (6th Cir. 2012) (noting that credit ratings are “predictive opinion[s]” (quoting *Compuware Corp. v. Moody’s Inv’rs Servs., Inc.*, 499 F.3d 520, 529 (6th Cir. 2007))).

558. *N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 271 (“[A]ccurate statements of historical fact and statements of opinion, including statements of hope, opinion, or belief about . . . future performance . . . are non-actionable’ under Section 11” (first and second alterations in original) (quoting *Panther Partners, Inc. v. Ikanos Commc’ns, Inc.*, 538 F. Supp. 2d 662, 668 (S.D.N.Y. 2008))); see also *Ohio Police & Fire Pension Fund*, 700 F.3d at 842 (dismissing claims against credit rating agencies for negligent misrepresentation because credit ratings are opinions about the future and, thus, “are not actionable misrepresentations”); *Anschutz Corp. v. Merrill Lynch & Co. (In re Merrill Lynch Auction Rate Sec. Litig.)*, No. 09 MD 2030, 2011 WL 536437, at *12–13 (S.D.N.Y. Feb. 9, 2011) (dismissing negligent misrepresentation claims against credit rating agencies because “[c]redit ratings are statements of opinion” and, therefore, not actionable).

559. *In re Nat’l Century Fin. Enters., Inc., Inv. Litig.*, 580 F. Supp. 2d 630, 639 (S.D. Ohio 2008) (quoting *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993)).

560. *N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 271–72 (quoting *In re AOL Time Warner, Inc. Sec. & “ERISA” Litig.*, 381 F. Supp. 2d 192, 243 (S.D.N.Y. 2004)); see also *Ohio*

ments of opinion are actionable under the securities laws “if the speaker does not believe the opinion and the opinion is not factually well-grounded.”⁵⁶¹ The Southern District of New York did not address whether the agencies believed the ratings; thus, it appears the court assumed that credit ratings could not be “objectively untrue.”⁵⁶²

According to the same court in a separate case, “[T]he fact that the [r]ating [a]gencies may have given higher—but not untruthful—ratings to retain business does not render the opinions of the [r]ating [a]gencies actionable.”⁵⁶³ This statement simply defies logic. If a credit rating agency gave a higher rating in order to retain business, then the rating cannot be truthful because it was not the rating the agency would have given in the absence of the monetary incentive to retain the business. Therefore, such a rating is not only “objectively untrue” but also “not believed by the speaker.”⁵⁶⁴ Such higher rating was not factually well-grounded, and the rating agency did not truly believe the rating when the agency issued it.⁵⁶⁵

It is uncertain whether courts would take a different view if violations of the expert prong of Section 11 (rather than the underwriter prong) were alleged against the credit rating agencies.⁵⁶⁶ Notably, the Second Circuit has stated that the rating issued by a credit rating agency “is the sort of expert opinion classically evaluated under the ‘expert’ provision of [Section] 11.”⁵⁶⁷ Moreover, in a case involving Section 11 claims against the underwriters of mortgage-backed securities, the Northern District of California found that statements made by executives of Moody’s and Standard & Poor’s—admitting “they were aware at the time the subject ratings were made that the agencies’ rating models were outdated”—were sufficient to find an “actionable misstatement” con-

Police & Fire Pension Fund, 700 F.3d at 843 (dismissing negligent misrepresentation claims because the plaintiff “fail[ed] to allege that the . . . [rating] [a]gencies did not believe their ratings” (first and second alterations in original) (quoting *Ohio Police & Fire Pension Fund v. Standard & Poor’s Fin. Servs., LLC*, 813 F. Supp. 2d 871, 883 (S.D. Ohio 2011))); *Merrill Lynch & Co.*, 2011 WL 536437, at *12 (“There is an exception to the non-actionable opinion rule in cases where the opinion holder knew the opinion was false or did not hold the opinion expressed at the time it was expressed.”).

561. *Nat’l Century Fin. Enters.*, 580 F. Supp. 2d at 639 (quoting *Mayer*, 988 F.2d at 639 (“[S]tatements which contain the speaker’s opinion are actionable under Section 10(b) of the Securities Exchange Act if the speaker does not believe the opinion and the opinion is not factually well-grounded.”)).

562. *See N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 271–72 (quoting *AOL Time Warner*, 381 F. Supp. 2d at 243).

563. *Merrill Lynch & Co.*, 2011 WL 536437, at *12 (dismissing claims for negligent misrepresentation).

564. *See supra* note 560 and accompanying text.

565. *Cf. Mayer*, 988 F.2d at 639 (“Material statements which contain the speaker’s opinion are actionable under Section 10(b) of the Securities Exchange Act if the speaker does not believe the opinion and the opinion is not factually well-grounded.”).

566. *See* 15 U.S.C. § 77k(a) (2012).

567. *Wyo. State Treasurer v. Moody’s Inv’rs Serv., Inc. (In re Lehman Bros. Mortg.-Backed Sec. Litig.)*, 650 F.3d 167, 183 & n.11 (2d Cir. 2011) (citing 15 U.S.C. § 77k(a)) (“[T]he issuance of a credit rating ostensibly falls within the ‘expert’ category of potential liability under § 11.”).

cerning the process of rating the securities.⁵⁶⁸ Furthermore, in a case concerning alleged violations of Section 10(b) of the Securities Exchange Act, the Southern District of Ohio found that credit ratings can be considered “not factually well-grounded.”⁵⁶⁹

If credit ratings were not actionable, as the Southern District of New York found,⁵⁷⁰ then there would be no basis for the Second Circuit’s observation regarding the applicability of the expert provision of Section 11 specifically to credit ratings.⁵⁷¹ Moreover, there would be no reason for the Commission to have issued the no-action letter permitting the continued omission of required credit rating disclosures in a registration statement involving asset-backed securities.⁵⁷² Significantly, the Dodd–Frank Act provides that any statements made by a credit rating agency will not be considered “forward-looking statements” under the safe harbor rules of Section 21E of the Securities Exchange Act.⁵⁷³ Therefore, Congress has determined that statements made by a credit rating agency should not be shielded from liability based on the notion that such statements are “predictions of future value” and, thus, non-actionable statements of opinion.⁵⁷⁴

In any event, since the Commission has not made any indication that its no-action letter will be rescinded, and (without a change in the law) a credit rating agency will likely never provide the necessary consent to list its name as an expert in the registration statement, we will perhaps never know whether the courts would ultimately find the credit rating agencies liable for false or misleading statements under the expert prong of Section 11 of the Securities Act.

III. CONFLICTS OF INTEREST

This part will examine the conflicts of interest inherent in the issuer-pays model of the credit rating agencies as well as the reforms provided by the Dodd–Frank Act and the Commission’s implementing rules. This part will then consider whether these reforms effect any real change.

568. See *In re Wells Fargo Mortg.-Backed Certificates Litig.*, 712 F. Supp. 2d 958, 973 (N.D. Cal. 2010).

569. *In re Nat’l Century Fin. Enters., Inc., Inv. Litig.*, 580 F. Supp. 2d 630, 639 (S.D. Ohio 2008) (finding the plaintiff sufficiently pled that the ratings issued by the agencies “were not factually well-grounded”).

570. See *supra* notes 556–58 and accompanying text.

571. See *supra* note 567 and accompanying text.

572. See discussion *supra* Section II.D.

573. See 15 U.S.C. § 78o-7(m) (2012); see also *id.* § 78u-5(c)(1), (i)(1)(C) (2012) (providing a safe harbor for “forward-looking statement” defined *inter alia* as “a statement of future economic performance”).

574. *N.J. Carpenters Vacation Fund v. Royal Bank of Scot. Grp., PLC*, 720 F. Supp. 2d 254, 271 (S.D.N.Y. 2010); see also 15 U.S.C. § 78o-7(m)(1).

A. Issuer-Pays Rating Agency Model

The credit rating agencies have been blamed for being a major cause of the financial crisis by assigning inaccurate ratings to structured securities such as mortgage-backed securities and collateralized debt obligations.⁵⁷⁵ Conflicts of interest that are inherent in the “issuer-pays” rating agency model appear to have precipitated these inaccurate ratings.⁵⁷⁶ Under the issuer-pays model, the rating agencies have a financial relationship with the investment banks that were the issuers of these structured securities.⁵⁷⁷ As part of this relationship, the issuers directly paid the credit rating agencies to assign a credit rating to the debt issue.⁵⁷⁸ As a result, monetary incentives and “pressure to improve the rating” plague the issuer-pays model.⁵⁷⁹

In addition, many investment banks would shop around for a rating.⁵⁸⁰ Thus, if a credit rating agency failed to provide a rating that was high enough, then that rating agency would not receive the business.⁵⁸¹ As a result, the rating agencies would begin with the intention to assign a

575. See *supra* notes 20–21, 523–24 and accompanying text.

576. See Schwarcz, *supra* note 122, at 15 (noting the “conflict of interest inherent in the way that rating agencies are paid”); see also Patrick Kingsley, *How Credit Ratings Agencies Rule the World*, GUARDIAN (Feb. 15, 2012, 3:00 PM), <http://www.theguardian.com/business/2012/feb/15/credit-ratings-agencies-moodys> (explaining that if a company wishes to be rated, it “must pay an agency between \$1,500 and \$2,500,000 for the privilege . . . [and] [i]n theory, this creates a conflict of interest, because it gives the agency an incentive to give the companies the rating they want”); Timothy W. Martin, *SEC Is Gearing Up to Focus on Ratings Firms*, WALL ST. J. (June 25, 2014, 1:29 P.M.), <http://online.wsj.com/articles/sec-is-gearing-up-to-focus-on-ratings-firms-1403651968> (noting Senator Al Franken and others have stated that the issuer-pays model “gives [credit rating] firms an incentive to compromise their criteria in order to win business”).

577. See Martin, *supra* note 576 (explaining that under the business model employed by the credit rating agencies “[i]ssuers of bond deals pay ratings firms to grade their deals”).

578. CARNELL ET AL., *supra* note 317, at 372–73 (“Most credit rating agencies, particularly Moody’s, Standard & Poor’s . . . and Fitch, earn money by charging issuers a fee in exchange for assigning a credit rating to the debt obligations marketed by the issuer.”); Schwarcz, *supra* note 122, at 15 (“Rating agencies are virtually always paid their fee by the issuer of securities applying for the rating.”); see also *N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 272 (“[T]he rating agencies were paid by the [issuing] investment banks that hired them . . .”).

579. Schwarcz, *supra* note 122, at 15 (noting the issuer-pays model “raises the possibility that the issuer will use, or the rating agency will perceive, monetary pressure to improve the rating”); see also *Ohio Police & Fire Pension Fund v. Standard & Poor’s Fin. Servs. LLC*, 700 F.3d 829, 834 (6th Cir. 2012) (alleging that “between 2005 and 2008, this ‘issuer pays’ system compromised the integrity of the credit rating process”); *N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 259 (“[T]he shopping process allowed [issuers] to pressure rating agencies to provide high ratings . . . in order to receive the profitable rating business.”).

580. See *Wyo. State Treasurer v. Moody’s Inv’rs Serv., Inc. (In re Lehman Bros. Mortg.-Backed Sec. Litig.)*, 650 F.3d 167, 172 (2d Cir. 2011) (“[I]ssuing banks engaged particular [r]ating [a]gencies through a ‘ratings shopping’ process, whereby the [r]ating [a]gencies reviewed loan-level data for a mortgage pool and provided preliminary ratings. The banks then negotiated with the [r]ating [a]gencies regarding the . . . percentage of AAA [securities] for each mortgage pool.” (citation omitted)); *N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 259 (alleging the issuer “engage[d] in ‘ratings shopping’ between the rating agencies”).

581. *Wyo. State Treasurer*, 650 F.3d at 172 (noting the issuer would “choos[e] the agency offering the highest percentage of AAA certificates”); *N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 259 (explaining the issuer “would ultimately select the agency who provided the highest rating”).

high rating to the security and work with the investment bank to achieve a structure that would seemingly support that rating.⁵⁸² Moreover, the credit rating agency would receive its fee only “if the desired rating issued.”⁵⁸³ Thus, under the issuer-pays model, the rating agencies had a patent monetary incentive to provide high ratings in order to earn their fees.⁵⁸⁴ Presumably, a higher rating also would have a greater likelihood of ensuring that the investment bank would ask the rating agency to perform additional ratings work.

Notably, Standard and Poor’s recently settled a lawsuit with the Justice Department based on allegations that “the rating [agency] had defrauded investors by issuing inflated ratings in the years preceding the financial crisis.”⁵⁸⁵ Moreover, the Government alleged that the rating agency “falsely represented” that the ratings it issued were “objective and uninfluenced by the firm’s relationship with investment banks” when in fact the rating agency was influenced by the “desire to boost revenue and profits by winning business.”⁵⁸⁶

Moreover, the rating agencies were using “flawed models” to assign ratings to structured securities, including subprime mortgage-backed securities and collateralized debt obligations.⁵⁸⁷ According to the Office of the Comptroller of the Currency—the regulator of national banks and

582. See *Wyo. State Treasurer*, 650 F.3d at 172 (noting the process described by an officer of Moody’s as first “start[ing] with a rating and build[ing] a deal around a rating”).

583. *Ohio Police & Fire Pension Fund*, 700 F.3d at 834, 836 (“[T]he [credit rating agencies’] entitlement to a fee vested when their ratings issued.”); see also *Anschutz Corp. v. Merrill Lynch & Co.*, 785 F. Supp. 2d 799, 809 (N.D. Cal. 2011) (alleging “that the securities could not issue and the credit rating agencies would not get paid unless the [a]gencies provided a pre-determined AAA rating for the securities”); *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 651 F. Supp. 2d 155, 167 (S.D.N.Y. 2009) (explaining that compensation of the credit rating agencies “was contingent upon the receipt of desired ratings for the [securities], and only in the event that the transaction closed with those ratings”).

584. See *Ohio Police & Fire Pension Fund*, 700 F.3d at 834 (“At any point in this process, the arranger could reject the [credit rating] [a]gency’s proposed rating.”); *Anschutz Corp.*, 785 F. Supp. 2d at 809 (“[A]n alleged conflict of interest developed such that the [r]ating [a]gencies abandoned their independence and relaxed their rating criteria and procedures in order to secure the business of the investment banks in rating [highly lucrative structured] securities.”); see also *supra* notes 576–79 and accompanying text.

585. John Kell, *S&P Will Pay Nearly \$1.4 Billion to Settle Financial Crisis Litigation*, FORTUNE (Feb. 3, 2015, 8:48 AM), <http://fortune.com/2015/02/03/standard-poors-financial-crisis/> (explaining the settlement will be paid to the Justice Department as well as to nineteen states and the District of Columbia).

586. *Id.*

587. Pfingraff, Remarks Before the Risk Magazine Credit Risk Conference, *supra* note 20, at 2 (explaining the view that rating agencies were using “flawed models” to rate mortgage-backed securities and collateralized debt obligations backed by subprime debt); see also *In re Wells Fargo Mortg.-Backed Certificates Litig.*, 712 F. Supp. 2d 958, 973 (N.D. Cal. 2010) (finding the statements made by executives of Moody’s and Standard & Poor’s admitting “they were aware at the time the subject ratings were made that the agencies’ rating models were outdated” was sufficient to find an “actionable misstatement” concerning the process of rating the mortgage-backed securities); *N.J. Carpenters Vacation Fund v. Royal Bank of Scot. Grp., PLC*, 720 F. Supp. 2d 254, 270–71 (S.D.N.Y. 2010) (“[T]he models relied on to rate the [mortgage-backed securities] were outdated and unable to accurately assess their risk . . .”).

federal thrifts⁵⁸⁸—the credit rating agencies’ excessive reliance on the fees earned through ratings of securitized products may have played a decisive role in the agencies’ continued employment of these “fundamentally flawed credit models.”⁵⁸⁹ Thus, conflicts of interest led the credit rating agencies to turn a blind eye to the sustained use of flawed credit models and ultimately resulted in the assignment of inaccurate ratings for “tens of billions” of mortgage-backed securities and collateralized debt obligations secured by subprime debt.⁵⁹⁰

B. Dodd–Frank Act Reforms

In the Dodd–Frank Act, Congress addressed certain conflicts of interest with respect to credit rating agencies.⁵⁹¹ For example, the statute grants the Commission the authority to suspend or revoke an NRSRO’s registration with regard to a particular class of securities if the Commission determines that the NRSRO “does not have adequate financial and managerial resources to consistently produce credit ratings with integrity.”⁵⁹²

The statute also requires the Commission to issue rules “to prevent the sales and marketing considerations . . . from influencing the production of ratings” issued by the NRSRO.⁵⁹³ The statute further provides for the suspension or revocation of an NRSRO’s registration if the Commission determines that the NRSRO has violated a rule issued pursuant to “this subsection” and that violation affected a credit rating.⁵⁹⁴

Additionally, the statute contains a “[l]ook-back requirement” whereby an NRSRO is required to establish policies and procedures to ensure that, if any employee of an entity that is the subject of a credit rating had been employed by the NRSRO and participated in the determination of the entity’s credit rating during the one-year period prior to the date when any action was taken regarding the credit rating, then the

588. See 12 U.S.C. §§ 1–16 (2012) (granting the Comptroller of the Currency the authority to regulate national banks); see also 12 U.S.C. § 5412(b)(2)(B) (granting the Comptroller of the Currency the authority to regulate federal savings associations).

589. Pfinsgraff, Remarks Before the Risk Magazine Credit Risk Conference, *supra* note 20, at 2 (“Rating agencies had become overly reliant on securitization fees which may have, in part, contributed to their failure to more quickly correct fundamentally flawed credit models.”); see also *Ohio Police & Fire Pension Fund*, 700 F.3d at 834 (alleging that “the desire to attract business led the [a]gencies to lower their rating standards [by using] . . . older, more forgiving debt models over more up-to-date ones that might result in the rejection of an arranger’s proposed capital structure” (citation omitted)).

590. Pfinsgraff, Remarks Before the Risk Magazine Credit Risk Conference, *supra* note 20, at 2 (noting the proposition that credit rating agencies “mis-rate[d] tens of billions of subprime securitizations and their derivative [collateralized debt obligations]”).

591. See 15 U.S.C. § 78o-7(d)(2), (h)(3)–(4), (i)(2).

592. *Id.* § 78o-7(d)(2).

593. *Id.* § 78o-7(h)(3).

594. *Id.*

NRSRO must determine whether the employee had any conflicts of interest that influenced the rating and revise the rating if necessary.⁵⁹⁵

C. Credit Rating Agency Reform Rules of 2014

The Commission then issued rules to implement the conflicts of interest provisions of the Dodd–Frank Act regarding credit rating agencies.⁵⁹⁶ For example, with respect to the sales and marketing conflict, the Commission’s rule prohibits an NRSRO from assigning a credit rating when an employee who is involved in monitoring or determining the credit rating, or approving or developing methodologies or procedures for assigning the credit rating, also participates in the marketing or sales of the NRSRO (or an affiliate) or is influenced by marketing or sales factors.⁵⁹⁷ As stated by the Commission, this provision is an “absolute prohibition” of individuals involved in the sales and marketing efforts of a rating agency from also participating in any aspect of the credit rating function and vice versa.⁵⁹⁸ Moreover, with respect to the Commission’s authority to suspend or revoke an NRSRO’s registration if the Commission determines the NRSRO has violated a rule issued pursuant to “this subsection” and that violation affected a credit rating,⁵⁹⁹ the Commission interpreted the phrase “this subsection” to include any rules issued under Section 15E(h) of the Securities Exchange Act.⁶⁰⁰ This section of the Securities Exchange Act concerns the management of conflicts of interest involving NRSROs.⁶⁰¹

With respect to the “look-back requirement,” the Commission’s rule requires an NRSRO to “promptly determine” if any credit ratings identified in a “look-back review” to include the influence of a conflict of interest involving a former employee of the NRSRO need to be modified so that the rating “is solely a product of the documented procedures and methodologies” that the NRSRO uses to assign credit ratings and “is no longer influenced by a conflict of interest.”⁶⁰² Once the determination is made, the NRSRO must “[p]romptly publish” either a modified credit

595. *Id.* § 78o-7(h)(4). The statute further provides for a board of directors in which at least one half of the directors are independent of the NRSRO. *Id.* § 78o-7(t)(2).

596. *See* Nationally Recognized Statistical Rating Organizations, 79 Fed. Reg. 55,078, 55,108 (Sept. 15, 2014) (to be codified at 17 C.F.R. pts. 232, 240, 249 & 249b).

597. *Id.* (codified as 17 C.F.R. § 240.17g-5(c)(8)).

598. *Id.* (“In practice, the Commission believes the amendment will require an NRSRO to prohibit personnel that have any role in the determination of credit ratings or the development or modification of rating procedures or methodologies from having any role in sales and marketing activities. It also will require an NRSRO to prohibit personnel that have any role in sales and marketing activities from having any role in the determination of credit ratings or the development or modification of rating procedures or methodologies.”).

599. *See* 15 U.S.C. § 78o-7(h)(3).

600. Nationally Recognized Statistical Rating Organizations, 79 Fed. Reg. at 55,114 (codified at 17 C.F.R. § 240.17g-5(g)).

601. *See* 15 U.S.C. § 78o-7(h).

602. Nationally Recognized Statistical Rating Organizations, 79 Fed. Reg. at 55,117–21 (codified at 17 C.F.R. § 240.17g-8(c)(1)).

rating or an affirmation of the existing credit rating.⁶⁰³ In addition, the NRSRO must provide the users of its credit ratings with information concerning the reasons for its decision.⁶⁰⁴ Moreover, as the “look-back requirement” is contained in Section 15E(h) of the Securities Exchange Act, the Commission has the authority to suspend or revoke an NRSRO’s registration if the Commission determines that the NRSRO has violated this requirement.⁶⁰⁵

D. Do the Reforms Effect Any Real Change?

The reforms enacted by Congress and implemented by the Commission are certainly a step in the direction of reducing conflicts of interest in the business of a credit rating agency. However, while it is important to separate the marketing and sales function from the credit rating function⁶⁰⁶ to avoid a direct conflict of interest for individual employees, such separation is not enough to eliminate the conflicts of interest inherent in the issuer-pays model⁶⁰⁷ of the credit rating agencies. Although an individual employee who participates in determining the credit rating of a security will not be involved in the sales and marketing function of the rating agency, that individual is still an employee of the credit rating agency, which is hired and paid by the issuer of the security. While a direct conflict of interest may no longer be present, the inherent conflicts of interest cannot be avoided.

Prior to the financial crisis, the Credit Rating Agency Reform Act of 2006 provided the Commission the statutory authority to issue rules “to prohibit, or require the management and disclosure of, any conflicts of interest,” including those conflicts of interest associated with the practice of the issuer of the security compensating the NRSRO for the assignment of a credit rating.⁶⁰⁸ However, the Commission’s rules required the rating agency to do no more than disclose that the conflict exists and establish procedures and policies to manage the conflict.⁶⁰⁹ Considering the evidence of persistent conflicts of interest involving credit ratings that precipitated the financial crisis,⁶¹⁰ simply disclosing and attempting to manage these conflicts is not enough to eliminate the problem.

603. *Id.* at 55,121 (codified at 17 C.F.R. § 240.17g-8(c)(2)).

604. *Id.*

605. *See* 15 U.S.C. § 78o-7(h)(3)–(4); Nationally Recognized Statistical Rating Organizations, 79 Fed. Reg. at 55,114 (codified at 17 C.F.R. § 240.17g-8(c)).

606. *See supra* notes 597–98 and accompanying text.

607. *See supra* Section III.A.

608. Credit Rating Agency Reform Act of 2006, Pub. L. No. 109-291, § 4(a), 120 Stat. 1327, 1334 (2006) (codified as 15 U.S.C. § 78o-7(h)(2)).

609. 17 C.F.R. § 240.17g-5(a)(1)–(2) (2015).

610. *See supra* Section III.A.

CONCLUSION

This Article demonstrates how the courts and the regulators have afforded the credit rating agencies protections from liability.⁶¹¹ The courts have considered credit ratings to be opinions and applied the protections of the First Amendment to shield the credit rating agencies from liability in actions for fraudulent or negligently prepared ratings.⁶¹² However, credit ratings are not pure statements of opinion similar to a newspaper editorial or a statement of opinion regarding a political matter. Rather, credit ratings are fact-based opinions made by business professionals.⁶¹³ Thus, credit rating agencies should be subject to the same liability as other commercial enterprises.

Moreover, the Commission has provided credit rating agencies with regulatory protections by shielding the agencies from liability for false or misleading statements in a registration statement.⁶¹⁴ Despite the express intent of Congress to hold the credit rating agencies accountable,⁶¹⁵ the Commission has effectively nullified those intentions.⁶¹⁶ These legal and regulatory protections provided to the credit rating agencies are clearly misguided, even more so in light of the conflicts of interest inherent in the issuer-pays model of the rating agencies.⁶¹⁷

Accordingly, the courts should hold credit rating agencies liable for fraudulent or negligently prepared credit ratings that are false or misleading. Similarly, the Commission should honor the express intentions of Congress and hold the credit rating agencies liable for false or misleading statements in a registration statement. Finally, as long as the issuer-pays model remains the accepted standard of practice for the credit rating agencies, the inherent conflicts of interest endemic to this industry will continue to persist; thus, more is needed to eliminate the conflicts of interest inherent in the issuer-pays business model of the credit rating agencies.

611. *See supra* note 3 and accompanying text.

612. *See supra* notes 4, 12 and accompanying text; *see also supra* Section I.A.3.b.

613. *See supra* notes 9, 384–85 and accompanying text.

614. *See supra* notes 13, 505–09 and accompanying text.

615. *See supra* notes 17, 525–27, 530–31 and accompanying text.

616. *See supra* Section II.D.

617. *See supra* Section III.A.

