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CORPORATE INVESTIGATIONS

Internal Investigations and the Risk of Defamation Lawsuits

BY HARRY SANDICK AND SUSAN MILLENKY

In every internal investigation, there is an inherent tension between the interests of the attorneys who represent the company and the attorneys who represent individual employees who are interviewed as part of the internal investigation. The attorneys who represent the company try to identify all possible wrongdoing in order to make a full and fair report to internal counsel and if necessary, to prosecutors and regulators. The attorneys for the company often are working under pressure, being pushed by prosecutors to identify misconduct by employees. Good company counsel does their best to make certain that their reports are complete and authoritative. Attorneys who represent individual employees have somewhat different objectives. They want to make sure that their clients are truthful in their interviews, which is required by law. But they are also concerned that their clients could be blamed for things that they did not do, perhaps based on another employee's word or the misreading of an innocent e-mail.

When company counsel concludes that an employee has engaged in an illegal act and reports this allegation to the government, the employee stands a higher likelihood of being prosecuted. Even if the government has no interest in prosecuting the employee, the employee is almost certain to be the subject of a publicized job action (such as a suspension or termination), making it hard for that employee to find another job. While indicted employees have a forum to clear their names if they have been unjustly accused, employees who are reported to the government and terminated from their jobs without being prosecuted do not have any opportunity to clear fully their names in the arena of public opinion.

Whether implicated employees may file defamation actions against the company to clear their names depends upon the type of privilege applicable to statements made by companies during internal investigations. Different jurisdictions around the country have answered this question differently. A case pending before the Texas Supreme Court asks the court to determine the applicable privilege and may influence the way attorneys for both sides approach these types of investigations.

The 'Writt' Litigation

Given the absence of a public forum in which the accused employee may clear his or her name, it is not a surprise that a former Shell Oil employee who was accused of bribery in violation of the Foreign Corrupt Practices Act ("FCPA") decided to take the unusual step of filing a defamation lawsuit against Shell.[1]

After receiving an inquiry from prosecutors at the Department of Justice who investigated violations of the FCPA, Shell agreed to conduct an internal investigation into its dealings with Panalpina, a freight-

Harry Sandick is a partner at Patterson, Belknap, Webb & Tyler LLP and a member of the firm's White Collar Defense and Investigations Team. Susan Millenky is an associate in Patterson Belknap's litigation department.

[1] *See* Janet Elliott, *Shell defamation case has implications for bribery inquiries*, HOUSTON CHRON., Dec. 6, 2014, *available at* http://www.houstonchronicle.com/business/article/Shell-defamation-case-has-implications-for-5938034.php. During oral argument before the Texas Supreme Court, Writt's counsel represented that he was unaware of any other defamation cases in the U.S. that had arisen out of a FCPA investigation.

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forwarding service. Shell's outside counsel conducted an investigation that began in August 2007 and ended with the submission of a written report to the DOJ in February 2009. Writt was interviewed during the course of the investigation and he alleged in his civil complaint that the Shell report accused Writt of being a major participant in illegal conduct in connection with the payment of bribes. Writt also states that Shell accused him of making inconsistent statements to Shell's counsel during the investigation. Writt was ultimately fired by Shell. In November 2010, 20 months after Shell provided its written report to the DOJ, the company entered into a Deferred Prosecution Agreement with the Government which included Shell's consent to the filing of a criminal information alleging bribery by Shell relating to Panalpina. *Writt v. Shell Oil Co.*, 409 S.W.3d 59, 62-65 (Tex. App. 2013).

In 2010, Writt sued Shell for defamation based on the allegedly false statement about him that Shell made to the DOJ. The trial court granted summary judgment in Shell's favor, concluding that Shell had an absolute privilege to make defamatory statements about Writt to the prosecutors because the statements were made during judicial or quasi-judicial proceedings.

The Texas Court of Appeals Rules in Writt's Favor

Writt appealed to the Court of Appeals of Texas, First District, which reversed the grant of summary judgment and remanded the case. The Court of Appeals concluded that Shell was entitled to the protection of a qualified privilege for statements believed to be true and made to one who acts in the public interest. *Writt*, 409 S.W.3d at 76.

The Court of Appeals ruled that under Texas law, there is an absolute privilege for statements made in the course of a judicial proceeding, such as testimony at trial or in a deposition, or statements made in supporting affidavits. *Id.* at 67. This privilege extends to proceedings before agencies and commissions that exercise a quasi-judicial power. *Id.* But here, the statements made by Shell to the prosecutors were not made during a judicial proceeding or after charges were brought, or as a witness to a judicial proceeding, but only as a result of a voluntary internal investigation. *Id.* at 72–74.

The Court of Appeals also articulated a policy basis for its decision: the existence of an absolute privilege would give Shell and similarly situated entities an incentive not to be truthful and encourage them ''to deflect blame to others without fear of consequence.'' *Id.* at 61. The court thought a qualified privilege was more appropriate here—a privilege for the speaker that could only be defeated if the plaintiff can show that the speaker knew his or her statement was false, or was not made for the purpose of protecting the public interest.[2] *Id.* at 74–75.

Shell appealed this decision to the Supreme Court of Texas, which heard oral argument on Nov. 6, 2014. In its brief, Shell argued that its defense fell within the rule in the Restatement (Second) of Torts affording an absolute privilege to those speakers who made statements in serious, good-faith contemplation of a future judicial proceeding, and that the statements were solicited by government officials during an ongoing law enforcement investigation. Shell's argument was focused heavily on the policy rationale for recognizing an absolute privilege in this context: the absence of an absolute privilege will ''chill[] the flow of information to justice systems [during] . . . the information-gathering stage'' and also undermine the cooperation-based enforcement framework of the FCPA and other federal laws. Without an absolute privilege, companies frequently will be required to proceed to trial in order to prove that they did not act with malice. Shell also asserted that the law of approximately 20 states recognized a rule that is coextensive with the Restatement, at least when the statements are made in response to a request from law enforcement. Shell argues, in the alternative, that a DOJ investigation is a quasi-judicial proceeding, therefore entitling Shell to an absolute privilege. Brief for the Petitioner at 19–27, 35–37, 45, *Shell Oil Co. v. Writt*, No. 13-0552 (Apr. 17, 2014).

Writt's brief filed in response relies heavily on the niceties of Texas state law, which he contends cannot be reconciled with the recognition of an absolute privilege in this context. Writt also rejected Shell's contention that most states have a rule similar to the one proposed by Shell and contended that the majority rule recognized in most states only affords a qualified privilege to statements made in the course of a criminal investigation. Writt explained that the DOJ cannot be viewed as a quasi-judicial entity because it has no authority to decide anyone's guilt, but only has an authority to investigate and charge crimes. Brief for the Respondent at 17–24, 31–36, 43–44, *Shell Oil Co. v. Writt*, No. 13-0552 (May 20, 2014).

At oral argument, the parties focused on whether and when statements made in the course of an internal investigation qualify as statements made in contemplation of a judicial proceeding. Counsel for Shell argued that the Court of Appeals understood the contemplation standard too narrowly and that applying a qualified privilege to statements solicited by an investigating entity would chill cooperation and lead to defamation lawsuits with protracted litigation over the question of maliciousness. Writt's counsel argued that the statements made in Shell's report to the DOJ occurred well before a contemplated judicial proceeding, that corporations are incentivized to cooperate with investigating agencies regardless of the applicable privilege and that applicable Texas case law required the application of qualified privilege in Writt's case.

What Is the Law in Other States?

Will other states see similar lawsuits filed by employees who believe that they were wrongly accused of illegal conduct? We have looked at the common law of defamation in other jurisdictions to see whether an absolute privilege or a qualified privilege is recognized.[3]

[2] A dissenting judge on the three-judge panel would have recognized an absolute privilege, arguing that it is necessary to permit the sort of ''frankness, cooperation, and self-reporting'' that is necessary for the DOJ to prevent and prosecute corporate misconduct relating to the FCPA. *Id.* at 77 (Brown, J., dissenting).

[3] By way of background, defamatory statements are statements that tend to injure the subject's reputation. A plaintiff who seeks recovery for the tort of defamation must prove: a false and defamatory statement; publication without privilege

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Publishers of defamatory material are liable only for unprivileged statements, so either an absolute privilege or a qualified privilege may defeat a defamation claim. Defendants prefer to have an absolute privilege, which provides complete immunity to the publisher of the statement; when the privilege applies, there can be no recovery for defamation. Robert D. Sack, *Sack on Defamation* §§ 8:1-8:2. A qualified or conditional privilege is a defense to defamation only when certain conditions, such as a lack of malice, are present. Sack § 9:1; *see, e.g.*, *Rosenberg v. Metlife, Inc.*, 8 N.Y.3d 359, 365 (2007) (''Communications that are protected by a qualified privilege are not actionable unless a plaintiff can demonstrate that the declarant made the statement with malice.''). Defendants seeking to shield their remarks from liability using a qualified or conditional privilege often must go to trial in order to prevail on their defense, as the fact-bound nature of a qualified privilege may be difficult to resolve on a motion to dismiss or a motion for summary judgment.

Qualified privilege seeks to balance the social need for unrestricted communication in certain circumstances against the opportunity to redress reputational harm. Sack § 9:1. The defendant bears the burden of demonstrating that the statement falls within a context where the qualified privilege applies. If the defendant does so, then the plaintiff must establish conditions that negate the privilege, such as malice or a lack of good faith. Sack §§ 9:1. 9:3.

Both absolute and qualified privileges may apply to statements made by a witness during a prosecuting authority's investigation into alleged corporate wrongdoing. The law is clear in all states that statements of parties, attorneys and witnesses during judicial proceedings are protected by an absolute privilege. Sack § 8:2.1[D]; Restatement (Second) of Torts §§ 587, 588; *Burns v. Reed*, 500 U.S. 478, 489–90 (1991) (''Like witnesses, prosecutors and other lawyers were absolutely immune from damages liability at common law for making false or defamatory statements in judicial proceedings.''). In this context, ''[a]bsolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation.'' *Burns*, 500 U.S. at 494 (emphasis removed). When a judicial proceeding is underway, the statements ''need not be material or relevant to the issues before the court'' to fall within the privilege as long as the statement ''has some reference to the subject of the litigation.'' Restatement § 588 cmt. c.

Statements made ''preliminary to a proposed judicial proceeding'' that are related to that proposed proceeding likewise receive absolute privilege in most jurisdictions. Restatement §§ 587, 588. The proposed proceeding must be ''contemplated in good faith and under serious consideration'' by the potential witness or party; a ''bare possibility'' that a proceeding may occur will not trigger absolute privilege. §§ 587 cmt. e, 588 cmt. e. Courts have divided over whether reports of criminal activity and communications in the context of an investigation into criminal wrongdoing qualify as statements preliminary to a judicial proceeding. *See* Sack § 9:2.1.

Most jurisdictions to have addressed the issue have held that statements made to a prosecuting authority prior to the institution of a legal action receive qualified privilege. Sack §§ 8:2.1[D] & n.60, 9:2.1. These courts generally treat the communications not as statements preliminary to a judicial proceeding but as statements in the public interest, which typically receive a qualified privilege. Sack § 9:2.5; Restatement § 598 (applying conditional privilege to communications made in the public interest to public officers or private citizens empowered to act if the defamatory statement is true).

In New York, for instance, communications to a prosecutor's office concerning alleged criminal activity receive a qualified privilege because ''the communication of a complaint, without more, to a District Attorney does not constitute or institute a judicial proceeding.'' *Toker v. Pollak*, 44 N.Y.2d 211, 220 (1978) (adjudicating a defamation claim in which the defendant had answered questions at the request of the District Attorney, though defendant had initially volunteered the allegedly defamatory statement to a government official in the mayor's office). Though *Toker* never has been overruled, an observation in a more recent New York Court of Appeals opinion casts some doubt upon its holding. In *Rosenberg v. Metlife, Inc.*, the Court of Appeals concluded that statements made in reports required by the National Association of Securities Dealers, an entity subject to SEC oversight, were protected by an absolute privilege. 8 N.Y.3d at 368. In reaching its conclusion, the court observed that, ''[a]lthough statements made during the course of a judicial or quasi-judicial proceeding are clearly protected by an absolute privilege . . . we have indicated that the absolute privilege can extend to preliminary or investigative stages of the process, particularly where compelling public interests are at stake.'' *Id.* at 365 (internal citation omitted)).

By contrast, other jurisdictions understand reports of criminal activity and statements made during investigations to be absolutely privileged, reasoning that these communications necessarily occur preliminary to a judicial proceeding. For instance, California courts understand the statutory provision that provides absolute privilege to statements made during judicial proceedings to extend to requests for agency investigation, reports of criminal wrongdoing and statements made after an official investigation has commenced. *Hagberg v. Calif. Fed. Bank*, 32 Cal. 4th 350, 364–65 (2004) (internal quotation marks and citation omitted). In *Hagberg*, the court reasoned that relevant public policy interests supported complete immunity when a citizen, unprompted by any prosecuting authority, reported alleged criminal activity: ''[t]he importance of providing to citizens free and open access to governmental agencies for the reporting of suspected illegal activity outweighs the occasional harm that might befall a defamed individual.'' *Id.* In short, there is a split of jurisdictions on this question, which makes the *Writt* litigation more interesting to observers.

Conclusion

Given the potential implications, criminal law practitioners should be watching closely to see how the *Writt* appeal is decided. Defamation lawsuits based on an allegedly erroneous report to the government are not common, and so a reversal of the Texas Court of Appeals' decision likely will leave things as they are for both company counsel and counsel for individuals.

by a third party; fault on the part of the publisher; and that the statement is per se actionable or qualifies as a ''special harm.'' Robert D. Sack, *Sack on Defamation* § 2:1–2.2 (4th ed. 2014) (citing the Restatement (Second) of Torts § 558 (1977)).

However, an affirmance of the Court of Appeals' decision could lead to a change in the balance of incentives that companies have when conducting investigations. For defense attorneys who represent business organizations, an affirmance might lead to the filing of defamation lawsuits by aggrieved employees in certain cases. At the same time, for several reasons, many individual employees would be poorly served by filing a defamation lawsuit against a former employer based on a company's report to the government. The employee would need to sit for a deposition about their allegedly criminal conduct, and by the filing of a lawsuit, the employee would further publicize the allegations made against them. At the same time, it is possible that the availability of such a claim, even if infrequently brought, might lead company counsel to be even more careful when dealing with employees whose conduct or intent is at or near the margins of what is permitted under the law. There is a distinct possibility that an affirmance might overly complicate the work of conducting internal investigations by putting counsel between a rock and a hard place: While a failure to report an individual who has engaged in criminal conduct could lead the government to question the completeness of a company's cooperation, an erroneous report of an individual's wrongdoing now might lead to a defamation lawsuit.

It is also possible that an affirmance might lead to proposals for legislative action. Prosecutors at both federal and state levels will no doubt be concerned that company counsel will be more restrained in their reporting of wrongdoing if they act in the shadow of a defamation lawsuit. This point was made by several former U.S. Attorney Generals who filed an amicus brief in the *Writt* case.[4] Given the extent to which the DOJ relies on internal investigations conducted by company counsel as part of its enforcement efforts, a change in defamation law might change how prosecutors oversee large white-collar investigations.[5]

A decision by the Texas Supreme Court is expected this year.

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[4] Amicus Letter on behalf of Benjamin Civiletti, et al., *Shell Oil Co. v. Writt*, No. 13-0552 (Tex. Oct. 1, 2013).

[5] JAMES M. COLE, U.S. DEPUTY ATTORNEY GENERAL, Foreign Corrupt Practices Act Conference (Nov. 19, 2013), http://www.justice.gov/opa/speech/deputy-attorney-general-james-m-cole-speaks-foreign-corrupt-practices-act-conference (telling the private FCPA defense bar that ''your role in the enforcement of the FCPA is vital to its success'').

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