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PROFESSIONAL LIABILITY UPDATE

ANTI-SLAPP
LITIGATION PRIVILEGE

By Jennifer A. Becker

Getfugu, Inc. v. Patton Boggs, LLP **2013 WL 5492575**

The Second District holds the anti-SLAPP statute does not apply to defamation claims premised on an attorney's press release, because republication to a nonparticipant it is not protected by the litigation privilege.

Richard Oparil and his firm Patton Boggs, LLP represented Simon Davis and David Warnock in a RICO case against GetFugu, Inc., Carl Freer, and Richard Jenkins.

After the Federal Court refused to exercise supplemental jurisdiction over their state law claims, Davis and Warnock appealed the decision and re-filed in state court. Based on an article that appeared in the online Copenhagen Post, Oparil issued a press release asserting Freer was being investigated by the FBI. The Release also asserted GetFugu was being investigated by the SEC. Oparil also "Tweeted" his opinion that GetFugu was run for the benefit of its officers and directors. GetFugu and Freer sued Oparil for defamation, and Oparil filed a special motion to strike under California's anti-Strategic Lawsuit Against Public Participation Statute (anti-SLAPP) C.C.P § 425.16.

The trial court granted the motion, holding the litigation privilege protected the press release and the Tweet because they were communications with some relation to the judicial proceedings, and were accurate statements about the RICO claims and the allegations of the underlying complaints.

The Court of Appeal observed Oparil and his firm met their burden of establishing under the first prong of the anti-SLAPP analysis that their conduct involved the right of free speech or petition. The anti-SLAPP statute applies to communications that concern issues of public interest, such as investment scams.

The Court concluded GetFugu and Freer met their burden under the second prong of the analysis to show minimal merit to their claim. First, the press release and the Tweet are not protected by the litigation privilege. The litigation privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.

Republications to nonparticipants, such as the press release and the Tweet, are not encompassed by the litigation privilege. Case

law has expanded the privilege to include publication to non-parties with a substantial interest in the litigation, for example, to members of an organization involved in litigation. Nonetheless, to expand this notion to include the general public would swallow the rule that the litigation privilege does not include republications to nonparticipants in the action. Moreover, it would encourage litigating in the press, along with its attendant evils of poisoned jury pools and disrepute to the judiciary and the bar.

The Court was not persuaded that issuing the press release through "Investor Wire" limited the communication to the interested investment community. Both the press release and the Tweet were posted on the internet and available worldwide. The "investment community" is so wide a notion as to constitute the general population.

Although some portions of the press release were undoubtedly true, one portion was to the effect the FBI was conducting a criminal investigation. While the defense of substantial truth does not require every word be justified, the evidence about the existence of an FBI criminal investigation was in conflict. GetFugu and its principals vehemently denied being subject to either an FBI or SEC investigation. Their attorney explained the Copenhagen Post's story was inaccurate, and was promptly removed from its website after a complaint.

In analyzing the second prong, the court does not engage in evaluating credibility or the weight of the evidence. The court accepts plaintiff's favorable evidence as true and assesses defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law. Plaintiffs' declarations denying the existence of criminal investigations were sufficient to meet their burden.

The Tweet, however, was not actionable. It merely expressed Oparil's opinion, and did not assert or imply facts.

Comment: Modern law practice at times requires counsel represent clients both in the court of law and in the court of public opinion. While there are many protections for attorney litigation conduct as well as attorney speech, defamation claims still present a risk, especially when the communication is directed to a potentially worldwide audience.