



Alerts

Absolute Litigation Privilege Bars Claims Stemming From Communications Related to Litigation

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Brief Summary

The First District Appellate Court in Illinois reaffirmed the broad scope of the absolute litigation privilege in claims arising from communications (and other conduct) related to judicial proceedings.

The court restates that the absolute litigation privilege protects defendants from defamation claims for statements contained in pleadings and communications, including communications to third-party non-litigants, provided that statements meet the "pertinency requirement" and that the communications would not have been made absent the non-litigant's interest in the litigation, as articulated in *O'Callaghan v. Satherlie* (2015 IL. App (1st) 142152), which remains the controlling case on these issues.

Complete Summary

This case arose from underlying litigation in which a group of plaintiffs filed a complaint alleging in pertinent part that the defendants engaged in "egregious misconduct" related to a business operated through Aries Community Capital, LLC (ACC) and Urban Development Fund, LLC (UDF).

ACC and UDF were formed by the defendant and one of the plaintiffs to provide loans and investments to low-income communities using federal and state tax credits issued through New Market Tax Credit (NMTC) Programs. The defendant was Vice President of ACC and manager of UDF.

The federal NMTC project operated by ACC began first. The complaint alleges that ACC (the plaintiff's company) and QSG (the defendants' company) each held 46 percent of the membership interests in ACC. The parties involved in ACC later created UDF to manage the state NMTC venture. QSG and its successor, QGH, also the defendants' company, held 80 percent of UDF's membership interests, with ACC holding 20 percent. One of the defendants was the manager of UDF ST.

The complaint alleges that the defendants exploited their ownership interests in the NMTC businesses by directing 100 percent of all termination fees to UDF when the fees actually should have been split between the federal and state NMTC administrative managers (ACC and UDF). Specifically, UDF allegedly

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diverted termination fees from a project involving Big Brothers Big Sisters of Miami Institute, Inc. (BBBS).

The BBBS project involved providing \$6.5 million in federal funds and \$6.41 million in state funds to finance the acquisition and development of property for a BBBS community facility in Florida. Despite this split between federal and state NMTC, UDF collected 100 percent of the \$64,171 termination fee. The complaint alleged that the defendants never provided notice to the plaintiff that UDF was collecting 100 percent of the termination fees. The defendant was removed as UDF's manager, and the plaintiff discovered the termination fee diversion scheme.

The defendant filed a counterclaim against the plaintiff and a third-party complaint against Perkaus and Perkaus & Farley, LLP, alleging defamation. The defendant attached three publications as exhibits to his counterclaim and third-party complaint.

Publication #1 was an email chain between the CFO of BBBS Miami, Perkaus, various executives at BBBS Miami, representatives of banks and lenders involved in the BBBS project, and their attorneys regarding the BBBS funding issue. Publication #1 stemmed from an email that BBBS Miami's CFO sent to Perkhaus inquiring as to the status of UDF's funding for the BBBS project.

Perkhaus responded to the CFO's email by stating:

"I have attached our complaint filed in Cook County Illinois detailing how [the defendants] through their control over the entities involved misdirected over \$6 million in fees from the federal entity to the state entity UDF NMTC ST which was 80% owned and controlled by [the defendants]. As alleged in our complaint, [the plaintiff] only discovered these illegal transfers after her wrested [sic] control of UDF on August 12, 2022, from [the defendant] in his successful Delaware litigation last year. [The defendant's] alleged illicit actions regarding BBBS Miami are detailed in the complaint in UDF 41 and 48." *Qualizza*, 2024 IL App (1st) 231534-U, 6.

Publication #2 was the complaint, which Perkhaus attached to his email (Publication #1).

Publication #3 consisted of the plaintiff's reply email in response to Publication #1, in which the plaintiff replied to the same recipients and added: "[I] suggest that the courts can decide whether [the defendants] misappropriated millions of dollars without knowledge of the majority owners of [UDF]."

The defendant alleged that the three publications contained defamatory statements.

The plaintiff filed a motion to dismiss the defendant's counterclaim under section 2-615 of the Illinois Code of Civil Procedure on the grounds that the absolute litigation privilege protected the publications. The defendant opposed, arguing that the privilege did not apply because the recipients were not parties to the underlying litigation and were not mentioned in the complaint.

In reply, the plaintiff argued that the defendant's arguments were based on outdated case law. The plaintiff argued that under current authority, the publications were protected, citing *Bedin v. Northwestern Memorial Hospital*, 2021 IL App (1st) 190723, *Scarpelli v McDermott Will & Emery LLP*, 2018 IL App (1st) 170874; *Doe v. William McCarthy, LLP*, 2017 IL App (2nd) 160860; and *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152 as the current controlling authority on the issue.

The trial court agreed with the plaintiff, finding that the three publications were protected by the absolute litigation privilege under the controlling case law and that dismissing the defendant's counterclaim and third-party complaint was proper.

The appellate court upheld the trial court's ruling, finding that the absolute litigation privilege applied as the publications were pertinent communications. *O'Callaghan*, 2015 IL App (1st) 142152, ¶¶25; *Bedin*, 2021 IL App (1st) 190723, ¶40, and that while made to third parties, the communications were protected because the third parties had some interest in the litigation. *Doe*, 2017 IL App (2d) 160860, ¶¶22-23 (citing *O'Callaghan*, 2015 IL App (1st) 142152, ¶29).



Significance of Decision

This decision reinforces that the absolute litigation privilege bars claims for defamation (and claims for other alleged misconduct) arising from pertinent communications made during a judicial proceeding or pleading, including communications made to third parties with an interest in the litigation.