

IN PRACTICE

CIVIL PRACTICE

The Litigation Privilege in Claims Against Attorneys

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The litigation privilege protects parties and their lawyers from liability for statements they make not only at trial, but at all stages of litigation and in other quasi-judicial proceedings as well. Specifically, the privilege extends to any communication: (1) made in judicial and quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of litigation; and (4) that have some connection or logical relation to the action. *Hawkins v. Harris*, 141 N.J. 207 (1995).

Settlement Discussions and Conferences

In *Dello Russo v. Nagel*, 358 N.J. Super. 254 (App. Div. 2003), the attorney made a statement during the settlement conference that if the doctor did not settle for \$3 million, the attorney would go public, contact the media, call a press conference and place an ad in the newspapers. The doctor refused. The court, relying on *Erickson v. Marsh & McLennan*, 117 N.J. Super.

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539 (1990), held that the statements made by the attorney were covered by the litigation privilege. In *Dello Russo*, the Appellate Division held that the privilege was applicable to statements made during settlement discussions and to statements made during the course of pretrial settlement discussions.

Also, in *Ruberton v. Gabage*, 280 N.J. Super. 125 (App. Div.), *certif. den.*, 142 N.J. 451 (1995), in the context of an abuse-of-process case, the court held that threats of criminal prosecution made by an attorney during a settlement conference, even if tortious, were protected by the litigation privilege.

Defamation Claims

In *Rainier's Dairies v. Raritan Valley Farms*, 19 N.J. 552 (1955), Joseph and Michael Gonnella, trading as Golden Dawn Dairy, filed an application with the Office of Milk Industry (OMI) for permission to transfer their source of supply from the defendant, Raritan Valley Farms, to the plaintiff, Rainier's Dairies. While the application was pending, Raritan filed a verified petition with the director of OMI, in which it alleged that the Gonnellas had entered into an illegal

agreement with Rainier's Dairies to purchase milk from Rainier's Dairies at two cents per quart, which was below the minimum prices fixed by the OMI director.

Following the entry of the director's conclusions and order, Rainier's Dairies filed a complaint in the Law Division alleging libel and malicious interference with business, grounded upon the petitions filed with OMI. The trial court held that the complaint was grounded entirely on the proceeding before the director, and that the director acted as a quasi-judicial officer. The trial court also held that the statements were absolutely privileged and granted the motion to dismiss. On appeal to the Supreme Court of New Jersey, Justice Jacobs noted that the proceedings before the director were quasi-judicial, and that it was an administrative proceeding similar to a judicial proceeding. Accordingly, the doctrine of absolute privilege or immunity applied to the same extent it would be applicable in court proceedings.

Civil Rights Actions and Sequestration Motions

In *Loigman v. Township of Middletown*, 185 N.J. 566 (2006), the Court determined that the litigation privilege shields a lawyer from a civil suit filed under 42 U.S.C. §1983, charging him with the improper use of a sequestration motion to exclude a spectator from a public hearing.

The Supreme Court held that the litigation privilege protected the at-

torney and the township from a claim made as a result of an attorney's sequestration motion. Also, the attorney's role as special counsel for the township at the hearings did not make him a municipal policymaker under §1983. Accordingly, because the litigation privilege applied, the attorney was immunized from liability.

Malicious-Abuse-of-Process Actions

The litigation privilege applies to malicious-abuse-of-process causes of action. See *Baglini v. Lauletta*, 338 N.J. Super. 282 (App. Div. 2001). In *Baglini*, the plaintiffs protested a development application made by University Executive Corp., Inc. (UEC), and Frank Lauletta (UEC's principal) to construct office condominiums in Gloucester County.

UEC and Lauletta filed an action against the plaintiffs sounding in defamation, interference with business advantage and malicious use of process. The attorney represented UEC and Lauletta in that action, which was voluntarily dismissed prior to trial. In turn, the plaintiffs filed an action charging the attorney and his clients with malicious abuse of process, malicious use of process and intentional infliction of emotional distress.

After a jury verdict in favor of the plaintiffs on their malicious-abuse-of-process claim, UEC and Lauletta appealed. The Appellate Division reversed and vacated the judgment. The court noted that the litigation privilege applied to the attorney because the "communications" were made by the attorney for a litigant authorized to make them, they were intended to achieve the objectives of the litigation, and they had a logical relation to the Lauletta litigation and the prerogative writ case.

Ethics Proceedings

In an unreported decision, *Abulkhair v. Engelhart*, A-5532-07T2 (App. Div. April 2, 2009), the Appellate Division held that statements made by counsel at an attorney ethics proceeding are also subject to the absolute privilege.

In *Abulkhair*, the attorney made a statement in a letter to the Ethics Committee stating that the claimant was continuing a "campaign of terror" against the attorney and the court system. The plaintiff alleged in his lawsuit that the phrase "campaign of terror" was unethical and insulting because plaintiff was a Muslim, and the comment was made after Sept. 11, 2001. The trial court found that the attorney's comment was made during the course of a quasi-judicial proceeding, and thus was absolutely privileged. The trial court dismissed the case, and the Appellate Division affirmed the dismissal, holding that an ethics proceeding is quasi-judicial and that attorneys are protected from civil liability arising from words uttered in the course of the same.

License Applications and Hearings

In *Zagami, LLC v. Cottrell*, 403 N.J. Super. 98 (App. Div. 2008), the Court held that statements made in connection with an application to renew a liquor license were covered by the litigation privilege.

It should be noted that in *Zagami*, the fact that the statements were not made under oath did not render the privilege inapplicable. The Appellate Division found that the litigation privilege immunized defendants from the defamation claim. It should also be noted that, in *Zagami*, because the other counts alleging related torts were predicated upon the same conduct on which the defamation claim was based, the court found that the defendants were shielded from liability on those counts as well.

Fair Debt Collection Practices Act Claims

In *Ogbin v. Fein, Such, Kahn & Shepard*, 2011 U.S. App. LEXIS 3499 (3d Cir. Feb. 22, 2011), the Third Circuit held that payoff letters sent by attorneys during the pendency of foreclosure proceedings fall within the scope of the New Jersey litigation privilege.

The court, relying on *Rickenbach v. Wells Fargo Bank*, 635 F.Supp. 2d 389, 401 (D.N.J. 2009), held that the

Ogbins' common-law claims were precluded by the litigation privilege and, therefore, could not be the subject of liability against the defendant attorneys. The Third Circuit affirmed the District Court's judgment dismissing the Ogbins' claims of intentional misrepresentation and negligence.

The Third Circuit did, however, vacate the District Court's decision in part, remanding the Ogbins' claims under the Fair Debt Collection Practices Act (FDCPA) based on its decision in *Allen v. LaSalle Bank*, F.3d, No. 09-1466-2011 WL 94420 (3d Cir. Jan. 12, 2011), in which the court concluded that letters to a debtor's attorney are actionable under §1692(f)(1) of the FDCPA, if those letters attempt to collect any amount not expressly authorized by the agreement creating the debt or permitted by law. In *Allen*, the court concluded that the New Jersey litigation privilege did not absolve a debt collector from FDCPA liability. Therefore, the *Ogbin* court remanded the portion of the District Court judgment that dismissed the Ogbins' FDCPA claims.

Background Checks and Administrative Hearings

In *Pollinger v. Loigman*, 256 N.J. Super. 257 (App. Div. 1992), the absolute privilege was found to apply to statements made in a report regarding the background check on a police-officer applicant. The report was issued to the township police chief and administrator to assist them in determining the applicant's fitness for a civil service appointment. The court reasoned that the report was part of a quasi-judicial proceeding, which entailed the exercise of an adjudicative function requiring notice and opportunity to be heard.

Arbitration Immunity

In *Malik v. Rutenberg*, 398 N.J. Super. 489 (App. Div. 2008), the Appellate Division applied the doctrine of arbitration immunity to an arbitrator under an American Arbitration Association proceeding. The court held that the arbitrator, Peter LiLoia III, was immune from civil liability for personal injuries sus-

tained by the plaintiff Malik, due to an alleged physical assault that occurred during a recess in a commercial arbitration proceeding. The court in *Malik* also found that the doctrine of immunity for civil liability applied to the arbitral organization.

Practice Tips

It has been held that whether a com-

mon-law or statutory immunity applies to a party is a question of law. *Malik*, 398 N.J. Super. at 494. Significantly, in *Malik*, the court further held that if an immunity applies and bars civil liability, it trumps any theory of negligence.

In New Jersey, our courts have expanded the litigation privilege to provide immunity to attorneys in various situations in connection with the representation of their clients. Whether in the

process of drafting, settlement discussions, depositions, motion practice, arguments at trial or on appeal, the privilege will apply.

Thus, when faced with a claim in which immunity applies, the defendant attorney should promptly file a motion to dismiss early in the proceeding. According to the *Malik* court, this is a “particularly effective device to resolve any claim of immunity.”■