

## Absolute Privilege Protects Employers' Statements

*Monday, April 02, 2007* --- On March 29, 2007, the New York Court of Appeals held in *Rosenberg v. MetLife Inc.*, USCOA, 2 No. 23 (Mar. 29, 2007), that an employer's statements on an NASD employee termination notice (Form U-5) are protected by an absolute privilege in defamation lawsuits, resolving a conflict among the New York Appellate Divisions.

Because so many jurisdictions look to New York court decisions on matters of public importance arising out of the securities industry, this decision is likely to be relied upon across the nation in attempting to abolish actionable defamation claims based on mandatory Form U-5 reporting.

### \* The NASD Form U-5 and the Absolute Versus Qualified Privilege \*

NASD member firms are required by the rules of the NASD to file an accurate Form U-5 when a registered person's association with the broker-dealer is terminated. Despite this complete candor requirement, the courts of many states leave former employers vulnerable to suits for defamation based on information provided on the Form U-5 because they only protect such statements with a qualified privilege.

Under the laws of most states, including New York, statements subject to a qualified privilege are still actionable if a plaintiff can demonstrate that the statements were made with malice. In contrast, statements subject to an absolute privilege are not actionable.

### \*The Plaintiff's Defamation Claim\*

Following the plaintiff's termination as a financial services representative, the plaintiff's employer, MetLife, prepared a Form U-5 filing that stated as the reason for termination: "An internal review disclosed [the plaintiff] appeared to have violated company policies and procedures involving speculative insurance sales and possible accessory to money laundering violations."

The plaintiff filed a complaint in the United States District Court for the Southern District of New York, alleging multiple claims against MetLife, including a claim for defamation based on MetLife's statements on the Form U-5, which plaintiff claimed were made with malice.

### \*The Lower Court's Dismissal and the Plaintiff's Appeal\*

On MetLife's motion, the court dismissed the plaintiff's defamation claim, holding that under New York law, MetLife's statements on the NASD Form U-5 were protected by an absolute privilege.

After MetLife prevailed on the remaining claims, the plaintiff appealed the court's ruling that MetLife's statements on the Form U-5 were absolutely privileged. The Second Circuit, finding differing opinions in the First, Second, and Fourth New York Appellate Divisions, certified the following question to the New York Court of Appeals: "Are statements made by an employer on an NASD employee termination notice ('Form U-5') subject to an absolute or a qualified privilege in a suit for defamation?"

\* The New York Court of Appeals' Majority Decision \*

Judge Graffeo, writing for the Court of Appeals in a 4–2 decision, recognized that the absolute privilege "is generally reserved for communications made by individuals participating in a public function, such as executive, legislative, judicial, or quasi-judicial proceedings" and explained that the "investigation and adjudication of suspected violations of the SEC's laws and regulations as well as the NASD's own rules" is a "quasi-judicial process."

Noting the strong public purpose behind the NASD's reporting requirements, the court explained that "[t]he Form U-5 plays a significant role in the NASD's self-regulatory process," and that "[u]pon receipt of the Form U-5, the NASD routinely investigates terminations for cause to determine whether the representative violated any securities rules."

Therefore, the court held, "the compulsory Form U-5 can be viewed as a preliminary . . . step in the NASD's quasi-judicial process." "The Form U-5's compulsory nature and its role in the NASD's quasi-judicial process, together with the protection of public interests," led the court to conclude that "statements made by an employer on the form should be subject to an absolute privilege."

\* Dissenting Opinion \*

In his dissent, Judge Pigott took the position that only a qualified privilege should apply to Form U-5 reporting, relying primarily on his belief that Form U-5 reporting was not part of "a preliminary or investigative stage" in a "quasi-judicial process."

He also expressed concern over providing complete immunity to member firm employers, given the possibility of intentional inaccurate reporting.

\* Significance of the Rosenberg Decision \*

In extending absolute immunity in New York for Form U-5 reporting, the Rosenberg court recognized the public function of the reporting requirement and the need to encourage complete candor in such reporting, including that of unethical behavior of financial services employees.

The Rosenberg decision is likely to be used as support for extending the absolute privilege not only to Form U-5 reporting in other states but also to

other similar forms of mandatory regulatory reporting designed to protect the public.

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