

## Outside Counsel

# Should the Absolute Privilege Apply To Defamation Per Se?

Under New York law, statements made in the context of court proceedings are typically protected and entitled to an “absolute privilege,” also known as “litigation privilege,” meaning they may not be the basis of liability, no matter how vile and outrageous the content and no matter how malicious the motive, provided they are material and pertinent to the litigation. New York likewise recognizes that certain statements are so derogatory that they are deemed “defamation per se,” meaning that a plaintiff need not even prove he/she was damaged by such statements to secure relief therefrom; rather, they are so disparaging that damages are presumed. These concepts seem directly contradictory—if a statement is defamatory per se, then how can it be privileged? Certain statements are so heinous that the absolute litigation privilege should not insulate the speaker from liability, particularly where the statements are not directly relevant to the litigation in which they were made. To address this issue, there arguably should be exceptions to the absolute privilege, including for statements that are defamatory per se.

In order to assert a claim for defamation, a plaintiff must prove he/she

By  
**Danielle  
Marlow**



suffered actual damages as a result of the offensive statements at issue to recover, meaning the plaintiff must demonstrate a financial or economic loss. But, in the case of defamation per se, the standards are not as stringent and such damages are presumed. There are four categories of statements considered to be defamatory per se:

- Statements charging a plaintiff with a serious crime,
- Statements that tend to injure another in his or her trade, business, or profession,
- Statements imputing a loathsome disease on a plaintiff, and
- Statements imputing unchastity on a woman.

Despite the clear recognition under New York law of the seriousness of baseless accusations and the damage they cause, such statements are absolutely privileged when made in the context of judicial proceedings. This absolute privilege applies to statements made in connection with litigation (or in good-faith anticipation of litigation) when the comments and descriptions are

considered to be relevant to the issues involved in the case. The underlying purpose of the privilege is to ensure that attorneys are able to speak freely in the course of litigation without a fear of harassment or potential financial punishment.

The recent case of *Deaton v. Napoli*, No. 17-CV-4592, 2019 WL 4736722 (E.D.N.Y. Sept. 27, 2019) highlights how the absolute privilege can unwittingly (and unjustifiably) protect defamatory statements and overlook the undeserving harm they may cause. In *Deaton*, plaintiffs, John Deaton (head of the Deaton law firm) and Marie Deaton (John Deaton’s wife), alleged that defendants made statements in court filings that John had an affair with one of his associate attorneys, that the affair caused John and Marie to get divorced, and that John subsequently harassed the associate when she went to work at the Shrader law firm. As a result of these defamatory statements, plaintiffs claimed that their personal and professional reputations were tarnished, that they lost significant business relationships—including a referral relationship with the Shrader law firm, and sought millions of dollars in damages. Notwithstanding the severity of the allegations, the U.S. District Court for the Eastern District of New York dismissed the action outright, holding that the statements at issue were absolutely

privileged because they were made in the context of judicial proceedings.

This case highlights the potential abuse of judicial process, and the question of whether there should be exceptions to the absolute privilege applicable to statements made in judicial proceedings—no matter how scandalous, humiliating, and damaging. For example, what if an employer brings a restrictive covenant action against a former employee, and in that action, impugns the employee's business practices and character—for example by claiming the employee stole from the employer, or was sexually promiscuous—when neither allegation is true, or directly relevant? Regardless of whether the employer wins or loses the litigation, the employer arguably has already won, as judicial proceedings are publicly available, can be disseminated to the press, and readily appear when performing Internet searches—thus enabling the employer to publish these false and defamatory allegations to all in the industry and make the employee a pariah.

The question thus arises as to whether there should be an exception to the absolute privilege applicable to statements made in the context of judicial proceedings? For example, where statements are blatantly and demonstrably false, where they are defamatory per se, and/or where they are made maliciously to harm the subject of the statements, should they be privileged? If the privilege continues to apply, parties can and will continue to be able to abuse the litigation process to harm others, to gain an unwarranted competitive advantage, and/or for other illegitimate ends. Consideration, therefore, should be given to circumscribe the breadth of the absolute privilege.

The Second Circuit insinuated as much in *Brown v. Maxell*, when expressly recognizing the potential abuse of affording

absolute privilege to statements made in connection with litigation proceedings and noting as follows:

Court filings are, in some respects, particularly susceptible to fraud. *For while the threat of defamation actions may deter malicious falsehoods in standard publications, this threat is non-existent with respect to certain court filings.* This is so because, under New York law (which governs the underlying defamation claim here), “absolute immunity from liability for defamation exists for oral or written statements made ... in connection with a proceeding before a court.” Thus, although

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the act of filing a document with a court might be thought to lend that document additional credibility, in fact, allegations appearing in such documents might be less credible than those published elsewhere.

*Brown v. Maxell*, 929 F.3d 41, 53 (2d Cir. 2019) (emphasis added). In a footnote, the Second Circuit proposed a potential means to address this indisputable potential for abuse by noting the exception that a statement must be “material and pertinent to the questions involved” for the litigation privilege to apply. *Id.* at note 47 (citing *Front*, 24 N.Y.3d at 718). Therefore, immaterial and impertinent statements are actionable, particularly when they are “so needlessly defamatory as to warrant the inference of express malice.” *Id.*; see also *Gugliotta v. Wilson*, 168 A.D.3d 817,

819 (2d Dept. 2019) (declining to apply absolute privilege where there was “not one scintilla of evidence present upon which to base the possible pertinency of [the] defendant’s statement[s]”).

This infrequently used exception could potentially be expanded to prevent abuse of the judicial privilege—especially where court filings are transparently used to lodge patently irrelevant allegations for the malicious purpose of damaging a party’s reputation, gaining a competitive advantage against that party, causing that party to suffer harm, or other nefarious purposes that should not be tolerated. There is simply no reason that such statements should be protected by an absolute privilege—particularly where they are defamatory per se and not relevant to the claim at issue. Likewise, statements should not be protected where a plaintiff can prove that a statement was made without basis and with the malicious intent to harm.

Put simply, the need for a judicial privilege is obvious. But, like most rules, the judicial privilege must be subject to exceptions where the privilege is patently and maliciously abused—particularly in the present day and age when judicial proceedings are publicly available on the Internet for all to see. The exception to the privilege noted in *Brown v. Maxell* for statements not “material and pertinent to the questions involved” in the litigation should be expanded, and additional exceptions, for example for statements that are defamatory per se and statements made for demonstrably malicious purposes, should be considered.