SEYFARTH SHAW

Management Alert

Allegedly False Statements Posted on Internet Regarding Pending Litigation Can Support Defamation Claim

By Mark T. Hansen and Robert B. Milligan

The California Court of Appeal recently examined whether someone who posts allegedly false statements on the internet about pending litigation can be sued for defamation. *Getfugu, Inc. v. Patton Boggs LLP* (Case No. B231794) (Cal. App., 2nd Dist., Div. 3, October 3, 2013). In *Getfugu*, the court answered this question in the affirmative, holding that such statements can support a claim for defamation against the person posting the statements, depending on the audience to which the statements are directed. This case serves as a reminder that parties should refrain from attempting to litigate their case in the press or on social media, particularly if the statements are known to be false, or the veracity of such statements is not yet confirmed.

Background Facts

The *Getfugu* case originated with a derivative suit brought by shareholders Davies and Warnock ("Shareholders") against Getfugu, and various officers and directors, including Carl Freer ("Freer") and Richard Jenkins ("Jenkins") in federal court. Shareholders alleged violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), breach of fiduciary duty, fraud, breach of contract and civil conspiracy. Each claim was later dismissed by the district court.

During that suit, an attorney for Shareholders ("Shareholders' Attorney") issued a one-page press release entitled "FBI Said to be Investigating Getfugu's Carl Freer" ("Press Release"). The Press Release stated that the Copenhagen Post had alleged FBI and Danish officials were investigating Freer in a matter separate from Shareholder's lawsuit. It also said the article stated that Getfugu and Freer were involved in a number of investment scams, and that the Securities and Exchange Commission was already investigating Getfugu.

Subsequently, Shareholders' Attorney tweeted, "Getfugu runs an organization for the benefit of its officers and directors, and not shareholders and employees. The RICO suit is not frivolous. The 500K lawsuit is frivolous, however, so buyer be wary" ("Tweet").

The same day Shareholders' RICO claim, the last claim pending, was dismissed, Getfugu, Freer and Jenkins (collectively, "Plaintiffs") filed suit in California state court against Shareholders, Shareholders' Attorney and his firm, and other counsel representing the Shareholders in the underlying action, for malicious prosecution, declaratory relief and defamation. The defamation claim was largely based on the Press Release and the Tweet.

The attorney defendants filed a special motion to strike under California's anti-SLAPP statute, alleging that the conduct underlying the complaint was based on counsel's petitioning activity and statements made in anticipation of, or in connection with, an issue pending before an official proceeding. They also argued that the action was barred because Plaintiffs could not show a probability of prevailing on their claims given that the litigation privilege applied to counsel's statements and writings, or, alternatively, that such statements were either truthful or non-actionable opinion.

In response, Plaintiffs offered a declaration from Freer stating that he and Getfugu had never been under investigation by the FBI, SEC or any other government agency. They also filed a declaration by their in-house counsel, who said he had been informed by the SEC that it was not investigating Freer or Getfugu. In addition, the in-house counsel said that after learning of the Copenhagen Post article, he sent a letter to the paper explaining the defamatory nature of the article. The paper then removed the article from the internet.

The trial court granted the motion. Plaintiffs then appealed the order as to the defamation claim.

The *Getfugu* Decision

Based on the Press Release, the Court of Appeal reversed the trial court's decision as to the Shareholders' Attorney and his law firm on the defamation claim.

The *Getfugu* court observed that in order to prevail on a special motion to strike, the movant must first show that the challenged conduct was an act in furtherance of the movant's right of petition or free speech under the U.S. or California Constitution relating to a public issue. If the movant meets this burden, then the responding party must show it is capable of prevailing on its claim. The responding party may meet its burden by establishing its claim has minimal merit.

The court found that the Shareholders' Attorney and his law firm had carried their burden as to the first part of the standard. The written statements by the Shareholders' Attorney were made in a place open to the public or a public forum regarding an issue of public interest. The court also noted that investment scams are a matter of public interest. However, the court held that Plaintiffs had shown the defamation claim against the Shareholders' Attorney and his law firm, based on the Press Release, had the requisite minimal merit to defeat the motion.

The Court of Appeal further ruled that the litigation privilege did not shield the Press Release or the Tweet. It pointed out that 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." However, republications of such communications to nonparticipants in the action are generally not protected by the litigation privilege, and thus can be actionable, unless covered by another privilege. The court also noted that while the litigation privilege has grown to include non-participants with a substantial interest in the proceedings, it still does not cover publications to the general public through the press. It emphasized that extending the litigation privilege to litigating in the press would be counter to the interests of the justice system.

Shareholders' Attorney and his firm argued that the Press Release was posted on "Investor Wire," which was directed only to people in the investment community, not the public at large. The court rejected this argument, finding that the Press Release and the Tweet were posted on the internet, and thus were released worldwide. Also, the investment community was so large as to be equivalent to a disclosure to the general public.

In addition, the court held that there was conflicting evidence as to whether the statements in the Press Release were true. The opposing declarations were enough to meet the slight threshold of showing that the case had "minimal merit." However, as to the Tweet, the court ruled that its contents were non-actionable opinions, and therefore could not support a defamation claim.

How *Getfugu* May Affect You

The *Getfugu* decision offers a couple of important lessons for persons posting statements on the internet, including social media, regarding pending litigation.

1. Be Careful of What You Say and to Whom You say it.

Getfugu underscores the fact that despite the protection afforded by California's anti-SLAPP statute, and the broad scope of the litigation privilege, persons posting allegedly false statements about pending litigation on the internet may still find themselves having to defend a defamation suit if they do not pay attention to what they are saying and to whom they are saying it. A potentially defamed party can defeat an anti-SLAPP motion if it can show that its claim has even minimal merit, which is a relatively low threshold. Trying to rely on the litigation privilege to avoid that result will be unavailing if disclosure has been made to persons other than participants and those nonparticipants having a substantial interest in the proceedings. Persons who make otherwise defamatory statements in connection with litigation will not be protected from liability where such statements are posted on the internet to the general public or such a broad swath of society as to be tantamount to a disclosure to the general public.

2. Do Not Try Your Case in the Press/on the Internet.

The *Getfugu* court made clear its disapproval of efforts to try cases in the press, including using the internet for that purpose. The Court of Appeal emphasized the damage that can result from such conduct, such as "poisoning of jury pools and bringing disrepute upon both the judiciary and the bar." The same applies to internet postings. Before posting statements on the internet regarding pending litigation, one should ask oneself, "Does the possible value of such statements outweigh the potential liability exposure and court ire that may flow from making those statements?" Client business representatives should be counseled not to make statements concerning pending litigation in the press and on social media.

Mark T. Hansen and *Robert B. Milligan* are members of Seyfarth's Commercial Litigation Practice Group.

Mr. Milligan is a partner and member of the Litigation and Labor & Employment practice groups in Seyfarth's Los Angeles Century City Office. Mr. Hansen, a commercial litigator and trial attorney, is senior counsel to the firm in its Downtown Los Angeles Office.

If you would like further information, please contact Mark Hansen at *mhansen@seyfarth.com*, Robert Milligan at *rmilligan@seyfarth.com* or your Seyfarth Commercial Litigation attorney.