Crafting a Media Response to a Lawsuit without Inviting Further Litigation

September 26, 2017 • Legal Updates & Insights

This Expert Analysis was originally published in the September 25, 2017 print edition of the New York Law Journal. See original.

CRAFTING A MEDIA RESPONSE TO A LAWSUIT WITHOUT INVITING FURTHER LITIGATION

By Michael J. WilleminOn Sept. 12, 2017, the Second Circuit held that a defendant-employer's statement, issued in response to litigation, that the plaintiff-employee had "repeatedly tried to extort money from the company" and was "dismissed for gross misconduct," could serve as the basis for a claim for defamation. *Friedman v. Bloomberg*, No. 16 Civ. 1335, 2017 WL 3995825 (2d Cir. Sept. 12, 2017). *Friedman* represents a departure from a long line of decisions that have held that similar statements made by employers in response to litigation were rhetorical, nonactionable expressions of opinion.The implications of *Friedman* are wide ranging, and the holding is likely to create headaches for employers and outside counsel when deciding how to respond to litigation. This article breaks down the state of the law and provides advice for employers and litigators on crafting statements in response to litigation.

Background

Dan Friedman was hired in November 2011 by Dutch asset management firm, Palladyne. Friedman worked for Palladyne until February 2012, at which time he alleges that he was fired after raising concerns about Palladyne's investment activities. In March 2014, Friedman sued Palladyne for, inter alia, fraudulent inducement. On March 27, 2014, Bloomberg published an article about the lawsuit. The article contained the following statement from Palladyne: "These entirely untrue and ludicrous allegations [by Friedman] have been made by a former employee who has repeatedly tried to extort money from the company … . He worked with us for just two months before being dismissed for gross misconduct."
Friedman then filed a second action, for defamation, against Bloomberg and Palladyne, among other defendants.

Consistent With Prevailing Law

Palladyne moved to dismiss the defamation claims brought against it on jurisdictional grounds. The district court granted that motion for reasons not relevant to this article. Bloomberg, the publisher of Palladyne's statement, moved to dismiss the defamation claim brought by Friedman under Fed. R. Civ. P. 12(b)(6). Bloomberg argued that the statement at issue was a protected expression of opinion. The district court granted Bloomberg's motion, holding: "A reasonable reader would understand the use of the word 'extort' to be 'rhetorical hyperbole, a vigorous epithet' and the statement to reflect Palladyne's belief that an upset former employee had filed a frivolous lawsuit against Palladyne in order to get money." *Friedman v. Bloomberg*, 180 F. Supp. 3d 137, 142 (D. Conn. 2016). Accordingly, court held that "Palladyne's statement was a nonactionable vigorous epithet, not a libelous statement of fact." Id.

Friedman appealed.

The district court's decision in *Friedman* was in keeping with a long line of decisions that have held that accusing a plaintiff of "extortion" in connection with pending litigation is likely to be understood by any reasonable reader to be mere rhetorical hyperbole regarding the merits of the lawsuit and, therefore, such statements have repeatedly been held to constitute nonactionable opinion. See, e.g., *Sabhawal & Finkel v. Sorrell*, 117 A.D.3d 437, 437-38 (1st Dep't 2014); *Melius v. Glacken*, 914 A.D.3d 959, 959-60 (2d Dep't 2012); *G&R Moojestic Treats v. Maggiemoo's Int'l*, No. 03 Civ. 10027 (RWS), 2004 WL 1172762, at *2 (S.D.N.Y. May 27, 2004); *Trustco Bank of New York v. Capital Newspaper Div. of Hearst*, 213 A.D.2d 940, 941-42 (3d Dep't 1995). In each of these cases, a plaintiff was accused of engaging in "extortion." Each time, the court held that the statements at issue were nonactionable opinion.

Statement at Issue Is Actionable

Despite the lengthy recitation of cases holding that similar statements were nonactionable opinion, the court held that the statement in the *Friedman* case was one of fact. Similar to the cases cited above, the *Friedman* court agreed that Palladyne's statement was made in the context of a "heated" dispute. The *Friedman* court also agreed that the statements were made in an article that described the *Friedman* dispute and the claims made by Friedman against Palladyne. Nevertheless, the Second Circuit held that a reasonable reader of the Bloomberg article could interpret Palladyne's use of the word "extort" to be more than mere "rhetorical hyperbole." In coming to its decision, the court relied on a number of distinctions it drew between prior decisions and the facts of *Friedman*.

First, the court noted that the statement at issue "did not simply state that Friedman's *lawsuit* was an attempt to extort money." (emphasis in original). Rather, Palladyne stated that Friedman had *"repeatedly"* tried to extort money from Palladyne. Given that the statement accused Friedman of multiple acts of extortion, the court found that the statement could be read as "something other than a characterization of Friedman's underlying lawsuit." Although not cited in *Friedman*, this is similar to the situation presented in *Osorio v. Source Enterprises*, No. 05 Civ. 10029 (JSR), 2006 WL 2548425, at *6 (S.D.N.Y. Sept. 5, 2006), in which the court denied summary judgment on a claim for defamation where an individual defendant issued a statement that the plaintiff tried to extort the defendant when she made a pre-litigation internal complaint.

Second, the court looked to the complete statement to contextualize the use of the word "extort." Specifically, the court noted that Palladyne's statement included the assertion that the plaintiff had been "dismissed for gross misconduct." In this context, the court found that a reasonable reader could have believed that Friedman's "gross misconduct" "consisted of multiple attempts to 'extort' money and that Friedman was fired for engaging in this criminal conduct."

Third, the court held, alternatively, that even if a reasonable reader would find that the use of the word "extort" was hyperbolic, the statement would still be actionable as one of mixed fact and opinion. The court noted that even a statement of opinion is actionable "if it implies that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental" to the subject of the statement. The statement at issue asserted that Friedman had previously made attempts to "extort" the company, but failed to disclose the extortionate actions Palladyne believed Friedman had taken. Without

clearly identifying the basis for the claim that Friedman attempted to extort the company, a reasonable reader could determine that Palladyne was in fact stating that Friedman had committed the criminal act of extortion.

Accordingly, the Second Circuit reversed the district court's dismissal of Friedman's defamation claim based on the statement that the Friedman had tried to "extort" Palladyne.

Implications and Key Takeaways

Friedman's impact in the employment litigation world is likely to be substantial. Employers regularly issue statements regarding pending lawsuits, and those statements often do more than simply deny the allegations. However, while an employer may be justifiably upset by a lawsuit, the decision in *Friedman* makes clear that statements made to the
media about litigation can expose an employer to additional liability. If an employer's statement regarding litigation is not carefully reviewed, it is entirely possible that an employer could succeed on the underlying claims in the original lawsuit, but find themselves on the wrong side of a verdict for defamation (the *Osorio* case resulted in a $3,500,000 jury verdict on the plaintiff's defamation claim). Even if the employer succeeds in defeating the defamation claim, it will cost time and money to defend against.

For these reasons, employers and the attorneys that represent them need to keep *Friedman* in mind when crafting responses to employee-initiated litigation. Here are some tips on how to issue a statement without being sued for defamation:

First, ensure that the statement being issued comments *only* on the litigation and the allegations in the Complaint. Any statement that can be construed to comment on the character or conduct of the plaintiff should be avoided.

Second, to that end, do not comment on the circumstances or reasons for the plaintiff's departure or his or her performance. Any statement disparaging the plaintiff in the employment context could open the door to a claim for defamation per se.

Third, avoid words such as "blackmail," "shakedown" and "extortion." While *Friedman* may not have overruled prior case law, it does create employee-friendly precedent where these types of words are used.

Fourth, the safest bet is to keep it simple. Statements such as, "we deny the allegations," "we will vigorously defend against this lawsuit" and "we look forward to presenting our defense in court" are all safe responses to litigation.

Finally, plaintiffs' attorneys also should read and understand Friedman and pay close attention to statements that defendants make to the media about litigation. An employer's misstep could provide the basis for a defamation claim and greatly enhance the plaintiff's chance of recovery.

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