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New York Court of Appeals Rules That Pre-Litigation Cease and Desist Letters Are Subject to a Qualified Privilege in Libel Actions

In *Front, Inc. v. Khalil*, 2015 N.Y. Slip Op. 01554, 2015 WL 750965 (N.Y. Feb. 24, 2015), the New York Court of Appeals settled an open question of New York law concerning immunity for lawyers who send pre-litigation “cease and desist” letters. Specifically, the Court held that such communications are protected by a qualified privilege in defense of a defamation claim “if the statements are pertinent to a good-faith anticipated litigation.” 2015 WL 750965 at 2.

The defendant in *Front, Inc. v. Khalil* was a former employee of the plaintiff who resigned to work for a competitor engineering firm. After an investigation, counsel for the plaintiff sent letters to Khalil, alleging that he had attempted to steal confidential company information, misappropriated trade secrets and otherwise committed ethical violations. The letter ended with a demand that Khalil “cease and desist” such activities. Counsel also provided a copy of the letter to Khalil’s employer. Receiving no response, Front, Inc. commenced an action against both Khalil and his employer. Khalil thereafter commenced a third-party action for libel against the lawyer and law firm that had sent the pre-litigation demand letters. On motions to dismiss, the New York Supreme Court dismissed the libel claims, holding that the letters were “absolutely privileged.” The Appellate Division, First Department affirmed.

The Court of Appeals affirmed, though it rejected the lower courts’ application of an “absolute privilege” to pre-litigation communications. The Court noted the longstanding rule in New York that statements by attorneys in connection with court proceedings are protected by an absolute immunity “when such words or writings are material and pertinent to the questions involved.” *Youmans v. Smith*, 153 N.Y. 214, 219 (1897) (quoted in *Front, Inc.*, 2015 WL 750965 at 3). The Court explained the rationale behind this rule as permitting attorneys to speak freely in order to zealously represent their clients without fear of reprisal. 2015 WL 750965 at 4.

The Court of Appeals, however, rejected the rule of absolute privilege with respect to pre-litigation communications and instead enunciated a rule of qualified privilege. In doing so, the Court recognized that pre-litigation communications, such as cease and desist letters, often are sent to avoid litigation and “should be encouraged and not chilled by the possibility of being the basis for a defamation suit.” *Id.* at 4. Yet concerned that an absolute privilege “has the potential to be abused,” the Court endorsed the rule of qualified privilege which “should only be applied to statements pertinent to a good-faith anticipated litigation.” *Id.* Thus, going forward, “the privilege is lost where [the libel plaintiff] proves that the statements were not pertinent to a good-faith anticipated litigation.” *Id.* Applying this new rule to the

letters in question, the Court held that the pre-litigation letters were pertinent to an anticipated litigation and thus affirmed the dismissal of the third-party complaint. *Id.* at 5.

The Court of Appeals' decision in *Front, Inc. v. Khalil* limits absolute privilege as a defense to libel actions to statements made in court proceedings and applies qualified privilege to pre-litigation communications. While this limitation should not affect most cease and desist letters sent in anticipation of litigation, it bears noting that the Court's rationale for applying only a qualified privilege to pre-litigation communications is that qualifying the privilege "ensures that privilege does not protect attorneys who are seeking to bully, harass, or intimidate their client's adversaries by threatening baseless litigation or by asserting wholly unmeritorious claims, unsupported in law and fact, in violation of counsel's ethical obligations." 2015 WL 750965 at 4. This rule could prove useful for companies that may be the recipient of baseless pre-litigation demands.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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