Published on *The National Law Review* https://natlawreview.com

Accountant's Defamatory Report To Audit Committee Held To Be Absolutely Privileged

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Once upon a time, an independent accounting firm learned from a law enforcement source that its publicly traded client and two of its directors had committed illegal acts of a serious nature. The accounting firm contacts the source who advises against further dissemination of the report. Nonetheless, the accounting firm decides to report the matter to the client's audit committee and ask for an investigation. The ensuing investigation by a national law firm with experience in regulatory and compliance issues reveals *no evidence* of misconduct. The two directors nevertheless resign. Not surprisingly, they decide to sue alleging that the accounting firm published defamatory statements to the audit committee and knowingly interfered with their contractual relationships and prospective economic advantage with the company as a result of the defamatory statements. Who wins?

This is essentially the case presented to the Nevada Supreme Court in ***Cucinotta v. Deloitte & Touche, LLP****,* 129 Nev. Adv. Op. 35 (May 30, 2013). In an *en banc* opinion issued yesterday, the Court held that one who is required by law to publish defamatory matter is absolutely privileged to publish it when (1) the communication is made pursuant to a lawful process, and (2) the communication is made to a qualified person. In doing so, the Court expressly adopted the Restatement (Second) of Torts section 592A.

The Court found that the accounting firm had met the first condition because Section 10A of the Securities and Exchange Act requires accounting firms to take specified actions "becomes aware of information indicating that an illegal act (whether or not perceived to have a material effect on the financial statements of the issuer) has or may have occurred." The Court found that the accounting firm met the second condition because it made the report to the audit committee.

National Law Review, Volume III, Number 151