

Compliance & Ethics Professional

October
2017



A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

www.corporatecompliance.org

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Defamation risks in doing compliance work

The risks of being sued for defamation in doing compliance work have existed for many years. Most famously, in the 1980s, a lawyer conducting an internal investigation for his brokerage house client (who happened to be former U.S. Attorney General Griffin Bell) was sued, unsuccessfully, for defamation by an individual implicated in that investigation. However, the advent of heightened expectations under the Foreign Corrupt Practices Act enforcement regimes regarding internal investigations and other remedial measures has arguably led to an increase in risks of this sort.



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In another—much more recent—case, a former employee of Shell Oil sued the company in Texas for defamation in connection with his being implicated in a report of an internal investigation regarding corruption given to the Department of Justice (DOJ). Shell ultimately prevailed, with the state's highest court holding that because Shell was a target of the DOJ's investigation and was, "practically speaking, compelled to undertake its internal investigation and report its findings to" the DOJ, the company was entitled to invoke an absolute privilege for its communications.¹

However, a different result was reached earlier this year in a case in Indiana,² in which an employee of Biomet, a life sciences company, sued it for defamation and related causes of action for an internal communication that included him in a restricted-parties list

issued in connection with a corruption-related investigation. In so holding, the court rejected the defendant's claim that Biomet had not made a factual statement about the plaintiff's being guilty of corruption but merely stated an opinion; rather, the court held that Biomet's communication implicitly implicated him in corruption.

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Note that this decision does not mean that Biomet has lost the case—only a motion to dismiss. Nor is it inconsistent with the logic of the Shell case—the two decisions, while both defamation related, addressed different issues.

Still, the Biomet decision does provide an important reminder to compliance officers to be prudent in communications implicating employees and others in wrongdoing—and perhaps to train all those who work at a company on investigations and other aspects of compliance about the perils of defamation. *

1. *Shell Oil Co. v. Witt*, No. 13-0552, 2015, WL 2328678, *7. Tex. (May 15, 2015). Available at <http://bit.ly/2wb8sVB>.
2. *Yeatts v. Zimmer Biomet Holdings, Inc.*, 3:16-CV-706-MGG. USDC, N.D. Ind. (April 17, 2017). Available at <http://bit.ly/2wgy6HK>.

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