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Management Alert

The Supreme Court To Clarify Who Is a Whistleblower Under the Dodd-Frank Act; Employers Have a Reason to be Hopeful

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Seyfarth Synopsis: *Following oral argument, employers can be cautiously optimistic that the U.S. Supreme Court will hold that the Dodd-Frank Act's anti-retaliation protections apply only to those employees who have made a report to the SEC, not to those who make reports internally or to other agencies.*

On Tuesday, the U.S. Supreme Court heard argument in *Digital Realty Trust, Inc. v. Somers,* a closely-watched case that will clarify the scope of whistleblower protection under the Dodd-Frank Act.

The issue, in simple terms, is whether an employee who only reports alleged wrongdoing to his or her employer may sue for whistleblower retaliation under the Act, even though the statute expressly defines a "whistleblower" as one who reports a securities law violation "to the [Securities and Exchange] Commission." This seemingly straightforward question has divided the Second, Fifth, and Ninth Circuit Courts of Appeal, prompting the high court's review.

A significant source of the circuit conflict is that the SEC, through administrative rule-making, has taken the position that, despite the statutory "whistleblower" definition, a report to the agency is *not* required in order to trigger whistleblower protection; an internal report to the employer suffices. The SEC's expansive definition of "whistleblower," if endorsed by the Supreme Court, could open the floodgates for Dodd-Frank whistleblower suits based solely on internal reports (or reports to other agencies or law enforcement), and those suits bring with them the risk of double back-pay awards.

Making predictions from oral argument is difficult, and the authors of this post, who attended the argument, offer these insights with all of the usual caveats.[1] Based on the tone and substance of the questioning, we are cautiously optimistic that the Court will adhere to the statutory text and require a report "to the Commission" as a prerequisite to a Dodd-Frank whistleblower claim.

Events Leading Up to the Oral Argument

Paul Somers, a former vice president of portfolio management for Digital Realty, alleged that, shortly before he was discharged, he had complained to senior management that his supervisor had eliminated some internal controls. Somers did not report any securities law violation to the SEC. Digital Realty moved to dismiss the Dodd-Frank Act retaliation claim on the basis that Somers had not made a report "to the Commission" and thus was not a statutory "whistleblower."

1 One more caveat: Seyfarth Shaw LLP represents Digital Realty Trust in this case and is co-counsel at the Supreme Court. The views expressed in this blog post are Seyfarth Shaw's and not necessarily those of Digital Realty.

A divided Ninth Circuit, while acknowledging the narrow "whistleblower" definition, nevertheless found the statute ambiguous overall and gave the SEC's regulation *Chevron* deference—that is, deference that courts will give to an administrative agency's "reasonable" interpretation of an "ambiguous" statute. *Chevron v. Natural Resources Defense Council.* The court also concluded that its broader view fulfilled "Congress's overall purpose." It thus joined the Second Circuit in finding that the Act's anti-retaliation provisions protect purely internal reporters.

The Fifth Circuit, in contrast, found the Act's plain language crystal-clear in protecting only those who make reports "to the Commission," and gave no *Chevron* deference to the SEC's contradictory regulation.

The Supreme Court's decision to review this case attracted notice from commentators, who pointed out that it could bring to the forefront core differences among the justices in their general approaches to statutory interpretation and agency deference. The proponents of strict "textualism" advocate close adherence to the statutory text—Justice Gorsuch, in particular, has been vocal both in his support of this approach and in his skepticism of *Chevron* deference. Others, among them Justices Breyer, Ginsburg and Sotomayor, have been more willing to consider a law's broader purpose as a tool in statutory interpretation. *See, e.g., King v. Burwell.*

The Oral Argument

Based on Tuesday's argument, it does not appear that the justices are divided along the predicted "textualism" vs. "purpose" lines in this particular case. The tenor of the questioning suggests that a majority of the justices share a concern about departing from the Act's explicit text, a view that favors Digital Realty's position.

Justice Gorsuch, one of the more vigorous questioners, repeatedly directed Somers' counsel, Daniel Geyser, back to the statutory text. "I'm just stuck on the plain language," he remarked, before noting that the Act mandates that the whistleblower definition "shall apply" to the anti-retaliation provisions. "How much clearer could they have possibly been?," he asked Geyser.

Justice Gorsuch returned to this theme in his questions to the government, which provided amicus support to Somers. The government's lawyer, Christopher Michel, argued that "it's quite clear that what Congress was trying to do in Dodd-Frank was bolster the remedies that were available under Sarbanes-Oxley," which protects internal reports. Justice Gorsuch responded that "we don't follow what [Congress is] trying to do. We follow what they *do* do, right?"

Justices Breyer also questioned whether Congress intended to cover internal reporters in Dodd-Frank's anti-retaliation provisions, as they are already protected under the Sarbanes-Oxley Act (SOX). "If we read it your way," he told Somers' counsel, "we've basically eliminated Sarbanes-Oxley because everybody would bring it this way"—that is, under Dodd-Frank, which has more generous remedies and fewer administrative requirements than a SOX claim.

Justices Breyer and Gorsuch also appeared to share a concern that, during the rule-making process, the SEC did not provide adequate notice to the public that it might expand Dodd-Frank's whistleblower definition to include those who had not made a report to the SEC. That "seems to me to put the whole administrative process on its head," Justice Gorsuch remarked. Justice Breyer echoed this point, stating that the SEC's notice, which described reports "to the Commission," did not tell the public it was considering non-SEC reports—"I mean, that's English, I would think."

Other justices picked up on this latter point, with Justice Ginsburg noting that "I thought … if the statute gives a definition, you follow the definition in the statute unless it would lead not merely to an anomaly, but to an absurd result."

After the Oral Argument

While we are cautiously optimistic that the Court will rule favorably to employers, there will be no definitive answer until the Court issues its opinion. A decision is expected in the Spring. No matter how the Court rules, employers should carefully

examine their corporate compliance and reporting systems to ensure that they are fair, robust and responsive.

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