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SCOTUS to Resolve Circuit Split Over Dodd-Frank Whistleblowers

On Monday, June 26, 2017, the U.S. Supreme Court agreed to review whether the Dodd-Frank Act (DFA) prohibits retaliation against internal whistleblowers or only covers individuals who report to the U.S. Securities and Exchange Commission (the SEC).

This question has divided practitioners and lower courts alike since Dodd-Frank's passage in 2010. As reported in our previous Alert on March 29, 2017, the Ninth Circuit Court of Appeals widened the circuit split on this question in *Somers v. Digital Realty Trust Inc.*, 850 F.3d. 1045 (9th Cir., March 8, 2017), when it affirmed the district court's denial of the defendant's motion to dismiss a DFA whistleblower claim, where the whistleblower had only reported internally.

In *Somers*, plaintiff alleged that he was terminated based on "vague, trivial and false allegations of misconduct" after he complained to senior management that a senior vice president had allegedly eliminated some internal corporate controls in violation of SOX. The district court denied Digital Realty's motion to dismiss the DFA claim, but certified the issue for interlocutory appeal. In a divided 2-1 decision, the Ninth Circuit panel followed a previous Second Circuit decision and concluded that the DFA's reference to certain provisions of the Sarbanes Oxley Act (SOX) "necessarily bars retaliation against an employee of a public company who reports violations to the boss, *i.e.*, one who 'provide[s] information' regarding a securities law violation to a 'person with supervisory authority of the employee.'" *Somers*, 850 F.3d. at 1049.

In petitioning for a writ of certiorari to the U.S. Supreme Court, Digital Realty emphasized that the anti-retaliation provision of DFA, 15 U.S.C. § 78u-6(h)(1), only prohibits retaliation against a "whistleblower" and that the DFA defines "whistleblower" as an "individual who provides … information relating to a violation of the securities laws ***to the Commission***, in a manner, established by rule or regulation, by the Commission." 15 U.S.C. 78u-6(a)(6) (emphasis added). Digital Realty took issue with the SEC's regulation under DFA which attempts to define "whistleblower" "not by reference to the statutory definition of 'whistleblower,' but rather by reference to the activity protected by that provision." Digital Realty argued that the Ninth Circuit's decision threatens to render obsolete SOX's anti-retaliation scheme "because the Dodd-Frank Act affords whistleblowers several distinct advantages that the Sarbanes-Oxley Act

does not" and the Ninth Circuit decision would have DFA protect all of the same conduct protected by SOX (and more).

Several amicus briefs have been filed in support of Digital Realty's petition to the Supreme Court, including from the U.S. Chamber of Commerce, which argued that the Ninth Circuit's interpretation of the DFA "would greatly expand the number of employees authorized to pursue the enhanced remedies of the Act, and the period of time for which they may sue for retaliation, without yielding the law enforcement benefits Congress intended when it enacted a 'bounty' and heightened protections for persons who complain to the Securities and Exchange Commission." The Chamber also argued that "[t]he interpretation of the Dodd-Frank Act espoused by the Ninth and Second Circuits has profound implications for employers across the country and in every industry. If allowed to stand, it would severely disrupt the carefully constructed anti-retaliation programs established by Congress, and open the door to countless lawsuits that Congress never intended Dodd-Frank to cover."

Other commentators have countered that narrowing the protection of internal whistleblowing may result in more whistleblowers disclosing securities law violations directly to the SEC, without any internal disclosure, thereby dealing a pyrrhic victory to employers should Realty Trust prevail before the Supreme Court.

Of particular interest to Supreme Court watchers is the possibility that *Somers* may provide an opportunity for the Court to revisit its *Chevron* deference doctrine, which is a doctrine under which courts may, under certain circumstances, defer to administrative agencies' interpretations of allegedly ambiguous statutes. In ruling that the DFA whistleblower protections covered internal reporting, the Ninth Circuit stated that to the extent there was any ambiguity in the statute, the SEC's regulation, 17 C.F.R. § 240.21F-2 (Rule 21F-2), which interpreted the DFA to protect those who made only internal disclosures, was entitled to *Chevron* deference.

The Court's newest member, Justice Gorsuch, has expressed skepticism of the *Chevron* doctrine, once referring to it during his time on the Tenth Circuit Court of Appeals as the "elephant in the room" and stating that "[m]aybe the time has come to face the behemoth." *Guitierrez-Brizuela v. Lynch*, No. 14-9585, at *15 (10th Cir. 2016) (Gorsuch, J., concurring). Justice Gorsuch has also called *Chevron* "a judge-made doctrine for the abdication of the judicial duty." *Id.* * 8. Notably, among Monday's orders, Justice Gorsuch issued a dissent in *Mathis v. Shulkin* in which he raised questions about a presumption of competence allowed to another government agency, the Department of Veteran Affairs, and noted that the presumption's "days may be numbered." *See Matthis v. Shulkin*, No. 16-677, 582 U.S. ____ (2017), *2 (Gorsuch, J.) (dissenting).

The Supreme Court may also view *Somers* as an opportunity to cabin *King v. Burwell*, 135 S.Ct. 2480, 2489 (2015), a decision interpreting provisions of the Patient Protection and Affordable Care Act (ACA). *King* was relied upon by the Ninth Circuit to reconcile the express definition of "whistleblower" in the DFA with its holding, as *King* had held that terms can have different operative consequences in different contexts. Of course, in *King*, such an approach may have been guided by a desire to avoid vitiating an entire statutory scheme, while in the whistleblower context individuals who are not covered by the DFA would still have SOX remedies if retaliated against following an internal report. In fact, in his dissent in *Somers*, Judge Owens wrote that "[i]n my view, we should quarantine *King* and its potentially dangerous shapeshifting nature to the specific facts of that case to avoid jurisprudential disruption on a cellular level." *Somers*, 850 F.3d. at 1051 (Owens, J.) (dissenting).

Whether the Court uses the *Somers* case to delve into *Chevron* deference or the statutory construction principles set forth in *King,* the Court's long-awaited consideration of this issue should provide a definitive answer on whether internal whistleblowers may rely on the anti-retaliation provisions of the DFA. Of course, a decision one way or another may potentially lead Congress to enact legislative changes to the law.

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