

SCOTUS - Oral Argument in Digital Realty Trust v. Somers. Section 922 of the Dodd-Frank Act

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December 6, 2017

Update: On Feb. 21, 2018, the Supreme Court unanimously held that the statute's definition of "whistleblower" was unambiguous and therefore precluded the SEC from more expansively interpreting that term. *Digital Realty Tr., Inc. v. Somers*, No. 16-1276, --- S. Ct. ---, 2018 WL 987345, at *14 (U.S. Feb. 21, 2018). As a result, the Court held that individuals who have not provided information to the SEC do not qualify for protection under the statute. *Id.* For a more detailed analysis of the decision, click [here](#).

Section 922 of the Dodd-Frank Act created new anti-retaliation protections for whistleblowers who raise complaints about securities violations. Section 922 allows "a whistleblower" to sue their employers in federal court if they retaliate against the whistleblower for having:

- provided information about their employer to the SEC, in accordance with the SEC whistleblower reward program;
- initiated, testified, or assisted in any investigation related to the reward program; or
- made disclosures "required or protected" under the Sarbanes-Oxley Act, the Securities Exchange Act of 1934, or any other law, rule, or regulation under the jurisdiction of the SEC. 15 U.S.C. § 78u-6(h)(1)(A).

One of the most hotly contested whistleblower retaliation issues hinges on whether Section 922 of the Dodd-Frank Act protects employees who make only internal reports of securities violations. The U.S. Supreme Court will resolve this issue during the 2017-2018 judicial term, and recently heard oral argument in the matter, on November 28, 2017.

Section 922 expressly prohibits an employer from retaliating against "a whistleblower" for engaging in protected activity. 15 U.S.C. § 78u-6(h)(1)(A). The Dodd-Frank Act further defines "whistleblower" as "any individual who provides...information relating to a violation of the securities laws to the SEC." 15 U.S.C. § 78u-6(a). But this definition of "whistleblower" arguably conflicts with the third category of protected conduct - *i.e.*, disclosures that are "required or protected" under the Sarbanes-Oxley Act. 15 U.S.C. § 78u-6(h)(1)(A). [SOX](#) expressly protects internal reporting violations of certain federal fraud statutes and SEC rules and regulations. Because SOX protects internal reporting, does Dodd-Frank also?

The SEC interprets Section 922 as covering employees who report securities violations internally, such that the SEC does not require that the employee report those same concerns externally to qualify for protection under the law. However, federal courts have reached conflicting outcomes on whether Dodd-Frank protects whistleblowers who only report internally. The U.S. Circuit Court of Appeals of the Fifth Circuit, which was the first federal appellate court to address the question, rejected the SEC's interpretation of Section 922. See *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, (5th Cir.

2013).

Two years later, the Second Circuit disagreed with *Asadi*, creating a circuit split and setting the stage for eventual U.S. Supreme Court review. In *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 147 (2d Cir. 2015), the Second Circuit held that Dodd-Frank protects whistleblowers who report securities violations internally but had not reported to the SEC. On March 8, 2017, the Ninth Circuit became the third U.S. Court of Appeals to address the question whether the Dodd-Frank Act protects internal reporting. See *Somers v. Digital Realty Trust Inc.*, 850 F.3d 1045 (9th Cir. 2017). In *Somers*, the Ninth Circuit joined the Second Circuit in deferring to the SEC's interpretation, and held that internal reporting is protected under the Dodd-Frank Act.

Following the Ninth Circuit's ruling in *Somers*, Digital Realty filed a petition for *certiorari* with the U.S. Supreme Court, asking the Justices to overturn the Ninth Circuit's decision and instead adopt the views expressed by the Fifth Circuit in *Asadi*. [The Supreme Court granted the petition](#) on June 26, 2017, and heard oral argument in the matter on November 28, 2017.

Although the Court might not issue a written opinion for several more months, the questions posed by the Justices during oral argument implied that the Court will adopt the Fifth Circuit's more restrictive interpretation of Section 922. Counsel for Digital Realty contended at oral argument that the Dodd-Frank Act's plain language controls the outcome of the case. According to Digital Realty's counsel, Section 922 clearly protects only "whistleblowers," and the statute further defines whistleblowers only as those who report concerns to the SEC. Digital Realty's lawyer asserted that SOX's anti-retaliation provision already adequately protects internal reports about securities violations, and that Digital Realty's interpretation of Section 922 did not create an "absurd result." The company's lawyer also argued that the SEC had failed to adequately solicit public comment about the agency's pro-whistleblower interpretation of Section 922, which undermined corporate America's ability to provide input on the SEC's interpretation and undermined any argument for deference to its views.

Tellingly, the Justices asked relatively few questions of Digital Realty's counsel and instead allowed him to present the majority of his argument without interruption. In contrast, the Justices frequently interrupted counsel for the whistleblower (*Somers*) and for the SEC with skeptical lines of questioning. For the conservative jurists on the Court, Justice Gorsuch dominated the discussion with questions indicating his intention to reverse the Ninth Circuit. Joined occasionally by Justice Alito and Chief Justice Roberts, Justice Gorsuch rooted his objections to the position of Mr. Somers and the SEC in both his textualist approach to Section 922 and his concerns about deficiencies in the SEC's rulemaking process.

Interestingly, Justice Kennedy did not ask any questions during the argument. And even the so-called "liberal" portion of the Court, including Justices Ginsburg, Breyer, Sotomayor, and Kagan, expressed a degree of skepticism toward the whistleblower's position. Among other inquiries, those Justices suggested that the Fifth Circuit's interpretation did not produce an absurd result and also explored whether existing remedies under SOX would protect whistleblowers who complain internally. There was thus unanimous agreement among the Justices who spoke about the controlling standard for interpreting statutory language. They all agreed that the plain language of a statute controls even if it produces an anomalous result, and that the Court would deviate from the plain language only if the language produces an absurd result.

As of now, the weight of the appellate court authority supports a more whistleblower-friendly and expansive interpretation of Section 922. But based on the Justices' questions at oral argument, the future vitality of that authority is very much in doubt. If the Supreme Court ultimately sides with Digital Realty, those whistleblowers who raise complaints internally and do not go to the SEC will lose out on Section 922's more robust anti-retaliation protections. A decision from the Supreme Court is

expected in early 2018.