Supreme Court's Limited Protection for Whistleblowers Under Dodd-Frank

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The Dodd-Frank Act (the "Act"), passed in the wake of the 2008 financial crisis, was intended to deter "abusive practices in the mortgage industry" and demand "accountability and responsibility from everyone."[1] In furtherance of these objectives, the Act includes significant incentives to encourage whistleblowing and protections for those who engage in whistleblowing. Under section 21F, whistleblowers may be entitled to a reward of up to 30% of any monetary sanction over $1 million imposed by the Securities and Exchange Commission ("SEC") if the whistleblower voluntarily provided original information to the SEC.[2] Additionally, the Act mandated the creation of the "Office of the Whistleblower" and the "Whistleblower Program" in order to implement the whistleblower provisions.[3]

Determining exactly who qualifies for the Dodd-Frank whistleblower protections was the question at issue in the recent United States Supreme Court decision in *Digital Realty Trust, Inc. v. Somers*.[4] Paul Somers, former Vice President of Digital Realty Trust, Inc., reported concerns of potential securities law violations committed by Digital Realty exclusively to his superiors at the company.[5] Shortly thereafter, Digital Realty terminated Somers's employment.[6] Somers failed to subsequently file an administrative complaint about his termination within the statutory period or remedy his failure to report his concerns to the SEC.[7]

Somers did, however, bring suit in the United States District Court for the Northern District of California.[8] His claim alleged that Digital

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[1] Press Release, The White House, President Obama Signs Wall Street Reform: "No Easy Task" (July 21, 2010) (on file with author).

[2] 17 CFR §§ 240.21F-3, F-5 (2011).

[3] *Office of the Whistleblower: Resources*, U.S. SECURITIES AND EXCHANGE COMMISSION (last updated Feb. 16, 2018), https://www.sec.gov/whistleblower/resources.

[4] Digital Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018) (*Somers III*).

[5] *Id.* at 776.

[6] *Id.*

[7] *Id.* The statutory period within which Somers was permitted to file an administrative complaint with the Secretary of Labor was 180 days. 18 U.S.C. § 1514A(b)(1)–(2).

[8] Somers v. Digital Realty Trust, Inc., 119 F. Supp. 3d 1088 (N.D. Ca. 2015) (*Somers I*).

Realty's termination action violated the anti-retaliation provisions of Dodd-Frank.[9] The defense moved to dismiss the case because Somers, they reasoned, was not a "whistleblower" under Dodd-Frank as he did not report directly to the SEC.[10] The district court found the statutory language ambiguous, warranting *Chevron* deference[11] be given to the SEC's interpretation, which recognizes those who report internally as whistleblowers.[12] Based on such deference, the district court denied Digital Realty's motion to dismiss.[13]

Upon interlocutory appeal to the Ninth Circuit, a divided panel affirmed the district court's holding.[14] The appellate court's reasoning

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[9] *Id.* at 1092.

[10] *Id.* at 1094.

[11] In *Chevron U.S.A. Inc. v. National Resources Defense Council Inc.*, the United States Supreme Court established a two-part test for determining whether an agency's interpretation of statutory language should be given deference by the judiciary. *See* Chevron U.S.A. Inc. v. Nat'l Res. Def. Council Inc., 467 U.S. 837, 843–44 (1984). First, the court must decide whether Congress directly spoke on the precise question at issue. *Id*. at 842–43. If Congress was silent or ambiguous, the agency's interpretation is given deference if it is a reasonable interpretation of the statute. *Id.*

[12] *Somers I*, 119 F. Supp. 3d at 1104–05 (holding that "[T]here is sufficient ambiguity to open the door to administrative interpretation and invocation of Chevron deference to the SEC's interpretive regulation."). The SEC's interpretation was set forth in its Rule 21F and formal interpretation of Rule 21F. In the interpretation, the SEC stated:

> [T]he employment retaliation protections afforded to whistleblowers under Section 21F could be read as limited to only those individuals who provide the Commission with information; this is because under Section 21F(a)(6) the term whistleblower means any 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. To resolve this ambiguity, the Commission in Rule 21F-2 promulgated two separate definitions of whistleblower. These two definitions apply in different circumstances and each involves its own specified reporting procedures that must be satisfied in order for an individual to qualify under the particular definition.

Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934, No. 34-75592, 80 Fed. Reg. 47829-01 (Aug. 10, 2015) (internal quotation marks omitted) (emphasis in original). The interpretation goes on to define that for purposes of awards, the definition of "whistleblower" shall mirror the statutory definition. *Id.* However, it allows that for the purposes of the anti-retaliation provisions, the definition "does not require reporting in accordance with Rule 21F-9(a)'s procedures." *Id.*

[13] *Somers I*, 119 F. Supp. 3d at 1108.

[14] *See* Somers v. Digital Realty Trust, Inc., 850 F.3d 1045, 1050 (9th Cir. 2017) (*Somers II*).

weighed the narrow interpretation that Digital Realty supported, alongside the broader statutory context of section 78u of the Dodd-Frank Act.[15] The corresponding section of Dodd-Frank proscribes employers from discharging, demoting, suspending, threatening, harassing, or discriminating in any way against a whistleblower.[16] It goes on to define "any lawful act done by the whistleblower" as including (1) providing information to the SEC; (2) assisting in any judicial or administrative action of the SEC based on information provided to the SEC by the whistleblower; or (3) making any disclosures required under the Sarbanes-Oxley Act, Dodd-Frank Act, or "any other law, rule, or regulation subject to the jurisdiction of the Commission."[17] The Ninth Circuit held that adopting the narrow interpretation of whistleblower would marginalize the third category of whistle-blowing activities "to the point of absurdity."[18] As such, the Ninth Circuit affirmed the district court's broad definition of whistleblower and denied Digital Realty's motion to dismiss.[19] This holding by the Ninth Circuit aligned with the Second Circuit's interpretation of the Dodd-Frank whistleblower protections, and contrasted with the Fifth Circuit's narrow interpretation, which requires whistleblowers to report directly to the SEC.[20]

The United States Supreme Court granted certiorari to resolve the circuit split and heard oral arguments on the case on November 28, 2017.[21] Two issues dominated the discourse at oral arguments: the necessary threshold for looking beyond the plain meaning of "whistleblower" and deference entitled to the SEC's interpretation under the *Chevron* doctrine.

Somers's counsel argued that application of the plain meaning of the term "whistleblower" would create anomalies which justified overcoming a long-standing canon of interpretation: the plain meaning rule.[22] As an alternative to the plain meaning rule, Somers's counsel argued that the possibility for anomalies required the court to also consider "the context,

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[15] *Id.* at 1048–50 (holding that adopting the narrow definition of a "whistleblower" would limit subsection (iii) of section 78u "to the point of absurdity").
[16] 15 U.S.C. § 78u-6(h)(1)(A).
[17] *Id.*
[18] *Somers II*, 850 F.3d at 1049.
[19] *Id.* at 1050–51.
[20] *Compare Somers II*, 850 F.3d 1045 *with* Berman v. Neo@Ogilvy, LLC, 801 F.3d 145 (2d Cir. 2015), *and* Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013).
[21] Digital Realty Trust Inc. v. Somers, 137 S. Ct. 2300 (2017); *Digital Realty Trust Inc. v. Somers*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/digital-realty-trust-inc-v-somers/ (providing access to the transcript and audio recording of the oral arguments).
[22] Transcript of Oral Argument at 26, 31, Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018) (No. 16-1276) [hereinafter Oral Argument Transcript].

the structure, the purpose, [and] the history" of the Act.[23] Justice Kagan articulated one such potential anomaly when she questioned how the Act would apply to an employee who had made a report to the SEC years earlier on an unrelated topic as opposed to an employee who recently made an internal report before going to the SEC.[24] Justice Alito challenged the logic of the proposition that a mere anomaly could justify disregarding a term's plain meaning and questioned what degree of seriousness such an anomaly needed to reach before that framework would be plausible.[25] Justice Ginsburg suggested that not "merely . . . an anomaly" but only an "absurd result" should warrant disregarding the plain meaning of a phrase.[26]

The parties also debated the application of *Chevron* deference during oral argument. At the heart of this discussion was whether the statutory definition of "whistleblower" in the Act was ambiguous such that the SEC was justified in creating its own interpretation. The SEC's administrative interpretation was set forth in a final rule which recognized internal reporters as "whistleblowers" under the Act.[27] The second *Chevron* topic this case raised was whether, assuming the Act's definition was ambiguous, the SEC had correctly followed the Administrative Procedure Act's ("APA") requirements for rulemaking.[28] Digital Realty's counsel argued that the SEC failed to provide adequate notice to interested parties to comment on the rule before it was finalized.[29]

Justice Ginsburg authored the Court's opinion, published on February 21, 2018.[30] The Court interpreted section 78u of the Act not as broadening the definition of whistleblower nor creating ambiguity, but as establishing two separate aspects of the test that the SEC must apply when determining whether an individual is entitled to whistleblower protections.[31] The Court held that the statutory definition should be given its plain meaning in defining *who* is a whistleblower, and then section 78u should be

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[23] *Id.* at 32.
[24] *Id.* at 11–12.
[25] *Id.* at 50–51.
[26] *Id.* at 51.
[27] Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934, No. 34-75592, 80 Fed. Reg. 47829-01 (Aug. 10, 2015).
[28] *See* 5 U.S.C. § 553 (setting forth the procedures for administrative rule making which require a notice of proposed rule-making and opportunities for interested persons to participate in the rule making).
[29] Oral Argument Transcript, *supra* note 22, at 19–22.
[30] *Somers III*, 138 S. Ct. 767 (2018).
[31] *Id.* at 777.

read as defining *what actions* of whistleblowers (as defined in the Act) are entitled to the protections.[32]

The Court further supported its decision by contrasting the Act's definition of a "covered employee" for purposes of providing information to the Consumer Financial Protection Bureau ("CFPB"). Congress explicitly included an individual who provides information to his or her employer within the scope of a "covered employee."[33] Because Congress included internal reporting in defining covered employees for the purposes of the CFPB but not for the SEC, the Court "presumes that Congress intended a different meaning."[34] Because the Court held that "Congress has directly spoken to the precise question at issue," the SEC's interpretation was not entitled to any deference under the *Chevron* doctrine.[35] As such, the Court did not expand its analysis as to whether the SEC complied with the APA in adopting its interpretation.

The Court's lack of commentary or dicta on the implications of the APA may result in similar cases coming before the Court in the next year. Renewed discussion has emerged around the APA as scholars, lawmakers, and lobbyists debate whether the United States' administrative agencies have been given too much liberty in creating the current bureaucratic state and whether the judiciary has fulfilled its duties of reviewing executive action.[36] While the definition of "whistleblower" may have been too clearly articulated to warrant the Court's discussion of the APA notice and rulemaking requirements or *Chevron*'s role in future decisions, it is likely that later cases will request clarification on how this Court, with the recent addition of Justice Gorsuch, will view the deference established by the

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[32] *Id.*
[33] *Id.*
[34] *Id.* (quoting Loughrin v. U.S., 134 S. Ct. 2384, 2390 (2014)).
[35] *Id.* at 782 (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council Inc., 467 U.S. at 842).
[36] *See e.g.*, Ilya Shapiro, *Digital Realty Trust v. Somers: Hasn't Chevron Deference Gone Too Far*, HARVARD LAW REVIEW BLOG (Oct. 17, 2017), https://blog.harvardlawreview.org/digital-realty-trust-v-somers/; Rachel E. Holland, *Setting the Caged Bird Free: Restoring Judicial Power to Meaningfully Review Administrative Interpretations of the Law*, 49 TEX. TECH L. REV. 927 (2017); Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitabi*lity, 85 GEO. WASH. L. REV. 1392 (2017); Lorelei Laird, *Political lawsuits bring the Administrative Procedure Act to the forefront*, ABA JOURNAL (Mar. 5, 2018), http://www.abajournal.com/news/article/political_lawsuits_bring_the_administrative_procedure_act_to_the_forefront; Sam Bray, *Does the Administrative Procedure Act authorize national injunctions?*, WASHINGTON POST (Nov. 20, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/20/does-the-administrative-procedure-act-authorize-national-injunctions/?utm_term=.9fee529075fb.

Chevron doctrine. Additionally, the Court's decision may require the SEC to create and promote new avenues and resources for whistleblowers to communicate directly with the Commission, even if such communication duplicates internal reporting efforts. Such actions would allow the SEC to both comply with the Court's narrow interpretation and still accomplish the Act's legislative intent of creating accountability for those in the financial industry.