

Whistleblower Case Could Widen Into A Chevron Challenge

By **Dunstan Prial**

Law360, New York (November 27, 2017, 6:40 PM EST) -- Oral arguments set for Tuesday at the U.S. Supreme Court in a case focusing on the reach of whistleblower protections under the Dodd-Frank Act could also veer into the broader question of how much leeway regulatory agencies have in interpreting federal statutes.

The court is set to hear arguments in *Digital Realty Trust Inc. v. Somers*, a case that could decide whether employees can bring whistleblower claims under Dodd-Frank's anti-retaliation provision even though they didn't report their concerns about possible securities law violations to the U.S. Securities and Exchange Commission.

The case is being closely watched by corporate America and whistleblower attorneys because the justices could either expand or narrow the definition of whistleblowers eligible for protections under Dodd-Frank.

Jonathan A. Shapiro, a partner at Baker Botts LLP who focuses on securities litigation, said attorneys representing Digital Realty are likely to argue that the wording in Dodd-Frank related to whistleblower protections is very specific and that the court merely needs to "interpret the words in the statute."

Defense attorneys are expected to seek a wider interpretation of the law, arguing that a narrower definition of whistleblower could virtually nullify the anti-retaliation protections under the statute, said Greg Keating, chair of the whistleblower defense group at Choate Hall & Stewart LLP. Keating said very few whistleblowers take their initial complaints to the SEC, and under a narrower definition none of them would be eligible for protection under Dodd-Frank.

The SEC said in a recent report to Congress that 83 percent of whistleblowers who have received SEC awards under Dodd-Frank since 2012 and who worked for the targeted company first reported internally and turned later to the SEC.

Hovering over the specific statutory issue is whether the justices will use the case as a challenge to Chevron deference, the high court doctrine that for decades has given regulatory agencies wide latitude for interpreting federal law.

"It's basically a straight-up statutory interpretation question folded into questions about regulatory and agency deference, the so-called Chevron overlay," said Shapiro. "If there's a disagreement about what

the language means, when should a court defer to what the relative agency says and how far and how enthusiastically should it defer.”

A ruling by the Supreme Court will settle a circuit split between the Ninth and Fifth circuits.

The Ninth Circuit found that former Digital Realty executive Paul Somers was entitled to protection under Dodd-Frank after being fired because he complained to senior management that a senior vice president had eliminated some internal corporate controls in violation of the Sarbanes-Oxley Act. The appeals court ruled that Dodd-Frank’s whistleblower anti-retaliation provision “unambiguously and expressly protects” both those who report to the U.S. Securities and Exchange Commission and internal whistleblowers.

In a Fifth Circuit ruling in a similar case, *Asadi v. G.E. Energy*, the court ruled that whistleblowers must take their complaints to the SEC to be eligible for protection under Dodd-Frank.

The Dodd-Frank Act, passed in 2010, expanded whistleblower incentives and protections created under the 2002 Sarbanes-Oxley Act, which was enacted in response to the corporate accounting scandals of that period. At issue now is the wording of Dodd-Frank, which defined whistleblowers as employees who provide “information relating to a violation of the securities laws to the [Securities and Exchange] Commission.”

In 2011, the SEC tried to address the specificity of the original wording — “to the Commission” — by passing a regulation to broaden the definition to include whistleblowers who report either internally or to the SEC. The agency has since defended its expanded definition by relying on the Chevron doctrine, a defense upheld by the Ninth Circuit.

Jordan Thomas, chair of Labaton Sucharow LLP’s SEC whistleblower practice, said Digital Realty’s argument in favor of narrowing the whistleblower definition seemingly runs counter to the best interests of corporate America. Labaton Sucharow describes itself as an “advocate” for SEC whistleblowers, and Thomas is described by the firm as a “principal architect” of the SEC’s whistleblower program while he worked at the agency.

A number of pro-business entities, including the Chamber of Commerce and the Cato Institute, have submitted friend-of-the-court briefs in support of Digital Realty’s case. Thomas said he finds that ironic.

If the Supreme Court determines that employees who report internally aren’t eligible for protections under Dodd-Frank, “sophisticated whistleblowers and their counsel will be compelled to report externally to ensure they have the whistleblower protections,” he said. “This is exactly what corporate America said they didn’t want when the SEC was drafting these rules.”

Thomas said corporate America should welcome incentives for employees to report internally rather than taking their complaints to the SEC, which can lead to potentially costly and embarrassing investigations.

“Digital Realty may win this case but corporate America loses because fewer whistleblowers will speak up,” Thomas said. “This case undermines the culture of integrity within corporate America — if you see something say something.”

If the high court expands the scope of the case to include a review of the Chevron doctrine it could have

important ramifications for all federal regulatory agencies in terms of the latitude afforded them by the courts in how they interpret their own statutes, said David Kornblau, the chair of Covington & Burling LLP's securities litigation group.

Recently seated Supreme Court Justice Neil Gorsuch has been vocal in his opposition to the Chevron doctrine's concept of giving wide deference to federal regulatory agencies' interpretations of federal statutes, and Digital Realty could provide an opening to challenge that standard.

"It opens the door to some potentially creative new takes on the doctrine," which is significant because "this doctrine plays into the role of the administrative state," Kornblau said.

Eugene Scalia, a partner at Gibson Dunn & Crutcher LLP, said the case reached the Supreme Court because some lower courts have been "ignoring" the definition of whistleblower under Dodd-Frank. Those courts, he said, have "looked away" from the language in the statute and based their rulings on "their own sense of purpose of the statute."

"My hope is that all, or virtually all, of the Supreme Court justices will recognize this as a straightforward and easy question of statutory interpretation and side with the Fifth Circuit and the other courts that have ruled that to be a whistleblower under Dodd-Frank you have to be a whistleblower as defined by Dodd-Frank," Scalia said.

Digital Realty is represented by Kannon K. Shanmugam, Amy Mason Saharia, A. Joshua Podoll and Meng Jia Yang of Williams & Connolly LLP and Brian T. Ashe, Kiran A. Seldon, Shireen Y. Wetmore and Kyle A. Petersen of Seyfarth Shaw LLP.

Somers is represented by Peter K. Stris, Brendan S. Maher, Daniel L. Geysler and Douglas D. Geysler of Stris & Maher LLP and by Stephen F. Henry.

The case is Digital Realty Trust Inc. v. Paul Somers, case number 16-1276, in the Supreme Court of the United States.

--Editing by Brian Baresch.