

Chevron Spared As Justices Say 'Whistleblower' Term Clear

By **Dunstan Prial**

Law360 (February 22, 2018, 7:54 PM EST) -- After speculation that a former executive's retaliation case would lead to a re-evaluation of the so-called Chevron doctrine, the U.S. Supreme Court instead found Wednesday that the definition of “whistleblower” in the Dodd-Frank Act is so clear that the question of courts deferring to agencies’ interpretations of ambiguous statutes was moot.

The case involved former Digital Realty Trust executive Paul Somers, who argued he was entitled to protection under Dodd-Frank after being fired for reporting the elimination of legally required corporate controls to upper management. The Ninth Circuit found in favor of Somers, while the Fifth Circuit ruled in a similar case that under the 2010 law, whistleblowers must first take their complaints to the U.S. Securities and Exchange Commission to be eligible for protection.

The SEC, for its part, had argued for a broader definition of whistleblower, one that included employees who complained internally first. The agency said those employees should be entitled to the enhanced anti-retaliation protections provided under Dodd-Frank. This led many court watchers to believe the Chevron doctrine would be front and center in Somers' case.

Recently seated Supreme Court Justice Neil Gorsuch, giving voice to a long-held conservative argument that federal agencies have too much power, has long been vocal in his opposition to the Chevron doctrine, and *Digital Realty Trust Inc. v. Paul Somers* was viewed by many as an ideal vehicle to challenge that standard. But it wasn't to be.

“This court took a clean approach. They saved for another day the issue of deference,” said Greg Keating, chair of the whistleblower defense group at Choate Hall & Stewart LLP. “The significant majority of this court is in the ‘plain meaning of the statute erases all’ approach. And in their view, since the statute was clear in its plain meaning, we stop.”

Specifically, the statute — now backed by the Supreme Court opinion — requires that employees who bring securities law complaints against their companies first take their allegations to the U.S. Securities and Exchange Commission, rather than filing their complaints internally, to be protected by anti-retaliation measures afforded under the Dodd-Frank Act.

The Dodd-Frank Act, passed in 2010, expanded whistleblower incentives and protections created under the 2002 Sarbanes-Oxley Act. At issue before the justices was the wording of Dodd-Frank, which defined whistleblowers as employees who provide "information relating to a violation of the securities laws to the commission."

The justices found that the wording in the statute was "unambiguously" clear.

"When a statute includes an explicit definition, we must follow that definition, even if it varies from a term's ordinary meaning," the court's opinion penned by Justice Ruth Bader Ginsburg states. "This principle resolves the question before us."

The opinion briefly addressed the Chevron issue, stating, "Because Congress has directly spoken to the precise question at issue, we do not accord deference to the contrary view advanced by the SEC. ... The statute's unambiguous whistleblower definition, in short, precludes the commission from more expansively interpreting that term."

David Kornblau, the chair of Covington & Burling LLP's securities litigation group, said the justices essentially found that the argument in favor of a narrow definition of whistleblower was "so lopsided" that "they didn't really need to get into any of the subtleties about the Chevron doctrine."

"And if a statute is unambiguous, then the SEC or any government agency doesn't have the power to expand it," Kornblau added. "The court said that the SEC was so far off base that they just invalidated the rule without much discussion at all of the Chevron deference."

An SEC spokesman declined to comment on the ruling.

Legal experts were unable to pinpoint a specific pending Supreme Court case under which the Chevron doctrine issue might be broached next, but they agree it's not likely to go away.

Jonathan A. Shapiro, a partner at Baker Botts LLP who focuses on securities litigation, said the high court's straightforward ruling in Digital Realty shouldn't be construed to mean the justices aren't interested in the issue. The Digital Realty case just wasn't the right vehicle, he said.

"There's been lots of discussion that some members of the high court may have an appetite to revisit or reconsider or take another look at Chevron," Shapiro said. "If there is that appetite, this case didn't allow for it because, as the unanimous opinion of the court indicated, it was that clear on the face of the statute. So there was no need to start taking additional steps or go any further in construing what the law means."

Keating said the court made "a conservative and understandable decision" to adhere to the "plain language" wording in the statute and decline to broaden the scope of the ruling. But he predicted the Chevron issue will rear its head again soon.

“I would be surprised if in the next year there isn’t a meaningful opportunity to take on the government agency deference issue,” he 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.

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