

Supreme Court to treat *Burwell* infection

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The U.S. Supreme Court recently heard oral argument in *Digital Realty Trust v. Somers* to determine the scope of the Dodd-Frank Wall Street Reform and Consumer Protection Act's anti-retaliation protection for corporate insiders who blow the whistle. *Digital Realty Trust v. Somers*, No. 16-1276, *oral argument held*, 2017 WL 5730691 (U.S. Nov. 28, 2017).

Dodd-Frank expressly defines a "whistleblower" as an individual who has provided information to the Securities and Exchange Commission. That express definition was not enough, however, to stop the 9th U.S. Circuit Court of Appeals in *Somers* from expanding the statute Dodd-Frank to protect purely internal whistleblowers — that is, insiders who do not report alleged misconduct to the SEC.

The 9th Circuit decision deepened a split between the 5th and 2nd circuits. It also provoked a pithy dissent from Judge Justin Owens, in which he analogized the majority's willingness to deviate from the express language of the statute to the potentially world-ending, mutating life-form in John Carpenter's "The Thing."

The Supreme Court's ruling will end uncertainty over the scope of whistleblower protection afforded by Dodd-Frank. But its more significant — if not world-saving — impact may be guidance it provides

regarding the limits of judicial attempts to repair poor legislative drafting.

THE ERSATZ WHISTLEBLOWER

Plaintiff Paul Somers was vice president of portfolio management of Digital Realty Trust Inc. in Europe and then Singapore. While in Singapore, he complained to senior management about Senior Vice President Kris Kumar, who headed the company's Asian Pacific region. Somers told management that Kumar had impaired

Section 21F defines a "whistleblower" as "any individual who provides ... information relating to a violation of the securities laws to the SEC, in a manner established, by rule or regulation, by the SEC." 15 U.S.C.A. § 78u-6(a)(6).

Digital Realty — arguing that Congress meant what it said — moved to dismiss that claim, contending that Somers was not a whistleblower under Dodd-Frank because he only reported the alleged violations internally.

The dissenting judge in *Somers* was sharply critical of the court's use of *Burwell* to justify an expansion of Dodd-Frank's protection of whistleblowers.

internal controls in violation of the Sarbanes-Oxley Act and engaged in other acts of serious misconduct, including hiding \$7 million in cost overruns on a Hong Kong development project. Somers was fired shortly thereafter.

Somers never reported Kumar's alleged violations to the SEC or any other enforcement agency. Instead, he sued Digital Realty, alleging violations of state and federal laws, including Section 21F of the Securities Exchange Act, which includes the anti-retaliation protections created by Dodd-Frank.

Despite Dodd-Frank's express definition of whistleblower, U.S. District Judge Edward Chen of the Northern District of California denied the motion. Judge Chen held that the determinative issue was whether the statute was ambiguous.

Specifically, he said the third subsection of the anti-retaliation provision "appears to be in direct conflict with the [Dodd-Frank Act's] definition of a whistleblower because it provides protection to persons who have not disclosed information to the SEC, while Section 21F(a)(6) requires the person report to the [SEC]." *Somers v. Digital Realty Trust Inc.*, 119 F. Supp. 3d 1088, 1098 (N.D. Cal. 2015) (internal quotations omitted).

Because of this perceived conflict, Judge Chen deferred to the SEC's interpretation of Dodd-Frank in accordance with *Chevron U.S.A. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), extending what is commonly referred to as "Chevron deference," and on that basis held that Dodd-Frank's anti-retaliation provision protects whistleblowers who only report internally.

In so doing, Judge Chen held that the term whistleblower in Dodd-Frank is not limited to Congress' express definition of that term in the very same statute.



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SAME WORD, DIFFERENT MEANING

The 9th Circuit affirmed Judge Chen's denial of Digital Realty's motion to dismiss, holding that "Dodd-Frank's anti-retaliation provision 'unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally.'" *Somers v. Digital Realty Trust*, 850 F.3d 1045, 1049 (2017).

Unlike Judge Chen, the panel's majority did not provide a detailed analysis explaining the statute's purported ambiguity or the requirements of *Chevron* deference in order to explain the deviance from the statute's explicit definition.

Instead, the appeals court's interpretation of Dodd-Frank relies on the panel's:

- Musings over the potential policy implications of strictly construing the statute to protect only those "whistleblowers" included in Dodd-Frank's definition of that term.
- Inference that Congress intended something other than the expressly provided definition.
- Assertion that it was free to resolve any literal conflicts in the statutory language by simply ignoring the definition set by Congress.

The first sentence of the opinion's analysis establishes the court's sweeping interpretive approach: "The case must be seen against the background of 21st-century statutes to curb securities abuses."

After recounting the history behind Dodd-Frank and Sarbanes-Oxley, the court concluded that Dodd-Frank's references to Sarbanes-Oxley's disclosure requirements and protections show that Dodd-Frank, like Sarbanes-Oxley, "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 over the employee."

Otherwise, the court speculated, employees would be left without sufficient protections, which "would result in early retaliation before the information could reach the regulators."

The court casually characterized its reconstruction of the statute as nothing more than a routine instance where "terms can have different operative consequences in

different contexts ... even where ... the statute includes a definitional provision."

The majority further justified its extraordinary legislative repair work by citing the Supreme Court's interpretive contortions in *King v. Burwell*, 135 S. Ct. 2480 (2015). In that case, Chief Justice John Roberts rescued the Affordable Care Act from its poor "draftsmanship" by giving different meanings to the same statutory terms, depending on the broader text and structure of the act. He justified doing so with the notion that "the presumption of consistent usage readily yields to context," despite the danger of definitional inconsistencies.

THE DISSENT

Judge Owens, the dissenting judge in *Somers*, was sharply critical of the court's use of *Burwell* to justify an expansion of Dodd-Frank's protection of whistleblowers. In fact, he recommended "quarantin[ing] *Burwell* and its potentially dangerous shape-shifting nature to the specific facts of that case to avoid jurisprudential disruption on a cellular level."

The majority's reliance on *Burwell* arguably conflicts with principles articulated in *Burwell* itself, as well as other deep-rooted principles of statutory interpretation.

To emphasize the dangerous consequences of permitting the *Burwell* approach to evolve and spread through subsequent jurisprudence, Judge Owens provided comparison to John Carpenter's "The Thing," a 1980s horror film in which the protagonists struggle to contain a parasitic extraterrestrial life form that assimilates and subsequently imitates other organisms, with uncertain success.

Notably, containing *Burwell* may not prove to be all that challenging. Indeed, the majority's reliance on *Burwell* arguably conflicts with principles articulated in *Burwell* itself, as well as other deep-rooted principles of statutory interpretation.

For example, the Supreme Court said in *Burwell* that "[i]f the statutory language is plain, we must enforce it according to its terms." The definition of whistleblower in Dodd-Frank is inarguably plain.

Moreover, in a nearly contemporaneous decision, *Baker Botts LLP v. Asarco LLC*, 135 S. Ct. 2158, 2169 (2015), the Supreme

Court emphasized that a judge's job "is to follow the text even if doing so will supposedly undercut a basic objective of the statute." The *Somers* decision, on its face, seems to run contrary to both principles.

Nonetheless, the contrary decisions from the 9th and 2nd circuits are not utterly unfounded. Specifically, the subsection that is the focus of Judge Chen's district court decision does seem to suggest that Congress may have intended to protect whistleblowers who report internally, but simply made a mistake in drafting.

The third subsection of the anti-retaliation provision expressly prohibits retaliation against individuals who make "disclosures that are required or protected under" Sarbanes-Oxley, a statute that expressly extends its protections to employees who make purely internal reports.

But in its current form, applying Dodd-Frank's definition of whistleblower to that subsection results in more robust protections to a subset of individuals identified in Sarbanes-Oxley: those who

make reports to the SEC. This result is coherent, and it does not require ignoring the actual language of the statute.

In contrast, the 9th Circuit's reliance on its own policy analysis, without the benefit of fact-finding, congressional hearings or any other resource beyond the judges' personal experience and wisdom, looks like judicial overreach.

CONCLUSION

The Supreme Court is unlikely to agree with the 9th Circuit's reasoning in *Somers*: namely, that a court is free to ignore statutory definitions whenever doing so will, in the court's view, better achieve Congress' purported policy objectives.

To do so would amount to a novel form of jurisprudence that would privilege judicial inferences over the plain text of a statute in a manner that transcends even *Burwell*. **WJ**