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FINANCIAL SERVICES LITIGATION
ALERT

December 2012

The Supreme Court Declines to Address Whether Financial Institutions Are Entitled to Unqualified Immunity from Claims Arising from the Filing of Suspicious Activity Reports

By Stephen J. Shapiro

Last month, the U.S. Supreme Court denied the Petition for a Writ of *Certiorari* in *Cummings v. Doughty*, thereby leaving open a split among circuit courts regarding the scope of the immunity financial institutions that file suspicious activity reports ("SARs") are entitled to under federal law. As a result, financial institutions that file SARs will continue to run the risk that they will be exposed to litigation for simply complying with federal law.

The SAR Safe Harbor Clause

To assist the government in uncovering and preventing crime and terrorism, the Annunzio-Wylie Anti-Money Laundering Act (the "Act") authorizes the Secretary of the Treasury to "require any financial institution … to report any suspicious transaction relevant to a possible violation of law or regulation." 31 U.S.C. § 5318 (g)(1). The Secretary has directed federal agencies and departments that regulate financial institutions to implement this provision, and the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Reserve System, the National Credit Union Administration, the Federal Trade Commission, and the Financial Crimes Enforcement Network all have promulgated regulations requiring the financial institutions they oversee to report certain questionable transactions by submitting SARs.

To encourage financial institutions to file mandatory SARs quickly and to voluntarily report other suspicious transactions, the Act contains a provision that immunizes financial institutions from liability for submitting SARs (the so-called "safe harbor" clause):

> Any financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this subsection or any other authority … shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure … .

31 U.S.C. § 5318(g)(3)(A).

The Circuit Split

Since the enactment of the Act in 1992, a split among circuits has developed with respect to whether the safe harbor provides financial institutions with absolute immunity, or only qualified immunity, from suit. The Eleventh Circuit, in *Lopez v. First Union National Bank*, 129 F.3d 1186 (11th Cir. 1997), held that the safe harbor clause provides qualified immunity and only insulates financial institutions that have a "good faith suspicion" that the subjects of the SARs they file have violated a law or regulation. In other words, the Eleventh Circuit concluded that the safe harbor

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clause only provides immunity to financial institutions that file SARs in good faith. The Supreme Court of Arkansas later arrived at the same conclusion, as did federal district courts in Florida and Utah. As a practical matter, this means that financial institutions facing suits in those jurisdictions arising from the filing of SARs must litigate them through, at least, summary judgment and, perhaps, through trial, to resolve the question of whether the institution acted in good faith.

Conversely, the Second Circuit, in *Lee v. Bankers Trust Co.*, 166 F.3d 540 (2d Cir. 1999), and the First Circuit, in *Stoutt v. Banco Popular de Puerto Rico*, 320 F.3d 26 (1st Cir. 2003), rejected the notion that the safe harbor clause includes an implicit good faith requirement. Rather, both courts held that the safe harbor clause provides financial institutions with absolute, unqualified immunity from all claims arising from the filing of SARs. Federal district courts in Arkansas, Iowa, Puerto Rico, Texas, and Indiana have sided with the First and Second Circuits. Financial institutions in those jurisdictions should be able to dispose of SAR-related claims via motions to dismiss.

The *Cummings* Petition

That was the state of the law when the petitioners in *Cummings v. Doughty* recently sought review in the U.S. Supreme Court of a Louisiana state court decision rejecting a bank's argument that the safe harbor clause provided it with absolute immunity from civil liability. In *Cummings*, Joe Doughty, the former President of a branch of a Louisiana bank, reported to the bank that more than $200,000 was missing from the account of one of its customers and that one of the customer's former bookkeepers had been implicated in the theft. After investigating the matter and discovering irregularities in both the account and the customer's relationship with the bank, the bank fired Doughty. According to Doughty, the bank also submitted a SAR to federal authorities that implicated him in the theft. A federal grand jury ultimately indicted Doughty for bank fraud, though the U.S. Attorney later dismissed the charges. Alleging that the bank improperly named him in the SAR, Doughty sued the bank for defamation and malicious prosecution. According to Doughty, the bank named him in the SAR, not because it believed in good faith that he had engaged in suspicious activity, but rather to make it easier for the bank to recover the missing funds under a liability bond that covered the bank for losses resulting from wrongdoing by its officers, directors and employees.

The bank first filed the state court equivalent of a motion to dismiss the action, arguing that the Act's safe harbor clause provided it with absolute immunity from Doughty's SAR-related claims. The trial court denied the motion to dismiss, and, on a discretionary appeal, an intermediate Louisiana appellate court, siding with the Eleventh Circuit, concluded that the safe harbor clause provides immunity only to financial institutions that act in good faith. After discovery, the bank moved for summary judgment, again arguing that the safe harbor clause provided it with absolute immunity as a matter of law and, in any event, that the record was devoid of any evidence to support Doughty's allegation that the bank had not acted in good faith. The trial court denied the motion for summary judgment without explanation and the Louisiana appellate courts denied the bank's requests for discretionary review.

The bank then asked the U.S. Supreme Court to hear the case. In its petition for a writ of *certiorari*, the bank first argued that the Court had authority to review the state court's interlocutory order because, under well-settled Supreme Court authority, a rejection of a claimed entitlement to absolute immunity may be appealed before final judgment. In the absence of interlocutory review, the policy behind absolute privileges — to protect the party entitled to the privilege from having to defend against claims from which he or she is immune — would be subverted. The bank

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next argued that the Court should agree to hear the case to resolve the split among the circuits as to the scope of the safe harbor clause, as the existing split threatened to frustrate the policy behind the safe harbor. Specifically, financial institutions that do business in the Eleventh Circuit, in jurisdictions that have followed the Eleventh Circuit, or in the numerous jurisdictions where an appellate court has yet to address the issue would face the possibility of defending against drawn-out litigation whenever they file SARs. This possibility, the bank argued, could lead financial institutions to delay filing mandatory SARs or discourage them from filing voluntary SARs altogether. Both possibilities would undermine the very purpose behind the Act's SAR requirements.

In opposition to the *cert* petition, Doughty did not dispute the existence of a split among the circuits. Rather, Doughty argued that, because the Louisiana trial court did not explain why it denied the bank's summary judgment motion, the order was not capable of review.

On November 26, 2012, the Supreme Court denied the bank's *cert* petition without opinion, thereby ensuring that the split among the circuits will remain unresolved for some time. The case, though, serves as a helpful reminder that financial institutions should review and update any policies they have implemented to insure that the reasons behind a decision to submit a SAR are well-documented and that those documents are preserved. ◆

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