No. 19-347

IN THE

Supreme Court of the United States

AER ADVISORS INC.; WILLIAM J. DEUTSCH;
PETER E. DEUTSCH,

Petitioners,

v.

FIDELITY BROKERAGE SERVICES, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Statutes and Other Authorities

Financial institutions including respondent Fidelity have weaponized the Bank Secrecy Act, 31 U.S.C. § 5318(g)(3)(A) ("Section 5318") arrogating unto themselves an "absolute immunity" never authorized by Congress. Contrary to Fidelity's claim (now endorsed by both the First and Second Circuits), the language employed by Congress in Section 5318, as part of the Annunzio-Wylie Anti-Money Laundering Act of 1992 (the "Annunzio-Wylie Act"), does not confer "absolute immunity." Instead, Section 5318 provides that financial institutions shall not be liable for "mak[ing] a disclosure of any possible violation of law or regulation to a government agency . . . ."

A. This Appeal Presents an Important Question Ripe for Resolution by the Supreme Court: Whether SAR Filers Are Entitled to Absolute Immunity.

As will be shown below: (1) circuit courts are split on whether a SAR's filer enjoys absolute immunity; (2) the case at bar is the ideal vehicle to resolve that split; (3) the surrounding circumstances warrant review by this Court.

1. The Eleventh Circuit, on the One Hand, and the First and Second Circuits, on the Other, are Divided Over Whether SAR-filers are Entitled to Absolute Immunity.

The circuit split has been clearly articulated and unmistakably established. The Eleventh Circuit in *Lopez v. First Union Nat'l Bank*, 129 F.3d 1186 (11th Cir. 1997) held that Section 5318 does not provide absolute immunity. *See Lopez v. First Union Nat'l Bank*, 129 F.3d 1186, 1192-93 (11th Cir. 1997).

In *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544-45 (2d Cir. 1999), the Second Circuit explicitly rejected the holding in *Lopez*, ruling instead that Section 5318 granted absolute immunity to a SAR filer.

The First Circuit in *Stoutt v. Banco Popular de Puerto Rico*, 320 F.3d 26, 30 (1st Cir. 2003) appeared to endorse the Second Circuit and expressly rejected the rule articulated by the Eleventh Circuit in *Lopez*. In the case at bar, the First Circuit reaffirmed its holding in *Stoutt* and clarified that, unlike the Eleventh Circuit, a SAR filer in the First Circuit enjoys absolute immunity.

Numerous other courts have recognized and discussed the circuit split. *See, e.g., Bank of Eureka Springs. See Doughty v. Cummings*, 28 So.3d 580, 583 (La. Ct. App. 2009). These cases – offering differing interpretations of Section 5318 – buttress the need for this Court to resolve the much debated question.

We cannot overlook Fidelity's counterargument. Turning a blind eye to the recognized circuit split, Fidelity urges that these colliding decisions may be reconciled because: (i) Section 5318 embodies three different "safe harbors"; (ii) the Eleventh Circuit, which requires "good faith" as a condition to immunity, triggered the "safe harbor" applicable to voluntary disclosures; (iii) the First and Second Circuits applied another "safe harbor" applicable to required disclosures. Thus, Fidelity urges that, as it reads the statutory language, there is no actual split since the lower courts (apparently in conflict) were addressing different "safe harbors."

But the words "safe harbor" do not appear in Section 5318, much less three different "safe harbors." Rather, the language embodied in Section 5318 embodies three different immunity triggers (essentially for voluntary disclosures and two types of involuntary disclosures). No matter how triggered, however, there is only one immunity: that which is bestowed when any possible violation is disclosed. And, despite Fidelity's creative reading, that immunity (the same immunity) attaches equally to voluntary and involuntary disclosures; *i.e.*, all three so-called "safe harbors".

Said another way, the lower courts were all correct: the First and Second Circuits have conferred "absolute immunity" for disclosures in a SAR; the Eleventh Circuit has not done so. This collision constitutes a sharp and defined split. Fidelity's counterargument is specious.

2. The Record Below is Emblematic of the Tension Created by the Circuit Split.

The record contains a pleading – a second amended complaint ("SAC") – that explains why statutory immunity is not conferred by Section 5318: because Fidelity did not disclose a possible violation of law. Instead, as detailed in the SAC, Fidelity embarked upon and implemented a fraudulent scheme – pivoting upon a falsified SAR – to cover up its own illegal conduct. It is specifically alleged how Fidelity's own conduct before June 12, 2012 precipitated the market disruption that was recognized by its senior executives by June 15, 2012, and how Fidelity's market manipulation precipitated failed recalls, resulting "buy-ins" leading to a short squeeze. SAC ¶ 58. Thus (as likewise detailed in the SAC), the Petitioners' movement

of accounts on or after June 18, 2012 did not (and could not) cause a short squeeze, *i.e.*, Fidelity's own conduct had already caused that market disruption. *Id.*, ¶ 59.

Contrary to Fidelity's representation, the FINRA arbitration panel did not exonerate Fidelity – certainly not with respect to AER, a non-party to that proceeding. Instead, if anything, the arbitral decision affirms Fidelity's culpability:

> Now turning to the underlying merits of the claim, the Panel finds serious fault with Fidelity's handling of the Deutsch account during the critical period.
>
> ***
>
> In essence, the firm appeared to be more focused on its own interests at the expense of accommodating those of its client or at *minimum* gaining a key understanding as to what the client's intentions and interests were. Instead, the conclusion was reached that Deutsch and O'Leary were engineering a short squeeze and should be cut off from further purchases of CMED. By reason of the foregoing, the Panel finds in favor of Claimants on this equitable issue.

Award at 9. This remarkable finding of willful and culpable ignorance was issued by an industry-created FINRA panel. The fraud, fraudulent concealment, and cover up detailed by the SAC (SAC ¶¶ 58-70) extended far beyond an absence of "good faith." *Id.* In short, Fidelity's

speculation that Petitioners could never prove their case is – at best – completely premature.

Finally, holding Fidelity responsible for its egregious conduct in this case will not (as Fidelity suggests) open the floodgates to investor litigation. Rather, a viable fraud complaint must be particularized – showing how the statutory prerequisites have been satisfied. Thus, it will not be possible, as Fidelity suggests, for a plaintiff to sustain a complaint containing a naked allegation of bad faith/fraud. As in this case, the pleading must be particularized and demonstrate a viable claim.

3. Absolute Immunity for Disclosures That Are Objectively Not Possible Violations of the Law or Regulations, or Made in Bad Faith, or Are Fraudulent is Inconsistent With the Purpose of Section 5318.

The sound policy articulated by the Eleventh Circuit is well-illustrated by the instant case. It would be grotesque to reward Fidelity for its fraudulent disclosure – particularly since that disclosure was fabricated to deflect attention from the unmistakable fact that Fidelity (itself) had triggered a market disruption by its illegal lending practices; *i.e.*, that it understood its own market practices (nothing done by Petitioners) had precipitated a market disruption but sought to shift the blame by issuing a bogus SAR disclosure. Sanitizing such conduct does nothing for law enforcement – except perhaps initiating a wild goose chase and wasting much needed enforcement resources. Sanitizing such deceptive practices certainly will not engender confidence in our financial or government institutions.

Unsurprisingly, Congress did not grant "absolute immunity" to financial institutions for conduct such as exhibited by Fidelity. There is simply no rational basis to immunize a fraud – much less to immunize an effort of a wrongdoer to fraudulently conceal its own misconduct. Instead, the statutory language limits the immunity to reports of "any possible violation of law," which is the very antithesis of an "absolute immunity" advocated by Fidelity. Said another way, honest (or good faith) disclosures will unquestionably assist law enforcement. A dishonest or fraudulent disclosure can only impede that effort (*i.e.*, as Fidelity intended in this case).

Moreover, Fidelity's resort to legislative history notably contrasts with the Petition's reliance on Section 5318's plain language. If Congress intended to confer absolute immunity, it would have said so. Even Fidelity conceded that absolute immunity may create some risk of false reporting, a risk Fidelity dismissed as "minor." Br. in Opp'n 19. It is for Congress – not a self-interested financial institution – to set the parameters of the immunity. Having limited immunity to reports of "any possible violation of law," Congress defined the contours of immunity. Had Congress determined to afford absolute immunity to financial institutions, it could have done so.

B. The Ambiguity Over Whether a Federal Transferee Court Must Apply Its Own Law in a Diversity Case When the Transfer is Pursuant to 28 U.S.C. § 1404 is Also Ripe for Resolution by the Supreme Court.

The question of whether a federal transferee court must apply its own law or the law of the transferor court to a defendant's federal statutory law affirmative defense

in a diversity case has never been addressed by this Court. The transfer at bar worked a dispositive difference because of the circuit split addressed above. The ruling below therefore frustrates the remedial purposes of 28 U.S.C. § 1404(a), effecting a change of law as an improper "bonus" for a change of venue. Such a rule contradicts the teachings of this Court in *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) and *Ferens v. John Deere Co.*, 494 U.S. 516, 523 (1990), which held that a federal court sitting in diversity shall apply the substantive laws of the transferor jurisdiction.

Fidelity in opposition relied on federal question cases, which are wholly irrelevant to the issue of whether a transferee court applies federal or state law to a federal statutory law affirmative defense in a diversity case based on state law claims. *See Menowitz v. Brown*, 991 F.2d 36 (2d Cir. 1993); *Bradley v. United States*, 161 F.3d 777 (4th Cir. 1998); *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134 (1992); *Murphy v. FDIC*, 208 F.3d 959 (11th Cir. 2000); *In Re Korean Air Lines Disaster*, 829 F.2d 1171, 1174 (D.C. Cir. 1987) (Ginsburg, J.), *aff'd on other grounds sub nom.*, *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989).

Fidelity seemingly suggests that only a circuit split warrants resolution by the Supreme Court, but this is clearly not the law. That the Supreme Court has not explicitly addressed the question of whether the rule in *Van Dusen* applies to a federal statutory defense is justification enough for the Supreme Court to resolve this issue.

Fidelity's inclusion of *In re TMJ Implants Prod. Liab. Litig.*, 97 F.3d 1050, 1056 (8th Cir. 1996) is puzzling. There, the Eighth Circuit applied *state law* – including to all defenses – at issue. *Id.* ("Products liability claims are, of course, state law tort actions. With approximately 280 cases from across the nation consolidated in this action, we would normally face the daunting task of analyzing the law of each state where the actions were originally filed. The parties, however, have conceded on appeal that 'the basis of component part liability law is constant in all jurisdictions.'").

Every one of the diversity cases Fidelity cited based on state law claims applied state law. *Ferens*, 494 U.S. at 523; *Van Dusen*, 376 U.S. at 639; *In re TMJ Implants Prod. Liab. Litig.*, 97 F.3d at 1056.

Fidelity in its brief in opposition never truly grappled with the issue of whether a federal transferee court should apply its own law or the law of the transferor court to a defendant's federal statutory law affirmative defense in a diversity case. Instead, Fidelity glossed over the issue, conflating diversity and federal question cases. The procedural issue presented by this Petition has never been addressed by this Court, and this case presents the perfect opportunity to answer the question.

CONCLUSION

For the reasons set forth above and in the Petition, the Petition for a writ of certiorari should be granted.

Dated: January 21, 2020

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