

Supreme Court Considers Mutual Fund Whistleblowers

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Gary O. Cohen

The U.S. Supreme Court heard oral arguments November 12 in the cases of two Fidelity whistleblowers claiming retaliation after they alleged deficiencies in mutual fund prospectus and shareholder report disclosure. The issue is whether certain Sarbanes-Oxley Act anti-retaliation protections apply to employees of *private*, as well as *public*, companies.

An assistant Solicitor General argued the SEC's position that the protections apply to employees of private companies, including fund investment advisers. The rationale is that, otherwise, funds would not benefit from the anti-retaliation protections, because, as Justice Breyer put it, a fund "has virtually no employees and does all its work really through investment advisers" that are often private companies.

Justices Kagan, Ginsburg, Roberts, and Scalia also recognized the SEC's position. For example, when the assistant SG pointed out that "investment advising . . . is the heart of what [private investment adviser] contractors of mutual funds do for mutual funds," Justice Scalia said, "I understand that."

On the other side, Fidelity argued for non-applicability of the anti-retaliation protections, noting that the Act gave rule-making authority to implement the Act to the Department of Labor -- not the SEC. Justice Breyer said that this fact raised the question whether "it's the SEC we should defer to."

Fidelity also emphasized the availability of other potent protections for whistleblowers, pointing to the Act's unrestricted imposition of *criminal* liability on "whoever shall retaliate against anybody who provides information to a law enforcement officer, which includes the SEC," as well as the anti-retaliation protections in the later-adopted Dodd-Frank Act. In fact, under Dodd-Frank, the SEC in October 2013 announced awards to whistleblowers of \$150,000 and \$14 million, which probably signals a building momentum for that program.