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First Circuit Confirms Broad Civil Immunity for Filing a SAR

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As we previously blogged, the District of Massachusetts held in *AER Advisors Inc. v. Fidelity Brokerage Services, LLC*, that the safe harbor provision of the Bank Secrecy Act (BSA) provides unqualified protection to financial institutions and their employees from civil liability for filing a Suspicious Activity Report, or SAR. An update: the First Circuit recently upheld this ruling in an opinion which, consistent with the holdings of most other federal courts, clearly found that the safe harbor protections for SAR filings are absolute.

AER Advisors Inc. (AER) had filed a complaint alleging that Fidelity Brokerage Services, LLC (Fidelity) falsely implicated it in a SAR that was filed in bad faith. As a result, AER claimed it was subject to multiple investigations by state and federal agencies. Fidelity moved to dismiss the complaint, arguing that it had complete immunity from any liability for any SARs it filed. The district court agreed.

The BSA's safe harbor provision, codified at 31 U.S.C. §5318(g)(3)(A), shields financial institutions, their officers and employees from civil liability for reporting known or suspected criminal offenses or suspicious activity by filing a SAR. The safe harbor provides immunity to any "financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency." This comprehensive protection precludes liability under any federal, state or local law or regulation or under any contract.

As we noted in our prior post, federal courts have disagreed about the scope of the protection afforded by this provision, despite its broad wording, and whether a bank and its officers and employees must have a "good faith" belief that a possible violation of law occurred before filing a SAR. A few courts, particularly those in the 11th Circuit (which covers Alabama, Florida and Georgia), have provided immunity only when the financial institution has a "good faith suspicion that a law or regulation may have been violated."

In the recent AER opinion, the First Circuit initially found that the law of the First Circuit governed (the case had been transferred from Florida to Massachusetts, and AER had argued that the more plaintiff-friendly law of the Eleventh Circuit should control). The First Circuit then rejected the notion that the safe harbor provision contains an implied requirement of good faith for SAR filings, noting that an earlier proposed version of the safe harbor provision actually had included such a requirement — but that language was pulled and not included in the final provision that passed. The First Circuit then explained — and endorsed again — the reasoning behind its prior precedent, *Stoutt v. Banco*

Popular de Puerto Rico, holding that the safe harbor protection was absolute:

[T]he provision was (according to its congressional author) "intended to provide 'the broadest possible exemption from civil liability for the reporting of suspicious transactions.'" *Id*. (quoting 139 Cong. Rec. E57-02 (1993)). And as far as Congress's policy concerns, "*any* qualification" on the immunity created by the BSA "poses practical problems," including that imposing an "objective reasonableness" or a "subjective good faith" requirement on a filing would "obviously create[] a risk of second guessing" and discourage disclosure. *Id*. (emphasis added). More, the risk that an "unfounded" or "malicious" filing will result in "false charges" is slight since "ordinarily the disclosures will as a practical matter be made to the [government] authorities, who provide their own filter as to what investigations are pursued and made public." *Id*. at 32. More still, "remedies other than private damage actions are available for wilfully false reports: private sanctions such as employment termination, and government penalties such as fines and imprisonment." *Id*. (citing 18 U.S.C. §§ 1001, 1517).

The First Circuit explained that this absolute civil immunity applies even if a SAR reports an "objectively impossible" violation of the law (AER had offered a hypothetical example in which a SAR reported that the plaintiffs had killed Abraham Lincoln in 2012), because "we doubt the government would investigate or prosecute such an accusation[,]" and because absolute immunity really means *absolute* immunity.

Finally, in a footnote, the First Circuit noted but did not decide a conundrum often facing financial institutions in civil lawsuits arising out of alleged BSA violations — the fact that the BSA prohibits institutions from disclosing whether a SAR was or was not filed:

Fidelity also argues that we can affirm on an alternative ground — namely, that federal law bars it "from disclosing even whether a[n] SAR was filed, let alone its contents"; so "[p]laintiffs can never prove that [it] filed an inaccurate SAR"; and thus it "cannot be forced to defend against [their] claims while, at the same time, being prohibited from using key exculpatory evidence."

That issue certainly will be a question for future cases, including those in which defrauded consumers or investors sue banks for allegedly failing to comply with the BSA, and thereby allowed a former customer's fraud scheme to be perpetrated against the plaintiffs by use of the bank's accounts.

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