

Good Faith Requirement for SARs – Does It Exist?

- No language in the statute to suggest “good faith” requirement.
- Legislative history shows earlier drafts of the “safe harbor” provision included an explicit good faith requirement for statements made in a SAR – this provision was not included in the final draft of the statute.
- US Supreme Court, in December 2012, declined certiorari in Cummings et al. v. Joe Doughty, which presented the Court with an opportunity to resolve a split in the Circuits on the requirement for a “good faith” basis when filing a SAR.

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- Split in the Circuits and lower courts:
 - Lopez v. First Union National Bank of Florida (11th Cir.) and cases that have followed it have held that there must be a “good faith” nexus between the suspicious activity and the information disclosed.
 - Lee v. Bankers Trust Co. (2nd Cir.) and cases that have followed it (notably, the 1st Cir.) have held that the immunity is unqualified and does not impose a good faith requirement.
 - Note the language in Lee where the Court states that “[t]he safe harbor provision applies, regardless of whether the SAR is filed as required by the Act *or in an excess of caution.*”

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- In Doughty, a former employee of Progressive Bancorp, sued for defamation and malicious prosecution because of statements allegedly made to law enforcement and bank regulators.
- Doughty alleged that Cummings (the president of the Bank), implicated him when Cummings learned that the bank's liability bond would not pay for the loss the bank had sustained with regard to a customer account unless the loss was linked to dishonesty by a bank employee.
- Although Doughty, according to the Court, had reported the problems with the customer to Cummings, the Court stated that “[n]othing in the analysis suggested that Doughty had diverted any money or received financial gain” from the account, i.e., the bank did not have a good faith basis for suspecting illegal activity by Doughty.

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- Where are we left?
 - Is there a need to document the decision “to file” as well as not to file? The SAR narrative should adequately convey the reason to file.
 - Need to document “suspicion” when reporting a “possible violation of law or regulation” as opposed to filing a SAR.
 - Even in jurisdictions that adopt the “good faith” requirement, a well-articulated set of facts supporting a “suspicion” will protect your institution (See, Hoffman v. Bank of America).