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Countrywide CFO's Defense: What About the Lawyers?

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As the [Securities and Exchange Commission's](#) fraud case against former executives at Countrywide Financial Corp. moves toward its Oct. 19 trial date, the executives charged have previewed their defenses in their failed motions for summary judgment. Perhaps not surprisingly, one top exec has argued that he relied on the advice of in-house lawyers.

No, it wasn't Angelo Mozilo, Countrywide's founder and CEO, whom the SEC accuses of playing the central role in misleading investors about the company's lending practices. The exec in question was Eric Sieracki, the former chief financial officer of the mortgage giant, which was acquired by [Bank of America Corp.](#) in 2008.

Judge John Walter of federal district court in Los Angeles [ruled last week \(pdf\)](#) that, Sieracki's argument notwithstanding, there are triable issues of fact he must answer at trial. But Walter's ruling provided no information about who the lawyers Sieracki claims he relied on were, and what they advised.

Sieracki's [memorandum of law \(pdf\)](#) in support of his motion for summary judgment shed some light. In it he argued that he was not guilty of securities fraud because he lacked the scienter, or guilty knowledge, that the SEC must prove. His evidence was his good-faith reliance on the advice of lawyers like Michael Udovic.

Udovic was designated as the company's SEC lawyer, Sieracki's brief said, and was responsible for many elements of the disclosure process. He "expressly informed Sieracki that detailed information about Countrywide's loans and loan standards had been and was being made publicly available through presentations to investors," the brief stated.

Yet, the lawyer "never advised Sieracki that this type of information was required to be in the 10-K," the brief continued. Neither did the company's other lawyers, Sieracki argued, including chief legal officer Sandor Samuels and the general counsel for corporate and securities matters, Susan Bow (who served on the company's disclosure committee with Udovic and Sieracki).

"Courts have recognized that good faith reliance on procedures designed to ensure compliance with the securities laws, including the involvement of lawyers and other professionals, negates scienter," the memorandum concluded. Sieracki's lead lawyer was Sherli Fabbri Weiss in the San Diego office of [DLA Piper](#).

The SEC's [memorandum in opposition \(pdf\)](#) argued that Sieracki failed to provide evidence that he had sought specific advice from the lawyers, and that he was improperly attempting to use this line of defense as both a sword and a shield.

The traditional advice of counsel defense, the SEC said in its brief, requires a party to show he requested advice about the legality of an action, received advice that was legal, and relied on it in good faith. Sieracki failed to provide evidence, the SEC asserted.

Instead, the former executive asserted a "quasi-reliance on counsel defense based on the legal department's 'involvement' with Countrywide's periodic filings," the SEC said. Yet, "when asked in deposition whether he consulted Countrywide lawyer Mike Udovic regarding credit risk disclosures, Sieracki asserted the attorney-client privilege."

It's well established, the commission argued, that the privilege can't be used as both sword and shield. "Thus, Sieracki should not be allowed to assert reliance on attorneys," the brief said, "while neither the SEC nor the Court are allowed to probe the actual content of his communications with counsel."

Anticipating Sieracki's response, the commission went on to say: "Sieracki will likely argue that he is powerless to address this conundrum because he will argue the privilege belongs to Countrywide. This argument will be disingenuous. It is not clear whether (or when) he has even asked Countrywide to waive the privilege, but he certainly has not moved to compel Countrywide to produce documents reflecting the attorney-client communications upon which he now claims to rely." The SEC's lead lawyer was John McCoy III.

Sieracki's own lawyer responded to the judge's ruling with a prepared statement. "We understand, of course, that the Court need only find that there are issues of fact in order to decline to resolve the case at the summary judgment stage," said Weiss of DLA Piper. "His Honor was careful to note that it is not the Court's function in deciding the motion to weigh the evidence or to determine truth, and that it remains to be seen whether the SEC will be able to convince a jury of its case. We agree and look forward to trial."

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