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NEWSLETTERS

Whistleblower Activity Heating Up All Over

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Fiscal year 2014 has been a banner year for whistleblowers. Recent developments involving whistleblowers under the Dodd-Frank Act, the Sarbanes-Oxley Act and qui tam relators under the False Claims Act, all point to future increased activity involving whistleblowers. This article provides an overview of recent developments of interest.

I. Sarbanes-Oxley Whistleblowers

In March, the Supreme Court decided a potentially landmark decision, *Lawson v. FMR LLC*, - U.S. -, 134 S.Ct. 1158 (2014). The Court construed Sarbanes-Oxley's whistleblower protection provision (18 U.S.C. §1514A) which states that "[n]o [public] company . . ., or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of [whistleblowing or other protected activity]."

The Court's majority concluded that this language protects not simply employees of public companies but also employees of private contractors and subcontractors, such as law firms, accounting firms, and employees who worked for public companies.

The breadth of the Court's interpretation was called "stunning" and likely to lead to "absurd results," including future claims that Congress could not have intended. Justice Sotomayor's dissent concluded that the opinion allows babysitters, gardeners, and housekeepers of employees of public companies, or even employees of private contractors for public companies, who report arguably fraudulent conduct by the public company, against the public company, or even by or against the contractor's other private clients, to claim retaliation if that reporting adversely affects their employment. While there has not been a flood of decisions yet supporting the dissent's concern, commentators have predicted that inventive and expansive assertions of SOX's whistleblower anti-retaliation provision are sure to come.

II. Dodd-Frank Whistleblowers

Since *Lawson*, however, more has happened involving Dodd-Frank's whistleblower-protection provisions. This may be because Dodd-Frank has greater financial incentives for plaintiffs, or because some courts have concluded that it does not require an employee to report first to an enforcement agency.

A. What is a "whistleblower" under Dodd-Frank?

"Whistleblowers" under Dodd-Frank are potentially a different universe of

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people than under Sarbanes-Oxley. Sarbanes-Oxley focuses particularly on whistleblower disclosures regarding certain enumerated activities (securities fraud, bank fraud, mail or wire fraud, or any violation of an SEC rule or regulation), so its anti-retaliation provision protects those who disclose to a person with supervisory authority over the employee, or to the SEC, or to Congress. Dodd-Frank, on the other hand, defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the Commission." 15 U.S.C. §78u-6(a)(6). It then prohibits, and provides a private cause of action for, adverse employment actions against a whistleblower for acts done by him or her in "provid[ing] information to the Commission," "initiat[ing], testify[ing] in, or assist[ing] in" any investigation or action of the Commission, or in making disclosures required or protected under Sarbanes-Oxley, the Exchange Act or the Commission's rules. 15 U.S.C. §78u-6(h)(1). A textual reading of these provisions suggests that a "whistleblower" has to provide information relating to a violation of the securities laws to the SEC.

However, after Dodd-Frank was enacted, the SEC promulgated rules that could be construed more broadly to encompass those who simply report internally or report to some other entity. Therefore, one issue beginning to be litigated is whether Dodd-Frank's anti-retaliation provisions apply to someone who reports alleged misconduct to their employers or other entities, but not the SEC. The Fifth Circuit, in *Asadi v. G.E. Energy* (USA) L.L.C., 720 F.3d 620 (5th Cir. 2013), concluded that Dodd-Frank's provision only applies to those who actually provide information to the SEC. Several district courts, including in Colorado, Florida, and the Northern District of California, have concurred with this analysis.

More district courts thus far, however, have concluded that Dodd-Frank is ambiguous on this issue and have given deference to the SEC's interpretation as set forth in its own regulations. The SEC has also asserted in an amicus brief to the Second Circuit that whistleblowers should be entitled to protection regardless of whether they disclose to their employers or the SEC. The agency said that *Asadi* was wrongly decided and, under its view, employees that report internally should get the same protections that those who report to the SEC receive. This definitional issue will shake out over time. While more courts thus far have adopted, or ruled consistently with, the SEC's interpretation, as a Florida district court stated, "[t]he fact that numerous courts have interpreted the same statutory language differently does not render the statute ambiguous."

B. Does Dodd-Frank's Whistleblower Protection Apply Extraterritorially?

In August, the Second Circuit decided a case in which it concluded that Dodd-Frank's whistleblower-protection provisions do not apply to conduct occurring exclusively extraterritorially. In that case, a former employee alleged that he was terminated for reporting alleged violations of the FCPA at a foreign company subsidiary. The Second Circuit relied extensively on the Supreme Court's *Morrison v. Nat'l Aust. Bank* case in reaching its decision. In *Morrison*, the Court reaffirmed the presumption that federal statutes do not apply extraterritorially absent clear direction from Congress.

The Second Circuit, despite the employee's argument that other

Dodd-Frank provisions applied extraterritorially and SEC regulations interpreting the whistleblower provisions at least suggested that the bounty provisions applied extraterritorially, disagreed. The court concluded that it need not defer to the SEC's interpretation of who can be a whistleblower because it believed that Section 21F was not ambiguous. It also concluded that the anti-retaliation provisions would be more burdensome if applied outside the country than the bounty provisions, so it did not feel the need to construe the two different aspects of the whistleblower provisions identically.

The Second Circuit case is on one end of the extraterritoriality spectrum. It involved a foreign worker employed abroad by a foreign corporation, where the alleged wrongdoing, the alleged disclosures, and the alleged discrimination all occurred abroad. Whether adding some domestic connection changes this result remains for future courts to consider.

C. The SEC Announces Several Interesting Dodd-Frank Bounties

Under Dodd-Frank, whistleblowers who provide the SEC with "high-quality," "original" information that leads to an enforcement action netting over $1 million in sanctions can receive an award of 10-30 percent of the amount collected. The SEC has recently awarded some noteworthy, even eye-popping bounties to whistleblowers in circumstances which suggest that the agency wants to encourage a broad range of whistleblowers with credible, inside information.

Fiscal year 2014 was historic for the SEC's whistleblower program. All totaled, the SEC issued whistleblower awards to more individuals in FY2014 than in all previous years combined. In addition, in September, the SEC announced its largest ever whistleblower award – a whopping $30 million. This more than doubles the previous largest award of $14 million and is 600 times its first award back in 2012.

It is clear that the SEC hopes to continue this activity. In its recently-published five-year Strategic Plan (through fiscal year 2018), the agency announced its intent to "build upon" the "successes of the Office of the Whistleblower" by encouraging individuals and entities with "timely, credible and specific information" to come forward. Its own press releases touting the $30 million award underscore that the SEC is looking to spur similar results.

Moreover, the Commission has also highlighted that its award was given to a whistleblower living in a foreign country, which "demonstrat[es] the program's international reach." Quoting Sean McKessy, the Chief of the SEC's Office of the Whistleblower, "Whistleblowers from all over the world should feel similarly incentivized to come forward with credible information about potential violations of the U.S. securities laws." The SEC's position highlights the disconnect between its own view on extraterritoriality and the Second Circuit's view. The SEC has asserted that, regardless of any extraterritorial limitations on Dodd-Frank's whistleblower protection provision, its bounty provision has a different focus and so need not have a commensurate limit. According to the Commission, even if a claimant is a foreign national, or resides overseas, or involves information submitted overseas, or – most importantly – the "misconduct comprising the U.S. securities law violation occurred entirely overseas," awarding a bounty may be appropriate under Dodd-Frank if the tip results in an action by the

Commission regarding violations of this country's securities laws.

Two other recent whistleblower awards have been noteworthy. In July, the agency awarded more than $400,000 to a whistleblower who appears not to have provided his information to the SEC voluntarily. Instead, the whistleblower attempted to encourage his employer to correct various compliance issues internally. Those efforts apparently resulted in a third-party apprising an SRO of the employer's issues and the whistleblower's efforts to correct them. The SEC's subsequent follow-up on the SRO's inquiry resulted in the enforcement action. Even though the "whistleblower" did not initiate communication with the SEC about these compliance issues, for his efforts, the agency nonetheless awarded him a bounty.

And in September, the SEC announced its first whistleblower award to a company employee who performed audit and compliance functions. The agency awarded the compliance staffer more than $300,000 after the employee first reported wrongdoing internally, and then, when the company failed to take remedial action after 120 days, reported the activity to the SEC. The SEC has highlighted that, though compliance personnel have some limitations on their ability to report potential misconduct, even they can do so and be compensated financially.

III. *Qui Tam* Relators Under The False Claims Act

Whistleblowers under the False Claims Act, called "*qui tam* relators," who assert claims that the federal government has been defrauded, are also receiving increased support and attention from the government. Leslie Caldwell, the recently appointed Assistant Attorney General for the Criminal Division of the Justice Department, highlighted in one of her first speeches in September, that the Justice Department intends to "step[] up" its efforts to collaborate with *qui tam* relators who bring claims under the False Claims Act. According to her, DoJ's fraud section "will be committing more resources" to False Claims Act cases so that it "can move swiftly and effectively to combat major fraud involving government programs." In addition, she announced a new procedure whereby "all new qui tam complaints are shared by the Civil Division with the Criminal Division as soon as the cases are filed."

Given the size of the False Claims Act awards in fiscal year 2014, though, the Criminal Division's encouragement may be superfluous. According to a recent press release, the Justice Department, often with the assistance of relators, brought in $5.7 billion in False Claims Act awards last year. Most of this amount ($3.1 billion) came from the financial sector, while healthcare providers and pharmaceutical companies paid out $2.3 billion. The number of new lawsuits in 2014 (713) also fell just short of the record of 754 set in FY2013. With qui tam relators eligible under the False Claims Act of between 15 and 30 percent of the amount recovered, the amount potentially available for qui tam bounties makes the SEC's whistleblower program seem diminutive.

Furthermore, there is every reason to believe that these awards amounts will continue. The Justice Department's regular announcements of such awards, coupled with their size, will undoubtedly stoke a would-be relator's interest in pursuing such claims. And recent legislation suggests that the False Claims Act could be used even more frequently in healthcare litigation. The Affordable Care Act has an overpayment provision, which turns an overpayment which is not returned within 60

days after it is identified into a potential False Claims Act violation.

Given the activity this past year, 2015 will likely continue to generate interesting (and potentially costly) developments in whistleblower litigation.

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