NINTH CIRCUIT EMBRACES BROAD WHISTLEBLOWER PROTECTION UNDER DODD-FRANK, DEEPENING SPLIT AMONG THE CIRCUITS

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Securities Litigation Alert

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The Ninth Circuit recently ruled that whistleblowers can file retaliation claims under Dodd-Frank, even when they reported their concerns only internally rather than directly to the SEC. This alert explores the significance of the opinion, which reinforces an existing split among the Circuit Courts on this issue, and how it may affect businesses and investors.

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The Ninth Circuit recently joined the Second Circuit in holding that corporate whistleblowers can assert claims for retaliation under Dodd-Frank (Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, Title IX, § 922(a), 124 Stat. 1376, 1841 (2010)), even if they did not make their disclosures directly to the Securities and Exchange Commission (SEC) but rather reported their concerns internally, such as to an audit committee or a supervisor. The court's opinion in *Somers v. Digital Realty Trust*, No. 15-17352, issued on March 8, 2017, further solidifies the split among the circuits regarding the definition of a whistleblower entitled to anti-retaliation protection under Dodd-Frank. Previously, the Fifth Circuit ruled to the contrary in *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 627-28 (5th Cir. 2013), holding that Dodd-Frank only provides anti-retaliation protection to persons who report "to the Commission." In *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015), the Second Circuit rejected the reasoning of *Asadi* and concluded, just as the Ninth Circuit did last week, that Dodd-Frank protects whistleblowers who only voice their concerns internally.

BACKGROUND

Anti-retaliation provisions applicable to corporate whistleblowers can be found in various sections of the federal law, making it difficult sometimes to know exactly which rules apply. When the statutes are inconsistent, yet cross-reference each other, it becomes complicated.

The Sarbanes-Oxley Act of 2002 (SOX) was passed in the wake of Enron and other corporate scandals. (Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002)). It provides a civil remedy for any whistleblower who suffers retaliation based on reporting misconduct to a supervisor or person within the company with investigative authority (e.g., internal audit, the audit committee), as well as to regulators or law enforcement. (18 U.S.C. § 1515A(a)). It also requires audit committees to put procedures in place to receive employee complaints, including anonymous tips. (15 U.S.C. § 78j-1(m)(4)). It even goes so far as to mandate whistleblowing in some contexts. For example, auditors are required to inform management if they became aware of illegal activity, and then confirm that management has informed the audit committee or the board. If that fails, auditors are required to resign or notify the SEC. (15 U.S.C. § 78j-1(b)).

Eight years later, Dodd-Frank was passed in the wake of the collapse of the financial markets. It provides protections for whistleblowers that overlap, but are not identical, to those in SOX. Unlike SOX, Dodd-Frank does not require administrative exhaustion, and allows for greater recoveries equal to two times back pay. (15 U.S.C. § 78u-6(h)(1)

(C)). And the statute of limitations is longer under Dodd-Frank—six years from the date of retaliation or three years from the date the employee became aware of it, but not longer than ten years—while SOX requires an administrative filing within 180 days. (*Cf.* 15 U.S.C. § 78u-6(h)(1)(B)(iii) and 18 U.S.C. § 1514A(b)(2)(D)). Thus, there are significant benefits to claiming status as a whistleblower under Dodd-Frank.

On the other hand, Dodd-Frank defines a whistleblower to be one who "[p]rovide(s) information relating to a violation of the securities laws *to the (Securities and Exchange) Commission*." (15 U.S.C. § 78u-6(a)(6) (emphasis added). However, that narrow definition is seemingly inconsistent with the anti-retaliation protection for any whistleblower who suffers retaliation after making a disclosure "[r]equired or protected under the Sarbanes-Oxley Act of 2002, the Securities Exchange Act of 1934, including section 10A(m) of such Act, section 1513(e) of title 18 of the United States Code, and any other law, rule or regulation subject to the jurisdiction of the Commission," which, of course, includes internal complaints. (15 U.S.C. § 78u-6(h)(1)(A)(iii)).

The SEC attempted to clarify the statute by promulgating regulations providing that a whistleblower is protected by the anti-retaliation provisions of Dodd-Frank if they suffer retaliation for any of the kinds of whistleblowing conduct described in that statute, including the conduct cross-referenced from other statutes. (17 C.F.R. § 240.21F-2). In short, the SEC regulations define a whistleblower by referencing those persons who provide information as enumerated in section (h)(1)(A)(iii), which includes internal complaints as well as reports to the Commission.

THE OPINION

Paul Somers was a vice president of defendant, Digital Realty Trust, Inc. He alleged he was terminated in part because he "made reports to senior management regarding possible securities law violations," described in the lower court opinion to be concerns about actions by his direct supervisor eliminating internal controls. *Somers v. Digital Realty Trust, Inc.,* 119 F. Supp.3d 1088 (N.D.Cal. 2015). He did not report his concerns to the SEC. The district court denied defendants' motion to dismiss his Dodd-Frank claim, employing the analysis of *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to conclude that the SEC's interpretation required deference. A few months later, the Second Circuit reached the same conclusion in *Berman v. Neo@Ogilvy LLC*, *supra.* (See our prior *Alert, Second Circuit Disagrees with Fifth Circuit on Who Is a Whistleblower Under Dodd-Frank—Bound for the Supreme Court?* September 14, 2015).

The Ninth Circuit's analysis is simple, and not lengthy. The court held that the narrow definition of a whistleblower cannot be squared with the broad and unambiguous express anti-retaliation protections afforded under the statute to those who report internally. Harmonization of the two requires that anti-retaliation protection not be limited to persons who have already reported their concerns to the SEC. According to the court, it would not be logical for Dodd-Frank to cross reference whistleblowing provisions in SOX that protect those who report misconduct to a supervisor, the audit committee or the board of directors, and purport to provide a remedy for retaliation in light of such reporting, but then limit that remedy only to those whistleblowers who report "to the Commission." *Opinion*, at 10. It would mean that a whistleblower would be vulnerable to retaliation, without a remedy (at least under Dodd-Frank), during the period when his or her complaint was under review by a supervisor or in-house counsel, but before the whistleblower had forwarded it to the SEC.

The court's analysis was substantially bolstered by the SEC's interpretation of the statute in the regulation described above. The court held that, as the agency authorized to enforce the securities laws, the SEC's interpretation of the statute should be given deference, especially where the statute is not entirely clear.

The Ninth Circuit relied on *King v. Burwell*, 135 S.Ct. 2480 (2015) for the proposition that the same word may have different meanings when used in different sections of a complex statute. In *Burwell,* the Supreme Court held that, based on the context and the logical structure of the statute, the word "state" in the Affordable Care Act (124 Sat. 119) could also refer to the federal government. As in the case of Dodd-Frank, the limiting word "state" in the Affordable Care Act had been construed in a regulation issued by the Internal Revenue Service to include the Department of Health and Human Services.

The decision is in contrast to the Fifth Circuit's reasoning in *Asadi v. G.E. Energy (USA), L.L.C.*, *supra*. According to the Fifth Circuit, any attempt to harmonize the statute through regulation or appellate opinion would simply be unauthorized. That same point of view was echoed by Judge Owens, the lone dissenter in the Ninth Circuit in *Somers*. The Fifth Circuit in *Asadi* and the dissenter in the Ninth Circuit in *Somers* were

clearly not in favor of an expansion of the power of administrative agencies or the courts to reinterpret statutory language under the mantle of the *King* case.

SIGNIFICANCE OF THE OPINION

On a practical level, the opinion is clearly "pro whistleblower." It allows employees who only report their concerns internally to invoke the broader protection available under Dodd-Frank. The opinion also solidifies a split in the circuits that may justify the Supreme Court granting review. Such a split existed after the Second Circuit *Ogilvy* case as well, but then that case settled, depriving the high court of an opportunity to consider the issue.

If the Supreme Court does grant review in *Somers*, it may do so as much to limit the *King* case and articulate the role of the courts and administrative agencies in statutory interpretation as to resolve the specific issue of the scope of anti-retaliation protection under Dodd-Frank.

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