

## Colorado District Court Adopts Broad Definition of Whistleblower Under Dodd-Frank

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The United States District Court for the District of Colorado recently joined the growing number of federal district courts that have adopted a broad definition of the term “whistleblower” under the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). On March 25, 2013, in the case of [Genberg v. Porter](#), the Court advanced the cause of future whistleblowers by becoming the fourth federal district court to adopt a broader interpretation of whistleblowers under Dodd-Frank, although it dismissed the plaintiff’s Securities and Exchange Commission (“SEC”) whistleblower claims for other reasons.

The plaintiff in the case was Carl Genberg, formerly employed by the pharmaceutical company Ceragenix as a Senior Vice President for Research and Development. Genberg alleged that he was terminated for informing Ceragenix’s upper-level management that Steven Porter, the company’s chief executive officer, had engaged in insider trading and that Ceragenix had violated several [federal securities violations](#). The defendants in the lawsuit, Porter and other former executives at Ceragenix (the company has filed Chapter 11 bankruptcy making it judgment proof), argued that the company terminated Genberg for encouraging a friend who owned a large portion of company stock to contact the company’s Board of Directors about Genberg’s accusations, which the defendants argued constituted an attempt to coerce a hostile takeover of the company.

The Court first decided the threshold matter of Genberg’s motion to compel arbitration, dismissing it for failure to prove alter ego or third-party beneficiary status. The Court then examined Genberg’s claim of retaliation under the Dodd-Frank Act. Specifically, Genberg alleged that Porter and Jeffrey Sperber, another former Ceraganix executive, retaliated against him in violation of Dodd-Frank by failing to pay Genberg post-termination wages mandated by Genberg’s employment contract. The defendants responded by arguing that (1) Genberg did not qualify as a “whistleblower” under Dodd-Frank because he did not provide information to the SEC; and, (2) Ceragenix’s failure to pay Genberg’s post-termination wages was not retaliation, it was the result of Ceragenix’s bankruptcy proceedings.

While the Court ultimately agreed with the second contention made by the defendants, and dismissed the case for that reason, it held that Genberg qualified as a “whistleblower” under the Dodd-Frank Act because the term included not just employees who reported information to the SEC, but also employees who make internal disclosures that are “required or protected under the Sarbanes-Oxley Act of 2002.” Such a clarification is necessary because there exists some tension within the Dodd-Frank Act in that it appears to offer two conflicting definitions of the term “whistleblower” for the purposes of determining who is protected from retaliation by the Act.

Thus far, all four courts to consider the issue have adopted the broader interpretation. For an in-depth discussion about another court’s analysis of this conflict, see our [blog post](#) on the decision by the United States District Court for the District of Connecticut in the case of *Kramer v. Trans-Lux Corp.* In

*Kramer*, the Court decided to adopt the broader interpretation largely on grounds of public policy – that the broader interpretation would more effectively enable courts to achieve the statute’s goals of “improve[ing] the accountability and transparency of the financial system.” In *Genberg*, on the other hand, the Court relied more heavily on the principles of statutory construction laid out by the Supreme Court in its 2001 decision in *TRW Inc. v. Andrews*: that a statute “ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” In this case, the Court held, adopting the more narrow definition of “whistleblower” would render the section extending whistleblower protections to employees who make SOX disclosures “inoperable and moot,” thus making it the disfavored construction.

Although the district court dismissed Genberg’s Dodd-Frank retaliation claim stemming from the company’s failure to make post-termination payments Genberg alleged he was due, Genberg’s [Sarbanes-Oxley claim](#) alleging that his termination was retaliatory survived the motion to dismiss, and he will be given the opportunity to continue to litigate that portion of his case.