SDNY Widens Split On Dodd-Frank Whistleblower Protection

Law360, New York (December 18, 2014, 12:01 PM ET) -- Since the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, there has been widespread disagreement as to whether the law's anti-retaliation provisions protect employees who report violations of securities laws within their organizations. The controversy stems from an apparent ambiguity in the definition of the term “whistleblower” for purposes of the anti-retaliation protections. While the U.S. Securities and Exchange Commission and several courts have found that Dodd-Frank was clearly meant to cover internal whistleblowers, there is a deepening split on the issue among the federal courts. On Dec. 4, 2014, in Berman v. Neo@Ogilvy LLC, the U.S. District Court for the Southern District of New York became the latest court to hold that Dodd-Frank only covers employees who report suspected violations of securities laws to the SEC. The split among the courts has created tremendous uncertainty for employers, whistleblowers and their counsel.

Origin of the Dispute

Section 922 of Dodd-Frank created a new cause of action to protect employees of publicly traded companies from reprisal for reporting suspected violations of securities laws. The dispute over the scope of the law arose because the anti-retaliation provision refers to “whistleblowers,” which Section 21F(a)(6) of the Securities Exchange Act of 1934 defines as individuals who provide information to the SEC. The anti-retaliation provision also identifies three categories of individuals entitled to protection, including employees who: (1) provide information about their employer to the SEC in accordance with Dodd-Frank’s whistleblower incentive program; (2) initiate, testify or assist in any investigation related to the whistleblower incentive program; or (3) make disclosures “required or protected” under the Sarbanes-Oxley Act of 2002, SEA or any other law, rule or regulation under the jurisdiction of the SEC.

If Congress intended Dodd-Frank only to apply to whistleblowers as defined by the SEA, the law would not protect employees who only report information internally. But the third category of protected individuals under the law specifically includes those whose disclosures are required or protected by SOX, which includes employees who report suspected violations of securities law internally. On June 13, 2011, the SEC weighed in, issuing interpretive guidance stating that “the statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities other than the [SEC].” The guidance set the
stage for the ongoing dispute about the scope of Dodd-Frank’s protections.

**Disagreement in the Courts**

In the two years following the passage of Dodd-Frank, several district courts reached holdings consistent with the SEC’s interpretive guidance. The district courts for the Middle District of Tennessee (Nollner v. Southern Baptist Convention Inc.), the District of Connecticut (Kramer v. Trans-Lux Corp.), the Southern District of New York (Egan v. TradingScreen Inc.) and the District of Colorado (Genberg v. Porter) each held that an individual need not report information to the SEC to receive protection under Dodd-Frank. These courts explained that the first two categories of protected activity under the anti-retaliation provision, by their own terms, protect only whistleblowers who report suspected violations of securities laws to the SEC directly. The third category is silent as to whom the disclosure must be made, however, and this provision would be rendered meaningless by a construction requiring contact with the SEC.

The Fifth Circuit firmly rejected this reasoning. In Asadi v. GE Energy (USA) LLC, the court of appeals refused to consider the anti-retaliation provisions as applying to three distinct groups under the law. Rather, the court held, “Under Dodd-Frank’s plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC.” The court concluded that there was no ambiguity in the law, and stated that a contrary interpretation would render SOX’s anti-retaliation provision, and the accompanying administrative scheme, moot.

In October 2013, the District Court for the Southern District of New York again rejected the interpretation of Dodd-Frank set forth in Asadi. In Rosenblum v. Thomson Reuters (Markets) LLC, the district court held that there was indeed an ambiguity in the law: “When considering the [Dodd-Frank Act] as a whole, it is plain that a narrow reading of the statute requiring a report to the SEC conflicts with the anti-retaliation provision, which does not have such a requirement.” Because of this ambiguity, the court found it appropriate to consider the position of the SEC, which Congress had vested authority to implement the Dodd-Frank Act. Following the SEC’s guidance, the court held that Dodd-Frank “does not require a report to the SEC in order to obtain whistleblower protection.”

After Asadi and Rosenblum, courts continued to reach inconsistent conclusions regarding the protections afforded to internal whistleblowers. In Yang v. Navigators Group Inc., and Azim v. Tortoise Capital Advisors LLC, the Southern District of New York affirmed its position that individuals reporting internally are protected. The district courts for the District of Nebraska (Bussing v. COR Cleaning LLC), the District of Massachusetts (Ellington v. Giacoumakis), the District of New Jersey (Khazin v. TD Ameritrade Holding Corp.) and the Northern District of California (Connolly v. Remkes) also adopted the majority view that Dodd-Frank’s protections extend to employees who report internally.


**Reversal of Course in the Southern District of New York**

The question of whether Dodd-Frank protects employees who only report internally has now divided the Southern District of New York. As noted above, the court had agreed previously that an employee need not report to the SEC to hold a claim for retaliation under Dodd-Frank. In Berman v. Neo@Ogilvy LLC, however, the it adopted the reasoning of the Fifth
In Asadi. Like the Fifth Circuit, the court in Berman concluded that the plain language of Dodd-Frank’s anti-retaliation provision was unambiguous in protecting only employees who provide information to the SEC.

In Berman, a magistrate judge issued a report and recommendation recommending dismissal of the Dodd-Frank retaliation claim of an employee who had reported suspected violations of securities laws internally only. The magistrate held that while Dodd-Frank protects internal reports, the plaintiff had not adequately alleged that he reasonably believed that the information he reported within the company constituted violations of securities laws. The magistrate recommended that the plaintiff be granted leave to amend, and the company objected.

In a decision issued by U.S. District Judge Gregory H. Woods reviewing the report and recommendation, the court accepted the textual interpretation of Dodd-Frank set out in Asadi. The court noted that whistleblowers who only report internally still have a remedy under SOX, even though they must first file a complaint with the U.S. Department of Labor. Judge Woods reasoned that it was “the exception, not the rule, for Congress to grant an individual a private right of action to sue for damages arising from retaliation without requiring that individual to make contact with a federal agency first.” Further, the court observed that in addition to Section 922, Dodd-Frank included anti-retaliation protections for individuals who: (1) report information concerning violations of the Commodity Exchange Act to the Commodity Futures Trading Commission, or assist in an investigation thereof; or (2) provide information concerning any provision of law subject to the jurisdiction of the Consumer Financial Protection Bureau.

To bring a cause of action under the latter provision, the court noted, an individual must first file a complaint with the DOL. The district court declined to adopt an interpretation of Dodd-Frank that would result in a “significant expansion of the class of individuals eligible to bring a private right of action under the Act.”

**Policy Implications**

A narrow interpretation of the anti-retaliation provisions undermines the purpose of the Dodd-Frank Act and threatens the balance that the SEC struck between encouraging internal reporting and rewarding individuals who provide information to the SEC. We earlier addressed the policy implications of the internal reporting question in a September guide. We noted that employees who discover potential securities violations must choose whether to report internally, as the SEC incentivizes them to do by offering larger rewards, or they may bypass internal compliance channels by reporting directly to the SEC. As we noted then and repeat here: “If Dodd-Frank protects only those who choose the latter option and leaves vulnerable those who only report internally, many employees will simply circumvent internal channels and take the safer route.”

While companies may welcome decisions like Asadi that limit the anti-retaliation protections of Dodd-Frank, it does not benefit employers to disincentivize employees from reporting suspected securities violations internally. Sean McKessy, Chief of the SEC’s Office of the Whistleblower, noted that Asadi should disappoint corporate interests that had insisted that the SEC Whistleblower Program avoid interference with internal compliance efforts. “[I]f word gets out that reporting internally means you will be unprotected,” McKessy said, “that may drive people to report to us more than the companies had hoped.”

**Conclusion**

More than three years after the SEC issued its interpretive guidance on Section 922 of Dodd-Frank, the waters are as murky as ever. Courts sitting in the First, Second, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits have held that Dodd-Frank protects internal
whistleblowers. Courts in the Second, Fifth, Seventh, Ninth and Tenth Circuits have held the opposite. Moreover, judges in at least three district courts — Colorado, the Northern District of California and the Southern District of New York — disagree among one another as to whether internal complaints are protected.

As district courts continue to issue divergent decisions, we can expect more courts of appeals to decide the scope of Dodd-Frank’s protections. The likely circuit split may afford the U.S. Supreme Court the opportunity to address the issue soon, and it is important that the high court does so. The protection of employees — and the shareholders whose interests they protect by blowing the whistle on securities violations — is too important to be left in doubt.

—By Michael Filoromo III and David Marshall, Katz Marshall & Banks LLP


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