CLIENT UPDATE

CIRCUIT COURT ADOPTS NARROW INTERPRETATION OF ANTI-RETALIATION PROVISION OF DODD-FRANK WHISTLEBLOWER RULES

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On July 17, 2013, the United States Court of Appeals for the Fifth Circuit issued a groundbreaking and pro-defense ruling on the scope and applicability of the whistleblower protection rules enacted by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). In *Asadi v. G.E. Energy (USA), LLC*, No. 12-20522, 2013 WL 3742492 (5th Cir. July 17, 2013), the Fifth Circuit held that the "plain language" of Dodd-Frank's whistleblower-protection provision applies *only* to individuals who report information relating to a violation of the securities laws to the SEC. Because plaintiff-appellant Khaled Asadi did not provide any information to the SEC, but rather reported his concerns internally to his supervisors at G.E., the court concluded that Asadi did not meet the statutory definition of "whistleblower" and was therefore not able to claim protection under Dodd-Frank's anti-retaliation provision. In so holding, the Fifth Circuit affirmatively rejected the SEC's final rule interpreting Dodd-Frank's whistleblower protection provision, noting that the agency's "expansive interpretation" of the term "whistleblower" was not supported by the plain language of the statute.

THE FIFTH CIRCUIT'S DECISION

As we described in a July 17, 2012 client update, the district court in *Asadi v. G.E. Energy (USA), LLC*, No. 120345, 2012 WL 2522599 (S.D. Tex. June 28, 2012), sidestepped the question of whether a whistleblower that failed to report to the SEC could still qualify for protection under the anti-retaliation provisions of Dodd-Frank. Instead, the district court dismissed Asadi's claim on the grounds that the anti-retaliation provisions in Dodd-Frank did not apply extraterritorially. On appeal, the Fifth Circuit affirmed the district court's decision, but did so without addressing the question of extraterritoriality. Instead, the Fifth Circuit framed the issue as a "relatively straightforward question" of whether an individual who is not a "whistleblower" under the statutory definition of the term may seek relief under the anti-retaliation provision. Ultimately, the circuit court held that the narrow scope of Dodd-Frank's definition of "whistleblower" necessarily limits the scope of the anti-retaliation provision to cover only those who report wrongdoing to the SEC.

The circuit court began with the statutory definition of "whistleblower," which applies to "any individual who provides . . . information related to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u–6(a)(6) (emphasis added). For the court, this definition "expressly and unambiguously requires that an individual provide information to the SEC to qualify as a 'whistleblower' for purposes of § 78u–6." Asadi, however, conceded this point, and argued instead that the whistleblower-protection provision should be read to protect individuals whose actions are covered by § 78u–(6)(h)(1)(A)(iii) (the third of three categories of protected activities),[1] regardless of whether they report to the SEC. Asadi based his construction on a perceived tension between § 78u–6(a)(6)'s narrow definition of "whistleblower," and the potentially broader reach of the third category's language, which refers more generally to "making disclosures that are required or protected" under various securities laws and regulations. § 78u–(6)(h)(1)(A)(iii). The circuit court recognized that Asadi had "some case law" in his corner, noting that most district courts to address the issue had concluded that the anti-retaliation provision was either conflicting or ambiguous.[2]

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1 The three categories of activity set forth in § 78u–(h)(1)(A) protect those who (i) "provide[] information to the Commission in accordance with this section"; those who (ii) "initiat[e], testify[] in, or assist[] in any investigation or judicial or administrative action of the Commission based upon or related to such information"; and those who (iii) "mak[e] disclosures that are required or protected under the Sarbanes–Oxley Act of 2002, the Securities Exchange Act of 1934 . . . and any other law, rule, or regulation subject to the jurisdiction of the Commission" (citations omitted).

2 *See e.g., Kramer v. Trans–Lux Corp.*, No. 3:11CV1424 (SRU), 2012 WL 4444820, at *4 (D.Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F.Supp.2d 986, 994 n.9 (M.D.Tenn.2012); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 WL 1672066, at *4–5 (S.D.N.Y. May 4, 2011)).

The court rebuffed Asadi's reading, and concluded that, for the purposes of § 78u–6(h)(1)(A), there is only one category of whistleblowers – those who report to the SEC, and only that category of whistleblowers expressly defined by the statute is entitled to the protections in Dodd-Frank. The court's detailed analysis addressed and rejected a number of arguments made by Asadi and reflected in the holdings of the other district court opinions:

- First, the court reasoned that an internal conflict would actually exist only under Asadi's reading that § 78u–6(h)(1)(A) provides three additional definitions of whistleblowers, as opposed to three categories of protected whistleblower (as uniformly defined in § 78u–6(a)(6)) activity. The court rejected Asadi's view that an individual could still be a protected whistleblower by taking actions under the third category of protected activity, but not qualify for the more narrow classification of whistleblowers who have reported to the SEC.
- The court observed that Congress deliberately used the already-defined term "whistleblower" in § 78u–6(h)(1)(A), as opposed to a broader term like "individual" or "employee." Thus, the court concluded that § 78u–6(h)(1)(A) does not provide for any alternative or broader definition of "whistleblower."
- The court similarly rejected Asadi's claim that the interplay between § 78u–6(a)(6) and § 78u–6(h)(1)(A)(iii) rendered the latter "superfluous." To this end, the court offered an example of a whistleblower who had reported both to his company's CEO and (unbeknownst to the CEO) to the SEC, only to be immediately fired by the CEO. The court noted that this example involves protection under the third category but not the first two (because he would not be able to prove the CEO retaliated against him because of the report to the SEC, given that the CEO did not know about his report to the SEC), demonstrating that the language is not superfluous. In fact, the court pointed out that Asadi's proposed construction would violate the surplusage canon, in that he would read the words "to the Commission" out of the definition of "whistleblower" for the purposes of the anti-retaliation provision.
- Finally, the court observed that extending Dodd-Frank's anti-retaliation provision beyond the statutory definition of "whistleblower" would render the Sarbanes–Oxley Act's ("SOX") anti-retaliation provision practically moot–given that anyone who qualified under the latter's provisions would be able to qualify for the former's greater monetary damages, easier filing process and longer statute of limitations. The circuit court noted that these important distinctions make it unlikely that an individual would raise a SOX anti-retaliation claim instead of one under Dodd-Frank. For practical purposes, SOX's anti-retaliation provision and administrative scheme would become a

dead letter if the court were to adopt Asadi's interpretation of Dodd-Frank's whistleblower-protection provision.

Perhaps most remarkably, while acknowledging that the SEC's final rule supported Asadi's broad construction of § 78u-(h)(1)(A), the Fifth Circuit expressly rejected the SEC's attempt to broaden the scope of the anti-retaliation provision. Citing *Chevron's* affirmation of the preeminence of clear legislative intent, the Fifth Circuit concluded that "[b]ecause Congress has directly addressed the precise question at issue, we must reject the SEC's expansive interpretation of the term 'whistleblower' for purposes of the whistleblower-protection provision."

POTENTIAL IMPACT OF THE *ASADI* DECISION

In narrowly construing Dodd-Frank's anti-retaliation provision, the *Asadi* court took a firm and decidedly pro-employer stance on a statutory interpretation question that has vexed both courts and litigants since passage of the Dodd-Frank Act. Although the Fifth Circuit's decision goes against what appeared to be a growing consensus around a more expansive interpretation of Dodd-Frank's whistleblower-protection provisions, it is the first Court of Appeals decision to address the issue and therefore should provide employers with strong ammunition in seeking to limit the scope and applicability of the anti-retaliation provision to cover only those who have reported to the SEC in the manner required by Dodd-Frank. Nevertheless, it remains to be seen how other courts will view the *Asadi* decision and whether they will follow the court's analysis of the statutory construction issues.

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Please do not hesitate to contact us with any questions.

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