CLIENT UPDATE

SUPREME COURT GIVES SOX WHISTLEBLOWER PROVISION EXPANSIVE READING

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In a significant pro-whistleblower decision, a divided Supreme Court recently adopted a broad interpretation of § 1514A, the anti-retaliation provision of the Sarbanes-Oxley Act of 2002 ("SOX"), holding that the provision extends to protect employees of private companies that contract or subcontract with public companies. The splintered Court's opinion in *Lawson v. FMR, Inc.*, written by Justice Ruth Bader Ginsburg, focused on a textual analysis of § 1514A to support its broad interpretation. The Court also looked to the underlying purpose of SOX as well as the legislative history of § 1514A to support its holding, noting the broader interpretation of the provision was consistent with Congress' intent in enacting SOX to "ward off another Enron debacle."

The *Lawson* decision could have far-reaching implications for privately held entities such as investment advisors, accounting firms and law firms, who typically contract with public companies to provide a wide range of services. Employees of these privately held contractors and sub-contractors can now pursue anti-retaliation claims against their private employers under § 1514A, arguably for a broad range of potential claims, even those that may not necessarily impact shareholders of the public company for whom the contractor provides services.

FACTUAL BACKGROUND

The *Lawson* case involved anti-retaliation claims by two individuals who worked for different privately held FMR LLC subsidiaries that provided advisory and management services to the Fidelity family of mutual funds (the "Funds"). The Funds were subject to § 1514A because they were registered with the Securities and Exchange Commission ("SEC") and were required to file reports under Section 15(d) of the Securities Exchange Act of 1934 ("1934 Act"). But, as is typically the case, the Funds themselves have no employees and instead contract with investment advisers to handle all day-to-day operations for the Funds, including making investment decisions, preparing reports for shareholders and for filing with the SEC. Petitioner Jackie Lawson worked as a director of finance at FMR and alleged that she was terminated after raising concerns about certain cost accounting methodologies that she believed overstated expenses associated with operating the Funds. Petitioner Jonathan Zang, a former portfolio manager at FMR, alleged that he was fired after he raised concerns regarding alleged inaccuracies in a draft SEC registration statement concerning the Funds.

In the district court, defendant FMR moved to dismiss the claims arguing that plaintiffs were not "employees" as defined under § 1514A. The district court rejected this argument, holding that § 1514A extended to protect employees of "agents, contractors and subcontractors to public companies." FMR sought interlocutory appeal to the First Circuit to address a controlling question of law as to the definition of "employee" in § 1514A.

In a split decision, the First Circuit held that § 1514A was limited to employees of public companies and therefore excluded from its protection employees of contractors or subcontractors who provided services to public companies. The First Circuit's decision was based on what it viewed as a more "natural reading" of the text of the statute. In addition, the First Circuit majority argued that its narrow interpretation was supported by the fact that the title and caption of the statute signaled that the protections were to be limited to public companies, and that the legislative history did not support a broad interpretation of the anti-retaliation provision to cover employees of contractors and subcontractors. Plaintiffs then filed a petition for certiorari with the Supreme Court.

THE SUPREME COURT DECISION

Justice Ginsburg, writing the opinion of the Court, first focused on a textual analysis of § 1514A, noting that when determining the meaning of a statutory provision, "we look first to its language, giving the words their ordinary meaning." Section 1514A provides in relevant part that:

> No [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 relating to mail fraud, wire fraud, bank fraud, securities or commodities fraud, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.][1]

The Court stated that nothing in the language of § 1514A "confines the class of employees protected to those of a designated employer." Boiling down the language of §1514A to its essential elements – *i.e.*, "no . . . contractor . . . may discharge . . . an employee" – Justice Ginsburg held that the "ordinary meaning" of "an employee" as set forth in the provision applies to the contractor's own employee. Absent any "textual qualification," the language of § 1514A "means what it appears to mean," that a contractor cannot retaliate against its own employees for engaging in whistleblowing activities. In so holding, Justice Ginsburg rejected FMR's interpretation of the text because it would require the insertion "of a public company" after "employee" in the provision and there was no indication that Congress intended such a limitation to be inserted into the provision.

Justice Ginsburg then went on to argue that the Court's broad interpretation of the text of § 1514A "fits the provision's purpose." Justice Ginsburg highlighted that Congress' purpose in enacting SOX was "[t]o safeguard investors in public companies and restore trust in the financial markets" in the wake of Enron. She went on to note that the legislative history included reports that employees of Enron and its contractors, such as Arthur Andersen, had attempted to report fraud but suffered retaliation from their employers in doing so. According to Justice Ginsburg, Congress was animated by a concern about protecting these kinds of whistleblowers when it drafted § 1514A and therefore "one can safely conclude that Congress enacted § 1514A aiming to encourage whistleblowing by contractor employees…." She emphasized that the majority's

[1] In 2010, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), § 1514A was amended to cover employees of public companies' subsidiaries and nationally recognized statistical ratings organizations. The Court's opinion rejected the argument that the Dodd-Frank amendments impacted the interpretation of the statute and whether it applies to contractors. The Court also rejected that a separate Dodd-Frank provision establishing a corporate whistleblower reward program covers any gap left open by § 1514A. The corporate whistleblower reward program provides whistleblower protection for employees who provide information to the SEC, participate in an SEC proceeding or make disclosures required or protected under SOX and certain other securities laws. 15 U.S.C. § 78u 6(h). The Court noted that protection related to the reward program focused on employees reporting to federal authorities, not "internal complaints" to people "with supervisory authority over the employee." § 1514A(a)(1)(C). As such, the amendments did not provide any clarity on the question of whether § 1514 applies to employees of contractors and subcontractors.

interpretation of § 1514A avoids "insulating the entire mutual fund industry" from the anti-retaliation provision and that expanding the whistleblower protections to mutual fund investment advisers is "crucial to [SOX]'s endeavor to 'protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws.'"

The decision, however, leaves open a significant legal question regarding the scope of claims covered by the anti-retaliation provision – specifically, whether the protections apply only to allegations of fraud related to the contractor's work for the public company or more broadly to other types of fraud claims. Although Justice Ginsburg suggested that the Court's ruling might be limited to covering only whistleblowing activities that relate to the contractor's provision of services to its public company client, that limitation was not one that was accepted by concurring Justices Scalia and Thomas. They took issue with Justice Ginsburg's purported limitation, stating that while the "'limiting principl[e],' may be appealing from a policy standpoint, it has no basis whatsoever in the statute's text." Justice Scalia's concurring opinion acknowledged the breadth of the provision's reach, noting that an employee is protected from retaliation provided she works for "one of the actors enumerated in § 1514A and reports a covered form of fraud."

THE DISSENT

In a strongly worded dissent, Justice Sonia Sotomayor, joined by Justices Anthony Kennedy and Samuel Alito, wrote that the Court's interpretation "gives § 1514A a stunning reach" and "transforms" the anti-retaliation provision into a "sweeping source of litigation that Congress could not have intended." Under the majority's interpretation, SOX regulates "employment relationships between individuals and their nannies, housekeepers and caretakers, subjecting individual employers to litigation." Justice Sotomayor illustrated her point by arguing that under the majority's interpretation, a babysitter could bring suit against her employer alleging retaliation for informing the parents that their "teenage son may have participated in an Internet purchase fraud" if one of the parents worked for a public company, such as the local Walmart. In responding to Justice Ginsburg's reliance on legislative history, Justice Sotomayor aptly noted that SOX "as a whole evinces a clear focus on public companies," pointing to the fact that SOX created enhanced disclosure obligations and audit committee requirements, all focused on public company accountability. In closing, Justice Sotomayor noted that "[t]he Court's decision upsets the balance struck by Congress," and suggested that Congress "respond to limit the far-reaching implications of the Court's interpretation."

IMPACT OF THE *LAWSON* DECISION

The *Lawson* decision is undoubtedly a victory for whistleblowers as it significantly expands the category of individuals that are covered by the protections of SOX's anti-retaliation provision. The decision is significant because it makes clear that not only public companies, but also private employers that contract with public companies, are subject to SOX's anti-retaliation provision. In light of the expansive scope of the *Lawson* decision, all employers – whether public companies or private entities – should be conscious of the importance of promoting and communicating a strong anti-retaliation culture within their firms. We recommend that public companies and private firms alike review their current whistleblower policies and procedures to ensure that whistleblower claims are handled in a timely and appropriate manner, and that employees raising those concerns are not subject to any employment actions or other treatment that could be deemed retaliatory. In addition, we advise that companies ensure that their employees are trained adequately in the relevant provisions of the internal whistleblower policies, as well as the role and impact of the SOX and Dodd-Frank whistleblower provisions.

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Please do not hesitate to contact us with any questions.

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