DEVELOPMENTS AND TRENDS IN SARBANES-OXLEY AND DODD-FRANK WHISTLEBLOWER LITIGATION

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Developments and Trends In Sarbanes-Oxley And Dodd-Frank Whistleblower Litigation[1]

2014 has been an extremely important year for litigants dealing with whistleblower claims brought under the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or "SOX") and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). In March, the Supreme Court issued its first decision interpreting the "whistleblower" protection provision of SOX. In June, the SEC filed and settled its first enforcement action alleging a violation of the Dodd-Frank anti-retaliation provision. In August, the Second Circuit issued the first appellate decision on the issue of whether Dodd-Frank applies extraterritorially. And throughout 2014, the SEC awarded substantial "bounty" awards to Dodd-Frank whistleblowers.

The development of the law in this area is likely to continue to accelerate, as administrative tribunals and federal courts grapple with a number of key, unresolved issues regarding the scope of SOX and Dodd-Frank whistleblower claims. This paper discusses recent developments in Sarbanes-Oxley and Dodd-Frank whistleblower law from the dual perspectives of a whistleblower attorney and defense counsel.

I.
BRIEF OVERVIEW OF SARBANES-OXLEY AND DODD-FRANK WHISTLEBLOWER PROVISIONS

A. Overview of the Sarbanes-Oxley Whistleblower Provision

The Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or "SOX") makes it illegal to fire or otherwise discriminate against an employee for providing information or assisting with an investigation regarding what the employee "reasonably believes" to be a violation of a rule of the Securities and Exchange Commission, the federal criminal laws regarding mail, wire, and bank

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fraud, or any provision of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1). Protection attaches when the employee provides information or assistance to a federal regulatory or law enforcement agency, to Congress, or to someone in the company with "supervisory authority over the employee" or with authority to "investigate, discover, or terminate misconduct." *Id*. Sarbanes-Oxley also makes it illegal to retaliate against an employee for commencing or participating in a proceeding related to alleged federal securities violations—testifying in a securities case, for example. *Id.* at § 1514A(a)(2).

Furthermore, SOX amended the federal obstruction of justice statute to make it a crime to "interfere[ ] with the lawful employment or livelihood of any person" in retaliation for "providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense . . . ." 18 U.S.C. § 1513(e). Note that while this criminal anti-retaliation provision is limited to "truthful" reports to law enforcement officers, by its terms it is not limited to alleged securities violations or fraud; rather, on its face the provision appears to cover reports of any federal offense to a law enforcement officer.

To successfully show involvement in a protected activity under the civil provision, a complainant must establish that he complained about conduct that he "reasonably believe[d]" constituted a violation of the federal laws regarding mail, wire, and bank fraud, securities fraud, and any rule or regulation of the Securities and Exchange Commission. 18 U.S.C. § 1514A(a)(1). The "reasonably believes" requirement includes both an objective and subjective component: the employee must subjectively believe that there is a violation, and that belief must be objectively reasonable. *Nielsen v. AECOM Tech. Corp.*, 2014 WL 3882488, at *5-7 (2d Cir. Aug. 8, 2014). The objective reasonableness of a belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and

experience as the aggrieved employee. *Id.* at *6. An "employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected." *Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008).

Sarbanes-Oxley's remedial provision states that a prevailing employee "shall be entitled to all relief necessary to make the employee whole," including reinstatement, back pay, and compensation for any "special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." 18 U.S.C. § 1514A(c). In addition, the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA")—which is responsible for investigating Sarbanes-Oxley whistleblower complaints—has issued a rule implementing SOX which provides that OSHA may order "preliminary reinstatement" of an employee, prior to any court hearing, when it finds "reasonable cause" that a violation occurred. Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 69 Fed. Reg. 52,104, 52,114 (August 24, 2004), codified at 29 C.F.R. § 1980.105(a)(2).

In 2010, SOX was amended to ban pre-dispute arbitration agreements for whistleblower claims. 18 U.S.C. § 1514A(e); *Pezza v. Investors Capital Corp.*, 767 F. Supp. 2d 225, 233-34 (D. Mass. 2011) (holding that ban on pre-dispute arbitration agreements applies retroactively); *but see Taylor v. Fannie Mae*, 839 F. Supp. 2d 259, 262-63 (D.D.C. 2012) (declining to follow *Pezza* and upholding a pre-dispute arbitration agreement entered into before the amendment of SOX).

As amended, complaints under Sarbanes-Oxley are to be filed within 180 days of the action complained of (or after the claimant should have known of the violation). 18 U.S.C.

§ 1514A(b)(2)(D). Under its rules, OSHA has 60 days to investigate the complaint and issue a letter indicating whether it has found reasonable cause to believe a violation occurred. *See* 49 U.S.C. § 42121(b) (provisions of the "AIR 21" whistleblower protection law incorporated by reference into Sarbanes-Oxley at 18 U.S.C. § 1514A(b)(2)(A)). In practice, the agency typically takes considerably longer to complete its investigation.

Under the rule implementing the SOX whistleblower provision, OSHA gives employers at least two opportunities to present their position to the agency as it conducts its investigation. *First*, after receiving notification of the complaint, the employer is given 20 days to file a "written statement and any affidavits or documents substantiating its position." A meeting with the OSHA investigator may also be requested. 29 C.F.R. § 1980.104(c). *Second*, toward the conclusion of OSHA's investigation, if the agency tentatively determines there is reasonable cause to believe a violation occurred and that preliminary reinstatement is warranted, the agency:

> will again contact the [named person] to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. . . . The [named person] will be given the opportunity to submit a written response, to meet with the investigators to present statements from witnesses in support of its position, and to present legal and factual arguments. The [named person] will present this evidence within 10 business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon afterwards as the Assistant Secretary and the named person can agree, if the interests of justice so require.

29 C.F.R. § 1980.104(e).

Cases under Sarbanes-Oxley are tried before Department of Labor administrative law judges ("ALJs"). (These judges are distinct from those who hear cases under the Occupational Safety and Health Act.) Appeal lies to the Labor Department's Administrative Review Board ("ARB"), which issues final agency decisions in the Secretary's name; review by the ARB is

discretionary under SOX, and the ALJ's factual findings are reviewed under the "substantial evidence" standard. 29 C.F.R. § 1981.110. Appeal of decisions of the ARB—and, if the ARB denies review, of decisions of ALJs—lies to the federal courts of appeals. 29 C.F.R. § 1980.112. The Solicitor of Labor typically defends the agency's action before the courts of appeal; the complainant is often also separately represented.

If the Labor Department has not issued a final decision within 180 days of the filing of the complaint, the complainant may file his case in federal district court and is "entitled to a trial by jury." 18 U.S.C. §§ 1514A(b)(1)(B), 1514A(b)(2)(E). Proceedings will be *de novo.* 18 U.S.C. § 1514A(b)(1)(B). One hundred and eighty days is not nearly enough time for an OSHA investigation and decision letter; discovery; trial before an administrative law judge; post-trial briefing; issuance of the ALJ decision; and, possibly, briefing and review before the ARB. As a practical matter, then, complainants usually have the opportunity to go to federal court, although for a variety of reasons they may choose to remain before the Labor Department.[2]

B. Overview of the Dodd-Frank Whistleblower Provision

On July 21, 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 11-203 ("Dodd-Frank"). Dodd-Frank contains a number of provisions relevant to whistleblowing:

[2] In a letter to the then-Chairman of the Securities and Exchange Commission, Senators Grassley and Leahy suggested that the SEC has the power to bring criminal and civil enforcement actions for violations of the SOX whistleblower provision. *See* Letter from Senator Patrick Leahy and Senator Charles Grassley, Senate Judiciary Committee, to William Donaldson, Chairman, Securities & Exchange Commission 1-2 (Nov. 9, 2004). In response, Chairman Donaldson demurred: the agency "does not prosecute criminal cases," he explained, "but under Section 21(d)(1) of the Exchange Act, [it] may transmit evidence of possible violations of the Exchange Act to the Attorney General, who then uses his discretion to institute the necessary criminal proceedings." Letter from William Donaldson, Chairman, Securities & Exchange Commission, to Senator Patrick Leahy and Senator Charles Grassley, Senate Judiciary Committee 3 (Dec. 21, 2004). Although Donaldson's response did not expressly disclaim SEC authority to civilly enforce the provision, it observed that "Section 806 explicitly gives a whistleblower relief by filing a complaint with the Secretary of Labor" and that consequently "the Commission has not proposed rules or regulations concerning Section 806, [nor has it] . . . filed any enforcement actions under Section 806." *Id*.

First, it amended the existing Sarbanes-Oxley whistleblower provision, among other things, to add nationally recognized statistical rating organizations as covered employers, to lengthen the limitations period from 90 to 180 days, to provide expressly for a right to trial by jury, and to prohibit pre-dispute arbitration agreements. *See* 18 U.S.C. § 1514A(a); *id.* at § 1514A(b); *id.* at § 1514A(e).

Second, it created a "bounty" program, which provides whistleblowers a financial incentive to report violations of securities laws to the Securities and Exchange Commission ("SEC"), which we discuss further below. 15 U.S.C. § 78u-6.

And third, it created three new federal anti-retaliation causes of action for individuals whose employers retaliate against them for taking certain protected actions. Two of the new causes of action have received relatively little attention: They protect employees who report potential violations of the Commodity Exchange Act (CEA) to the CFTC (7 U.S.C. § 26), and employees who report potential violations of federal banking laws to their employers, the newly created Bureau of Consumer Financial Protection, or other government authorities (12 U.S.C. § 5567).

The Dodd-Frank Act also created a new cause of action within the Securities Exchange Act that protects all covered employees from retaliation for (a) "providing information to the [SEC]," (b) "initiating, testifying in, or assisting in any investigation or judicial or administrative action . . . related to [ ] information" provided to the SEC, or (c) "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002," the Securities Exchange Act of 1934, or "any other law, rule, or regulation subject to the jurisdiction of the [SEC]." 15 U.S.C. § 78u-6(h).

This Dodd-Frank anti-retaliation provision provides that "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower." 15 U.S.C. § 78u-6(h)(1)(A). Individuals successful in proving retaliation may be entitled to "(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination; (ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and (iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees." 15 U.S.C. § 78u-6(h)(1)(C).

Claims for alleged retaliation for protected whistleblower activities may be brought before an "appropriate district court of the United States," 15 U.S.C. § 78u-6(h)(B)(i), within "6 years after the date on which the violation . . . occurred," or "3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation," while "an action under this subsection may not in any circumstance be brought more than 10 years after the date on which the violation occurs." 15 U.S.C. § 78u-6(h)(1)(B)(iii).

There are substantial benefits to claimants who bring retaliation claims under Dodd-Frank rather than SOX.

First, SOX has a 180-day statute of limitations, while the Dodd-Frank limitations period is six years (or three years after the material facts were known or reasonably should have been known to the employee, but in no event longer than ten years). *Compare* 18 U.S.C. § 1514A(b)(2), *with* 15 U.S.C. § 78u–6(h)(1)(B)(iii).

Second, a whistleblower must exhaust administrative remedies under SOX by filing a complaint with OSHA, while Dodd-Frank allows immediate suit in federal court. *Compare* 18 U.S.C. § 1514A(b), *with* 15 U.S.C. § 78u–6(h)(B)(i).

Third, Dodd-Frank allows employees to recover double back pay, whereas only actual back pay is available under SOX. *Compare* 18 U.S.C. § 1514A(c)(2)(B) (back pay with interest, reinstatement with equivalent seniority, and reasonable attorneys' fees), *with* 15 U.S.C. § 78u-6(h)(1)(C) (double back pay with interest, reinstatement with equivalent seniority, and reasonable attorneys' fees).

Fourth, Dodd-Frank's final rules contain a provision that purports to prevent employers from enforcing confidentiality agreements to prevent whistleblower employees from cooperating with the SEC. 17 C.F.R. § 240.21F-17(a).

Fifth, and finally, the SEC's rules provide the Commission with the authority to enforce Dodd Frank's anti-retaliation provisions. 17 C.F.R. § 240.21F-2(b)(2).

A recent SEC enforcement order confirms that retaliating against a whistleblower can result not only in a private suit brought by the whistleblower, but can also result in a unilateral SEC enforcement action. In June 2014, the SEC brought its first-ever whistleblower retaliation suit under the Dodd–Frank anti-retaliation provision.

In *Paradigm Capital Management., Inc. and Candace King Weir*, Admin. Proc. File No. 3-15930 (June 16, 2014), the SEC sued Paradigm Capital Management, a hedge fund advisory firm, for engaging in prohibited principal transactions and for retaliating against the whistleblower who disclosed the unlawful trading activity to the SEC. The SEC alleged that after Paradigm learned that the firm's head trader had reported potential misconduct to the SEC, the firm engaged in a series of retaliatory actions that ultimately resulted in the head trader's

resignation, including "removing the [w]histleblower from his position as head trader, tasking him with investigating the very conduct he reported to the [SEC], changing his job function from head trader to a full-time compliance assistant, stripping him of his supervisory responsibilities, and otherwise marginalizing him," including by requiring him to work offsite. *Id.* at ¶¶ 27, 40.

Paradigm settled the SEC charges by consenting to the entry of an order finding that it violated the anti-retaliation provision of Dodd-Frank and committed other securities law violations, agreeing to pay $2.2 million in disgorgement, prejudgment interest, and penalties, agreeing to hire a compliance consultant to overhaul its internal procedures, and entering into a cease-and-desist order. *Id.*, Part IV. The SEC did not disclose which portion of the $300,000 penalty, if any, was related to the hedge fund's whistleblower retaliation.

As for the possibility of similar SEC actions in the future, immediately following the settlement with Paradigm and Weir, the chief of the SEC's Office of the Whistleblower stated that the SEC "will continue to exercise our anti-retaliation authority in these and other types of situations where a whistleblower is wrongfully targeted for doing the right thing and reporting a possible securities law violation." SEC Release 2014-118 (June 16, 2014).

C. SEC Whistleblower "Bounty" Program

Since its implementation in August of 2011, the SEC's whistleblower reward or "bounty" program has slowly gained momentum. Under Section 922(a) of Dodd-Frank, a whistleblower who provides original information to the SEC that results in monetary sanctions exceeding $1 million shall be paid an award of ten to thirty percent of the amount recouped. *See* 15 U.S.C. § 78u-6. The SEC whistleblower reward program has generated over 6,500 tips, nearly half of which were submitted in fiscal year 2013. *See U.S. Sec. & Exch. Comm'n., 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program* (2014).

Recently, the SEC granted several whistleblower awards, including an award of $14 million to a whistleblower who disclosed an alleged scheme to dupe Chinese investors by promising that investments in a hotel and conference center would boost their chances of obtaining green cards. The whistleblowers' disclosures led to the return of $147 million to investors. Subsequent awards have been much lower, averaging approximately $500,000.

II.
WHO CAN BE A WHISTLEBLOWER?
SUPREME COURT HOLDS THAT SOX PROTECTS EMPLOYEES OF PRIVATELY-HELD CONTRACTORS AND SUBCONTRACTORS OF PUBLICLY-TRADED COMPANIES

In March 2014, the Supreme Court held in *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014) that SOX creates a cause of action not merely for the employees of public companies, but also for employees of non-public companies that perform work for public companies.

Plaintiffs in *Lawson* were employees of mutual fund investment advisers, non-public companies that had contractual relationships with the public "investment companies," or mutual funds, that they advised. Plaintiffs sued their employers under Section 806 of SOX, alleging that they had been retaliated against by the non-public advisers after they reported supposed shareholder fraud at the mutual funds. Section 806—which is titled "Protection For Employees of Publicly Traded Companies"—provides in 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]." 18 U.S.C. § 1514A(a). Defendants moved to dismiss plaintiffs' complaints on the ground that Section 806, as its title suggests, creates a cause of action only for employees of public companies, protecting them from discrimination and harassment by the company and its employees, agents, and contractors. The district court disagreed and ruled for plaintiffs, but certified the question for

interlocutory review to the First Circuit, which sided with defendants and reversed. *See Lawson v. FMR LLC*, 724 F.Supp.2d 141 (D. Mass. 2010); *Lawson v. FMR LLC*, 724 F. Supp. 2d 167 (D. Mass. 2010); *Lawson v. FMR LLC*, 670 F.3d 61 (1st Cir. 2012).

In a 6-3 decision, the Supreme Court reversed the First Circuit, holding that SOX whistleblower protection "extends to employees of contractors and subcontractors." *Lawson*, 134 S. Ct. at 1176. In a broad-ranging opinion by Justice Ginsburg, the Court based its decision on its reading of the statutory text and legislative history, the "mischief" to which Congress was responding when it enacted SOX in the wake of the Enron scandal, and an earlier whistleblower protection law for aviation employees on which SOX was partly modeled. *See id.* at 1161-76. Moreover, because mutual fund companies typically have no employees of their own, Justice Ginsburg expressed particular concern that a decision refusing to extend SOX to the advisers' employees would insulate the mutual fund industry from Section 806. *Id.* at 1168-71.

The Supreme Court declined to resolve a number of issues that had been considered important by the parties, their *amici*, and the courts below, including whether, if the SOX whistleblower provision extends to non-public company employees, there is a "limiting principle" that prevents the provision from being wielded against non-public companies in disputes that have little if anything to do with harm to shareholders, public accounting, and the concerns that led to SOX's enactment. *See id.* at 1172-73. The Court concluded it was unnecessary to reach these issues because the plaintiffs in this case had, in the Court's view, alleged fraud that "directly implicate[d]" the shareholders of the publicly held funds. *Id.* at 1173.

Justice Sotomayor's dissenting opinion (joined by Justices Kennedy and Alito) criticized the majority's reasoning and the "stunning reach" of its decision: "By interpreting a statute that already protects an expansive class of conduct also to cover a large class of employees, today's

opinion threatens to subject private companies to a costly new front of employment litigation." *Id.* at 1184-85 (Sotomayor, J., dissenting). In the dissent's view, it was simply not plausible "that Congress intended the Act to impose costly litigation burdens on any private business that happens to have an ongoing contract with a public company." *Id.* at 1184. The dissent expressed concern that the decision would provide the protections of § 1514A to a nanny "if the parent stops employing the babysitter after he expresses concern that the parent's teenage son may have participated in an Internet purchase fraud" and "a small business that contracts to clean the local Starbucks (a public company) if an employee is demoted after reporting that another nonpublic company client has mailed the cleaning company a fraudulent invoice." *Id.* at 1178.

The Court in *Lawson* declined to address some of the potentially sweeping consequences of holding that non-public company employees are covered by SOX. The result will be an increase in SOX litigation against public and non-public companies, in which lower courts and litigants must continue to wrestle with a number of important questions about SOX's scope and meaning.

At least one court has directly confronted the effects of *Lawson*. In *Gibney v. Evolution Marketing Research, LLC*, 2014 WL 2611213 (E.D. Pa. June 11, 2014), the U.S. District Court for the Eastern District of Pennsylvania suggested a limiting principle for SOX coverage of employees of non-public contractors and subcontractors to public companies. Leo Gibney was employed by Evolution Marketing Research, a private consulting company that contracted its services out to many publicly-traded companies, including the pharmaceutical company Merck. *Id.* at *1. Evolution terminated Gibney's employment after he allegedly reported to his supervisor that Evolution was fraudulently overbilling Merck for its services. *Id*. at *2. The court held that even though Gibney was a protected employee and had reported securities fraud,

SOX did not apply because it only protects disclosures aimed at preventing fraud perpetrated by, rather than against, publicly-traded companies. *Id*. at *7. The court expressed concern that permitting Gibney's claim to proceed would transform SOX into a "general anti-retaliation statute that would apply to any private company that transacts business with a public company." *Id*. (internal quotation marks omitted).

While *Lawson* will probably generate an increase in SOX claims, *Gibney* suggests that many courts will likely adopt limiting principles that narrow the scope of SOX coverage for employees of contractors and subcontractors of public companies.

III.
WHAT CAN WHISTLEBLOWERS DISCLOSE?
IMPACT OF BROADENING OF "PROTECTED ACTIVITY" UNDER SARBANES-OXLEY

In *Platone v. FLYi, Inc.*, ARB Case No. 04-154, 2006 WL 3246910 (Sept. 29, 2006), the ARB held that, in order to be protected, an employee's communications "must relate 'definitively and specifically' to the subject matter of the particular statute under which protection is afforded." *Id.* at *8. Federal courts considering the scope of SOX-protected activity—with or without reliance on the ARB's "definitively or specifically" standard—had distinguished between generalized reports and the provision of information about fraudulent or illegal activity that can damage investors in publicly traded companies. *See, e.g.*, *Vodopia v. Koninklijke Philips Elecs., N.V.*, 398 F. App'x 659, 662-63 (2d Cir. 2010); *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996-97 (9th Cir. 2009); *Harp v. Charter Commc'ns*, 558 F.3d 722, 724-26 (7th Cir. 2009); *Day v. Staples, Inc.*, 555 F.3d 42, 55-57 (1st Cir. 2009); *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008).

In May of 2011, the ARB reversed course and overruled the "definitively and specifically" standard in *Sylvester v. Parexel Internat'l LLC*, ARB Case No. 07-123, 2011 WL 2165854 (ARB May 25, 2011). In particular, the ARB held the following in *Sylvester*:

- Under the plain language of SOX, "the complainant need only show that he or she 'reasonably believes' that the conduct complained of constitutes a violation of the laws listed in Section 1514A." *Id*. at *11.

- An employee need not wait until the illegal conduct occurs to make a protected disclosure, so long as the employee "reasonably believes that the violation is likely to happen." *Id*. at *13.

- A complaint need not allege shareholder fraud in order to be protected under SOX. The ARB found that SOX was enacted, not solely to address securities fraud, but "corporate fraud generally." *Id.* at *16. It is sufficient for an employee to form a reasonable belief that a violation of "any rule or regulation of the Securities and Exchange Commission" could lead to fraud, even if the violation itself is not fraudulent. *Id.* at *17. For example, SOX would protect a disclosure about deficient or inadequate internal controls over financial reporting, even though there is no allegation that fraud has actually taken place. *Id*. at *19.

- "The reasonable belief standard requires an examination of the reasonableness of a complainant's beliefs," but it does *not* require an examination of "whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities." *Id*. at *12.

- The ARB overruled prior authority that had required a complainant to establish that the protected disclosure "definitively and specifically" related to one or more of the laws listed under Section 806(a). *Id.* at *14.

- A SOX complainant has engaged in protected activity if he or she simply has an objectively reasonable belief that a violation of the laws in Section 806 has occurred—the complainant does *not* need not establish the various elements of criminal fraud. The ARB found that requiring a complainant to allege, prove, or approximate the elements of fraud (that the reported conduct was "material," intentional, relied upon by shareholders, and caused a loss to shareholders) would be contrary to the purpose of the whistleblower protection provision. *Id*. at *17-18.

- The *Iqbal/Twombly* plausibility pleading standard does not apply to SOX claims filed with OSHA. *Id*. at *10. Instead, a SOX complainant must simply provide "a full statement of the acts and omissions . . .which are believed to constitute the violations." *Id.* at *9 (internal quotation marks omitted).

Acknowledging that the "definitively and specifically" standard had been followed in a number of ARB decisions and deferred to on appeal in several federal court decisions since the *Platone* decision, the ARB found that the standard was nonetheless in conflict with "the plain language of the SOX whistleblower protection provision, which protects 'all good faith and reasonable reporting of fraud.'" *Id.* at *14-15, 30 (quoting 148 Cong. Rec. S7418-01, S7420). The *Sylvester* decision asserted that "the critical focus is on whether the employee reported conduct that he or she reasonably believes constituted a violation of federal law," rather than "whether that information 'definitively and specifically' described one or more of those violations." *Id.* at *15.

Some federal courts have now also rejected the "definitively and specifically" standard and adopted or deferred to the ARB's construction of SOX-protected conduct as articulated in *Sylvester*. *See, e.g.*, *Nielsen v. AECOM Technology Corp.*, 2014 WL 3882488, at *5-6 (2d Cir. Aug. 8, 2014); *Wiest v. Lynch*, 710 F.3d 121, 131 (3d Cir.2013); *Leshinksy v. Telvent GIT, S.A.*, 942 F. Supp. 2d 432, 443-45 (S.D.N.Y. May 2013).

As and to the extent that federal courts continue to adopt or defer to the ARB's construction of SOX-protected conduct as articulated in *Sylvester*, the trend in the case law may continue to move further away from a requirement that SOX complaints relate specifically to shareholder fraud and SOX whistleblower plaintiffs whose alleged protected activity does not relate to core issues of shareholder fraud will be more likely to survive a motion to dismiss. On the other hand, *Lawson*'s heavy reliance on SOX's purpose—preventing public company fraud such as at Enron and WorldCom—should help defendants continue to argue against using the law in circumstances with no discernible connection to shareholder fraud.

IV.
HOW CAN WHISTLEBLOWERS DISCLOSE? COURTS SPLIT OVER WHETHER DODD-FRANK COVERS INTERNAL WHISTLEBLOWING

A split of authority has emerged regarding whether internal disclosures are protected under the Dodd-Frank Act, 15 U.S.C. § 78u-6(h). Dodd-Frank defines the term "whistleblower" to mean "any individual who provides, or 2 or more individuals acting jointly who provide, information relating 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). The Dodd-Frank anti-retaliation provision, however, defines protected conduct as lawful actions taken by a whistleblower:

> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A).

The Fifth Circuit has held that the statutory language is not ambiguous and that an employee cannot bring a Dodd-Frank whistleblower claim unless he made a report to the SEC, *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 629-31 (5th Cir. 2013), whereas the SEC regulations implementing the bounty provision and decisions from some district courts say that an employee can pursue a Dodd-Frank whistleblower claim if he reported internally, within the meaning of SOX. 17 C.F.R. § 240.21F-2; *Bussing v. Cor Clearing, LLC*, 2014 WL 2111207, at *11-12 (D. Neb. July 17, 2014); *Khazin v. TD Ameritrade Holding Corp.*, 2014 WL 940703, at *6 (D.N.J. May 11, 2014); *Yang v. Navigators Grp., Inc.*, 2014 WL 1870802, at *13 (S.D.N.Y.

May 8, 2014); *Ahmad v. Morgan Stanley & Co.*, 2014 WL 700339, at *4 n.5 (S.D.N.Y. Feb. 21, 2014); *Rosenblum v. Thomson Reuters (Markets) LLC*, 984 F. Supp. 2d 141, 147-48 (S.D.N.Y. 2013); *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 45-46 (S.D.N.Y. 2013); *Murray v. UBS Sec., LLC*, 2013 WL 2190084, at *7 (S.D.N.Y. May 21, 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106-07 (D. Colo. 2013); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 994 n.9 (M.D. Tenn. 2012); *Kramer v. Trans-Lux Corp.*, 2012 WL 4444820, at *5-7 (D. Conn. Sept. 25, 2012). Most of the district court decisions have found an ambiguity in the statutory language and deferred to the SEC's interpretive guidance. *See, e.g.*, *Khazin*, 2014 WL 940703, at *6; *Yang*, 2014 WL 1870802, at *13; *Rosenblum*, 984 F. Supp. 2d at 147-48.

On the other hand, several courts have expressly followed the Fifth Circuit's decision in *Asadi*. For example, in *Englehart v. Career Educ. Corp.*, 2014 WL 2619501, at *9 (M.D. Fla. May 12, 2014), the court held that an employee of an education services company who disclosed material misrepresentations in budget forecasts to her supervisor was not a whistleblower within Dodd-Frank's statutory definition. The court found that the restrictive statutory definition of "whistleblower" was unambiguous, and therefore gave no weight to the SEC's guidance, agreeing with *Asadi* that only an employee who complains to the SEC can be a whistleblower under the law. *Id*.

The U.S. District Court for the Northern District of California also followed the Fifth Circuit's lead in *Banko v. Apple Inc.*, 2013 WL 7394596 (N.D. Cal. Sept. 27, 2013). Banko was an Apple engineer who reported to his supervisors that a fellow engineer was embezzling money, an allegation that was allegedly later confirmed by an internal investigation. *Id*. at *1. Apple then terminated Banko, who responded by bringing a claim for whistleblower retaliation under Dodd-Frank. *Id*. The district court granted Apple's motion for summary judgment on the Dodd-

Frank claim, citing *Asadi* and dismissing Banko's claim on grounds that he never reported his concerns to the SEC. *Id*. at *4-6. *Accord Wagner v. Bank of Am. Corp.*, 2013 WL 3786643, at *4 (D. Colo. July 19, 2013).

The Second Circuit recently declined to address the split of authority over Dodd-Frank's definition of "whistleblower." *See Liu Meng-Lin v. Siemens AG*, 2014 WL 3953672, at *7 (2d Cir. Aug. 14, 2014).

It is possible that this split of authority will eventually reach the Supreme Court. Until it does, plaintiffs will no doubt continue to bring Dodd-Frank claims even when they have made no complaint to the SEC.

V.
WHERE SHOULD WHISTLEBLOWERS BRING CLAIMS? PROCEDURAL DIFFERENCES BETWEEN DODD-FRANK AND SARBANES-OXLEY CLAIMS

Dodd-Frank provides a remedy that overlaps to some extent with SOX, but offers a much longer statute of limitations, double back pay, and the opportunity to proceed directly in federal court without exhausting administrative remedies. While these differences may lead some whistleblowers to focus on asserting Dodd-Frank claims, there are certain other procedural elements that suggest that SOX claims may be preferable. In particular, Dodd-Frank claims are not exempt from mandatory arbitration agreements and Dodd-Frank does not expressly provide for the right to a jury trial. Further, SOX authorizes front pay and recent jury verdicts suggest that SOX whistleblowers may be able to recover substantial damages.

In January of 2014, the Southern District of New York held that Dodd-Frank claims are not exempt from mandatory pre-dispute arbitration agreements. *Murray v. UBS Securities LLC*, 2014 WL 285093, at *8 (S.D.N.Y. Jan. 27, 2014). Murray was a former CMBS strategist at UBS who alleged that UBS terminated his employment after he supposedly complained about

alleged pressure by co-workers to "skew" his research reports. *Id*. at *1-3. Murray filed a Dodd-Frank retaliation claim in federal court and separately filed a SOX claim with OSHA.

Murray's employment agreement contained an arbitration clause requiring the arbitration of any "employment-related disputes," but excluding SOX claims. *Id.* at *2. UBS moved to compel arbitration of Murray's Dodd-Frank claim. Murray argued that because his complaints to his supervisor were protected conduct under SOX, his claims arose under SOX and therefore his claim should proceed in court as a SOX claim. *Id*. at *10. The court disagreed, holding that Dodd-Frank claims are not exempt from mandatory arbitration, and compelling Murray to arbitrate his Dodd-Frank claim. *Id*. at *10-14.

The availability of a jury trial is another important procedural distinction between SOX and Dodd-Frank whistleblower retaliation claims. As amended by Dodd-Frank, Section 806 of SOX includes an express right to a jury trial. 15 U.S.C. § 1514A(b)(2)(E). Dodd-Frank, however, does not contain an express right to jury trial. In late 2013, a Georgia district court held that Dodd-Frank plaintiffs are not entitled to trial by jury. *Pruett v. BlueLinx Holdings, Inc.*, 2013 U.S. Dist. LEXIS 185551, at *10 (N.D. Ga. Nov. 12, 2013).

Very few SOX claims have been tried before juries and until recently, SOX whistleblowers had not obtained large verdicts. This is due in part to the ambiguity that existed prior to 2010 as to whether SOX whistleblowers are entitled to a jury trial. The Dodd-Frank amendments to SOX clarified the right to try to a SOX whistleblower claim before a jury. *See* 18 U.S.C. § 1514A(b)(2)(E) ("A party to an action brought under [Section 806] shall be entitled to trial by jury."). Some recent verdicts suggest that SOX whistleblowers can obtain large verdicts, which may prompt more SOX whistleblowers to remove their claims from the Department of Labor to federal court.

On March 5, 2014, a California jury awarded $6 million to Catherine Zulfer in her SOX whistleblower retaliation claim against Playboy, Inc. ("Playboy"). Zulfer, a former accounting executive, alleged that Playboy had terminated her in retaliation for raising concerns about executive bonuses to Playboy's Chief Financial Officer and Chief Compliance Officer. *Zulfer v. Playboy Enterprises Inc.*, 2014 WL 1891246 (C.D. Cal. Mar. 5 2014). She contended that she had been instructed by Playboy's CFO to set aside $1 million for executive bonuses that had not been approved by the Board of Directors. *Id*. Zulfer refused to carry out this instruction, warning Playboy's General Counsel that the bonuses were contrary to Playboy's internal controls over financial reporting. *Id*. After Zulfer's disclosure, the CFO allegedly retaliated by ostracizing Zulfer, excluding her from meetings, forcing her to take on additional duties, and eventually terminating her employment. *Id*. After a short trial, a jury awarded Zulfer $6 million in compensatory damages, and additionally ruled that Zulfer was entitled to punitive damages. *Id*. Zulfer and Playboy reached a settlement before a determination of punitive damages. The $6 million compensatory damages award represents the highest award to date in a SOX anti-retaliation case.

The Ninth Circuit recently affirmed a SOX jury verdict awarding $2.2 million dollars, plus $2.4 million for attorneys' fees, to two former in-house counsel. *Van Asdale v. Int'l Game Tech.*, 549 F. App'x 611, 614 (9th Cir. 2013); *see also* Beth Winegarner, *IGT Slams $5 M Whistleblower Judgment in 9th Circ.*, LAW360.COM (Sept. 10, 2013). The plaintiffs, both former in-house counsel at International Game Technology, alleged that they had been terminated in retaliation for disclosing shareholder fraud related to International's merger with rival game company Anchor Gaming. *See id.*

The large jury verdicts are the result of the fact that a prevailing SOX whistleblower can recover "all relief necessary to make the employee whole," including reinstatement, back pay, attorney's fees, and costs. 18 U.S.C. § 1514A(c). "Special damages," at least according to the ARB, include damages for impairment of reputation, personal humiliation, mental anguish and suffering, as well as other non-economic harm resulting from retaliation. *See Kalkunte v. DVI Fin. Servs*., ARB Nos. 05-139, 05-140 at 11, ALJ No. 2004-SOX-56 at 11 (ARB Feb. 27, 2009). Although reinstatement is an available remedy to make an employee whole, some ALJs have awarded front pay in lieu of reinstatement. *See, e.g.*, *Hagman v. Washington Mutual Bank, Inc.*, 2005-SOX-00073, at 26-30 (ALJ Dec. 19, 2006), *appeal withdrawn by employer and dismissed*, 07-039 (ARB May 23, 2007) (awarding $640,000 in front pay to a banker whose supervisor allegedly became verbally and physically threatening when Hagman disclosed concerns about the short funding of construction loans). And recently, a federal district court held that front pay is an appropriate remedy in lieu of reinstatement in SOX actions. *See Jones v. SouthPeak Interactive Corp. of De.*, 986 F. Supp. 2d 680, 683-85 (E.D. Va. 2013). Jones had worked at SouthPeak as its CFO, and SouthPeak terminated his employment after she disclosed accounting irregularities to the SEC. *Id*. at 681. Following a four-day trial, a jury found for Jones and awarded nearly $700,000 in damages. *Id*. at 682. Jones then filed a motion seeking front pay in lieu of reinstatement in addition to compensatory damages. The court awarded front pay on the SOX claim, relying on DOL regulations implementing SOX that authorize the award of front pay in lieu of reinstatement and Fourth Circuit precedent affirming district court awards of front pay in lieu of reinstatement under similar remedial statutes, such as the ADEA and FMLA. *Id.* at 683-84.

SouthPeak appealed the decision and the Department of Labor has filed an *amicus curiae* brief arguing that front pay is an appropriate remedy under SOX. Assuming the plaintiff prevails on appeal, other circuits may hold that SOX authorizes front pay in lieu of reinstatement. Although SOX does not authorize punitive damages, large awards of front pay to highly compensated employees, such as corporate officers, could result in very large recoveries under SOX.

* * *

When Congress enacted Dodd-Frank approximately four years ago, its anti-retaliation provision appeared at first glance to provide a stronger remedy than SOX. Recent decisions highlighting important procedural differences between the statutes and recent jury verdicts in SOX cases, however, suggest that SOX might in some cases offer a stronger remedy than Dodd-Frank. Given the evolving case law, we expect that many whistleblowers will continue to assert both Dodd-Frank and SOX claims for the foreseeable future.