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Blowing the Whistle: Ninth Circuit Rejects Narrow Interpretation of Dodd-Frank's "Whistleblower" Protections

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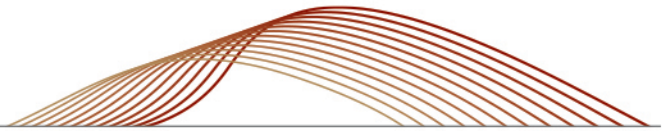
On March 8, 2017, the U.S. Court of Appeals for the Ninth Circuit waded into the ongoing legal debate over the breadth of the Dodd-Frank Act's "whistleblower" and anti-retaliation protections. In *Somers v. Digital Realty Trust Inc.*, the court held that the Dodd-Frank Act protects employees who disclose potential corporate wrongdoing internally to their employer in addition to those who disclose the wrongdoing externally to government regulators.[1] With its 2-to-1 decision, the court deepened an existing split among the circuit courts of appeal, suggesting that the scope of the Dodd-Frank Act's whistleblower protections may be ripe for review by the Supreme Court. Regardless, corporate employers in California would be wise to consider the take-home point from *Somers*—namely, that the Dodd-Frank Act protects employees who disclose potential corporate wrongdoing, even if they only make the disclosure internally within the corporation.

In response to the financial crisis of 2008, Congress passed the Dodd-Frank Act ("Dodd-Frank"), which contains a number of provisions aimed at curbing certain misconduct Congress deemed detrimental to the financial system.[2] Less than a decade earlier, Congress reacted to concerns about inadequate financial accounting regulation by passing the Sarbanes-Oxley Act ("Sarbanes-Oxley").[3] Among other things, Sarbanes-Oxley protects employees from retaliation in the event they "blow the whistle" and report concerns about accounting and auditing improprieties internally to their supervisors or to certain federal regulators.[4] Dodd-Frank contains similar anti-retaliation protections for whistleblowers that report potential corporate wrongdoing to the Securities and Exchange Commission ("SEC"), assist in any SEC investigation regarding the wrongdoing, or make any "disclosures that are required or protected under the Sarbanes-Oxley Act of 2002."[5] Critically, however, a different section of Dodd-Frank defines "whistleblower" as one who provides "information relating to a violation of the securities laws to the [SEC], in a manner established, by rule or regulation, by the [SEC]."[6] The tension between these two sections of Dodd-Frank's whistleblower protections illuminates the question before the court in *Somers*: whether the term "whistleblower" as used in Dodd-Frank strictly protects employees who disclose potential corporate wrongdoing to the SEC or whether it also protects those who only disclose the wrongdoing internally within their corporation.[7]

This issue has divided the courts. On the one hand, the Second Circuit concluded that Dodd-Frank protects a whistleblower employee regardless of whether that employee discloses potential misconduct internally within the corporation or externally to government regulators.[8] On the other hand, the Fifth



Circuit determined that Dodd-Frank's anti-retaliation provisions only apply when an employee reports suspected wrongdoing to the SEC.[9] Ultimately, the Ninth Circuit in *Somers* sided with the Second Circuit, further sharpening the split among the courts.[10]

The plaintiff in *Somers* alleged that he was fired after reporting suspected securities laws violations to "senior management" at his company, but before reporting the misconduct to the SEC.[11] Plaintiff brought suit against his company claiming, among other things, violations of Dodd-Frank's anti-retaliation provisions. The lower court denied the company's motion to dismiss the complaint, granting deference to an SEC regulation interpreting Dodd-Frank to protect employee whistleblowers who only report suspected misconduct internally.

In affirming the lower court's judgment, the Ninth Circuit first determined that Dodd-Frank's anti-retaliation provisions "broadly incorporat[e]…Sarbanes-Oxley's disclosure requirements and protections…."[12] The court also noted that Sarbanes-Oxley indeed *requires* certain employees to report suspected misconduct internally to a corporation *before* reporting the misconduct externally. Thus, according to the court, an overly narrow interpretation of Dodd-Frank's anti-retaliation provisions would effectively leave employees unprotected from termination for following Sarbanes-Oxley's sequenced reporting requirements and would "undercut congressional intent."[13] The court addressed head on the Fifth Circuit's reasoning that, if Dodd-Frank's anti-retaliation provisions are broadly interpreted to protect the same conduct that is protected by Sarbanes-Oxley, then Sarbanes-Oxley's protections are superfluous and would never be used by any whistleblowers. In rejecting this conclusion, the court in *Somers* noted that, in many circumstances, Sarbanes-Oxley's protections are more favorable than the protections offered by Dodd-Frank. Accordingly, Dodd-Frank and Sarbanes-Oxley provide "alternative enforcement mechanisms," with one not rendering the other superfluous.[14] Finally, the court gave express deference to an SEC rule which determined that Dodd-Frank protects employees "whether they blow the whistle internally, as in many instances, or they report directly to the SEC."[15] In a short dissent—and potential signal to the Supreme Court that the *Somers* decision is worth review—Judge Owens criticized the majority's reliance on *King v. Burwell*, the Supreme Court's controversial decision regarding the Affordable Care Act.

Now that the Ninth Circuit has widened the circuit split by holding that Dodd-Frank's anti-retaliation provisions protect employees who only disclose suspected corporate wrongdoing internally, the issue may be primed for Supreme Court review. Either way, corporations should take note of the Ninth Circuit's conclusion, especially when handling an employee's internal disclosure of suspected corporate wrongdoing and should consult with capable legal counsel to ensure compliance with Dodd-Frank's complex anti-retaliation provisions.

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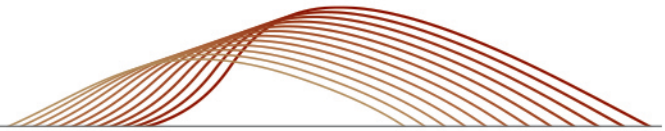

[1] No. 15-17352, --- F.3d ---, 2017 WL 908245 at *1 (9th Cir. Mar. 8, 2017).

[2] *Id.* at *2.

[3] *Id.*

[4] 18 U.S.C. § 1514A(a).

[5] 15 U.S.C. § 78u-6(h)(1)(A).

[6] 15 U.S.C. § 78u-6(a)(6).

[7] *See Somers*, 2017 WL 908245 at *1.

[8] *Id.* at *1 (citing *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015)).

[9] *Id.* (citing *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 621 (5th Cir. 2013)).

[10] *Id.* at *1.

[11] *Id.* at *2.

[12] *Id.* at *3.

[13] *Id.* at *3-4.

[14] *Id.*

[15] *Id.* at *5.