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US Supreme Court Upholds Broad Scope of Sarbanes-Oxley Act Whistleblower Protection

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Last week, the US Supreme Court issued an important decision addressing whether Section 806 of the Sarbanes-Oxley Act of 2002 (SOX) (codified at 18 U.S.C. § 1514A) limits protection from retaliation to the employees of public companies, or if it also covers employees of contractors to a public company. *Lawson v. FMR LLC*, No. 12-3 (March 4, 2014). In a 6-3 ruling, the Court held that Section 1514A whistleblower protection extends to employees of contractors and subcontractors of public companies, including investment advisers, law firms, and accounting firms.

Section 1514A created a private cause of action for whistleblowers who are alleged to have been retaliated against for reporting possible violations of the federal securities laws and other specified laws. In the pertinent part, Section 1514A provides that:

> "[n]o company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. §78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §78o(d))… *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 by] the employee…."

18 U.S.C. § 1514A (emphasis added).

Justice Ruth Bader Ginsburg's opinion said that the text of Section 1514A, other considerations such as legislative intent, and the Department of Labor's interpretation and similar prior whistleblower protection legislation that Congress drew on when drafting Section 1514A, all weighed in favor of interpreting the SOX whistleblower protection to cover employees not just of the public company itself, but of any officer, employee, contractor, subcontractor, or agent of a public company. The Court reasoned that the ordinary meaning of "an employee" in this context was the contractor's *own* employee. Slip Op. at 9 (emphasis added). Further, the Court reasoned that Congress did not intend to stop contractors from retaliating against whistleblowers employed by the

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public companies they served, yet permit them to retaliate against their own employees. *Id*. at 2. (Justices Antonin Scalia and Clarence Thomas joined in the opinion only to the extent it was based on the language of the statute itself.)

Petitioners Jackie Lawson and Jonathan Zang were employed by private company contractors that provided investment advisory services to a mutual fund complex. The petitioners brought SOX retaliation claims, asserting that they were terminated because they reported alleged fraud by the funds. Mutual funds file reports with the Securities and Exchange Commission, but typically do not have employees; rather, the funds are managed by employees of investment advisers. The *Lawson* decision means that such employees are protected by Section 1514A. The decision's scope is not limited to employees of mutual fund contractors but also extends to employees of other contractors to public companies, such as law firms and accounting firms.

Justice Sonia Sotomayor's dissent argued that the majority's holding gave the law a "stunning reach." Dissenting Op. at 2. A babysitter, for example, could bring a Section 1514A claim against his employer, merely because that employer was an employee of a public company. *Id*. Justice Ginsburg's opinion discounted the dissent's "fanciful visions of whistleblowing babysitters" and noted that "[f]ew housekeepers or gardeners… are likely to come upon and comprehend evidence of their employer's complicity in fraud." Slip Op. at 14-15.

Lawson's ultimate scope could hinge on legal questions under the law that remain unresolved. One such issue, which the Court identified but did not decide, is whether the law protects employees of contractors only to the extent the whistleblowing relates to the contractor fulfilling its role as a contractor for the public company, or extends to activities by the contractor that relate to non-public companies. Slip Op. at 23-24. Another issue is whether whistleblower protections apply broadly to a variety of fraud claims, or simply to allegations of shareholder fraud. The statute applies to "any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders…." 18 U.S.C. § 1514A(1). Some have argued that the predicate legal violations should be limited to claims of shareholder fraud. The Department of Labor Administrative Review Board, however, has held that SOX whistleblower protection "does not require that [] mail fraud or wire fraud pertain to a fraud against the shareholders." *Brown v. Lockheed Martin Corp*., ARB No. 10-050, Slip Op. at 9 (Feb. 28, 2011) (citations omitted).

Lawson resolved an open question, and did so in a manner that interprets the scope of whistleblower protection expansively. Investment advisers to mutual funds, and indeed any private companies, law firms, or accounting firms that contract with public companies, should be mindful of the broad reach of Section 1514A. Retaliation taken against employees of such organizations for reporting possible public company misconduct may be actionable under SOX. These organizations might consider revisiting their internal policies and procedures to ensure that they comply with Section 1514A. For a more detailed discussion about mitigating the retaliation risks associated with whistleblowers, see Don't Tread on Whistleblowers: Mitigating and Managing Retaliation Risks —

Part II SEC. REG. & LAW REP., 46 SRLR 167 (Jan. 27, 2014) available here.

Mark. Cahn, while serving as General Counsel for the Securities and Exchange Commission, was one of the authors of an amicus curiae *brief filed by the SEC during the appeal to the First Circuit in this case. The views expressed by Mr. Cahn in this article are his own.*

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