DePaul Business and Commercial Law Journal

Volume 15
Issue 2 *Winter 2017*

Article 2

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I. Introduction

On July 21, 2010, in response to the financial abuses that occurred during from 2007 to 2009, President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").

This Act was, for the most part, created to increase protection for whistleblower employees who report alleged fraudulent corporate behavior against employee retaliation. Thus, under Dodd Frank, employees who report violations of law are protected from employer retaliation that may result from reporting such violations. One of the primary intended consequences of Dodd-Frank was to restore public faith and confidence in the financial system.[1] Dodd-Frank is also intended to play a pivotal role in preempting and exposing attempted fraud.[2]

The Dodd-Frank Act is claimed to be an improvement on the whistleblower protection provided under the Sarbanes Oxley Act of 2002 (SOX).[3] Prior to SOX, there were laws in place to protect government employees who reported fraud to avoid the waste of taxpayer money, but such employee protections did not extend to private sector employees. Under SOX protection was extended, but not all private sector employees were covered; protection was limited to employees of a company that either registered a class of securities per § 12 of the Securities Exchange Act of 1934 or were required to file reports under

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1. *See* Meghan E. King, *Blowing the Whistle on the Dodd-Frank Amendments: The Case Against the New Amendments to Whistleblower Protection in Section 806 of Sarbanes-Oxley*, 48 Am. Crim. L. Rev. 1457, 1462 (2011).

2. Caroline E. Keen, *Clarifying What Is "Clear": Reconsidering Whistleblower Protections Under Dodd-Frank*, 19 N.C. Banking Inst. 215, 232 (2015).

3. *See* King, *supra* note 1, at 1460.

§ 15(d) of the Act.[4] The source of protection for a private company's employees was contained in § 806 of SOX.[5] However, §§ 922 and 929A of Dodd-Frank extended protection for whistleblower employees not covered under SOX.[6] Dodd-Frank also simplifies the procedures for whistleblower employees. Under SOX, the whistleblower has to first file a claim to the Occupational Safety and Health Administration ("OSHA");[7] if after 180 days there is no final determination, then the whistleblower could bring an action in a federal district court.[8] However, under Dodd-Frank, the complainant has direct access to the district court to file a claim.[9]

This Article examines the historical impetus behind the Dodd-Frank Act against the backdrop of the Wall Street financial crisis. I will look at SOX in light of changes made by Congress under the Dodd-Frank Act as it relates to improving some provisions of SOX, as well as examining case law to see if there is indeed a commensurate improvement as intended by Congress. This Article will analyze the SOX and Dodd-Frank Acts to highlight any fundamental differences that could change the outcome of a case depending upon which Act a whistleblower decides to bring a claim under. For example, under SOX, a whistleblower may be qualified in receiving back pay after a retaliatory discharge, whereas under Dodd-Frank that same whistleblower is eligible for double the back pay.[10] In the same vein, Dodd-Frank created a bounty program that would monetarily reward whistleblowers who report directly to the SEC if the reported information results in successful enforcement, thereby giving whistleblowers an even stronger incentive to report under Dodd-Frank.[11] However, the question of who exactly is considered a whistleblower under Dodd-Frank's anti-retaliation protection is still unsettled, given that the courts have recently rendered differing deci-

4. Sarbanes-Oxley Act of 2002 § 806, 18 U.S.C. § 1415A(a) (2012); *see also* King, *supra* note 1, at 1458.

5. *Id.* § 806.

6. Dodd-Frank Wall Street Reform and Consumer Protection Act §§ 922, 929A, 15 U.S.C. §§ 78u-6(h), 1514A (2012).

7. Sarbanes-Oxley Act of 2002 § 806; 29 C.F.R. § 1980.103(d) (2016).

8. Sarbanes-Oxley Act of 2002 § 806(b)(1)(B).

9. Dodd-Frank Wall Street Reform and Consumer Protection Act § 78u-6(h)(1)(B)(i).

10. *See* Keen, *supra* note 2, at 218-19.

11. *Id.* at 218. However, the SEC's regulations have widened eligibility of the bounty program to include a whistleblower that reports internally; the company thereafter passes the information to the SEC. *Id.* at 229. The bounty program basically encourages corporate employees who are "aware of legal violations to become statutorily defined as 'whistleblowers' by reporting violations to the SEC in order to qualify for the monetary awards." Nicole Sprinzen, *Asadi v GE Energy (USA) L.L.C.: A Case Study of the Limits of Dodd-Frank Anti-Retaliation Protections and the Impact on Corporate Compliance Objectives*, 51 AM. CRIM. L. REV. 151, 153 (2014).

sions on the issue of whether a whistleblower must report any violations to the SEC, or if internal reporting would be sufficient to claim the benefit. I will therefore examine court decisions in this area to determine whether there is a trend toward one decision over the other, and if there is potential for reconciliation of the conflict.

Furthermore, this Article will take a look at how the Dodd-Frank whistleblower protections may impact companies and countries outside of the United States. In the case of *Liu Meng-Lin v. Siemens AG*,[12] the Second Circuit held that Dodd-Frank does not apply outside the United States, and therefore the plaintiff, a citizen of Taiwan working for a Chinese company that had shares listed on the New York Stock Exchange, was not eligible for protection under Dodd-Frank.[13] However, a U.S. parent company with a foreign subsidiary company may nonetheless wish to avoid or discourage fraud through the use of codes of conduct or codes of ethics, for example, and encourage its foreign employees to report possible corporate violations, even though the subsidiary may not be directly subject to Dodd-Frank. Can this be done without running afoul of the privacy laws of other countries or even their cultural norms?[14]

Finally, this Article will analyze the impact of amending SOX under Dodd-Frank to prohibit mandatory arbitration agreements between employees and employers. This tends to undermine the universal principle of freedom of contract, as well as an individual's ability to seek alternative dispute resolution methods. Arbitration could be cheaper and more expedient to an employee who is unlikely to have as many resources as the employer. Would it have been better for Congress to remain neutral on this issue and thereby let the parties have the unfettered right to contract as desired? Is the mandatory arbitration prohibition under Dodd-Frank really advantageous to the whistleblower?

II. FROM SOX TO DODD-FRANK: HISTORICAL OVERVIEW

A. *The Sarbanes-Oxley Act*

In October 2001, one of the fastest-growing companies in the United States, Enron, revealed that it had drastically misstated its in-

12. 763 F.3d 175, 177 (2d Cir. 2014).

13. *Id.* at 183.

14. *See* Stephen M. Kohn, *Sarbanes-Oxley Act: Legal Protection for Corporate Whistleblowers*, NAT'L WHISTLEBLOWERS CTR., http://www.whistleblowers.org/index.php?option=com_content&task=view&id=27 (last visited Jan. 30, 2016) (stating that there could be repercussions of shame for an individual who is identified with a group to have reported that a member of the group did not act properly).

come for years.[15] Prior to the scandal, Enron was considered one of the best-managed, most successful companies in the United States.[16] The company collapsed four months after the revelation and declared bankruptcy.[17] The scandal resulted in losses of billions for investors and employees, as well as thousands of jobs.[18] Several Enron executives were arrested as a result and several other companies were exposed as committing accounting fraud over the next year.[19] These scandals pressed Congress to pass the Sarbanes-Oxley Act of 2002.[20]

SOX was passed in order to "provide for criminal prosecution and enhanced penalties of persons who defraud investors in publicly traded securities or alter or destroy evidence in certain Federal investigations . . . [and] to protect whistleblowers who report fraud against retaliation by their employers, and for other purposes."[21]

One motivation behind the enactment of SOX was "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws."[22] "Prior to Sarbanes-Oxley, there was no federal protection for whistleblowing employees of publicly traded companies."[23] Significant protections were already in place for federal employees for the purpose of preventing waste of taxpayer dollars.[24]

B. *The Dodd-Frank Act*

In the year 2000, Harry Markopolos[25] attempted to expose possibly the largest Ponzi scheme in history.[26] Employed by a separate securi-

15. Connor C. Turpan, *Whistleblower? More Like Cybercriminal: The Computer Fraud and Abuse Act as Applied to Sarbanes-Oxley Whistleblowers*, 42 RUTGERS COMPUTER & TECH. L.J. 120, 123-24 (2016); King, *supra* note 1, at 1459; Jason Zuckerman, *Recent Developments in Whistleblower Law from a Whistleblower Lawyer's Perspective*, SX001 ALI-CLE 851 (2015); William Dorsey, *Materiality in Sarbanes-Oxley Act Employee Protection Claims*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 339, 340-41 (2007).

16. Turpan, *supra* note 15, at 123-24.

17. *Id.*; King, *supra* note 1, at 1459.

18. Turpan, *supra* note 15, at 124.

19. *Id.*

20. *Id.* at 124-25; King, *supra* note 1, at 1459-60.

21. S. REP. NO. 107-146, at 2 (2002).

22. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18, 28 U.S.C. (2012)).

23. Turpan, *supra* note 15, at 126; King, *supra* note 1, at 1458.

24. King, *supra* note 1, at 1458.

25. Harry Markopolos was an American securities fund manager who, beginning in the year 2000, would repeatedly attempt to blow the whistle on one of the largest Ponzi schemes in United States history being run by Bernie Madoff. Andrew Clark, *The Man Who Blew the Whistle on Bernard Madoff*, GUARDIAN (Mar. 24, 2010, 8:17 PM), https://www.theguardian.com/business/2010/mar/24/bernard-madoff-whistleblower-harry-markopolos.

26. King, *supra* note 1, at 1462-63.

ties firm,[27] Markopolos investigated the securities firm run by Bernie Madoff,[28] attempting to understand how Madoff achieved such successful returns on investments.[29] Markopolos instead discovered a massive fraudulent scheme and reported Madoff to the SEC in 2000.[30] The SEC did not act on Markopolos's report.[31] Markopolos tried again in 2001, 2005, 2007, and 2008.[32] Each time Markopolos reported Madoff to the SEC he was ignored.[33] It was only because Madoff confessed his crimes to his sons, who subsequently turned Madoff over to the police that Madoff's scheme finally came to an end in 2008.[34] Markopolos would later condemn the SEC to Congress for the agency's failure to act earlier and prevent Madoff from squandering as much as he had.[35] Due in part to the Bernie Madoff Ponzi scheme, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act on July 21, 2010.[36]

The stated purpose of Dodd-Frank is to "promote the financial stability of the United States by improving accountability and transparency in the financial system . . . [and] to protect consumers from abusive financial services practice."[37] Dodd-Frank changed the playing field of securities exchanges through several additional provisions. Section 922 of Dodd-Frank amends the Securities Exchange Act of 1934 to significantly improve the SEC's whistleblower program, including provisions to increase the possible reward to whistleblowers to between 10% and 30% of collected sanctions which exceed $1,000,000

27. The firm that had hired Harry Markopolos to discover Madoff's secret to success was Rampart Investment Management, an investment firm based out of Massachusetts. Clark, *supra* note 25.

28. Bernie Madoff was the founder of a U.S. multi-billion-dollar securities investment firm who orchestrated a fraudulent securities scheme, resulting in the loss of billions of dollars of investor's money. *Bernard Madoff Biography*, BIOGRAPHY, http://www.biography.com/people/bernard-madoff-466366#arrest (last updated Feb. 1, 2016). Madoff is currently serving a 150-year sentence in prison. Clark, *supra* note 25.

29. King, *supra* note 1, at 1462-63.

30. *Id.* at 1462.

31. *Id.*

32. *Id.*

33. *Id.*

34. Melissa C. Nunziato, *Aiding and Abetting, a Madoff Family Affair: Why Secondary Actors Should be Held Accountable for Securities Fraud Through the Restoration of the Private Right of Action for Aiding and Abetting Liability Under the Federal Securities Laws*, 73 ALB. L. REV. 603, 608 (2010).

35. King, *supra* note 1, at 1462-63.

36. *Id.* at 1463; Michael Neal, *Securities Whistleblowing Under Dodd-Frank: Neglecting the Power of "Enterprising Privateers" in Favor of the "Slow-Going Public Vessel"*, 15 LEWIS & CLARK L. REV. 1107, 1117-18 (2011).

37. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 5, 7, 12, 15, 26, 28, 31, 42 U.S.C. (2012)).

by actions resulting from original information by the whistleblower; allow the whistleblower to appeal the award determination through the appropriate court of appeals; provide enhanced anti-retaliation whistleblower protection, including a private cause of action against retaliators; and create a whistleblower office to administer and enforce the provisions of the new SEC whistleblower program.[38] Dodd-Frank required that the SEC promulgate regulations for the new whistleblower program no later than April 21, 2011.[39] On June 13, 2011, the final rules of the SEC whistleblower provisions were promulgated.[40] Two days after President Obama signed the Dodd-Frank Act into law the SEC awarded its first $1,000,000 bounty award to Glen and Karen Kaiser for providing the SEC with information leading to a $17,000,000 sanction against Pequot Capital Management.[41] A look at cases under Dodd-Frank and other cases pertaining to whistleblowers will be helpful in understanding the evolution of case law in the area.

III. Evolution Of The Dodd-Frank Act Whistleblower Case Law

Courts have struggled with whether whistleblowers under Dodd-Frank must report their information directly to the SEC or if they may report internally to their supervisors in order to claim protection by Dodd-Frank's whistleblower provisions. The issue is created by the language of Dodd-Frank itself. Dodd-Frank states that a whistleblower is a person who reports to the SEC; however, the anti-retaliation provision lists three different types of activities which are protected from retaliation, the third of which pertains to disclosures under the Sarbanes-Oxley Act, which has led to the argument that this third category could be used as an exception to the rule that a whistleblower under Dodd-Frank must report to the SEC.[42] Courts have come to differing conclusions on this problem. There is a split between the Fifth and Second Circuits on this issue. The Fifth Circuit has held that only whistleblowers reporting directly to the SEC may claim protection under Dodd-Frank's anti-retaliation provisions. This

38. King, *supra* note 1, at 1463.

39. Neal, *supra* note 36, at 1118.

40. *Id.*

41. King, *supra* note 1, at 1463.

42. Dodd-Frank Wall Street Reform and Consumer Protection Act § 922, 15 U.S.C. § 78u-6(h)(1)(A)(iii). The first activity protected from retaliation is disclosing information directly to the SEC. *Id.* § 922, 15 U.S.C. § 78u-6 (h)(1)(A)(i). The second activity protected from retaliation is the act of testifying or aiding the SEC in bringing an investigation or other proceeding in furtherance of the Dodd-Frank Act. *Id.* § 922, 15 U.S.C. § 78u-6 (h)(1)(A)(ii).

is the minority view of the district courts that have addressed the issue.[43] The majority view as espoused by the Second Circuit has since held that Dodd-Frank protections also extend to whistleblowers reporting internally within the company.[44] These are the only federal circuit courts that have addressed the issue, but a number of federal district courts have also weighed in, as discussed below.

A. *Federal District Cases Prior to Asadi*

In *Egan v. TradingScreen, Inc.*,[45] the plaintiff-employee of the defendant-CEO discovered that his employer was subverting the company's funds into what was essentially a shell corporation owned by the employer.[46] The plaintiff reported this information internally within the company to the president and board of directors.[47] The CEO-defendant was able to gain control over the board of directors and fired the plaintiff.[48] The plaintiff alleged that the CEO violated the anti-retaliation provision of Dodd-Frank.[49] The defendant argued that the plaintiff could not bring this claim because he did not directly report to the SEC.[50] The Southern District of New York held that a plaintiff could bring a Dodd-Frank claim without necessarily reporting to the SEC.[51] The court found that the third Dodd-Frank category is an exception to the definition of a whistleblower.[52] This case, and decision, is significant because it was the first case in which a federal court dealt with the application of § 922 of the Dodd-Frank Act and demonstrated that a complaining employee could "establish a prima facie case" by the use of the anti-retaliatory provision without necessarily reporting the alleged wrongdoing to the SEC.[53]

In *Nollner v. Southern Baptist Convention, Inc.*,[54] the plaintiff was a new hire into a New Delhi-based company with a wide range of issues, including a failure to record invoices, bribing officials, and operating a

43. Stephanie Klein, *Interpreting the Definition of a Whistleblower Under Dodd-Frank's Anti-Retaliation Provision: How and Why Public Policy Should Guide the Courts in Finding that Whistleblowers Do not Need to Report to the SEC*, 10 FLA. INT'L U. L. REV. 279, 298 (2014).

44. *Id.* at 289.

45. No. 10 Civ. 8202 LBS, 2011 WL 1672066 (S.D.N.Y. May 4, 2011).

46. *Id*. at *2.

47. *Id.*

48. *Id.*

49. *Id*. at *3.

50. *Id.*

51. *Egan*, 2011 WL 1672066, at *3.

52. *Id.*

53. Sprinzen, *supra* note 11, at 175.

54. 852 F. Supp. 2d 986 (M.D. Tenn. 2012).

series of shell companies to conceal funds.[55] The plaintiff internally reported these issues within the company, but nothing was done.[56] The plaintiff was fired after complaining about these issues.[57] The plaintiff then filed a complaint, seeking protection under Dodd-Frank.[58] While the case was disposed of on other grounds, the court did look at whether the third category of the anti-retaliation provision requires reporting directly to the SEC.[59] The court determined that the third category does not mandate a whistleblower report directly to the SEC.[60] The court further held that in order for a plaintiff to take advantage of this third category, a plaintiff must show that his reporting somehow relates to a violation of a federal securities law.[61]

Kramer v. Trans-Lux Corp.[62] involved a plaintiff-employee working for a defendant-company.[63] When the plaintiff believed that the defendant's CFO, by being a member of a pension plan committee of which the CFO was the sole beneficiary, was involved in a conflict of interest, the plaintiff reported his concerns within the company.[64] The CFO told the plaintiff not to contact the SEC.[65] Instead, the plaintiff reported his concerns to the company's board of directors and was terminated shortly afterward.[66] The court agreed with *Egan* and *Nollner* and determined that the plaintiff could still be shielded by the protections of Dodd-Frank even though he reported internally, instead of directly to the SEC.[67] The court stated that interpreting the third category of the anti-retaliation provision broadly as an exception to the general rule would promote the primary purpose of Dodd-Frank by encouraging whistleblowers to speak out.[68]

B. *Asadi v. GE Energy*

The Fifth Circuit in *Asadi v. GE Energy*,[69] concluded that whistleblowers disclosing under this supposed exception to the gen-

55. *Id.* at 989-90.
56. *Id.* at 990.
57. *Id.*
58. *Id.*
59. *Id.* at 993.
60. *Nollner*, 852 F. Supp. 2d. at 994.
61. *Id.*
62. No. 3:11CV1424 (SRU), 2012 WL 4444820 (D. Conn. Sept. 25, 2012).
63. *Id.* at *2.
64. *Id.* at *2-3.
65. *Id.*
66. *Id.* at *3.
67. *Id.* at *4.
68. *Kramer*, 2012 WL 4444820, at *4.
69. 720 F.3d 620 (5th Cir. 2013).

eral rule must report to the SEC to be protected by Dodd-Frank, thus there is no exception at all.[70]

Asadi brought a lawsuit against GE Energy, alleging that GE Energy fired him after he made an internal complaint about a potential securities violation.[71] Rather, Asadi was initially required to step down from his current responsibilities and accept a position of lower responsibility.[72] Declining the demotion, Asadi was promptly terminated.[73]

Filing a lawsuit, Asadi alleged that GE violated Dodd-Frank's whistleblower anti-retaliation provisions.[74] On appeal, the court sought to answer the issue: "whether an individual who is not a 'whistleblower' under the statutory definition . . . may, in some circumstances, nevertheless seek relief under the whistleblower-protection provision."[75] The court concluded that Dodd-Frank's protection only covers whistleblowers reporting directly to the SEC.[76] Asadi reported internally, so he was not entitled to protection.[77]

The *Asadi* court began its analysis with Dodd-Frank's definition of a whistleblower and found initially that the definition expressly indicates a whistleblower must report directly to the SEC, regardless of the supposed third category exception.[78] The court moved on to consider Asadi's argument that the third category is in direct conflict with this definition by not mandating reporting to the SEC.[79] The court disagreed with this argument by claiming that the three categories are not categories of whistleblowers, rather that they are types of actions that can be taken by a whistleblower who reports directly to the SEC and receives the protection of Dodd-Frank.[80] The majority of district courts who have ruled on the same issue tend to come to a different conclusion than the *Asadi* court. The extraterritorial issue in *Asadi* is dealt with in part IV below.

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70. *Id.* at 623.
71. *Id.* at 621.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Asadi*, 720 F.3d at 623.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 626.
80. *Id.*

C. *After Asadi*

In the recent case of *Berman v. Neo@Ogilvy L.L.C.*,[81] the Second Circuit split with the Fifth by holding that the Dodd-Frank whistleblower protections extend beyond whistleblowers who report directly to the SEC.[82] In this case, Berman was the finance director for Neo, a media agency.[83] During his employment, Berman discovered that Neo was engaged in practices that Berman concluded amounted to accounting fraud.[84] Berman reported this information within Neo, but never externally to the SEC.[85] Berman was subsequently fired by a supervisor and filed a lawsuit against the company, claiming protection under Dodd-Frank.[86] The court reached its conclusion that the Dodd-Frank provisions should extend beyond those who report directly to the SEC by reasoning that a rule to the contrary would severely limit the protections afforded since, among other reasons, some whistleblowers, such as attorneys and accountants, are unable to report to the SEC before reporting internally.[87] The court's view created a circuit split between the Second and Fifth Circuits.

1. Federal District Cases Agreeing with *Berman*: Majority View

Since *Asadi*, most cases have disagreed with its holding. The majority of district courts agree that a whistleblower should not be denied protection under Dodd-Frank for reporting SOX violations internally, as opposed to reporting them directly to the SEC.

In *Rosenblum v. Thomson Reuters (Markets) L.L.C.*,[88] the plaintiff, an employee of defendant, Thomson Reuters, brought a lawsuit against the defendant for violating the Securities Exchange Act of 1934.[89] Thomson Reuters had created a new product that would allow them to gauge the expectations and attitudes of consumers in regard to the U.S. economy and how those attitudes might change.[90] This information would aid investors in deciding where and when to invest. Reuters released this information to its subscribers at a specified time each day, but Rosenblum learned that certain subscribers were receiving this information nearly an hour earlier than all other subscribers,

81. 801 F.3d 145 (2d Cir. 2015).
82. *Id.* at 153, 155.
83. *Id.* at 148-49.
84. *Id.* at 149.
85. *Id.*
86. *Id.*
87. *Berman*, 801 F.3d at 151.
88. 984 F. Supp. 2d 141 (S.D.N.Y. 2013).
89. *Id.* at 143.
90. *Id.*

giving them an unequal advantage.[91] Rosenblum expressed his concerns about the early disclosures to several of his supervisors and, after being turned away, reported the disclosures to the FBI.[92] Rosenblum was fired by Thomson Reuters shortly afterward.[93] Rosenblum argued that his disclosures should be protected under Dodd-Frank's anti-retaliation provisions, whereas Thomson Reuters claimed this relief was not available to Rosenblum under *Asadi* because Rosenblum did not report directly to the SEC.[94] The court held that Rosenblum was protected by the anti-retaliation provisions, despite the decision in *Asadi*, because he had reported internally and to the FBI.[95]

In *Ellington v. Giacoumakis*,[96] Ellington was employed as a financial planner for New England Investment & Retirement Group, Inc.[97] Ellington learned that the company was producing investment reports to clients that were misleading.[98] Ellington reported his concerns internally to his supervisor, Giacoumakis, and wrote a report detailing his concerns.[99]

Ellington filed the report with the company's compliance office, and Giacoumakis terminated him.[100] After being fired, Ellington disclosed the report and the company's misleading information to the SEC, which began an investigation.[101] Ellington also filed a lawsuit against the company, claiming he was entitled to the Dodd-Frank protections.[102] As in the other cases, the defendant argued that the Dodd-Frank protections do not cover Ellington because he reported internally, instead of reporting directly to the SEC.[103] The court agreed with the majority of courts and with Ellington, holding that Dodd-Frank's whistleblower protections extend to a whistleblower who reports internally.[104] The court reasoned that this interpretation was more in line with Congress' intent in promoting whistleblower activities, as opposed to the view of the court in *Asadi*.[105]

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91. *Id.* at 143-44.
92. *Id.* at 144.
93. *Id.*
94. *Rosenblum*, 984 F. Supp. 2d at 146.
95. *Id.* at 148.
96. 977 F. Supp. 2d 42 (D. Mass. 2013).
97. *Id.* at 43.
98. *Id.*
99. *Id.*
100. *Id.* at 43-44.
101. *Id.* at 44.
102. *Ellington*, 977 F. Supp. 2d at 44.
103. *Id.* at 45.
104. *Id.*
105. *Id.*

In *Connolly v. Remkes*,[106] the plaintiff, Connolly, worked for a company involved in securities and owned by the defendant, Remkes.[107] During her work, Connolly received a file containing checks from a different financial advisor in violation of the Financial Industry Regulatory Authority ("FINRA").[108] Connolly informed Remkes of her concerns and Remkes instructed her to contact the company's compliance department.[109] The compliance department affirmed Connolly's concerns that this was a violation.[110] Upon hearing of this, Remkes told Connolly she should have presented the situation to the compliance department as a hypothetical.[111] The compliance department then contacted Connolly for a statement on the issue, which Remkes directed her to ignore and instead drafted his own email regarding the matter, which Connolly claims was untruthful.[112] Refusing to be a part of this cover-up, Connolly resigned and subsequently informed the compliance department about the checks.[113] Connolly filed suit against Remkes, claiming she was pressured into resigning and should receive the protection of Dodd-Frank's anti-retaliation provisions.[114] The court held that, despite the *Asadi* decision, the plaintiff should be entitled to the anti-retaliation provisions even though she did not report directly to the SEC, but reported internally instead.[115]

Khazin v. TD Ameritrade Holding Corp.,[116] featured Khazin, a financial oversight officer of TD Ameritrade, who discovered that one of Ameritrade's products was improperly priced in violation of the federal securities laws.[117] Khazin reported this information to his supervisor, who advised Khazin to conduct an impact analysis, which would project the cost-benefit analysis of fixing the pricing issue.[118] Fixing the pricing issue would be costly to Ameritrade and Khazin's supervisor told Khazin to take no further action and to stop emailing her about the situation.[119] Khazin's supervisor later accused Khazin of being involved in a supposed invoicing issue, even though Khazin

106. No. 5:14-CV-01344-LHK, 2014 WL 5473144 (N.D. Cal. Oct. 28, 2014).
107. *Id.* at *1.
108. *Id*. at *1-2.
109. *Id.* at *1.
110. *Id.*
111. *Id.* at *2.
112. *Connolly,* 2014 WL 5473144, at *2.
113. *Id.*
114. *Id.*
115. *Id.* at *6.
116. No. 13-4149 (SDW) (MCA), 2014 WL 940703 (D. N.J. Mar. 11, 2014).
117. *Id.* at *1.
118. *Id.*
119. *Id.*

had little involvement with invoices, and Khazin was fired.[120] Khazin reported the violation to the SEC and argued he was entitled to the protection of the anti-retaliation provisions.[121] The court held that the anti-retaliation provisions of Dodd-Frank extend beyond the limits placed on them in *Asadi* to cover whistleblowers who "report potential violations to a supervisory authority and not to the SEC itself."[122]

In *Genberg v. Porter*,[123] the situation leading up to the lawsuit is complicated, but can be boiled down to a few pertinent facts. Genberg was a high-ranking employee for a corporation, where Porter was the CEO.[124] Genberg alerted Porter and the corporation's board of directors that they had violated the SEC rules on proxy voting by "allowing its [Board of Directors] to vote the shares in the custodial account on a 'non-routine' matter without instruction of the beneficial owners of the shares."[125] Genberg was subsequently terminated.[126] Genberg then filed a complaint, claiming he was fired in violation of the anti-retaliation provisions of Dodd-Frank.[127] The defendants argued that Genberg was not entitled to this protection because he did not report directly to the SEC.[128] Agreeing with the majority of courts that have decided this issue, the court held that Genberg may still be considered a whistleblower under Dodd-Frank, and therefore was entitled to the anti-retaliation protections "even though he has not provided the SEC with any information regarding alleged federal securities law violations."[129]

Murray v. UBS Securities, L.L.C.,[130] involved Murray, a securities strategist employed by UBS.[131] As part of his employment, Murray would publish reports regarding UBS's products, which were published for UBS's clients.[132] According to Murray, UBS attempted to pressure Murray into writing misleading reports that would cast UBS's products in a more favorable light.[133] Murray refused and re-

120. *Id.*
121. *Id.* at *1-2.
122. *Khazin*, 2014 WL 940703, at *6.
123. 935 F. Supp. 2d 1094, 1106-07 (D. Colo. 2013) *aff'd in part*, *appeal dismissed in part*, 566 F. App'x 719 (10th Cir. 2014).
124. *Id.* at 1097.
125. *Id.* at 1098.
126. *Id.* at 1099.
127. *Id.* at 1104.
128. *Id.*
129. *Genberg*, 935 F. Supp. 2d at 1106-07.
130. No. 12 Civ. 5914(JMF), 2013 WL 2190084 (S.D.N.Y. May 21, 2013).
131. *Id.* at *1.
132. *Id*.
133. *Id.* at *1-2.

ported this information to several of his managers and supervisors.[134] UBS later fired Murray.[135] Murray filed suit against UBS, claiming he was unlawfully discharged and deserved protection under the anti-retaliation provisions of Dodd-Frank.[136] As in the other cases, UBS argued that because Murray only reported the information internally, and not to the SEC; he was not entitled to protection as a whistleblower.[137] The court here agreed with the majority view and disagreed with *Asadi* by holding that Murray was entitled to the anti-retaliation protections of Dodd-Frank even though he only reported the misconduct internally.[138]

In *Yang v. Navigators Group, Inc.*[139] the plaintiff, Yang, worked as a risk officer for the defendant, Navigators.[140] During her time working for Navigators, Yang reported to the CFO several instances of fraud being committed by Navigators employees.[141] Yang also notified the CEO and general counsel for Navigators and was fired shortly afterward.[142] The Southern District of New York granted the defendant's motion for summary judgment because the plaintiff failed to demonstrate that she had actually complained *either* to the SEC or internally within the company.[143] The majority of the plaintiff's evidence regarding the defendant's fraud was comprised of outside research gathered by other individuals before the plaintiff had even started working for the defendant.[144] Although the court ruled in favor of the defendant in this case, the court also followed the majority view that a whistleblower who reports within the organization, as opposed to reporting directly to the SEC, may still be protected under Dodd-Frank, disagreeing with *Asadi*.[145] The court here cites both *Genberg* and *Nollner* in affirming this rule.[146]

Azim v. Tortoise Capital Advisors, L.L.C.[147] features the plaintiff, Azim, working as a vice president for the defendant, Tortoise.[148] Dur-

134. *Id.* at *2.
135. *Id.*
136. *Murray*, 2013 WL 2190084, at *2.
137. *Id.* at *3.
138. *Id.* at *7.
139. 155 F. Supp. 3d 327 (S.D.N.Y. 2016), *vacated*, 2016 WL 7436485, at *1 (2d. Cir. Dec. 22, 2016).
140. *Id.* at 330.
141. *Id.*
142. *Id.*
143. *Id.* at 332-33, 336-37.
144. *Id.* at 332-33.
145. *Yang*, 155 F. Supp. 3d at 336-37.
146. *Id.*
147. No. 13-2267-KHV, 2014 WL 707235 (D. Kan. Feb. 24, 2014).
148. *Id.* at *1.

ing his employment, Azim learned that Tortoise was engaging in fraudulent misrepresentations made to investors and false filings with the SEC.[149] Azim reported his concerns to the director of human resources of the company and was subsequently fired.[150] Azim filed a lawsuit against the company claiming, among other things, that he was entitled to the protection of Dodd-Frank's anti-retaliatory provisions.[151] The court agreed with Azim's contention that simply because he reported his concerns about Tortoise's fraudulent conduct to his supervisor, and not to the SEC, he was still entitled to Dodd-Frank's protection.[152]

In *Bussing v. COR Clearing, L.L.C.*,[153] Bussing worked in an independent contractor capacity for COR, a private investment company.[154] COR was in the process of acquiring another company at the time and hired Bussing as the company's Executive Vice President.[155] Shortly after Bussing began working as Executive Vice President of the acquired company, FINRA began an investigation of the acquired company for several suspected violations and served the company with production requests.[156] Bussing began complying with these requests and uncovered a number of other violations.[157] Bussing reported the violations to several supervisors at COR who told her not to comply with the requests.[158] Bussing continued to reply to the requests, was terminated, and filed suit against the company.[159] On the issue of whether Bussing's internal reporting entitled her to Dodd-Frank's whistleblower protections, the court ruled in the affirmative.[160] The court reasoned that the text of the Dodd-Frank Act is ambiguous on this issue, but the provision can be reconciled with the Act as a whole, stating:

> [w]hen the term "whistleblower" is given its ordinary meaning—for purposes of the retaliation section only—everything falls into place. The broad protections of subsection (iii) are given effect, while rewards under the bounty program are properly limited to whistleblowers who provide tips to the SEC. But the same is not true under the contrary interpretation. When "whistleblower" is

149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at *3.
153. 20 F. Supp. 3d 719 (D. Neb. 2014).
154. *Id.* at 723.
155. *Id.*
156. *Id.*
157. *Id.* at 724.
158. *Id.*
159. *Bussing*, 20 F. Supp. 3d at 724-25.
160. *Id.* at 733.

> used in its narrower sense, subsection (iii) serves no significant purpose, and its aim of broadly protecting whistleblowers is stifled.[161]

The *Bussing* court thus agreed with the majority view.

2. Federal District Cases Agreeing with Asadi: Minority View

The minority view that Dodd-Frank's whistleblower protections only extend to those who disclose directly to the SEC, as set forth in *Asadi*, has been followed by a small number of federal district courts. These courts contend that the Act is not ambiguous; therefore, it must be strictly construed in accordance with the literal text.

Wagner v. Bank of America Corp.,[162] was a case involving Wagner, an appraiser working for LandSafe Appraisal Services, Inc.[163] Wagner overheard one of her coworkers telling another coworker that his wife was helping him with his appraisals, which is a violation of the Uniform Standards of Professional Appraisal Practice.[164] Wagner reported her suspicions to several supervisors and was eventually terminated.[165] Wagner filed suit against her employer claiming, in part, protection under the Dodd-Frank whistleblower provisions.[166] The court determined that Wagner was not a whistleblower entitled to Dodd-Frank's protections because she did not report directly to the SEC, stating:

> [i]nitially, and in my view dispositively, the statute defines the term "whistleblower": "any individual who provides, or 2 or more individuals acting jointly who provide, *information relating to a violation of the securities laws to the [Securities Exchange] Commission,* in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u–6(a)(6) (emphasis added). Ms. Wagner did not provide any information to the Commission, whether relating to a violation of the securities laws or otherwise, prior to her termination. Accordingly, she was not a "whistleblower" as defined in this statute.[167]

The *Wagner* court thus agreed with the court in *Asadi*.

In *Englehart v. Career Education Corp.*,[168] the defendant, Career Education, was a corporation involved in running school systems, and employed the plaintiff, Englehart, as a director of career services.[169]

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161. *Id.* at 730.
162. No. 12-CV-00381-RBJ, 2013 WL 37866 43 (D. Colo. July 19, 2013).
163. *Id.* at *1.
164. *Id.*
165. *Id.* at *1-4.
166. *Id.* at *4.
167. *Id.*
168. No. 8:14-CV-444-T-33EAJ, 2014 WL 2619501 (M.D. Fla. May 12, 2014).
169. *Id.* at *1.

While she was employed with the defendant, Englehart raised concerns to her supervisors that Career Education was misrepresenting its enrollment numbers and budget to shareholders.[170] The New York Attorney General's Office began an investigation into Career Education and Englehart was fired thereafter.[171] Englehart filed suit against Career Education, claiming protection as a whistleblower under Dodd-Frank.[172] The court held that the anti-retaliation provision of Dodd-Frank is not ambiguous and, therefore, the provision offers protection only to whistleblowers who report directly to the SEC.[173] The court further stated that the mere fact that other courts have extended Dodd-Frank's provisions beyond whistleblowers who report to the SEC does not result in the provision being deemed ambiguous.[174]

In *Verfuerth v. Orion Energy Systems, Inc.*,[175] the legal dispute arose between the company Orion Energy and its CEO, Verfuerth.[176] The board of Orion Energy voted to remove Verfuerth from his position as CEO and, instead, make him an honorary chairman.[177] Verfuerth then sent the board members an e-mail titled "Whistleblower Filing," informing the board that he was filing a whistleblower complaint under Sarbanes-Oxley for alleged securities violations committed by the company.[178] The board fired Verfuerth following the e-mail.[179] Verfuerth then contacted the SEC to notify them of the alleged violations.[180] Verfuerth also filed a lawsuit against Orion Energy, claiming protection under Dodd-Frank.[181] Like the other courts that agreed with the *Asadi* court, this court first concluded that the text of Dodd-Frank's anti-retaliatory provisions are not ambiguous and noted that none of the courts disagreeing with *Asadi* have given specific reasoning as to how the provisions are vague.[182] The court concluded that Verfuerth was not a whistleblower entitled to Dodd-Frank's protection because he did not report directly to the SEC before he was terminated.[183]

170. *Id.*
171. *Id.* at *2.
172. *Id.*
173. *Id.* at *7.
174. *Englehart*, 2014 WL 2619501, at *8.
175. 65 F. Supp. 3d 640 (E.D. Wis. 2014).
176. *Id.* at 642.
177. *Id.*
178. *Id.*
179. *Id.* at 642-43.
180. *Id.* at 643.
181. *Verfuerth*, 65 F. Supp. 3d at 643.
182. *Id.* at 644-45 (citing Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 626 (5th Cir. 2013)).
183. *Id.* at 646.

The court in *Puffenbarger v. Engility Corp.*,[184] also followed the minority *Asadi* view that whistleblowers under Dodd-Frank must report directly to the SEC.[185] Engility Corp. hired Puffenbarger as its director of payroll.[186] Puffenbarger learned that another employee had been granted a "cash out" in violation of the company's new policy and reported her concerns to several supervisors.[187] The supervisors conducted an investigation, concluded that no wrongdoing had occurred, and restructured Engility Corp.'s payroll system.[188] Puffenbarger resigned shortly afterward.[189] Puffenbarger filed a Dodd-Frank retaliation suit against Engility Corp.[190] The court denied Puffenbarger's assertions that she was entitled to whistleblower status under Dodd-Frank.[191] The court noted the circuit split between *Asadi* and *Berman*, but it agreed with *Asadi* that the text of the statute was unambiguous and, therefore, only whistleblowers who report directly to the SEC are entitled to protection.[192]

As the cases demonstrate, whistleblower reporting and awards have undoubtedly grown and are likely a successful means by Congress to cut down on securities violations. However, the outcome of cases seem to hinge on the interpretation of the statutory language. Consequently, *Asadi*'s restriction on internal reporting protection and Dodd-Frank's interpretation as per the SEC will likely continue to diverge.[193] Since the case history seems to show this prevalent oscillating outcome, the likelihood of the courts reconciling the conflict is very slim. Perhaps the Supreme Court will soon be in the position to resolve the issue once and for all, especially given how frequently retaliation claims made by whistleblowers arise in litigation.[194] Some scholars have advocated that should the issue be entertained by the Supreme Court, the Supreme Court should interpret the anti-retaliation provision in favor of finding that a whistleblower does not need to report directly to the SEC to be able to bring a subsequent retalia-

184. 151 F. Supp. 3d 651 (E.D. Va. 2015).

185. *Id.* at 664 (citing *Asadi*, 720 F.3d at 626).

186. *Id.* at 654.

187. *Id.* at 656-57.

188. *Id.*

189. *Id.* at 657.

190. *Puffenbarger*, 151 F. Supp. 3d at 651.

191. *Id.* at 663.

192. *Id.* at 663-64.

193. Overall, the district court cases disagreeing with the holding in *Asadi* find that the statutory provisions are ambiguous, while the post-*Asadi* cases that agree with *Asadi*'s holding find that the anti-retaliation provisions are not ambiguous. Klein, *supra* note 43, at 296-97.

194. Samuel Gorski, *Whistleblower Protection Under Dodd Frank and Sarbanes –Oxley: Interpretative Developments from 2014*, 34 BANKING & FIN. L. REV., 478, 489-90 (2014).

tion claim.[195] Therefore, as an exception to the whistleblower definition, the Court should examine the third section of the anti-retaliation provision.[196] This interpretation, the argument goes, will encompass the public policy argument[197] because a whistleblower who reports claims under SOX and concomitantly suffers retaliation may still file for retaliation under Dodd-Frank even without filing a direct claim with the SEC.[198] Regardless of these outcome in the cases, one would certainly appreciate the fact that creating an environment for employees to report internally and also granting employees the option to go straight to the SEC undoubtedly makes the whistleblower program reach its major goal of monitoring the financial system.[199]

IV. SOX VERSUS DODD-FRANK ACT'S WHISTLEBLOWER PROVISIONS

The passing of SOX in 2002 as a result of the Enron and WorldCom scandals was applauded as one of the most "protective anti-retaliation provision in the world" for whistleblowers.[200] However, SOX did not apparently live up to this expectation given the statistical data of the first few years after its passing. Only 3.6% of whistleblower claims were successful in the first three years while only 6.5% were successful on appeal.[201] This was compounded by the fact that meeting the legal standards on the merits under SOX was tough, and as such 66.7% of cases were rejected by the Occupational Safety and Health Administration with 95.2% of the cases appealed to the administrative law judges were rejected.[202] One scholar espoused the view that SOX "gives the illusion of protection without truly meaningful opportunities or remedies for achieving it."[203] Comparing the statutory text of

195. Klein, *supra* note 43, at 314.

196. *Id.*

197. *Id.* This argument contends that the interpretation of Dodd-Frank's anti-retaliation provisions invariably allows for using public policy considerations as a guide to statutory interpretation. *Id.* at 307-08. So, in considering the public value of Dodd-Frank, which was to deal with public concerns about the economy in 2008, the courts should lend themselves to such considerations in statutory interpretation as opposed to a strict adherence to the statutory language. *Id.*

198. *Id.* at 315.

199. Keen, *supra* note 2, at 235.

200. Jessica Luhrs, *Encouraging Litigation: Why Dodd Frank Goes Too Far in Eliminating the Procedural Difficulties in Sarbanes Oxley*, 8 HASTINGS BUS. L. J. 175, 179 (2012) (quoting Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 65 (2007)).

201. *Id.*

202. *Id.*

203. Bradley Mark Nerderman, *Should Courts Apply Dodd Frank Prohibition on the Enforcement of Pre-Dispute Arbitration Agreements Retrospectively*, 98 IOWA L. REV. 2141, 2152 (citing Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1764 (2007)).

SOX with that of Dodd-Frank will be helpful in illuminating some of the improved provisions as expanded under Dodd-Frank.

Under SOX, the scope of whistleblower protection for employees under 18 U.S.C. § 1514A(a) deals with whistleblower protection for employees of publicly-traded companies that report violations, and provides that:

> No 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 any lawful act done by the employee-1) to provide information . . . which the employee reasonably believes constitutes a violation [and] . . . when the information or assistance is provided to or the investigation is conducted by A) a Federal regulatory or law enforcement agency . . . or C) a person with supervisory authority over the employee.[204]

This section is replicated under Dodd-Frank § 78u-6(h)(1)(A)(iii), but, as initially stated in the introduction, under SOX, whistleblower protection was limited to employees of a company that either registered a class of securities per § 12 of the Securities Exchange Act of 1934 or was required to file reports under § 15(d) of the Securities Act.[205] Section 806 of SOX provides for civil and criminal liability on corporations that take retaliatory actions against whistleblowers as well as provides for reinstatement or other forms of remedies.[206]

Section 301 provided that a mechanism be in place for receiving and retaining employees concerns and reporting of financial improprieties in order to catch corporate fraud.[207] Over time, the practical implementation of these provisions proved ineffective.[208] Employees were not only subject to a high burden of proof but were also faced with a time crunch, within a ninety day period, in filing a successful claim.[209] To make matters worse, the provisions of SOX were subjected to varying interpretation by the courts resulting in different and arbitrary results.[210] Consequently, the whistleblower provisions did not live up to its expectations.[211] These loopholes were apparently rectified under

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204. 18 U.S.C. § 1514A(a) (2012). Unlike SOX, Dodd-Frank deals with public companies and subsidiaries or affiliates whose financial information is included in their financial statements.

205. King, *supra* note 1, at 1463.

206. 18 U.S.C. § 1415A(a).

207. *See* Sarbanes-Oxley Act of 2002 § 301.

208. Umang Desai, *Crying Fowl: Whistleblower Provisions of the Dodd-Frank Act of 2010*, 43 Loy. U. Chi. L. Rev. 427, 443-44 (2012).

209. *Id.*

210. *Id.*

211. *Id.* at 444.

Dodd-Frank. Under § 922, for example, the definition of a whistleblower was changed by including four specific elements,[212] thereby unequivocally defining individuals who are permitted to bring a whistleblower claim. An individual must "voluntarily furnish original information resulting in a successful enforcement action"; the information has to be provided voluntarily, that is, free from pressure; the "original information" has to come from "the individual's independent knowledge or analysis";[213] and the information provided must result in successful enforcement or other form of punishment.[214]

A pertinent and notable feature of Dodd-Frank's whistleblower provision of § 922 is the bounty program, which both provides incentives and awareness which tends to enable the reduction of corporate fraud.[215] The incentive of awarding the successful whistleblower between 10% to 30% of a recovery of $100,000[216] is a huge incentive. In the same vein, a whistleblower who is retaliated upon by the employer terminating employment after reporting a violation could get reinstatement, reward, or double pay for missed days under Dodd-Frank.[217] Another positive addition in Dodd-Frank is that an individual who is potentially liable for fraud can present himself or herself as an anonymous whistleblower.[218] The statute of limitations under SOX to report a claim is 180 days from the violation, or the knowledge of it.[219] In contrast, under Dodd-Frank, an action may be brought not more than six years after the date on which the violation occurred, although not more than three years from when the whistleblower became aware of the facts.[220] These changes seem to have a positive effect as it resulted in a spike in whistleblower inquiries or tips. In 2015, the SEC indicated it had directly received over 4,000 whistleblower tips under Dodd-Frank, a thirty percent increase from 2014.[221] However, companies with in-house internal reporting mecha-

212. *Id.* at 448.

213. *Id.* at 449 (For what is meant by Original information, see Rule 21 F-4, but this is derived from a person's independent knowledge and not from publicly available sources.)

214. Desai, *supra* note 208, at 449-50.

215. *Id.* at 450-51.

216. *Id.* at 451.

217. *Id.* Such an employee may also be reimbursed for attorney's fees. *Id.* In addition to the recovery of actual pay, Dodd Frank improved the whistleblower's position by providing for recovery of double back pay. *Id.*

218. *Id.* at 452.

219. Sarbanes-Oxley Act of 2002 § 806(b)(2)(D), 18 U.S.C § 514(A)(b)(2)(D) (2012).

220. Dodd-Frank Wall Street Reform and Consumer Protection Act § 922 (h)(1)(B)(iii), 15 U.S.C. § 78u-6(h)(1)(B)(iii) (2012).

221. NICK BEERMAN ET AL., UNDERSTANDING SOX WHISTLEBLOWER PROTECTIONS: LEADING LAWYERS ON WHISTLEBLOWER PROTECTIONS AND RECOGNIZING/PREVENTING CONDUCT THAT LEADS TO CLAIMS 9 (2016).

nisms and credibility with their employees are better placed than to the SEC to have their employees approach them with their complaints.[222] On the whole, Dodd-Frank tends to improve corporate governance, as the whistleblower provisions serve as mandatory examination of federal compliance.[223] Whether indeed corporate compliance is promoted is another debate, but what seems obvious is that the bounty program under Dodd-Frank unequivocally allows corporate employees with knowledge of a violation to "become statutorily defined as whistleblowers" when they do report such violations to the SEC and qualify for the "bounty" as provided by the SEC.[224] However, the pending issue to resolve, as indicated by the case history, is the one of the interpretations of the statutory anti-retaliatory provision between company employees who report directly to the SEC and apparently meet the statutory requirement versus those who report internally and apparently do or do not meet the requirement. In other words, the anti-retaliatory protection depends on the authority to which the employee reported the wrongdoing.[225]

The added question that goes beyond that the boundaries of the United States, is the looming question, also posed in *Asadi*, whether under Dodd-Frank, the anti-retaliation protection for SEC whistleblowers should apply to employees outside the United States. In other words, would company employees working for a U.S. company abroad who finds a violation be protected under the anti-retaliation provisions?

V. Dodd-Frank Whistleblower Provisions and Their Impact on Company Employees Outside the United States

As discussed above, Dodd-Frank broadened the definition of who may be a covered whistleblower under SOX. However, both under SOX and Dodd-Frank, the courts, in addressing the issue of extraterritorial application of the provision, hold that it does not apply to company employees extraterritorially.[226] In *Asadi*, the plaintiff filed a complaint against GE Energy, claiming that GE violated Dodd-Frank's whistleblower-protection provision by firing him after he made reports of violations on the part of GE.[227] At the trial court,

222. *Id.*
223. Desai, *supra* note 208, at 463.
224. Sprinzen, *supra* note 11, at 153.
225. *Id.* at 169.
226. Beerman et al., *supra* note 221, at 3.
227. Asadi v. G.E. Energy (USA), L.L.C , 720 F.3d 620, 621 (5th Cir. 2013).

GE defended, in part, that the whistleblower provision does not apply to extraterritorial situations.[228] The district court dismissed Asadi's complaint, holding that Dodd-Frank's whistleblower provisions do not cover extraterritorial whistleblowing.[229] On appeal, the Fifth Circuit did not address Asadi's extraterritorial claim, but instead focused solely on whether Asadi was a whistleblower.[230] While the appellate court did not address the extraterritoriality issue, it did affirm the trial court's decision.[231]

In *Morrison v. National Australia Bank, Ltd.*,[232] National Australia Bank ("National"), a foreign company, purchased a Florida-based company, HomeSide Lending.[233] National wrote down the value of HomeSide's assets, resulting in National's stock falling.[234] A group of National stockholders brought suit, alleging violations of § 10b-5 of the Securities Exchange Act of 1934.[235] The Supreme Court first held that § 10b-5 does not apply extraterritorially.[236] The Court reached this conclusion by stating that unless there existed an explicit, contrary intent by Congress for a particular piece of legislation to extend extraterritorially, the legislation should be presumed to apply only domestically.[237] The Court then held that, even though the Exchange Act explicitly states that it applies to interstate commerce and the Act's definition of interstate commerce includes foreign commerce, this is not determinative in deciding whether the Exchange Act applies extraterritorially.[238] The Court next deems the Act's purpose section, which describes the impact of the U.S. stock exchanges on the foreign markets, as also not sufficient to overcome the presumption of domestic application.[239] Finally, the Court points to § 30(b) of the Exchange Act, which states that the Act does not apply to individuals transacting business outside the jurisdiction of the United States.[240] The Court concluded that the Exchange Act did not apply extraterritorially and thus, the plaintiffs' claims must fail.[241] Later, *Meng-Lin*, in

228. *Id.*
229. *Id.*
230. *Id.* at 623.
231. *Id.* at 630.
232. 561 U.S. 247 (2010).
233. *Id.* at 251.
234. *Id.* at 252.
235. *Id.* at 252-53.
236. *Id.* at 265.
237. *Id.* at 255.
238. *Morrison*, 561 U.S. at 263.
239. *Id.*
240. *Id.* at 263-64.
241. *Id.* at 265.

the Second Circuit case, would rely on *Morrison* to conclude that the anti-retaliation provisions of Dodd-Frank do not apply extraterritorially since the presumption against extraterritorial application could not be overcome by any explicit provision to the contrary in Dodd-Frank.[242]

In the 2014 case of *Meng-Lin*, the issue was whether the whistleblower anti-retaliation provision applied to a "foreign worker employed abroad by a foreign corporation where all events related to the disclosures occurred abroad."[243] The Second Circuit held that Dodd-Frank does not apply outside the United States, and, therefore, the plaintiff, a citizen and resident of Taiwan working for a Chinese company, Siemens China Ltd., that had shares listed on the New York Stock Exchange, was not eligible for protection under Dodd-Frank.[244] The Second Circuit also stated that the employee did not state a claim requiring the application of domestic anti-retaliation provision per the Dodd-Frank Act.[245]

Likewise, in the case of *Villanueva v. U.S. Department of Labor*,[246] where a CEO of a subsidiary of Core Laboratories NV, a Dutch Company publicly traded on the New York Stock Exchange, reported that Core Laboratories had undertaken some questionable pricing arrangement.[247] Under the nefarious arrangement, Core Laboratories ended up with a ten-percent contractual revenue even though the company did not really procure the sales contracts from which this revenue was generated.[248] The CEO further alleged that the company Saybolt Columbia underreported taxable revenue to the government of Colombia as well as unlawfully claimed Value Added Tax exemption to the supposed revenue.[249] The complainant did not agree to sign the company's tax return and was later dismissed.[250] The complainant's SOX complaint was initially dismissed by the OSHA, and the dismissal was affirmed by an Administrative Law Judge; the Department of Labor Review Board and the Fifth Circuit also affirmed the dismissal on the basis that SOX has no obvious extraterritorial application.[251]

242. Liu Meng-Lin v. Siemens AG, 763 F.3d 175, 183 (2d Cir. 2014).
243. *Id.* at 176-77.
244. Keen, *supra* note 2, at 224.
245. *Meng-Lin,* 763 F.3d at 177.
246. 743 F.3d 103 (5th Cir. 2014).
247. *Id.* at 106.
248. *Id.*
249. *Id.*
250. *Id.* at 107.
251. *Id.* at 110.

Thus, as it stands now, the broad definition of a covered whistleblower under Dodd-Frank is not applicable when it comes to extraterritorial application as confirmed by the cases discussed above. However, the failure of SOX and Dodd-Frank to extend outside of the United States does not necessarily mean employers of foreign-based subsidiaries should not be concerned about foreign-based whistleblower claims, especially given that other countries have their own statutes under which liability may ensue.[252] As a result, to be on the safe side, a U.S. parent company with a foreign subsidiary company may nonetheless wish to avoid or discourage fraud through the use of codes of conduct or codes of ethics. For example, U.S. employers should encourage its foreign employees to report possible corporate violations, even though the subsidiary may not be directly subject to Dodd-Frank. In so doing, the U.S. company should, however, beware of possibly of running afoul of the privacy laws of other countries or even their cultural norms.[253]

VI. DODD-FRANK, EMPLOYMENT CONTRACTS, AND MANDATORY ARBITRATION AGREEMENTS

The Federal Arbitration Act (FAA) favors and recognizes arbitration agreements as well as the courts' ability to enforce such agreements, and this includes arbitration agreements in securities disputes.[254] Consequently, the FAA seeks to enforce arbitration agreements in securities disputes, like any other contract, so long as the arbitration agreement is valid.[255] Under Dodd-Frank, Congress established a new Bureau of Consumer Financial Protection ("the CFPB").[256] It was established as an independent branch of the Federal Reserve Board.[257] In encouraging even more enforcement of arbitration clauses, the CFPB and the SEC were empowered to regulate, and in fact even ban, impose, or limit the use of arbitration clauses in consumer finances and investment contracts.[258] Although these regulatory bodies have been granted this authority to regulate

252. BEERMAN ET AL., *supra* note 221, at 3.

253. Daniel P. Westman, *The Significance of the Sarbanes-Oxley Whistleblower Provisions*, 21 LABOR LAW. 141, 152 (2005).

254. Catherine Moore, *The Effect of the Dodd- Frank Act on Arbitration Agreements: A Proposal for Consumer Choice*, 12 PEPP. DISP. RESOL. L.J. 503, 506 (2012).

255. *Id.* at 506-07.

256. Alan Kaplinsky et al., *Arbitration Developments: Has the Supreme Court Finally Stepped In? – Survey of Consumer Financial Services Law*, 66 BUS. LAW. 529, 537 (2011).

257. *Id.*

258. Dodd-Frank Wall Street Reform and Consumer Protection Act §§ 921, 1028, 15 U.S.C. § 78o, 12 U.S.C. § 5518 (2012).

accordingly regarding arbitration agreements, they have not yet exercised this regulatory power per se. However, the CFPB has not been shy in taking a stance – by imposing a ban – when it comes to arbitration agreements in mortgage contracts, as well as in those pertaining to whistleblower protections per Dodd-Frank.[259] Part of the mandate from Congress to the CFPB was that it carry out a study, ultimately resulting in a report, on the use of arbitration on future disputes covering persons and consumers in relation to consumer products or financial services.[260] In the same vein, the CFPB was empowered to prohibit, limit, or impose conditions for arbitration agreements as deemed necessary to protect public interest.[261] Two reports on predispute arbitration clauses have been submitted by the CFPB since then: one in 2013 and the second in 2015.[262] Contrary to the intent of arbitration clauses, the CFPB Study, released in March of 2015, stated that a large number of consumers are unaware that their financial products and services contracts require resolution of disputes through arbitration or through litigation.[263] Even in those cases where consumers are aware of arbitration clauses, very few consumers, fewer than seven percent, actually understand what arbitration means or entails.[264]

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259. Michael S. Barr, *Mandatory Arbitration in Consumer Finance and Investor Contracts*, 11 N.Y.U. J.L. & BUS. 793, 799 (2015).

260. Edna Sussman, *The Dodd Frank Act: Seeking Fairness and Public Interest in Consumer Transactions*, 18 DISP. RESOL. MAG. 14, 15 (2011).

261. *Id.*

262. *Id.* at 16.

263. CONSUMER FIN. PROTECTION BUREAU, *CFPB Considers Proposal to Ban Arbitration Clauses that Allow Companies to Avoid Accountability to their Customers*, (Oct. 7, 2015), http://www.consumerfinance.gov/about-us/newsroom/cfpb-considers-proposal-to-ban-arbitration-clauses-that-allow-companies-to-avoid-accountability-to-their-customers.

264. *Id.* At a hearing in on October 7, 2015, the CFPB announced that it is "considering proposing rules that would ban consumer financial companies from using 'free pass' arbitration clauses to block consumers from suing in groups to obtain relief." *Id.* The CFPB also published an outline of proposals which includes: "(i) prohibiting pre-dispute arbitration clauses from foreclosing class litigation; and (ii) requiring submission of any arbitral claims and awards to the CFPB for collection and possible publication." *The Future of Mandatory Consumer Arbitration Clauses*, JONES DAY 1 (Nov. 2015), http://www.jonesday.com/files/Publication/141bd3d6-06e5-487e-8fd4-fe8c6ee585a3/Presentation/PublicationAttachment/2bb9bb69-4425-4d7a-9ff5-6de73e0517cc/Future%20of%20Man (citing CONSUMER FIN. PROTECTION BUREAU, SMALL BUSINESS ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKING ON ARBITRATION AGREEMENTS: OUTLINE OF PROPOSALS UNDER CONSIDERATION AND ALTERNATIVES CONSIDERED 1-21 (Oct. 7, 2015), http://files.consumerfinance.gov/f/201510_cfpb_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf [hereinafter CFPB PROPOSAL OUTLINE]). Contrary to popular thinking, however, currently, the "Bureau is not considering at this time a proposal that would prohibit entirely the use of pre-dispute arbitration agreements." *Id.* (quoting CFPB PROPOSAL OUTLINE, supra, at 14).

A. *The Impetus for Reform*

Dodd-Frank ushers a shift from the many years of federal policy favoring arbitration of securities disputes, as under these provisions, the validity of mandatory arbitration agreements are being challenged, especially in the context of home loans, mortgage agreements, and securities fraud.[265] This reform is a necessity, especially given that the bargaining power of the "main stream consumer" against a sophisticated Wall Street firm is parallel. In fact, most of these arbitration agreements are given to the consumer on a take-it-or-leave-it basis, often referred to as contracts of adhesion. This problem of mandatory arbitration clauses is compounded by the fact that the growing numbers of investors subjected to these mandatory arbitration clauses were typically forced to FINRA arbitration as it may pertain to their security investments.[266] FINRA favoring mandatory arbitration is worsened by the fact that one individual of the three-member arbitration panels is from the security industry, and is thus bias.[267] FINRA membership is made up of the broker-dealers, which creates an obvious conflict that impliedly shows that FINRA is really not going to bite the hand that feeds it.[268] Prior to the enactment of Dodd Frank, in 2009, the Arbitration Fairness Act ("AFA") was introduced but failed to pass, and Dodd-Frank was used to cover some of the loopholes in AFA and, in particular, dispute resolution methods in the industry.[269] In fact, the AFA, although not identical to Dodd-Frank provisions, has been said to be an "ideological precursor" to the Dodd-Frank arbitration provisions.[270]

B. *Dodd-Frank and Mandatory Arbitration Agreements*

On a daily basis, most people in the United States have knowingly, or unknowingly, agreed to a boilerplate mandatory arbitration clause in a contract or agreement. "Over the years big business has begun inserting these mandatory arbitration provisions in just about every

265. Moore, *supra* note 265, at 505.

266. *Id.* at 510-11.

267. *Id.*

268. *See* STARR AUSTEN & MILLER, LLP, *Will the Dodd-Frank Wall Street Reform Act Make FINRA Arbitration Obsolete?*, STARR AUSTEN (Nov. 14, 2011), http://www.starrausten.com/will-the-dodd-frank-wall-street-reform-act-make-finra-arbitration-obsolete; *see also* Moore, *supra* note 265, at 512.

269. Moore, *supra* note 265, at 511.

270. *Id.* at 512. The AFA stated a number of findings explaining why the Dodd-Frank was a better amended to the failed AFA. *Id.* For example, AFA demonstrated that the Federal Arbitration Act (FAA) was intended to apply to disputes involving sophisticated parties with the same bargaining power, yet this was not the decision by the AFA. *Id.*

contract they can think of."[271] These arbitration provisions tend to provide businesses the upper hand over consumers in dispute resolution.[272] What may also make these mandatory arbitration agreements unappealing to the consumer is that "consumers cannot negotiate these provisions," but the agreements are offered on a "take it or leave it" basis.[273] Dodd-Frank invokes federal arbitration law in many ways, but this Article focuses primarily on those provisions that relate to arbitration and whistleblowers.

"[S]ection 748 amends the Commodity Exchange Act . . . [providing]: '[t]he rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment including by a predispute arbitration agreement.'"[274] Thus, § 748n (1) of Dodd-Frank states: "No predispute arbitration agreement shall be valid or enforceable if the agreement requires arbitration of a dispute arising under this section."[275] Further, "[s]ection 921 amends . . . section 15 of the Securities Act of 1934 . . . [granting the SEC the authority] to prohibit or limit the use of arbitration agreements used by . . . securities traders."[276]

Section 922 amends the Securities Exchange Act of 1934 to significantly improve the SEC's whistleblower program, including provisions to increase the possible reward to whistleblowers to between 10% and 30% of collected sanctions, which exceeds $1,000,000 by actions resulting from original information by the whistleblower.[277] At the time of reporting a violation, the whistleblower under this section does not have to identify himself.[278] Section 922 clearly states in its anti-arbitration provision that "no predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this [S]ection."[279] A major issue, and the most heavily debated one,[280] arising after the passage of Dodd Frank in relation to Section 922 was the question of whether this section should apply retroactively to pending cases prior to the passing of Dodd Frank. In *Pezza v. Investors Capital Corp.*,[281] the United States District Court of Massachusetts, applying the precedent listed by the Supreme Court in

271. Starr Austen & Miller, LLP, *supra* note 279.
272. *Id.*
273. *Id.*
274. Moore, *supra* note 265, at 517 n.83.
275. *Id.* (quoting Dodd-Frank Act).
276. *Id.* at 515.
277. *Id.*
278. *Id.* at 516.
279. *Id.* at 517 n.83 (quoting Dodd-Frank Act).
280. King, *supra* note 1, at 1463.
281. 767 F. Supp. 2d 225 (D. Mass. 2011).

Landgraf v. USI Film Products,[282] concluded that the prohibition of pre-arbitration dispute agreement per § 922 applied retrospectively.[283] The court held this, even though § 4 of Dodd Frank states that "except as otherwise specifically provided in this Act . . . or the amendments made by this Act, this Act and such amendments shall take effect [one] day after the date of enactment of this Act."[284] On the other hand, the District Court of Nevada, even though it applied the same framework as the court in *Landgraf*, held that § 922 does not apply retrospectively.[285]

Section 1028 empowers the CFPB to carry out a study on predispute arbitration agreements in consumer financial products.[286] In the CFPB's recent report, the CFPB published an outline of proposals, which includes: "(i) prohibiting pre-dispute arbitration clauses from foreclosing class litigation; and (ii) requiring submission of any arbitral claims and awards to the CFPB for collection and possible publication ('CFPB Proposal Outline')."[287] Contrary to popular thinking, however, the "Bureau is not considering at this time a proposal that would prohibit entirely the use of pre-dispute arbitration agreements."[288]

"Section 1414 amends section 129C of the Truth in Lending Act by" incorporating sections dealing with arbitration "claims in residential mortgage loans or consumer credit."[289] Under this section, the right of the consumer or creditor to agree to arbitration after a claim is underway is not limited.[290]

It is therefore apparent that mandatory predispute arbitration agreements are not favored nor even welcomed; consequently, for consumer choice to prevail and be fostered, mandatory arbitration agreements should be obliterated in favor of consumer choice.[291] No doubt the CFPB's Proposal Outline permits pre-dispute arbitration clauses in contracts for consumer financial products and services only under two circumstances: "Arbitration could not block class actions

282. 511 U.S. 244 (1994).

283. *Pezza*, 767 F. Supp. 2d at 233-34.

284. Nerderman, *supra* note 203, at 2165 (quoting Dodd-Frank Act).

285. *Id.* at 2143.

286. *See* JONES DAY, *supra* note 275, at 1.

287. *Id.*

288. *Id.*

289. Moore, *supra* note 265, at 517; Dodd-Frank Wall Street Reform and Consumer Protection Act § 1414, 15 U.S.C. § 1639c(e) (2012).

290. *Id.* at 518.

291. *Id.* at 523-24.

without court action . . . [and] [c]ompanies would be required to submit arbitration claims filed and awards issued to the CFPB."[292]

VII. CONCLUSION

Given that prior to Dodd-Frank, whistleblower provisions were intended to foster and encourage employees to self-report to its employee, thereby giving the corporations the opportunity to resolve problems internally.[293] This internal resolution process is thwarted under Dodd-Frank § 922 because it gives the whistleblower incentive to report to the SEC, and the potential of being rewarded handsomely undermines the internal dispute resolution mechanism.[294] For one thing, even if a company wanted to investigate and resolve a violation, that ability is undermined given that the SEC is likely to be notified first before the company, as in the cases discussed above; the corporation will then be in a position "to play catch up and could be in the position of having to defend itself prior to fully investigating the accusations."[295] Consequently, Dodd-Frank, and in particular, § 922 with its other related sections, marks "a new era of SEC enforcement and power" without an opportunity for corporations to initially investigate and attempt to resolve violations[296] thereby causing a conundrum for corporations. However, the positives of Dodd-Frank over SOX cannot be underestimated. These positives under Dodd-Frank include, for example: the number of employees covered by federal whistleblower provisions is far more extensive; the statute of limitations for retaliation claims is extended; significantly increased the damages available to whistleblowers; and, more importantly, extended the number of companies protected by whistleblower laws.[297] With an overwhelming increase in the number of tips every year,[298] it is quintessential that whistleblowers be protected from retaliation. This new legal landscape of whistleblower protection is one that should be embraced by both the employer and employees, as this is here to stay, at least for the time being.

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292. JONES DAY, *supra* note 275, at 1.
293. Moore, *supra* note 265, at 519-20.
294. *Id.* at 520.
295. *Id.*
296. *Id.*
297. Nerderman, *supra* note 203, at 2156.
298. *Id.* From 2012 to 2014 the SEC received more than 20 percent increase in whistleblower tips and also issued more awards in 2014 than had been in the combined previous years. *Id.*; BEERMAN ET AL., *supra* note 221, at 9; Michael M. Krauss et al., *For Whom the Whistle Blows: The Role of Private Enforcement in Dodd-Frank's Regulatory Framework*, 8 U. ST. THOMAS J.L. & PUB. POL'Y 194, 204-05 (2014).

Arbitration as a means of resolving disputes should be a choice for consumers. Dodd-Frank does not reject arbitration as a means of resolving dispute per se, rather, under § 921, it seeks to limit mandatory arbitration.[299] With mandatory arbitration, the consumer has virtually no choice and as indicated by the 2015 CFPB report. The consumer is often not even aware that the agreement entered into is to require arbitration. Besides, although arbitration does have its own shortcomings, giving the consumer the option to choose between litigation and arbitration encompasses the policy of freedom of contract. In fact, it is more likely the consumer will lean towards arbitration, especially given the cost of litigation and the potential protracted court proceedings.[300] One of the flaws of SOX, as stated by some scholars, is that public companies under the SOX whistleblower protections were able to hide corporate violations from the public by entering into arbitration agreements that are generally private.[301] Section 922 of Dodd-Frank, which prohibits predispute arbitration agreements, has been applauded on the basis that the prohibition would likely result in civil actions in court that will expose the violation claims to the public and this exposure will in turn also invariably lead to investor knowledge of the fraud. Further, such investor knowledge will lead to better financial information, and ultimately greater protections.[302] However, denying predispute agreements not only impedes on the employee's freedom of contract, but it also deprives the employee of the opportunity to resolve problem inexpensively should the employer not want to arbitrate. By the same token, some critics believe that with mandatory arbitration of employment disputes, both employer and employee tend to benefit, especially given that the employee is faced with increasing litigation costs against an employer with no cash limit.[303]

Although there has been a split in the court cases as to whether the predispute arbitration agreements under Dodd-Frank should apply retrospectively, when one looks at the intent of Congress behind Dodd-Frank and the decision of the Supreme Court in *Landgraf* and

299. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 921, 15 USC §§ 78o, 80b-5(f) (2012).

300. Some advantages of arbitration include the speed at which the case may be decided, which usually means lower costs and the ability of the parties to select experts who are specialized in the kind of dispute in question. Although arbitration is said to be cheaper and faster, critics of arbitration believe that arbitration as mandated by the employer provides a biased forum in favor of the employer. *See generally* Nerderman, *supra* note 203, at 2148.

301. *Id.* at 2157.

302. *Id.*

303. King, *supra* note 1, at 1478.

as "modified and clarified" in the more recent cases of *Hughes* and *Lindh*,[304] it becomes apparent that § 922 was not intended to apply retrospectively to whistleblower claims prior to 2010.[305]

304. Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 951 (1997); Lindh v. Murphy, 521 U.S. 320, 341 (1997).

305. Nerderman, *supra* note 203, at 2172.