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Client Alert

Special Matters & Government Investigations Practice Group

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Court Holds Dodd-Frank Whistleblower Has No Right to Jury Trial

In an apparent case of first impression, a federal district judge in Atlanta has ruled that whistleblowers claiming retaliation under the Dodd-Frank Wall Street Financial Reform and Consumer Protection Act of 2010 are not entitled to a jury trial. The decision provides the first authoritative answer to one of several statutory issues still working their way through the courts.

Dodd-Frank section 922—along with Securities and Exchange Commission rules promulgated thereunder—provides monetary awards for certain whistleblowers and prohibits retaliation against such whistleblowers. Under the latter provisions, a whistleblower claiming retaliation (or alternatively the SEC) can sue for reinstatement, double back pay, and certain litigation-related costs. The statute is silent with respect to whether a jury trial is available in such cases.

In a decision announced on November 12th, U.S. District Judge J. Owen Forrester of the United States District Court for the Northern District of Georgia held that whistleblowers claiming retaliation under Dodd-Frank are not entitled to a jury trial.[1] The whistleblower in the case was a former compliance manager at BlueLinx Holdings, Inc., a distributor of building products. He claimed he was retaliated against for disclosing potential violations of law to the SEC and the Public Company Accounting Oversight Board. BlueLinx sought to strike the whistleblower's request for a jury trial, arguing that no such right exists because Dodd-Frank is silent on the issue.

The court agreed, reasoning that the statutory remedies provided by Dodd-Frank's anti-retaliation provisions—reinstatement, doubling of back pay, and recovery of litigation fees and costs—are more equitable than legal in nature and thus do not trigger the right to a jury trial under the Seventh Amendment. The court also found Dodd-Frank's statutory silence on the right to a jury trial particularly significant because a separate provision within the very same section of Dodd-Frank simultaneously amended a legacy provision of the Sarbanes-Oxley Act of 2002 to explicitly codify a right to trial by jury in retaliation claims under that statute.

There are at least two important results from this decision if it is followed by other courts. First, both companies and whistleblower counsel would know, when a case is filed, exactly whom the fact finder will be at a trial. Second, many people believe that juries tend to be more sympathetic to plaintiffs than

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judges in civil cases, particularly if emotional issues are involved. To the extent this belief is true, companies may see this decision as favorable and potentially discouraging to the filing of frivolous retaliation claims.

In any event, the availability of jury trials is just one of several important statutory ambiguities in the whistleblower area that still need clarification from the courts. Another is whether the retaliation provisions of Sarbanes-Oxley protect whistleblowers who are not employees of public companies but rather employees of private contractors doing work for public companies. That issue was debated in oral arguments before the Supreme Court the same day that the district court issued its decision in *BlueLinx* on the jury trial issue, with a decision expected during the first part of next year.[2]

Another unsettled issue is whether the anti-retaliation provisions of Dodd-Frank protect whistleblowers who report potential misconduct only internally to their companies rather than to the SEC. The Fifth Circuit recently said no, but that decision is at odds with most district court decisions that have addressed the issue.[3]

Finally, an appeal currently pending before the Second Circuit presents the question of whether the Dodd-Frank anti-retaliation provisions apply extraterritorially to protect foreign whistleblower-employees of issuers that are based outside the United States. The appellant in the case is challenging an October 2013 ruling from the Southern District of New York that declined to apply those provisions extraterritorially, at least in circumstances where neither the foreign employee nor the relevant conduct had any connection with the United States.[4]

We will continue to monitor these and other issues affecting whistleblower claims under both Sarbanes-Oxley and Dodd-Frank, and would be pleased to discuss any related matter with our clients.

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[1] *Pruett v. BlueLinx Holdings, Inc.*, Civil Action No. 1:13-cv-02607-JOF, slip op. at 7 (N.D. Ga. Nov. 12, 2013).
[2] *Lawson v. FMR LLC*, No. 12-3 (Sup. Ct. oral argument Nov. 12, 2013).
[3] *Asadi v. GE Energy (USA), LLC*, 720 F..3d 620, 630 (5th Cir. 2013).
[4] *Liu v. Siemens A.G.*, 2013 U.S. Dist. LEXIS 151005 (S.D.N.Y. Oct. 21, 2013).