Nova Southeastern University

From the SelectedWorks of Florence Shu-Acquaye

Spring 2017

Dodd-Frank Wall Street Reform and Consumer protection Act: The Evolution of Whistleblower Protections, Employment Contracts and Mandatory Arbitration Agreements

Florence Shu-Acquaye

Available at: https://works.bepress.com/florence_shu-acquaye/7/
Dodd-Frank Wall Street Reform and Consumer Protection Act: The Evolution of Whistleblower Protections, Employment Contracts and Mandatory Arbitration Agreements

Florence Shu-Acquaye
Copyright © 2017 DePaul Business & Commercial Law Journal

Cite as 15 DePaul Bus. & Com. L.J.

Except as otherwise provided, DePaul Business & Commercial Law Journal permits any individual or organization to photocopy any article, comment, note, or other piece in this publication, provided that: (1) copies are distributed at or below cost; (2) the author and the Journal are prominently identified on the first page; (3) proper notice of copyright is affixed to each copy; and (4) all other applicable laws and regulations are followed. DePaul Business & Commercial Law Journal reserves all other rights.

DePaul Business & Commercial Law Journal (ISSN: #1542-2763) is published quarterly by DePaul University College of Law, 25 East Jackson Boulevard, Chicago, Illinois 60604-2219.

The DePaul Business & Commercial Law Journal welcomes the submission of articles written by admitted members of the bar and by other professionals and notes and comments written by students at accredited law schools. Manuscripts by candidates for graduate degrees in law (e.g., LL.M. or M.L.T.) will be considered articles if the author is admitted to the bar at the time of submission and will be considered as student notes if the author is not admitted to the bar. Although the utmost care will be given to material submitted, the Journal cannot accept responsibility for unsolicited manuscripts. Authors should mail manuscripts to DePaul Business & Commercial Law Journal, 25 East Jackson Boulevard, Room 226, Chicago, IL 60604-2219.

The text and citations of the Journal conform to The Bluebook: A Uniform System of Citation (Columbia Law Review Ass’n et al. eds., 20th ed. 2010).

Although the DePaul Business & Commercial Law Journal generally grants great deference to an author’s work, the Journal retains the right to determine the final published form of every article.

The views expressed in published material are those of the authors and do not necessarily reflect the policies or opinions of the DePaul Business & Commercial Law Journal, its editors and staff, or DePaul University College of Law.
Dodd-Frank Wall Street Reform and Consumer Protection Act: The Evolution of Whistleblower Protections, Employment Contracts and Mandatory Arbitration Agreements

Florence Shu-Acquaye*

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 preemption 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

---

¹ Florence Shu-Acquaye is a Professor of Law at the Shepard Broad College of Law of Nova Southeastern University, Fort Lauderdale, Florida. She would like to thank Henry Norwood for his excellent research assistance.


⁴ See King, supra note 1, at 1460.
§ 15(d) of the Act. The source of protection for a private company's employees was contained in § 806 of SOX. However, §§ 922 and 929A of Dodd-Frank extended protection for whistleblower employees not covered under SOX. Dodd-Frank also simplifies the procedures for whistleblower employees. Under SOX, the whistleblower must have filed a claim to the Occupational Safety and Health Administration ("OSHA"); if after 180 days there is no final determination, then the whistleblower could bring an action in a federal district court. However, under Dodd-Frank, the complainant has direct access to the district court to file a claim.

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. 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. 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 decisions 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*, 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. 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 afoot of the privacy laws of other countries or even their cultural norms?

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.
§ 15(d) of the Act. The source of protection for a private company’s employees was contained in § 806 of SOX. However, §§ 922 and 929A of Dodd-Frank extended protection for whistleblower employees not covered under SOX. 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”). If after 180 days there is no final determination, then the whistleblower could bring an action in a federal district court. However, under Dodd-Frank, the complainant has direct access to the district court to file a claim.

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. 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. 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 decisions 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, 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. 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?

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-

5. Id. § 806.
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).
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.\textsuperscript{15} Prior to the scandal, Enron was considered one of the best-managed, most successful companies in the United States.\textsuperscript{16} The company collapsed four months after the revelation and declared bankruptcy.\textsuperscript{17} The scandal resulted in losses of billions for investors and employees, as well as thousands of jobs.\textsuperscript{18} Several Enron executives were arrested as a result and several other companies were exposed as committing accounting fraud over the next year.\textsuperscript{19} These scandals pressed Congress to pass the Sarbanes-Oxley Act of 2002.\textsuperscript{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."\textsuperscript{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."\textsuperscript{22} "Prior to Sarbanes-Oxley, there was no federal protection for whistleblowing employees of publicly traded companies."\textsuperscript{23} Significant protections were already in place for federal employees for the purpose of preventing waste of taxpayer dollars.\textsuperscript{24}

B. The Dodd-Frank Act

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


\textsuperscript{16} Turpan, supra note 15, at 123-24.

\textsuperscript{17} Id.; King, supra note 1, at 1459.

\textsuperscript{18} Turpan, supra note 15, at 124.

\textsuperscript{19} Id.

\textsuperscript{20} Id. at 124-25; King, supra note 1, at 1459-60.

\textsuperscript{21} S. REP. NO. 107-146, at 2 (2002).


\textsuperscript{23} Turpan, supra note 15, at 126; King, supra note 1, at 1458.

\textsuperscript{24} King, supra note 1, at 1458.

\textsuperscript{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.

\textsuperscript{26} King, supra note 1, at 1462-63.
come for years. Prior to the scandal, Enron was considered one of the best-managed, most successful companies in the United States. The company collapsed four months after the revelation and declared bankruptcy. The scandal resulted in losses of billions for investors and employees, as well as thousands of jobs. Several Enron executives were arrested as a result and several other companies were exposed as committing accounting fraud over the next year. These scandals pressed Congress to pass the Sarbanes-Oxley Act of 2002.

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."

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." Prior to Sarbanes-Oxley, there was no federal protection for whistleblowing employees of publicly traded companies. Significant protections were already in place for federal employees for the purpose of preventing waste of taxpayer dollars.

B. The Dodd-Frank Act

In the year 2000, Harry Markopolos attempted to expose possibly the largest Ponzi scheme in history. Employed by a separate securities firm, Markopolos investigated the securities firm run by Bernie Madoff, attempting to understand how Madoff achieved such successful returns on investments. Markopolos instead discovered a massive fraudulent scheme and reported Madoff to the SEC in 2000. The SEC did not act on Markopolos's report. Markopolos tried again in 2001, 2005, 2007, and 2008. Each time Markopolos reported Madoff to the SEC he was ignored. 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. Markopolos would later condemn the SEC for the agency's failure to act earlier and prevent Madoff from squandering as much as he had. 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.

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." 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 Rampant Investment Management, an investment firm based out of Massachusetts. Clark, supra note 25.
29. Id. at 1462-63.
30. Id. at 1462.
31. Id.
32. Id.
33. Id.
35. King, supra note 1, at 1462-63.
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.

---

38. King, supra note 1, at 1463.
40. Id.
41. King, supra note 1, at 1463.

---

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

---

44. Id. at 289.
46. Id. at *2.
47. Id.
48. Id.
49. Id. at *3.
50. Id.
52. Id.
53. Sprinzen, supra note 11, at 175.
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 is the minority view of the district courts that have addressed the issue. 43 The majority view 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-retaliation 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

44. Id. at 289.
46. Id. at *2.
47. Id.
48. Id.
49. Id. at *3.
50. Id.
52. Id.
53. Sprinzzen, supra note 11, at 175.
series of shell companies to conceal funds. The plaintiff internally reported these issues within the company, but nothing was done. The plaintiff was fired after complaining about these issues. The plaintiff then filed a complaint, seeking protection under Dodd-Frank. 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. The court determined that the third category does not mandate a whistleblower report directly to the SEC. 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.

Kramer v. Trans-Lux Corp. involved a plaintiff-employee working for a defendant-company. 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. The CFO told the plaintiff not to contact the SEC. Instead, the plaintiff reported his concerns to the company’s board of directors and was terminated shortly afterward. 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. 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.

B. Asadi v. GE Energy

The Fifth Circuit in Asadi v. GE Energy concluded that whistleblowers disclosing under this supposed exception to the general rule must report to the SEC to be protected by Dodd-Frank, thus there is no exception at all.

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

Filing a lawsuit, Asadi alleged that GE violated Dodd-Frank’s whistleblower anti-retaliation provisions. 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.” The court concluded that Dodd-Frank’s protection only covers whistleblowers reporting directly to the SEC. Asadi reported internally, so he was not entitled to protection.

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. 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. 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. 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.

---

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.
63. Id. at *2.
64. Id. at *2-3.
65. Id.
66. Id. at *3.
67. Id. at *4.
69. 720 F.3d 620 (5th Cir. 2013).
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.
series of shell companies to conceal funds. The plaintiff internally reported these issues within the company, but nothing was done. The plaintiff was fired after complaining about these issues. The plaintiff then filed a complaint, seeking protection under Dodd-Frank. 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. The court determined that the third category does not mandate a whistleblower report directly to the SEC. The court further held that in order for a whistleblower to take advantage of this third category, a plaintiff must show that his reporting somehow relates to a violation of a federal securities law.

Kramer v. Trans-Lux Corp. involved a plaintiff-employee working for a defendant-company. 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. The CFO told the plaintiff not to contact the SEC. Instead, the plaintiff reported his concerns to the company’s board of directors and was terminated shortly afterward. 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. 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.

B. Asadi v. GE Energy

The Fifth Circuit in Asadi v. GE Energy concluded that whistleblowers disclosing under this supposed exception to the general rule must report to the SEC to be protected by Dodd-Frank, thus there is no exception at all.

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

Filing a lawsuit, Asadi alleged that GE violated Dodd-Frank’s whistleblower anti-retaliation provisions. 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.” The court concluded that Dodd-Frank’s protection only covers whistleblowers reporting directly to the SEC. Asadi reported internally, so he was not entitled to protection.

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. 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. 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. 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.

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.
63. Id. at *2.
64. Id. at *2-3.
65. Id.
66. Id. at *3.
67. Id. at *4.
69. 720 F.3d 620 (5th Cir. 2013).
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., the Second Circuit split with the Fifth by holding that the Dodd-Frank whistleblower protections extend beyond whistleblowers who report directly to the SEC. In this case, Berman was the finance director for Neo, a media agency. During his employment, Berman discovered that Neo was engaged in practices that Berman concluded amounted to accounting fraud. Berman reported this information within Neo, but never externally to the SEC. Berman was subsequently fired by a supervisor and filed a lawsuit against the company, claiming protection under Dodd-Frank. 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. 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., the plaintiff, an employee of defendant, Thomson Reuters, brought a lawsuit against the defendant for violating the Securities Exchange Act of 1934. 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. This information would aid investors in deciding where and when to invest. Thomson 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, giving them an unequal advantage. Rosenblum expressed his concerns about the early disclosures to several of his supervisors and, after being turned away, reported the disclosures to the FBI. Rosenblum was fired by Thomson Reuters shortly afterward. 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. 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.

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

Ellington filed the report with the company's compliance office, and Giacoumakis terminated him. After being fired, Ellington disclosed the report and the company's misleading information to the SEC, which began an investigation. Ellington also filed a lawsuit against the company, claiming he was entitled to the Dodd-Frank protections. 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. 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. 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.
C. After Asadi

In the recent case of Berman v. Neo@Ogilvy L.L.C., the Second Circuit split with the Fifth by holding that the Dodd-Frank whistleblower protections extend beyond whistleblowers who report directly to the SEC. In this case, Berman was the finance director for Neo, a media agency. During his employment, Berman discovered that Neo was engaged in practices that Berman concluded amounted to accounting fraud. Berman reported this information within Neo, but never externally to the SEC. Berman was subsequently fired by a supervisor and filed a lawsuit against the company, claiming protection under Dodd-Frank. 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. 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., the plaintiff, an employee of defendant, Thomson Reuters, brought a lawsuit against the defendant for violating the Securities Exchange Act of 1934. 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. 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, giving them an unequal advantage. Rosenblum expressed his concerns about the early disclosures to several of his supervisors and, after being turned away, reported the disclosures to the FBI. Rosenblum was fired by Thomson Reuters shortly afterward. 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. 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.

In Ellington v. Giacoumakis, Ellington was employed as a financial planner for New England Investment & Retirement Group, Inc. Ellington learned that the company was producing investment reports to clients that were misleading. Ellington reported his concerns internally to his supervisor, Giacoumakis, and wrote a report detailing his concerns. Ellington filed the report with the company's compliance office, and Giacoumakis terminated him. After being fired, Ellington disclosed the report and the company's misleading information to the SEC, which began an investigation. Ellington also filed a lawsuit against the company, claiming he was entitled to the Dodd-Frank protections. 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. 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. 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.

---

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.
89. Id. at 143.
90. Id.
In Connolly v. Remkes, the plaintiff, Connolly, worked for a company involved in securities and owned by the defendant, Remkes. During her work, Connolly received a file containing checks from a different financial advisor in violation of the Financial Industry Regulatory Authority ("FINRA"). Connolly informed Remkes of her concerns and Remkes instructed her to contact the company's compliance department. The compliance department affirmed Connolly's concerns that this was a violation. Upon hearing of this, Remkes told Connolly she should have presented the situation to the compliance department as a hypothetical. 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. Refusing to be a part of this cover-up, Connolly resigned and subsequently informed the compliance department about the checks. Connolly filed suit against Remkes, claiming she was pressured into resigning and should receive the protection of Dodd-Frank's anti-retaliation provisions. 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.

Khazin v. TD Ameritrade Holding Corp. 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. 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. 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. Khazin's supervisor later accused Khazin of being involved in a supposed invoicing issue, even though Khazin had little involvement with invoices, and Khazin was fired. Khazin reported the violation to the SEC and argued he was entitled to the protection of the anti-retaliation provisions. 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." Genberg v. Porter, 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. 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." Genberg was subsequently terminated. Genberg then filed a complaint, claiming he was fired in violation of the anti-retaliation provisions of Dodd-Frank. The defendants argued that Genberg was not entitled to this protection because he did not report directly to the SEC. 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." Murray v. UBS Securities, L.L.C. involved Murray, a securities strategist employed by UBS. As part of his employment, Murray would publish reports regarding UBS's products, which were published for UBS's clients. According to Murray, UBS attempted to pressure Murray into writing misleading reports that would cast UBS's products in a more favorable light. Murray refused and re-
In Connolly v. Remkes,\textsuperscript{106} the plaintiff, Connolly, worked for a company involved in securities and owned by the defendant, Remkes.\textsuperscript{107} During her work, Connolly received a file containing checks from a different financial advisor in violation of the Financial Industry Regulatory Authority ("FINRA").\textsuperscript{108} Connolly informed Remkes of her concerns and Remkes instructed her to contact the company's compliance department.\textsuperscript{109} The compliance department affirmed Connolly's concerns that this was a violation.\textsuperscript{110} Upon hearing of this, Remkes told Connolly she should have presented the situation to the compliance department as a hypothetical.\textsuperscript{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.\textsuperscript{112} Refusing to be a part of this cover-up, Connolly resigned and subsequently informed the compliance department about the checks.\textsuperscript{113} Connolly filed suit against Remkes, claiming she was pressured into resigning and should receive the protection of Dodd-Frank's anti-retaliation provisions.\textsuperscript{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.\textsuperscript{115}

Khazin v. TD Ameritrade Holding Corp.,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{119} Khazin's supervisor later accused Khazin of being involved in a supposed invoicing issue, even though Khazin had little involvement with invoices, and Khazin was fired.\textsuperscript{120} Khazin reported the violation to the SEC and argued he was entitled to the protection of the anti-retaliation provisions.\textsuperscript{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."\textsuperscript{122}

In Genberg v. Porter,\textsuperscript{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.\textsuperscript{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."\textsuperscript{125} Genberg was subsequently terminated.\textsuperscript{126} Genberg then filed a complaint, claiming he was fired in violation of the anti-retaliation provisions of Dodd-Frank.\textsuperscript{127} The defendants argued that Genberg was not entitled to this protection because he did not report directly to the SEC.\textsuperscript{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."\textsuperscript{129}

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

\textsuperscript{107} Id. at *1.
\textsuperscript{108} Id. at *1-2.
\textsuperscript{109} Id. at *1.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at *2.
\textsuperscript{112} Connolly, 2014 WL 5473144, at *2.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id. at *6.
\textsuperscript{117} Id. at *1.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at *1-2.
\textsuperscript{122} Khazin, 2014 WL 940703, at *6.
\textsuperscript{123} 935 F. Supp. 2d 1094, 1106-07 (D. Colo. 2013) aff'd in part, appeal dismissed in part, 566 F. App'y 719 (10th Cir. 2014).
\textsuperscript{124} Id. at 1097.
\textsuperscript{125} Id. at 1098.
\textsuperscript{126} Id. at 1099.
\textsuperscript{127} Id. at 1104.
\textsuperscript{128} Id.
\textsuperscript{129} Genberg, 935 F. Supp. 2d at 1106-07.
\textsuperscript{130} No. 12 Civ. 5914(JMF), 2013 WL 2190084 (S.D.N.Y. May 21, 2013).
\textsuperscript{131} Id. at *1.
\textsuperscript{132} Id.
\textsuperscript{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 During 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:

[when 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]
ported this information to several of his managers and supervisors. Murray later fired Murray. Murray filed suit against UBS, claiming he was unlawfully discharged and deserved protection under the anti-retaliation provisions of Dodd-Frank. 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. 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.

In Yang v. Navigators Group, Inc., the plaintiff, Yang, worked as a risk officer for the defendant, Navigators. During her time working for Navigators, Yang reported to the CFO several instances of fraud being committed by Navigators employees. Yang also notified the CEO and general counsel for Navigators and was fired shortly afterward. 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. The majority of the plaintiff's evidence regarding the defendant's fraud was comprised of outside research gathered by other individuals before the plaintiff even started working for the defendant. 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. The court here cites both Genberg and Nollner in affirming this rule.

Azim v. Tortoise Capital Advisors, L.L.C. features the plaintiff, Azim, working as a vice president for the defendant, Tortoise. Dur-
used in its narrower sense, subsection (iii) serves no significant purpose, and its aim of broadly protecting whistleblowers is stifled.\textsuperscript{161} The 
\textit{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 \textit{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.

\textbf{Wagner v. Bank of America Corp.},\textsuperscript{162} was a case involving Wagner, an appraiser working for LandSafe Appraisal Services, Inc.\textsuperscript{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.\textsuperscript{164} Wagner reported her suspicions to several supervisors and was eventually terminated.\textsuperscript{165} Wagner filed suit against her employer claiming, in part, protection under the Dodd-Frank whistleblower provisions.\textsuperscript{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:

\textit{[\[\text{Initially, 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.}\[\]

The \textit{Wagner} court thus agreed with the court in \textit{Asadi}. In \textit{Englehart v. Career Education Corp.},\textsuperscript{168} the defendant, Career Education, was a corporation involved in running school systems, and employed the plaintiff, Englehart, as a director of career services.\textsuperscript{169}

\textbf{Verfuerth v. Orion Energy Systems, Inc.},\textsuperscript{170} the legal dispute arose between the company Orion Energy and its CEO, Verfuerth.\textsuperscript{171} The board of Orion Energy voted to remove Verfuerth from his position as CEO and, instead, make him an honorary chairman.\textsuperscript{172} 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.\textsuperscript{173} The board fired Verfuerth following the e-mail.\textsuperscript{174} Verfuerth then contacted the SEC to notify them of the alleged violations.\textsuperscript{175} Verfuerth also filed a lawsuit against Orion Energy, claiming protection under Dodd-Frank.\textsuperscript{176} Like the other courts that agreed with the \textit{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 \textit{Asadi} have given specific reasoning as to how the provisions are vague.\textsuperscript{177} 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.\textsuperscript{178}

\begin{thebibliography}{99}
\bibitem{161} \textit{Id. at 730.}
\bibitem{163} \textit{Id. at *1.}
\bibitem{164} \textit{Id.}
\bibitem{165} \textit{Id. at *1-4.}
\bibitem{166} \textit{Id. at *4.}
\bibitem{167} \textit{Id.}
\bibitem{168} No. 8:14-CV-444-T-33EAJ, 2014 WL 2619501 (M.D. Fla. May 12, 2014).
\bibitem{169} \textit{Id. at *1.}
\bibitem{170} \textit{Id.}
\bibitem{171} \textit{Id. at *2.}
\bibitem{172} \textit{Id.}
\bibitem{173} \textit{Id. at *7.}
\bibitem{174} \textit{Englehart v. Career Education Corp.}, 2014 WL 2619501, at *8.
\bibitem{175} 65 F. Supp. 3d 640 (E.D. Wis. 2014).
\bibitem{176} \textit{Id. at 642.}
\bibitem{177} \textit{Id.}
\bibitem{178} \textit{Id.}
\bibitem{179} \textit{Id. at 642-43.}
\bibitem{180} \textit{Id. at 643.}
\bibitem{181} \textit{Verfuerth v. Orion Energy Systems, Inc.}, 65 F. Supp. 3d at 643.
\bibitem{182} \textit{Id. at 644-45 (citing Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 626 (5th Cir. 2013)).}
\bibitem{183} \textit{Id. at 646.}
\end{thebibliography}
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 sued 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:

[[Initially, 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

161. Id. at 738.
163. Id. at *1.
164. Id.
165. Id. at *1-4.
166. Id. at *4.
167. Id.
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 Verfueth v. Orion Energy Systems, Inc.,175 the legal dispute arose between the company Orion Energy and its CEO, Verfueth.176 The board of Orion Energy voted to remove Verfueth from his position as CEO and, instead, make him an honorary chairman.177 Verfueth 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 Verfueth following the e-mail.179 Verfueth then contacted the SEC to notify them of the alleged violations.180 Verfueth 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 Verfueth 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.
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.
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., also followed the minority Asadi view that whistleblowers under Dodd-Frank must report directly to the SEC. Engility Corp. hired Puffenbarger as its director of payroll. 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. The supervisors conducted an investigation, concluded that no wrongdoing had occurred, and restructured Engility Corp.’s payroll system. Puffenbarger resigned shortly afterward. Puffenbarger filed a Dodd-Frank retaliation suit against Engility Corp. The court denied Puffenbarger’s assertions that she was entitled to whistleblower status under Dodd-Frank. 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.

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. 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. 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 retaliation claim. Therefore, as an exception to the whistleblower definition, the Court should examine the third section of the anti-retaliation provision. This interpretation, the argument goes, will encompass the public policy argument 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. 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.

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. 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. 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. One scholar espoused the view that SOX “gives the illusion of protection without truly meaningful opportunities or remedies for achieving it.”

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 206-97.
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 retaliation 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 argument197 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

---

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 206-67.
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.
201. Id.
202. Id.
203. Bradley Mark Nerdeman, 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 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-

---

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.


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


210. Id.

211. Id. at 444.

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.)


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.


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

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.
207. See Sarbanes-Oxley Act of 2002 § 301.
209. Id.
210. Id.
211. Id. at 444.
nisms and credibility with their employees are better placed than to
the SEC to have their employees approach them with their com-
plaints. On the whole, Dodd-Frank tends to improve corporate
governance, as the whistleblower provisions serve as mandatory ex-
amination of federal compliance. Whether indeed corporate com-
pliance is promoted is another debate, but what seems obvious is that
the bounty program under Dodd-Frank unequivocally allows corpo-
rate 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. However,
the pending issue to resolve, as indicated by the case history, is
the one of the interpretations of the statutory anti-retaliatory provi-
sion 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.

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 whistle-
blowers 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-retaliatory
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 extraterritor-
ial application of the provision, hold that it does not apply to com-
pany employees extraterritorially. 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. At the trial court,

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

In Morrison v. National Australia Bank, Ltd., National Australia
Bank (“National”), a foreign company, purchased a Florida-based
company, HomeSide Lending. National wrote down the value of
HomeSide’s assets, resulting in National’s stock falling. A group of
National stockholders brought suit, alleging violations of § 10b-5 of
the Securities Exchange Act of 1934. The Supreme Court first held
that § 10b-5 does not apply extraterritorially. 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 extra-
territorially, the legislation should be presumed to apply only domesti-
cally. 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 ex-
traterritorially. 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 domes-
tic application. Finally, the Court points to § 30(b) of the Exchange
Act, which states that the Act does not apply to individuals transac-
ting business outside the jurisdiction of the United States. The
Court concluded that the Exchange Act did not apply extraterritorial-
ly and thus, the plaintiffs’ claims must fail. Later, Meng-Lin, in

222. Id.
223. Id.
224. Id. at 623.
225. Id. at 630.
226. Id. at 631.
227. Id. at 632.
228. Id. at 247 (2010).
229. Id. at 251.
230. Id. at 252.
231. Id. at 252-53.
232. Id. at 255.
233. Id. at 256.
234. Id. at 257.
235. Id. at 265.
236. Id. at 266.
237. Id. at 267.
238. Morrison, 561 U.S. at 263.
239. Id. at 264.
240. Id. at 264-65.
241. Id. at 265.
nisms and credibility with their employees are better placed than to the SEC to have their employees approach them with their complaints. On the whole, Dodd-Frank tends to improve corporate governance, as the whistleblower provisions serve as mandatory examination of federal compliance. 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. 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.

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-retaliatory 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-retaliatory 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. 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. At the trial court,

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

In Morrison v. National Australia Bank, Ltd., National Australia Bank (“National”), a foreign company, purchased a Florida-based company, HomeSide Lending. National wrote down the value of HomeSide’s assets, resulting in National’s stock falling. A group of National stockholders brought suit, alleging violations of § 10b-5 of the Securities Exchange Act of 1934. The Supreme Court first held that § 10b-5 does not apply extraterritorially. 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. 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. 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. 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. The Court concluded that the Exchange Act did not apply extraterritorially and thus, the plaintiffs’ claims must fail. Later, Meng-Lin, in

222. Id.
223. Id., supra note 208, at 463.
224. Id., supra note 11, at 153.
225. Id. at 169.
226. Id., supra note 221, at 3.
228. Id.
229. Id.
230. Id. at 623.
231. Id. at 630.
232. Id. at 611 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. Id., supra note 221, at 3.
239. Id., supra note 221, at 3.
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.\(^{251}\)

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 their 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 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

\(^{242}\) Liu *et al.*, supra note 6, at 226.

\(^{243}\) Id. at 117.

\(^{244}\) Id. at 131.

\(^{245}\) Id. at 176.

\(^{246}\) *Villanueva*, supra note 3.

\(^{247}\) *Meng-Lin*, supra note 2, at 224.

\(^{248}\) *Meng-Lin*, 763 F.3d at 177.

\(^{249}\) 763 F.3d at 103 (5th Cir. 2014).

\(^{250}\) Id. at 106.

\(^{251}\) Id.

\(^{252}\) SEEBERMAN ET AL., supra note 2, at 3.


\(^{255}\) 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.

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

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 their 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 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. BEIRMAN ET AL., supra note 221, at 3.
255. Id. at 506-07.
257. Id.
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. 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. In the same vein, the CFPB was empowered to prohibit, limit, or impose conditions for arbitration agreements as deemed necessary to protect public interest. Two reports on pre-dispute arbitration clauses have been submitted by the CFPB since then: one in 2013 and the second in 2015. 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. 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.

261. Id.
262. Id. at 16.
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 arbitrable 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/141d8d3e-06e5-487e-814d-fecb6c585a3d-Presentation/PublicationAttachment/2tb98b69-4425-4a7a-9815-66d3e50717c6cFuture%200%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 2-1 (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. (quotiing CFPB PROPOSAL OUTLINE, supra, at 14).

265. Moore, supra note 265, at 505.
266. Id. at 510-11.
267. Id.
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.
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 pre-dispute 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

261. Id.
262. Id. at 16.
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/141bd53b-96e5-4876-8f04-f6c68ce558a3/Presentation/PublicationAttachment/2b3b9b69-4425-4d7a-9f65-6fe370e0517c/the-future-of-mandatory-consumer-arbitration-clauses-allow-companies-to-avoid-accountability-to-their-customers.pdf
266. 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." These arbitration provisions tend to provide businesses the upper hand over consumers in dispute resolution. 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. 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.’” 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.” 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.”

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. At the time of reporting a violation, the whistleblower under this section does not have to identify himself. 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.” A major issue, and the most heavily debated one, 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., the United States District Court of Massachusetts, applying the precedent listed by the Supreme Court in

Landgraf v. USI Film Products, concluded that the prohibition of pre-arbitration dispute agreement per § 922 applied retrospectively. 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.” 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.

Section 1028 empowers the CFPB to carry out a study on predispute arbitration agreements in consumer financial products. 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’).” 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.”

“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.” Under this section, the right of the consumer or creditor to agree to arbitration after a claim is underway is not limited.

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. 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

271. Starr & Miller, 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.
282. 511 U.S. 244 (1994).
285. Id. at 2143.
286. See Jones, supra note 275, at 1.
287. Id.
288. Id.
290. Id. at 518.
291. Id. at 523–24.
contract they can think of." These arbitration provisions tend to provide businesses the upper hand over consumers in dispute resolution. 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. Dodd-Frank invokes federal arbitration law in many ways, but this Article focuses primarily on those provisions that relate to arbitration and whistleblowers.

"[Section] 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.' 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." 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." 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. At the time of reporting a violation, the whistleblower under this section does not have to identify himself. 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 [section]." A major issue, and the most heavily debated one, 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., the United States District Court of Massachusetts, applying the precedent listed by the Supreme Court in

271. STARR AUSTEN & MILLER, LLP, supra note 270.
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.
282. Landgraf v. USI Film Products, 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." 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.
284. Section 1028 empowers the CFPB to carry out a study on predispute arbitration agreements in consumer financial products. 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"). 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."
285. "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." Under this section, the right of the consumer or creditor to agree to arbitration after a claim is underway is not limited.
286. 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.
287. 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

288. 511 U.S. 244 (1994).
289. Pezza, 767 F. Supp. 2d at 233-34.
290. Nerderman, supra note 203, at 2165 (quoting Dodd-Frank Act).
291. Id. at 2143.
292. See Jones Day, supra note 275, at 1.
293. Id.
295. Id. at 518.
296. Id. at 523-24.
as "modified and clarified" in the more recent cases of *Hughes* and *Lindh,* it becomes apparent that § 922 was not intended to apply retrospectively to whistleblower claims prior to 2010.

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