ROPES & GRAY ALERT

Securities & Futures Enforcement ▪ Asset Management

September 11, 2015

Circuit Court of Appeals Creates Circuit Split on Controversial Dodd-Frank Act Whistleblower Anti-Retaliation Provision

Attorneys
Eva Ciko Carman
Aaron Katz

On Thursday, September 10, 2015, the United States Court of Appeals for the Second Circuit issued its highly anticipated decision in *Berman v. Neo@Ogilvy LLC*. The plaintiff-appellant, Daniel Berman, had been the finance director of Neo@Ogilvy. Mr. Berman's lawsuit alleged that Neo@Ogilvy had unlawfully terminated him because he had reported internally, to senior company officers, supposed violations of GAAP and other accounting irregularities. The question of law presented was whether the Dodd-Frank Act's whistleblower anti-retaliation provision offers protection to an employee who, like Mr. Berman, is fired after he reports possible financial misconduct internally but before he makes a report to the SEC. The district court had answered that question in the negative and dismissed Mr. Berman's wrongful termination lawsuit. On appeal, the SEC, participating as *amicus curiae*, argued that the Dodd-Frank Act's statutory language is ambiguous and that the SEC's agency regulation answering that question in the affirmative, Exchange Act Rule 21F-2, is a reasonable interpretation of the statute. The Second Circuit agreed with the SEC, thereby creating a circuit split on the issue and raising the possibility that the Supreme Court will soon weigh in.

Writing for the majority, Judge Newman concluded the Dodd-Frank Act's definition of "whistleblower" — someone who reports potential misconduct *to the SEC* — is in "tension" with the statute's anti-retaliation provision, which purports to protect "whistleblowers" who report potential misconduct internally. According to Judge Newman, limiting the anti-retaliation provision to "whistleblowers" who report potential misconduct internally and to the SEC simultaneously, or who report potential misconduct internally only after having reported it to the SEC, would dramatically narrow the protections that the provision would offer. Judge Newman stated that it will be the rare employee who chooses to make a report internally and to the SEC simultaneously; the more likely reality, Judge Newman said, is that an employee will choose to report misconduct internally first, in the hopes that the company will rectify the misconduct. Judge Newman also pointed out that certain categories of employees — such as auditors, compliance personnel, and in-house attorneys — are statutorily *required* to report misconduct internally, and to allow the company a reasonable time to respond, prior to elevating the issue to the SEC's Office of the Whistleblower. Judge Newman expressed concern that the Dodd-Frank Act's anti-retaliation provision therefore would offer only minimal protection if it were read to apply only to employees who made a report to the SEC prior to his or her employer's allegedly retaliatory action.

Against that backdrop, Judge Newman stated that the Dodd-Frank Act's statutory language was ambiguous and that examination of the statute's legislative history "yield[s] nothing." Judge Newman then quickly concluded that the SEC's Exchange Act Rule 21F-2, which extends anti-retaliation protection to employees who, like Mr. Berman, are retaliated against after reporting misconduct internally but before making (or even threatening to make) a report to the SEC, was a reasonable resolution of the ambiguous statutory language and therefore entitled to deference.

In addition to the fact that it creates a circuit split, the Second Circuit's decision is notable in at least two other respects. First, the majority seemingly found the Dodd-Frank Act's statutory language ambiguous not because certain words were susceptible to multiple definitions, but rather because it considered it unlikely that Congress would have wanted the anti-retaliation provision to have a "limited effect." Second, the potential consequence of the Second Circuit's decision, at least to the extent it is not overruled by the Supreme Court, is to eliminate one potential disincentive to a company's compliance personnel, auditors, and in-house lawyers — who may report potential misconduct to the Commission only *after* reporting it internally and providing the company a chance to respond —

from becoming whistleblowers. In this regard, the Second Circuit's decision dovetails with several SEC agency decisions from the spring and summer of 2015 offering enhanced whistleblower protection and incentives to those categories of employees.

If you would like more information on the Second Circuit's *Berman* decision, or on any other issues related to the Dodd-Frank Act's whistleblower provisions, please contact Eva Carman, Aaron Katz or your usual Ropes & Gray attorney.