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Ninth Circuit Affirms Most of Jury Verdict in Former GC's SOX Whistleblower Lawsuit

Proskauer Whistleblower Defense on **March 6, 2019**

On February 26, 2019, the Ninth Circuit affirmed much of a jury's approximately $11M verdict finding that a former general counsel was discharged in retaliation for reporting alleged Foreign Corrupt Practices Act ("FCPA") violations. *Wadler v. Bio-Rad Labs., Inc.*, No. 17-cv-16193.

Background

Sanford Wadler, then the former General Counsel of Bio-Rad Laboratories, Inc. (the "Company") filed whistleblower retaliation claims against the Company and its CEO under SOX and Dodd-Frank, along with a wrongful termination claim against the company under California common law. Wadler's claims were premised on his allegation that he was discharged for submitting a memorandum to Bio-Rad's audit committee asserting FCPA violations.

The district court denied the Company's motion to dismiss after the SEC filed an *amicus* brief arguing that Dodd-Frank prohibits retaliation based on internal complaints, and the case proceeded to trial. On the eve of trial, the Company filed a motion to exclude evidence it claimed was shielded by the attorney-client privilege. The SEC submitted another *amicus* brief, arguing that federal whistleblower laws are designed to protect all employees of public companies from retaliation, and preempt California's ethical rules that generally prohibit attorneys from disclosing client confidences. The motion was denied and a trial was held over several weeks in January and February 2017. On February 6, 2017, the jury found in Wadler's favor on each of his claims and awarded him approximately $11M, including $2.96M in backpay, which was doubled under Dodd-Frank, and $5 million in punitive damages under his California public policy claim. An appeal to the Ninth Circuit followed.

Ruling

The Ninth Circuit upheld the award of damages with the exception of the award of double backpay under Dodd-Frank, recognizing that the U.S. Supreme Court in *Digital Realty Trust, Inc. v. Somers*, No. 10-1276 (2018), held that Dodd-Frank does not protect purely internal complaints (discussed here). However, the Ninth Circuit vacated the verdict as to the SOX claim, concluding that the jury instructions erroneously listed the FCPA's anti-bribery and books-and-records-provisions as "rules and regulations of the SEC" under SOX Section 806. The court explained that those provisions are not "rules or regulations" of the SEC under Section 806 of SOX because Congress's use of the phrase "rule or regulation" in conjunction with an administrative agency (the SEC) suggests it was only intended to encompass administrative rules or regulations. This interpretation was supported by Congress's use of that phrase in the same list of unlawful activities (in Section 806 of SOX) as violations of "Federal law relating to fraud against shareholders," which suggests there is a difference between the meaning of a "law"—which encompasses statutes (like the FCPA)—and a "rule or regulation"—which does not. The Ninth Circuit ruled that the district court erred in instructing the jury otherwise, and that the error was not harmless with respect to the SOX claim. It remanded the case for consideration of whether a new trial is warranted and directed the district court to consider whether any retrial would result in a double recovery given the portion of the decision affirming the California public policy verdict and the corresponding verdict for compensatory damages for past economic loss. Notably, the Ninth Circuit did not address the district court's ruling allowing the use of privileged information at trial.

Implications for Employers

The Ninth Circuit's narrow reading of what constitutes an SEC "rule or regulation" will make it more difficult for plaintiffs to show they engaged in protected activity under SOX.

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