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Dodd-Frank's Extension of SOX Whistleblower Protections to Subsidiaries of Publicly Traded Companies Applies Retroactively, Says SDNY

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Recently, the Southern District of New York held that Section 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), which amends Section 806 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or "SOX"), can apply retroactively to protect whistleblowers working for a non-public subsidiary of a publicly traded company.

In *Leshinsky v. Telvent GIT SA et al.*, No. 10 Civ. 4511 (JPO), 2012 WL 2686111 (S.D.N.Y. July 9, 2012), the Plaintiff, Phillip Leshinsky, was employed by a non-public subsidiary of Telvent GIT, a NASDAQ-listed corporation. In July of 2008, the company terminated Leshinsky's employment. Leshinsky claimed that he was terminated for objecting to fraud in a bid for a contract with the Metropolitan Transportation Authority for work on the E-ZPass toll system and he filed suit against various Telvent entities claiming he was retaliated against for engaging in protected activity under Section 806 of Sarbanes-Oxley.

Prior to 2010, and during Leshinsky's term of employment, SOX Section 806 protected "employees of public companies." In July 2010, Dodd-Frank Section 929A was passed, which amended SOX Section 806 to protect employees of non-public subsidiaries or affiliates "whose financial information is included in the consolidated financial statements of such [public] company." Because Leshinsky was terminated prior to the enactment of Dodd-Frank, the Defendants moved to dismiss his claims, arguing that at the time of the Plaintiff's termination, SOX only covered employees of publicly traded companies and not their non-public subsidiaries.

On July 9, 2012, Judge Paul Oetken of the Southern District of New York denied the Defendants' motions to dismiss, holding that Section 929A of Dodd-Frank merely clarified SOX Section 806's existing protections, and therefore could apply retroactively. The court reasoned that, generally, a new statute will not apply to conduct occurring prior to its enactment for the fear of impairing vesting rights or unfairly imposing new duties. However, when a statutory amendment "merely clarifies existing law," courts have found that these concerns are not present because the rights and liabilities created by the law existed all along. In determining whether an amendment "merely clarifies" or restates existing law, courts often look to three factors: (1) whether the enacting body declared that it was clarifying a prior enactment; (2) whether a conflict or ambiguity existed prior to the amendment; and (3) whether the amendment is consistent with a reasonable interpretation of the prior enactment and its legislative history.

In analyzing these factors, the Southern District determined that Dodd-Frank 929A should apply retroactively because: (1) the legislative history of Dodd-Frank Section 929A indicated that its enactment was meant merely to clarify the protections already found in SOX Section 806; (2) as originally enacted, SOX Section 806 was ambiguous, resulting in conflicting ALJ and district court decisions; and (3) Dodd-Frank Section 929A's protections for employees of non-public subsidiaries of public parents is consistent with a reasonable interpretation of SOX Section 806's protections for employees of "public companies." Accordingly, the court denied the Defendants' motion to dismiss, concluding that Dodd-Frank Section 929A should apply retroactively to protect employees of non-public subsidiaries of public parent companies because 929A was a mere clarification of protections which already existed in SOX Section 806. Although no other court cases on this issue were cited by the *Leshinsky* court, its holding is consistent with other recent decisions that likewise have found that Dodd-Frank Section 929A is a "clarifying" amendment.

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