THE SEC, THE COURTS AND WHISTLEBLOWERS: AN EXAMINATION INTO THE STRENGTH OF THE ANTI-RETALIATION PROVISIONS OF THE DODD-FRANK ACT AS DEFINED BY RECENT FEDERAL COURT DECISIONS

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"The history of the twentieth century was dominated by the struggle against totalitarian systems of state power. The twenty-first will no doubt be marked by a struggle to curtail excessive corporate power." — Eric Schlosser (author)[1]

Do we pay? Dearly, for the lion takes so greedily and he knows that what he's taken, it is ours. That's how the wealth's divided among the lambs and king of the beasts, it is so one-sided. Until the lamb is king of the beasts we live so one-sided. — 10,000 Maniacs, "The Lion's Share"[2]

I. INTRODUCTION

Excessive corporate power can be compared to the religious, allegorical, poetic, historic, pop culture, and fairy tale references to the unfair distribution of power between the "Lion" and the "Lamb." It is so one sided. In an era dominated by excessive corporate greed and corruption, to whom should the "lambs" turn to for protection? Although followers of Adam Smith would say that we must let the market correct itself, the reality is that it does not. History has shown a trend where the rich get richer and the poor get poorer, unless the government steps in and puts into place statutes, rules and regulations that deter and punish corporate greed, and then enforces those laws to hold the powerful accountable.

One method that Congress has adopted to identify and abate corporate corruption is to provide legal incentives and protections for corporate insiders, those most likely to know of the criminal wrong-doings of their employers, to come forward and report their employer's unlawful acts. These persons are known as whistleblowers and the laws that protect them are called whistleblower protection statutes. The first U.S. law adopted specifically to protect whistleblowers was the United States False Claims Act (1863, revised in 1986),[3] which combatted fraud committed by suppliers of the United States government during the Civil War by

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[1] ERIC SCHLOSSER, FASTFOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL (2013).

[2] 10,000 MANIACS, *The Lion's Share*, on BLIND MAN'S ZOO (Elektra 1989).

[3] 31 U.S.C. § 3729-3733 (1986).

encouraging whistleblowers to come forward and collect a "bounty," a percentage of the money recovered or damages won by the government. In addition to the bounty awards, the FCA also protects these whistleblowers from wrongful dismissal.[4] Today the False Claims Act remains alive and well and accountable for the recovery of $17 billion in damages awarded to the U.S. Government between 2008 and 2013, the largest five year total ever.[5] Another U.S. law that has specifically protected whistleblowers is the Civil Service Reform Act (CSRA).[6] The CSRA, however, has had little impact because "while the CSRA set the foundation for future whistleblower legislation, its provisions were limited to protecting federal employees."[7]

During the 1970s, Congress also passed a number of whistleblower protection laws aimed at catching significant environmental polluters. The first U.S. environmental law to include a whistleblower protection was the Clean Water Act of 1972.[8] Similar protections were included in subsequent federal environmental laws, including the Safe Drinking Water Act (1974),[9] Resource Conservation and Recovery Act (1976),[10] the 1980 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or the Superfund Law) ,[11] the Clean Air Act (1990),[12] and others. Then there seemed to be a lull in the passage of whistleblower statutes until the corporate scandals of Enron and WorldCom in the early 2000's, reaffirming the need for protection of a new type of whistleblowers, those willing to expose corporate financial fraud on the market.

Over the past decades, federal law has developed into a loose web of roughly thirty federal statutes that address some form of whistleblower protections. Unfortunately, these statutes are quite broad and often enforced inconsistently so that there are no standard procedures for determining: 1) who is protected, 2) what constitutes protected activity, 3) the length of the statute of limitations, 4) the burden of proof, 5) what legal forum can hear the claim, 6) and the scope of the remedies.[13] The answers to these questions vary from statute to statue, making it difficult for a potential whistleblower to know when, if or how he or she will be granted protections from retaliation.

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[4] *Id*.
[5] Gibson Dunn Publications, 2013 Year-End False Claims Update, http://www.gibsondunn.com/publications/pages/2013-Year-End_False-Claims-Act-Update.aspx (Jan. 8, 2014).
[6] 5 U.S.C. § 7101(1978).
[7] Dave Ebersole, *Blowing the Whistle on the Dodd-Frank Whistleblower Provisions*, 6 OHIO ST. ENTREPREN. BUS. L. J. 123, 125 (2011).
[8] 33 U.S.C. § 26 et. seq. (1972).
[9] 42 U.S.C. § 300f et. seq. (1974).
[10] 42 U.S.C. § 6901 et. seq. (1976).
[11] 42 U.S.C. § 9601 et. seq. (1980).
[12] 42 U.S.C. § 7401 et. seq. (1990).
[13] Ebersole, *supra* note 8.

In addition to the many federal whistleblower statutes, there are over fifty state statutes that contain provisions intended to protect whistleblowers, but like the federal laws each offers different statutory and common law protections. These variations and inconsistencies in the law can make it difficult to determine the extent, if any, of legal protection for whistleblowers.

The thirty or so federal whistleblower statutes can be grouped into six sub categories: 1) reporting fraud against the government, 2) federal employees reporting violations of laws, or waste by management; 3) reporting discrimination; 4) reporting violations of environmental laws; 5) reporting conduct adverse to health; and 6) reporting violations of securities law.[14] Each one of the six categories of whistleblower protections usually has different rules regarding the parameters and court precedence for protection. This article will focus on two recent laws that have captured public attention in the fight against corporate financial fraud, the Sarbanes-Oxley Act of 2002[15] ("SOX") and the Dodd-Frank Wall Street Consumer Reform and Protection Act of 2010[16] ("DFA") and discuss the ways in which the Dodd-Frank Act has greatly expanded protections to whistleblowers. The article will address how aggressive the SEC has been so far in its enforcement actions and how the federal courts are reacting to the law's aim to lure in whistleblower tips with promises of protection from retaliation and even, in some cases, bounty incentives.

In particular, we will examine how the courts have treated issues such as (1) whether the whistleblower protections of the DFA apply only to employees of public companies or if they extend to the employees of privately held contractors and subcontractors who perform work for a public company; (2) whether a whistleblower is protected by the Act if he or she fails to make a direct report to the SEC of the suspected employer wrongdoing, and (3) whether the provision of the DFA that prohibits the enforcement of mandatory arbitration provisions against whistleblowers applies retroactively.

SARBANES-OXLEY ACT (SOX)

In the wake of the Enron and Arthur Anderson scandals and many other corporate financial scandals in the early 2000s, Congress passed the Sarbanes-Oxley Act of 2002. This Act "extended whistleblower protection beyond federal employees to employees of publicly held companies."[17] Among its protections, "SOX provides

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[14] Ebersole, *supra* note 8.
[15] Pub. L. No. 107-204, 116 Stat. 745 (2002).
[16] Pub. L. No. 111-203, §922, 124 Stat. 1841 (2010).
[17] Ebersole, *supra* note 8.

… an anti-retaliation provision to protect whistleblowers."[18] This provision creates a both a private civil action for whistleblowers subject to adverse employment action by reporting statutory violations of public companies to the SEC, and also criminalizes such retaliation."[19]

SOX created protective anti-retaliation provisions for corporate whistleblowers by empowering courts and administrative agencies to provide monetary and non-monetary remedies to make the whistleblower whole. A whistleblower is protected from retaliation if he or she "provided information, caused information to be provided, or assisted in an investigation by a federal regulatory or law enforcement agency, a Member of committee of Congress, or an internal investigation by the company relating to alleged mail fraud, wire fraud, bank fraud, violation(s) of SEC rules and regulations, or violation(s) of Federal law relating to fraud against shareholders."[20] A claim for retaliation may be based the actions of an employer subjecting an employee to unfavorable employment action, such as firing or laying off, blacklisting, demoting, denying overtime or promotion, disciplining, denying benefits, failing to hire or rehire, intimidation, making threats, reassignment affecting prospects for promotion, reducing pay or hours, or any other action that negatively affects the terms and conditions of an employee's work.[21] Similar to the provisions found in Title VII of the Civil Rights Act's[22] remedies for retaliation against employees who report violations of discriminatory employment practices to their employers and to the EEOC, SOX codified the nearly identical remedies available to whistleblowers, which include reinstatement of the whistleblower's job if the whistleblower is fired, monetary damages for back pay with interest, as well as compensation for special damages, attorney's fees, expert witness fees, and litigation costs.[23]

However, many critics of SOX believe that its anti-retaliation protections are too narrow and too tangled in a procedural quagmire to really be of much incentive to would-be whistleblowers who fear a loss of their job if they report their employer for wrongdoing. For example, under SOX an employee only has 180 days to file a claim of retaliation from the date of the adverse action and the complaint must be filed with the Occupational Safety and Health Administration, which will then conduct an investigation and issue an order. After OSHA issues its findings and order, either party may request a full hearing before an administrative law judge of the Department of Labor within 30 days. The administrative law judge's decision and order may be appealed to the Department's Administrative Review Board. If a

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[18] Geoffrey Christopher Rapp, *Mutiny by the Bounties? An Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, BYU L. R. (2012).
[19] *Id.* at 82.
[20] Sarbanes-Oxley Act of 2002, PL 107-204, 116 Stat 745 (2002).
[21] *Id.*
[22] Pub. L. 88-352, Stat. 241 (1964).
[23] 29 CFR § 1980 (2010).

final agency order is not issued within 180 days from the date the employee's complaint is filed, then the employee may leave the administrative process and file a complaint in the appropriate U.S. District Court.[24] Of further concern is the fact that SOX protections against retaliation are limited to the employees of publicly traded companies only and not extended to other quasi-insiders doing work for public companies who also have access to inside information that could lead to a fraud investigation and possible prosecution.

The initial criticisms of SOX were in fact well-placed. According to a report by lawyers from Orrick, Herrington, & Sutliffe LLP, prior to the enactment of the DFA in 2010, about 1,000 whistleblower cases had been filed under SOX, but almost all of these claims were dismissed or settled.[25] Specifically, of the almost 1,000 cases examined, "655 were dismissed as having no merit"; "126 complaints were withdrawn by the whistleblower; and 138 complaints were settled before a Department of Labor ruling. Only 17 cases were deemed to have merit and allowed to proceed."[26] With the passage of the DFA, Congress took the opportunity to correct many of the weaknesses of SOX and to give much more substantial incentives and protections to corporate financial fraud whistleblowers.

DODD-FRANK ACT

The Dodd-Frank Wall Street Reform and Consumer Protection Act was enacted in 2010.[27] President Obama signed into law the Dodd-Frank Act as a measure to further protect against public harm, such as that caused by the 2008 financial crisis that followed shortly upon the heels of the Enron, WorldCom, HealthSouth and other significant financial reporting corporate scandals. The DFA enhances SOX protections by providing the potential for generous cash awards and the promise of strong job protections to whistleblowers. It also expands whistleblower protections to employees other than those of the public company.

The Act takes a more proactive approach to fighting corporate fraud by offering structural reforms to existing law to facilitate internal disclosures about financial problems.[28]

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[24] *Id.*
[25] Tracy Coenen, *The Failure of Whistleblower protections Under Sarbanes-Oxley*, AllBusiness.com, www.allbusiness.com/accounting/fraud/4969189-1.html (2012).
[26] *Id*.
[27] *See* Dodd-Frank Act, §922(a); 15 U.S.C.A. §78u-6; 17 C.F. R. Parts 240.21F *et. seq.* (2010).
[28] Dana Gold, *Speaking Up for Justice, Suffering Injustice: Whistleblower Protection and the Need for Reform*, 11 SEATTLE J. FOR SOC. JUST. 55 (Winter, 2013).

The Dodd-Frank Act contains significant differences from SOX , but yet since both the SOX and DFA whistleblower provisions are intact, the two provisions must operate side by side. Section 21F of the DFA extends the statute of limitations for filing a claim for retaliation from 180 days to six years after the date of the retaliation occurs or within three years of the date "facts material to the right of action are known or reasonably should have been known by the employee," but not more than ten years after the date of the violation. [29] Unlike SOX, an employee who claims retaliation under the DFA does not have to file a claim with an administrative agency,[30] but may proceed directly to federal district court.

The whistleblower provisions of the DFA also extend liability for whistleblower retaliation to a variety of employees previously not covered by SOX.[31] The Dodd-Frank Act extends whistleblower protection to the employees of a private subsidiary of a publicly traded company if the public company consolidates the subsidiary's financial statements with its own. Protection under the whistleblower anti-retaliation provision is also expanded from protecting only employees of publically traded companies to now include employees of private companies, agents, and contractors who perform work for public companies, as well as the possibility of protections against the acts of past and future employers.

Another important change brought about by the Dodd-Frank Act is the prohibition of the enforcement of mandatory arbitration agreements between employees and whistleblowers. This provision has spawned controversy. Although the DFA protects whistleblowers from being forced to go to arbitration, some critics argue that arbitration is a faster and cheaper alternative to court trials. Supporters of arbitration argue that arbitration keeps the name of the whistleblower confidential, which is important because in the past whistleblowers were blacklisted by the industry and often had a hard time finding subsequent jobs. Private arbitration may also be beneficial to both parties as well as investors because investors may be protected from large changes to the market resulting from public litigation. At the same time, though, private arbitration may be perceived as being "stacked" in favor of the employer, and if the arbitrator makes an erroneous decision, the employee has no recourse for appeal.

Under Dodd-Frank, whistleblowers are not required to report possible securities violations through an internal reporting system prior to reporting to the SEC. This rule protects whistleblowers that work in companies without anonymous tip lines, small companies where the identity of the whistleblower would be known,

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[29] *See* 15 U.S.C. § 78u-6(h)(1)(B)(iii) (2010).
[30] SOX claimants have been required to file a complaint with OSHA under the purview of the Department of Labor and proceed through a complicated administrative process.
[31] Meghan King, *Blowing the Whistle on the Dodd-Frank Amendments: The Case Against the New Amendments to Whistleblower Protection In Section 806 of Sarbanes-Oxley*, AM. CRIM. L. R., Vol. 48, Issue 43, pp. 1457-1483 (2011).

and in situations where the whole company is corrupt. Going directly to the SEC and choosing to remain anonymous may help to prevent employer retaliation against whistleblowers and encourage more would-be whistleblowers to come forward. The DFA also created the Office of the Whistleblower ("OWB") to administratively handle the provisions of the Act. According to an official announcement by the OWB, the

Office of the Whistleblower is coordinating actively with Enforcement Divisions staff to identify matters where employers may have taken retaliatory measures against individuals who reported potential securities law violations or have utilized confidentiality, severance, or other agreements in an effort to prohibit their employees from voicing concerns about potential wrongdoing. [32]

The Dodd-Frank Act provides more protections, incentives, and rewards to whistleblowers than most previous statutes. Retaliation protections differ from the bounty incentives by incorporating both public and private entities. In order to receive a bounty, an individual may only report securities law violations related to a public company if that individual is an employee of that company. To be covered under the anti-retaliation provision of the DFA, there is no difference between the report of a securities law violation by an employee of a public company or an employee of a private subcontractor who does work for the public company.

Dodd-Frank is organized into 16 titles containing diverse areas of finance, from financial stability to mortgage reform. Two of the titles in particular, Title IX and Title X, have implications in whistleblower protections extended to the employees who report wrongdoing or refuse to participate in activities that are unlawful.

TITLE IX

Under the provisions of Title IX, Subtitle B, of the DFA, an employer cannot demote, suspend, threaten, harass or discriminate against whistleblowers for:

1. Providing information to the SEC pursuant to the bounty provision,

2. Initiating, testifying or assisting in any judicial or administrative SEC action predicated on information the whistleblower had provided, or

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[32] Walter Pavlo, *What the SEC Whistleblower Report Means for Companies*, http://www.forbes.com/sites/walterpavlo/2013/11/18/sec-releases-whistleblower-report-here-is-what-it-means-for-companies/ (Nov. 18, 2013).

3. Making disclosures that are required under or protected by SOX.

Whistleblowers who submit their tips through an attorney are allowed to remain anonymous until the reward is paid. Even then, the SEC does not publicly disclose whistleblower identities.[33] Anonymity helps to protect the whistleblower from employer retaliation, while allowing an individual who is potentially liable for fraud to come forward without the fear of punishment.[34]

If an individual only reports the possible securities law violation internally, Dodd-Frank still protects him or her from retaliation. However, in order to receive a bounty, an individual must submit a claim to the SEC within 120 days of internally reporting the possible securities law violation. Further, the information supplied by the whistleblower to the SEC must be "original" in order to qualify for whistleblower protections, a provision of the DFA that also does not apply to anti-retaliation protections.

Concerns have been raised that the new whistleblower bounty provisions encourage individuals to completely bypass a company's internal reporting system by first reporting a claim directly to the SEC.[35] In order to encourage employees to first report claims internally, the SEC adopted a 120-day "look back period" that allows an individual who has reported a possible violation internally to submit a claim to the SEC where the information would be treated as though the employee reported the information to the SEC on the date he or she actually reported the information to the employer for purposes of considering whether or not the information is "original".[36] However, as discussed later in this article, these particular requirements of the DFA do not affect whistleblower anti-retaliation protections.

TITLE X

Title X of the DFA extends whistleblower protection to employees in the consumer financial services industry. It has similar protections as Title IX for the employees who provide information to the appropriate authorities, testify in proceedings and refuse to participate in any unlawful financial activity.

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[33] Unfortunately the SEC has committed at least one known gaffe when its investigator showed some notes to an executive of a company accused of securities violations. The executive recognized the hand-writing of the whistleblower, who later publicly identified himself as Peter C. Earle, a former employee of a Pipeline trading affiliate. See Scott Patterson and Jenny Strasburg, *Source's Cover Blown by SEC*, http://www.wsj.com/articles/SB10001424052702303459004577363683833934726 (April 25, 2014).

[34] Umang Desai, *Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010*, 43 LOY. U. CHI. L. J. 247 (2012).

[35] King, *supra* note 30.

[36] *Id.*

Similar to Title IX, Title X prohibits employers from forcing employees to waive their rights under Dodd-Frank via a confidentiality clause or an anti-arbitration clause, and voids any arbitration clauses in collective bargaining agreements.

ADVANTAGES OF DFA

One of the major advantages of the new anti-retaliation provisions is whistleblower confidentiality. In the past, employees have been hesitant about coming forward with a claim due to the fear of employee retaliation and the negative stigma associated with being a whistleblower. As author Joel Hesch points out, corporate culture demands loyalty regardless of whether any harm comes upon the individual, the corporation, or even the stakeholders.[37] Whistleblowers are often labeled as a “snitch”, “tattle tale”, and even “low life.” In 1974 Karen Silkwood came forward as a whistleblower and then tragically died in a mysterious car crash on her way to talk with a news reporter. The provision of the DFA that allows individuals to now make claims anonymously through an attorney can go a long way in reducing potential whistleblowers’ fears.

Another significant advantage of the DFA is the breadth of its anti-retaliation protections. The anti-retaliation provision under the Dodd-Frank Act prohibits an employer from discriminating against a person because of his whistleblower status. Examples of unlawful retaliation include being fired, harassed, or discriminated against in the work place. This provision even protects whistleblowers who report “possible” securities law violations even when the possible violation turns out to be legal or if the Government takes no action. The whistleblower need only have a reasonable belief that a possible securities violation has occurred, is in progress, or is about to occur at the time of the report to be protected.[38] The Commission’s rules prohibit any person from attempting to impede someone from reporting a securities law violation to the SEC. This prohibition includes attempts to impede someone from reporting via a confidentiality agreement.

A third significant improvement to whistleblower protection accomplished by the DFA was the creation the Office of the Whistleblower (OWB). According to the SEC’s 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program, the OWB’s mission is to “administer a vigorous whistleblower program that will help the Commission identify and halt frauds early and quickly to minimize

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[37] Joel D. Hesch, *Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt*, 6 LIBERTY U. L. R. 51, 102 (2011).

[38] U.S. Securities and Exchange Commission, 2013 Annual Report To Congress on the Dodd-Frank Whistleblower Program.

investor losses."[39] The OWB is "staffed by nine attorneys, and three paralegals,"[40] and is responsible for many activities. Of the 18 activities listed, only one of the activities relates to retaliation. The OWB is responsible for:

> Identifying and monitoring whistleblower complaints alleging retaliation by employers or former employers for reporting possible securities law violations internally or to the Commission. The Commission has the authority to enforce the provisions of the Exchange Act, including the anti-retaliation provisions of Section 21F(h)(1). OWB works with Enforcement staff on potential anti-retaliation enforcement actions where appropriate. OWB also monitors federal court cases addressing the anti-retaliation provisions of the Dodd-Frank Act and the Sarbanes-Oxley Act of 2002. In addition, OWB reviews employee confidentiality and other agreements provided by whistleblowers for potential concerns arising under Rule 21F-17 of the Exchange Act.[41]

Dodd-Frank also addresses some of the administrative and practical weaknesses that many perceived with SOX. For example, under Dodd-Frank, whistleblowers and the Commission can enforce through civil enforcement actions in federal court or administrative proceedings the anti-retaliation provisions of the Dodd-Frank Act. The addition of "or" allows the whistleblower to go straight to court instead of being required to go to mediation, as was required under SOX.

A fourth benefit of the DFA, as mentioned earlier in the article, is that employers are prohibited from trying to force employees into arbitration over their retaliation claims. Employees, should they so choose, have a right to their day in court.

CRITICISMS OF DFA

The scope of the Dodd-Frank Act has received mixed reviews. Originally opponents of the broad scope of the Dodd-Frank Act were fearful that it would overly restrict employers from making employment decisions unrelated to an employee's status as a whistleblower. Opponents have also expressed concern that the Act's anti-retaliation provisions would "invite frivolous claims by employees looking for a 'shield that could prevent companies from terminating or otherwise changing the[ir] employment

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39 *Id.*
40 *Id.*
41 *Id.*

status.'"[42] The SEC dismisses both of these objections by stating that "by its terms, the statute only prohibits adverse employment actions that are taken 'because of' any lawful act by the whistleblower to provide information."[43]

There is additional concern about confusing language within the Act. For instance, Congress defined the term "whistleblower" under Section 21F to be a person who provides information regarding violations of securities laws to the Commission.[44] The wording in this section seems to exclude individuals who choose to report the violations internally. The Act encourages internal reporting and states that the SEC will treat the whistleblowers who choose to report internally first and then subsequently to the SEC within 120 days as having reported to the SEC on the date that they originally reported internally.[45]

Further, some critics argue that another downfall of Dodd-Frank's anti-retaliation provisions is the requirement of adjudicatory actions. When an individual comes forward with a tip that the SEC Office of the Whistleblower decides is of value, and that individual meets the criteria to be considered a whistleblower, the individual may then be required to go through a trial process. One potential downside for the whistleblower resulting from litigation is public exposure. Litigation can also attract media attention. While adding public pressure may force a corporation to make changes, it can attract unwanted attention to whistleblowers who wish to keep their identity confidential.

Another potential downside of litigation for the whistleblower is cost. Corporations typically can better withstand the length and high costs of litigation than individuals. A whistleblower may be forced to settle the case because of lack of resources, which could prevent the whistleblower from receiving the proper protection he or she deserves. The Dodd-Frank Act makes pre-dispute arbitration agreements invalid when the arbitration deals with whistleblower related retaliation from the employer. Finally, although the DFA prevents the mandatory enforcement of arbitration clauses, many employees may be reluctant to act on retaliation issues because they signed an arbitration clause and may not be aware of these particular protections of the DFA. Despite the fact that there is value that can come from an adjudicatory action, some people believe that it would be more beneficial for both the whistleblower and the employer if there were to be an alternative way to resolve

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[42] *See* Jill L. Rosenburg and Renee B. Phillips, *Whistleblower Claims Under the Dodd-Frank Wall Street Reform and Consumer Protection Act: The New Landscape*, https://www.nysba.org/Sections/Labor_and_Employment/Labor_PDFs/LaborMeetingsAssets/Whistleblower_Claims_Under_Dodd_Frank.html.
[43] *Id.*
[44] *Id.*
[45] 2013 Annual Report, *supra* note 37.

the issue.[46]

The public should also be aware that Dodd-Frank's anti-retaliation provisions do not extend overseas. Although the Act does not specify its lack of protection in foreign locations, the U.S. Supreme Court decided there is no protection in its ruling in the 2010 case, *Morrison v. National Australia Bank*.[47] Dodd-Frank anti-retaliation protections were not granted to the individual in this case because the Court interpreted the Act to require that the individual whistleblower should be in the United States in order to be protected against retaliation by an employer.

Despite the concerns and criticisms leveled against the DFA immediately following its passage, the reality is that at least with respect to the anti-retaliation provisions, the DFA has been an effective vehicle for relief to injured employees in many ways. The SEC has been active in promoting and enforcing regulations that punish employers for taking retaliatory actions against employees who have dared to question their practices, and the courts have given liberal reading to potential gaps or inconsistencies in the Dodd-Frank language resulting in a significant pro-employee trend in reported decisions resolving claims of retaliation.

II. CURRENT CASE LAW

At the time of this writing there have been more than three dozen reported cases decided by federal courts in some way interpreting the anti-retaliation provisions of the Dodd-Frank Act. Only two issues have been definitively decided by the U.S. Supreme Court. In addition to the *Morrison* decision cited earlier,[48] in *Lang v. FMR*, *LLC*, 134 S. Ct. 1158 (2014), the U.S. Supreme Court settled the question of whether pursuant to 18 U.S.C. Sec. 1514A, whistleblower protection extends to employees of privately held contractors and subcontractors of public companies in the affirmative. In its holding, the Court reasoned that reading the statute to the contrary would leave contractor's employees "vulnerable to retaliation by their employers for blowing the whistle on a scheme to defraud the public company's investors, even a scheme engineered entirely by the contractor."[49] Further, the Court wrote that "[n]ot only would mutual fund advisers and managers escape Sec. 1514A's control…" but that "[l]egions of accountants and lawyers would be denied Sec. 1514A's protections."[50]

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[46] Gold, *supra* note 28.
[47] 516 U.S. 247 (2010).
[48] *Id*.
[49] *Lang*, 134 S. Ct. at 1168.
[50] *Id.*

The question of whether a whistleblower is protected by the Act if he or she fails to make a direct report to the SEC of the suspected employer wrongdoing is unsettled. In 2013, the Fifth Circuit held in *Asadi v. G.E. Energy LLC*, 720 F. 3d 620 (5th Cir. 2013), that "[u]nder Dodd-Frank's plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC. The three categories listed in subparagraph §78u-6(h)(1)(A) represent the protected activity in a whistleblower-protection claim. They do not, however, define which individuals qualify as whistleblowers." This decision shows the source of the controversy over this issue. There are ten subsections of 15 U.S.C §78u-6, "Securities whistleblower incentives and protection," and there are two different subsections that define the term "whistleblower." Subsection (a) provides definitions for certain terms throughout §78(u)-6. Included in this list of terms, the term "whistleblower" is defined for purposes of §78u-6:

Specifically, "[t]he term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission."

This definition is then contrasted with subsection (h), titled "Protection of whistleblowers." The language of that subsection, §78u-6(h), includes three paragraphs. Paragraph (1) is divided into three subparagraphs. Subparagraph (A) provides that:

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower –

> (i) in providing information to the Commission in according with this section;
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> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
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> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et. Seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et. Seq.), including section 10A(m) of such Act (15 U.S.C. 78j-l(m), section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

In holding that the plaintiff, Asadi, was in fact not a whistleblower, the Fifth Circuit reasoned that:

> [t]he use of the term "whistleblower," as compared with the terms such as "individual" or "employee," is significant. If Congress had selected the terms "individual" or "employee," Asadi's construction of the whistleblower-protection statute would follow more naturally because the use of such broader terms would indicate that Congress intended any individual or employee – not just those individuals or employees who qualify as a "whistleblower" – to be protected from retaliatory actions by their employers. Congress, however, used the term "whistleblower" throughout subsection (h) and, we must give that language effect.[51]

Therefore, the Court concluded that the whistleblower-protection provision "unambiguously requires individuals to provide information relating to a violation of the securities laws to the SEC to qualify for protection from retaliation under §78u-6h."[52]

Following that decision, a number of district courts which were called upon to settle the same question refused to follow the holding of *Asadi*. For example, in *Bussing v. COR Cleaning, LLC*, -- F.Supp. 2d --, 2014 WL 2111207 (D. Neb.), the plaintiff was an accountant who worked as an independent contractor for a private management investment company. Upon her discharge she brought an action for retaliation under the Dodd-Frank Act. First, in following the precedent of *Lang*, the Court found that even though the plaintiff was an employee of a private company that does work for a public company, she is entitled to protection from retaliation as a whistleblower under the Dodd-Frank Act. Next, the district court faced the question of how to resolve the conflict in the statutory language of Dodd-Frank regarding the definition of a "whistleblower" covered by the Act. In resolving the alleged conflict of language between subsection (a) and subsection (h), the court reasoned that "[u]nless the term "whistleblower" is given its ordinary meaning for purpose s of this anti-retaliation provision, subsection (ii) will be rendered insignificant, and its purpose – to shield a broad range of employee disclosures – will be thwarted."[53] Further, in challenging *Asadi*, the district court held that a contrary reading would result in the law failing to protect the majority of whistleblowers, especially those who are most vulnerable to retaliation. "Congress aimed to encourage whistleblowers to report to the SEC. But is does not follow that Congress intended to discourage internal reporting." Ultimately the Court concluded that its reading of the DFA, that an employee was not required to file a complaint with the SEC to be covered as a whistleblower, was "not only faithful to the text of the statute, but it also gives meaningful effect to all of its parts, and furthers the purposes

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[51] *Asadi*, 720 F. 3d at 626.
[52] *Id.*
[53] *Bussing*, 2014 WL 2111207 at 3.

underlying Dodd-Frank."

In *Yang v. Navigators Group, Inc.*, -- F. Supp. --, 2014 WL 1870802 (S.D.N.Y.), the Plaintiff alleged that her employer terminated her in violation of the anti-retaliation provision of the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. §1514A, and the whistleblower protection provision of the Dodd-Frank Act, 15 U.S.C. §78u-6(h)(1), because she complained to her employer about its improper risk control procedures, which she reasonably believed constituted shareholder fraud and violated securities laws and SEC rules and regulations. Here, the Court held that:

(1) an employee is not require to communicate to the employer which laws the employer's conduct allegedly violated;
(2) the employee's communication need only "identify the specific conduct that the employee believes is illegal;" and
(3) an employee may engage in protected activity even where the employee is discharging her duties. [54]

The district court reasoned that "[a]ccording to the comments in support of the SEC regulation promulgated in 2011, 17 C.F.R. §240.21F-2(b)(1) ("Rule 21F-2"), 'the statutory anti-retaliation protections apply to the three different categories of whistleblowers, and the third category [which incorporates the SOX anti-retaliation provision] includes individuals who report to persons and governmental authorities other than the [SEC].'"[55] In so ruling, the court noted its disagreement with the finding of the *Asadi* court that the language of the statute is unambiguous, thus allowing it to reject the SEC's interpretation in Rule 21F-2. The district court held that in considering the context of 15 U.S.C. §78u-6, the statute does not clearly and unambiguously limit whistleblower protections to individuals who report violations to the SEC where the anti-retaliation provision simultaneously incorporates SOX-protected reporting to supervisors (emphasis added), and that it is appropriate for the Court to look to the regulations promulgated by the SEC for further guidance. [56]

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[54] *Yang*, 2014 WL 1870802 at 11.
[55] *Id.*
[56] *See also Khazin v. TD Ameritrade Holding Corp.*, Slip Copy, 2014 WL 940703 (D.N.J.) This Court agrees with the majority of district courts' view that the Dodd-Frank Act is ambiguous with respect to who qualifies as a whistleblower for purposes of the anti-retaliation provision of the statute); and *Rosenblum v. Thomson Reuters (Markets) LLC*, 985 F. Supp. 2d 141 (S.D.N.Y. 2013)("When considering the DFA as a whole, it is plain that a narrow reading of the statute requiring a report to the SEC conflicts with the anti-retaliation provision, which does not have such a requirement. This, the governing statute is ambiguous. As a result, it is appropriate to consider the SEC's interpretation of the statute.")

Finally, as to the question of whether the provision of the DFA that prohibits the enforcement of mandatory arbitration provisions against whistleblowers applies retroactively, one district court has held that the Act does prohibit the enforcement of arbitration agreements, even if the employee's termination occurred prior to its enactment date, while a number of district court cases have answered the same question in the negative. In *Wong v. CKX, Inc.*, 890 F. Supp. 2d 411 (S.D. N.Y. 2012), the plaintiff was employed by the defendant as its Senior Tax Counsel. In the course of her duties, Wong discovered actions by her employer that she believed to violate certain filing requirements with the Securities and Exchange Commission ("SEC"). The plaintiff repeatedly reported her concerns to senior management and was ultimately discharged on September 14, 2009. She filed a demand for arbitration on November 25, 2009, and on December 10, 2009, she filed a complaint with the Occupational Safety and Health Administration of the Department of Labor ("OSHA") seeking damages for retaliatory termination pursuant to Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. §1514A.

The defendant raised two arguments against Wong: (1) that the Court lacked jurisdiction over Wong's complaint because she failed to exhaust her administrative remedies, and (2) that section 922 of the Dodd-Frank Act does not apply to Wong's termination as the termination took place prior to the effective date of the Act. In support of its holding in favor of Wong, the district court found that Wong qualified as whistleblower under the DFA, that she had in fact exhausted her administrative remedies in accordance with the requirements of SOX, and that Section 922 of DFA applies to prohibit arbitration of this dispute. In so holding, the district court concluded that there were three requirements that must be met in order for an employee to seek de novo review by a district court: (1) 180 days have elapsed since the filing of the OSHA complaint; (2) OSHA must not have issued a final decision; and (3) the delay must not have been caused by bad faith by the employee.[57]

Prior to OSHA's final determination of Wong's claim, on September 8, 2011 Wong filed her complaint in the district court for the Southern District of New York, seeking relief under the whistleblower provision of the Sarbanes-Oxley Act. Although the dispute arose out of events that occurred prior to the passage of Dodd-Frank, the district court found that the 2010 amendment does apply to this dispute. In explaining its decision, the district court reasoned that the right to have a dispute heard in "an arbitral forum is a procedural right that affects the forum that will decide the substantive rights of the parties. Therefore, applying the present law to this dispute could not have a disfavored consequence."[58] The district court relied on the language of several U.S. Supreme Court cases regarding the retroactive

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[57] *Wong*, F. Supp. 2d at 417.
[58] *Id.* at 423.

application of a statute in support of its findings.[59]

However, in a recent case decided by the Southern District of New York, *Ahmad v. Morgan Stanley & Co*, -- F. Supp. --, 2014 WL 700339 (S.D.N.Y.), the district court held that there was no retroactive application of the DFA anti-arbitration clause. The plaintiff, a former auditor at Morgan Stanley & Co., alleged that the defendant retaliated against him in violation of the whistleblower protection provision of the Dodd-Frank Act. The defendant moved to dismiss the lawsuit and enforce arbitration on the grounds that the alleged acts of retaliation occurred before Dodd-Frank's effective date and that Dodd-Frank's whistleblower protection is not retroactive. In holding in favor of the defendant, the district court found that "as a general rule, a new statute does not apply retroactively to conduct that occurred prior to the statute's enactment." [60] But the court also noted that the presumption against retroactivity does not apply when the statute (1) "authorizes or affects the propriety of prospective relief," (2) "confer[s] or out[s] jurisdiction," or (3) "makes '[c]hanges in procedural rules."[61] Although the plaintiff argues that the presumption against retroactivity does not apply to §78u-6(h), because "it makes only procedural changes to pre-existing law and does not create new duties or liabilities," the district court was unpersuaded, holding that if applied to pre-enactment acts of retaliation, it would "attach[] new legal consequences to events completed before its enactment," by "increas[ing] a party's liability for past conduct."[62] The district court ultimately held that the presumption against retroactivity of this provision of the DFA applies with full force.

Further, in another recent case of *Khazin v. TD Ameritrade Holding Corp.*, Slip Copy, 2014 WL 940703 (D.N.J.), the district court also addressed whether Dodd-Frank Act's bar of pre-dispute arbitration can be applied retroactively. In concluding that it does not, the court reasoned that Congress did not explicitly command the Dodd-Frank Act's restriction on pre-dispute arbitration to apply retroactively, and that although the arbitration provision of the Dodd-Frank Act affects the jurisdictional location of where the claims are brought, it also affects the parties' rights and obligations agreed upon in the arbitration agreement. For these reasons, this district court also found that the Dodd-Frank Act does not operate

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[59] *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006); *Landsgraf v. USI Film*, 511 U.S. 244 (1994) and *Lindh v. Murphy*, 521 U.S. 320 (1997). The district court also relied on *Pezza v. Investors Capital Corp.*, 767 F. Supp. 2d 225, 228 (D. Mass 2011), which had held that "[n]"othing in Section 922 of the [Dodd-Frank] Act provides an express congressional intent regarding retroactivity."

[60] *Ahmad*, 2014 WL 700339, citing *Leshinsky v. Telvent GIT, S.A.*, 873 F. 2d. 582, 590 (S.D. N.Y. 2012).

[61] *Id.*, citing *Landsgraf v. USI Film Prods*., 511 U.S. 244, 273.

[62] *Id.*, citing *Landsgraf* at 270.

retroactively to bar the parties' arbitration agreement.[63] At this time, there seems to be no definitive answer as to whether the anti-arbitration enforcement provisions of the DFA indeed have retroactive effect, and at the time of this writing the authors were unable to locate any reported Circuit Court decisions on this issue.

There have been several other recently reported decisions that deal with other issues related to the retaliation protections of the Dodd Frank Act. In *Santoro v. Accenture Federal Services*, 748 F. 3d 217 (4th Cir. 2014), the Fourth Circuit held that the DFA does not invalidate arbitration of non-DFA claims. In this case the plaintiff had brought an age discrimination suit against her employer. The defendant filed a motion to dismiss her federal court action because she had signed an employment agreement that contained an arbitration clause. Despite the plaintiff's argument that Dodd-Frank applied to all employment arbitration agreements (emphasis added), the Court held that nothing in Dodd-Frank suggests that Congress sought to bar arbitration of every claim if the arbitration agreement in question did not exempt Dodd-Frank claims.

Finally, in the unreported decision in *Ott v. Fred Alger Management, Inc.*, 2012 WL 4767200 (S.D. N.Y. 2012), the district court held that the anti-retaliation provisions under DFA apply whether or not the whistleblower requirements to claim a bounty, such as providing "new" information to the SEC, are met, drawing a distinction between the protections afforded a DFA whistleblower seeking bounty and a DFA whistleblower seeking protection from retaliation.

III. CONCLUSION

According to author Joel Hesch, "[a]though still incomplete, the patchwork of federal whistleblower laws is beginning to resemble a beautiful quilt …to promote and encourage a culture that values human welfare over profits gained at the secret expense of human health, environmental stewardship, government waste, unfair discrimination, [and] fairness in the stock market,"[64] and the Dodd-Frank Act is playing important role in meeting these objectives. In order to achieve fairness in the stock market, the Dodd-Frank Act clearly acknowledges the importance of the whistleblower. Whistleblowers have "disclosed roughly one-third of fraudulent crimes against businesses…[and] encouraging employees to become internal whistleblowers is an essential steps towards preventing fraud."[65]

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[63] *Khazin*, 2014 WL 940703 at 5.
[64] Hesch, *supra* note 38, at 55.
[65] Sharon Quigley, *Whistleblower Tug-of-War: Corporate Attempts to Secure Internal Reporting in the Face of External Monetary Incentives Provided by the Dodd-Frank Act,* 52 SANTA CLARA L. REV. 255 (2012).

Despite initial skepticism, it appears that the Dodd-Frank Act has the means to bring these employers into the light. Not all whistleblowers are motivated by money, and this article does not address the bounty provisions of the Act. However, almost all whistleblowers value their jobs and their reputations, which places them in a position where they must choose between “telling the truth and committing career suicide.” [66]

The courts seem to have taken the intended protections of the Dodd-Frank Act very seriously, and have given liberal reading to some of the ambiguities in the law. Thanks to the pro-whistleblower trend that seems to be developing in these early federal court decisions, whistleblowers now know that they do not have to be employed by a public company but may work for a contractor or subcontractor of a public company to qualify for anti-retaliation protections. They know that they do not have to make a report directly to the SEC, but can instead report internally, and still be protected from retaliation. They also have some reason to believe that the Dodd-Frank Act may be applied retroactively in certain situations where the employee’s termination occurred before the effective date of the Act, although that issue remains unsettled.

If the federal courts continue to make decisions about the applicability of the Dodd-Frank Act with the goals of recognizing the importance of whistleblowers in combatting corporate fraud and protecting them from retaliation should they come forward and provide much needed information on suspected fraudulent activities within their company to either their employer or the SEC, we may begin to see a shift of power so that the corporate world no longer belongs exclusively to the “lions,” a world that, for the public, becomes a little less one-sided.

[66] Rosenberg and Phillips, *supra* note 44.