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WHISTLEBLOWER LITIGATION: NEW DEVELOPMENTS AND STRATEGIES

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Whistleblower Protection:
The Dodd-Frank Wall Street Reform and Consumer Protection Act's Expansion of SOX Whistleblower Protections

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Sarbanes-Oxley, 15 U.S.C. §§ 7201 et seq., protects company "whistleblowers" under 18 U.S.C. 1514A. It prohibits publicly held companies, their officers, employees, contractors, subcontractors or agents from efforts to "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" to report, assist in reporting or assist in an investigation regarding conduct which the employee "reasonably believes constitutes a violation" of the Securities Exchange Act, any rule or regulation of the SEC, or provision of Federal law relating to fraud against shareholders.

While SOX does not itself provide whistleblowers with financial incentives for reporting violations of securities laws, the Securities Exchange Act, 15 U.S.C. 78u-1(e) provides for such rewards to employees who report insider trading, and the False Claims Act, 31 U.S.C. 3729 provides rewards to employees who report fraud on the federal government.

- Since passage of SOX, the Department of Labor has consistently held that the whistleblower protections of 18 U.S.C. 1514A applicable to publicly held companies do **not** extend to employees of privately held subsidiaries of public companies.[1]

- Financial reward provisions of the SEA, while in place since 1988, have resulted in "very few payments … under the program", due to its limitation to insider trading allegations and the "broad, somewhat vague" criteria for such awards.[2]

- Although the reward provisions of FCA have resulted in substantial recoveries for persons reporting fraud claims covered by that statute[3], the FCA bounty provisions are limited to claims of fraud on the federal government.

- DOL decisions not to apply whistleblower protections to private subsidiaries of public companies have drawn criticism from some members of Congress.[4]

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[1] See Stevenson v. Neighborhood House Charter School, No. 2005-SOX-00087 (ALJ Sept. 7, 2005), and Paz v. Mary's Center for Maternal & Child Care, No. 2006-SOX-7 (ALJ Dec. 12, 2005) (SOX whistleblower protections are based solely on whether the company has a class of stock registered under Section 12 of the Exchange Act or whether it is required to make reports pursuant to the Act's Section 15(d).

[2] See "Assessment of the SEC's Bounty Program", Report No. 474, published by the SEC Office of Inspector General March 29, 2010, page 2.

[3] DOJ Press Release 11/19/09 ("Justice Department Recovers $2.4 Billion in False Claims Cases in Fiscal Year 2009; More Than $24 Billion Since 1986").

[4] See, e.g., October 6, 2010 letter of Senators Patrick Leahy and Charles Grassley, published at http://grassley.senate.gov.

- In March 2010 the SEC recommended changes to its whistleblower protection and enforcement mechanisms, including:

    - An "outreach" program to provide the general public and SEC personnel more information about its bounty program.

    - Posting to its web site a publicly available whistleblower application form.

    - Establishing policies for agency follow-up of whistleblower reports, to clarify claims in such reports, "obtain readily available supporting documentation" and to provide status reports to reporting whistleblowers.

    - Developing specific criteria for awarding bounties, including that whistleblowers may rely in part on publicly available information and still be eligible.

    - Establishing formal paper and electronic files for each received claim.[5]

- The decisions not to apply whistleblower protections of SOX and related statutes to privately held affiliates of public companies allowed those companies to structure compliance policies less rigorously than public companies, and a means to contest whistleblower claims filed with regulatory agencies.

- Privately held affiliates have not to date been exposed to the SOX related remedies for whistleblowers, such as SEA and FCA "bounty" payments.

- Publicly held companies that <u>were</u> subject to the whistleblower remedies could rely on the specificity of claims for which the remedies are available, to determine where bounties may apply.

- The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 (July 21, 2010), amends the SOX whistleblower provisions to include "any subsidiary or affiliate whose financial information is included in the consolidated financial statements" of public companies. (Section 929(a)).

- Dodd-Frank also extends the availability of bounty payments to a broader array of claims, including any claim "under the securities laws that results in monetary sanctions exceeding $1,000,000". (Section 922(a)(1)).

- The statute also provides new penalties/remedies for whistleblower retaliation claims, including possible double back-pay with interest and a separate cause of action for retaliation that does not require first filing a claim with the DOL. (Section 922(h)).

[5] See "Assessment of the SEC's Bounty Program", supra.

In-House/Outside Counsel Challenges

- Board members, senior managers and their in-house and outside counsel at privately held affiliates of public companies have not to date been required to implement policies or procedures that provide the same measure of whistleblower protection as their publicly held parents, owners or counterparts.

- To protect clients from triggering the expanded whistleblower protections/remedies that will now be applied to both public and certain privately held companies, in-house and outside counsel for those companies must:

    i. educate their Boards, senior management, compliance/ethics officers and HR personnel about the extended requirements, and

    ii. provide direction for evaluation of current company compliance, ethics and auditing policies and implementation of needed whistleblower policies or policy improvements.

Recommended Actions

1. Counsel evaluation of individual company policies to determine whether they are sufficiently rigorous to provide required protections to whistleblowers.

2. Similar review of compliance and auditing practices to assure that a company responds appropriately to reported violations.

3. If existing policies, compliance programs and auditing practices are found lacking, development of policies that assure compliance with the new requirements.

4. Development of training/education programs covering expanded whistleblower protections/remedies, to be provided to Boards of affiliate companies affected by the new requirements.

5. Develop specific resolutions for their Boards to implement the new or modified policies and procedures, where needed.

6. Training on new requirements and new or revised policies and procedures for ethics, compliance and HR personnel for implementation and communication to employees.

7. Follow-up meetings/communications with ethics and compliance personnel, to assure maintenance of appropriate investigations and follow-ups to reported claims.

8. Periodic evaluation (minimum yearly) of contacts to ethics and compliance "hotlines", 800 numbers or other sources where employees can report perceived legal and ethics violations, to identify any changes in frequency or content over time.

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Lynden Transport

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Mr. Cronin is a founding partner of the Corr Cronin law firm. Mr. Cronin was formerly co-chair of the Bogle & Gates litigation department from 1995 to 1999. Mr. Cronin is a Fellow in the American College of Trial Lawyers and has been named as one of the top business litigators in Seattle in every one of Seattle Magazine's top lawyer surveys since 2001. Mr. Cronin was one of the five named top business litigators in 2001 and 2003 and one of the four named in 2005 (his partner, Kelly Corr, was also named as a top business litigator in each survey). For 8 years in a row Mr. Cronin has been listed in the Best Lawyers in America. He has also been selected as a "Super Lawyer" on multiple occasions by Washington Law & Politics and has been named as one of the Top 100 Super Lawyers in the state.

Practice / Experience

Mr. Cronin's practice focuses on business litigation, representing both plaintiffs and defendants. He has considerable experience representing law firms, accounting firms, corporate officers and directors, and majority and minority stockholders in securities litigation, professional liability litigation, and corporate control disputes. During his career, Mr. Cronin has represented: Exxon Corp. in a large tax dispute with the State of Alaska involving a claim in excess of $1 billion; Exxon and Arco Alaska in a major dispute with Chevron, Mobil and Phillips over the respective ownership interests in the Prudhoe Bay Oil Field, the largest oil field in North America; Georgia Pacific Corporation, AT&T Wireless, Pendleton Woolen Mills, Todd Shipyards and Champion International as plaintiffs in major insurance coverage disputes; and Amazon.com and AT&T Wireless in major contract disputes.

Education / Background

J.D., University of Southern California Law School, 1975
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>Briedenbach Scholarship
>American Jurisprudence Award for Constitutional Law, 1974

University of Oregon Law School, 1972-1973
>Oregon Law Alumni Scholarship

B.A., cum laude, Brown University, 1970
Joined Bogle & Gates PLLC in 1978, and was a Member from 1983 to 1999
Associate Attorney, O'Melveny & Myers, Los Angeles, California, 1975-1978
Admitted to the Bar in California in 1975 and in Washington State in 1978