



Government Investigations/Securities Litigation/Employment ADVISORY ■

MARCH 10, 2014

Supreme Court Expands Corporate Whistleblower Protection

On March 4, 2014, the Supreme Court issued an important ruling that expanded the legal protection for corporate whistleblowers. Specifically, in *Lawson v. FMR LLC*, No. 12-3, the Court held that the whistleblower-protection provision of the Sarbanes-Oxley Act of 2002 covers private companies and contractors that work with publicly traded companies. This expansion is of particular importance to companies in the mutual fund industry. As the Court noted, most public mutual fund companies “have no employees of their own” and, instead, are managed by independent advisers and rely on private contractors for their operations.

Sarbanes-Oxley protects “whistleblowers,” providing that “[n]o [public] company...or any...contractor [or] subcontractor...of such company, may discharge, demote...[or] discriminate against an employee in the terms and conditions of employment because of [whistleblowing activity].” 18 U.S.C. § 1514A(a). The plaintiffs in *Lawson* were former employees of a private company that contracted with publicly traded mutual funds. As private contractors, the plaintiffs handled certain day-to-day operations for the mutual funds. In this capacity, one of the plaintiffs raised concerns about her belief that the cost-accounting methodologies being used overstated operating expenses, while the other plaintiff raised concerns about inaccuracies in a draft SEC registration statement about certain funds. The plaintiffs sued FMR under Section 1514A alleging that FMR had retaliated against them for these reports. FMR moved to dismiss the complaint on the grounds that Section 1514A only protects employees of public companies. FMR insisted that the provision should be read to prevent a contractor from taking adverse action against employees of a public company for which it performed services but not to prohibit a contractor from taking action against its own employees. The district court denied FMR’s motion to dismiss, but the First Circuit reversed, agreeing with FMR that only employees of public companies are protected by Sarbanes-Oxley.

In reversing the First Circuit’s decision, the Supreme Court held that the ordinary meaning of the statutory text prohibited adverse action against “the contractor’s own employee” for whistleblowing activity. The Court noted that FMR’s interpretation would require that the additional words “of a public company” be read into the statute, which was explicitly done elsewhere in the statute, but not in Section 1514A(a). The Court also held that its interpretation was confirmed by considering the provision as a whole. The Court explained that the prohibited retaliatory measures set forth in Section 1514A(a) are actions that an employer typically takes against its own employees—not actions that a contractor would be expected to take against employees of a public company for which it was working. The Supreme

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Court held that FMR's suggestion that the provision should be read to prohibit only a contractor from retaliating against a client's employees would "shrink to insignificance" Sarbanes-Oxley's ban on retaliation by contractors.

The Court found additional support for the extension of the whistleblower protection in its analysis of the background and purpose of the Sarbanes-Oxley Act, including Congress's installation of whistleblower protection in the statute "as one means to ward off another Enron debacle." The Court reviewed the legislative history and stated that Congress had considered the role of outside contractors in facilitating fraud when it enacted Sarbanes-Oxley. The Supreme Court, therefore, held that "one can safely conclude that Congress enacted § 1514A aiming to encourage whistleblowing by contractor employees who suspect fraud involving the public companies with whom they work."

The Court addressed the mutual fund industry specifically, holding that its "reading of § 1514A avoids insulating the entire mutual fund industry from § 1514A," as FMR's narrower statutory construction would have done. The Court found that "[v]irtually all mutual funds are structured so that they have no employees of their own; they are managed, instead, by independent investment advisers." The Court announced that these advisers are prohibited—by the ruling—from retaliating against their own employees for whistleblowing activity, thus protecting the insiders who are the witnesses to any fraud. In so holding, the Court also rejected the First Circuit's finding that the exclusion of the mutual fund industry from Section 1514A was acceptable because mutual funds and their investment advisers are regulated by other statutes and other provisions of Sarbanes-Oxley. The Court explained that none of these other provisions or statutes included whistleblower protection for employees of contractors working for mutual funds.

Justice Ginsberg delivered the majority opinion, in which Chief Justice Roberts and Justices Breyer and Kagan joined. Justices Scalia, joined by Justice Thomas, filed an opinion concurring in part and concurring in the judgment. Justice Sotomayor filed a dissenting opinion, in which Justices Kennedy and Alito joined. The dissent expressed concerns that the decision gave Sarbanes-Oxley a "stunning reach," and that it could permit cases by personal employees (such as babysitters or gardeners) against employees of public companies. The majority dismissed these concerns, noting that the Department of Labor has interpreted the law to cover contractor employees for almost a decade, without any opening of litigation floodgates. It also held that if any such flood of unrelated litigation occurred, Congress could easily fix the problem by amending Section 1514A to explicitly remove personal employees of public company employees from the provision's reach.

Companies that now fall within the expanded employee protection should evaluate their policies and consult with counsel to determine if existing policies are sufficient to address the concerns and claims of potential whistleblowers.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Government Investigations Attorneys

Michael L. Brown Group Leader, Government Investigations 404.881.7589 mike.brown@alston.com	William H. Jordan 404.881.7850 bill.jordan@alston.com
Craig Carpenito Group Leader, Government Investigations 212.210.9582 craig.carpenito@alston.com	Edward T. Kang 202.239.3728 edward.kang@alston.com
George B. Abney 404.881.7980 george.abney@alston.com	Wade P. Miller 404.881.4971 wade.miller@alston.com
Jeffrey A. Belkin 404.881.7388 jeff.belkin@alston.com	William R. Mitchelson 404.881.7661 mitch.mitchelson@alston.com
Mark T. Calloway 704.444.1089 mark.calloway@alston.com	Kimberly K. Peretti 202.239.3720 kimberly.peretti@alston.com
Marianne R. Casserly 202.239.3379 marianne.casserly@alston.com	T.C. Spencer Pryor 404.881.7978 spence.pryor@alston.com
Thomas E. Crocker 202.239.3318 thomas.crocker@alston.com	Brian R. Stimson 404.881.4972 brian.stimson@alston.com
Katherine E. Hertel 213.576.2600 kate.hertel@alston.com	Jason M. Waite 202.239.3455 jason.waite@alston.com
	Kyle G.A. Wallace 404.881.7808 kyle.wallace@alston.com

Securities Litigation Attorneys

Jessica Perry Corley Group Leader, Securities Litigation 404.881.7374 jessica.corley@alston.com	Susan E. Hurd 404.881.7572 susan.hurd@alston.com
Lisa R. Bugni 404.881.4959 lisa.bugni@alston.com	John A. Jordak, Jr. 404.881.7868 john.jordak@alston.com
Gidon M. Caine 650.838.2060 gidon.caine@alston.com	John L. Latham 404.881.7915 john.latham@alston.com
Steven M. Collins 404.881.7149 steve.collins@alston.com	Robert R. Long 404.881.4760 robert.long@alston.com
Charles W. Cox 213.576.1048 charles.cox@alston.com	John D. Roesser 212.210.9479 john.roesser@alston.com
Thomas E. Crocker 202.239.3318 thomas.crocker@alston.com	Theodore J. Sawicki 404.881.7639 tod.sawicki@alston.com
Todd R. David 404.881.7357 todd.david@alston.com	Brandon R. Williams 404.881.4942 brandon.williams@alston.com
Mary C. Gill 404.881.7276 mary.gill@alston.com	Dawn M. Wilson 212.210.9451 dawn.wilson@alston.com

Labor & Employment Attorneys

Lisa H. Cassilly 404.881.7945 lisa.cassilly@alston.com
Brett E. Coburn 404.881.4990 brett.coburn@alston.com
Robert P. Riordan 404.881.7682 bob.riordan@alston.com

ALSTON & BIRD LLP

WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
 BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
 CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
 DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
 LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213-576-1100
 NEW YORK: 90 Park Avenue ■ 12th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
 RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260
 SILICON VALLEY: 275 Middlefield Road ■ Suite 150 ■ Menlo Park, California, USA, 94025-4004 ■ 650-838-2000 ■ Fax: 650.838.2001
 WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333