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Second Circuit Creates Circuit Split Over Scope of Dodd-Frank Act's Anti-Retaliation Protection

By [Kenneth W. Gage](#), [Mark D. Pollack](#), [Kelsey G. Van Wart](#)

In a 2-1 decision last week, the Second Circuit Court of Appeals created a circuit split over the scope of protection offered by the anti-retaliation protections contained in the Dodd-Frank whistleblower provision, Section 21F of the Securities Exchange Act of 1934. Disagreeing with the Fifth Circuit, the only other federal court of appeals that has addressed the issue, the Second Circuit in *Berman v. Neo@Ogilvy LLC*, held that the anti-retaliation protections in Section 21F extend to individuals who only report a potential violation of the securities laws internally to their employers. This increases the likelihood that the U.S. Supreme Court will need to weigh in on another statutory construction question involving the Dodd-Frank Act.

Background

As part of the Dodd-Frank Act of 2010, Congress added Section 21F to the Securities Exchange Act of 1934, establishing a whistleblower bounty program for certain individuals who provide information to the SEC, defined as “whistleblowers,” and creating a private cause of action for violations of a new anti-retaliation provision.¹ The federal courts have reached different conclusions over a number of issues involving Section 21F. Among them is whether the Dodd-Frank Act’s anti-retaliation provision protects only those individuals who provide information to the SEC relating to possible fraud under the bounty program or also extends to individuals who merely report such information internally to their employers, similar to the Sarbanes-Oxley Act of 2002.

Three provisions of Section 21F are relevant to this question.

- First, the statute defines a “whistleblower” as “any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.”²
- Second, the statute defines the “protected activity” for purposes of the anti-retaliation provision; it provides that employers may not take adverse employment actions against “a whistleblower because of any lawful act done by the whistleblower”—(i) in providing information to the SEC in accordance with that section; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action by the SEC based upon or related to such information; or (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002, the Securities Exchange Act of 1934, or any other law, rule, or regulation subject to the SEC’s jurisdiction.³ Notably, the first two of these



forms of protected activity involve providing information to the Commission, and the last may involve disclosures only made internally to the individual's employer.

- Third, Section 21F grants rulemaking authority to the SEC "to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section."⁴

The SEC's final rule interpreting Section 21F was issued in 2011. It contains two definitions of the term "whistleblower": one, for purposes of the bounty program, which requires that the individual provide information to the Commission, and another, for purposes of the anti-retaliation protection, which does not require that the individual provide information to the Commission. The latter encompasses an individual who engages in protected activity defined in Section 21F, regardless of whether she or he provided information to the Commission.⁵ The Commission has aggressively defended the third rule by filing amicus briefs in cases across the country, including in *Berman*, and on August 4, 2015 it published an interpretation further pressing its views on the issue.

Federal district courts across the country have been divided over the issue, with a majority of them to date concluding that the SEC's interpretation of Section 21F in the regulation is entitled to deference.⁶ A number of them, however, including the district court in *Berman* have concluded that the statute is unambiguous and the anti-retaliation protections are only afforded to individuals who fit the statutory definition of whistleblower and provide information to the Commission.⁷ Until the Second Circuit's ruling, the Fifth Circuit Court of Appeals was the only appellate court to address the question, in *Asadi v. G.E. Energy (USA) L.L.C.*, rejecting the SEC's interpretation.⁸

The District Court's Decision in *Berman*

The plaintiff in *Berman*, a former Finance Director of Neo@Ogilvy North America, alleged that he reported a number of transactions to his employer that he believed to be violations of various securities laws, and that he was fired in retaliation for making his report in violation of Section 21F. The plaintiff did not report any of his concerns to the SEC prior to his discharge. The defendants moved to dismiss the plaintiff's claims, arguing, among other things, that the plaintiff was not a whistleblower as defined by the Dodd-Frank Act at the time of the alleged retaliation because he had not reported any violations to the SEC.

District Judge Gregory H. Woods agreed with the Fifth Circuit's analysis in *Asadi*, which Judge Woods found "rest[ed] on fundamental principles of statutory construction," and "identified a harmonious interpretation of the statute that eliminates the purported contradiction in the Act that forms the basis of other district courts' determination that the statute is ambiguous, despite the plain language of the definition of the term 'whistleblower.'"⁹ He therefore granted the defendant's motion to dismiss. Last week, the Second Circuit disagreed with Judge Woods over a vigorous dissent by one member of the panel.

The Second Circuit's Decision

The Second Circuit began, as all other courts have, by considering whether the statute is ambiguous. "We do not doubt," the majority conceded, "that 'provide ... to the Commission' means 'provide ... to the Commission,'" referring to the whistleblower definition in Section 21F.¹⁰ Curiously, however, the court said that whether the definition means what it says is not the issue. Rather, the court explained that the issue is whether the definition "applies to another provision of the statute, or, more precisely,



whether the answer to that question is sufficiently unclear to warrant *Chevron* deference to the Commission's regulation."¹¹

The court ultimately concluded that Section 21F is ambiguous but struggled to get there. The majority acknowledged that there was no direct conflict between the whistleblower definition, which expressly requires a report to the Commission, and the absence of such a requirement in the broad third category of protected activity, which covers internal reporting.¹² "[A]n absolute contradiction," the majority said, can be avoided because employees who make simultaneous reports to both the employer and the SEC would be protected by the anti-retaliation provision's third category if the employee suffered retaliation as a result of the internal report.¹³ That such an interpretation of Section 21F would provide anti-retaliation protection in "the rare example of simultaneous (or nearly simultaneous) reporting of wrongdoing," in the court's view, was insufficient to relieve what it considered to be tension between the two provisions in the statute.¹⁴ The court was also troubled by the fact that applying the whistleblower definition as written would lead to a situation in which auditors and attorneys, both of whom are required by law to first raise their concerns internally, would frequently be deprived of the anti-retaliation protections of Section 21F.

All of this led the court to question whether Congress intended to include the broader category of protected activity "only to achieve such a limited result." So the court then turned to the legislative history behind Section 21F for guidance, only to find that sub-section (iii) of the anti-retaliation provision was added to the Dodd-Frank Act in conference, after earlier versions of the bill were passed by the House and the Senate and that there is no mention of the addition of sub-section (iii) in any legislative materials. Nonetheless, the majority explained, "we think it doubtful that the conferees who accepted the last-minute insertion of subdivision (iii) would have expected it to have the extremely limited scope" given to it by the lower court's ruling.

Finding no answers in the legislative history, the majority returned to where it began, by asking "whether the definition should apply to a late-added subdivision of a subsection that uses the defined term."¹⁵ Having concluded that Section 21F is "as a whole sufficiently ambiguous," the majority held that the SEC's Rule 21F was entitled to deference. The court relied heavily on the U.S. Supreme Court's recent decision in *Burwell v. King*, where the Court held that the phrase "established by a state" in the Affordable Care Act allows for income tax subsidies to individuals who purchased insurance on federal exchanges.

In his dissent, Judge Jacobs acknowledged that he and his colleagues in the judiciary "[n]o doubt ... could improve many federal statutes by tightening them or loosening them, or recasting or rewriting them."¹⁶ There are many federal statutes with "extremely limited effect," he pointed out, but it is not the role of the judiciary, he argued, to make these policy decisions when the statute so clearly defines the term at issue. Applying the statute as written, Judge Jacobs explained, does not leave those who report securities violations only to their employer without protection; they remain protected by Sarbanes-Oxley, albeit with a shorter statute of limitations and somewhat more limited monetary remedies. "The only palpable danger lurking here," he argued, "is that bureaucrats and federal judges assume and exercise power to redraft a statute to give it a more respectable reach."

Practical Implications

The most practical result from *Berman* is this: potential plaintiffs in the Second Circuit who only have complained internally to their employer about potential securities violations will now have the benefit of Dodd-Frank's longer statute of limitations to assert retaliation claims and will be able to seek the



additional remedy of double back-pay. These are benefits they would not have under Sarbanes Oxley. This is likely to make retaliation claims, already enjoying great popularity among employees and former employees who sue their employers, even more attractive to plaintiff and counsel alike. The decision, however, does not change how employers should respond to internal whistleblowers. Employers should continue to vigilantly investigate complaints to determine whether the securities laws have been violated and take steps to prevent adverse actions from befalling any whistleblower who reports or complains of such violations. More broadly, however, this dispute over the interpretation of Section 21F presents an interesting question of how the Supreme Court's decision in *Burwell* may have impacted the approach that the lower federal courts will take in addressing what may to some appear to be curious or even dubious policy choices reflected in the plain language of statutes. Given the patent circuit split over the interpretation of the statutory provision, and the important policy implications associated with the decision to expand or limit the statute's reach, we suspect that the Supreme Court is likely to soon address the issue and opine on whether the statute is indeed sufficiently ambiguous so as to warrant *Chevron* deference to the Commission's interpretation.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Chicago

Mark D. Pollack
1.312.499.6050

markpollack@paulhastings.com

Maria E. Douvas
1.212.318.6072

mariadouvas@paulhastings.com

Kelsey G. Van Wart
1.212.318.6396

kelseyvanwart@paulhastings.com

Los Angeles

Elena R. Baca
1.213.683.6306

elenabaca@paulhastings.com

Kenneth W. Gage
1.212.318.6046

kennethgage@paulhastings.com

Washington D.C.

Tara K. Giunta
1.202.551.1791

taragiunta@paulhastings.com

New York

Kenneth M. Breen
1.212.318.6344

kennethbreen@paulhastings.com

Stephen P. Sonnenberg
1.212.318.6414

stephensonnenberg@paulhastings.com

Carson H. Sullivan
1.202.551.1809

carsonsullivan@paulhastings.com

¹ 15 U.S.C. § 78u-6.

² 15 U.S.C. § 78u-6(a)(6) (emphasis added).

³ 15 U.S.C. § 78u-6(h)(1)(A)(i)-(iii) (emphasis added).

⁴ 15 U.S.C. § 78u-6(j).

⁵ 17 C.F.R. 240.21F-2.

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- ⁶ See *Dressler v. Lime Energy*, Civ. No. 3:14-cv-07060 (FLW)(DEA), 2015 WL 4773326 (D.N.J. Aug. 13, 2015); *Somers v. Digital Realty Trust, Inc.*, No. C-14-5180 EMC, 2015 WL 4483955 (N.D. Cal. July 22, 2015); *Connolly v. Remkes*, No. 5:14-CV-01344-LHK, 2014 WL 5473144 (N.D. Cal. Oct. 28, 2014); *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719 (D. Neb. 2014); *Yang v. Navigators Grp.*, No. 13 Civ. 2073(NSR), 2014 WL 1870802 (S.D.N.Y. May 8, 2014); *Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149 (SDW)(MCA), 2014 WL 940703 (D.N.J. Mar. 11, 2014); *Rosenblum v. Thomson Reuters (Markets) LLC*, 984 F. Supp. 2d 141 (S.D.N.Y. 2013); *Ellington v. Giacomakis*, 977 F. Supp. 2d 42, 44 (D. Mass. 2013); *Murray v. UBS Securities, LLC*, No. 12 Civ. 5814 (JMF), 2013 WL 2190084 (S.D.N.Y. May 21, 2013); *Genberg v. Porter*, No. 11 Civ. 2424 (WYD)(MEH), 2013 WL 1222056 (D. Colo. Mar. 25, 2013); *Kramer v. Trans-Lux Corp.*, No. 3:11 Civ. 1424, 2012 WL 4444820 (D. Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986 (M.D. Tenn. 2012); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202, 2011 WL 1672066 (S.D.N.Y. May 4, 2011).
- ⁷ See *Wiggins v. ING U.S., Inc.*, No. 3:14-CV-1089 JCH, 2015 WL 3771646 (D. Conn. June 17, 2015); *Lutzeier v. Citigroup Inc.*, 305 F.R.D. 107 (E.D. Mo. 2015); *Berman v. Neo@Ogilvy LLC (Berman I)*, No. 1:14-cv-523-GHW-SN, 2014 WL 6860583 (S.D.N.Y. Dec. 4, 2014); *Englehart v. Career Educ. Corp.*, No. 8:14-CV-444-T-33EAJ, 2014 WL 2619501 (M.D. Fla. May 12, 2014); *Verfeurth v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640 (E.D. Wisc. 2014); *Wagner v. Bank of Am. Corp.*, No. 12-CV-00381-RBJ, 2013 WL 3786643 (D. Colo. July 19, 2013); *Bank v. Apple, Inc.*, 20 F. Supp. 3d 749 (N.D. Cal. 2013).
- ⁸ See *Asadi v. G.E. Energy (USA) L.L.C.*, 720 F.3d 620 (5th Cir. 2013) (holding that the SEC's interpretation was not entitled to deference because the statute is unambiguous; concluding that Congress had not used the word "individual" or "employee" in the anti-retaliation provision, but instead chose to use the defined term "whistleblower.").
- ⁹ *Berman I*, 2014 WL 6860583, at *4.
- ¹⁰ *Berman v. Neo@Ogilvy LLC (Berman II)*, No. 14-4626, -- F.3d --, 2015 WL 5254916, at *5 n.4 (2d Cir. Sept. 10, 2015).
- ¹¹ *Id.* at *5.
- ¹² *Id.*
- ¹³ *Id.*
- ¹⁴ *Id.* at *7.
- ¹⁵ *Id.* at *8.
- ¹⁶ *Id.* at *10 (Jacobs, C.J., dissenting).