IX. Whistleblower Protection Under Dodd-Frank and Sarbanes-Oxley: Interpretative Developments from 2014

A. Introduction

Legislation establishing awards for the reporting of fraud is no recent phenomenon. With history in English "qui tam" statutes, Congress passed the False Claims Act in 1863 to establish a system for encouraging fraud reporting, specifically frauds against the United States government.[1] Furthermore, legislation establishing whistleblower protection is well established, with the Whistleblower Protection Act of 1989 seeking to protect federal employees from "reprisals."[2] Yet, with the 2002 passage of the Sarbanes-Oxley Act[3] ("SOX") and the 2011 passage of the Dodd-Frank Act[4] ("Dodd-Frank"), whistleblower awards and protection have expanded to private employees who aid the Securities and Exchange Commission ("SEC") in uncovering and prosecuting fraud in publicly traded companies.[5] In the past year, both Acts have received considerable judicial and administrative attention.[6] The SEC instituted its first enforcement action of the anti-retaliation provision of Dodd-Frank and actively advocated for its interpretation of the scope of "whistleblower" protection through amicus curiae briefs in five cases.[7] The Supreme Court expanded SOX

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[1] CHARLES DOYLE, CONG. RESEARCH SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 2-5 (2009); *see* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (codified as amended in scattered sections of 31 U.S.C.).

[2] Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 20, 103 Stat. 16 (1989).

[3] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 18 U.S.C. § 1514A(a) (2012)).

[4] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376, 1841-49 (codified at 15 U.S.C. § 78u-6 (2012)).

[5] 15 U.S.C. § 78u-6; 18 U.S.C. § 1514A(a).

[6] Jason Zuckerman, *A Year for Whistleblower Rewards and Protections*, LAW360 (Dec. 17, 2014, 10:40 AM), http://www.law360.com/articles/602321.

[7] Paradigm Capital Mgmt., Inc., Exchange Act Release No. 72393, Investment Advisers Act Release No. 3857, 2014 WL 2704311, at *1 (June 16, 2014); U.S. SEC. & EXCH. COMM'N, 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 18-19 & n.33 (2014), *available at* http://www.sec.gov/about/offices/owb/annual-report-2014.pdf, *archived at* http://perma.cc/Q9FG-VQ8E; *e.g.*, Brief for the Sec. & Exch. Comm'n as

whistleblower protection to employees of contractors for publicly traded companies.[8] The Third Circuit grappled with Dodd-Frank's anti-arbitration provision and how it applies to claims under various whistleblower programs.[9] Additionally, the district courts split on their interpretation of "whistleblower" in Dodd-Frank between deferring to the SEC and adopting the reasoning of the Fifth Circuit holding in *Asadi v. G.E. Energy*.[10]

This article discusses these recent developments and how they affect the climate of whistleblower claims and litigation moving forward. Part B sets forth the relevant statutory provisions referenced in the current case law, while Part C discusses the holdings in recent cases. Part D analyzes the effects of these recent holdings when read together, and Part E proposes future issues that might arise in whistleblower litigation. Finally, Part F offers conclusions based on these recent developments in whistleblower litigation and rulemaking.

B. Dodd-Frank, Sarbanes-Oxley, and the SEC Rule Clarifying the Scope of the Dodd-Frank "Whistleblower" Definition

Analysis of the various court interpretations requires a brief identification and discussion of the key provisions of Dodd-Frank, SOX, and the SEC's proposed interpretation of Dodd-Frank.[11] SOX has a wide breadth of protection for whistleblowing employees.[12] Under subsection (a) of 18 U.S.C. § 1514A entitled "Whistleblower protection for employees of publicly traded companies," Congress stated that:

> No company . . . or any officer, employee, contractor, subcontractor, or agent of such company . . . may discharge, demote, suspend, threaten, harass, or in any

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Amicus Curiae Supporting Appellant, Safarian v. American DG Energy Inc., No. 14-2734 (3d Cir. Dec. 11, 2014) [hereinafter Safarian Brief].

[8] Lawson v. FMR LLC, 134 S.Ct. 1158, 1176 (2014).

[9] Khazin v. TD Ameritrade Holding Corp., 773 F.3d 488, 490 (3d Cir. 2014).

[10] Berman v. Neo@Ogilvy LLC, No. 1:14-CV-523-GHW-SN, 2014 WL 6860583, at *1 (S.D.N.Y. Dec. 5, 2014).

[11] 15 U.S.C § 78u-6 (2012); 18 U.S.C. § 1514A(a) (2012); Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-2 (2014).

[12] *See generally* 18 U.S.C. § 1514A (providing protection and remedies for various types of whistleblowers).

> other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—(1) to provide information . . . which the employee reasonably believes constitutes a violation . . . to . . . (A) a Federal regulatory or law enforcement agency . . . or . . . (C) a person with supervisory authority over the employee.[13]

This protection is incorporated into Dodd-Frank through the § 78u-6(h)(1)(A)(iii) inclusion of disclosures protected under SOX.[14]

Section 922 of the Dodd-Frank Act, as it amends the Securities Exchange Act of 1934,[15] implemented a new securities-focused awards program for whistleblowers and improved the retaliation protection for these whistleblowers through simplifying the ability for individuals to bring claims in federal court.[16] Major litigation attention is currently focused on the definition of "whistleblower" and the scope of protection provided in different subsections of Dodd-Frank.[17] Under 15 U.S.C. § 78u-6(a)(6), a "whistleblower" is "any individual who provides, or two 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."[18] The scope of protection for whistleblowers in 15 U.S.C. § 78u-6(h) specifically prohibits retaliation:

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

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[13] 18 U.S.C. § 1514A(a).
[14] 15 U.S.C. § 78u-6(h)(1)(A)(iii).
[15] Securities and Exchange Act of 1934, 15 U.S.C. § 78a (2012).
[16] 15 U.S.C § 78u-6; Pia Adolphsen, *5 Insights From the SEC Whistleblower Program Annual Report That Will Impact Your 2015*, JD SUPRA (Dec. 19, 2014), http://www.jdsupra.com/legalnews/5-insights-from-the-sec-whistleblower-pr-05516, *archived at* http://perma.cc/CLP7-NKEL.
[17] U.S. SEC. & EXCH. COMM'N, *supra* note 7, at 8; *e.g.*, Berman v. Neo@Ogilvy LLC, No. 1:14-CV-523-GHW-SN, 2014 WL 6860583, at *1 (S.D.N.Y. Dec. 5, 2014).
[18] 15 U.S.C. § 78u-6(a)(6) (2012).

> making disclosure that are required or protected under the Sarbanes-Oxley Act of 2002 . . . , the Securities Exchange Act of 1934 . . . , section 1513(e) of title 18 . . . , or any other law, rule, or regulation subject to the jurisdiction of the Commission.[19]

Shortly after Dodd-Frank passed, the SEC used its interpretative authority[20] to issue a rule explaining the relationship between these subsections.[21] For protection from retaliation, whistleblowers are those who "possess a reasonable belief that the information . . . relates to a possible securities law violation" and "provide[] that information in a manner described in . . . 15 U.S.C. 78u-6(h)(1)(A)," regardless of whether the whistleblower's tip satisfies the award requirements.[22] The SEC further clarified these provisions in the adopting release for the rule, stating that whistleblower protection "includes individuals who report to persons or governmental authorities *other than the Commission*."[23] Before turning to the scope of protection in SOX, Dodd-Frank directly amends SOX by adding that "[n]o predispute arbitration agreement shall be valid or enforceable" in claims against employers for retaliation.[24]

C. Recent Judicial and Administrative Cases Interpreting and Enforcing Dodd-Frank and SOX

Four major developments in whistleblower litigation have taken place this year: (1) the continued split on defining "whistleblower" for purposes of anti-retaliation protection in the wake of *Asadi v. G.E. Energy*;[25] (2) the SEC's first anti-retaliation enforcement case;[26]

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[19] *Id*. at § 78u-6(h)(1)(A).
[20] *Id*. at § 78u-6(j).
[21] *See* Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-2 (2014).
[22] *Id*.
[23] Securities Whistleblower Incentives and Protections, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34304 (June 13, 2011).
[24] Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(e)(2) (2012) (amended by 15 U.S.C. § 78u-6 (2012)).
[25] Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620, 623 (5th Cir. 2013); Berman v. Neo@Ogilvy LLC, No. 1:14-CV-523-GHW-SN, 2014 WL 6860583, at *4 (S.D.N.Y. Dec. 5, 2014); Safarian v. American DG Energy Inc., No. 10-6082, 2014 WL 1744989, at *1 (D.N.J. Apr. 29, 2014).

(3) the restriction of the anti-arbitration provision to only SOX claims;[27] and (4) the Supreme Court's expansion of SOX protection to "employees of contractors and subcontractors."[28]

In *Asadi*, the Fifth Circuit held that whistleblower protection was restricted only to those individuals who report information directly to the SEC.[29] In reaching this holding, the court explained that the whistleblower definition in 15 U.S.C. § 78u-6(a)(6) "expressly and unambiguously requires that an individual provide information to the SEC," and that this definition can be reconciled with SOX's broader protection of individuals who report internally.[30] Although prior to and following *Asadi* the Southern District of New York deferred to the SEC's interpretation—that employees who report internally are protected as whistleblowers—Judge Woods has split the court by adopting the *Asadi* holding in *Berman v. Neo@Ogilvy*.[31] In *Berman*, Judge Woods rejected the notion of creating a "narrow exception" for internal reporters or deferring to the SEC.[32] He based this decision on the straightforward language of Dodd-Frank that whistleblowers are

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[26] Paradigm Capital Mgmt., Inc., Exchange Act Release No. 72393, Investment Advisers Act Release No. 3857, 2014 WL 2704311, at *1 (June 16, 2014); U.S. SEC. & EXCH. COMM'N, *supra* note 7, at 8.

[27] Khazin v. TD Ameritrade Holding Corp., 773 F.3d 488, 490 (3d Cir. 2014).

[28] Lawson v. FMR LLC, 134 S.Ct. 1158, 1176 (2014).

[29] *Asadi*, 720 F.3d at 623.

[30] *Id*. at 627-28. The Fifth Circuit uses an illustrative example of an employee reporting to both their employer and the SEC before being fired by the CEO without knowledge the employee had already reported the violation to the SEC. It reasons that the employee falls under the whistleblower definition for having reported "to the Commission" while also receiving anti-retaliation protection under Dodd-Frank for falling within SOX protection. It appears to be a convolutedly narrow scenario which fails to realize that the employee is already covered under Dodd-Frank anti-retaliation provision independently of SOX. For further discussion of *Asadi* and case law prior to 2014, see Thomas S. Markey, Development Article, *"Whistleblower" Redefined: Implications of the Recent Interpretative Split on the Dodd-Frank Whistleblower Anti-Retaliation Provision*, 33 REV. BANKING & FIN. L. 441 (2014).

[31] No. 1:14-CV-523-GHW-SN, 2014 WL 6860583, at *4 (S.D.N.Y. Dec. 5, 2014) (dismissing the plaintiffs' whistleblower retaliation suit); Michael Filoromo III & David Marshall, *SDNY Widens Split on Dodd-Frank Whistle-blower Protection*, LAW360 (Dec. 18, 2014, 12:01 PM), http://www.law360.com/articles/602937.

[32] *Berman*, 2014 WL 6860583, at *3-*4.

those reporting "to the Commission."[33] Furthermore, Judge Woods highlighted that "grant[ing] an individual a private right of action . . . arising from retaliation without requiring that individual to make contact with a federal agency first" is the "exception, not the rule."[34]

Nearby in the Third Circuit, this same battle between the *Asadi* holding and the SEC interpretation is playing out in *Safarian v. American DG Energy*.[35] Despite the U.S. District Court for the District of New Jersey choosing not to weigh in since the disclosure was not properly under the coverage of SOX or Dodd-Frank anti-whistleblower provisions, the case is on appeal to the Third Circuit and the SEC has submitted an amicus curiae brief to explain and persuade the court that the SEC rule including internal reporters is sound.[36] Depending on the outcome in the Third Circuit, this case might be ripe for review by the Supreme Court to ultimately decide the interpretation of this statute.[37]

Besides promulgating interpretive rules and submitting amicus curiae briefs, the SEC recently undertook its first administrative enforcement action against Paradigm Capital Management for retaliation against a whistleblower.[38] The action settled prior to administrative adjudication, with Paradigm admitting liability for fraud and retaliation, paying roughly $2.2 million to compensate investors for administrative fees from the fraud, and hiring an independent compliance consultant to prevent future fraud.[39] Since this was an enforcement action, there was no provision regarding private damages to the whistleblower, a claim which the whistleblower voluntarily consented to dismissal in December 2012.[40]

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[33] *Id.* at *4.
[34] *Id.* at *4-*5.
[35] Safarian v. American DG Energy Inc., No. 10-6082, 2014 WL 1744989, at *4 (D.N.J. Apr. 29, 2014).
[36] *Id.*; Safarian Brief, *supra* note 7, at 2.
[37] Pamela L. Johnston et al., *A Review of Recent Whistleblower Developments*, FOLEY & LARDNER LLP (Jan. 5, 2015), http://www.foley.com/a-review-of-recent-whistleblower-developments-01-05-2015, *archived at* http://perma.cc/A8FR-5WSA.
[38] Paradigm Capital Mgmt., Inc., Exchange Act Release No. 72393, Investment Advisers Act Release No. 3857, 2014 WL 2704311, at *1 (June 16, 2014).
[39] *Id.* at *1-*9.
[40] Notice of Voluntary Dismissal, Nordgaard v. King Weir, No. 12 Civ. 6843 (DLC) (S.D.N.Y. Dec. 4, 2012).

Apart from its consideration of the *Berman* appeal, the Third Circuit has recently interpreted a separate whistleblower provision, the anti-arbitration provision of Dodd-Frank, in *Khazin v. TD Ameritrade*.[41] Under 18 U.S.C. § 1514A, as amended by section 922 of Dodd-Frank, the anti-arbitration provision invalidates any "predispute arbitration agreement" an employee has signed with his employer "if the agreement requires arbitration of a dispute arising under this section."[42] On appeal from the U.S. District Court for the District of New Jersey's decision that the provision did not apply retroactively to agreements signed before Dodd-Frank's enactment, the Third Circuit went further to establish that the anti-arbitration provision did not apply at all to anti-retaliation claims under Dodd-Frank.[43] The Third Circuit held that the provision was only designed to amend SOX whistleblower claims under 18 U.S.C. § 1514A,[44] given the restrictive language of "arising under this section" and the notion that Congress made the "omission . . . deliberate[ly]" in not appending the Dodd-Frank section as well.[45] Therefore, under this ruling, only claims brought under the SOX's cause of action in 18 U.S.C. § 1514A are covered by the anti-arbitration provision.[46] Claims brought under Dodd-Frank's cause of action in 15 U.S.C. § 78u-6(h), despite its inclusion of disclosures protected by SOX, are not covered by the anti-arbitration provision.[47]

A final notable development in whistleblower protection came from the Supreme Court in March of 2014.[48] In *Lawson v. FMR*, the Court confronted the issue of whether whistleblower protection extended to employees of private contractors and subcontractors who report violations by a separate publicly traded company.[49] Despite the dissent noting the provision was entitled "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud" and

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[41] 773 F.3d 488 (3d Cir. 2014).
[42] 18 U.S.C. § 1514A(e)(2) (2012).
[43] Khazin v. TD Ameritrade Holding Corp., 773 F.3d 488, 490-91 (3d Cir. 2014) (quoting Oss Nokalva, Inc. v. European Space Agency, 617 F.3d 756, 761 (3d Cir. 2010)).
[44] 18 U.S.C. § 1514A(e)(2).
[45] *Khazin*, 773 F.3d at 492-93.
[46] Kimberly Kemper, *A Dodd-Frank Claim Was Not Exempt From Arbitration*, 32 No. 2 EMP. ALERT NL 5 (2014).
[47] *Id*.
[48] Lawson v. FMR LLC, 134 S.Ct. 1158, 1176 (2014).
[49] *Id*. at 1161.

therefore signals intent only to cover those employees,[50] the Court reasoned that the ordinary meaning of the statute is to include employees of contractors in whistleblower protection.[51] Justice Ginsburg, for the majority, pointed to the fact that Congress could have stated "an employee of [a] publicly traded company" if it intended for narrow coverage.[52]

Although a minor argument in *Lawson*, the Court also briefly addressed the employer FMR's urging that Dodd-Frank whistleblower protection provision covers employees of both public and private companies, and therefore a broad reading of SOX is redundant to the expansion of coverage in Dodd-Frank.[53] The Court responded, however, that in order to justify the coverage of contractors, FMR was "overstat[ing] Dodd-Frank's coverage."[54] Rather, Congress intended SOX to cover employees providing information to supervisors while Dodd-Frank "focuses primarily on reporting to federal authorities."[55] Although this justification was intended to distinguish SOX and Dodd-Frank for the purpose of showing why inclusion of contractors was necessary, it inadvertently reveals a judicial impression that Dodd-Frank reporting may be restricted to SEC reporting only.[56]

D. The Implications of *Berman, Safarian, Paradigm, Khazin,* and *Lawson*

2014 was a milestone year for whistleblower programs, with awards under Dodd-Frank totaling more than all prior years combined and total tips rising over twenty percent from just two years prior.[57] Yet, the ability for whistleblower protection to remain broad in safeguarding these many types of whistleblower employees, including those reporting internally, is in question.[58] As discussed in Part C, the

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[50] *Id*. at 1179 (Sotomayor, J., dissenting).
[51] *Id*. at 1165-66 (majority opinion).
[52] *Id*. at 1165.
[53] *Id*. at 1174.
[54] *Id*. at 1175.
[55] *Id*.
[56] *See id*.
[57] U.S. SEC. & EXCH. COMM'N, *supra* note 7, at 1, 20.
[58] Erika Kelton, *The War on Dodd-Frank Whistleblowers—How Wall Street Gags, Intimidates and Fights the Fraud Fighters*, FORBES (Jan. 5, 2015, 4:50 PM), http://onforb.es/1KfvBVt, *archived at* http://perma.cc/F5LR-DNU6.

recent decisions and administrative actions signal both broadening and narrowing of the protections available to whistleblowers.[59]

Given its status as a Supreme Court ruling, *Lawson* undoubtedly has the widest impact on both SOX and Dodd-Frank.[60] Not only does it afford protection to a new class of contractor and subcontractor employees under SOX, but the incorporation of SOX disclosures into Dodd-Frank protection means that contractors and subcontractors can pursue claims under either statute.[61] Furthermore, the decision signals a larger willingness for the Supreme Court to expand the scope of whistleblower protection statutes despite signs of contrary legislative intent.[62] However, the Court's statement that Dodd-Frank is "focuse[d] primarily on reporting to federal authorities" may prompt courts to consider adopting the *Asadi* narrow view of "whistleblower" coverage rather than the broad view advocated by the SEC.[63]

Furthermore, *Asadi* still stands as a wall against the SEC in trying to press coverage of internal reporters through 17 C.F.R. § 240.21F-2(b).[64] As discussed *supra* Part C, even the expansion of protection for contractors and subcontractors incorporated into Dodd-Frank could be restricted to only those employees of contractors and subcontractors who report to the both the SEC and their employer, but not those reporting only to the public company or within their own private company.[65] Such employees would still be able to find a cause of action in SOX given its clear language including internal reporting, but the future of internal claims under Dodd-Frank remains unclear pending a decision from the Supreme Court.[66]

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[59] *See, e.g.*, *Lawson*, 134 S.Ct. at 1158; Berman v. Neo@Ogilvy LLC, No. 1:14-CV-523-GHW-SN, 2014 WL 6860583, at *1 (S.D.N.Y. Dec. 5, 2014); Paradigm Capital Mgmt., Inc., Exchange Act Release No. 72393, Investment Advisers Act Release No. 3857, 2014 WL 2704311, at *1 (June 16, 2014).

[60] *Lawson*, 134 S.Ct. at 1158.

[61] 15 U.S.C. § 78u-6(h)(1)(A) (2012).

[62] *Lawson*, 134 S.Ct. at 1165-66, 1179.

[63] *Id.* at 1175.

[64] Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620, 621 (5th Cir. 2013); Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-2 (2014).

[65] *See supra* note 30 and accompanying text (explaining, through hypothetical, Dodd-Frank's coverage for SOX internal reporters could exist when the employee reports both to the SEC and to his or her employer).

[66] *Id.*

This uncertainty has prompted the SEC to vigorously promote its interpretation and begin pursuing administrative enforcement actions.[67] Its amicus curiae brief in *Safarian* signals that the Third Circuit may be the next battleground between the *Asadi* ruling and the SEC, as well as a possible case for Supreme Court review.[68] However, the claim in *Safarian* stems from reporting by an engineer of accounting errors only indirectly tied to securities fraud, which may prompt the SEC to seek a more favorable fact pattern for appeal to the Supreme Court.[69]

On the other hand, the SEC has instituted and settled its first enforcement action under the Dodd-Frank anti-retaliation provision.[70] This was an important showing of support for whistleblowers and opens the door to further actions in the future, but its importance is largely symbolic rather than practical.[71] The private cause of action established in Dodd-Frank serves to allow individuals affected by retaliation to pursue their claims more speedily through the federal court system.[72] The notion that the SEC will become any more than a minor force in pursuing action under the anti-retaliation provisions is far-fetched, as the SEC lacks the infrastructure and resources to engage in large scale administrative pursuit of companies which retaliate.[73] Furthermore, the provisions of the *Paradigm* settlement were largely focused on repaying investors who suffered from fraud and setting up a system to prevent future fraud, not seeking damages for the whistleblower or setting up protection mechanisms for whistleblowers

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[67] U.S. SEC. & EXCH. COMM'N, *supra* note 7, at 18-19.

[68] Johnston, *supra* note 37.

[69] Safarian v. American DG Energy Inc., No. 10-6082, 2014 WL 1744989, at *1 (D.N.J. Apr. 29, 2014); Johnston, *supra* note 37.

[70] Paradigm Capital Mgmt., Inc., Exchange Act Release No. 72393, Investment Advisers Act Release No. 3857, 2014 WL 2704311, at *1 (June 16, 2014).

[71] Zuckerman, *supra* note 6.

[72] 15 U.S.C. § 78u-6(h)(1)(B)(i) (2012); Berman v. Neo@Ogilvy LLC, No. 1:14-CV-523-GHW-SN, 2014 WL 6860583, at *5 (S.D.N.Y. Dec. 5, 2014).

[73] 15 U.S.C. § 78u-6(g)(2) (providing funds for the purposes of paying awards to whistleblower and "funding [the] activities of the Inspector General of the Commission."); U.S. SEC. & EXCH. COMM'N, *supra* note 7, at 26 (showing that the Inspector General's use of funds is for improving "work efficiency, effectiveness, productivity, and the use of resources . . ." through a suggestion program and that amounted to roughly $47,000 for the entire fiscal year 2014).

within the company.[74] Finally, *Asadi* may prevent future administrative action for employees that report internally if more circuits or the Supreme Court adopt the Fifth Circuit holding.[75]

Khazin, which stands somewhat apart from the other cases in its focus on arbitration rather than anti-retaliation claims, presents another limitation to the effectiveness of Dodd-Frank in protecting whistleblowers.[76] The Dodd-Frank anti-retaliation provisions created greater ease for whistleblowers to directly bring their claims in federal court rather than first maneuver through bureaucratic channels.[77] Yet, the enforcement of arbitration for Dodd-Frank claims, and not SOX claims, creates an impediment to the envisioned streamlining of whistleblower claims into federal court.[78] Rather than seeking remedy directly through judicial means, an employee must go through the arbitration process.[79]

E. What Does the Future Hold?

Although SOX presented an ideal template for the drafting of expansive protection, Congress's attempt to increase the damages available to whistleblowers and streamline the claim process to federal court came at a significant cost.[80] Internal reporters and individuals who sign arbitration agreements face the prospect of complete exclusion from whistleblower protection and prevention from directly entering federal courts, respectively.[81] Even though the SEC has attempted to expansively define the scope of whistleblower protection, their rulemaking and administrative action may ultimately have little impact if the courts continue to adopt the *Asadi* holding.[82] Furthermore, given the current partisan makeup of Congress, it is unlikely that any amendment or new legislation will be drafted to address these issues.[83]

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[74] Paradigm Capital Mgmt., Inc., 2014 WL 2704311, at *7-*8.
[75] Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620, 623 (5th Cir. 2013).
[76] Khazin v. TD Ameritrade Holding Corp., 773 F.3d 488, 495 (3d Cir. 2014).
[77] *Berman*, 2014 WL 6860583, at *3-*5.
[78] *Khazin*, 773 F.3d at 495.
[79] *Id.*
[80] *See* 15 U.S.C. §§ 78u-6(h)(1)(B)(i)-(C)(ii)(2012); *Asadi*, 720 F.3d at 629.
[81] Johnston, *supra* note 37.
[82] U.S. SEC. & EXCH. COMM'N, *supra* note 7, at 26.
[83] *See, e.g.*, Jim Puzzanghera & Lisa Mascaro, *Funding Bill Rolls Back Bank Reform*, L.A. TIMES, Dec. 11, 2014, at B1 (describing current congressional efforts to roll back Dodd-Frank rather than expand it).

Therefore, the federal courts will likely become the battleground for the SEC to promote their interpretation of Dodd-Frank whistleblower protection and implore courts to overlook statutory language in favor of congressional intent.[84] Otherwise, Dodd-Frank faces the possibility of a significant reduction in scope and effectiveness.[85]

F. Conclusion

Whistleblower awards and protection have evolved drastically from their historical roots in encouraging the report of fraud against the federal government.[86] Particularly in the twenty-first century, whistle-blowing is a powerful tool in Congress's attempt to curb violations of securities regulation.[87] Still, the statutory language passed by Congress in SOX and Dodd-Frank as well as the SEC's interpretation of these laws is currently facing resistance to maintain a narrow scope of protection.[88] The recent case law is split, expanding protection for contractors,[89] while narrowing protection for employees who report fraud internally[90] or sign arbitration agreements.[91] The SEC continues to promote its interpretation of the Dodd-Frank statutory language and venture into the realm of administrative enforcement of anti-retaliation.[92] Much of the future of whistleblower protection, however, depends on the current battle between *Asadi*'s restriction on internal reporter protection and the SEC's interpretation of the Dodd-Frank statutory language.[93] Given that more Circuit courts are facing the issue

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[84] U.S. SEC. & EXCH. COMM'N, *supra* note 7, at 19.
[85] *See Asadi*, 720 F.3d at 623.
[86] DOYLE, *supra* note 1.
[87] *See* Adolphsen, *supra* note 16.
[88] *E.g.*, Berman v. Neo@Ogilvy LLC, No. 1:14-CV-523-GHW-SN, 2014 WL 6860583, at *1 (S.D.N.Y. Dec. 5, 2014).
[89] Lawson v. FMR LLC, 134 S.Ct. 1158, 1176 (2014).
[90] Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620, 623 (5th Cir. 2013).
[91] Khazin v. TD Ameritrade Holding Corp., 773 F.3d 488, 490 (3d Cir. 2014).
[92] *E.g.*, Paradigm Capital Mgmt., Inc., Exchange Act Release No. 72393, Investment Advisers Act Release No. 3857, 2014 WL 2704311 (June 16, 2014).
[93] *See supra* notes 35-37, 67-69 and accompanying text (discussing the *Safarian* appeal in the Third Circuit as the next potential venue for the clashing opinions between the *Asadi* holding and the SEC's interpretation).

of internal reporting, the Supreme Court will likely soon have the opportunity to hear oral arguments on the matter.[94]

Samuel Gorski[95]

[94] *See supra* note 68 and accompanying text (proposing *Safarian* as ripe for Supreme Court review, pending the Third Circuit's resolution of the case).
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