CLIENT UPDATE

COURT'S BROAD INTERPRETATION OF DODD-FRANK WHISTLEBLOWER PROVISION COULD PROMPT MORE EMPLOYEE CLAIMS

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On September 25, 2012, a federal judge in Connecticut resolved an apparent tension between the anti-retaliation provision of the Dodd-Frank Act ("Dodd-Frank" or the "Act") and the definition of "whistleblower" under that Act in a way that broadly interprets the protections afforded to employees who report issues they "reasonably believe" constitute violations of the securities laws, even where the employee has never raised the issue with the Securities and Exchange Commission ("SEC"). The decision by Judge Stefan R. Underhill in *Kramer v. Trans-Lux Corp.*, No. 3:11-cv-01424, 2012 WL 4444820 (D. Conn. Sept. 25, 2012), appears to be the first in which a judge has allowed a whistleblower anti-retaliation claim under Dodd-Frank to proceed past the motion to dismiss stage.[1]

Under Judge Underhill's ruling, whistleblower protection extends to all individuals who report or disclose, either internally or to the SEC, alleged violations that are "required or protected" under the Sarbanes-Oxley Act of 2002, the Securities Exchange Act of 1934, 18 U.S.C. § 1513(e), or any other law, rule, or regulation subject to the jurisdiction of the SEC. The *Kramer* ruling could embolden corporate employees to claim whistleblower protection for a broad range of activities.

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[1] Although the recent holding in *Kramer* is the first time a claim under Dodd-Frank's anti-retaliation provision has survived a motion to dismiss, two other district courts have considered the scope of this provision and reached the same conclusion. *See Nollner v. Southern Baptist Convention*, 852 F. Supp. 2d 986, 992-95 (M.D. Tenn. 2012); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011).

BACKGROUND

The plaintiff, Richard Kramer, served as the Vice President of Human Resources and Administration for Trans-Lux and in that position reported to the Chief Financial Officer ("CFO"). Mr. Kramer alleged that he had been subject to retaliation for raising concerns about Trans-Lux's pension plan with the CFO, then with the Board's Audit Committee, and finally in a letter to the SEC. Mr. Kramer's alleged concerns included a potential failure to make a required filing to the SEC, among other issues. Mr. Kramer alleged that shortly after he reported his concerns to the SEC, he was stripped of most of his job responsibilities and ultimately fired.

Mr. Kramer filed a claim alleging a violation of, *inter alia*, the Dodd-Frank anti-retaliation provision, which states that no employer may "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against[] a whistleblower" who makes "disclosures that are required or protected" under the Sarbanes-Oxley Act of 2002, the Securities Exchange Act of 1934, 18 U.S.C. § 1513(e), and any other law, rule, or regulation subject to the jurisdiction of the SEC. 15 U.S.C. § 78u-6(h)(1)(A). In response to Mr. Kramer's suit, Trans-Lux filed a motion to dismiss, arguing that he was not entitled to protection under Dodd-Frank's anti-retaliation provision because he did not qualify as a "whistleblower," which is defined in Dodd-Frank as an individual, or two or more individuals working together, "who provide, information relating to a violation of the securities laws of the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u-6(a)(6). In particular, Trans-Lux argued that the SEC, by regulation, requires that a "whistleblower" must report information to the SEC in a specific manner required by the SEC, either through the SEC's website or by completing Form TCR ("Tip, Complaint or Referral"), 17 C.F.R. § 240.21F-9(a), which Mr. Kramer had not done.

THE COURT'S ANALYSIS

The Court's analysis in Kramer focused on reconciling the apparent tension between the anti-retaliation provision (15 U.S.C. § 78u-6(h)(1)) and the whistleblower definition in Dodd-Frank (15 U.S.C. § 78u-6(a)(6)). In short, the question presented in *Kramer* was whether an individual who made a disclosure seemingly protected under the anti-retaliation provision, but who did not do so in the manner required under the definition of a "whistleblower," could avail himself of the anti-retaliation provisions of Dodd-Frank.

Seeking to resolve this tension, Judge Underhill looked to the SEC's August 12, 2011 rule clarifying the scope of Dodd-Frank's whistleblower protections. *See* 17 C.F.R. § 240.21F-2.

The SEC rule broadly defines a "whistleblower" protected from retaliation under Dodd-Frank as someone who has made disclosures that are protected or required under the categories identified in the statute, and not merely as someone who makes such disclosures to the SEC. Judge Underhill found that the SEC's rule was a permissible construction and thus he was bound to follow it. *Kramer*, at *5. Applying that construction to the facts of the case, Judge Underhill held that Mr. Kramer's letter to the SEC was covered by the anti-retaliation provision, which does not even require reporting to the SEC, much less any specified manner for such reporting.

The Court also rejected Trans-Lux's argument that Mr. Kramer's claim should be dismissed because the disclosures at issue did not relate to violations of the securities laws. In deciding this issue, Judge Underhill noted that under the broader definition of protected activity in the anti-retaliation provision, "[d]isclosures that are protected under Sarbanes-Oxley's whistleblower provision are also protected under the Dodd-Frank Act's whistleblower provision." *Id.* at *6. Because an actual violation of securities laws need not have been reported to be protected under Sarbanes-Oxley, the Court found that an employee need only to have "reasonably believe[d]" that a violation of securities laws had occurred and to have reported the issue, externally or internally, to fall within the protections from retaliation. *Id.*

BROAD INTERPRETATION OF DODD-FRANK'S ANTI-RETALIATION PROVISION MEANS INCREASED RISK FOR COMPANIES

This case has important implications for companies seeking to comply with Dodd-Frank's new anti-retaliation provisions, as it is likely the decision will embolden potential whistleblowers to pursue anti-retaliation claims. Under the analysis of the *Kramer* decision, a whistleblower can avail himself or herself of the protections of the anti-retaliation provision even in a situation where he or she only reports concerns internally to management or the Board, provided he or she reasonably believes there has been a violation of the federal securities laws (whether or not there actually has been). The *Kramer* decision's broad construction further provides that, in those situations where an individual chooses to report externally to the SEC, there is no requirement that the individual do so in any particular way. To be protected from retaliation, an individual need only, as here, provide information in the form of a letter to the SEC setting forth his or her reasonable belief in a possible securities law violation.

In light of decisions by two other district courts that reached the same conclusion,[2] it appears as though *Kramer* may be in accord with a growing consensus around the interpretation of the scope of Dodd-Frank's anti-retaliation provisions. Given the potential breadth of this interpretation, companies should tread carefully in addressing whistleblower concerns and involve competent counsel early in the process to ensure full compliance with all aspects of Dodd-Frank's expansive whistleblower protections.

Please do not hesitate to contact us if you have any questions.

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October 1, 2012

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[2] See, *supra*, n. 1.