

Whistleblower Protections Here To Stay, Expert Says

By **Dunstan Prial**

Law360, New York (October 27, 2017, 10:17 PM EDT) -- No matter how the U.S. Supreme Court rules on a closely watched case challenging the Dodd-Frank Act's ban on retaliation against whistleblowers, reprisals against employees who report internal violations of securities regulations will remain illegal, a white-collar attorney and former U.S. Securities and Exchange Commission official said Thursday.

David L. Kornblau, who spent 10 years in the SEC's enforcement division and now heads Covington & Burling LLP's securities enforcement practice, said the main takeaway for companies and employees watching the case is "what's not at stake."

That, Kornblau said, is that it will still be illegal to retaliate against whistleblowers, regardless of how the Supreme Court rules on the Dodd-Frank ban.

"That proposition isn't going away," he said during a panel discussion at the Securities Enforcement Forum 2017, an annual conference in Washington.

The high court case, *Digital Realty Trust v. Somers*, could restrict who is protected under the strong anti-retaliation measures included in Dodd-Frank. The case hinges on whether employees who report company violations internally to their corporate compliance departments instead of to the SEC are protected under the Dodd-Frank provisions.

Digital Realty is appealing a Ninth Circuit decision that found former company employee Paul Somers can bring whistleblower claims under Dodd-Frank's anti-retaliation provision even though he didn't report his concerns about alleged securities law violations to the SEC before he was fired in 2014.

A split panel of the appellate court ruled that Dodd-Frank's whistleblower anti-retaliation provision "unambiguously and expressly protects" both those who report to the SEC and internal whistleblowers.

The Dodd-Frank act, signed into law in 2010 in the wake of the 2008 economic crisis, provides significant financial incentives for whistleblowers to come forward, as well as enhanced protections against retaliation by employers. The incentives and enhancements were added to induce employees to come forward and report without fear of reprisal the kinds of violations that led to the financial crisis.

The new rules under Dodd-Frank allow for a reward if the sanctions imposed by the SEC based on a whistleblower complaint are greater than \$1 million. The whistleblower receives between 10 and 30

percent of the amount, based on the discretion of the SEC. Before the SEC will release an award, the agency must first determine that the tip was obtained independently by the whistleblower and that the SEC didn't already have it.

The SEC's 2016 statistics suggest the incentives are working. The agency received 4,200 tips in fiscal year 2016, a 40 percent increase over 2012, the first full year for which statistics were kept, according to the agency's annual report. In 2016, the SEC handed out \$57 million in rewards, more than all the amounts awarded in previous years combined. The 2016 figure raised the total amount of awards disbursed by the SEC to \$111 million in connection with information provided by 34 whistleblowers.

In addition, those 34 cases led to SEC enforcement actions seeking \$584 million in financial sanctions, \$346 million of which was earmarked as disgorgement of ill-gotten gains and interest, the SEC reported.

Jane A. Norberg, head of the SEC Whistleblower Office, said at Thursday's forum that in fiscal year 2017 the total amount of rewards over the duration of the program under Dodd-Frank surged to \$160 million paid out to 47 whistleblowers.

Norberg said the strengthened retaliation measures are "critical" to the program's success. "If you don't have retaliation protections, our program is not as strong," she said.

Retaliation doesn't always take the form of outright dismissal, Norberg said. In some cases, employees who have reported violations are demoted, have responsibilities taken away or are harassed.

The SEC is beefing up its actions against companies that retaliate against whistleblowing employees or attempt to impede employees' efforts to report allegations of violations. For example, in 2016, in a first-of-its-kind case for the SEC, casino-gaming company International Game Technology agreed to a \$500,000 fine for firing an employee who had reported potential problems with the company's financial statements.

"The good news is that I've seen improvements in this area," Norberg said, referring to retaliation and efforts by companies to impede reporting by whistleblowers.

Earlier this month, the SEC filed an amicus brief with the Supreme Court in support of the argument that the provisions included in Dodd-Frank should be interpreted to protect whistleblowers regardless of whether they bring their concerns to the agency.

"Excluding such persons from Dodd-Frank's protections would depart from usual understandings of the term 'whistleblower' and would undermine Congress' effort to promote more rigorous and effective internal compliance programs," the SEC said.

Erika A. Kelton, who represents whistleblowers as a partner at Phillips & Cohen LLP, said during Thursday's forum that companies need to "rethink their corporate culture" so that "people are rewarded for speaking up."

--Additional reporting by Jon Hill. Editing by Jill Coffey.