Are Privately-Held Companies Subject to the Whistleblower Provisions of Sarbanes-Oxley? An Analysis of Lawson v. FMR, LLC

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Lawson v. FMR, LLC, a case recently decided by the U.S. Supreme Court, concerned the issue of whether "whistleblower" provisions of the Sarbanes-Oxley Act apply to employees of privately-held companies. The Court held that its provisions did apply. This paper will discuss facts of the Lawson case, historical background of Sarbanes-Oxley, and analyze the lower court and appeals court decisions. Further, this paper will analyze the majority and dissenting opinions of the Supreme Court. Finally, this paper will discuss some questions that remain unanswered in the aftermath of this ruling.

INTRODUCTION

On March 4, 2014, the Supreme Court rendered a decision in *Lawson v. FMR, LLC*[1], a case that was before it. The issue before the Court was whether the "whistleblower" provisions of the Sarbanes-Oxley Act applied to employees of privately-held companies who worked as agents, contractors or subcontractors for public companies. In a 6-3 decision, the Court ruled that the whistleblower provisions of Sarbanes-Oxley created a cause of action by whistleblower-employees of privately-held companies who contracted with publicly held companies. Prior to *Lawson*, most legal commentators believed that Sarbanes-Oxley applied only to employees of publicly-held companies.

This paper will discuss the historical and legislative background of the whistleblower provisions of the Sarbanes-Oxley Act. It will then discuss the district court and appeals court decisions. Further, this paper will discuss the Supreme Court's rationale in coming to its conclusion, as well as look at the dissent's reply. Finally, this paper will provide an analysis of the potential impact this decision may have on private employers in the future.

HISTORY AND BACKGROUND OF SARBANES-OXLEY'S WHISTLEBLOWERS PROVISIONS

Historical Background

Sarbanes-Oxley (hereinafter referred to as "SOX") and its various provisions came out of a reaction by Congress to the various high-profile corporate scandals in the early-2000s- most notably, the Enron bankruptcy, the WorldCom bankruptcy, and Health South's revelation of financial misconduct. It was enacted into law in 2002. SOX introduced several provisions which changed the way publicly-held companies were governed, as well as the scope of the reporting requirements of publicly-held companies.

[1] 569 U.S. ___, (2014) *slip op*.

It also included several provisions that dealt with civil and criminal penalties for not following the reporting and corporate governance requirements of SOX. Section 806 and its subsection §1514A, was an amended section which provided for relief and protection for so-called "whistleblowers".

Legislative History

Because SOX was enacted so quickly, there is there is very little legislative background to follow to determine whether Congress' intent was to include whistleblowing employees of private companies in §1514A. In a review of the legislative reports, however, there is some evidence that Congress intended to cover only whistleblowers who were employees of public companies. For example, in the Senate Report 107-146, there are repeated references to "corporate whistleblowers." Each time, though, it refers to them as employees of publicly traded companies. For example, the report states that corporate whistleblowers were unprotected under current law. If further stated that

"although current law protects government employees who act in the public interest by reporting wrongdoing, there is no similar protection for *employees of publicly traded companies* who blow the whistle on fraud and protect investors (emphasis added)."[2]

Furthermore, it states that

"Corporate employees who report fraud are subject to the patchwork and vagaries of current state laws, although most publicly traded companies do business nationwide."[3]

In its section-by-section analysis, it reiterates that

"This section would provide whistleblower protection to employees of publicly traded companies. It specifically protects them when they take lawful acts to disclose information or otherwise assist criminal investigators …"[4]

In another section, it states that the bill

"would protect employees of certain publicly traded companies who provide information to the U.S. government…."[5]

In the Conference Report addressing SOX, Senator Sarbanes emphasized the scope of the law by stating

"…let me make very clear that it applies exclusively to public companies—that is, to companies registered with the Securities and Exchange Commission. It is not applicable to private companies, who make up the vast majority of companies across the country."[6]

In that same report, Senator Patrick Leahy went on to state

" … we include meaningful protections for corporate whistleblowers…. We learned from Sherron Watkins of Enron that these corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court."[7]

Structure of Section 806 and §1514A

SOX's relevant "whistleblower" provisions read as follows:

SEC. 806. PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES WHO PROVIDE EVIDENCE OF FRAUD.

(a) IN GENERAL.—Chapter 73 of title 18, United States Code, is amended by inserting after section 1514 the following:

''§ 1514A. Civil action to protect against retaliation in fraud cases

''(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES.—**No company with a class of securities registered under section 12 of the Securities**

[2] S. Rep. 107-146 at *10 (2002).
[3] Id.
[4] Id. at *13.
[5] Id. at *24.
[6] 148 Cong. Rec. S7350, 7351 (July 25, 2002).
[7] Id. at 7358.

Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)),
or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any 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, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any
provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
‘‘(A) a Federal regulatory or law enforcement agency;
‘‘(B) any Member of Congress or any committee of Congress; or
‘‘(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
‘‘(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders (emphasis added)**.**

Under the statute, a covered employee is protected from retaliation by their employer if the employee's reporting activities relate to various matters, some of which are specific and some of which are more general in nature. Specifically, an employee is protected from retaliation by their employer if they reasonably believe that the information the employee provides relates to a violation that falls into one or more of the following categories:

1. A violation of section 1341- Mail fraud.
2. A violation of section 1343- Wire fraud.
3. A violation of section 1344- Bank fraud.
4. A violation of section 1348- Securities or commodities fraud.
5. A violation of any rule or regulation of the Securities Exchange Commission.
6. Any provision of Federal law relating to fraud against shareholders.

SOX further provides for various remedies that may be given to the whistleblowing employee, including reinstatement, back pay, and other damages caused by the employer's retaliatory acts.

FACTUAL BACKGROUND OF THE LAWSON CASE

The Plaintiffs in the Lawson case, Jonathan Zang and Jackie Hosang Lawson, were employees of FMR, LLC, a privately-held company who was contracted by Fidelity Funds. Fidelity Funds was registered with the Securities & Exchange Commission ("SEC"), but had no employees. Thus, it contracted with FMR, LLC and its affiliates to provide its clients with advisory and management services. A Fidelity Fund Board of Trustees oversees the management of the funds.

Zang, concerned with the registration statements filed with the SEC by some of the Fidelity funds, raised questions about the accuracy of these statements. After he raised concerns, Zang was terminated. Zang filed a complaint with the Occupational Health & Safety Administration ("OSHA"), which comes under the purview of the Department of Labor ("DOL"), pursuant to the requirements of Sarbanes Oxley. Zang claimed that his discharge violated 18 § 1514A(b)(1)(A). OSHA ruled that, while Zang was entitled under the act to file a complaint as a whistleblower, they denied his claim based upon the grounds that the type of conduct that led to his termination was not protected. Zang appealed the decision to an Administrative Law Judge ("ALJ"), who ruled that Zang was not an employee who was protected by Sec. 1514A, since he was an employee of a privately-held company. Zang then brought a cause of action in Federal District Court.

Lawson was an employee of Fidelity Brokerage Services, LLC, a subsidiary of FMR, LLC. Prior to her discharge she made complaints to her superiors concerning the accounting methods of Fidelity funds.

She resigned in 2007, claiming that she was, in essence, constructively discharged. After filing a complaint with OSHA, she notified that DOL that she had filed a cause of action in Federal District Court.[8]

DISTRICT COURT'S RULING

In the district court, FMR filed a Motion to Dismiss in both cases. FMR argued, among other things, that because Zang and Lawson were employees of privately-held companies, they were not protected by the whistleblower provisions of SOX. Because the Defendant was the same in both cases, and both cases addressed the same issues, the court addressed FMR's motion in a joint order.

The issue at hand was:

1. whether or not "an employee" relates back exclusively to the phrase "a company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d))" (a publicly-held company), or

2. also to the phrase "or any officer, employee, contractor, subcontractor, or agent of such company."

If "an employee" relates only to the former, then only employees of publicly-held companies are protected by 1514A. If "an employee" relates to the former as well as the latter, then employees of publicly-held companies are protected by 1514A, as well as employees of any officer, employee, contractor, subcontractor, or agent of a publicly-held company.

Noting that the statutory text was far from pellucid, the court stated that the statute protects "an employee", but does not directly state at which entity the individual must be employed.[9] The Plaintiffs argued for a more expansive reading to include employees of publicly-held companies as well as employees of any officer, employee, contractor, subcontractor, or agent of a publicly-held company. FMR, on the other hand, argued for a more limited reading to include only employees of publicly-held companies.

FMR further argued that a more expansive reading would lead to a construction that was linguistically nonsensical, because it would require the words "any officer, employee, contractor, subcontractor, or agent of such company" to serve two functions: subject (those who cannot discriminate), and the object (those who cannot be discriminated against). The court, however, rejected FMR's argument, stating that while the entities in the former group (publicly-held company or its officer, employee, contractor, subcontractor, or agent) perform two conceptual functions as discriminating entities and as employers of protected individuals does not mean that they serve two grammatical functions.[10] The court acknowledged that, given the complexity of the statute's wording and possible interpretations, both interpretations presented somewhat awkward applications to various business relationships.[11]

The court illustrated the fact that the Plaintiffs' reading of the statute would protect an employee of an employee of a public company, as well as an employee of an officer of a public company. The further noted that FMR's interpretation would mean that a subcontractor or subcontractor of a public company could not discharge, demote or suspend an employee of a public company. It stated that it would be difficult to think of a situation where contractor would be enabled to discharge, demote or suspend an employee of a public company.[12]

The court looked at prior cases in the district courts and DOL administrative decisions. It found that these prior proceedings shared the narrow reading of the proper scope of Section 806, but noted that these prior cases engaged in little thorough discussion of the text of the statute and the different meanings of the

[8] Lawson v. FMR LLC, 724 F. Supp. 2d 141 (D. Mass. 2010).
[9] *Id.* at 152-3.
[10] *Id.* at 153.
[11] *Id.* at 154.
[12] *Id.*

word "employee". Therefore, the court found the term "employee" to be ambiguous, and turned to other considerations to provide further guidance.[13]

The court then considered the title and headings of Section 806, noting that the title "Whistleblower Protection for Employees of Publicly Traded Companies" supported FMR's position.[14] . The court concluded that since the phrase "an employee" only indirectly identifies the employer in question, there was doubt as to the scope of the word "employee." Thus, the court concluded that the heading, while providing some support to FMR's argument, was of limited use in statutory interpretation.[15]

The court also looked to the legislative history to shed light on the statute's meaning. The court stated that the legislative history was notably unhelpful in answering the question before the court, since the congressional debates did not speak directly to whether employees of privately-held companies were covered under 1514A. Turning to the purpose of SOX, the court stated that the purpose of the law was "to prevent and punish corporate fraud, protect the victims of such fraud, preserve evidence of such fraud and crime, and hold wrongdoers accountable for their actions."[16] The court believed that legislative history indicated that Congress was concerned with reporting fraud not only by employees of public companies, but also by employees of those institutions working with the public company.[17] The court sought to limit the scope of their ruling by stating that such whistleblowing activity must relate to fraud against shareholders.[18]

The court also noted the structure of the mutual fund industry. The publicly-held mutual fund companies have no employees, and rely on other companies to manage funds through contractual arrangements, most notably investment advisement. If the whistleblower provisions of SOX did not apply to the employees of the companies providing services to the publicly-held mutual funds, then SOX would be inapplicable since the mutual fund companies have no employees. Thus, shareholders would go unprotected.[19] Based upon the court's analysis, it denied FMR's motion to dismiss.

APPEALS COURT'S DECISION

FMR appealed the districts court's decision to the first Circuit Court of Appeals.[20] The appeals court limited their review to the question that the district court had certified in its order granting motion for certification for interlocutory appeal, which was whether or not §1514A whistleblower protection applies to contractors or subcontractors of a public company. More specifically, the court posed the question before it as whether or not Congress intended for §1514A to apply to employees of a contractor or subcontractor to a public company and who engage in a protected activity.[21] The court further noted that no other appeals court had ruled on this particular issue.[22]

In reversing the lower court's ruling, the appeals court held that the term "employee" in §1514A referred exclusively to employees of public companies. The court further concluded that the clause "officer, employee, contractor, subcontractor, or agent of such company" goes to who is prohibited from retaliating or discriminating.[23] The court looked to several sources in determining their decision. First, they looked at the text of the statute. They noted that the statute's reading by the Plaintiffs would both create anomalies and very broad coverage, since its coverage would extend to any employee of an

[13] *Id.* at 156.
[14] *Id.*
[15] *Id.*
[16] Quoting S. REP. No. 107-146, at *1 (2002).
[17] *Id.* at 160.
[18] *Id.* at 159-60.
[19] *Id.* at 162.
[20] Lawson v. FMR, LLC, 670 F. 3d 61 (1st Cir. 2012).
[21] *Id.* at 66
[22] *Id.*
[23] *Id.* at 68.

employee or officer of a public company.[24] The court further noted that the clause "officer, employee, contractor, subcontractor, or agent of such company" was meant to cover entities that the public company may hire to retaliate against a whistleblower employee, much like the character played by George Clooney in the film "Up in the Air."[25]

The court then addressed the title of section 806 and the caption of §1514A, stating that the Supreme Court required such consideration when doing so would shed light on the meaning of the text, especially on some ambiguous word or phrase.[26] They noted that the title of Section 806 and the caption of §1514A are explicit guides to the meaning of the textual phrase within §1514A. Just from Section 806's title, "Protection of Employees of Publicly Traded Companies Who Provide Evidence of Fraud" alone, the court reasoned, it would be odd to read §1514A as covering employees of private companies.[27] The court went on the note that Congress did not stop there, since it repeated the limitation "Whistleblower protection for employees of publicly traded companies" in the caption of the text of subpart (a) of §1514A.[28]

The court then went on to address other textual provisions of SOX. It first noted that where Congress meant to enact broader whistleblower legislation in SOX, it chose to do so. The court cited section 1107 as an example of where Congress intended broad coverage for a whistleblower statute, noting that the language of 1107 required neither a public company, nor an employee or a securities violation to trigger a violation.[29] By contrast, the court stated, the scope of §1514A was conspicuously narrow.[30] It also pointed to the fact that SOX set up the Public Company Accounting Oversight Board to oversee the activities of "public accounting firms that prepare audit reports for issuers, brokers, and dealers."[31] Another example the court pointed out was section 307 of SOX, which governed the professional conduct of attorneys.[32]

The court further noted that the primary concern in enacting SOX was not the activities of advisers of mutual funds, and that, at the time of its enactment, Congress was aware that the mutual fund companies had no employees but only a Board of Trustees.[33] In fact, Congress had created this structure through enactment of the Investment Company Act, which also regulates the activities of investment advisers and their employees.[34] The court then noted that, had Congress intended to extend §1514A to private companies that extend investment advice, it would have done so explicitly. It noted that other parts of SOX addressed investment companies and the advisers, and made it explicit when coverage applied and when it didn't.[35]

The court then compared §1514A with the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). It noted that 49 U.S.C. § 42121 was a model for a portion of the whistleblower provisions of §1514A. It also noted that there were several important differences between the two provisions.[36] The text of AIR 21 was clearer and had specific limits on who

[24] *Id.*
[25] *Id.* at 69, *noting* Judge Easterbrook's observations, in dicta, in Eleszar v. U.S. Dept. of Labor, 598 F.3d 912 (7th Cir. 2010).
[26] *Id.*, *citing* Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co., 331 U.S. 519 at 528-29 (1947).
[27] *Id.*
[28] *Id.*
[29] *Id.* at 70.
[30] *Id.*
[31] *Id., citing*15 15 U.S.C. § 7211(c)(1) .
[32] *Id.* at 71.
[33] *Id.*
[34] *Id.* at 72 *citing* 15 U.S.C. § 80b-6 (which makes it unlawful for investment advisers to, among other things, defraud their clients or prospective clients).
[35] *Id.* at 73.
[36] *Id.*

was covered under its provisions.[37] By contrast, the court stated, the Plaintiffs' broad reading of §1514A would make an employee of any contractor or subcontractor subject to its provisions.[38]
The court then discussed other canons of construction in backing its decision. It noted that the Supreme Court had admonished the lower courts not to give the securities laws greater scope than allowed by the text or the statutory scope.[39]

The court then looked to the pre-legislative history of §1514A. It noted that committee reports state that the purpose of §1514A would be to "provide whistleblower protection to employees of publicly traded companies." It noted that the committee reports were not only concerned about the fact that Enron employees were bullied into not going to the proper authorities, but also was concerned about the fact that employees of Arthur Andersen, Enron's auditor, were also retaliated against. However, the court stated that the concerns regarding Andersen were dealt with in other areas of SOX, most notably at SOX title 1, 116 Stat. at 750-71 (which established the Public Company Accounting Oversight Board), and SOX title II, 116 Stat. at 771-75 (concerning auditor independence).[40]

The court then turned to SOX's post-legislation history. It noted that in 2004, proposed legislation attempted to expand the term "employee" in §1514A. The Mutual Fund Reform Act of 2004[41] (MFRA) would have amended §1514A to explicitly cover employees of investment advisers of mutual funds. As amended by MFRA, §1514A would have read:

"Whistleblower Protection for Employees of Publicly traded Companies and Registered Investment Companies—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934(15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934(15 U.S.C. 78o(d)), or that is an investment adviser, principal underwriter, or significant service provider … of an investment company which is registered under section 8 of the Investment Company Act of 1940, or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—"

The bill, however, never made it out of committee. While the court did acknowledge that failed legislative proposals were dangerous grounds on which to rest an interpretation of a prior statute, it noted that the Supreme Court had used failed attempts to amend statutory language as aids to understand Congress' intent.[42] It noted that if §1514A were meant to cover employees such as the Plaintiffs, the MFRA's amendment would have been superfluous.[43]

The court further noted that, in 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act did amend §1514A to include whistleblower coverage to employees of public companies' subsidiaries and employees of statistical rating organizations.[44] In remarks introducing the bill, Senator Cardin confirmed that §1514A was intended to cover employees of public companies and that the proposed legislation would expand its coverage to include employees of subsidiaries of public companies as well as employees of statistical rating agencies.[45]

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[37] Specifically, § 42121(c) defined "contractor" to mean "a company that performs safety-sensitive functions by contract for an air carrier."
[38] *Id.*
[39] *Id.* at 75-76, *citing* Stoneridge Inv. Partners, LLC v. Scientific Atlanta, Inc., 552 U.S. 148 (2008) as an example .
[40] *Id.* at 78.
[41] S. 2059, 108th Cong. (2004).
[42] *Id.* at 79, footnote 18.
[43] *Id.*
[44] 18 U.S.C. § 1514A(a), as amended by Pub. L. No. 111-203 §§ 922(b), 929A, 124 Stat. 1376. 1848, 1852 (2010).
[45] *Id.* at 80.

SUPREME COURT'S OPINION

Majority Opinion

The Plaintiffs filed a Petition for Writ of Certiorari, which the Supreme Court granted. On March 4, 2014, the Court rendered its opinion in the case, with Justice Ginsberg delivering the opinion of the majority. In a 6-3 decision, the court reversed the appeals court's decision and remanded the case to the district court for further orders. The Court ruled that the provisions of §1514A protected whistleblowers who were employees of contractors and subcontractors of public companies, just as it did employees of public companies.

The Court began by looking at the plain language of §1514A. The Court stated that the relevant portions of §1514A were:

> "[n]o … contractor … may … discriminate against [its own] employee [for whistleblowing]."[46]

The Court stated that this reading was consistent with the text of the statute and common sense, since contractors are in control of their own employees, but not ordinarily in control of someone else's workers. Further, the Court stated that they were resisting any attempt to attributing to Congress a purpose to stop a contractor from retaliating against whistleblowers employed by the public company the contractor serves, while leaving the contractor free to retaliate against its own employees when they reveal corporate fraud.[47] The Court further reasoned that, given Congress' concern about contractor conduct on behalf of Arthur Andersen in the Enron collapse, they regarded with suspicion any construction of §1514A that protects whistleblowers of public companies but not when they work for the public company's contractor.[48]

The Court went on to discuss the events that led up to the passage of SOX, most notably the Enron collapse. It noted that employees of Enron and Andersen faced retaliation if they attempted to report any misconduct either externally or internally. They noted that Enron's efforts to "quiet" whistleblowers generally were not proscribed under then-existing law, and that Congress identified the lack of whistleblower protection as a "significant deficiency" in the law.[49] §1514A, it stated, addressed this concern.[50]

The Court addressed FMR's argument that its interpretation of §1514A must be accepted to avoid the absurd result of extending protection to employees of company officers and employee (e.g., housekeepers or gardeners), the court stated that FMR's argument was more theoretical than real and was outweighed by the compelling arguments opposing FMR's reading of §1514A.[51] The Court further stated that FMR's argument that the statutory headings of Section 806 and §1514A supported their claims was not meant to take the place of the detailed provisions of the text.[52]

The Court then went on to other considerations that supported their decision. It stated that its decision comported with Congress' intent to avoid another Enron debacle. The Court looked to the legislative history of SOX, which showed that Congress understood the significant responsibility that outside professionals bear in reporting fraud by public companies. It further noted that, while there was other provisions of SOX that were designed to control the conduct of the outside professionals such as accountants and lawyers, there was no provisions other than §1514A which protected such individuals from retaliation by their employers.[53]

The Court further stated that its' reading of §1514A avoids insulating the entire mutual fund industry from §1514A, since the mutual funds themselves have no employees. Its reading, it stated, protects

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[46] *Supra* note 1 at ___ (2014).
[47] *Id.*
[48] *Id.*
[49] Id. at ___, *citing* S. Rep. No. 107-146 at 5, 10 (2002).
[50] Id. at ___.
[51] Id. at ___.
[52] Id. at ___.
[53] Id. at ___.

employees of investment advisers, who are often the firsthand witnesses to shareholder fraud involving mutual funds.[54]

The Court turned away any argument that its decision would open the floodgates to whistleblowing suits outside §1514A's purposes. Noting that the Department of Labor has interpreted in its regulations of §1514A as protecting contractor employees for almost a decade, it stated that FMR could not identify a single case in which an employee of a private contractor has asserted a §1514A claim based on allegations unrelated to shareholder fraud.[55]

The Court also noted that AIR 21's whistleblower protection provision has been read to cover employees of contractors and subcontractors. The Court stated that, given the parallel statutory texts of the whistleblower protective claims, the Court reads the words "an employee" in AIR 21 and §1514A to have similar import.[56] The Court failed to address the bounds of §1514A, simply noting that the plaintiffs were seeking "mainstream application" dealing with shareholder fraud.[57]

Dissenting Opinion

Justice Sotomayor, writing for the dissent, questioned the majority's ease in interpreting the statute. She noted that the wording could lead to two different interpretations- one that included both employees of public companies and employees of the enumerated public employee representatives, and another that could be read more narrowly to prohibit the public company and the listed representatives from retaliating against public company employees.[58] Because of the inherent ambiguity in the statute, the dissent suggested that other markers of intent should be relied on.[59]

The dissent suggested that, due to the statute's ambiguity, the Court should rely on the statute's title as an aid in resolving any ambiguity.[60] It criticized the majority's broad interpretation of the title, which the dissent stated, would cause Congress have meant to use the term not just for employees of public companies, but also:

> for household employees of any individuals who work for a public company,
> employees of private companies who contract with public companies,
> employees of subcontractors who don't contract with a public company but contract with a contractor who contracts with a public company, and
> employees of any agent of a public company.[61]

The dissent pointed out that, when Congress wanted to depart from the Act's public company focus to regulate private companies and their employees, it spoke clearly. It noted that §1514A's wording did not unambiguously cover employees of private companies.[62] It further pointed to the fact that Congress strayed from AIR21 in significant ways when it wrote §1514A, and that such wording show Congress' intent to adopt a narrower interpretation.[63]

The dissent illustrated the majority's faulty rationale concerning a contractor's ability to retaliate against an employee of a public company. The dissent stated that such logic belies the nature of the modern work force, noting that there were 10 million independent contractors and 11 million contract workers who contracted with public companies.[64] The dissent further pointed out that Congress had as much reason to shield employees of public companies from contractors, since excluding contractors in §1514A would leave the statute with a gaping hole and allow a public company to evade §1514A simply

[54] Id. at ___.
[55] Id. at ___.
[56] Id. at ___.
[57] Id. at ___.
[58] Id. at ___
[59] Id. at ___.
[60] Id. at ___, citing FTC v. Mandel Brothers, Inc., 359 U.S. 385, 388-389 (1959).
[61] Id. at ___.
[62] Id. at ___.
[63] Id. at ___
[64] Id. at ___.

by hiring a contractor to engage in the very retaliatory acts that an officer or employee could not.[65] The dissent also pointed out the majority's lack of consideration for the importance of outplacement firms in helping public companies in deciding whom to fire, noting that public companies had spent $3.6 billion on such services.[66]

The dissent further stated that the majority's ruling ran afoul of the precept that "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."[67] They pointed out that the majority's opinion transforms §1514A into a sweeping source of litigation that, as construed by the majority, will lead to regulation of employment agreement relationships between their nannies, housekeepers, and caretakers. It further pointed out that this will lead to litigation against private employers if their employees claim they have been harassed for providing information regarding any of a host of offenses.[68]

Finally, the dissent pointed out that §1514A protects the reporting of a variety of frauds- not only securities fraud, but also mail, wire, and bank fraud. By interpreting §1514A to cover a large class of employees, the dissent stated that it subjects private companies to a costly front of employment litigation.[69] The dissent concluded by noting that Congress could now respond to limit the majority's far-reaching implications.[70]

ANALYSIS

Questions remain as to the boundaries of the law on two fronts:

1.) how far will courts and administrative bodies go in future cases in determining who is an employee covered under §1514A?

2.) how far will courts and administrative bodies go in the future in determining what kind of behavior is covered under §1514A?

Breadth of a Covered Employee

At first glance, one might think that the Supreme Courts' ruling is definitive in determining who is an employee covered under §1514A. However, as the dissent pointed out, it did not address fully the breadth of such coverage. What we know for sure is that the following employees are covered under §1514A:

1. employees of public companies;
2. employees of contractors of public companies;
3. employees of subcontractors of public companies;
4. employees of agents of public companies;
5. employees of officers of public companies; and
6. employees of employees of public companies.

What we don't know is whether or not such coverage extends below the surface of such relationships. For example, does coverage extend to an employee of a subcontractor who contracts with a contractor who, in turn contracts with a public company? The example posed may seem ridiculous, but it's worth considering when trying to determine the scope of this decision.

The Court's expansion is perhaps the most problematical when it comes to employees of officers and employees of a public company, as well. One could perceive a scenario where such employee could, in turn have employees. At what point do future courts and administrative bodies cut off the term "employee?" Only future cases and the creativity of the lawyers involved will tell.

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[65] Id. at ___.
[66] Id. at ___.
[67] Id. at ___, citing Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982).
[68] Id. at ___.
[69] Id. at ___.
[70] Id. at ___.

Breadth of the Covered Employee's Whistleblowing Activity

As the dissent pointed out, the majority's expansive inclusiveness of the term employee under §1514A could possibly bring forth a multitude of claims. For instance, with the majority's expanded definition of employee, it is understood that the activity that they report could be related to the public company. It is just as conceivable that such activity be could be related to mail, wire of bank fraud of a private company. It is also conceivable that if their whistleblowing activity relates to shareholder fraud of the private company. Again, how far courts and administrative agencies will allow the breadth of the whistleblowing activities to go is up to them and the creativity of the lawyers involved.

To illustrate, what if a private employer has questionable billing practices toward its clients who are other private companies, but the company does not use such questionable practices when billing its public-company clients? Can an employee of the private company with such billing practices be protected under §1514A? Or does §1514A only apply if the private company's fraudulent billing practices apply to the public client? In the latter scenario, it seems clear that such a situation would be covered, since fraudulent billing of the private company's public client is tantamount to fraud on the public company's shareholders. In the latter scenario, it is not so clear.

Congressional Clarification

One of the most compelling arguments that was brought up by FMR in its arguments before the Court is the fact that it would be unfathomable that Congress meant to authorize lawsuits by employees of millions of private employers with nary a word to that effect.[71] They further pointed out that it would be far too monumental an action for Congress to take without doing so expressly. As FMR pointed out in their arguments before the Supreme Court, "Congress does not hide elephants in mouseholes."[72] Given the amazing scope of coverage that the majority's ruling has wrought, it does seem amazing that Congress had meant such a broad interpretation. Since there is no limiting principle in the majority's ruling, it is left in the air to what breadth this statute is now applicable.

Congress could fix this problem by simply adding a few words to clarify its intent. If Congress truly meant to include on employees of public companies, they could simply change §1514A to state the following:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) ["*public company*"], or any officer, employee, contractor, subcontractor, or agent of such [*public*] company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee [*of such public company*] in the terms and conditions of employment because of any lawful act done by the employee (emphasis added)—

Time will tell whether or not Congress does so, but it will probably not happen until after the 2014 midterm elections and will probably also depend on the makeup of Congress.

As the dissent pointed out, the majority's interpretation now leaves open the possibility that employees of employees of public companies could be protected by §1514A. Since there is no limiting function under the law, it will be interesting to see if some crafty lawyer will use this law to their advantage in litigation. For example, what if the housekeeper finds evidence that the employee is faking expense reports or faking sickness, and reports this to the public company employer? Since such activity is at least somewhat a "fraud on the shareholders," is the housekeeper protected for blowing the whistle on the employee? Again, it will take a creative use of the law by some attorney in the future to find out.

[71] Brief for Respondents at 10 Lawson v. FMR LLC, No. 12-3 (U.S. Sept. 30, 2013).
[72] Id. at 32 (quoting Whitman v. Am. Trucking Ass'n., 531 U.S. 457, 468 (2001).

CONCLUSION

One thing is certain- private companies that contract with public companies (and possibly other entities and individuals, as well) will need to review their policies and procedures for how they handle employees in whistleblower situations. In addition, they may need to review the contractual relationships with both public and private entities. If they don't, they may subject themselves to an arbitrary administrative or court decision based upon some crafty lawyer's arguments.