SCOTUS Expands Sarbanes-Oxley to Include Contractors

In a stunning expansion of previously understood law, the Supreme Court held, on Tuesday, March 4, 2014, that the employees of a contractor to a publicly traded company may sue their employer for retaliation suffered as a result of their complaints about the publicly traded company. The case was titled, *Lawson v. FMR LLC*.

Future courts will have to struggle with the possible limitations of this expansive ruling, but for now, all contractors to publicly traded companies should take care to review *Lawson* and immediately contact legal counsel if their employees raise concerns about a publicly traded company's actions. Contractors should no longer assume that the Sarbanes-Oxley Act ("SOX") does not apply to them simply because they are, themselves, not a publicly traded company.

In 2002, Congress enacted SOX in response to a number of corporate accounting scandals. Among other things, SOX prohibits a publicly traded company from retaliating against its employees for blowing the whistle on securities violations and certain other types of fraud. The *Lawson* case has extended that protection to employees of a publicly traded company's contractors. In *Lawson*, the employees worked for a privately owned company, FMR, which managed certain of the day-to-day affairs of a mutual fund. They claimed they blew the whistle on what they believed to be fraud by the mutual fund. They claimed that their employer, FMR, then terminated them in retaliation. They sued FMR, relying on SOX.

FMR argued that SOX did not apply to it because it was not, itself, publicly traded. The First Circuit of the United States Court of Appeals agreed, dismissing the case. The employees appealed to the Supreme Court, which agreed to hear the case.

The employees argued that SOX should be deemed applicable to FMR because it was a contractor to a publicly traded company, because they had complained about that publicly traded company and because their complaints were about the kinds of things SOX would otherwise protect (accounting methodologies).

The Supreme Court began its analysis by noting that SOX's statutory language prohibiting retaliation, 18 USC 1514A(a), included the word "contractor." Then the Supreme Court noted that the practice for many mutual funds was, like this one, to have no actual employees of its own. Instead, the Supreme Court noted that mutual funds use contractors, like FMR, to manage their affairs. Therefore, the Court concluded, in order to effectuate SOX's prohibition, SOX had to be extended to the employees of contractors.

It was a deeply split 6-3 decision, with the dissent saying the majority's ruling would lead to "absurd results," including even giving a "babysitter" the chance to sue a "parent" under SOX simply because the parent happened to work for a publicly traded company. The majority recognized that an absurd situation like that was indeed a possibility but noted Congress could just rewrite SOX if it chooses.

The ruling seems to have surprised even the plaintiffs. Indeed, they had apparently thought such a ruling so unlikely that they had volunteered some possible limitations on their own theory, apparently, in the hopes of making it more palatable. The plaintiffs had suggested the Supreme Court could limit its ruling to publicly traded companies' most significant contractors, in other words, clarifying that it "does not extend to every fleeting business relationship," so that, for example, SOX would not be extended to an

office supply store simply because it contracted to sell the publicly traded company "a box of rubber bands." The United States Solicitor General suggested another limitation, saying the Supreme Court could hold its ruling only applied to employees whose complaints arose out of their work for the publicly traded company. The Supreme Court put both possible limitations off for another case. The Supreme Court felt there was no need to decide the bounds of its ruling since, at least on the facts of this case, the "alleged fraud directly implicates the funds' shareholders," in other words, was, in the majority's reading, precisely the kind of whistleblowing that SOX was designed to protect.

The case is sure to spur any number of new lawsuits. What limitations, if any, will bound this expansive ruling will be debated before the courts for years to come. Contractors to publicly traded companies should consult with legal counsel.

This document is intended to provide you with general information regarding the Supreme Court's decision in Lawson v. FMR LLC*. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.*

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