

The Firm Line

August 2013

Welcome to *The Firm Line*, a newsletter designed to inform our clients and friends about developments at the firm, legal issues that may impact your lives and businesses, and other items of interest. Our intention is to keep the information we provide to you in this newsletter concise. We welcome any further discussion on the topics discussed herein and hope that *The Firm Line* will provide you with interesting and noteworthy information about the law and our firm.

Uncertainty Surrounds the Dodd-Frank Act's Protection of Whistleblowers

Whistleblowers seeking protection under the Dodd-Frank Act beware. The U.S. Fifth Circuit Court of Appeals ruled on July 17, 2013 in *Asadi v. G.E. Energy (USA), L.L.C.*, 2013 WL 3742492, that the whistleblower provisions in the Dodd-Frank Act only protect those who disclose information directly to the U.S. Securities and Exchange Commission. Ignoring several federal district court rulings and the SEC's own regulations, the Fifth Circuit held that persons reporting internally to their employers (rather than to the SEC) were *not* afforded whistleblower protection under Dodd-Frank. This decision has therefore set up a potential circuit split, meanwhile leaving potential whistleblowers uncertain as to the protections they are afforded.

The Dodd-Frank Act of 2010

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111-203, H.R. 4173, was signed into federal law by President Barack Obama on July 21, 2010. Dodd-Frank was intended to regulate financial markets and prevent a recurrence of the 2008 financial crisis. Given its emphasis on increased oversight, Dodd-Frank included protection for whistleblowers, which are defined in 15 U.S.C. 78u-6(a) (6) as individuals who provide information relating to a violation of securities law "to the Commission." A separate provision, 15 U.S.C. 78u-6(h), provides "whistleblowers" with the right to sue their employer for retaliation, but it does not require disclosure to the SEC. Notably, unlike the Sarbanes-Oxley Act of 2002 (which does not require reporting to the SEC but does have many administrative requirements), Dodd-Frank permits whistleblowers to sue for double the pay they lost through corporate retaliation without jumping through administrative hoops. As such, there is a potential benefit in suing for retaliation against a former employer under Dodd-Frank rather than Sarbanes-Oxley.

The discrepancy between 15 U.S.C. 78u-6(a)(6) and 15 U.S.C. 78u-6(h) regarding whistleblower disclosure to the SEC provided the basis for several federal district courts to hold that the provisions are either ambiguous or conflicting. As such, each of those courts afforded

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Suggestions

Please provide us with ideas and suggestions for topics that you would like to read about in the future, as well as any thoughts you may have that will help us deliver better, more insightful information to you.

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whistleblower protection to persons first reporting potential fraud to their employers. The SEC itself adopted a final regulation stating that persons may be deemed whistleblowers even if they do not first report directly to the SEC. Nevertheless, the Fifth Circuit's opinion in *Asadi*, the first by an appeals court regarding whistleblower protection under Dodd-Frank, focused on the plain language of 15 U.S.C. 78u-6(a)(6) in holding that protection is only afforded those reporting "to the Commission" - namely, the SEC.

Asadi v. G.E. Energy (USA), L.L.C.

Khaled Asadi is a former GE executive who worked in GE Energy's Amman, Jordan, office. In that capacity, he was responsible for maintaining the company's relationship with Iraq's central government. In June 2010, Mr. Asadi learned that GE had hired a woman closely associated with Iraq's senior deputy minister of electricity, allegedly to curry favor with Iraq's electricity ministry while GE negotiated a contract with that agency. Mr. Asadi was concerned that these actions might violate the Foreign Corrupt Practices Act, and he reported his concerns to his supervisor and the GE ombudsman for the region. Notably, Mr. Asadi never alerted the SEC, and he was ultimately terminated by GE following a negative performance review. He filed suit in Houston claiming that GE had illegally retaliated against him in violation of Dodd-Frank. Asadi's suit was initially dismissed in the district court because the Judge opined that the anti-retaliation provisions of Dodd-Frank did not apply outside the United States, and Asadi appealed.

The Fifth Circuit affirmed the district court's ruling, but was far more concerned with the issue of who qualifies as a whistleblower under Dodd-Frank. As noted above, the Fifth Circuit opined that the language of 15 U.S.C. 78u-6(a)(6) requires that reporting must be made "to the Commission," and internal reporting to an employer did *not* meet the statutory requirements for whistleblower protection. In the Fifth Circuit's view, the statute "clearly expresses Congress' intention to require individuals to report information to the SEC to qualify as a whistleblower under Dodd-Frank." Thus, despite lower court rulings and SEC regulations to the contrary, the Fifth Circuit relied on Congress's clear language in defining a "whistleblower" in interpreting the Dodd-Frank Act and excluded individuals reporting only internally from protection.

Given that this ruling stands in conflict with numerous district court holdings from other circuits, the potential for a circuit split looms. After all, would Mr. Asadi's protection under Dodd-Frank have been interpreted differently in Manhattan? Or Nashville? District Court rulings suggest that is a distinct possibility, and ultimately, as some have suggested, the Supreme Court may have to review this controversy. To date, however, the Fifth Circuit is the only Court of Appeals to rule on the issue of whistleblower protection under the Dodd-Frank Act, and the *Asadi* opinion provides a cautionary tale to would-be Dodd-Frank whistleblowers: be wary of your reporting technique because you may not be afforded the protection you expect.

Lynn Swanson is Recognized as an Honoree of the Loyola University College of Law 2013 "Women in Law"

Jones, Swanson, Huddell & Garrison, LLC managing member [Lynn E. Swanson](#) was recently named a 2013 Loyola Alumni "Women in Law" Honoree. She was recognized on May 16th along with six other Loyola University New Orleans College of Law alumnae at the Loyola "Women in Law" Spring Fling, which took place at the home of alumna Linda Nelson-Barnett, J.D. '77.



The "Women in Law" honor was created by the Loyola University College of Law in order to appreciate female alumnae who have demonstrated professional achievement in the practice of law as well as a strong involvement in the community. In addition to Lynn, this year's honorees included Susan Chehardy, J.D. '85, Dana M. Douglas, J.D. '00, Donna D. Fraiche, J.D. '75, Laurie Young, J.D. '91, and Vanessa Guidry-Whipple, J.D. '80.

Lynn has been practicing law since 1993 in the fields of complex and commercial litigation. She worked the majority of her first ten years of practice representing plaintiffs in pharmaceutical and medical device litigation. She joined Jones, Verras & Freiberg, LLC, now known as Jones, Swanson, Huddell & Garrison, LLC in 2004, and was instrumental in developing and establishing the firm's commercial litigation practice. Lynn has spent the past ten years developing and carrying out an organized strategy and approach to case management, by which she has handled a variety of non-formulaic, complicated business disputes, including several matters involving tax strategy advice and litigation related to that advice. Lynn has led Jones Swanson's efforts related to the 2010 Deepwater Horizon Disaster in the Gulf of Mexico. She was appointed to co-

coordinate the multidistrict litigation's GCCF Outreach Group and has been spearheading the successful efforts of Jones Swanson to recover economic damages on behalf of claimants in a wide variety of industries, including oil and gas, tourism and construction as well as claims for general economic loss and property damage. Lynn and her team have sued BP Exploration & Production Inc., BP America Production Company and BP p.l.c. outside of the multidistrict litigation on behalf of many of their clients whose claims were not settled through the Deepwater Horizon Settlement. Lynn graduated from Loyola Law School in 1993 after completing her undergraduate degree at Bryn Mawr College in Pennsylvania in 1990.

ABOUT THE FIRM

Jones, Swanson, Huddell & Garrison, L.L.C., is a boutique litigation law firm based in New Orleans, Louisiana, which handles complex commercial and environmental/property disputes. In the commercial and environmental litigation arenas, the firm has and continues to represent many of Louisiana's and the Southeast's largest and most active business entrepreneurs and landholders, while also retaining a focus on the representation of small businesses and individuals. Jones Swanson is not limited geographically, having served as lead counsel in litigation elsewhere, including in California, Connecticut, Massachusetts, New York, and Texas as well as Mississippi, Alabama, Florida and Louisiana.



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