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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

9th Circ. SOX Ruling May Curb More Than Media Leaks

By **Leigh Kamping-Carder**

Law360, New York (June 2, 2011) -- The Ninth Circuit's recent landmark ruling that the whistleblower provisions of the Sarbanes-Oxley Act do not protect employees who release information to the media could persuade other courts to read the law equally narrowly in other contexts, forcing employees to think twice about what they reveal, and to whom, attorneys say.

On May 3, the Ninth Circuit ruled that Sarbanes-Oxley prohibits public companies from retaliating against employees who disclose evidence of fraud to only three entities — federal regulatory or law enforcement agencies, Congress or workplace supervisors — that are "specifically enumerated" in the 2002 legislation.

The ruling was a defeat for two auditors at Boeing Co. who tested the airplane maker's information technology controls as part of a Sarbanes-Oxley compliance program and had shared internal documents with a Seattle-Post Intelligencer reporter who ran an investigative report in 2007 about Boeing's computer systems security.

The auditors, who took issue with alleged accounting deficiencies at Boeing, said they believed their disclosures to the reporter were protected under the National Labor Relations Act, which allows employees to discuss working conditions.

But according to Boeing, the employees were fired for violating a company policy prohibiting them from releasing information to the media without approval from its corporate communications department.

Whistleblower cases involving media leaks are relatively rare, and generally stem from internal employee complaints, attorneys said. But the Ninth Circuit's reading of Section 806 of SOX hewed so closely to the statutory language that the ruling could impact on cases involving disclosures in other contexts, such as disclosures to spouses, during a picketing campaign, or to state authorities, they said.

"As far as other SOX cases that deal with reports to anybody not listed in the statute, [the decision] could, and probably will, result in those claims being denied," said Alan Quiles, a Ruden McClosky shareholder who focuses on employment law and litigation.

The plaintiffs, who on May 16 petitioned the Ninth Circuit for a rehearing en banc, said the appeals court's decision improperly circumscribed the ways that employees can make evidence of fraud public, forcing them to "pick a rifle rather than a shotgun to communicate the message."

Providing information to the press was one way to get it to federal agencies and lawmakers, and nothing in SOX calls for nonpublic disclosure, the plaintiffs argued.

“Why cannot a whistleblower use a bullhorn in front of Congress to try to get the attention of a member of Congress?” they said. “What in [Section 806] prevents a picketing campaign at Boeing with signs calling on the company to comply with SOX?”

But for attorneys who represent employers and public companies, the Ninth Circuit's decision in Tides et al. v. Boeing Co. tracks closely with the intent of SOX — namely, to limit protected activity to employees who raise concerns of fraud or securities violations with those authorized or required to act on the information.

A decision allowing employees to release sensitive information to reporters or other sources — while preventing employers from taking disciplinary actions — would defeat the purpose of the legislation, according to attorneys.

“If you're trying to further law enforcement goals and objectives and corporate compliance with the law, which is what these whistleblower provisions are about, the idea that leaking information to the media would be somehow protected doesn't seem that logical to me,” said Jones Day partner Henry Klehm, who represents companies in regulatory investigations.

In passing SOX, Congress aimed to strike a balance between getting information out to the public immediately and handling allegations of fraud in a prudent and responsible way, Klehm said.

If employees complain first to a supervisor or the U.S. Securities and Exchange Commission — and neither acts on the complaint — they could then go to a reporter and still win the protections of SOX, attorneys said.

But if employees can release information to journalists directly without fear of punishment — and without the same commitments and safeguards required by federal agencies — there's no telling what inaccurate or trumped-up allegations could hit the public domain, attorneys said. The resulting news reports could unnecessarily hurt the stock price and harm investors in the process, they said.

"It's easy for anyone to go to the media and make an allegation,” said Jacqueline C. Wolff, co-chair of the corporate investigations and white collar defense group at Manatt Phelps & Phillips LLP. “The SEC's initial intake form requires the whistleblower to swear under penalty of perjury that the allegations are truthful. That requirement alone should weed out the disgruntled employee who is just trying to get back at the employer.”

On the other hand, some whistleblower legislation does protect employees who disclose wrongdoing to the media, such as the Whistleblower Protection Act, which governs federal workers, or the Energy Reorganization Act, which has been interpreted to protect media leaks — meaning the Tides decision puts SOX at odds with other whistleblower laws, employees' attorneys said.

“It's the first time ever a court has said a whistleblower cannot go to the press, which is illogical because whistleblowers have historically used the press as the most effective mechanism to alert the government to problems,” Stephen M. Kohn of Kohn Kohn & Colapinto PC, who filed an amicus brief for the National Whistleblowers Center advocacy group, told Law360 on May 3.

The decision is also surprising coming from the relatively employee-friendly Ninth Circuit, Quiles said.

The appeals court recently revived a case from two former in-house attorneys at International Game Technology who claimed they were fired for raising concerns about the company's acquisition of Anchor Gaming. The decision in Van Asdale et al. v. International Game Technology represented the first time the Ninth Circuit ruled on Section 806, although it did not address the merits of the plaintiffs' claims.

The Tides decision also follows several rulings from the U.S. Department of Labor expanding SOX whistleblower protections to cover employees of the subsidiaries of public companies, as well as disclosures related to mail or wire fraud.

According to Paul R. Monsees, a litigation partner with Foley & Lardner LLP who has written about whistleblower retaliation, courts will continue to wrestle with the intricacies of whistleblower claims — from what constitutes retaliation under the Dodd-Frank Wall Street Reform and Consumer Protection Act to the exact definition of a supervisor under SOX.

“The subject of whistleblower claims is likely to expand pretty dramatically,” Monsees said. “Even though this case curtails a claim, I think there will be more cases, not less, that expand on claims.”

Circuit Judges Andrew J. Kleinfeld, A. Wallace Tashima and Barry G. Silverman sat on the panel for the Ninth Circuit in the Tides case.

The plaintiffs are represented by the Tollefsen Law Office PLLC.

Boeing is represented by McGuireWoods LLP.

The case is Tides et al. v. The Boeing Co., case number 10-35238, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Christine Caulfield and John Williams.