

AN A.S. PRATT PUBLICATION

SEPTEMBER 2017

VOL. 3 • NO. 7

PRATT'S
**PRIVACY &
CYBERSECURITY
LAW**
REPORT



EDITOR'S NOTE: PRIVACY POTPOURRI

Victoria Prussen Spears

**A GUIDE TO CORPORATE INTERNAL
INVESTIGATIONS – PART II**

Jennifer L. Chunias and Jennifer B. Luz

**PAY UP . . . OR ELSE? RANSOMWARE IS A
GROWING THREAT TO HIGHER EDUCATION –
PART II**

Kimberly C. Metzger and Stephen E. Reynolds

**UNITED STATES V. ULBRICHT: DREAD PIRATE
ROBERTS PUSHES THE ENVELOPE OF THE
FOURTH AMENDMENT**

Jay D. Kenigsberg

**SUPREME COURT TO WEIGH IN ON THE
SCOPE OF DODD-FRANK WHISTLEBLOWER
PROTECTION**

Christian R. Bartholomew, Katya Jestin, and
Skyler J. Silvertrust

**COULD YOUR PATIENT BE “WANTED?”
TAKING ACTION UNDER HIPAA**

Sherry A. Fabina-Abney and Deepali Doddi

**DATA PROTECTION, PRIVACY, AND THE
HOSPITALITY AND LEISURE INDUSTRY:
PREPARING FOR THE EU GDPR**

Gretchen Scott, Campbell Featherstone, and
Federica De Santis

Pratt's Privacy & Cybersecurity Law Report

VOLUME 3

NUMBER 7

SEPTEMBER 2017

Editor's Note: Privacy Potpourri

Victoria Prussen Spears 231

A Guide to Corporate Internal Investigations – Part II

Jennifer L. Chunias and Jennifer B. Luz 233

Pay Up . . . or Else? Ransomware is a Growing Threat to Higher Education – Part II

Kimberly C. Metzger and Stephen E. Reynolds 243

***United States v. Ulbricht*: Dread Pirate Roberts Pushes the Envelope
of the Fourth Amendment**

Jay D. Kenigsberg 251

Supreme Court to Weigh In on the Scope of Dodd-Frank Whistleblower Protection

Christian R. Bartholomew, Katya Jestin, and Skyler J. Silvertrust 257

Could Your Patient Be “Wanted?” Taking Action Under HIPAA

Sherry A. Fabina-Abney and Deepali Doddi 261

**Data Protection, Privacy, and the Hospitality and Leisure Industry: Preparing
for the EU GDPR**

Gretchen Scott, Campbell Featherstone, and Federica De Santis 264

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please contact:
Deneil C. Targowski at 908-673-3380
Email: Deneil.C.Targowski@lexisnexis.com
For assistance with replacement pages, shipments, billing or other customer service matters, please call:
Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Web site <http://www.lexisnexis.com/custserv/>
For information on other Matthew Bender publications, please call
Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

ISBN: 978-1-6328-3362-4 (print)
ISBN: 978-1-6328-3363-1 (eBook)

ISSN: 2380-4785 (Print)
ISSN: 2380-4823 (Online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S PRIVACY & CYBERSECURITY LAW REPORT [page number]
(LexisNexis A.S. Pratt);

Laura Clark Fey and Jeff Johnson, *Shielding Personal Information in eDiscovery*, [1] PRATT'S PRIVACY & CYBERSECURITY LAW REPORT [233] (LexisNexis A.S. Pratt)

This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. A.S. Pratt is a trademark of Reed Elsevier Properties SA, used under license.

Copyright © 2017 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. All Rights Reserved.

No copyright is claimed by LexisNexis, Matthew Bender & Company, Inc., or Reed Elsevier Properties SA, in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

An A.S. Pratt™ Publication

Editorial

Editorial Offices

630 Central Ave., New Providence, NJ 07974 (908) 464-6800
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com

MATTHEW  BENDER

(2017–Pub. 4939)

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

EMILIO W. CIVIDANES

Partner, Venable LLP

RICHARD COHEN

Special Counsel, Kelley Drye & Warren LLP

CHRISTOPHER G. C WALINA

Partner, Holland & Knight LLP

RICHARD D. HARRIS

Partner, Day Pitney LLP

DAVID C. LASHWAY

Partner, Baker & McKenzie LLP

CRAIG A. NEWMAN

Partner, Patterson Belknap Webb & Tyler LLP

ALAN CHARLES RAUL

Partner, Sidley Austin LLP

AARON P. SIMPSON

Partner, Hunton & Williams LLP

RANDI SINGER

Partner, Weil, Gotshal & Manges LLP

JOHN P. TOMASZEWSKI

Senior Counsel, Seyfarth Shaw LLP

TODD G. VARE

Partner, Barnes & Thornburg LLP

THOMAS F. ZYCH

Partner, Thompson Hine

Pratt's Privacy & Cybersecurity Law Report is published nine times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2017 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 718.224.2258. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Privacy & Cybersecurity Law Report*, LexisNexis Matthew Bender, 630 Central Ave., New Providence, NJ 07974.

Supreme Court to Weigh In on the Scope of Dodd-Frank Whistleblower Protection

By *Christian R. Bartholomew, Katya Jestin, and Skyler J. Silvertrust**

Following a recent Ninth Circuit decision, the U.S. Supreme Court is set to resolve a growing circuit split over the scope of whistleblower protection under Dodd-Frank. The authors of this article discuss the circuit split and offer some important takeaways.

In *Somers v. Digital Realty Trust*,¹ the U.S. Court of Appeals for the Ninth Circuit recently widened a growing split among federal courts over whether Dodd-Frank's anti-retaliation protections extend to whistleblowers who voice concerns about potential securities law violations internally, but do not report those violations to the Securities and Exchange Commission ("SEC"). In a divided panel decision, the Ninth Circuit answered that question in the affirmative, holding that internal reporting alone is sufficient to qualify an employee for whistleblower status under Dodd-Frank. The court thus affirmed the district court's ruling allowing the plaintiff to proceed with a Dodd-Frank retaliation claim against his former employer. On June 26, 2017, the U.S. Supreme Court granted certiorari and will hear the case next term.

BACKGROUND

Somers has potentially far-reaching implications not only with respect to the future of private whistleblower claims brought under Dodd-Frank, but also the SEC's enforcement activities in this area. The SEC has indicated for some time now that anti-retaliation enforcement is a critical focus of its whistleblower program. In 2015, the SEC issued formal guidance reflecting an expansive interpretation of Dodd-Frank's retaliation protections. The SEC's guidance makes clear that the SEC views Dodd-Frank as protecting internal reporting to the same extent that it protects reporting to the SEC. Consistent with that interpretation, the SEC has taken enforcement action in circumstances where an internal whistleblower makes no corresponding disclosure to the SEC, and even in circumstances where the whistleblower's internal complaint discloses conduct that does not amount to a chargeable securities law violation.²

* Christian R. Bartholomew is a partner at Jenner & Block LLP and a member of the firm's Securities Litigation and Enforcement Practice. Katya Jestin is a partner at the firm and co-chair of its Investigations, Compliance and Defense Practice. She counsels companies and executives in criminal, regulatory, and congressional investigations. Skyler J. Silvertrust is an associate in the firm's Litigation Department. The authors may be reached at cbartholomew@jenner.com, kjestin@jenner.com, and ssilvertrust@jenner.com, respectively.

¹ 15-17352 (9th Cir. Mar. 8, 2017).

² See *In re International Game Technology*, Order Instituting Cease-And-Desist Proceedings, File No. 3-17596 (Sept. 29, 2016).

With *Somers*' approval of the SEC's interpretation, companies may see a bolstering of the SEC's anti-retaliation enforcement efforts and increased potential for liability in private whistleblower actions. Thus, companies should be especially mindful about how they address issues with employees who report potential misconduct internally, even if it is determined that no securities violation has occurred.

CONFLICTING RULINGS

Somers is the first appellate decision to address the scope of Dodd-Frank whistleblower status following conflicting rulings on the issue from the U.S. Courts of Appeals for the Fifth and Second Circuits. The U.S. Court of Appeals for the Sixth Circuit recently acknowledged this split in authority but declined to weigh in on the question.³

Disagreement over the reach of Dodd-Frank's anti-retaliation protections arises from an internal statutory inconsistency caused by Dodd-Frank's addition of certain whistleblower-related provisions to the Securities Exchange Act of 1934. Among other things, those provisions, found in Section 21F of the Act, offer incentives for employees who report potential violations of the securities laws and prohibit retaliation against employees for disclosing such violations.⁴ There is a tension between Section 21F's stated definition of the term "whistleblower," however, and Section 21F's anti-retaliation provision, which outlines the bounds of what constitutes protected activity. While the statutory definition of the term "whistleblower" applies only to individuals who provide information relating to a violation of the securities laws to the SEC, Section 21F's anti-retaliation provision appears to cover a broader category of whistleblowers, including those who report violations solely on an internal basis.⁵ The result is an arguable ambiguity over the kind of conduct that qualifies as whistleblower activity for purposes of Dodd-Frank.

ASADI V. G.E. ENERGY, LLC

The Fifth Circuit, in *Asadi v. G.E. Energy, LLC*, was the first appeals court to consider the availability of a Dodd-Frank claim for retaliation in response to internal reporting only.⁶ Emphasizing the specific meaning accorded to the term "whistleblower" in the statute's definitional section, the *Asadi* court held that the "plain language of the Dodd-Frank whistle-blower protection provision" applies only to "individuals who provide information relating to a securities law violation *to the SEC*."⁷ The court held that a contrary reading would render superfluous the Sarbanes-Oxley enforcement scheme, which indisputably confers protection on

³ *Verble v. Morgan Stanley Smith Barney, LLC*, 15-6397 (6th Cir. Jan. 13, 2017).

⁴ 15 U.S.C. § 78u-6.

⁵ 15 U.S.C. § 78u-6(h)(1)(A)(iii).

⁶ 720 F.3d 620 (5th Cir. 2013).

⁷ Emphasis added.

internal whistleblowers, but imposes different administrative requirements on claimants and provides for a shorter limitations period and generally less extensive damages than may be available under Dodd-Frank.

In August 2015, in response to *Asadi*, the SEC issued interpretative guidance that takes the opposite position. The SEC's guidance rejects the Fifth Circuit's reasoning and interprets Section 21F as containing two entirely separate whistleblower definitions—the first of which concerns the statute's award and confidentiality provisions and applies only to reporting made to the SEC, while the second, which is relevant for anti-retaliation purposes, encompasses a broader category of whistleblowers, including those who report violations internally.

BERMAN V. NEO@OGILVY LLC

Examining the SEC's interpretative guidance, the Second Circuit in *Berman v. Neo@Ogilvy LLC* agreed that Section 21F does not limit Dodd-Frank whistleblower protection only to those who disclose violations to the SEC.⁸ Rather, the Second Circuit determined that Section 21F was sufficiently ambiguous to warrant deference to the SEC's interpretation that the anti-retaliation provision “expands the protections of Dodd-Frank to include the whistleblower protection provisions of Sarbanes-Oxley, and those provisions, which contemplate an employee reporting violations internally, do not require reporting violations to the [SEC].” The court noted that, despite *Asadi*, a majority of lower court decisions had arrived at a similar conclusion.

SOMERS V. DIGITAL REALTY TRUST

In *Somers*, the Ninth Circuit considered whether a plaintiff who was fired after reporting concerns about potential securities law violations to senior company management could proceed with a Dodd-Frank retaliation claim even though he did not disclose those violations to the SEC. Recognizing the intercircuit disagreement on the issue, the Ninth Circuit sided with the Second Circuit's approach, finding that the SEC's guidance “correctly reflects congressional intent to provide protection for those who make internal disclosures as well as those who make disclosures to the SEC.” Addressing *Asadi*'s counterarguments head on, the court concluded that *Asadi*'s interpretation of the term “whistleblower” would “all but read [the portion of the anti-retaliation provision describing internal reporting] out of the statute.” The court further rejected *Asadi*'s position that a broader reading of Dodd-Frank whistleblower protections would render Sarbanes-Oxley moot. Rather, the court noted that Dodd-Frank and Sarbanes-Oxley provide different relief and separate recovery procedures, and therefore offer aggrieved employees “alternative enforcement mechanisms.”

The U.S. Supreme Court granted certiorari on June 26, 2017.

⁸ 801 F.3d 145 (2d Cir. 2015).

CONCLUSION

With the scope of whistleblower protection under Dodd-Frank now squarely before the Supreme Court, the future of SEC anti-retaliation enforcement remains uncertain. The balance of lower court decisions is tipped in favor of the SEC's interpretation—for now. But a crucial vote against the SEC could come from Justice Neil Gorsuch, who is an acknowledged skeptic on the principle of deferring to agency interpretations.⁹ Whatever the future holds, the issue presents some important takeaways:

- As articulated in its interpretative guidance, the SEC views internal reporting as clearly within the ambit of Dodd-Frank's anti-retaliation protections. Many federal courts, including two circuit courts, have now deferred to the SEC's guidance on this issue.
- The SEC has signaled that it is very focused on whistleblower issues and has indicated a willingness to bring anti-retaliation enforcement proceedings even where the whistleblower reports only internally. Depending on the direction taken by the Supreme Court increased enforcement action with respect to internal whistleblowers may be expected in the future.
- The SEC has brought anti-retaliation enforcement proceedings where the underlying conduct complained of does not amount to a chargeable violation. Companies should therefore be aware that Dodd-Frank whistleblower issues may arise even when it has been determined that no violation occurred.

⁹ *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016) (Gorsuch, J., concurring).