

Ninth Circuit Narrowly Construes Scope of Protected Activity for Sarbanes-Oxley Whistleblower Claim

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In *Wadler v. Bio-Rad Laboratories, Inc.*, the U.S. Court of Appeals for the Ninth Circuit adopted a limited, plain meaning construction of the types of reports that are protected by the Sarbanes-Oxley Act's (SOX) whistleblower provision and in the process partially reversed an \$11 million jury verdict in favor of a corporate general counsel.

In *Wadler*, a corporation's general counsel believed that the corporation was violating the Foreign Corrupt Practices Act's (FCPA) bribery prohibition and recordkeeping requirements and reported his findings to the corporation's board. After an outside investigation found no evidence of an FCPA violation, the corporation terminated the general counsel's employment. The general counsel filed SOX and other claims against the corporation alleging, among other things, that he was retaliated against for reporting the suspected FCPA violation. The general counsel subsequently prevailed at trial.

The Ninth Circuit reversed the judgment in favor of the general counsel as to his SOX claims because his reporting of alleged FCPA violations was not protected activity under SOX. The Court found that SOX only protects employees who report violations of specific statutes, of which FCPA is not one. The district court had ruled that FCPA fell into the category of "any rule or regulation of the Securities and Exchange Commission," which is identified in SOX, because FCPA is an amendment of and codified in the Securities and Exchange Act and is enforced by the SEC. But, the Ninth Circuit held that under plain meaning construction of SOX, an SEC "rule or regulation" encompassed only administrative rules or regulations and not a statute like FCPA. The Ninth Circuit also rejected the general counsel's argument that the remedial purpose of SOX – i.e., to clamp down on corporate misconduct – required a broader interpretation of what constituted protected activity.

Since Section 806 of SOX was enacted in 2002, federal courts have generally adopted expansive interpretations of the scope of protected activities. This Ninth Circuit decision is one of several recent federal decisions which instead limit protected activities to complaints concerning the specific statutes, rules, and regulations enumerated in SOX.

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