Court Holds Board Members Cannot be Sued for Retaliation Under Sarbanes Oxley

On December 9, 2019, the United States District Court for the Southern District of New York granted a motion to dismiss a claim against two members of the Board of Directors of a publicly traded company, holding as a matter of law that the anti-retaliation provisions of the Sarbanes-Oxley Act ("SOX") do not give rise to claims against directors. This is just the second federal court which has addressed this issue; the previous court had ruled that directors can be sued individually, thus creating a conflict within the courts.

WHAT YOU NEED TO KNOW

The case is *Zornoza v. Terraform Global, Inc.* The plaintiff served as the President and CEO of Terraform Global, Inc. ("Global") and Terraform Power, Inc. ("TERP"), two entities owned by now bankrupt SunEdison Inc. Plaintiff claims that he became aware of a liquidity crisis within SunEdison and tried to raise his concerns with the CEO and chief financial officer at SunEdison and also directly with the chair of SunEdison's board and another director. He claims that in response, defendants orchestrated a scheme to oust him from his position as CEO. He was terminated in 2015 and subsequently brought claims of retaliation under SOX against Global and TERP and against the individual officers and directors of SunEdison to whom he had raised his concerns.

The individual defendants filed motions to dismiss. The Court addressed whether individual directors could be held liable for alleged retaliation under SOX. Examining the language of the statute, the Court noted that while SOX proscribes retaliation by "any officer, employee, contractor, subcontractor or agent," it does not expressly include "directors." The Court found this omission particularly instructive given that Congress had expressly referenced "directors" in other sections of SOX. Applying the plain language of the statute, the Court held that directors are not subject to liability for retaliation under SOX.

Of note, the *Zornoza* Court acknowledged that in *Wadler v. Bio-Rad Labs., Inc.*, a federal court in California reached the opposite result. In that case, the California Court considered the word "agent" to be ambiguous and therefore examined Congress' intent in drafting the anti-retaliation provision of SOX. The court deemed that intent to be heightened protection of whistleblowers. The *Wadler* Court stated "that purpose would be significantly undermined were the Court to construe the term 'agent' as excluding directors." The Court in *Zernoza* concluded that it "respectfully disagrees with the reasoning of *Wadler*." Specifically, the Court took exception with the suggestion that the word "agent" was ambiguous and noted that under established principles of agency law, "corporate directors are not understood to function as agents."

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WHAT YOU NEED TO DO

Exposure faced by board leadership is an important issue for any publicly traded company. The *Zernoza* decision provides some potential for protection. There is now a split in the courts on the issue of whether directors may face liability for retaliation under SOX. It is also likely this issue will need to be addressed on appeal in this case and in future cases. We will keep you posted regarding further developments.

FOR MORE INFORMATION

If you have questions about these developments, please contact one of the following attorneys.

Greg Keating
Practice Group Leader – Labor, Employment & Benefits
617-248-5065 | gkeating@choate.com

Alison Reif
Partner
617-248-5157 | areif@choate.com

Lyndsey Kruzer
Counsel
617-248-4790 | lkruzer@choate.com