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# Arbitration Agreement Arbitrage?: Statutory Discrepancy Leads to Third Circuit Victory for Dodd-Frank Whistleblower Defendants in *Khazin v. TD Ameritrade Holding Corp.*

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ARBITRATION AGREEMENT ARBITRAGE?:  
STATUTORY DISCREPANCY LEADS TO THIRD CIRCUIT VICTORY  
FOR DODD-FRANK WHISTLEBLOWER DEFENDANTS IN  
*KHAZIN v. TD AMERITRADE HOLDING CORP.*

JOHN K. LISMAN\*

“By holding that Dodd-Frank retaliation claims are not statutorily exempt from enforcement of pre-dispute arbitration agreements, the Third Circuit has handed employers a significant victory. . . . Potential plaintiffs will now have to weigh the pros and cons of asserting claims under [Sarbanes-Oxley] . . . versus pursuing claims under Dodd-Frank that may be subject to mandatory arbitration agreements.”<sup>1</sup>

I. INTRODUCTION: PROFITING FROM DISCREPANCY

In the recent proliferation of whistleblower activity in the financial services sector, there is a new sort of arbitrage occurring.<sup>2</sup> Arbitrage allows investors to exploit inefficiencies and profit from a “price discrepancy” between two markets.<sup>3</sup> The new arbitrage is based on a statutory discrepancy in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).<sup>4</sup> That discrepancy recently led to a major victory for defendants in whistleblower anti-retaliation lawsuits.<sup>5</sup>

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1. Jyotin Hamid, Mary Beth Hogan, Jonathan R. Tuttle & Ada Fernandez Johnson, *Third Circuit Affirms Enforceability of Pre-Dispute Arbitration Agreements for Whistleblower Claims Under Dodd-Frank*, CLIENT UPDATE (Debevoise & Plimpton, New York, N.Y. & Wash., D.C.), Dec. 17, 2014, at 2–3, available at <http://www.debevoise.com/~media/files/insights/publications/2014/12/20141217a%20third%20circuit%20affirms%20enforceability.pdf> [<http://perma.cc/Q7LF-QE4M>].

2. See generally Peter J. Henning, *Tattletales Embraced as Whistle-Blower Programs Gain Support*, N.Y. TIMES, Dec. 1, 2014, <http://dealbook.nytimes.com/2014/12/01/tattletales-embraced-as-whistle-blower-programs-gain-support/> [<http://perma.cc/3FC4-XQK8>] (outlining recent growth in whistleblower activity as among several different legal provisions).

3. See generally *Fixed Income Arbitrage Defined*, HEDGETHINK (Oct. 28, 2014), <http://www.hedgethink.com/education/fixed-income-arbitrage-defined/> [<http://perma.cc/7QN4-ZXC8>] (labeling “the presence of a price discrepancy between the two markets” for product as “[t]he backbone of arbitrage” and describing buying and selling activity of arbitrage which allows profit realization).

4. See Hamid et al., *supra* note 1, at 1 (reviewing statutory issue).

5. See *id.* (stating holding of *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488 (3d Cir. 2014)).

Dodd-Frank aimed to reform the American financial services sector.<sup>6</sup> Part of this reform included increased engagement of whistleblowers.<sup>7</sup> One section of Dodd-Frank created a new whistleblower program to be administered by the Securities and Exchange Commission (SEC). Other sections of Dodd-Frank amended anti-retaliation provisions in separate laws meant to protect whistleblowers (e.g., Sarbanes-Oxley Act of 2002 (SOX)).<sup>8</sup> Those amendments invalidated predispute arbitration agreements included in employment contracts, which now guarantee whistleblowers their day in court.<sup>9</sup> Oddly omitted from the section of Dodd-Frank governing the new SEC program, however, was a provision invalidating predispute arbitration agreements.<sup>10</sup>

With the groundbreaking decision in *Khazin v. TD Ameritrade Holding Corp.*,<sup>11</sup> the Third Circuit became the first federal circuit court to address that omission.<sup>12</sup> Many commentators believed Dodd-Frank intended to nullify whistleblower arbitration agreements altogether, including those enacted under the new SEC program.<sup>13</sup> Much to their surprise, the Third

6. See Clea Benson, *Obama Pledges to Veto Measures Weakening Dodd-Frank*, BLOOMBERG (Jan. 20, 2015), <http://www.bloomberg.com/politics/articles/2015-01-21/obama-pledges-to-veto-measures-weakening-dodd-frank-finance-law> [<http://perma.cc/FF2J-MWJX>] (noting initial congressional approval of Dodd-Frank aimed at post-crisis reform).

7. See Owen Davis, *Wall Street Whistleblowers: After the Largest Leak in Banking History, Are They Safe?*, INT'L BUS. TIMES (Feb. 9, 2015), <http://www.ibtimes.com/wall-street-whistleblowers-after-largest-leak-banking-history-are-they-safe-1810474> [<http://perma.cc/9C27-XLQ3>] (noting “raft of provisions” in Dodd-Frank aimed at increasing whistleblower activity).

8. See Steven Davidoff Solomon, *Whistle-Blower Awards Lure Wrongdoers Looking to Score*, N.Y. TIMES, Dec. 30, 2014, [http://dealbook.nytimes.com/2014/12/30/whistle-blower-awards-lure-wrongdoers-looking-to-score/?\\_r=0](http://dealbook.nytimes.com/2014/12/30/whistle-blower-awards-lure-wrongdoers-looking-to-score/?_r=0) [<http://perma.cc/FA4U-7ZKC>] (providing overview of new SEC whistleblower program instituted by Dodd-Frank). For a further discussion of Dodd-Frank enactments of and amendments to anti-retaliation provisions, see *infra* notes 31–50 and accompanying text.

9. For a further discussion of amendments invalidating predispute arbitration agreements, see *infra* notes 41–47 and accompanying text.

10. For a further discussion of this omission in the Dodd-Frank laws governing the new SEC program, see *infra* notes 36–41 and accompanying text.

11. 773 F.3d 488 (3d Cir. 2014).

12. See Christopher J. Oberst, *You Can (Maybe) Arbitrate That: Arbitration and the Dodd-Frank Act*, BLOOMBERG BNA (Jan. 22, 2015), <http://www.bna.com/maybe-arbitrate-arbitration-b17179922421/> [<http://perma.cc/9DZX-9PPJ>] (noting that Third Circuit is first appeals court to rule on this issue).

13. See Hamid et al., *supra* note 1, at 1 (“The [*Khazin*] decision is noteworthy in part because most commentary following the passage of Dodd-Frank assumed that the restrictions on pre-dispute arbitration in the Act applied to claims brought under the [new SEC program].”). For the impact on practitioners, see Susanna M. Buerger et al., *Third Circuit Holds That Parties to Arbitration Agreements Can Compel Arbitration of Dodd-Frank Whistleblower Claims*, CLIENT MEMORANDUM (Paul Weiss, New York, N.Y.), Dec. 16, 2014, <http://www.paulweiss.com/media/2738612/16dec14alert.pdf> [<http://perma.cc/UZE3-9UNF>] (speculating that *Khazin* will spur more similar decisions and noting implications of decision).

Circuit compelled arbitration of an anti-retaliation claim based on the omission.<sup>14</sup>

This Casebrief analyzes how the *Khazin* decision is a victory for defendants and should inform future practitioner decisions in whistleblower litigation.<sup>15</sup> Part II reviews the history of whistleblower law, Dodd-Frank, and related jurisprudence.<sup>16</sup> Part III analyzes the Third Circuit's resolution of the omission issue in *Khazin*.<sup>17</sup> Part IV positions the opinion within other narrow interpretations of Dodd-Frank whistleblower law, revealing that the current precedent is advantageous for defendants.<sup>18</sup> Part V considers the implications of *Khazin* and recommends that defendants employ arbitration agreements and plaintiffs consider approaching their whistleblower claims differently.<sup>19</sup> Though the *Khazin* defendants arbitrated this statutory discrepancy in Dodd-Frank, plaintiffs can still effectively plan to avoid arbitration agreements.<sup>20</sup>

## II. UNDERSTANDING THE MARKET: A BACKGROUND OF WHISTLEBLOWER LAW, DODD-FRANK, AND SURROUNDING JURISPRUDENCE

Despite the broad historical roots of whistleblower protection in other jurisdictions, American law has only recently come to embrace whistleblowers.<sup>21</sup> Dodd-Frank followed in that progression, seeking to employ whistleblowers to combat further financial industry fraud.<sup>22</sup> In the years since the enactment of Dodd-Frank, its whistleblower provisions have spurred a flurry of jurisprudence.<sup>23</sup>

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14. See *Khazin*, 773 F.3d at 489 (noting ultimate decision to compel arbitration of plaintiff's claim).

15. For a further discussion of the manner in which *Khazin* represents a victory for defendants and should inform practitioners, see *infra* notes 173–94 and accompanying text.

16. For a further discussion of the history of whistleblower law, Dodd-Frank, and surrounding jurisprudence, see *infra* notes 24–99 and accompanying text.

17. For a further discussion of the facts and decision in *Khazin*, see *infra* notes 102–21 and accompanying text.

18. For a further discussion of how *Khazin* is positioned within jurisprudence regarding other narrow interpretations of Dodd-Frank whistleblower law and the manner in which that advantages defendants, see *infra* notes 122–72 and accompanying text.

19. For a further discussion of the implications of *Khazin* and recommendations to practitioners, see *infra* notes 173–98 and accompanying text.

20. See *supra* note 19.

21. For a further discussion of the history of whistleblower law, see *infra* notes 24–30 and accompanying text. Whistleblowers are defined as people who report information on wrongdoing gleaned from their employment with a company.

22. For a further discussion of the whistleblower provisions of Dodd-Frank, see *infra* notes 35–50 and accompanying text.

23. See *supra* note 22.

A. *Growing Value: A Brief History of Whistleblower Law*

Modern whistleblower provisions developed from broad historical underpinnings.<sup>24</sup> Before 2006, American law failed to protect whistleblowers.<sup>25</sup> The False Claims Act (FCA), commonly credited as the

24. See Norman D. Bishara, Elletta Sangrey Callahan & Terry Morehead Dworin, *The Mouth of Truth*, 10 N.Y.U. J.L. & BUS. 37, 39 (2013) (recounting historical Venetian whistleblowing system); Lucienne M. Hartmann, Comment, *Whistle While You Work: The Fairytale-Like Whistleblower Provisions of the Dodd-Frank Act and the Emergence of “Greedy,” the Eighth Dwarf*, 62 MERCER L. REV. 1279, 1280 (2011) (identifying origination of term whistleblower in English law enforcement).

The proliferation of whistleblower anti-retaliation protections is also a recent phenomenon. Compare John Ashcroft, Catherine Hanaway & Claudia L. Oñate Greim, *Whistleblowers Cash In, Unwary Corporations Pay*, 40 HOFSTRA L. REV. 367, 369 (2011) (identifying “ancient lineage” of federal whistleblower incentives as beginning with False Claims Act (FCA) during Civil War), with Joel D. Hesch, *Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt*, 6 LIBERTY U. L. REV. 51, 56 (2011) (noting ineffectiveness of FCA provisions prior to 1986 amendments to law and identifying 1986 as turning point for law).

Recent crises have spurred more societal interest and have contributed to changing societal tones toward individual whistleblowers. See *id.* at 52–53 (pointing out “rapidly changing” attitudes towards whistleblowers and recounting positive societal acknowledgement of whistleblowers). Figures reviewing annual whistleblower activity in 2014 show huge growth, further evidencing how recently the whistleblowing phenomenon originated. See Solomon, *supra* note 8 (referencing 2014 as “banner year for whistleblowers”).

25. See Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73, 80 (2012) (detailing former lack of federal legal protection for whistleblowers and ineffective “patchwork” of state law protections). Prior to the enactment of federal whistleblower protections, individuals who reported wrongdoing effectively waded into a minefield. See *id.* at 80–81 (describing several particularly problematic points of historical whistleblower law). Importantly, historical whistleblower law seemed to disincentivize reporting of securities law violations. See *id.* at 81 (pointing out New York state law renders potential whistleblowers susceptible to weak protection, if any, and thus deters reporting).

For the definition of whistleblower, see Bishara et al., *supra* note 24, at 43 (“We espouse the following widely-used definition: ‘whistle-blowers are organization members (including former members and job applicants) who disclose illegal, immoral, or illegitimate practices (including omissions) under the control of their employers, to persons or organizations who may be able to effect action.’”); Hartmann, *supra* note 24, at 1280 (describing understanding as “an employee externally reporting fraudulent actions of the employer-company to the federal government”).

Industry-specific whistleblower laws dictate a more pointed definition. See generally Rapp, *supra*, at 85 (comparing whistleblower protections provided for in Sarbanes-Oxley Act with eventual legislative developments leading to whistleblower protections in Dodd-Frank Act); see also Thomas S. Markey, Note, “Whistleblower” Redefined: Implications of the Recent Interpretive Split on the Dodd-Frank Whistleblower Anti-Retaliation Provision, 33 REV. BANKING & FIN. L. 441, 446 (2014) (reviewing split interpretations on definitional ambiguity); Peter J. Henning, *Who Is a Whistle-Blower? The Courts Weigh In*, N.Y. TIMES, Jan. 5, 2015, available at [http://dealbook.nytimes.com/2015/01/05/who-is-a-whistle-blower-the-courts-weigh-in/?\\_r=0](http://dealbook.nytimes.com/2015/01/05/who-is-a-whistle-blower-the-courts-weigh-in/?_r=0) [<http://perma.cc/8MSV-2R79>] (noting definitional “ambiguity” of Dodd-Frank anti-retaliation provision).

first American whistleblower law, provides a basis for many of the modern statutes.<sup>26</sup>

Modern anti-retaliation protections in Dodd-Frank and other whistleblower laws recognize the spectrum of risks and rewards whistleblowers encounter.<sup>27</sup> On one hand, whistleblowers often receive

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Whistleblower narratives can arise in any number of contexts in both the private and public sectors. See, e.g., Susan Carey, *United Flight Attendants File Whistleblower Complaint*, WALL ST. J., Jan. 7, 2015, <http://www.wsj.com/articles/united-flight-attendants-file-whistleblower-complaint-1420663426> [<http://perma.cc/4HFV-HEFH>] (recounting whistleblower claim brought by flight attendants); Norman Solomon, *Why Jeffrey Sterling Deserves Support as a CIA Whistleblower*, HUFFINGTON POST (Jan. 5, 2015), [http://www.huffingtonpost.com/norman-solomon/why-jeffrey-sterling-dese\\_b\\_6414952.html](http://www.huffingtonpost.com/norman-solomon/why-jeffrey-sterling-dese_b_6414952.html) [<http://perma.cc/SYU4-5PAN>] (discussing Central Intelligence Agency whistleblower).

26. See generally Patrick A. Barthle II, Note, *Whistling Rogues: A Comparative Analysis of the Dodd-Frank Whistleblower Bounty Program*, 69 WASH. & LEE L. REV. 1201, 1217–20 (2012) (discussing historical development of FCA). Though the FCA originated during the Civil War, the 1986 amendments to the Act are seen as the major turning point for whistleblower law. See *id.* at 1218–20 (labeling 1986 amendments as forming “current version” of FCA); Hesch, *supra* note 24, at 56 (indicating ineffective nature of FCA prior to passage of 1986 amendments). The post-1986 FCA is widely recognized as successful and has effectuated huge recoveries. See Press Release, Dep’t of Justice, Justice Department Recovers \$2.4 Billion in False Claims Cases in Fiscal Year 2009; More Than \$24 Billion Since 1986 (Nov. 19, 2009), available at <http://www.justice.gov/opa/pr/justice-department-recovers-24-billion-false-claims-cases-fiscal-year-2009-more-24-billion> [<http://perma.cc/B295-2B27>] (reporting total FCA recoveries since 1986 amendments of \$24 billion); Solomon, *supra* note 8 (referencing Department of Justice report stating over \$6 billion was recovered under FCA in 2014).

Additionally, Dodd-Frank and other whistleblower protections trace their roots to the FCA. See Barthle, *supra*, at 1217 (noting FCA served as model for Dodd-Frank and other whistleblower laws); see also Bishara et al., *supra* note 24, at 41 (marking 1986 amendments to FCA as “key trend” toward incentivizing whistleblowing through monetary rewards). The FCA allows for suits to stymie fraud against the federal government. See Hesch, *supra* note 24, at 55–56 (labeling FCA “the government’s primary enforcement tool in combatting fraud”).

The FCA uniquely allows for whistleblower activity through a *qui tam* species of lawsuits. See generally Barthle, *supra*, at 1217–18 (providing description of historical basis of *qui tam* suits). *Qui tam* suits provide causes of action for whistleblowers acting on behalf of the government. See *id.* at 1217 (defining *qui tam* actions as those in which “private citizens . . . can bring a suit on behalf of the United States” and share in recoveries under that suit). Whistleblower activity under the FCA has been measurable. See Umang Desai, Comment, *Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010*, 43 LOY. U. CHI. L.J. 427, 441 (2012) (outlining success of FCA and stating that over \$24 billion has been collected by government thanks to FCA activity since 1986 amendments); see also Hesch, *supra* note 24, at 56 (noting \$12 billion recovered under FCA actions from 1996 to 2006 and attributing large percentage to *qui tam* actions).

27. See Erika Kelton, *The War on Dodd-Frank Whistleblowers—How Wall Street Gags, Intimidates and Fights the Fraud Fighters*, FORBES (Jan. 5, 2015), <http://www.forbes.com/sites/erikakelton/2015/01/05/the-war-on-dodd-frank-whistleblowers-how-wall-street-gags-intimidates-and-fights-the-fraud-fighters/> [<http://perma.cc/H5KH-WZCC>] (commenting on methods to suppress whistleblowing).

high monetary rewards for reporting wrongdoing.<sup>28</sup> On the other hand, blowing the whistle could potentially result in loss of employment and alienation in an industry.<sup>29</sup> In extreme cases, whistleblowers can be left out in the cold, completely unprotected, and without any remedy.<sup>30</sup>

### B. Investing in Whistleblowers: Dodd-Frank

There are three important aspects of the Dodd-Frank whistleblower provisions that put the law in perspective.<sup>31</sup> First, Dodd-Frank created a new SEC program aimed at increasing whistleblower incentives and protections.<sup>32</sup> Second, Dodd-Frank amended other whistleblower laws by adding provisions that invalidate predispute arbitration agreements, but nevertheless omitted these provisions from the sections governing the new SEC program.<sup>33</sup> Third, the new Dodd-Frank SEC program has elicited criticism for several shortcomings.<sup>34</sup>

#### 1. The New SEC Whistleblower Program

The economic crises that plagued America in 2008 were, in many ways, the driving force behind the development of Dodd-Frank.<sup>35</sup> The whistleblower provisions of Dodd-Frank were merely one aspect of many

28. See Daniel Fisher with Shanti Atkins, *SEC's Secret \$30 Million Whistleblower Case Won't Improve Corporate Behavior*, FORBES (Sept. 25, 2014), <http://www.forbes.com/sites/danielfisher/2014/09/25/secs-secret-30-million-whistleblower-case-wont-improve-corporate-behavior/> [<http://perma.cc/2T23-6TCZ>] (reviewing \$30 million award); Henning, *supra* note 2 (detailing \$104 million and \$30 million whistleblower awards).

29. See Ashcroft et al., *supra* note 24, at 407 (describing issues encountered by whistleblowers as being typecast as “problem employees,” responses of “alienation, isolation, and hostility,” and treatment as “snitches”); Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 753 (2014) (stating that choosing to blow whistle can be “devastating to [whistleblower's] livelihood”).

30. See Scott Patterson & Jenny Strasburg, *Source's Cover Blown by SEC*, WALL ST. J., Apr. 25, 2012, 9:22 AM, <http://www.wsj.com/articles/SB10001424052702303459004577363683833934726> [<http://perma.cc/5PYL-W9JH>] (recounting story of whistleblower whose identity was inadvertently exposed by SEC). *But see* George S. Canellos, *Letter on SEC Did Not Blow Source's Cover*, WALL ST. J., Apr. 25, 2012, 6:23 PM, <http://www.wsj.com/articles/SB10001424052702304811304577366381288135106> [<http://perma.cc/7GPV-HT42>] (disagreeing that SEC inadvertently exposed source).

31. See *infra* notes 32–34 and accompanying text.

32. See *infra* notes 35–40 and accompanying text.

33. See *infra* notes 41–47 and accompanying text.

34. See *infra* notes 48–50 and accompanying text.

35. See Pacella, *supra* note 29, at 726 (describing climate of 2008 financial crisis as prompting Dodd-Frank); Sara L. Reid & Serena B. David, *The Evolution of the SEC Whistleblower: From Sarbanes-Oxley to Dodd-Frank*, 129 BANKING L.J. 907, 909 (2012) (noting Dodd-Frank attempted to improve on former programs); Rachel S. Taylor, *A Cultural Revolution: The Demise of Corporate Culture Through the Whistleblower Bounty Provisions of the Dodd-Frank Act*, 15 TRANSACTIONS: TENN. J. BUS. L. 69, 69 (2013) (stating Dodd-Frank was direct response to crisis); Jessica Luhrs, Note, *Encouraging Litigation: Why Dodd-Frank Goes Too Far in Eliminating the Procedural Difficul-*

subsequent undertakings for reform.<sup>36</sup> Though the whistleblower provisions are a small part of larger legislation, many characterize them as a prominent part of the law.<sup>37</sup>

Dodd-Frank established its own unique whistleblower program to be run by the SEC.<sup>38</sup> The program utilizes a “bounty” model based on financial incentives for whistleblower reports.<sup>39</sup> In a parallel effort, the sections governing this program include anti-retaliation provisions, which prohibit retaliation, establish a cause of action, and make certain forms of relief available.<sup>40</sup>

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*ties in Sarbanes-Oxley*, 8 HASTINGS BUS. L.J. 175, 175 (2012) (describing 2008 financial crisis prompting Dodd-Frank).

36. See Pacella, *supra* note 29, at 726–27 (noting whistleblower sections “are just a few” of multitude of Dodd-Frank provisions); Luhrs, *supra* note 35, at 175–76 (outlining several additional changes effected by Dodd-Frank).

37. See Ashcroft et al., *supra* note 24, at 372 (describing one goal of Dodd-Frank program was “to counterbalance the potential chilling effect” of whistleblowing risks); Pacella, *supra* note 29, at 727 (characterizing Dodd-Frank in part as aiming to grow whistleblower activity); Rapp, *supra* note 25, at 85 (referring to characterization of Dodd-Frank program as potentially contributing to huge advancement of whistleblower activity); Desai, *supra* note 26, at 447 (outlining one goal of Dodd-Frank as fraud deterrence).

38. See *infra* notes 39–40. Prior to the passage of Dodd-Frank, the SEC ran a whistleblower program available only for reports of insider trading that was largely unsuccessful. See Ashcroft et al., *supra* note 24, at 372 (noting former program “resulted in . . . \$159,537 paid to . . . five claimants.”).

39. See Ashcroft et al., *supra* note 24, at 380 (describing theory of program); see also *id.* (reviewing final structure of program as promulgated in SEC rules pursuant to Dodd-Frank provision as awarding “between ten to thirty percent of collected monetary sanctions to whistleblowers who (i) voluntarily provide the SEC (ii) with original information about a violation of the securities laws (iii) that leads to the successful enforcement of an action brought by the SEC (iv) resulting in monetary sanctions exceeding \$1 million” (footnotes omitted)); Desai, *supra* note 26, at 448 (identifying aim of unique approach of Dodd-Frank bounty model as increasing benefits and “significant incentives” available to whistleblowers); Meghan Elizabeth King, Note, *Blowing the Whistle on the Dodd-Frank Amendments: The Case Against the New Amendments to Whistleblower Protection in Section 806 of Sarbanes-Oxley*, 48 AM. CRIM. L. REV. 1457, 1463 (2011) (describing bounty program requirements).

Though the Dodd-Frank program is not the only one based on a “bounty” model, the law independently enlarged potential financial bounties. See Barthle, *supra* note 26, at 1207 (pointing out changes in new program, notably increased cap on awards of “10% mandatory floor, with a possible reward up to . . . 30%” and removal of complete agency discretion as to decision on whether to pay bounties); King, *supra*, at 1463 (specifying that whistleblowers who meet requirements now “automatically receive a bounty award”). For a discussion of the bounty model, see Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives For Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91 (2007).

40. See 15 U.S.C. § 78u-6(h)(1)(A) (2012) (prohibiting retaliation); *id.* § 78u-6(h)(1)(B) (outlining cause of action); *id.* § 78u-6(h)(1)(C) (outlining potential forms of relief); Ashcroft et al., *supra* note 24, at 384 (reviewing “two-tiered” retaliation protections in Dodd-Frank); Pacella, *supra* note 29, at 723 (describing specific prohibitions on retaliation against whistleblowers).

## 2. *Predispute Arbitration Agreement Amendments*

In addition to establishing the new SEC program, Dodd-Frank also amended whistleblower provisions in the Sarbanes-Oxley Act of 2002 (SOX), the Commodity Exchange Act (CEA), and the Consumer Financial Protection Act of 2010 (CFPA).<sup>41</sup> In part, Dodd-Frank added similar provisions to invalidate predispute arbitration agreements to the anti-retaliation sections of SOX, CEA, and CFPA.<sup>42</sup>

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41. See generally Luhrs, *supra* note 35, at 179–81 (providing overview of Dodd-Frank amendments to other laws). Dodd-Frank also amended the FCA whistleblower provisions. See Mark J. Oberti, *New Wave of Employment Retaliation and Whistleblowing*, 38 T. MARSHALL L. REV. 43, 99–100 (2012) (discussing Dodd-Frank FCA amendment).

42. See *infra* note 44. SOX preceded Dodd-Frank, but Dodd-Frank and SOX (and its original whistleblower provisions) were enacted for similar purposes. See Desai, *supra* note 26, at 441–42 (reviewing motivations behind passage of original version of SOX); Samuel C. Leifer, Note, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 MICH. L. REV. 121, 126 (2014) (pointing out motivations behind original SOX whistleblower program).

SOX whistleblower provisions are structurally different from those in Dodd-Frank. See Pacella, *supra* note 29, at 729 (outlining differences in SOX program, such as requirement to file original complaint with administrative agency, shorter statute of limitations, and narrower relief available). The initial SOX whistleblower efforts were largely unproductive. See *id.* at 729–30 (reviewing ineffectiveness of SOX); Leifer, *supra*, at 128–29 (outlining research indicating failures of original SOX program). Some believe Dodd-Frank was informed by the lack of success in SOX. See Reid & David, *supra* note 35, at 909 (stating Dodd-Frank sought to “address the deficiencies” of unsuccessful programs passed as components of former legislation). Dodd-Frank also amended the CEA to include a nearly identical whistleblower program of its own, relative to commodities law violations. See Oberti, *supra* note 41, at 98–99 (outlining program and protections created by Dodd-Frank by way of amendments to CEA). Finally, Dodd-Frank inserted additional anti-retaliation measures in the CFPA. See *id.* at 97 (describing anti-retaliation measures put in place by Dodd-Frank relative to reporting under CFPA).

For a discussion of the similarities in the different laws, see *infra* note 49 and accompanying text. See 18 U.S.C. § 1514A(e)(1)-(2) (2012).

(e) Nonenforceability of certain provisions waiving rights and remedies or requiring arbitration of disputes.—

(1) Waiver of rights and remedies.—The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.

(2) Predispute arbitration agreements.—No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

*id.*; 7 U.S.C. § 26(n) (2012).

(n) Nonenforceability of certain provisions waiving rights and remedies or requiring arbitration of disputes

(1) Waiver of rights and remedies

The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment including by a predispute arbitration agreement.

(2) Predispute arbitration agreements

Notably, however, Dodd-Frank did not invalidate predispute arbitration agreements in the sections governing the new SEC whistleblower program.<sup>43</sup> The legislative history of Dodd-Frank indicates that some level of commentary recommended including a predispute arbitration provision in the SEC whistleblower program laws.<sup>44</sup> At least one commentator pointed out that this omission from Dodd-Frank could leave a gaping hole in the new SEC program.<sup>45</sup> Congress and the SEC were aware of this

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No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

*id.*; 12 U.S.C. § 5567(d) (2012).

(d) Unenforceability of certain agreements

(1) No waiver of rights and remedies

Except as provided under paragraph (3), and notwithstanding any other provision of law, the rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment, including by any predispute arbitration agreement.

(2) No predispute arbitration agreements

Except as provided under paragraph (3), and notwithstanding any other provision of law, no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section.

(3) Exception

Notwithstanding paragraphs (1) and (2), an arbitration provision in a collective bargaining agreement shall be enforceable as to disputes arising under subsection (a)(4), unless the Bureau determines, by rule, that such provision is inconsistent with the purposes of this title.

*Id.* The inclusion of such a provision in the SOX amendments has been viewed as an indication of congressional intent favoring strong whistleblower protections. See Bradley Mark Nerderman, Note, *Should Courts Apply Dodd-Frank's Prohibition on the Enforcement of Pre-Dispute Arbitration Agreements Retroactively?*, 98 IOWA L. REV. 2141, 2154 (2013) (noting that invalidation of predispute arbitration agreements represents greater protection for whistleblowers than former version of SOX and is meant "to encourage whistleblowing"); *id.* at 2157 (referring to scholarly consensus that former version of SOX was ineffective because companies kept and employed power to head off whistleblower activity through use of arbitration agreements). That congressional intent might also stand for a broader intent to rid "the securities industry" as a whole of arbitration agreements. See Catherine Moore, Note, *The Effect of the Dodd-Frank Act on Arbitration Agreements: A Proposal for Consumer Choice*, 12 PEPP. DISP. RESOL. L.J. 503, 518 (2012) (arguing that Congress meant to stop use of arbitration agreements in whistleblower context).

43. See 15 U.S.C. § 78u-6(a)-(j) (outlining Dodd-Frank's specific cause of action and potential remedies).

44. See Pacella, *supra* note 29, at 731 (noting "several commentators" wanted anti-arbitration clause in provisions governing SEC program).

45. See Letter from Daniel J. Kaiser, Partner, Kaiser Saurborn & Mair, P.C., to SEC (Dec. 2, 2010), available at <http://www.sec.gov/comments/s7-33-10/s73310-27.pdf> [<http://perma.cc/SH48-GUHT>] ("Of course, the same reasons the no waiver language is necessary for the companion Commodities whistleblower section, which is nearly identical in all respects, are equally applicable to the SEC whistleblower section. Otherwise, the SEC whistleblower provision will be eviscerated by employers who will include waiver language in every document their employe[es] sign. In short, the program will be gutted . . . . I respectfully suggest that

omission when drafting Dodd-Frank.<sup>46</sup> Despite these concerns, the provisions governing the new SEC program are undoubtedly silent on arbitration agreements.<sup>47</sup>

### 3. *Criticisms of the New SEC Whistleblower Program*

Years after its enactment, criticisms regarding the nuances of the SEC whistleblower program remain.<sup>48</sup> Given the federal government's usual preference for arbitration, some have criticized the invalidation of arbitration agreements as inappropriate.<sup>49</sup> And despite the seemingly noble goals of Dodd-Frank, others are unconvinced that the law will actually lead whistleblowers to expose wrongdoing, while some believe the whistleblower provisions threaten internal corporate structures.<sup>50</sup>

#### C. *A Successful Model?: Cases Interpreting Dodd-Frank*

In the years since the passage of Dodd-Frank, courts have parsed out numerous issues with the law, creating three categories of jurisprudence that are important to review.<sup>51</sup> First, in addition to the Third Circuit, two other federal courts have addressed the absence of an arbitration provision in laws governing the new SEC whistleblower program.<sup>52</sup> Second, two

the Commission carefully consider this issue and consider fixes that implement Congress' intention on the 'no waiver' clause.”).

46. *See id.* (reviewing commentary submitted during drafting stage of Dodd-Frank).

47. For a discussion of the absence of arbitration agreements in the new SEC program, see *infra* notes 55–67 and accompanying text.

48. For a summary of criticisms of the SEC whistleblower program, see *infra* notes 49–50 and accompanying text.

49. *See* Imre S. Szalai, *An Obituary for the Federal Arbitration Act: An Older Cousin to Modern Civil Procedure*, 2010 J. DISP. RESOL. 391, 428 (2010) (citing Dodd-Frank's invalidation of several sorts of arbitration agreements as evidence “Congress has been chipping away at” federal preference for arbitration). This federal preference originated with the Federal Arbitration Act (FAA) in 1925. *See id.* at 391–92 (describing “groundbreaking” nature of FAA in endorsing arbitration agreements). Jurisprudence has broadened the FAA since its passage. *See id.* at 392 (noting judicial expansion of FAA).

50. *See* Ashcroft et al., *supra* note 24, at 371 (discussing “perverse incentive” and “conflict of interest” underlying bounty program in that whistleblowers might harbor information as opposed to reporting it immediately to increase their potential bounty); *id.* at 380 (mentioning Dodd-Frank scheme as encouraging reporting “potentially entirely in lieu” of any internal compliance system existing within company); Taylor, *supra* note 35, at 70 (arguing that Dodd-Frank may affect larger threat to corporate culture); Dave Ebersole, Note, *Blowing the Whistle on the Dodd-Frank Whistleblower Provisions*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 123, 135–43 (2011) (outlining negative aspects of bounty program); Hartmann, *supra* note 24, at 1305–07 (outlining how Dodd-Frank whistleblower provisions have potential to increase frivolous claims); Luhrs, *supra* note 35, at 182–84 (reviewing manner in which program has potential to increase “meritless” litigation); *id.* at 183 (noting “strong incentives to bypass internal . . . measures”).

51. *See infra* notes 52–54 and accompanying text.

52. For a further discussion of these cases, see *infra* notes 55–67 and accompanying text.

district courts in the Third Circuit have analyzed other Dodd-Frank whistleblower issues (e.g., retroactive applicability of the Dodd-Frank amendments).<sup>53</sup> Third, federal district and circuit courts nationally have ruled on other aspects of the Dodd-Frank whistleblower provisions, including a definitional issue, extraterritorial applicability of the law, and retroactive applicability.<sup>54</sup> These three broad categories of jurisprudence reveal an arguably narrow overall construction of Dodd-Frank, which provides a helpful reference point when analyzing the *Khazin* decision.

### 1. *Absence of a Predispute Arbitration Provision in New SEC Program Provisions*

District court decisions conflict on the issue of pre-arbitration dispute agreements: two federal district courts have upheld predispute arbitration agreements against plaintiffs alleging whistleblower retaliation under Dodd-Frank and one did not.<sup>55</sup>

In *Ruhe v. Masimo Corp.*,<sup>56</sup> former employees of a public medical device manufacturer brought a whistleblower suit alleging unethical practices and defective product cover-ups.<sup>57</sup> The United States District Court for the Central District of California compelled arbitration pursuant to an agreement signed by the employees.<sup>58</sup> The court refused the plaintiffs' request to read a provision invalidating predispute arbitration agreements into Dodd-Frank.<sup>59</sup>

53. For a further discussion of these other Third Circuit opinions, see *infra* notes 68–80 and accompanying text.

54. For a further discussion of this national jurisprudence, see *infra* notes 81–99 and accompanying text.

55. For an examination of two federal district courts' analysis in upholding the arbitration agreements, see *infra* notes 56–67 and accompanying text.

56. No. SACV 11-00734-CJC(JCGx), 2011 WL 4442790 (C.D. Cal. Sept. 16, 2011), *appeal docketed*, No. 14-55556 (9th Cir. Apr. 7, 2014), and *appeal docketed*, No. 14-55725 (9th Cir. May 2, 2014).

57. See *id.* at \*1 (describing complaint as alleging “constructive discharge in violation” of Dodd-Frank anti-retaliation provisions).

58. See *id.* at \*5 (summarizing failure of each argument lodged by plaintiffs against motion to compel and resolving motion in favor of defendants). The arbitration agreement was signed in tandem with a confidentiality agreement at the commencement of plaintiffs' employment. See *id.* at \*1 (detailing arbitration and confidentiality agreements).

59. See *id.* at \*4 (declining to “read the arbitration provision from the Sarbanes-Oxley” into the Dodd-Frank anti-retaliation provision). The court compared the Dodd-Frank provision to the amendments Dodd-Frank made to the SEA and SOX. See *id.* (describing omission of provision from Dodd-Frank invalidating arbitration agreements and juxtaposing omission against Dodd-Frank amendments including such provisions). The court found any evidence supporting the proposition of reading an anti-arbitration clause into Dodd-Frank “insufficient.” See *id.* (noting plaintiffs' arguments were “insufficient . . . to conclude that Congress unintentionally omitted this provision”).

Similarly, the United States District Court for the Southern District of New York issued a decision in *Murray v. UBS Securities, LLC*<sup>60</sup> compelling arbitration of a plaintiff's Dodd-Frank anti-retaliation claim.<sup>61</sup> The court held that given the absence of any invalidating provision in Dodd-Frank, the arbitration agreement governed.<sup>62</sup> In making its decision, the court focused on a strong federal preference for arbitration, differences between Dodd-Frank and other whistleblower protections, and congressional intent implicit in the Act's statutory construction.<sup>63</sup>

The Fourth Circuit's decision in *Santoro v. Accenture Federal Services, LLC*,<sup>64</sup> went in a different direction than the two decisions above and implied that all whistleblower claims brought under Dodd-Frank are barred from arbitration.<sup>65</sup> However, the *Santoro* decision does not specifically regard the predispute arbitration issue.<sup>66</sup> The court did not distinguish between the causes of action in the SEC program provisions and the amended SOX, CEA, and CFPA provisions.<sup>67</sup>

## 2. *Dodd-Frank Jurisprudence in the Third Circuit*

Third Circuit jurisprudence on other aspects of Dodd-Frank whistleblower law indicates an overall narrow interpretation of several other open Dodd-Frank questions.<sup>68</sup> In *Sefen v. Animas Corp.*,<sup>69</sup> the District Court for the Eastern District of Pennsylvania addressed potential retroactive application of the Dodd-Frank amendments to the FCA.<sup>70</sup> A whistleblower alleged that his employer engaged in wrongful conduct in violation of the FCA.<sup>71</sup> To avoid being barred by the statute of limitations, the plaintiff attempted to apply a Dodd-Frank amendment to the FCA.<sup>72</sup>

60. No. 12 Civ. 5914(KPF), 2014 WL 285093 (S.D.N.Y. Jan. 27, 2014).

61. *See id.* at \*14 (granting motion to compel arbitration and stay proceeding).

62. *See id.* at \*10 (declining to extend protection of SOX provision because claims arose under Dodd-Frank provision).

63. *See id.* at \*10–11 (discussing preference for arbitration, reasoning of *Ruhe* court, other decisions declining to extend Dodd-Frank amendments to other statutes, and text of Dodd-Frank itself).

64. 748 F.3d 217 (4th Cir. 2014). In *Santoro*, the Fourth Circuit addressed a plaintiff's argument to expand the Dodd-Frank arbitration agreement prohibitions. *See id.* at 220 (describing plaintiff's arguments).

65. *See id.*

66. *See id.* (noting issue of whether Dodd-Frank invalidation of arbitration agreements "prohibits the arbitration of non-whistleblower claims").

67. *See id.* at 223 (referring to Dodd-Frank "causes of action" generally but failing to distinguish as between them).

68. For an examination of Third Circuit jurisprudence on Dodd-Frank's whistleblower provisions, see *infra* notes 72–85 and accompanying text.

69. No. 10–2971, 2014 WL 2710957 (E.D. Pa. June 13, 2014).

70. *See id.* at \*4 (describing plaintiff's argument that claim was not barred by statute of limitations).

71. *See id.* at \*1 (outlining allegations of plaintiff).

72. *See id.* at \*4 (describing failure of amendment to clearly denote "effective date" or retroactivity).

Driven by a lack of clarity in the statute directly supporting retroactive application, the court held that the plaintiff failed to meet the statute of limitations.<sup>73</sup>

In *Safarian v. American DG Energy, Inc.*,<sup>74</sup> the District Court of New Jersey addressed alleged retaliation.<sup>75</sup> The plaintiff attempted to invoke the protections of the Dodd-Frank anti-retaliation provision.<sup>76</sup> Declining to address what constitutes a whistleblower under the Act, the court instead found that the disclosures made by the plaintiff were not a category protected by Dodd-Frank.<sup>77</sup>

Finally, in *Port Authority Trans-Hudson Corp. v. U.S. Department of Labor*,<sup>78</sup> the Third Circuit briefly spoke again on its general interpretation of anti-retaliation provisions and addressed a non-Dodd-Frank anti-retaliation statute.<sup>79</sup> The Third Circuit made clear that as a general principle of interpreting anti-retaliation statutes, the plain text will always “trump” intent-based arguments.<sup>80</sup>

### 3. *Dodd-Frank Jurisprudence Nationally*

Nationally, courts have addressed three other issues of Dodd-Frank whistleblower law and have chosen to resolve these issues narrowly.<sup>81</sup>

First, numerous federal courts have addressed a definitional issue presented by conflicting Dodd-Frank provisions.<sup>82</sup> The Dodd-Frank anti-retaliation provision references whistleblowers that report wrongdoing to

73. *See id.* at \*6 (holding against retroactivity based partly on lack of congressional guidance).

74. No. 10–6082, 2014 WL 1744989 (D.N.J. Apr. 29, 2014), *aff'd in part, vacated in part*, No. 14–2734, 2015 WL 4430837 (3d Cir. July 21, 2015).

75. *See id.* at \*1 (describing employment relationship between plaintiff and defendant and “Defendant’s alleged retaliation against Plaintiff”).

76. *See id.* at \*5 (noting plaintiff’s failure to prove he was within purview of Dodd-Frank protections).

77. *See id.* at \*4 (avoiding definitional issue); *see also id.* at \*4–5 (describing plaintiff as failing to qualify for protections of statute due to failure to make disclosures of type protected by Dodd-Frank).

78. 776 F.3d 157 (3d Cir. 2015).

79. For a discussion of the *Port Authority Trans-Hudson* case, *see infra* note 80 and accompanying text. *See also Port Auth. Trans-Hudson Corp.*, 776 F.3d at 159 (describing railroad worker anti-retaliation statute at issue in case).

80. *See id.* at 163 n.8 (“Of course, we would not allow considerations of the purpose of an anti-retaliation provision to trump the statute’s text. For example, we recently rejected a rather plausible argument that a whistleblower provision would be undermined, in favor of ‘Congress’s intent [as] clearly reflected in the text and structure of [the Act].’” (alterations in original)).

81. For a further discussion of this jurisprudence, *see infra* notes 82–99 and accompanying text.

82. For a discussion of the federal courts addressing a definitional issue in the Dodd-Frank provisions, *see infra* notes 83–99 and accompanying text.

the SEC.<sup>83</sup> The definitional gap lies in whether whistleblowers who engage in internal reporting can invoke anti-retaliation protections.<sup>84</sup>

District court decisions on the definitional issue have been wide-ranging and ultimately have arrived at opposing resolutions.<sup>85</sup> In *Asadi v. G.E. Energy*,<sup>86</sup> the Fifth Circuit became the first circuit court to address this issue and took a narrow approach by holding that internal whistleblowers could not invoke the Dodd-Frank anti-retaliation protections.<sup>87</sup> The *Asadi* opinion has not passed without criticism, but it stands as the only circuit decision on the definitional issue thus far.<sup>88</sup>

Second, courts have encountered potential foreign application of the Dodd-Frank whistleblower anti-retaliation provisions.<sup>89</sup> In *Meng-Lin v. Siemens AG*,<sup>90</sup> the Second Circuit declined to extend Dodd-Frank anti-retaliation protections extraterritorially.<sup>91</sup> A whistleblower alleged that he was fired for reporting misconduct, but all operative events in the case took place abroad.<sup>92</sup> The Second Circuit was not persuaded that Dodd-Frank protections should have extraterritorial application.<sup>93</sup>

83. See Pacella, *supra* note 29, at 723 (detailing definitions in operative section of Dodd-Frank); see also Leifer, *supra* note 42, at 123 (describing definitional issue as “an internal inconsistency in the way that the statute defines ‘whistleblower’”).

84. See Leifer, *supra* note 42, at 123–24 (elaborating on “disagreement” that definitional point has engendered); see also Pacella, *supra* note 29, at 723 (stating that subsections have “created ambiguity”).

85. See Pacella, *supra* note 29, at 733–41 (outlining diverse federal district court decisions addressing definitional issue).

86. 720 F.3d 620 (5th Cir. 2013).

87. See *Asadi*, 720 F.3d at 625 (holding Dodd-Frank only protects whistleblowers who first report to SEC); see also Pacella, *supra* note 29, at 743 (characterizing *Asadi* holding).

88. See, e.g., Pacella, *supra* note 29, at 725–26 (outlining reasons why *Asadi* decision is “alarming” and might precipitate more case law).

89. For a discussion of the Second Circuit’s treatment of Dodd-Frank’s whistleblower provisions, see *infra* notes 90–93 and accompanying text.

90. 763 F.3d 175 (2d Cir. 2014).

91. See *id.* at 176–77 (summarizing reasoning and conclusion that Dodd-Frank anti-retaliation protections do not apply extraterritorially). The issue of extraterritorial application came before the Fifth Circuit in *Asadi*, but the court chose to resolve the case on a definitional point. See Pacella, *supra* note 29, at 724–25 (describing lower court holding in *Asadi* as grounded in extraterritoriality).

92. See *Meng-Lin*, 763 F.3d at 177–78 (describing allegations that plaintiff reported information that company was engaging in improper payments to officials of Asian governments and subsequent employment restrictions ultimately resulting in termination). The Taiwanese plaintiff was employed by a Chinese subsidiary corporation of a German parent corporation. See *id.* at 177 (reviewing citizenship and employment of plaintiff within subsidiary and parent companies).

93. See *id.* at 179–80 (labeling plaintiff’s arguments in favor of extraterritorial application “unavailing”); *id.* at 183 (citing lack of explicit congressional intent as driving decision). Reminiscent of arguments in *Ruhe* and *Murray*, the plaintiff argued that Dodd-Frank exposed a congressional intention for extraterritorial reach. See *id.* at 180 (holding that Dodd-Frank “contains no hint” indicating extraterritorial application).

Third, there is wide judicial disagreement over retroactive application of the Dodd-Frank whistleblower protections, and confusing congressional intent is partly responsible.<sup>94</sup> Plaintiffs have attempted to apply Dodd-Frank protections to conduct occurring prior to passage of the law.<sup>95</sup> In particular, the Dodd-Frank amendment to SOX that invalidates predispute arbitration agreements has spurred a flurry of decisions.<sup>96</sup> District court decisions in *Pezza v. Investors Capital Corp.*<sup>97</sup> and *Henderson v. Masco Framing Corp.*<sup>98</sup> demonstrate the split between federal courts on the retroactivity issue.<sup>99</sup>

### III. ARBITRAGING THE DISCREPANCY: THE THIRD CIRCUIT TAKES THE NARROW APPROACH AND DECLINES TO READ IN AN INVALIDATING PROVISION IN *KHAZIN*

The Third Circuit addressed the odd discrepancy in Dodd-Frank and analyzed the absence of a provision invalidating predispute arbitration agreements in the section of Dodd-Frank that governs the new SEC program.<sup>100</sup> Despite arguments to read such a provision in and preserve the intent of Dodd-Frank to protect whistleblowers, the Third Circuit was not convinced that such judicial action was warranted.<sup>101</sup>

94. See Hannah Garden-Monheit, Comment, *Using Severability Doctrine to Solve the Retroactivity Unit-of-Analysis Puzzle: A Dodd-Frank Case Study*, 80 U. CHI. L. REV. 1885, 1893–94 (2013) (stating that resolution of Dodd-Frank retroactivity issue by federal district courts has “yielded unpredictable results” and identifying unclear congressional intent as “play[ing] a central role” in diverse retroactivity analyses). In particular, there has been wide disagreement as to the retroactivity of the Dodd-Frank amendments to SOX whistleblower provisions and, more specifically, the amendment invalidating predispute arbitration agreements. See *id.* at 1894–95 (outlining retroactivity problems as to “five Dodd-Frank amendments to SOX” including predispute arbitration provision). Retroactivity of statutes presents an issue governed by Supreme Court case law. See *id.* at 1893–95 (describing Supreme Court framework for analysis of retroactivity of statute); Nerderman, *supra* note 42, at 2159 (describing retroactivity analysis as matter of constitutional law addressed by Supreme Court).

95. See Nerderman, *supra* note 42, at 2164 (describing plaintiff’s attempt to apply Dodd-Frank amendment, invalidating predispute arbitration agreements to conduct occurring before passage of Dodd-Frank, to SOX).

96. See Garden-Monheit, *supra* note 94, at 1895 (labeling this particular provision the most problematic).

97. 767 F. Supp. 2d 225 (D. Mass. 2011).

98. No. 3:11–CV–00088–LRH, 2011 WL 3022535 (D. Nev. July 22, 2011).

99. See generally Garden-Monheit, *supra* note 94, at 1897 (summarizing *Henderson* holding that reached opposite resolution following *Pezza*); Nerderman, *supra* note 42, at 2159 (juxtaposing *Pezza* holding with *Henderson* holding). The parties in each case elicited mixed responses on their congressional intent arguments. Compare *Pezza*, 767 F. Supp. 2d at 233 (labeling congressional intent as to retroactive applicability “unclear” and applying predispute arbitration provision retroactively), with *Henderson*, 2011 WL 3022535, at \*4 (stating nothing on congressional intent and declining to apply predispute arbitration provision retroactively).

100. For a discussion of the *Khazin* court’s treatment of the Dodd-Frank discrepancy and the court’s analysis, see *infra* notes 109–21 and accompanying text.

101. See *infra* notes 119–21.

### A. *Blowing the Whistle: Facts and Background of Khazin*

Boris Khazin was employed by TD Ameritrade (TD) and conducted due diligence analysis on TD's products.<sup>102</sup> In the course of his employment, Khazin became aware of a pricing issue that ran afoul of securities laws, which he presented to one of his superiors.<sup>103</sup> As instructed by his supervisor, Khazin studied effects of re-pricing the product and discovered that TD would experience negative revenue impacts from such repricing.<sup>104</sup> Though instructed to cease investigation of the issue, Khazin persisted and was fired several months later.<sup>105</sup>

Khazin initially filed several state law claims as well as a Dodd-Frank claim in New Jersey state court.<sup>106</sup> Khazin later brought the Dodd-Frank claim in federal court.<sup>107</sup> The United States District Court for the District of New Jersey dismissed the Dodd-Frank claim and compelled arbitration based on a retroactivity analysis.<sup>108</sup>

102. *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 489 (3d Cir. 2014) (describing employment responsibilities of Khazin as "performing due diligence on financial products offered to TD customers"); *see also* *Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149 (SDW) (MCA), 2014 WL 940703, at \*1 (D.N.J. Mar. 11) (labeling Khazin "an investment oversight officer"), *aff'd on other grounds* by 773 F.3d 488, 489 (3d Cir. 2014). Khazin and TD entered into "an employment agreement in which they agreed to arbitrate all disputes arising out of Khazin's employment." *Khazin*, 773 F.3d at 489.

103. *See Khazin*, 773 F.3d at 489 (describing discovery that one product "was priced in a manner that did not comply with the relevant securities regulations" and subsequent reporting of issue); *see also Khazin*, 2014 WL 940703, at \*1 (noting improper pricing "would result in customers paying additional overhead for the product").

104. *See Khazin*, 773 F.3d at 489 (detailing discoveries of revenue analysis of re-price as showing "that although remedying the violation would save customers \$2,000,000, it would cost TD \$1,150,000 in revenues and negatively impact the balance sheet of" other divisions overseen by Khazin's supervisor).

105. *See id.* at 490 (reviewing instructions of supervisor to Khazin "not to correct the problem and to stop sending her emails on the subject"); *id.* at 489-90 (noting Kazin approached supervisor again to discuss "changing the price to remedy the violation"); *id.* at 490 (stating Khazin was terminated after months of conflict regarding his employment). Once Khazin brought up the issue after he was instructed to ignore it, TD leveled accusations that Khazin had been involved in wrongdoing in his employment. *See id.* (describing confrontation regarding "billing irregularity"); *Khazin*, 2014 WL 940703, at \*1 (detailing initial accusations of TD against Khazin). Khazin's firing was premised on those accusations. *See Khazin*, 773 F.3d at 490 (noting "Khazin was told that he could no longer be trusted" and was fired).

106. *See Khazin*, 773 F.3d at 490 (explaining initial filings in Superior Court of New Jersey). The state law claims were dismissed in light of the arbitration provision in the employment agreement. *See id.* (stating that state court "compelled arbitration of the state-law claims").

107. *See id.* (outlining holding of state court and jurisdictional dismissal of Dodd-Frank claim, and re-filing of claim in federal court).

108. *See id.* (describing ruling by federal district court that Dodd-Frank "did not prohibit the enforcement of arbitration agreements" retroactively). The lower court engaged in a retroactivity analysis driven by the Supreme Court precedent. *See id.* (summarizing lower court ruling on retroactivity).

B. *Defendant Profits from Discrepancy: Third Circuit Analyzes the Absence of a Predispute Arbitration Provision in Laws Governing the New SEC Program*

The Third Circuit first discussed and focused on the SEC bounty program created by Dodd-Frank.<sup>109</sup> The court noted the differences between Dodd-Frank provisions governing the SEC program and Dodd-Frank amendments to other whistleblower laws.<sup>110</sup> In particular, the court drew distinctions between the Dodd-Frank section on the SEC program and the Dodd-Frank amendments to SOX.<sup>111</sup> Khazin's cause of action arose under the provisions governing the SEC program.<sup>112</sup>

The court reviewed different aspects of Dodd-Frank and concluded that the action was not subject to an anti-arbitration provision.<sup>113</sup> The Third Circuit thought the lack of an anti-arbitration provision in Dodd-Frank indicated a "deliberate" decision by Congress.<sup>114</sup> Though Khazin asserted that this omission could not be reconciled with the broader goals of Dodd-Frank, the court noted that Congress might have had good reason "to exempt [the SEC program provision] claims from arbitration."<sup>115</sup> The federal preference for arbitration and existing case law on the arbitration issue compelled the court to follow this construction.<sup>116</sup> Further, the

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109. *See id.* at 491 (providing overview of Dodd-Frank and bounty program created by legislation).

110. *See id.* at 492 (drawing differences between new SEC program and Dodd-Frank amendments to other whistleblower laws).

111. *See id.* at 491 (drawing distinctions between SOX whistleblower provisions as they existed both before and after Dodd-Frank amendments, and SEC program).

112. *See id.* at 492 (identifying "type of claim that Khazin asserts" as new Dodd-Frank cause of action).

113. *See id.* at 493 (stating broadly that "text and structure of Dodd-Frank" favor court's resolution of matter).

114. *See id.* at 492–93 (reviewing manner in which anti-arbitration provision applies to SOX, CEA, and CFPA based on statutory location and pointing out congressional action in "not append[ing] an anti-arbitration provision to the Dodd-Frank cause of action while contemporaneously adding such provisions elsewhere" as evidence "that the omission was deliberate"); *id.* at 495 ("Congress was not 'silent' on the question of whether Dodd-Frank whistleblowers may avoid arbitration. By adding anti-arbitration provisions to certain statutes but not others, it expressed its intent unambiguously."); *id.* at 493 (labeling difference between amendments that invalidate arbitration agreements, and lack of parallel provision in SEC program section "all the more glaring" since Congress addressed these issues all in one section of Dodd-Frank).

115. *Id.* at 493 (noting that SOX and SEC program provisions "differ significantly in a number of respects that might explain Congress's reluctance to exempt Dodd-Frank claims from arbitration").

116. *See id.* (citing Federal Arbitration Act and underlying federal policy preferring arbitration in tandem with district court decisions in *Ruhe* and *Murray* for proposition that arbitration should be allowed). The plaintiff had argued that allowing arbitration "would be counterintuitive" and "undermine" broader Dodd-Frank whistleblower protection goals. *See id.*

court recognized that rules promulgated after Dodd-Frank had no bearing on the SEC program provisions.<sup>117</sup>

The Third Circuit finally noted that the Fourth Circuit's *Santoro* decision focused on a different issue.<sup>118</sup> According to the court, the "broad language" of *Santoro* did not differentiate between the SEC program and the other Dodd-Frank amendments.<sup>119</sup> The court noted that the *Santoro* decision failed to even mention the SEC program provisions.<sup>120</sup> The Third Circuit dismissed the complaint and compelled arbitration.<sup>121</sup>

#### IV. THE STATE OF THE MARKET: NARROW WHISTLEBLOWER JURISPRUDENCE GIVES DEFENDANTS AN ADVANTAGE

*Khazin* represents cutting-edge precedent on a matter of first impression in the Third Circuit that is advantageous to corporate defendants.<sup>122</sup> As such, practitioners who encounter Dodd-Frank whistleblower cases should be aware of two primary issues.<sup>123</sup> First, jurisprudence indicates that courts will not broaden the whistleblower provisions.<sup>124</sup> Second, certain policy considerations indicate that allowing arbitration of Dodd-Frank whistleblower issues may be a prudent congressional choice.<sup>125</sup>

117. *See id.* at 494–95 (explaining that rules promulgated after passage of Dodd-Frank do not refer to SEC program provision and as such, position of rules on arbitration is irrelevant); *id.* at 494 (stating "regulatory actions" cited by plaintiff "are of no help").

118. *See id.* at 493–94 (noting that *Santoro* court addressed "an entirely different issue" and that *Santoro* court "rejected Santoro's interpretation of the anti-arbitration provisions").

119. *Id.* at 493 (finding that "although *Santoro* contains broad language" about Dodd-Frank anti-retaliation provisions, opinion does not discuss SEC program provision).

120. *See id.* (noting *Santoro* "did not even mention" SEC program provision that is subject of *Khazin*).

121. *See id.* at 495 ("Khazin's Dodd-Frank retaliation claim is not statutorily exempt from the arbitration agreement with TD. The District Court's order dismissing the complaint and compelling arbitration will therefore be affirmed on this ground.").

122. For a detailed discussion of the *Khazin* decision and reasoning, see generally *supra* notes 102–27 and accompanying text.

123. For a further explanation of these issues, see *infra* notes 124–25 and accompanying text.

124. *See supra* notes 68–121 (explaining narrow construction of Dodd-Frank whistleblower issue in *Khazin*, and other issues both in Third Circuit and beyond).

125. For an examination of policy points responsible for not forbidding arbitration of whistleblower claims governing the SEC program, see *infra* notes 157–72 and accompanying text.

A. *Don't Expect a Market Correction: Khazin Aligns with Jurisprudence Showing Courts Are Unlikely to Broaden Dodd-Frank Whistleblower Provisions*

The *Khazin* decision, when positioned among other Dodd-Frank jurisprudence, exposes two main trends.<sup>126</sup> First, recent opinions indicate that courts will not read an anti-arbitration clause in the SEC program provisions of Dodd-Frank.<sup>127</sup> The *Khazin* court, like others, refused to view the absence of an invalidating provision as an inadvertent mistake.<sup>128</sup> Instead, the court interpreted the lack of an anti-arbitration section in the SEC program provisions as a “deliberate” legislative choice.<sup>129</sup> Similarly, the courts in *Murray* and *Ruhe* were weary of reading in a provision based on a goal of purportedly preserving broader purposes of Dodd-Frank.<sup>130</sup> In fact, the Third Circuit recently referenced *Khazin* and reaffirmed its decision to prohibit an arguable interpretation of legislative intent from outweighing the plain language of anti-retaliation statutes.<sup>131</sup>

Second, the opinions are also driven by the strong federal preference for arbitration.<sup>132</sup> The *Khazin* court noted clear federal directives regard-

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126. For a discussion of common threads among the decisions, see *infra* notes 127–50 and accompanying text.

127. See generally *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 492 (3d Cir. 2014) (finding “text and structure of Dodd-Frank” fail to protect plaintiff from being compelled to arbitrate claims); *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914(KPF), 2014 WL 285093, at \*11 (S.D.N.Y. Jan. 27, 2014) (stating “nothing in the statutory text” of Dodd-Frank clearly forbids operation of predispute arbitration agreements); *Ruhe v. Masimo Corp.*, No. SACV 11-00734-CJC(JCGx), 2011 WL 4442790, at \*4 (C.D. Cal. Sept. 16, 2011) (declining to read in arbitration agreement invalidating provision as it would require “ignoring the plain language of the statute”), *appeal docketed*, No. 14-55556 (9th Cir. Apr. 7, 2014), and *appeal docketed*, No. 14-55725 (9th Cir. May 2, 2014).

128. See *Khazin*, 773 F.3d at 492–93 (“Recognizing that no provision expressly restricts the arbitration of Dodd-Frank retaliation claims, *Khazin* contends that a bill as massive as Dodd-Frank will inevitably contain gaps not intended by Congress.”).

129. *Id.*

130. See *Murray*, 2014 WL 285093, at \*11 (declining to cross apply arbitration provisions from other laws to Dodd-Frank whistleblower law and interpreting “this absence to demonstrate Congress’ intent that the Anti-Retaliation Provision [of the Dodd-Frank whistleblower program] not include any prohibition against predispute arbitration agreements”); *Ruhe*, 2011 WL 4442790, at \*4 (deciding that “insufficient evidence” exists to support judicial conclusion that provision invalidating predispute arbitration agreements should be read into Dodd-Frank anti-retaliation provision).

131. See *Port Auth. Trans-Hudson Corp. v. U.S. Dep’t of Labor*, 776 F.3d 157, 163 n.8 (3d Cir. 2015) (citing to *Khazin* and reaffirming that text of anti-retaliation statutes will be strictly followed).

132. See generally *Khazin*, 773 F.3d at 493 (discussing arbitration issues involved in federal law); *Murray*, 2014 WL 285093, at \*3 (expounding on FAA that informs case and arbitration issues); *Ruhe*, 2011 WL 4442790, at \*1 (reviewing governing federal precedent relative to enforcement of arbitration agreements).

ing arbitration.<sup>133</sup> Similarly, the *Ruhe* and *Murray* courts both cited to the same federal preference in their decisions.<sup>134</sup> Courts consistently recognize the strength of this preference and, absent a clear textual command, enforce it.<sup>135</sup>

In addition, Third Circuit jurisprudence regarding other aspects of Dodd-Frank exposes the same concerns and a narrow construction of the whistleblower provisions.<sup>136</sup> The *Sefen* and *Safarian* decisions are two prime examples of this narrow Dodd-Frank jurisprudence in the Third Circuit.<sup>137</sup> First, the *Sefen* court narrowly interpreted the issue of retroactive application of Dodd-Frank amendments to the FCA anti-retaliation provisions.<sup>138</sup> Unclear legislative intent drove the court's reasoning in a manner similar to that in the *Khazin* decision.<sup>139</sup> *Sefen* affirmed further reluctance to apply a more expansive reading of Dodd-Frank absent a clear congressional command.<sup>140</sup>

Second, the *Safarian* court took a narrow view of an aspect of the Dodd-Frank definitional issue, specifically whether the plaintiff properly made necessary disclosures.<sup>141</sup> *Safarian* admittedly circumvented the tougher definitional issue addressed by other courts.<sup>142</sup> However, taken

133. See *Khazin*, 773 F.3d at 493 (“This legislative choice must be respected, especially in light of the ‘liberal federal policy favoring arbitration agreements’ embodied in the Federal Arbitration Act.”).

134. See *Murray*, 2014 WL 285093, at \*3 (discussing manner in which FAA directs arbitration agreements be treated deferentially by courts); *Ruhe*, 2011 WL 4442790, at \*1 (“Federal law strongly favors agreements to arbitrate.”).

135. See *infra* notes 148–53. The preference for arbitration has proliferated recently and has grown stronger. See Nerderman, *supra* note 42, at 2146–47 (outlining aspects of FAA as effecting wider federal judicial acceptance of arbitration and wide reach of FAA in lending favor to arbitration and arbitration agreements).

136. For an examination of Third Circuit jurisprudence, see *supra* notes 68–80 and accompanying text.

137. See *Sefen v. Animas Corp.*, No. 10-2971, 2014 WL 2710957, at \*9 (E.D. Pa. June 13, 2014) (holding that claim is “untimely” due to disagreement with plaintiff’s argument on retroactive application of statute); *Safarian v. Am. DG Energy, Inc.*, No. 10-6082, 2014 WL 1744989 (D.N.J. Apr. 29, 2014), *aff’d in part, vacated in part* by No. 14-2734, 2015 WL 4430837 (3d Cir. July 21, 2015).

138. See *Sefen*, 2014 WL 2710957, at \*6 (declining to apply amendment extending statute of limitation and refusing to extend new benefit to plaintiff).

139. See *id.* at \*5 (attributing decision in part to lack of “clear and unambiguous guidance from Congress regarding retroactivity”).

140. See *generally id.* (outlining reasoning for decision).

141. See *Safarian*, 2014 WL 1744989, at \*4 (discussing manner in which plaintiff failed to properly disclose violations of SOX and thus failed to invoke anti-retaliation protections as outlined in Dodd-Frank whistleblower program); *id.* at \*3–4 (declining to review reporting requirement issue and deciding case based on type of information reported and whether such information properly warranted protection under anti-retaliation provision of Dodd-Frank).

142. For a discussion of *Safarian*, see *supra* notes 74–77 and accompanying text.

together, *Safarian*, *Sefen*, and *Khazin* arguably indicate narrow Third Circuit jurisprudence regarding Dodd-Frank whistleblower law.<sup>143</sup>

Finally, beyond the Third Circuit, most federal courts have also resolved other Dodd-Frank issues narrowly.<sup>144</sup> The only circuit court to decide the definitional issue has elected to follow the narrow resolution.<sup>145</sup> Potential extraterritoriality of Dodd-Frank protections has also been narrowly interpreted, evidenced by the Second Circuit's opinion in *Meng-Lin*.<sup>146</sup> Further, decisions regarding retroactivity have come out largely against retroactive application.<sup>147</sup>

The problem of unclear congressional intent has driven each of these issues.<sup>148</sup> The concerns that prompted the Fifth Circuit to decide the definitional issue in *Asadi* echoed the concerns of the Third Circuit in *Khazin*.<sup>149</sup> Similarly, there is no clear congressional intent regarding the extraterritoriality of Dodd-Frank anti-retaliation protections.<sup>150</sup> Addressing extraterritoriality, the Second Circuit opinion in *Liu Meng-Lin* reaf-

143. For a discussion of the three Third Circuit cases, see *supra* notes 68–80 and accompanying text.

144. For a discussion of other federal courts that have narrowly construed these issues, see *supra* notes 81–99 and accompanying text.

145. See Pacella, *supra* note 29, at 741–43 (noting Fifth Circuit was first circuit-level court to decide issue and pointing out that *Asadi* opinion refused to extend protection to plaintiff based on failure to properly qualify under Dodd-Frank definition of whistleblower). Decisions regarding this definitional issue are admittedly less cohesively narrow. See *id.* at 733 (describing early district court jurisprudence regarding definitional point as affording protection to whistleblowers who report internally just as to whistleblowers who report externally). In an analysis that ran counter to other judicial responses to Dodd-Frank, one district court addressed the ambiguous congressional intent by attempting to derive congressional goals from other sections of the statute. See *id.* at 734 (detailing one decision that examined other sections of Dodd-Frank in order to identify congressional intent).

146. For a discussion of the *Liu Meng-Lin* decision, see *supra* notes 90–93 and accompanying text.

147. See Oberti, *supra* note 41, at 113 (“Most courts have held [the Dodd-Frank amendment to SOX that invalidates predispute arbitration agreements] is not retroactive, although one court has held that it is retroactive. At this point, the clear trend is against retroactivity.” (footnote omitted)); see also Saranac Hale Spencer, *Third Circuit Eyes Dodd-Frank’s Whistleblower Protection*, LEGAL INTELLIGENCER (Oct. 24, 2014), <http://www.thelegalintelligencer.com/id=1202674423094/Third-Circuit-Eyes-Dodd-Franks-Whistleblower-Protection?slreturn=20150318150605> [<http://perma.cc/GTH-2NKG>] (noting that out of “about a dozen cases” decided on retroactivity question only “two” have sided with pro-plaintiff view).

148. For an examination of the problems posed by unclear congressional intent, see *infra* notes 167–72 and accompanying text.

149. See *Asadi v. GE Energy (USA), LLC*, 720 F.3d 620, 630 (5th Cir. 2013) (referring to text and “plain language” of statute in order to derive congressional intent).

150. See *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 180 (2d Cir. 2014) (discussing “absence of any direct evidence of a congressional intent” directing extraterritorial application of Dodd-Frank anti-retaliation protections as reason for holding against extraterritorial application). As in *Khazin*, the only arguments in favor of extraterritorial application are based on other aspects of Dodd-Frank. See *id.* at 180–81 (reviewing plaintiff arguments for extraterritorial application of stat-

firmed a general judicial unwillingness to wade into unspoken congressional intentions.<sup>151</sup> Finally, unclear congressional intent plays a major role in retroactivity decisions.<sup>152</sup> A lack of explicit intent leaves courts reluctant to retroactively apply the law despite compelling arguments to the contrary.<sup>153</sup>

Overall, whether it is the precise arbitration issue in *Khazin* or another aspect of the Dodd-Frank whistleblower provisions, plaintiff arguments to extend the law beyond its clear boundaries continue to fall short.<sup>154</sup> Defendants have the upper hand on Dodd-Frank issues both within the Third Circuit and nationally.<sup>155</sup> Practitioners moving forward with Dodd-Frank whistleblower litigation should be aware of each of these trends as they continue to litigate anti-retaliation claims.<sup>156</sup>

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ute and holding that no argument meets high standard required to rule in favor of extraterritorial application).

151. *See id.* at 183 (refusing to engage in extraterritorial application of Dodd-Frank whistleblower provisions due to lack of “explicit statutory evidence” directing such application and despite “tangential indications” directing such application submitted by plaintiff).

152. *See* Garden-Monheit, *supra* note 94, at 1895–98 (pointing out judicial responses to arguments regarding congressional intent including courts holding that no clear intent on retroactivity had been indicated and deferring chance to rule on intent).

153. *See* Wong v. CKX, Inc., 890 F. Supp. 2d 411, 422 (S.D.N.Y. 2012) (“The first step [in determining congressional intent per the *Landgraf* standard] thus provides no clear answer to the question of retroactivity.”); Leshinsky v. Telvent GIT, S.A., 873 F. Supp. 2d 582, 592 (S.D.N.Y. 2012) (“That is, in the absence of other direct evidence in the text or structure of the statutory amendment as to Congress’s intent on the issue, the language in the Senate Report provides some evidence (albeit not overwhelming or dispositive evidence) that the amendment was intended to be a ‘clarification,’ rather than a substantively new rule of law.”); Taylor v. Fannie Mae, 839 F. Supp. 2d 259, 262 n.3 (D.D.C. 2012) (“All courts that have addressed this issue agree that the portions of the Dodd-Frank Act addressing predispute arbitration do not evidence any express intent from Congress that they be applied retroactively.”); Holmes v. Air Liquide USA LLC, No. H–11–2580, 2012 WL 267194, at \*6 (S.D. Tex. Jan. 30, 2012) (“The Court begins its analysis by agreeing with both the *Pezza* and *Henderson* courts that the portions of Dodd-Frank addressing predispute arbitration do not evidence any intent to apply retroactively.”); Henderson v. Masco Framing Corp., No. 3:11-CV-00088-LRH, 2011 WL 3022535, at \*4 (D. Nev. July 22, 2011) (holding against retroactive application without ruling on congressional intent); *Pezza v. Investors Capital Corp.*, 767 F. Supp. 2d 225, 228 (D. Mass. 2011) (“Nothing in Section 922 of the [Dodd-Frank] Act provides an express congressional intent regarding retroactivity.”).

154. For a discussion of why plaintiffs have been unsuccessful, see generally *infra* notes 186–94.

155. *Id.*

156. For a further discussion of the specific manner in which this jurisprudence should inform practitioners, see *infra* notes 173–94 and accompanying text.

B. *Market Inefficiency or Reasonable Discrepancy?: Omission of an Anti-Arbitration Provision as a Reasonable Policy Choice*

In *Khazin*, the Third Circuit speculated that the omission of a predispute arbitration provision in the SEC program might have been a reasonable congressional choice.<sup>157</sup> There are two policy factors that support allowing arbitration of Dodd-Frank retaliation claims.<sup>158</sup> First, there are important differences between protections in the SEC program and in SOX.<sup>159</sup> Second, the SEC program has potential to negatively affect corporate culture.<sup>160</sup>

Whistleblowers reporting violations of securities laws can invoke protections under either SOX or the SEC program, but the protections are different.<sup>161</sup> Two differences between causes of action under SOX and the SEC program support a narrow construction of the latter.<sup>162</sup> First, SOX contains a procedural hurdle not applicable to the SEC program.<sup>163</sup> Second, the remedies under the SOX provisions are limited compared to the potential recovery sharing under the SEC program.<sup>164</sup> The lessened procedural control and heightened potential rewards have been identified as potential avenues of false reporting.<sup>165</sup> Allowing arbitration of claims

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157. See *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 493 (3d Cir. 2014) (“As explained above, however, the Sarbanes-Oxley and Dodd-Frank causes of action differ significantly in a number of respects that might explain Congress’s reluctance to exempt Dodd-Frank claims from arbitration.”).

158. See *infra* notes 159–72 and accompanying text.

159. See *infra* notes 161–66 and accompanying text.

160. See *infra* notes 167–72 and accompanying text.

161. Compare 18 U.S.C. § 1514A(a)(1) (2012) (forbidding retaliation against employees who report wrongdoing relative to conduct violating securities laws), with 15 U.S.C. § 78u-6(h)(1)(A)(i)–(iii) (2012) (outlining retaliation protections as to whistleblowers reporting under new SEC program).

162. See *infra* notes 163–66 and accompanying text.

163. Compare 18 U.S.C. § 1514A(b)(1)(A) (requiring complainant to file initial complaint with Secretary of Labor), with 15 U.S.C. § 78u-6(h)(1)(A) (outlining anti-retaliation cause of action, but not requiring any initial complaint to be filed with any agency). See also Hartmann, *supra* note 24, at 1296 (“It is important to note that the Dodd-Frank Act does not completely usurp Sarbanes-Oxley’s administrative process; rather, it creates an entirely new and separate enforcement mechanism for retaliation claims that parallels the existing regime under Sarbanes-Oxley. Therefore, the Dodd-Frank Act simultaneously enhances the protections available to whistleblowers under Sarbanes-Oxley but also creates a separate enforcement mechanism for claims brought under the SEC or CFTC.” (footnote omitted)).

164. Compare 18 U.S.C. § 1514A(c)(2)(A)–(C) (stating available remedies as including reinstatement to job, back pay plus interest, and special damages compensation), with 15 U.S.C. § 78u-6(h)(1)(C) (outlining substantially same remedies for anti-retaliation), and *id.* § 78u-6(b)(1)(A)–(B) (outlining potential recovery-sharing amounts to be awarded to whistleblowers under certain circumstances).

165. See Desai, *supra* note 26, at 457–58 (outlining threat of false reporting); Ebersole, *supra* note 50, at 145 (explaining lack of repercussion for false reporting under Dodd-Frank); *id.* at 135 (noting Dodd-Frank “is likely to incentivize frivolous, misleading, exaggerated or otherwise unreliable tips”).

to be brought pursuant to the SEC program provisions, therefore, might mediate the wider latitude of whistleblower claims brought under the lower procedural safeguards and higher potential bounty rewards inherent in Dodd-Frank.<sup>166</sup>

Dodd-Frank has elicited criticism because of the potential dangers it poses to corporate culture.<sup>167</sup> Commentators speculate that while Congress had seemingly innocuous intentions to incentivize and protect whistleblowers under the Act, in execution, the SEC program has perhaps spurred further corporate fraud.<sup>168</sup> The original version of SOX directed corporations to design and implement stronger internal procedures to catch wrongdoing.<sup>169</sup> The SEC bounty program undermines those very controls by luring whistleblowers outside the company, circumventing the internal controls of business organizations across the nation.<sup>170</sup> The SEC program also has the potential to encourage whistleblowers to delay reporting instead of immediately exposing wrongdoing in order to increase their monetary rewards.<sup>171</sup> Arbitration could feasibly serve to counterbalance these potential negative effects.<sup>172</sup>

#### V. PORTFOLIO PLANNING FOR THE FUTURE: THE IMPACT OF THE KHAZIN DECISION ON CORPORATE DEFENDANTS AND WHISTLEBLOWING PLAINTIFFS

While *Khazin* favors defendants, the decision and other whistleblower jurisprudence should serve to inform practitioners in two ways.<sup>173</sup> First, defendants can take advantage of the *Khazin* precedent while plaintiffs can preserve their chance for success.<sup>174</sup> Second, defense counsel representing financial services firms should utilize predispute arbitration clauses in their employment agreements.<sup>175</sup> On the other hand, plaintiffs should consider potentially pursuing whistleblower claims under SOX to avoid arbitration.<sup>176</sup>

166. See *supra* note 150 and accompanying text.

167. See *infra* notes 169–72 and accompanying text.

168. See *id.*

169. See Pacella, *supra* note 29, at 751–52 (discussing SOX requirements for “internal reporting” mechanisms).

170. See Ashcroft et al., *supra* note 24, at 386 (reviewing concerns about threats to internal compliance systems); Hartmann, *supra* note 24, at 1307 (outlining theory that Dodd-Frank incentive program will encourage whistleblowers to avoid internal controls and “report externally first”).

171. See Ashcroft et al., *supra* note 24, at 387 (describing theory that whistleblowers might actually wait to report corporate misconduct in order to grow size of potential award); Rapp, *supra* note 25, at 93–94 (describing same theory).

172. See *infra* note 178 and accompanying text.

173. For a further discussion of how *Khazin* should inform practitioners, see *infra* notes 183–98 and accompanying text.

174. For a further discussion of how *Khazin* should inform practitioners, see *infra* notes 177–98 and accompanying text.

175. See *infra* notes 177–85 and accompanying text.

176. See *infra* notes 186–94 and accompanying text.

### A. Attorneys for Employers: Exploit the Discrepancy

For defense attorneys, the *Khazin* decision and surrounding jurisprudence indicates counsel should encourage clients to utilize predispute arbitration clauses.<sup>177</sup> Such clauses will provide a clear method of arbitrating retaliation disputes that arise under the SEC bounty program provisions in the Third Circuit and possibly in other circuits as well.<sup>178</sup> Though there has not been a plethora of litigation on the topic, each court that has addressed the absence of the predispute arbitration provision in the SEC program laws has declined to read one in.<sup>179</sup> Not only have the resolutions of these cases been the same, each has engaged in a similar analysis.<sup>180</sup>

Defense counsel might also consider utilizing the body of narrow jurisprudence regarding the SEC program generally to defend their position on other whistleblower issues.<sup>181</sup> This trend is apparent in the Third Circuit and beyond.<sup>182</sup> Policy arguments on the potentially negative effects of the SEC program can also serve to augment defendants' positions in lawsuits on other Dodd-Frank whistleblower issues.<sup>183</sup> That said, the absence of the predispute arbitration agreement in the SEC program does not leave defendants completely off the hook.<sup>184</sup> To be sure, SOX, CEA, and CFPA all similarly invalidate predispute arbitration agreements, so defendants will have to face anti-retaliation claims brought under those provisions in court.<sup>185</sup>

### B. Attorneys for Whistleblowers: Change the Strategy

For attorneys representing whistleblowers, the *Khazin* decision directs careful considerations moving forward.<sup>186</sup> Despite an arguable incongruence with Dodd-Frank, plaintiffs should not expect courts in other circuits to read in an anti-arbitration provision.<sup>187</sup> Arguments to read in an invali-

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177. See Hamid et al., *supra* note 1, at 2 (labeling *Khazin* decision one that advantages employers).

178. See *id.* at 3 (noting that “[i]t remains to be seen” whether additional courts will follow the *Khazin* reasoning on the arbitration agreement issue).

179. See *supra* notes 55–99 (discussing judicial opinions that have declined to read anti-arbitration provision into sections governing new SEC program).

180. *But see infra* note 181 and accompanying text (discussing of cases reaching varying conclusions).

181. See *infra* notes 182–85 and accompanying text.

182. See *supra* notes 55–99 and accompanying text.

183. See *supra* notes 157–72 and accompanying text.

184. See *supra* notes 55–67 and accompanying text.

185. See *supra* notes 41–47 and accompanying text.

186. See *infra* notes 187–94.

187. Compare Desai, *supra* note 26, at 460 (noting Dodd-Frank “goal” of whistleblower activity), and Pacella, *supra* note 29, at 727 (emphasizing importance Dodd-Frank placed on whistleblowers), with *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 492 (3d Cir. 2014) (expressing shortcomings of plaintiff argument that absence of equivalent provision in Dodd-Frank was predictable mistake).

dating provision are likely futile given three courts have declined to do so thus far.<sup>188</sup> In post-*Khazin* jurisprudence, plaintiffs must choose their cause of action carefully and perhaps consider taking advantage of SOX.<sup>189</sup>

Under SOX, a whistleblower will forgo the potentially higher awards and stronger remedies available under the SEC program.<sup>190</sup> But the SOX anti-retaliation provisions clearly preempt and invalidate arbitration agreements.<sup>191</sup> Plaintiffs subject to arbitration clauses should pursue anti-retaliation claims under SOX to avoid arbitration.<sup>192</sup> If plaintiffs are attempting to take advantage of the SEC program (which also allows recovery-sharing for reporting SOX violations), they might also consider preparing to repackage any Dodd-Frank anti-retaliation claims into SOX claims.<sup>193</sup> However, pleadings should be specific and perhaps plead under Dodd-Frank, and SOX in the alternative, to avoid inadvertently forgoing SOX protection.<sup>194</sup>

188. See *supra* note 130 and accompanying text.

189. See Buerger et al., *supra* note 13 (“[P]otential plaintiffs who are signatories to arbitration agreements will be forced to choose whether to assert SOX claims in a judicial forum, or Dodd-Frank claims in an arbitral forum”); Oberst, *supra* note 12 (“This distinction [of Dodd-Frank claims being subject to arbitration clauses while SOX claims are not] may be important to employee-side attorneys in deciding how to proceed on behalf of a financial whistleblower client. There appears to be some overlap between SOX and the new Dodd-Frank claims, but an employee may have no judicial remedy if they are subject to mandatory arbitration and also fail to exhaust the administrative remedies necessary to bring a SOX claim.”).

190. Compare 15 U.S.C. § 78u-6(b)(1) (2012) (outlining potential whistleblower rewards of between 10 and 30% of recoveries over \$1 million for participation in SEC program), and *id.* § 78u-6(h)(1)(C) (outlining anti-retaliation remedies under SEC program claim, including “2 times the amount of back pay”), with 18 U.S.C. § 1514A(c) (2012) (outlining anti-retaliation remedies under SOX claim, including only “back pay”). See also Buerger et al., *supra* note 13 (discussing negative aspects of pursuing a SOX claim, namely “forgo[ing] [ ] heightened remedies” of Dodd-Frank).

191. See generally Buerger et al., *supra* note 13; Oberst, *supra* note 12.

192. See Buerger et al., *supra* note 13 (explaining plaintiff’s choice “judicial forum” and “arbitral forum”); see also Oberst, *supra* note 12 (noting employees want to avoid arbitration).

193. See *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 492 (3d Cir. 2014) (explaining that provision invalidating arbitration agreements was attached to SOX anti-retaliation cause of action only); *id.* at 491 (outlining lesser remedies available under SOX anti-retaliation cause of action); Buerger et al., *supra* note 13 (noting plaintiff choice grounded in fact that “the conduct prescribed by both [the SEC program and SOX] statutes is in most cases identical”).

194. See *Khazin*, 773 F.3d at 492 (noting that plaintiff “assert[ed] only a Dodd-Frank claim” and thus could not claim protection of provisions invalidating arbitration agreements as to SOX, CEA, or CFPA claims); see also *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914(KPF), 2014 WL 285093, at \*9 (S.D.N.Y. Jan. 27, 2014) (holding that “[p]laintiff cannot recast his claim” under SOX to benefit from SOX provision invalidating arbitration agreements). Indeed, the plaintiff in *Murray* made this very mistake and lost any chance of invoking the SOX protections. See *id.*

VI. LIQUIDATE OR REALLOCATE?: THIRD CIRCUIT SETTLES ARBITRATION  
PROVISION ISSUE, SETS STAGE FOR FUTURE

Despite what now seems to be a commonly held misconception, claims brought under the SEC whistleblower program are subject to arbitration in the Third Circuit.<sup>195</sup> Viewed in light of other jurisprudence, the *Khazin* decision changes the landscape of Dodd-Frank whistleblower litigation.<sup>196</sup> Regardless of the initial surprise about the decision, litigants must be vigilant moving forward.<sup>197</sup> An understanding of these issues will assist practitioners on both sides of whistleblower law to strategize accordingly.<sup>198</sup>

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195. See *Khazin*, 773 F.3d at 489 (describing holding).

196. See Buerger et al., *supra* note 13, (stating *Khazin* “has important practical consequences for employers” and informs plaintiffs).

197. See *id.*

198. For practitioner advice, see generally *supra* notes 173–94.

