MEMORANDUM

To: [Topic Access Editor]
From: [Topic Access Candidate]
Date: November 8, 2012
Re: Retroactivity of Dodd-Frank changes to Sarbanes-Oxley whistleblower protections

I. INTRODUCTION

In the wake of scandals at Enron and other companies, Congress passed the Sarbanes-Oxley Act[1] (SOX) to increase corporate accountability at public companies.[2] SOX included a cause of action for employees of publicly traded companies who allege retaliation after blowing the whistle on certain corporate fraud or securities-related violations.[3] In response to the most recent financial crisis, Congress overhauled the financial regulatory system with the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act[4] (Dodd-Frank), which contained several changes to the SOX cause of action for whistleblowers who experience retaliation.[5]

Since Dodd-Frank took effect on July 22, 2010,[6] courts have struggled to determine which, if any, of the Dodd-Frank changes apply retroactively. Five district courts in four different circuits declined to apply a Dodd-Frank provision retroactively,[7] while four other district courts applied a Dodd-Frank provision retroactively or expressed a willingness to do so.[8]

This ad hoc approach to the retroactivity question seems counter to the protection of reliance-based interests, the purported goal of retroactivity analysis.[9] A systematic approach to retroactivity is especially pertinent to regulations stemming from a financial crisis, as one member of

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[1] Pub L No 107-204, 116 Stat 745 (2002), codified in various sections of Titles 11, 15, 18, 28, and 29.
[2] See generally SOX §§ 101–1107, codified in various sections of Titles 11, 15, 18, 28, and 29.
[3] See SOX § 806, 18 USC 1514A.
[4] Pub L No 111-203, 124 Stat 1374 (2010), codified in various sections of Titles 7, 12, 15, and 18.
[5] See Dodd-Frank §§ 922, 929A, 18 USC 1514A.
[6] Dodd-Frank § 4, 18 USC 1514A note.
[7] See Henderson v Masco Framing Corp, 2011 WL 3022535, *4 (D Nev) (Dodd-Frank amendment proscribing predispute agreements to arbitrate SOX retaliation claims); Blackwell v Bank of America Corp, 2012 WL 1229673, *3–4(D SC) (same); Taylor v Fannie Mae, 839 F Supp 2d 259, 263 (DDC 2012) (same); Holmes v Air Liquide USA LLC, 2012 WL 267194, *6 (SD Tex) (same); Berglund v Boeing Co, 835 F Supp 2d 1020, 1034 (D Or 2011) (Dodd-Frank provision establishing False Claims Act retaliation limitations period).
[8] See Pezza v Investors Capital Corp, 767 F Supp 2d 225, 233 (D Mass 2011) (Dodd-Frank amendment proscribing predispute agreements to arbitrate SOX retaliation claims); Wong v CSX, Inc, 2012 WL 3893609, *9–10 (SDNY) (same); Leshinsky v Telvent GIT, SA, 2012 WL 268611, *18 (SDNY) (Dodd-Frank amendment applying SOX whistleblower protection to private subsidiaries of public companies); Gladitsch v Neo@Ogilvy, 2012 WL 1003513, *4 (SDNY) (same); Ashmore v CGI Group, Inc, 2012 WL 2148899, *3–4 (SDNY) (same subsidiaries amendment as well as Dodd-Frank extension of SOX whistleblower limitations period); Tolman v American Red Cross, 2011 WL 6333700, *4 (D Idaho) (Dodd-Frank amendment establishing False Claims Act limitations period); Saunders v DC, 789 F Supp 2d 48, 53–54 (DDC 2011) (dicta on Dodd-Frank amendment establishing False Claims Act limitations period). See also In the matter of: Carri S. Johnson v Siemens Building Technologies, Inc, 2011 WL 1247202, *11 (DOL Adm Rev Bd) (applying Dodd-Frank subsidiary amendment to SOX whistleblower protection retroactively).
[9] See Landgraf v USI Film Products, 511 US 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.").

the Securities and Exchange Commission (SEC) has noted the public and media pressure "to embrace toughness at the expense of fairness" in the context of Dodd-Frank retroactivity analysis.[10] Given the dearth of legal commentary on the issue, the topic is ripe for Comment.

II. ANALYSIS OF CURRENT LAW

Under SOX, a public company may not "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee" who participates in a judicial proceeding related to violations of federal securities laws, shareholder fraud laws, bank, mail, or wire fraud laws, or who provides information relating to such violations to a regulatory or law enforcement agency, member or committee of Congress, or supervisor.[11] The complainant must file with the Secretary of Labor and may bring an action in federal district court if the Secretary does not issue a final decision within 180 days.[12] Dodd-Frank amended this scheme by expressly covering certain subsidiaries of publicly traded companies,[13] extending coverage to nationally recognized statistical ratings organizations,[14] providing a right to a jury trial,[15] extending the statute of limitations from 90 to 180 days,[16] and invalidating predispute agreements to arbitrate or waive SOX whistleblower claims.[17]

In Landgraf v USI Film Products,[18] the Supreme Court articulated a two-part test to determine whether a statute applies to conduct predating enactment.[19] First, the court must determine "whether Congress has expressly prescribed the statute's proper reach."[20] If so, this directive is followed, absent constitutional problems.[21] If, however, there is "no such express command," the court "determine[s] whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[22] If it would have retroactive effect, the statute applies prospectively.[23] With regard to this latter step, Landgraf distinguishes between provisions affecting contractual rights, where retroactivity is disfavored,[24] and provisions that affect jurisdiction or procedure, which raise fewer concerns because they "regulate secondary rather than primary conduct."[25] Lower courts' application of this doctrine to the Dodd-Frank amendments to SOX varies significantly.

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[10] Kathleen L. Casey, Speech by SEC Commissioner: Address to Practicing Law Institute's SEC Speaks in 2011 Program, 1879 PLI/Corp 497, 507 (2011).
[11] See SOX § 806, 18 USC § 1514A.
[12] See SOX § 806, 18 USC § 1514A.
[13] See Dodd-Frank § 929A, 18 USC 1514A.
[14] See Dodd-Frank § 922, 18 USC 1514A.
[15] See id.
[16] See id.
[17] See id. Note that Dodd-Frank created and amended a variety of other whistleblower protection programs, but this proposed Comment focuses on changes to the SOX whistleblower scheme. For a brief summary of other Dodd-Frank whistleblower provisions, see Willis J. Goldsmith, Retaliation and Whistleblower Claims, 880 PLI/Lit 423, 434–37 (2012).
[18] 511 US 244 (1994).
[19] See id at 280.
[20] Id.
[21] See id at 267, 280 ("Absent a violation of one of those specific [constitutional] provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope.").
[22] Landgraf, 511 US at 280.
[23] See id.
[24] See id at 271.
[25] See id at 274–75.

The Dodd-Frank provision invalidating predispute agreements to arbitrate SOX whistleblower claims engendered the most disagreement among courts. In Pezza v Investors Capital Corp,[26] the first district court to consider the issue applied the provision retroactively.[27] With regard to the first Landgraf step, the court found that the general effective date language in Dodd-Frank failed to supply "an express congressional intent regarding retroactivity."[28] The court noted that three other Dodd-Frank provisions limiting predispute arbitration agreements contain express statements regarding retroactivity, but the court declined to draw a negative inference from these provisions because of the "sprawling" nature of Dodd-Frank.[29] The Pezza court did not delve into Dodd-Frank's legislative history, though Landgraf's own analysis looked (unavailingly) to legislators' remarks for evidence "that an agreement had been tacitly struck."[30]

Turning to the second Landgraf step, Pezza found that "Section 922 . . . principally concerns the type of jurisdictional statute" that may be applied retroactively because "statutes conferring or ousting jurisdiction 'speak to the power of the court rather than to the rights or obligations of the parties.'"[31] In other words, the enforceability of an agreement to arbitrate "'takes away no substantive right but simply changes the tribunal'" and thus does not raise retroactivity concerns.[32]

Considering the same Dodd-Frank arbitration provision, the Southern District of New York followed Pezza. While recognizing that four district courts had since disagreed with Pezza's holding, the court nonetheless adopted Pezza's analysis of congressional intent and found that "Section 922 is more appropriately viewed as concerning jurisdiction rather than affecting substantive rights," although the arbitration provision could be categorized as affecting contractual or property rights.[33]

Four district courts reached the opposite conclusion, declining to apply the arbitration provision retroactively. In Henderson v Masco Framing Corp,[34] the first case to so hold, the court skipped the first step of Landgraf analysis, noting the parties' arguments regarding congressional intent yet failing to rule on them.[35] Instead, the court emphasized that a presumption against retroactivity is most often applied to "provisions affecting contractual or property rights, matters in which predictability are of prime importance."[36] The court reasoned that the Supreme Court has characterized "the right of the parties to agree to arbitration [a]s a contractual matter governed by contract law," and that retroactive application of the Dodd-Frank provision would "fundamentally interfere" with a right to contract for arbitration that existed prior to the amendment.[37]

The other district courts holding that the Dodd-Frank arbitration provision does not apply retroactively largely follow Henderson's reasoning. In Holmes v Air Liquide USA LLC,[38] the court did not undertake its own analysis of congressional intent, noting that Pezza found no reliable evidence of congressional intent and Henderson implicitly agreed.[39] The court then reiterated Henderson's conclusion that Dodd-Frank "would have a 'genuinely retroactive' effect" because it

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[26] 767 F Supp 2d 225 (D Mass 2011).
[27] See id at 234.
[28] Id at 228 (discussion Section 4 of Dodd-Frank).
[29] See id at 232.
[30] Landgraf, 511 US at 262.
[31] Pezza, 767 F Supp 2d at 233, quoting Landgraf, 511 US at 274.
[32] See Pezza, 767 F Supp 2d at 233, quoting Hamdan v Rumsfeld, 548 US 557, 577 (2006).
[33] Wong v CSX, Inc, 2012 WL 3893609, *8–10 (SDNY).
[34] 2011 WL 3022535 (D Nev).
[35] See id at *3–4.
[36] Id at *4, quoting Landgraf, 511 US at 271.
[37] Henderson, 2011 WL 3022535 at *4.
[38] 2012 WL 267194 (SD Tex).
[39] See id at *6 n 2.

impacted contractual rights.[40] Taylor v Fannie Mae[41] takes the same approach.[42] Blackwell v Bank of America Corp[43] is notable for its willingness to rely on Dodd-Frank's general effective date as an "express term" precluding application of the arbitration provision to a claim that arose before the effective date.[44] Despite this finding, the Blackwell court continued to the second Landgraf step, concluding retroactive application of the statute would interfere with "the parties' contractual expectation that they would arbitrate."[45]

Decisions considering the retroactivity of other Dodd-Frank provisions take markedly different approaches to the question. In three different cases, the Southern District of New York concluded that the Dodd-Frank provision applying SOX whistleblower protections to subsidiaries of public companies applies retroactively because it is a clarification, rather than a change, of law.[46] For example, in Ashmore v CGI Group Inc,[47] the court first noted that "the text of the 2010 amendment to § 806 does not express a clear intent that it apply retroactively."[48] It then adopted the Administrative Review Board's analysis of "'[1] whether the enacting body declared that it was clarifying a prior enactment; [2] whether a conflict or ambiguity existed prior to the amendment, and [3] whether the amendment is consistent with a reasonable interpretation of the prior enactment and its legislative history,'"[49] concluding the Dodd-Frank provision "'is a clarification of Section 806 and does not create retroactive effects.'"[50] This line of analysis considering how established the law was prior to the amendment is absent from the arbitration-related cases.

Dodd-Frank provisions impacting statutes of limitations also receive varying retroactivity treatment. In Ashmore, the court further held—without extended analysis—that it was proper to apply the new, extended Dodd-Frank statute of limitations for SOX whistleblower claims to a cause of action filed after the statute's effective date, though the alleged violation took place preenactment.[51] Meanwhile, courts considering the retroactive application of a Dodd-Frank provision establishing a federal statute of limitations for False Claims Act whistleblower retaliation claims[52] sometimes apply the amendment retroactively[53] and sometimes do not.[54]

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[40] Id at *6, quoting Landgraf, 511 US at 277 (quotation marks omitted).

[41] 839 F Supp 2d 259 (DDC 2012).

[42] See id at 262 n 3, 263 (noting no other court has found "any express intent from Congress that [the provision] applie[s] retroactively and concluding that retroactive application would impair "the parties' rights possessed when they acted").

[43] 2012 WL 1229673 (D SC).

[44] Id at *3.

[45] Id at *4.

[46] See Leshinsky v Telvent GIT, SA, 2012 WL 268611, *18 (SDNY); Ashmore v CGI Group, Inc, 2012 WL 2148899, *3–4 (SDNY); Gladitsch v Neo@Ogilvy, 2012 WL 1003513, *4 (SDNY). See also In the matter of: Carri S. Johnson v Siemens Building Technologies, Inc, 2011 WL 1247202, *11 (DOL Adm Rev Bd).

[47] 2012 WL 2148899 (SDNY).

[48] Id at *3.

[49] Id at *4, quoting Middleton v City of Chicago, 578 F3d 655, 663–64 (7th Cir 2009).

[50] Id at *4, quoting In the matter of: Carri S. Johnson v Siemens Building Technologies, Inc, 2011 WL 1247202, *11 (DOL Adm Rev Bd).

[51] Ashmore v CGI Group, Inc, 2012 WL 2148899 at *5.

[52] Prior to Dodd-Frank, courts applied the most closely analogous state law statute of limitations to False Claims Act retaliation claims because federal law did not specify a statute of limitations. See Saunders, 789 F Supp 2d at 51.

[53] See Tolman, 2011 WL 6333700 at *4 (applying amendment to conduct predating enactment because "the limitations period was not settled" before). See also Saunders, 789 F Supp 2d at 53–54 (dicta stating that Dodd-Frank amendment specifying limitations period for False Claims Act retaliation claims may obviate the need to borrow a state statute of limitations).

III. COMMENTARY

Besides periodicals and treatises noting the unsettled nature of the question,[55] no legal commentary addresses whether the Dodd-Frank amendments to SOX whistleblower protections are retroactive. The article most closely related to the proposed Comment examines whether Dodd-Frank's grant to the SEC of authority to impose collateral bars on people who violate the securities law applies retroactively.[56] The article contends that the provision constitutes prospective relief similar to an injunction,[57] an exception noted in Landgraf as not producing retroactive effects.[58] At this time I do not, however, anticipate that this exception will be relevant to the proposed Comment because the amendments to the SOX whistleblower scheme do not take this form.

There are also two articles examining whether extensions of the limitations and repose periods for securities fraud claims included in the original enactment of SOX apply retroactively under Landgraf.[59] One argues that courts failed to adhere to an express statutory statement of retroactivity and that the canon that "statutes which are remedial in nature are to be liberally construed" should apply to this language.[60] The second article takes a similar approach, arguing the courts should have relied on legislative history to find the amendment applied retroactively.[61] These articles should not preempt the proposed Comment for two reasons: first, because the statute at issue included an express provision regarding its temporal application—a provision lacking in the Dodd-Frank SOX whistleblower context—the articles only reach a subset of methodological problems associated with the first Landgraf step. Second, because they address a single SOX provision, the articles do not confront the problem of determining whether multiple changes to a single statutory scheme should be treated alike.

Articles examine the Dodd-Frank arbitration reforms and the retroactive application of arbitration prohibitions, but the intersection of the two has not been explored. One author provides a helpful history of arbitration in securities disputes, weighing the pros and cons of Dodd-Frank

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[54] See Berglund, 835 F Supp 2d at 1033–34 (declining to apply amendment to conduct predating enactment). See also Riddle v Dyncorp International Inc, 666 F3d 940, 944 (5th Cir 2012) (dicta stating "precedent directs us to apply the statute of limitations that is in effect at the time a plaintiff files his complaint").

[55] See A Very Specialized Firm Practice: Whistleblowing, Metropolitan Corporate Counsel 40 (Sept 2012); William E. Hartsfield, Sarbanes-Oxley Act of 2002, 2 Investig Employee Conduct § 12:34 (Thomson Reuters 2012); Willis J. Goldsmith, Retaliation and Whistleblower Claims, 880 PLI/Lit 423, 439–40 (2012); Debra S. Katz, Whistleblower Litigation, ST033 ALI-ABA 991, 1022–24 (2012); Chris W. Haaf and Monica C. Platt, 2011 Sees Focus on Whistleblowing and Dodd-Frank Claims, Bus L Today 1, 3 (Jan 2012); Debra L. Raskin, Whistleblower Protections under the Dodd-Frank Act, 860 PLI/Lit 173, 185–86 (2011). See also Casey, 1879 PLI/Corp at 503–07 (summarizing other retroactivity activity issues SEC must confront in wake of Dodd-Frank) (cited in note 10).

[56] Chad Howell, Back to the Future: Applying the Collateral Bars of Section 925 of the Dodd-Frank Act to Previous Bad Acts, 7 J Bus & Tech L 285, 286 (2012).

[57] See id at 296–303.

[58] See Landgraf, 511 US at 273.

[59] See Bryan A. McGrane, The Audit Committee: Director Liability in the Wake of the Sarbanes-Oxley Act and Tello v Dean Witter Reynolds, 18 Cornell J L & Pub Pol 575, 604–06 (2009); Sarah J. Greenberg, Darn Your SOX: Exploring Retroactive Application of Extended Statutes of Limitation and Repose in Securities Fraud Litigation, 9 Duquesne Bus LJ 91, 93–94 (2007).

[60] See Greenberg, 9 Duquesne Bus LJ 91 at 117–123 (cited in note 59).

[61] See McGrane, 18 Cornell J L & Pub Pol at 604–06 (cited in note 59).

reforms, but the article does not address retroactivity.[62] A different article summarizes a case applying a National Association of Security Dealer's rule change barring agreements to arbitrate class actions retroactively and concludes it is "consistent with relevant precedent and, significantly, does not violate fundamental notions of justice."[63] The article does not, however, contribute much analysis of its own and, somewhat perplexingly, makes no mention of Landgraf.

Post-Landgraf articles examining legislative retroactivity in general focus on proposing entirely new frameworks for the analysis, an exercise in which the University of Chicago Law Review does not engage. One author argues for an approach that takes into account the "context in which change occurs," such as whether the law was previously unsettled.[64] This theory echoes the approach of courts holding that the Dodd-Frank provision extending SOX whistleblower coverage to subsidiaries applies retroactively as a clarification of law,[65] but the article itself does not explore such cases. Another article focuses on developing a new framework for retroactive application where a statute's purpose is corrective,[66] while another proposes a classification system for retroactivity questions and analyzes Supreme Court cases through that lens.[67] I have not located any articles that explore how Landgraf applies when multiple provisions of a statute are at issue.

IV. EVALUATION

The question of retroactive application of Dodd-Frank changes to SOX whistleblower protection presents an interesting opportunity to examine retroactivity doctrine. Retroactivity analysis confronts the tension between giving a statute its fullest possible temporal scope and the protection of private parties' rights and expectations, a problem particularly salient where legislation addresses a widespread financial crisis. On the one hand, retroactive application of Dodd-Frank may "serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary."[68] On the other hand, retroactive application of Dodd-Frank may exacerbate fairness concerns, given skepticism regarding whether the statute serves "genuine 'reform'—or just revenge."[69]

Any commentary regarding retroactivity will be of limited use to practitioners, since the number of affected cases is by definition limited to those involving conduct predating enactment. Given the other Dodd-Frank arbitration reforms, however, it is possible that similar retroactivity

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[62] See Catherine Moore, The Effect of the Dodd-Frank Act on Arbitration Agreements: A Proposal for Consumer Choice, 12 Pepperdine Disp Resol L J 503, 516 (2012).

[63] Douglas M. Worley, Retroactive Application of Rule Changes: Arbitration Agreements May Be Circumvented, 1996 J Disp Resol 267, 275 (1996). See also Allen Jay Wilt, Securities Arbitration Agreements in the Aftermath of Rodriguez: Paulson v. Dean Witter Reynolds, Inc., 27 Willamette L Rev 693, (1996) (recounting the arguments for and against retroactive rescission of a rule invalidating agreements to arbitrate securities claims, but refraining from proposing a solution resolving the circuit split).

[64] Jill E. Fisch, Retroactivity and Legal Change: An Equilibrium Approach, 110 Harv L Rev 1055, 1056 (1997).

[65] See Part II.

[66] See Elizabeth M. Siemer, The Impact of Landgraf v. Usi Film Products on the Retroactive Application of the Private Securities Litigation Reform Act, 26 Cap U L Rev 595 (1997).

[67] See Jan G. Laitos, Legislative Retroactivity, 52 Wash U J Urban & Contemp L 81 (1997).

[68] Landgraf, 511 US at 268.

[69] Casey, 1879 PLI/Corp at 501 (cited in note 10) (quotation marks omitted).

cases will arise,[70] and by focusing on underlying methodological problems, the Comment would be of use in other statutory contexts.

Two potentially fruitful lines of analysis present themselves. First, how does Landgraf apply to each Dodd-Frank change to SOX whistleblower protections? With regard to the Dodd-Frank provision banning predispute arbitration agreements, a Comment could resolve the division of authority by arguing that Pezza takes the correct approach to the first Landgraf step, while the Henderson line of cases correctly applies the second step. The Comment could argue that in Landgraf the Court expressed skepticism regarding the use of legislative history to determine intent[71] and that other Court precedent demonstrates that it is appropriate to read a statute's provisions on temporal application in pari materia only if Congress considered the provisions together.[72] With its focus on congressional deliberation, the appropriateness of a negative inference is connected to the proposed solution to the unit of analysis problem discussed below.

As for the second step, a Comment could argue that retroactive application of the provision would impermissibly disturb bargained for agreements between employers and employees. While this argument is weakened by the fact that many such agreements are of a blanket nature and do not reflect actual negotiations,[73] the Comment could find that concerns about adhesion agreements are better policed through contract doctrine than indirectly through retroactivity analysis.

In arguing the arbitration provision should not apply retroactively, the Comment could advocate that analysis under Landgraf's second step should focus on functional considerations of "retroactive effect," and "legal consequences,"[74] rather than simply compiling a litany of citations characterizing a provision as substantive versus procedural or jurisdictional. For example, the Supreme Court held statutes of limitation to be substantive in the Erie doctrine context,[75] but procedural in choice of law analysis.[76] The Court acknowledged that "substance" and "procedure" are not self-explanatory terms, and that "what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn."[77] Thus, a Comment might argue that for the purposes of the second Landgraf step, retroactive application of new statutes of limitation does not create impermissible retroactive effects because employers are unlikely to modify their primary conduct based on how long an aggrieved employee has to file a claim. This conclusion is supported by at least some empirical evidence that longer statutes of limitations do not increase deterrence by significantly increasing the likelihood of prosecution.[78]

More research is needed to determine how the cases finding the Dodd-Frank provision

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[70] See, for example, Pezza, 767 F Supp 2d at 229–32 (listing other Dodd-Frank arbitration reforms with ambiguous temporal scope).

[71] See Landgraf, 511 US at 262 (noting partisan statements in record "cannot plausibly be read as reflecting any general agreement" and stating that although "a majority of the 1991 Congress also favored retroactive application, even the will of the majority does not become law unless it follows the path charted in Article I, § 7, cl. 2, of the Constitution").

[72] See Martin v Hadix, 527 US 343, 356 (1999) (distinguishing use of negative inference to find congressional intent regarding retroactivity in Lindh v Murphy "[b]ecause §§ 802 and 803 address wholly distinct subject matters").

[73] See, for example, Taylor, 839 F Supp 2d at 260 n 2.

[74] Landgraf, 511 US at 271 (emphasis added).

[75] See Guaranty Trust Co v York, 326 US 99, 109 (1945).

[76] See Sun Oil Co v Wortman, 486 US 717, 726 (1988).

[77] See id.

[78] Michael A. Perino, Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002, 76 St John's L Rev 671, 689–91 (2002) (examining deterrence effects of SOX provision extending statute of limitations for certain private rights of action under the securities laws).

extending SOX whistleblower protection to employees of subsidiaries is a clarification without retroactive effects fits into the broader context of Landgraf analysis. I have, however, found some statements in the legislative history that would be useful to analyzing whether the provisions constitute a change, rather than a clarification of law.[79]

As for the second line of analysis, the Comment could contribute a novel examination of the appropriate unit of analysis under Landgraf because the retroactivity question remains unsettled for multiple Dodd-Frank provisions amending SOX whistleblower protections, a single statutory scheme. For example, I have suggested above that the provision prohibiting predispute agreements to arbitrate should not apply retroactively, while Landgraf strongly suggests that provision of a jury trial right does apply retroactively.[80] Thus, individualized analysis of the Dodd-Frank provisions threatens to produce a hybrid SOX whistleblower scheme that does not wholeheartedly further the congressional goal that "more claims . . . be pursued and remedied in the court system."[81]

Although Landgraf found "there is no special reason to think that all the diverse provisions of the [Civil Rights Act of 1991] must be treated uniformly," it is unclear under what circumstances uniformity is appropriate. A Comment could propose that courts look to severability doctrine to resolve this question, since both retroactivity and severability cases present the risk that a "[c]ourt's decree [will create] its own new statutory regime, consisting of policies, risks, and duties that Congress did not enact."[82] In severability analysis, courts consider whether the act "remains fully operative as law" with a provision removed.[83] If so, it may be excised from the statute "[u]nless it is evident that the Legislature would not have enacted those provisions . . . independently of that which is [invalid]."[84] The same framework could be used to determine whether the creation of a hybrid regime through retroactivity analysis contravenes congressional intent. More research is needed into how this framework would apply to the Dodd-Frank SOX whistleblower amendments, but the inclusion of a severability clause in Dodd-Frank[85] "creates no more than a mere presumption of severability,"[86] making extended analysis in a Comment appropriate.

V. ANNOTATED BIBLIOGRAPHY

Statutes

- Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L No 111-203, 124 Stat 1374 (2010), codified in various sections of Titles 7, 12, 15, and 18
- Sarbanes-Oxley Act, Pub L No 107-204, 116 Stat 745 (2002), codified in various sections of Titles 11, 15, 18, 28, and 29

Supreme Court Cases

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[79] See, for example, Wall Street Reform and Consumer Protection Act Conference Report Proceedings and Debate, 156 Cong Rec S5870-02, 111st Cong, 2d Sess (2010) (statement by Senator Cardin regarding extension of whistleblower protection to employees of statistical rating organizations).

[80] See Landgraf, 511 US at 280 (""The jury trial right set out in § 102(c)(1) is plainly a procedural change of the sort that would ordinarily govern in trials conducted after its effective date.").

[81] See Moore, 12 Pepperdine Disp Resol L J at 514 (cited in note 62).

[82] National Federation of Independent Business v Sebelius, 132 S Ct 2566, 2668 (2012) (Thomas dissenting).

[83] Free Enterprise Fund v Public Accounting Oversight Board, 130 S Ct 3138, 3161–62 (2010) (holding unconstitutional SOX provision severable) (quotation marks omitted).

[84] Id.

[85] Dodd-Frank § 3, 12 USC 5301 note.

[86] Israel E. Friedman, Inseverability Clauses in Statutes, 64 U Chi L Rev 903, 906 (1997).

- Landgraf v USI Film Products, 511 US 244 (1994)
- Free Enterprise Fund v Public Accounting Oversight Board, 130 S Ct 3138 (2010) (holding unconstitutional SOX provision severable)
- Sun Oil Co v Wortman, 486 US 717 (1988) (applying forum state statute of limitations to claim governed by another state's substantive law)
- Guaranty Trust v York, 326 US 99 (1945) (applying state statute of limitations in diversity case)
- National Federation of Independent Business v Sebelius, 132 S Ct 2566 (2012) (discussing severability of individual health insurance mandate)
- ATT&T Mobility LLC v Conception 131 S Ct 1740 (2011) (holding Federal Arbitration Act preempts California's judicial rule regarding the unconscionability of class arbitration waivers)
- Hamdan v Rumsfeld, 548 US 557 (2006) (considering retroactivity of provision stripping federal courts of jurisdiction over Guantanamo habeas cases)
- Fernandez-Vargas v Gonzales, 548 US 30 (2006) (considering retroactivity of statute modifying availability of relief from a removal order for undocumented immigrants reentering the country)
- Martin v Hadix, 527 US 343 (1999) (considering retroactivity of changes to availability of attorney fees for postjudgment monitoring services)
- Lindh v Murphy, 521 US 320 (1997) (considering retroactivity of amendments to habeas corpus statute)
- Hughes Aircraft Co v Schumer, 520 US 939 (1997) (holding 1986 amendment to False Claims Act narrowing availability of affirmative defense does not apply retroactively)
- Kaiser Aluminum & Chemical Corp v Bonjorno, 494 US 827 (1990) (considering retroactivity of statute changing calculation of postjudgment interest)
- Rodriguez de Quijas v Shearson/American Express, Inc, 490 US 477 (1989) (applying decision to overrule prior decision finding arbitration prohibited for Securities Act claims retroactively)
- Goodman v Lukens Steel Co, 482 US 656 (1987) (considering retroactivity of decision specifying applicable limitations period to claim under 18 USC § 1981)

Circuit court cases

- Riddle v Dyncorp International Inc, 666 F3d 940 (5th Cir 2012)
- Middleton v Chicago, 578 F3d 655 (7th Cir 2009) (declining to apply act abolishing Uniformed Services Employment and Reemployment Rights Act statute of limitations retroactively)
- Guyden v Aetna, Inc, 544 F3d 376 (2008) (finding Sarbanes-Oxley claims arbitrable)
- US v Flores, 135 F3d 1000 (5th Cir 1998) (considering retroactive application of statute creating limitations period for post-conviction motions)
- Vernon v Cassadaga Valley Central School District, 49 F3d 886 (2d Cir 1995) (applying limitations period in effect at time of filing to Age Discrimination in Employment Act claim)
- Chenault v United States Postal Service, 37 F3d 535 (9th Cir 1994) (holding Civil Rights Act of 1991 amendment extending statute of limitations for employment discrimination claim does not apply retroactively)

District court cases

- Wong v CSX, Inc, 2012 WL 3893609 (SDNY)
- Leshinsky v Telvent GIT, SA, 2012 WL 268611 (SDNY)
- Ashmore v CGI Group, Inc, 2012 WL 2148899 (SDNY)
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