

Another SOX Clawback from Executives Without Wrongdoing

December 7, 2012 | Client Update | 2-minute read

A federal district court in Texas recently upheld the right of the SEC to seek clawbacks of bonus and other compensation under Section 304 of Sarbanes-Oxley from executives who have not been accused of any wrongdoing, by denying the executives' motion for summary judgment. In the case, [SEC v. Baker](#), the SEC is seeking reimbursement of bonuses, incentives and compensation from the CEO and CFO of Arthrocare in connection with the company's restatement of its financial statements. The restatements were due to alleged fraud by two senior vice presidents of Arthrocare. The SEC did not allege that the CEO and CFO committed any conscious wrongdoing.

As we have [discussed](#), the SEC had previously sought clawbacks under Section 304 from executives not charged with personal wrongdoing. The current case in Texas is apparently only the second time that a federal court has upheld the right of the SEC to seek clawbacks where the SEC has not alleged that the executives in question participated in the wrongful conduct. (The first case, [SEC v. Jenkins](#), was decided by a federal district court in Arizona.) The court in Baker rejected the argument that the language of Section 304 required the misconduct of the officer from whom the reimbursement was being sought and found that Section 304 "require[s] only the misconduct of the issuer". The court also rejected arguments by the defendants that Section 304 is unconstitutional and that they are protected by the Civil Asset Forfeiture Reform Act. In addition to cases where courts have upheld the right to clawbacks, the SEC has previously reached settlements to clawback compensation under Section 304 with executives not charged with personal misconduct.

Prior to these cases, it had been generally viewed that the clawback provisions of the Dodd-Frank Act, which provide for disgorgement regardless of whether misconduct has occurred, are broader than those of Sarbanes-Oxley. While the Dodd-Frank provision remains broader in many respects, this court case brings Section 304 one step closer to the Dodd-Frank provision.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Kyoko Takahashi Lin

+1 212 450 4706

kyoko.lin@davispolk.com

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.