Does Dodd-Frank Protect Foreign Whistleblowers?

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Section 922 of the Dodd-Frank Act establishes generous financial rewards and broad anti-retaliation safeguards to encourage individuals to report violations of American securities law. Discord over the language of, and legislative intent behind, these provisions underpins two complementary legal questions that are percolating up the federal judiciary in fits and starts: 1) whether the act classifies — and protects — as "whistleblowers" employees who inform their employers about apparent securities violations before reporting them to law enforcement; and 2) whether the act protects as whistleblowers individuals who report violations while on foreign soil.

The Fifth Circuit answered the first query with a resounding "no" last year in Asadi v. G.E.,[1] rejecting the logic of several district court decisions and dismissing the U.S. Securities and Exchange Commission's own interpretation on grounds that the act unambiguously reserves whistleblower protections for those who report lawbreaking directly to the SEC.[2] While Asadi remains the only federal appellate decision on the question to date, district courts in other circuit jurisdictions are now divided on whether the act protects internal reporters as whistleblowers, portending the likely development of a cert-friendly circuit split.[3]

Less settled still is the second question. Section 922 of the Dodd-Frank Act establishes that an employer may not "directly or indirectly" "discharge, demote, suspend, threaten, harass ... or in any other manner discriminate against" a whistleblowing employee for disclosing apparent violations of the Sarbanes-Oxley Act of 2002, the Securities Exchange Act of 1934, or "any other law, rule, or regulation subject to the jurisdiction of the [SEC]."[4] However, while Section 922 clearly governs violations of American securities law stemming from misconduct committed outside the United States, it does not expressly state whether or not the act protects those who report such violations while they themselves are physically overseas.

In August, the Second Circuit held that it does not. In Liu v. Siemens,[5] the circuit upheld a ruling from the U.S. District Court for the Southern District of New York denying whistleblower protections to a Taiwanese resident who claimed that a Siemens subsidiary had fired him in violation of Section 922 after he complained internally that the company had violated the Foreign Corrupt Practices Act by funneling kickback bribes to North Korean and Chinese officials who approved the purchase of Siemens medical imaging equipment. The circuit relied heavily on the current U.S. Supreme Court's expansive application of the "presumption against extraterritoriality" in holding that courts may assume Congress intends its laws to apply only to domestic conduct "unless a contrary intent appears."[6]

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Originating in a simpler and less restrictive form more than 200 years ago,[7] the presumption against extraterritoriality was progressively abandoned by the courts to the point that the Restatement (Third) of Foreign Relations Law concluded in 1987 that the presumption no longer reflected "the current law of the United States."[8] Four years later, however, the Rehnquist court resuscitated — and expanded — this rebuttable presumption against extraterritoriality in Aramco, in which a deeply divided court denied Title VII workplace protections to an American working overseas, reasoning that courts should assume that Congress intended a law to apply only to domestic conduct unless the scrutinized statute contains express language suggesting otherwise.[9]

However, less than eight months later, Congress amended the Civil Rights Act of 1964 to expressly provide precisely what the court assumed had already been considered and intentionally omitted — coverage of extraterritorial conduct.[10] The bill passed within two months of its introduction by votes of 93-5 and 381-38 in the Senate and House of Representatives, respectively.[11]

Nevertheless, a narrow majority of the Roberts court has built upon Aramco's requirement of a "clear statement" of extraterritorial coverage to find that the presumption against extraterritorial application had not been rebutted in Morrison v. National Australian Bank Ltd.[12] and Kiobel v. Royal Dutch Petroleum Co.[13] (denying extraterritorial coverage to alleged violations of Section 10(b) of the Securities Exchange Act of 1934 and the Alien Tort Statute, respectively).

Importantly, the court in Morrison expanded the presumption beyond even what the Aramco court[14] had established, effectively applying an unrebuttable presumption if the statute's express language does not provide for extraterritorial coverage. (The Aramco court had not gone so far as to rule out the possibility that evidence of legislative intent — including agency interpretation of the relevant law — not appearing in the statute itself could suffice to overcome the presumption.)

Working under these recent precedents, the Liu courts both held that the anti-retaliation provisions of Dodd-Frank do not protect whistleblowers who report foreign misconduct while on foreign soil because the act does not expressly provide for such extraterritorial coverage. In dismissing the case, the Southern District concluded that "[t]here is simply no indication that Congress intended the Anti-Retaliation Provision [of Section 922] to apply extraterritorially."[15] The Second Circuit delved deeper in upholding the Southern District's ruling, finding "absolutely nothing in the text of [Section 922] ... or in the legislative history of the Dodd-Frank Act" to suggest "that Congress intended the anti-retaliation provision to [apply extraterritorially]."[16]

Neither Liu court, however, attempted to reconcile its conclusion that Congress did not envision Dodd-Frank protecting foreign whistleblowers with the fact that Dodd-Frank governs violations of the Foreign

Corrupt Practices Act — a definitively extraterritorial law, and one whose efficacy relies to a great extent on its ability to attract foreign whistleblowers. Nor did the Liu court forward a plausible theory as to why Congress would have decided to encourage aggressive worldwide whistleblowing by offering bounties to foreign-based whistleblowers while at the same time concluding that protecting these same informers from being fired (or worse) for exposing lawbreaking would not further this goal.

Instead, the Second Circuit relied on the Supreme Court holdings in Kiobel and Morrison in reasoning that if Congress had intended for such coverage, it would have included express language providing as much. The circuit's rationale, again, can be traced in its modern form to Aramco — where, as discussed above, Congress quickly amended the statute in question to expressly convey an intent the Rehnquist court had failed to identify.

There is little doubt that Congress does not always record a mirror image of its intentions when it drafts legislation. This is particularly so with lengthy and complex bills — and few have been longer or more complex than Dodd-Frank, which directed 10 federal agencies to pass more than 400 rules and measured some 2,300 pages upon passage.[17] Nor does one need to travel far from the foreign-coverage question to find support for this supposition: The act's own discrepancy between different definitions of "whistleblower" — central to the above-described issue of internal reporting coverage — would seem to illustrate the fallibility of legislative drafters.[18]

Nevertheless, the judicial hierarchy is the ultimate arbiter of arguably ambiguous congressional language, and thus far, the highest court to consider the question of foreign-reporter coverage has drawn a narrow scope. The Second Circuit dismissed Liu's argument that Congress intended to protect the foreign whistleblowers who the act was already rewarding as "a concatenation of strained assumptions."[19]

The circuit's criticism of the plaintiff's plea for protections from a company with only "one slim connection to the United States" — a listing on the New York Stock Exchange — seems likewise misplaced, as that same "slim connection" sufficed to convince Siemens to pay the largest FCPA settlement in history as it pleaded guilty in 2008 to delivering more than $1.4 billion in bribes to government officials on four continents. The unprecedented bribery scheme implicated the type of securities law violations now enforceable under Dodd-Frank, as Siemens "engaged in systematic efforts to falsify its corporate books and records" to hide bribes from Argentina to Iraq, from Bangladesh to Venezuela.[20]

Regardless, in upholding the dismissal of the Liu complaint, the Second Circuit found that "the listing of securities [on an American exchange market] alone is the sort of "fleeting" connection [to the United States] that "cannot overcome the presumption against extraterritoriality.""[21] In so holding, the circuit relied on the Roberts court's presumption doctrine and rejected the "idea that a foreign company is

subject to U.S. [s]ecurities laws everywhere it conducts foreign transactions merely because it has 'listed' some securities in the United States" as "simply contrary to the spirit of Morrison."[22]

The Second Circuit did seem to preserve a slender opening through which international whistleblowers may expect Dodd-Frank protection from retaliation by FCPA-covered foreign employers: The Liu court inferred that the plaintiff's failure to demonstrate a "meaningful relationship between the harm [of Siemens' reported bribery of the Chinese and North Korean officials] and those domestically listed securities" factored into the circuit's decision to deprive Liu of Section 922 protections. Thus, even under this narrow reading, Section 922 may still protect foreign-based informants if they can show such a "meaningful relationship" between the foreign misconduct and the foreign malefactor's American-listed securities.

While no court has ruled on the foreign-coverage question since Liu,[23] the Second Circuit's holding is already changing behavior beyond its jurisdiction. In announcing a Dodd-Frank whistleblower reward in September that more than doubled the next-highest bounty, the SEC took pains to note that the whistleblower was a foreign resident and to emphasize that foreign informants were still eligible for Section 922 rewards because, under Liu, the act's bounty provisions have "a different Congressional focus than the anti-retaliation provisions."[24]

At the same time, the agency issued an unambiguous rebuke[25] of the Liu court's general inference that Congress did not intend to protect or otherwise encourage foreign whistleblowing through Section 922, with SEC whistleblower chief Sean McKessy declaring that "[w]histleblowers from all over the world should feel similarly incentivized to come forward with credible information about potential violations of the U.S. securities laws."[26] McKessy's statement was as reflective as it was prospective: Five of the 14 Dodd-Frank rewards the SEC has issued to date have gone to foreign-based whistleblowers.[27]

While two branches of our government continue to debate the central tenets of Liu, what is beyond dispute is that the boundaries of Section 922's whistleblower provisions remain very much in flux. Should the question of the coverage of Dodd-Frank's extraterritorial whistleblower protections follow the evolution of its internal-reporting brethren — and the passionate discord the Liu decision sparked suggests it will — the public may well have to wait for the Supreme Court to provide an answer.

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[1] Asadi v. G.E. Energy (USA) LLC, 720 F.3d 620, 621 (5th Cir. 2013).

[2] Id. at 629 (analyzing 17 C.F.R. § 240.21F-2(b)(1)).

[3] See Banko v. Apple Inc., 2013 U.S. Dist. LEXIS 149686 (N.D. Cal. Sept. 26, 2013); Meng-Lin Liu v. Siemens A.G., 978 F. Supp. 2d 325, 329 (S.D.N.Y. 2013) (rejecting an internal reporter's plea for whistleblower status); but see Kramer v. Trans-Lux Corp., 2012 U.S. Dist. LEXIS 136939 (D. Conn. Sept. 25, 2012); Connolly v. Wolfgang Remkes, 2014 U.S. Dist. LEXIS 153439 (N.D. Cal. Oct. 28, 2014) (siding with "a large majority of district courts before and after Asadi" in deferring to the SEC's reasonable interpretation of the act as protecting internal reporters). Notably, the Second Circuit sidestepped the question in the Liu appeal in August 2014, expressly declining to address the issue and upholding the district court's dismissal of the appellant's retaliation claim against Siemens on extraterritorial grounds alone (discussed further infra in text). Meng-Lin Liu v. Siemens A.G., 763 F.3d 175 (2d Cir. N.Y. 2014).

[4] Section 922. 15 U.S.C. § 78u-6(h)(1)(A).

[5] Liu, supra n. 3.

[6] Morrison v. National Australian Bank Ltd., 561 U.S. 247 (2010).

[7] See Rose v. Himely, 8 U.S. (4 Cranch) 241, 279 (1808) (Marshall, C.J.); see also The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824) (Story, J.).

[8] William S. Dodge, Understanding the Presumption Against Extraterritoriality, 16 Berkeley J. Int'l L. 85, 114 (1998) (characterizing the Restatement (Third) § 415, Reporters' Note 2 (1987)).

[9] E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244 (1991) ("Aramco").

[10] See 42 U.S.C. § 2000e(f) (1994) ("[w]ith respect to employment in a foreign country, ["employee"] includes an individual who is a citizen of the United States").

[11] S. 1745, 102nd Congress (1991) ("Civil Rights Act of 1991") (codified as Pub. L. 102–166, § 109(a)).

[12] 561 U.S. 247 (2010). Writing for five members of the Court and quoting Aramco, Justice Antonin

Scalia asserted that barring an "'affirmative'" and "'clearly expressed'" intention of Congress "to give a statute extraterritorial effect, we must presume [that Congress is] primarily concerned with domestic conditions" in its lawmaking. In other words, Scalia wrote, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." Id. at 255.

[13] 133 S. Ct. 1659 (2013).

[14] In an eloquent and fiery Morrison dissent issued five days before his retirement after 35 years on the high bench, Justice John Paul Stevens criticized Aramco as "surely the most extreme application of the presumption against extraterritoriality in my time on the Court," yet noted that the holding still "contained numerous passages suggesting that the presumption may be overcome without a clear directive." Morrison, supra n. 6, at 278-280 (noting that even Aramco identified congressional intent as the touchstone of the presumption). Stevens further assailed Scalia's imposition of his "personal view of statutory interpretation" in Morrison for ignoring multiple court holdings "before and after Aramco [that] make perfectly clear that the Court continues to give effect to 'all available evidence about the meaning' of a provision when considering its extraterritorial application, lest we defy Congress' will." Id. (quoting Sale v. Haitian Centers Council Inc., 509 U.S. 155, 177 (1993) (emphasis added by Morrison dissent).

[15] In the sentence immediately following its conclusion regarding Congress' intent in Dodd-Frank, the Southern District cites Morrison constraints in dismissing without consideration Liu's argument that Congress intended to protect foreign-based securities law whistleblowers, averring that "the Supreme Court has warned against 'divining what Congress would have wanted if it had thought of the situation before the court.'" Meng-Lin Liu v. Siemens A.G., 978 F. Supp. 2d 325, 329 (S.D.N.Y. 2013) (quoting and citing to Morrison, 561 U.S. at 256). The court does not discuss whether it could have reviewed and cited the transcripts of the congressional deliberations preceding the act's passage for relevant general intent without having to speculate on "what Congress would have wanted" under the particular facts of Liu.

[16] Meng-Lin Liu v. Siemens A.G., 763 F.3d 175, 180 (2d Cir. N.Y. 2014).

[17] "Oversight of Dodd-Frank Act Implementation," The Committee on Financial Services, U.S. House of Representatives (available here: http://financialservices.house.gov/dodd-frank/) (last accessed Nov. 8, 2014); see also "Too Big Not to Fail," The Economist (Feb. 18, 2012) (available here: http://www.economist.com/node/21547784) (last accessed Nov. 8, 2014).

[18] See Fabrice Vincent, et al., "Court Split Likely to Lead to More FCPA Whistleblowing," Law360 (Feb. 13, 2014) (available here: http://www.law360.com/articles/509278/court-split-likely-to-lead-to-more-fcpa-whistleblowing) (last accessed Nov. 8, 2014).

[19] Liu, supra n. 16, at 182.

[20] "Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines," U.S. Dept. of Justice (Dec. 15, 2008) (available here: http://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html) (last accessed Nov. 8, 2014) (reporting that Siemens AG paid a total of roughly $1.6 billion to the American and German governments in penalties and disgorgements in multiple related prosecutions for the global bribery scheme). The Second Circuit's Liu opinion contains numerous other statements indicating an apparent disregard for the undisputed fact that the FCPA governs the foreign conduct of foreign entities that benefit from trading on American exchanges, and that some FCPA violations concurrently constitute violations of Dodd-Frank. See 15 U.S.C. § 78m ("[i]t shall be unlawful for *any* issuer which has a class of securities registered [pursuant to the Securities and Exchange Act of 1934], or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to ... offer, gift, promise to give, or [authorize] the giving of anything of value to ... any foreign official for purposes of" influencing the official to act, or to omit to act, to benefit the violator's business interests (emphasis added)).

[21] Liu, supra n. 16, at 180 (quoting Morrison v. National Australian Bank Ltd., 561 U.S. 247, 263 (2010)).

[22] Id. (citing Royal Bank of Scotland Grp. PLC Sec. Litig., 765 F. Supp. 2d 327, 336 (S.D.N.Y. 2011)).

[23] In fact, only one other court has answered the question to date, with the Southern District of Texas similarly finding and upholding a presumption against extraterritoriality in 2012 in the Asadi case described supra in the text. Asadi v. G.E. Energy (USA), 2012 U.S. Dist. LEXIS 89746 (S.D. Tex. June 28, 2012), aff'd on other grounds, 720 F.3d 620 (5th Cir. 2013).

[24] Order Determining Whistleblower Award Claim, Whistleblower Award Proceeding, File No. 2014-10 (Sept. 22, 2014) (available here: http://www.sec.gov/rules/other/2014/34-73174.pdf) (last accessed Nov. 8, 2014).

[25] In its Sept. 22, 2014, order, the SEC included a nearly page-long footnote explaining that "[i]n our view, there is a sufficient U.S. territorial nexus whenever a claimant's information leads to the successful enforcement of a covered action brought in the United States, concerning violations of the U.S. securities laws, by the commission, the U.S. regulatory agency with enforcement authority for such violations. *When these key territorial connections exist, it makes no difference whether, for example, the claimant was a foreign national, the claimant resides overseas, the information was submitted from overseas, or the misconduct comprising the U.S. securities law violation occurred entirely overseas*." Id. at 2 (emphasis added). The

commission also used the opportunity to more generally critique the narrow interpretation of Section 922 espoused by Liu, Asadi, and their progeny, stating that "[w]e believe this approach best effectuates the clear Congressional purpose underlying the award program, which was to further the effective enforcement of the U.S. securities laws by encouraging individuals with knowledge of violations of these U.S. laws to voluntarily provide that information to the Commission." Id.

[26] "SEC Announces Largest-Ever Whistleblower Award," SEC Press Release (Sept. 22, 2014) (available here: http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290#.VF7D7vnF98E) (last accessed November 8, 2014).

[27] Id.