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Extraterritoriality and Whistleblower Retaliation

Crossing the Line

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Though whistleblower protection statutes take many forms, the frameworks for determining liability are really quite similar. Generally speaking, an employee must first demonstrate that he or she engaged in protected conduct under an act. Next, the employee may be required to prove that the employer actually knew about the employee's protected conduct. Third, the employer must take some sort of adverse personnel action against the employee. Finally, the employee must demonstrate that his or her protected conduct was causally related to the adverse employment action.

In-house counsel for multinational corporations and counsel for foreign plaintiffs often must deal with an even more preliminary issue than any of those cited above. Specifically, can overseas whistleblowers avail themselves of United States whistleblower protection laws? If so, under what circumstances? How can corporations protect themselves against claims of retaliation from company whistleblowers located outside the United States? An answer one way or the other may render meaningless arguments about, for example, whether an employee's conduct should be deemed protected or the appropriate causation standard to be applied. Indeed, understanding the extraterritoriality issues in international whistleblower cases is absolutely critical insofar as it may provide an avenue for defense counsel to seek a dismissal early in litigation.

Morrison v. National Australian Bank, Ltd.

In 2010, the Supreme Court decided the case of *Morrison v. National Australia Bank*. 130 S. Ct. 2869 (2010). Relying heavily upon a presumption against extraterritorial application, the Court established a two-part test to determine whether extraterritorial application is appropriate.

Setting the Stage

The *Morrison* case involved a lawsuit by shareholders in Australia against National Australian Bank, Ltd. (National), Australia's largest bank at the time of the suit. *Morrison*, 130 S. Ct. at 2875. In 1998, National purchased HomeSide Lending, Inc. (HomeSide), a mortgage servicing company in Florida. *Id*. Over the next several years, National, through its annual reports and public statements from company officers, discussed the success of HomeSide's business. *Id*. In mid-2001, however, National announced a more than $2 billion dollar write-down in the value of

HomeSide's assets. *Id*. at 2876. Shareholders, upset about the write-down, accused National of intentionally manipulating HomeSide's financial models to make the company's assets to appear more valuable than they actually were. *Id* . The shareholders, again residents and citizens of Australia, filed a complaint in the Southern District of New York, alleging violations of §§ 10(b) and 20(a) of the Securities and Exchange Act of 1934 and SEC Rule 10b-5. *Id*

The district court dismissed the complaint for lack of jurisdiction, finding that the acts in the United States were, "at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad." *In re National Australia Bank Securities Litigation*, No. 03 Civ. 6537(BSJ), 2006 WL 3844465, *8 (S.D.N.Y., Oct.25, 2006). The Court of Appeals for the Second Circuit affirmed the dismissal. 547 F.3d 167, 175 (2d Cir. 2008).

SCOTUS Establishes a Two-Part Inquiry

Justice Antonin Scalia began the majority opinion by noting the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Id*. at 2877 (quoting *EEOC v. Arabian American Oil Co.*, 449 U.S. 244, 248 (1991)). He went on to state that, "unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions." *Id*. Scalia criticized the Second Circuit's "effects" and "conduct" tests, finding that its framework disregarded the presumption against extraterritoriality and that the tests became overly cumbersome in their application. *Id*. at 288-80.

The Court went on to discuss what has essentially become a two-part inquiry. First, the relevant statute should be examined for "a clear statement of extraterritorial effect." *Id*. at 2883. Noting that a statute need not explicitly state, "this law applies abroad," the Court endorsed looking to "whatever sources of statutory meaning one consults to give 'the most faithful reading' of the text." *Id*. Such a framework, in the Court's view, was more faithful to the presumption that federal law is not meant to have extraterritorial effect.

In a paragraph that could be written by no one but Justice Scalia, the Court acknowledged the fact that, in most cases, some contact with the United States is inevitable:

For it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case. The concurrence seems to imagine just such a timid sentinel, but our cases are to the contrary.

Id. at 2884. (internal citations omitted).

The Court went on to discuss "the focus" of the Exchange Act as regulating transactions in securities listed on domestic exchanges. Ultimately, it concluded that under "the *transactiona* l test we have adopted — whether the purchase or sale is made in the United States, or involves a

security listed on a domestic exchange," the statute did not allow for extraterritorial application. *Id*. (emphasis added).

Fallout from *Morrison* in the ARB

The next major decision in extraterritoriality application for whistleblowers came from the Administrative Review Board (ARB) in *Villanueva v. Core Laboratories NV*, 2009 ARB CASE NO. 09-108, 2011 WL 6981989 (Dec. 22, 2011). William Villanueva is a Colombian national who, during the relevant period, was living and working in Bogota. *Id*. at *2. The company's ownership structure is a bit complex. Villanueva worked for Saybolt Columbia, a Colombian company that is 95% owned by Saybolt Latin America B.V., a Netherlands company, and 5% owned by a Colombian national. Saybolt Latin America is, in turn, owned by Saybolt International B.V., also a Netherlands company. Saybolt International is a wholly owned subsidiary of defendant Core Laboratories, a United States company. *Id*.

In a complaint under Section 806 of the Sarbanes Oxley Act (SOX), Villanueva alleged that Core Laboratories "orchestrated a 'transfer price fixing scheme'" whereby Core Laboratories Sales, an offshore subsidiary of defendant Core Laboratories, received a percentage of Saybolt Colombia's generated revenues even though Core Laboratories Sales provided no services on the contract. Villanueva alleged that this scheme led to an under-reporting of taxable revenue to the Colombian government. *Id* . Skeptical of the scheme, Villanueva, Saybolt Colombia's General Manager, reported his concerns to various individuals both within and external to Core Labs. Ultimately, he refused to sign the tax returns that were due to the Colombian government. *Id*.

Villanueva claimed that, as a result of his disclosures, Core Labs retaliated against him by failing to provide him a pay raise and then terminating his employment. He asserted that the Core Laboratories' Regional Manager and Saybolt Latin America's President, both located in Houston, TX, were the individuals responsible for the decision.

Villanueva required the ARB to decide whether Section 806 of SOX was to be given extraterritorial application. Turning the *Morrison* test around, the ARB first sought to determine Congress's focus when enacting SOX, and found it to be "prevent[ing] and uncover[ing] financial fraud, criminal conduct in corporate activity, and violations of securities and financial reporting laws." *Id*. at 10-1. The ARB found that "the alleged fraud … involved Colombian laws with no stated violation or impact on U.S. securities or financial disclosure laws" and that, as a result, Villanueva's complaint did not fall within the statute's focus. *Id* . at 11. To prevail, Villanueva would need to demonstrate that § 806 "included extraterritorial laws within its definition of protected activity." *Id*.

The ARB then looked to the plain text of § 806 and found no clear indication that it embraced communications about foreign securities and tax law as protected activity. *Id* . at 11. It next compared § 806's language with that of other statutes already dealt with by federal courts in the determining extraterritoriality application. The ARB noted that in many other statutes that contained even stronger indications of extraterritoriality intent, the presumption against extraterritoriality could not be overcome. *Id* . at 11-12. Finally, the ARB noted that the Dodd-

Frank act expressly extended coverage of some aspects of SOX to foreign transactions but remained silent as to the extraterritoriality of § 806's anti-retaliation provision. *Id*. at 12.

In sum, *Villanueva* provides several key takeaways for practitioners. To begin, the second step of *Morrison* (but the first in *Villanueva*) requires looking at the "primary focus" of the statute in general and then the "additional focus" of the anti-retaliation provision. Then, the ARB will look to the "labor elements" to determine whether the statute's territorial scope implicates the subject matter of the complaint (in *Villanueva*, the ARB noted that the labor elements were so obviously extraterritorial such that extensive treatment was not necessary).

Moreover, the ARB's decision seems to advocate for more of a case-by-case assessment of the facts and labor factors as opposed to bright-line tests. It noted the following could be factors in determining whether a complainant's claim would require extraterritorial application (at least under SOX): location of the protected activity, location of the job, location of the retaliatory act, and the nationality of the laws allegedly violated for which the complainant has been fired for reporting. *Id*. at FN 22. The ARB also noted that the fraudulently activity being reported was "the driving force of the case," was "solely extraterritorial," and therefore "[took] the events outside Section 806's scope." *Id*. Again, this factor-based approach and acknowledgement that, depending upon the circumstances of the case, some factors may be more important than others steps away from the bright lines of *Morrison*.

Conclusion

Extraterritorial application in whistleblower cases requires a unique inquiry into the statute at issue and the facts of a given case. After reviewing the explicit text of the governing statute and confirming that there is no language stating that "this law applies abroad," counsel must be prepared to take a deep dive into the "focus" of the law's anti-retaliation provisions and, under *Villanueva* , the broader purpose of the law, itself.

From a factual perspective, it behooves defense counsel to demonstrate the extent to which the facts of the case are removed from the United States and, at least in administrative proceedings within the Department of Labor (DOL), frame the dispute as being "driven" by some factor that occurred abroad. Conversely, plaintiff's counsel could (and certainly should) try to put Justice Scalia's "craven watchdog" back in its kennel. In a best-case scenario, the plaintiff will want to argue that all of the requisite elements of the protected conduct and retaliatory actions occurred within the United States and that extraterritorial application of the statute is not an issue. In other words, the goal is to demonstrate that the plaintiff's case merely requires an application of a U.S. whistleblower statute to retaliatory acts committed within the U.S.

Perhaps most importantly, once these extraterritorial issues are decided, all of the parties will either get to go on about their business or get back to arguing about protected conduct, causation standards, and everything else with which we are all much more comfortable debating.

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