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Application Of SOX Whistleblower Rulings Inconsistent

By Paul J. Martinek — November 8, 2005

This is the second of a two-part look at issues arising under the whistleblower provisions of the Sarbanes-Oxley Act.

Although the Sarbanes-Oxley Act has been law for more than three years, it's still not clear whether whistleblowers in foreign countries are protected against retaliation under the statute, according to two attorneys at Wilmer Culter Pickering Hale and Dorr in Washington.

The lawyers, Carrie Wofford and Thomas W. White, recently completed a comprehensive analysis of every administrative ruling and federal court decision under Section 806 of Sarbanes-Oxley through September 2005. Their research—which was covered in the last edition of Compliance Week (see "Application Of SOX Whistleblower Rulings Inconsistent" in box at right)—will appear in a chapter on whistleblowers in the upcoming third volume of the American Bar Association's "Practitioner's Guide to the Sarbanes-Oxley Act."


Wofford

Wofford notes that SOX 806 "contains jurisdictional language that explicitly covers any company that has a class of securities registered in accordance with Section 12 of the Exchange Act or that is required to file reporters under Section 15(d) of the Exchange Act." Since, under the Exchange Act, foreign companies that issue debt or equity securities in the U.S. are not distinguished from U.S. companies, a foreign company that is publicly traded in the U.S. "would appear to be subject to be subject to the civil whistleblower provision" of SOX, she says.

When it comes to the application of SOX 806 to foreign whistleblowers, the "legislative history is silent," says Wofford, contrasting the civil whistleblower provision with the criminal whistleblower section of SOX, which amended an existing part of the U.S. criminal code that explicitly covers foreign nationals.

"In no other context under the Sarbanes-Oxley Act has Congressional intent to apply the act extraterritorially been questioned," Wofford notes. "To the contrary, the [Securities and Exchange Commission's] regulations under [SOX] apply generally to all foreign companies that report under the Exchange Act, including regarding their internal operations, although in some cases the SEC has exercised regulatory discretion to make accommodations to address potential conflicts with foreign laws and other concerns specific to foreign issuers."

Few Cases Have Addressed Question

To date, there have been only three rulings involving employees who work in foreign countries—and all three were decided against the employee. Those decisions have all been premised on the presumption

against extraterritorial application of U.S. laws absent clear congressional intent to the contrary, Wofford says.

In *Carnero v. Boston Scientific Corp.*, a U.S. District Court judge in Boston dismissed a civil whistleblower complaint brought by an Argentine citizen who worked for the Argentine and Brazilian subsidiaries of a U.S. company. "The protection of workers is a particularly local matter, and nothing in the legislative history supports [the] assertion that the language of [SOX 806] protecting an 'employee' was meant to include all employees wherever they may work," the judge wrote in her decision, which is currently on appeal to the 1st U.S. Circuit Court of Appeals.

The two other cases involving foreign whistleblowers have been decided by ALJs at the Labor Department, which is in charge of enforcing SOX 806.

One case, *Concone v. Capital One Financial*, was filed by an Italian employee of a U.S. company who worked entirely in Italy and the United Kingdom. The ALJ relied on *Carnero* in finding that the foreign worker was not an "employee" under the civil whistleblower provision. The second case, *Ede v. Swatch Group*, dismissed a claim brought by two foreign-based employees of a Swiss company. Addressing the employees' contention that *Carnero* was wrongly decided because SOX was meant to protect U.S. investors, the ALJ said that "the immediate purpose of the whistleblower provision of [SOX is] to protect employees" and concluded that "protecting employees is a local matter."

Despite the *Carnero* decision and the two ALJ rulings, Wofford says it is possible that other ALJs and courts will rule differently in the future. "The current rulings could be seen as vulnerable to challenge or might be distinguished in that they fail to address the express jurisdictional provision of the civil whistleblower provision over U.S.-registered public companies and do not address the myriad other provisions in the act that are considered to have extra-territorial application," she notes. "Practitioners should certainly watch developments on this point carefully."

Other Nations Have Different Principles


White

Opposition to the application of SOX 806 has been based, at least in part, on the theory that "employment laws should, as a policy matter, always be directed by the country in which the employee works," says White at Wilmer Cutler. And he agrees that persuasive reasons can be articulated for such a policy, "since employment laws may embody important economic or welfare policies in the foreign state."

White notes a recent French court decision ordering the local subsidiary of a U.S. firm to withdraw a whistleblower hotline initiative launched to comply with SOX (see "Multinationals Find SOX Is Conflicting With Local Laws," in box above, right).

"The court reasoned that hotline complaints could lead to unfounded accusations and other violations of employees' rights to privacy in the workplace, and that the hotline did not offer employees the right to view accusations, make responses, or defend themselves, in violation of French law," says White. "This decision points up the problem that other nations do not have the same principles of employee reporting and protection as they do in the U.S."

The view that foreign-based workers are not protected by SOX "itself raises knotty questions," says White. "What if the whistleblower is a U.S. citizen employed by a U.S. company that happens to be based in a foreign country? If such an employee made allegations of corporate wrongdoing that violated U.S. laws, would he not be protected from retaliation, while a co-worker based in the U.S. would be? That seems to be implied by the current rulings, although it would lead to an anomaly."

For a company that is publicly traded in the U.S., the best advice if someone in a foreign country raises questions that would be clearly covered if the worker were in the U.S. would be to assume coverage just in case an ALJ or court finds that the worker is covered, Wofford notes. "In addition, employers should consult with local employment counsel to ensure that any actions taken vis-a-vis a possible whistleblower comport with local law in the foreign state," she says.

---------- EXCERPT ----------

Whistleblowers Overseas

The following was prepared by Carrie Wofford and Thomas W. White of Wilmer Cutler Pickering Hale and Dorr and includes material that will be published in an upcoming chapter of the American Bar Association's "Practitioner's Guide to the Sarbanes-Oxley Act." Reprinted with permission:

Another current hot topic is whether whistleblowers in foreign countries are protected against retaliation under the Act. The civil whistleblower provision of the Act contains jurisdictional language that explicitly covers any company that has a class of securities registered in accordance with section 12 of the Exchange Act or that is required to file reports under section 15(d) of the Exchange Act. Under the Exchange Act, foreign companies that issue debt or equity securities in the U.S. are not distinguished from U.S. companies. Thus, if a foreign company is publicly traded in the U.S., it would appear to be subject to the civil whistleblower provision of the Sarbanes-Oxley Act. Accordingly, one ALJ accepted without question that a U.S.-based employee working for a U.S. subsidiary of a British company that was required to comply with the Exchange Act could bring a claim against the British parent company.

So far, however, in the nascent case law, U.S. authorities have not applied the Sarbanes-Oxley Act's civil whistleblower protections to employees who live and work in other countries. There are only three rulings on the question to date:

- In the *Carnero* case, a U.S. district court dismissed a civil whistleblower complaint brought by an Argentine citizen who worked for the Argentine and Brazilian subsidiaries of a U.S. company. The court did not address the Act's jurisdictional language; instead, its decision turned on what the court said was an absence of clear congressional intent in favor of applying the civil whistleblower provision extraterritorially. The court also observed that extraterritorial application "may conflict with foreign laws, which is pecially likely in this case where plaintiff seeks to be reinstated to his job. Notably, he has already invoked Argentinean law in support of his cause. ... The protection of workers is a particularly local matter ..."
- An ALJ at the U.S. Department of Labor ruled that an Italian employee of a U.S. company whose employment occurred entirely in Italy and the United Kingdom was not an "employee" under the civil whistleblower provision. The ALJ relied on *Carnero* to find an absence of clear congressional intent that the civil whistleblower provision should apply extraterritorially. The ALJ also contrasted the civil whistleblower provision with the criminal whistleblower provision, which amended an existing part of the U.S. criminal code that explicitly covers foreign nationals. Here, the ALJ imputed to Congress an intent to treat the civil and criminal whistleblower provisions of the Act differently with regard to extraterritorial jurisdiction.
- A second ALJ rejected a claim brought by two foreign-based employees of a Swiss company. Although the ALJ could have relied on the fact that the Swiss company is neither publicly traded in the United States nor subject to SEC reporting requirements, it instead relied on Carnero to find an absence of congressional intent in favor of extraterritorial application. The ALJ addressed complainants' contention that "Carnero is 'wrong' and 'unpersuasive' because .. it ignores the

> purpose of the Act, which is to protect U.S. investors," and concluded that, in contrast to the overall purpose of the Act, "the immediate purpose of the whistleblower provision of the Act [is] to protect employees" and "protecting employees is a local matter."

These rulings are premised on a canon of statutory construction—the presumption against extraterritorial application of U.S. statutes in the absence of clear congressional intent to the contrary. It is, however, at best debatable that Congress did not evince such a clear intent. As discussed above, the express language of the whistleblower provision covers any company required to register its securities under section 12 of the Exchange Act or required to file reports under section 15(d) of that Act. This jurisdiction parallels that of the Sarbanes-Oxley Act generally, and other provisions of the Act plainly have extraterritorial effect. Most notably, the Act by its terms applies to non-U.S. companies, if they have securities registered under section 12 or if they report under Section 15(d). None of the cases addressed the express jurisdictional language of the civil whistleblower provision of the Act or attempted to explain why its scope should be interpreted more narrowly than the virtually identical definitions applicable to other provisions of the Act. In addition, none of the cases turned on the nationality of the whistleblowers, and this suggests the possibility that an American whistleblower working in an overseas office of an American company might not be protected under the Act, given current case law.

Excerpt courtesy Carrie Wofford and Thomas W. White of Wilmer Cutler Pickering Hale and Dorr; reprinted with permission. Please note that footnotes have been removed for ease of reading. This material will be published in an upcoming chapter of the American Bar Association's "Practitioner's Guide to the Sarbanes-Oxley Act."