

WHO, WHAT, WHEN, WHERE AND WHY: AN
EXAMINATION OF *ASADI V. G.E. ENERGY* AND
THE DODD-FRANK ANTI-RETALIATION
PROVISION

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WHO, WHAT, WHEN, WHERE AND WHY: AN EXAMINATION OF *ASADI V. G.E. ENERGY* AND THE DODD-FRANK ANTI-RETALIATION PROVISION

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INTRODUCTION

On June 28, 2012, the case of *Asadi v. G.E. Energy (USA), L.L.C.* was dismissed by the United States District Court for the Southern District of Texas.¹ A little over one year later, the case was reviewed *de novo* and subsequently affirmed by the United States Court of Appeals for the Fifth Circuit.² In this case, Khaled Asadi brought a “whistleblower” claim under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”) and a state law breach of contract claim³ against his former employer.⁴ Asadi, a dual citizen of the United States and Iraq, was a “U.S.-based employee of GE Energy (“GE”), but agreed to ‘temporarily relocate’ to Amman, Jordan” for his work as the GE-Iraq Country Executive.⁵ During his time in Jordan, Asadi was tipped off to corrupt actions being performed by GE, which he believed to be violations of the Foreign Corrupt

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¹ *Asadi v. G.E. Energy (USA), L.L.C.*, Civil Action No. 4:12-345, 2012 WL 2522599 (S.D. Tex. June 28, 2012), *aff’d*, 720 F.3d 620 (5th Cir. Tex. 2013).

² *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. Tex. 2013).

³ The ruling on the breach of contract claim is not in dispute and therefore will not be examined in this note.

⁴ *Asadi*, 2012 WL 2522599, at *1.

⁵ *Id.*

Practices Act (“FCPA”).⁶ As such, Asadi reported the potential violations to his supervisor.⁷ After reporting the violations, Asadi alleged that he received a negative performance review and began to experience pressure from his supervisor to step down from his position within the company.⁸ Throughout his employment, Asadi had received ten positive reviews and, immediately prior to these incidents, Asadi’s role with GE had been extended for two years.⁹ Shortly thereafter, “GE began ‘constant and aggressive severance negotiations’ with him, which continued until GE ‘abruptly ended all discussions and terminated [Asadi’s] employment on June 24, 2011.’”¹⁰ The termination notice came in the form of an email. Asadi “was told that he was being terminated ‘as an at-will employee, as allowed under U.S. law’ and that ‘[a]s a U.S.-based employee you will be terminated in the U.S. . . .’”¹¹ Shortly following his termination, Asadi brought suit alleging that his termination was illegal retaliation for his reporting of the potential FCPA violations.¹²

In making its decision, the district court determined that Asadi did not meet the Dodd-Frank definition of a whistleblower. When challenged by Asadi that anti-retaliation protection can be afforded to a broader range of individuals than the Dodd-Frank whistleblower definition provides for, the court chose to ignore the issue and dismiss the case on other grounds.¹³ Instead, the district court analyzed whether the Anti-Retaliation Provision applies extraterritorially and determined that it does not and that Asadi was therefore not entitled to its protection.¹⁴ In refuting the extraterritoriality analysis, Asadi argued that GE made it clear by their statements in the termination email that he was a U.S. employee and that he therefore should not be subject to the extraterritorial jurisdiction ban.¹⁵ The district

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at *2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Nicole H. Sprinzen, *The Diminished Scope of Dodd-Frank Whistleblower Protections After Asadi v. G.E. Energy (USA), LLC, THE METROPOLITAN CORPORATE COUNSEL*, Oct. 2012, at 12, available at <http://www.metrocorpocounsel.com/pdf/2012/October/12.pdf>.

¹² *Asadi*, 2012 WL 2522599, at *2.

¹³ *Id.* at *3.

¹⁴ *Id.* at *4–5.

¹⁵ *Id.* at *5.

court quickly disposed of this claim by noting that the “majority of events giving rise to the suit occurred in a foreign country” to justify its extraterritoriality analysis.¹⁶ On these determinations, the district court granted GE’s Motion to Dismiss for Failure to State a Claim and dismissed Asadi’s claim with prejudice.¹⁷

On appeal, the Fifth Circuit affirmed the decision of the district court.¹⁸ The Fifth Circuit, picking up where the district court left off, found that Asadi was not a whistleblower under Dodd-Frank.¹⁹ The Fifth Circuit analyzed the appeal utilizing canons of statutory construction and held that “the plain language of the Dodd-Frank whistle-blower protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC.”²⁰ Essentially, the Fifth Circuit found that the plain language and structure of Dodd-Frank defines only those individuals who provide information directly to the SEC as whistleblowers.²¹ The Fifth Circuit further stated that there was no ambiguity in the language of the provisions and that it would be reluctant to agree with Asadi even if the provisions were ambiguous.²²

Part I of this note examines the working definition of a whistleblower for anti-retaliation purposes based upon who an individual must report to and what an individual must report in order to receive anti-retaliation protection, with a primary focus on *Kramer v. Trans-Lux Corp.*²³ Part II covers the impact of the retroactivity of Dodd-Frank and when an individual may have a valid claim as supported by the holding in *Leshinsky v. Telvent GIT, S.A.*²⁴ Part III discusses the case for extraterritoriality and where an individual may be located versus where a claim may originate in order to have a valid anti-retaliation claim as recently discussed in *Morrison v. National Australia Bank, Ltd.*²⁵ Finally, Part IV ties it all together and

¹⁶ *Id.*

¹⁷ *Id.* at *7.

¹⁸ *Asadi*, 720 F.3d at 621.

¹⁹ *Id.*

²⁰ *Id.* at 622–23.

²¹ *Id.* at 625.

²² *Id.* at 628.

²³ *Kramer v. Trans-Lux Corp.*, No. 3:11CV1424 (SRU), 2012 WL 4444820 (D. Conn. Sept. 25, 2012).

²⁴ *Leshinsky v. Telvent GIT, S.A.*, 873 F. Supp. 2d 582 (S.D.N.Y. 2012), *aff’d in part, rev’d in part*, 2013 U.S. Dist. LEXIS 62364 (S.D.N.Y. May 1, 2013).

²⁵ *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010).

examines why the holding in *Asadi v. G.E. Energy (USA), L.L.C.*²⁶ and its affirmation by the Fifth Circuit²⁷ will likely lead to a circuit split.

As Dodd-Frank is still in its infancy and relatively few cases have been brought under its Anti-Retaliation Provision, this note primarily reviews and compares United States District Court decisions that are currently engaged in the appellate process. However, this note finds that the current inconsistency regarding court rulings on Dodd-Frank Anti-Retaliation Provision issues will ultimately result in a circuit split that may force either Congress or the Supreme Court to issue guidance on the matter. As such, this note focuses on the motivations behind the Dodd-Frank Anti-Retaliation Provision in combination with established law to determine the proper limitations of the Provision.

I. WHO & WHAT: A BROADENED DEFINITION OF WHISTLEBLOWER IN *KRAMER V. TRANS-LUX CORP.*

Dodd-Frank defines a whistleblower as “any individual who provides . . . information relating to a violation of the securities laws to the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the Commission.”²⁸ Following a strict interpretation of this definition, both the district court²⁹ and the Fifth Circuit³⁰ found that *Asadi* did not meet this definition because he reported the potential FCPA violation to his supervisor and not to the SEC. As the suit was brought under the Anti-Retaliation Provision, however, *Asadi* properly states that an employer may not retaliate against a whistleblower for “making disclosures that are required or protected” by any “law, rule, or regulation subject to the jurisdiction of the Commission.”³¹ The district court determined that it could dismiss *Asadi*’s claim on other grounds and therefore chose to not reach a decision on whether an individual may qualify as a whistleblower under the Anti-Retaliation Provision.³² The Fifth Circuit, however, utilized statutory construction and stated that *Asadi*’s proposed whistleblower definition went against the plain meaning of

²⁶ *Asadi*, 2012 WL 2522599.

²⁷ *Asadi*, 720 F.3d 620.

²⁸ 15 U.S.C. § 78u-6(a)(6) (2012 & Supp. I 2013).

²⁹ *Asadi*, 2012 WL 2522599, at *3.

³⁰ *Asadi*, 720 F.3d at 623.

³¹ *Asadi*, 2012 WL 2522599, at *3; see 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2012 & Supp. I 2013).

³² *Asadi*, 2012 WL 2522599, at *3.

the provisions.³³ Other courts, as discussed *infra*, have decided nearly identical matters, however, and it appears that Asadi had strong support for his assertion.

In *Kramer v. Trans-Lux Corp.*, the plaintiff brought a Dodd-Frank Anti-Retaliation suit against his former employer for wrongful termination after he reported violations internally to his company and to the SEC.³⁴ The defendant sought dismissal of the claim on the grounds that the plaintiff did not meet the definition of a whistleblower because he failed to report the violation in the manner required by the SEC.³⁵ The court disagreed, however, and stated that strictly following the whistleblower definition for Anti-Retaliation claims would be “inconsistent with the goal of the Dodd-Frank Act, which was to ‘improve the accountability and transparency of the financial system,’ and create ‘new incentives and protections for whistleblowers.’”³⁶ The *Kramer* court also noted that the only two other courts to examine whether the Anti-Retaliation Provision establishes a broader whistleblower definition have both held that it does.³⁷

The two cases referenced in *Kramer* are *Nollner v. Southern Baptist Convention, Inc.* and *Egan v. TradingScreen, Inc.* and both sought in part to resolve the strict whistleblower definition versus broad Anti-Retaliation Provision discrepancy.³⁸ In particular, the *Egan* court held that “[t]he contradictory provisions of the Dodd-Frank Act are best harmonized by reading 15 U.S.C. § 78u-6(h)(1)(A)(iii)’s protection of certain whistleblower disclosures as a narrow

³³ *Asadi*, 720 F.3d at 630.

³⁴ *Kramer v. Trans-Lux Corp.*, No. 3:11CV1424 (SRU), 2012 WL 4444820 at *1 (D. Conn. Sept. 25, 2012). See Jim McQuade, Renee Phillips & Mike Delikat, *Federal Court Decisions Permit Two Dodd-Frank Whistleblower Cases to Proceed*, EMP. L. & LITIG. BLOG (Oct. 11, 2012), available at <http://www.jdsupra.com/legalnews/federal-court-decisions-permit-two-dodd-58264>.

³⁵ *Kramer*, 2012 WL 4444820, at *3.

³⁶ *Id.* at *4.

³⁷ *Id.*

³⁸ See *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986 (M.D. Tenn. 2012) (involving an employee and his spouse filing a Dodd-Frank Anti-Retaliation Provision suit after the employee was allegedly terminated for reporting FCPA violations to his supervisors); *Egan v. TradingScreen, Inc.*, No. 10 CIV. 8202(LBS), 2011 WL 1672066 (S.D.N.Y. May 4, 2011) (involving an employee suing under the Dodd-Frank Anti-Retaliation Provision as well as state whistleblower statutes after the employee was terminated for reporting securities violations by the CEO of the company to the company’s President).

exception” to the strict whistleblower definition requiring reporting to the SEC in a proper manner.³⁹ More specifically, the *Nollner* court stated:

Harmonizing all of these provisions, as the court must, a plaintiff seeking protection under § 78u-6(h)(1)(A)(iii) must at least show the following: (1) he or she was retaliated against for reporting a violation of the securities laws, (2) the plaintiff reported that information to the SEC or to another entity (perhaps even internally) as appropriate; (3) the disclosure was made pursuant to a law, rule, or regulation subject to the SEC’s jurisdiction; and (4) the disclosure was “required or protected” by that law, rule, or regulation within the SEC’s jurisdiction.⁴⁰

While they certainly do not establish a bright-line rule, the overarching theme of the *Kramer*, *Egan* and *Nollner* decisions is of reconciling the tensions between the whistleblower definition and the Anti-Retaliation Provision in a way that echoes the underlying premise of Dodd-Frank as a whole. These decisions are further supported by the SEC’s August 12, 2011 clarification that “[t]he anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for [a whistleblower] award.”⁴¹ Essentially, the SEC clarification supports the idea that a whistleblower as defined under the whistleblower sections and a whistleblower as defined under the Anti-Retaliation Provision are not the same, and that an individual may qualify under the broader Anti-Retaliation Provision even though the individual does not meet the stricter whistleblower definition.

However, the Fifth Circuit, in responding to Asadi’s arguments regarding the SEC regulation, stated that the regulation “redefines ‘whistleblower’ more broadly” and is therefore unsupported by a plain language analysis of the Dodd-Frank provisions.⁴² The Fifth Circuit’s argument was premised on the determination that there was no ambiguity in section 78u-6 and that its plain meaning, which limits

³⁹ *Egan v. TradingScreen, Inc.*, No. 10 CIV. 8202(LBS), 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011).

⁴⁰ *Nollner*, 852 F. Supp. 2d at 995 (An analysis of what is required for an FCPA claim to meet requirements (3) and (4) can be found at 996, but a detailed discussion of such issues is beyond the scope of this note. Thus, for purposes of this note, it will be assumed that Asadi’s FCPA claim does meet requirements (3) and (4) as GE is an “issuer” and Asadi is a U.S. citizen and therefore qualifies as a “domestic concern.”).

⁴¹ 17 C.F.R. § 240.21F-2 (2013).

⁴² *Asadi*, 720 F.3d at 629–30.

the definition of a whistleblower to only those who report information to the SEC, must therefore be followed.⁴³ In *Murray v. UBS Securities, LLC*, however, the United States District Court for the Southern District of New York disagreed with the Fifth Circuit regarding the lack of ambiguity and the application of the SEC regulation.⁴⁴ The *Murray* court found that the SEC regulation resolved an ambiguity in the Dodd-Frank provisions and that deference to the SEC's rule was therefore warranted.⁴⁵ The *Murray* court's finding of ambiguity is therefore in direct opposition to the holding of the Fifth Circuit.

Thus, using the logic of *Murray* and *Kramer*, there appears to be a strong argument that whistleblowers will be protected under the Anti-Retaliation Provision so long as they attempt to report what they reasonably believe to be a violation of federal securities law, even if they only report it internally and do not report directly to the SEC, or even if the reported violation does not turn out to be a violation at all.⁴⁶ In part, this broad interpretation is supported by the *Kramer* court's holding that an individual need not report a violation in a specific manner to the SEC in order to qualify for protection under the Anti-Retaliation Provision which significantly expanded upon a strict construction interpretation of the Provision.⁴⁷ It is further strengthened by the *Murray* court and its finding of ambiguity and utilization of the SEC regulation to resolve the ambiguity.⁴⁸ Ultimately, *Murray* and *Kramer*, and to a lesser extent, *Egan* and *Nollner*, appear to significantly expand the scope of the Anti-Retaliation Provisions of Dodd-Frank

⁴³ *Id.* at 630.

⁴⁴ See *Murray v. UBS Sec., LLC*, 12 CIV. 5914 JMF, 2013 WL 2190084 (S.D.N.Y. May 21, 2013) (This case involved an individual who sued his former employer under 15 U.S.C. § 78u-6(h). The individual had been fired after he discussed the potential securities violations that the employer was committing with his supervisors. The employer moved to dismiss the claim on the grounds that the individual did not fit the definition of a whistleblower under Dodd-Frank, but the court denied the motion to dismiss.)

⁴⁵ *Murray*, 2013 WL 2190084, at *4.

⁴⁶ Jonathan R. Tuttle et al., *Court's Broad Interpretation of Dodd-Frank Whistleblower Provision Could Prompt More Employee Claims*, DEBEVOISE & PLIMPTON LLP 1, 3 (Oct. 2, 2012), available at <http://www.debevoise.com/files/Publication/c62b0308-7fd4-4dd6-9b17-5a13aac4cad9/Presentation/PublicationAttachment/89dc714f-97a7-4b7e-8492-6b421f45d6f9/Court's%20Broad%20Interpretation%20of%20Dodd-Frank%20Whistleblower%20Provision%20Could%20Prompt%20Mo.pdf>.

⁴⁷ *Kramer v. Trans-Lux Corp.*, No. 3:11CV1424 (SRU), 2012 WL 4444820 at *5 (D. Conn. Sept. 25, 2012).

⁴⁸ *Murray*, 2013 WL 2190084, at *7.

and its definition of a whistleblower, and therefore present a strong argument against the holding of the Fifth Circuit.⁴⁹

II. WHEN: THE IMPACT OF THE RETROACTIVITY DECISION IN *LESHINSKY V. TELVENT GIT, S.A.*

In the case of *Leshinsky v. Telvent GIT, S.A.* an employee brought a Sarbanes-Oxley Act (SOX) whistleblower suit against his former employer claiming that he had been wrongfully terminated.⁵⁰ The plaintiff's employer was a foreign wholly owned subsidiary of a company publicly traded in the United States.⁵¹ The plaintiff alleged that he was fired because he raised internal objections against his employer's use of fraudulent information, a violation which fell under the anti-retaliation protection of section 806 of SOX.⁵² The case did not focus on the merits of the plaintiff's claim, but instead upon whether the court actually had "subject matter jurisdiction over the case under section 806 of Sarbanes-Oxley."⁵³

The issue was that under the original enactment of section 806 of SOX, whistleblower protection was established for employees of publicly traded companies "who provide[d] information concerning 'fraud against shareholders' to their supervisors, any government enforcement agency or Congress."⁵⁴ However, there was no mention of whether section 806 afforded protection to the employees of the wholly owned subsidiaries of the publicly traded companies and courts were unable to come to a consensus on the matter.⁵⁵ In order to rectify the situation and clarify its position, Congress included section 929A in Dodd-Frank which stated "that the whistleblower provisions extended to 'any subsidiary or affiliate whose

⁴⁹ Tuttle et al., *supra* note 46, at 4.

⁵⁰ See *Leshinsky v. Telvent GIT, S.A.*, 873 F. Supp. 2d 582 (S.D.N.Y. 2012), *aff'd in part, rev'd in part*, 2013 U.S. Dist. LEXIS 62364 (S.D.N.Y. May 1, 2013).

⁵¹ *Id.* at 585.

⁵² *Id.* at 587.

⁵³ *Id.*

⁵⁴ Jyotin Hamid et al., *Dodd-Frank's New Whistleblower Protections: Guidance on Extraterritoriality and Retroactivity*, DEBEVOISE & PLIMPTON L.L.P. 1 (July 17, 2012), available at <http://www.debevoise.com/files/Publication/c62b0308-7fd4-4dd6-9b17-5a13aac4cad9/Presentation/PublicationAttachment/89dc714f-97a7-4b7e-8492-6b421f45d6f9/Court's%20Broad%20Interpretation%20of%20Dodd-Frank%20Whistleblower%20Provision%20Could%20Prompt%20Mo.pdf>.

⁵⁵ *Id.* at 1-2.

financial information is included in the consolidated financial statements of such company.”⁵⁶

Returning to *Leshinsky*, the subject matter jurisdiction issue that the court focused on was whether the Dodd-Frank clarification that SOX section 806 whistleblower protection did indeed apply to employees of wholly owned subsidiaries of publicly traded companies, and not just employees of publicly traded companies, could be retroactively applied to the plaintiff’s claim which arose prior to the enactment of Dodd-Frank and the clarification.⁵⁷ Ultimately, the court found that section 929A of Dodd-Frank was a clarification of Congress’s original intent under SOX section 806 and that the court should therefore apply section 929A retroactively.⁵⁸ As such, the court held that the plaintiff was deemed to be covered by the whistleblower protections provided by SOX section 806 even though he was an employee of the foreign subsidiary and not of the actual publicly traded company.⁵⁹ To reach this holding, the court inferred the intent of Congress’ passage of SOX and stated:

In light of the fact that corporate malfeasance can—and often does—occur within subsidiaries of a public company, and that such malfeasance was precisely what precipitated the passage of Sarbanes-Oxley, it is certainly reasonable to infer that, in enacting whistleblower protections, Congress intended to protect the employees of a corporation’s subsidiaries in addition to employees of the parent itself.⁶⁰

III. WHERE: THE EXTRATERRITORIALITY DECISION IN ASADI V. G.E. ENERGY AS SUPPORTED BY MORRISON V. NATIONAL AUSTRALIA BANK LTD.

Returning once again to *Asadi v. G.E. Energy*, the driving force behind the district court’s ultimate decision to dismiss Asadi’s Anti-Retaliation Provision claim was the determination that the Anti-Retaliation Provision does not have

⁵⁶ *Id.* at 2.

⁵⁷ *Leshinsky*, 873 F. Supp. 2d at 584.

⁵⁸ *Id.*

⁵⁹ *Id.* at 605.

⁶⁰ *Id.* at 599.

extraterritorial reach.⁶¹ Thus, since the whistleblowing activities almost entirely occurred overseas, the court held that Asadi was not entitled to anti-retaliation protection per se and therefore granted GE's Motion to Dismiss for Failure to State a Claim.⁶²

In its analysis of the extraterritoriality issue, the district court focused on three primary areas.⁶³ First, the district court discussed the “‘longstanding principle’ that Congress’ legislation does not apply outside the United States ‘unless a contrary intent appears’” as noted by the Supreme Court in *Morrison v. National Australia Bank, Ltd.*,⁶⁴ and upon review of Dodd-Frank the district court did not find any provision for or even discussion of extraterritorial application.⁶⁵ In *Morrison*, a group of Australian investors brought suit against the National Australia Bank (“National”) for violation of parts of the Securities and Exchange Act of 1934 and SEC Rules.⁶⁶ The investors sought to bring the suit in Federal District Court on the grounds that National, a foreign bank that is not publicly traded in the United States, had purchased a United States mortgage servicing company.⁶⁷ National subsequently wrote down the asset value of its newly acquired subsidiary, which caused a drop in National’s share prices for which the investors, who had purchased National shares prior to its purchase of the United States mortgage servicing company, brought suit.⁶⁸ The Court held that the allegedly violated sections of the Securities and Exchange Act of 1934 and SEC Rules did not have

⁶¹ *Asadi v. G.E. Energy (USA), L.L.C.*, Civil Action No. 4:12-345, 2012 WL 2522599, at *5 (S.D. Tex. June 28, 2012) (This particular aspect of the district court opinion was not addressed by the Fifth Circuit.).

⁶² *Id.* at *7.

⁶³ Allen B. Roberts & Michael J. Slocum, *District Court Holds That Dodd-Frank Whistleblower Protection Does Not Have an Extraterritorial Reach—Longstanding Presumption Against Extraterritoriality May Also Apply to Other Statutes*, WHISTLEBLOWING AND COMPLIANCE L. BLOG (July 5, 2012), available at <http://www.whistleblowingcompliancelaw.com/2012/07/articles/restoring-american-financial-s/district-court-holds-that-doddfrank-whistleblower-protection-does-not-have-extraterritorial-reachlongstanding-presumption-against-extraterritoriality-may-also-apply-to-other-statutes/>.

⁶⁴ *Asadi*, 2012 WL 2522599, at *4; see *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

⁶⁵ Roberts & Slocum, *supra* note 63.

⁶⁶ *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2873 (2010).

⁶⁷ *Id.* at 2872–73.

⁶⁸ *Id.* at 2873. The actual validity of the claims is not within the scope of this note and similarly was not the focus of the Supreme Court decision.

extraterritorial reach and that the foreign investors therefore did not have a valid claim against the United States subsidiary for violations which occurred in relation to non-domestically traded securities.⁶⁹

Specifically, the Court discussed the focus of the Securities and Exchange Act of 1934 and stated that its focus was “not on the place where the deception originated, but on purchases and sales of securities in the United States.”⁷⁰ The Court further stated that “it is parties or prospective parties to those transactions that the statute seeks to ‘protec[t]’ in reference to the purchase and sales of securities in the United States.”⁷¹ The Court further substantiated its point that the investors’ claims do not establish a valid domestic cause of action and that extraterritorial application will not be given to their non-domestic claims.⁷² The Court also dismissed a test proposed by the Solicitor General as *amicus curiae*, which provided that a “transnational securities fraud violates [§] 10(b) when the fraud involves significant conduct in the United States that is material to the fraud’s success.”⁷³ The so-called “significant and material conduct” test seemingly appealed to the Court in part, but was ultimately determined to not have enough factual support for the Court to implement it.⁷⁴ Thus, in regards to the test, the Court stated, “[i]t is our function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve.”⁷⁵

The district court’s second area of focus in regards to the extraterritoriality issue was that certain parts of Dodd-Frank expressly give “limited extraterritorial jurisdiction over certain enforcement actions brought by the Securities and Exchange Commission (“SEC”) or federal authorities.”⁷⁶ Specifically, section 929P(b) of Dodd-Frank includes a subsection entitled “Extraterritorial Jurisdiction,” which grants jurisdiction to federal courts over an “action or proceeding brought or instituted by the Commission or the United States” for

⁶⁹ *Id.*

⁷⁰ *Id.* at 2874.

⁷¹ *Id.* at 2884.

⁷² *Id.* at 2885.

⁷³ *Id.* at 2886.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Roberts & Slocum, *supra* note 63.

conduct that occurred in the United States and furthered a violation or conduct that occurred outside the United States and had “a foreseeable substantial effect within the United States.”⁷⁷ The district court seemingly decided Asadi’s claim did not meet either of the requirements for extraterritorial application of Dodd-Frank, and moreover used section 929P(b) to further its point that, because the extraterritorial application was specifically stated in this section, the rest of Dodd-Frank, which had no specific statements regarding extraterritoriality, had no extraterritorial reach.⁷⁸

Lastly, the third area of focus of the district court was whether the Anti-Retaliation Provision’s reach, although not extraterritorial per se, is extended via the incorporation of other statutes such as SOX and the FCPA because of their protection and requirement for overseas disclosures.⁷⁹ The district court first analyzed whether SOX extended the territorial reach of the Anti-Retaliation Provision.⁸⁰ While some SOX provisions do have extraterritorial reach, the district court determined that Asadi’s claims were not based upon those specific provisions and therefore his claims under SOX lack extraterritorial effect.⁸¹ The district court bolstered its ruling on the matter by citing two older cases which held that SOX’s whistleblower provisions did not have extraterritorial reach.⁸² The district court then turned to an analysis under the FCPA.⁸³ The district court sidestepped this issue, however, and stated that the court “need not and does not, address Asadi’s argument that the FCPA extends the territorial reach of the [Anti-Retaliation] Provision” because “the facts alleged by Asadi do not fit within the Anti-Retaliation Provision.”⁸⁴ The district court’s basis for determining that Asadi’s claim did not fit within the Provision was that his disclosure of alleged bribery is

⁷⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864 (2010).

⁷⁸ *Asadi*, 2012 WL 2522599, at *4.

⁷⁹ *Id.* at *5.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at *5–6; see *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006); *Villanueva v. Core Labs. NV*, No. 09-108, 2011 WL 6981989 (Dep’t of Labor, Dec. 22, 2011) (en banc); *Roberts & Slocum*, *supra* note 63.

⁸³ *Asadi*, 2012 WL 2522599, at *6.

⁸⁴ *Id.*

not a “required or protected” disclosure under the FCPA.⁸⁵ However, the primary purpose of the FCPA is to “mak[e] it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.”⁸⁶ Ultimately, the Dodd-Frank Anti-Retaliation Provision was designed to protect “whistleblowers for any report of securities laws violations, including the FCPA—and FCPA violations, by definition, occur overseas.”⁸⁷

IV. WHY: THE HOLDING IN *ASADI V. G.E. ENERGY* WILL RESULT IN A CIRCUIT SPLIT

As previously discussed, the district court made the following determinations en route to its ultimate holding that Asadi was not entitled to protection under the Dodd-Frank Anti-Retaliation Provision:⁸⁸ (1) “Asadi does not fit within Dodd-Frank’s definition of a whistleblower”⁸⁹ and “[t]he Court need not reach the issue of whether Plaintiff qualifies as a whistleblower under the Anti-Retaliation Provision [because] each of Plaintiff’s claims fails on other grounds”;⁹⁰ (2) “The Court holds that the Anti-Retaliation Provision does not extend or protect Asadi’s extraterritorial whistleblowing activity”;⁹¹ and (3) In regards to Asadi’s claims that the Anti-Retaliation Provision has its reach extended extraterritorially through interaction with SOX and the FCPA, “the Court need not decide the issue . . . because Asadi’s claims fail on other grounds.”⁹² The second determination can be further broken down into the following three sub-determinations made by the court: (A) The language of the Anti-Retaliation Provision is silent regarding extraterritorial application and the court therefore presumes that it does not apply outside of the United States;⁹³ (B) Dodd-Frank section 929(b) does mention specific instances where extraterritorial application may exist, but Asadi’s claims to

⁸⁵ *Id.*

⁸⁶ *Foreign Corrupt Practices Act*, THE U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/> (last visited Mar. 14, 2013).

⁸⁷ Hamid et al., *supra* note 54, at 1.

⁸⁸ *Asadi*, 2012 WL 2522599, at *7.

⁸⁹ *Id.* at *3.

⁹⁰ *Id.*

⁹¹ *Id.* at *5.

⁹² *Id.*

⁹³ *Asadi*, 2012 WL 2522599, at *4.

not fall into any of the potential categories;⁹⁴ and (C) The majority of the events which caused Asadi to bring suit were outside of the U.S. and therefore, even though Asadi is a U.S. citizen, his claims that he was terminated under U.S. law were not sustained.⁹⁵ The Fifth Circuit then readdressed the first determination on appeal and held that Asadi did not meet the definition of a whistleblower under a plain meaning analysis of the provisions.⁹⁶ The Fifth Circuit supported its use of the plain meaning analysis by finding that there was no ambiguity present in the wording of the provisions that would cause deference to the SEC regulation.⁹⁷

Thus, it is apparent that the crux of the Fifth Circuit's holding is that there is no ambiguity present in the provisions and that the SEC regulation should not be deferred to. Based upon the findings of other courts, however, it is apparent that there are conflicting opinions on this matter.⁹⁸ The crux of the district court's holding is its finding that the "Anti-Retaliation Provision does not extend or protect Asadi's extraterritorial whistleblowing activity," while the other primary issues are briefly mentioned but left mostly undecided.⁹⁹ Ultimately, however, the district court was incorrect in regards to its extraterritoriality analysis. Therefore, in order to fully justify the likelihood of a circuit split on the holding established by the Fifth Circuit, all three determinations of the district court must also be resolved.

First, while Asadi may not fit within the strict whistleblower definition set forth in the Dodd-Frank whistleblower provisions, he does fit the broader definition of a whistleblower under the Anti-Retaliation Provision. The strict Dodd-Frank definition per the whistleblower provisions is "any individual who provides . . . information relating to a violation of the securities laws to the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the Commission."¹⁰⁰ Both the Fifth Circuit and the district court were correct in their

⁹⁴ *Id.* at *4.

⁹⁵ *Id.* at *5.

⁹⁶ See *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. Tex. 2013).

⁹⁷ *Id.*

⁹⁸ See *Murray v. UBS Sec., LLC*, 12 CIV. 5914 JMF, 2013 WL 2190084 (S.D.N.Y. May 21, 2013); *Kramer v. Trans-Lux Corp.*, No. 3:11CV1424 (SRU), 2012 WL 4444820 (D. Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986 (M.D. Tenn. 2012); *Egan v. TradingScreen, Inc.*, No. 10 CIV. 8202(LBS), 2011 WL 1672066 (S.D.N.Y. May 4, 2011).

⁹⁹ *Asadi*, 2012 WL 2522599, at *3–7.

¹⁰⁰ 15 U.S.C. § 78u-6(a)(6) (2012 & Supp. I 2013).

determinations that Asadi did not meet *this* definition, as he did not provide any information to SEC. However, applying the logic set forth in *Murray*, *Kramer*, *Egan* and *Nollner*, Asadi's claims do meet the broader Anti-Retaliation Provision definition of whistleblower. While *Egan* simply stated that the Provision provides a "narrow exception,"¹⁰¹ *Nollner* effectively set forth a rule for the exception.¹⁰² Congress then promulgated a final ruling that simplified the matter further, and *Murray* and *Kramer* found the rule to be proper, based in part on statutory construction and also on the original SOX provisions.¹⁰³ Thus, there is strong support that an individual is a whistleblower for purposes of the Anti-Retaliation Provision if they possess a reasonable belief that they are providing information related to a possible securities law violation.¹⁰⁴

Applying the facts of *Asadi* to the rule, it seems clear that Asadi would be eligible for whistleblower protection under the Anti-Retaliation Provision. Asadi reasonably believed that his company was bribing foreign officials in order to secure lucrative contracts.¹⁰⁵ Bribery of foreign officials in order to obtain contracts qualifies as a violation under the FCPA and is therefore a possible securities law violation.¹⁰⁶ Therefore, Asadi does qualify for whistleblower protection under the Anti-Retaliation Provision.

Second, contrary to the district court's holding, Asadi's claims should not be dismissed on the grounds that they were found to be based outside of the United States and the Provision does not provide for extraterritorial application.¹⁰⁷ As discussed above, the district court's rationale can be broken down into three sub-determinations, which supported their ultimate holding on the issue of extraterritoriality.

¹⁰¹ *Egan*, 2011 WL 1672066, at *5.

¹⁰² *Nollner*, 854 F. Supp. 2d at 995.

¹⁰³ *Murray*, 2013 WL 2190084, at *7; *Kramer*, 2012 WL 4444820, at *4-5.

¹⁰⁴ *Kramer*, 2012 WL 4444820, at *4.

¹⁰⁵ *Asadi v. G.E. Energy (USA), L.L.C.*, Civil Action No. 4:12-345, 2012 WL 2522599, at *1 (S.D. Tex. June 28, 2012).

¹⁰⁶ Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m(b)(2)-78m(b)(7), 78dd-1-78dd-3, 78ff(c) (2012); see also *Foreign Corrupt Practices Act*, THE UNITED STATES DEPARTMENT OF JUSTICE FOREIGN CORRUPT PRACTICES ACT, <http://www.justice.gov/criminal/fraud/fcpa/> (last visited Sept. 26, 2013) (providing general information regarding the Foreign Corrupt Practices Act).

¹⁰⁷ *Asadi*, 2012 WL 2522599, at *4-5.

The first and second sub-determinations were that the Anti-Retaliation Provision was silent on extraterritoriality, while other provisions within Dodd-Frank specifically addressed the issue of extraterritoriality. It was therefore presumed that the Provision did not have extraterritorial effect.¹⁰⁸ While holding true to the canons of statutory construction, such a determination is based on a rather myopic approach. Recall in *Leshinsky* that some courts began to apply the SOX whistleblower provisions to employees of wholly owned subsidiaries, while other courts refused to do so because the statute was silent on such issues.¹⁰⁹ The courts that chose to apply the provisions realized the overriding premise of the SOX whistleblower provisions was to encourage individuals to report potential securities violations in order to help protect American investors. As such, these courts inferred from the statute that, although it was technically silent on the issue, employees of wholly owned subsidiaries should be entitled to the same protections as employees of publicly traded companies in order to best achieve the goal of the whistleblower provisions. These courts were later proven to be correct when Congress issued an amendment to the SOX whistleblower provisions in section 929A of Dodd-Frank to clarify that its original intent was for the statute to apply to employees of the wholly owned subsidiaries.

Asadi involves a similar situation in regards to the extraterritoriality issue. Though silent on extraterritoriality, the goal of the Anti-Retaliation Provision is to protect and encourage whistleblowing in order to ultimately increase the likelihood that violations will either be brought to light or begin to cease for fear of being brought to light. In order to more fully achieve these goals, courts must provide for extraterritorial application wherever possible and particularly in situations, such as *Asadi*, which involve foreign operated subsidiaries of companies publicly traded in the United States. To do otherwise will substantially discourage employees in such situations from coming forward to report violations for fear of termination without protection. It is important to note that such a decision would not go against the Supreme Court's holding in *Morrison*, but would merely seek to distinguish it.

Such a distinction would, however, go against the district court's third extraterritorial sub-determination; that the events which led to *Asadi* bringing suit occurred primarily outside of the United States and that he therefore could not receive extraterritorial protection under the Provision, even though he is a U.S. citizen and was terminated under U.S. employment law. The district court reasoned

¹⁰⁸ *Id.*

¹⁰⁹ Hamid et al., *supra* note 54, at 1.

in part that, “[u]nder *Morrison*, the [termination] email’s reference to U.S. employment law is insufficient to extend the territorial reach of the Anti-Retaliation Provision.”¹¹⁰ Recall that the facts of *Morrison* involved foreign investors of a company traded on a foreign market attempting to bring suit in the United States because the company had purchased a United States subsidiary, which led to the potential violations.¹¹¹ Such a cause of action clearly does not fall under the goal of Dodd-Frank, as it has little to no impact on domestic securities and investors. Therefore, the decision to not apply extraterritoriality was correct. In *Asadi*, however, the court is presented with nearly the complete opposite scenario: a United States citizen is seeking the extraterritorial protection after having reported violations of a foreign subsidiary of a domestically traded company. Thus, an extraterritorial application of the Dodd-Frank Anti-Retaliation Provision in *Asadi* would simply distinguish itself from *Morrison* on the grounds of whether the extraterritorial application is being granted for domestic and not foreign benefit.

Third, assuming, arguendo, that *Asadi* is not granted extraterritorial Anti-Retaliation Provision protection per the preceding argument, *Asadi* should be able to receive the extraterritorial protection through the Provision’s interaction with SOX and the FCPA. Such interaction was essentially brushed aside by the district court, as it chose to decide the case on different grounds.¹¹² *Asadi* pursued this statutory interaction argument by first arguing that certain SOX provisions¹¹³ protect his disclosures and then arguing that other SOX provisions¹¹⁴ actually required his disclosures. *Asadi* also argued that the “FCPA qualifies as a ‘law, rule, or regulation subject to the jurisdiction of the [Securities and Exchange] Commission’ directly protected by the Provision.”¹¹⁵ To summarize:

Thus, he argued that Dodd-Frank should be read to confer statutory protection on him as a “whistleblower” making disclosures that are “required or protected” under SOX; the Securities Exchange Act of 1934; a law, rule, or regulation subject to the jurisdiction of the SEC; or a federal criminal statute outlawing intentional retaliation against individuals who provide truthful information to

¹¹⁰ *Asadi*, 2012 WL 2522599, at *5.

¹¹¹ *Morrison v. Nat’l Austl. Bank LTD.*, 130 S. Ct. 2869, 2875–76 (2010).

¹¹² *Asadi*, 2012 WL 2522599, at *5.

¹¹³ 18 U.S.C. § 1514A (2012).

¹¹⁴ 15 U.S.C. §§ 7241, 7262 (2012).

¹¹⁵ *Asadi*, 2012 WL 2522599, at *6.

law enforcement officers relating to the commission or possible commission of any federal offense.¹¹⁶

As it was seemingly a last ditch effort at that point, the majority of Asadi's statutory interaction claims in relation to SOX were properly dismissed by the district court for its lack of applicability to Asadi's claim.¹¹⁷ Interestingly, however, the district court appeared to leave the door open in regards to the Dodd-Frank Anti-Retaliation Provision's statutory interaction with the FCPA in dicta. The district court noted that Asadi's argument was premised on the idea that "because the FCPA is clearly intended to apply extraterritorially, the Provision also must apply extraterritorially."¹¹⁸ The district court avoided the argument by dismissing the case on other grounds, but not before stating that "although Asadi has alleged that his internal disclosures at GE pertained to bribery of foreign officials, he has cited the Court to no provision of the FCPA that 'protects' or 'requires' his internal report of the alleged bribery."¹¹⁹ The primary goal of the FCPA is to "mak[e] it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business,"¹²⁰ and it would therefore appear that a skilled litigator should be able to locate a provision which either explicitly or impliedly provides for the "'protection' or 'requirement' of an internal report of alleged bribery."¹²¹

CONCLUSION

In summation, this note maintains that the overriding purpose of the Dodd-Frank Anti-Retaliation Provision is to help whistleblowers come forward with securities violations by providing them with a safety net to catch them if they are terminated for attempting to do the right thing and protect the public. It is the

¹¹⁶ Roberts & Slocum, *supra* note 63.

¹¹⁷ *Asadi*, 2012 WL 2522599, at *5–6.

¹¹⁸ *Id.* at *6.

¹¹⁹ *Id.*

¹²⁰ Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m(b)(2)–78m(b)(7), 78dd-1–78dd-3, 78ff(c) (2012); see also THE UNITED STATES DEPARTMENT OF JUSTICE FOREIGN CORRUPT PRACTICES ACT, <http://www.justice.gov/criminal/fraud/fcpa/> (last visited Sept. 26, 2013) (providing general information regarding the Foreign Corrupt Practices Act).

¹²¹ *Asadi*, 2012 WL 2522599, at *6. The crafting of such an argument, however, is beyond the scope of this note and the skill of its transactional-attorney-to-be author.

violation reports of these whistleblowers that serve as a key control against corporate irresponsibility and illegality and as an ultimate protection to the American investor, consumer and citizen. This contention is supported by the goal of the Dodd-Frank Act, which is to “improve the accountability and transparency of the financial system,” and “create ‘new incentives and protections for whistleblowers.’”¹²²

Overall, this note contends that the current state of case law in regards to the Dodd-Frank Anti-Retaliation Provision is substantially disjointed. It is likely that the number of cases brought under the Provision will continue to increase and that the inconsistencies in court rulings, as discussed above, will continue to multiply and result in different treatment among the circuit courts. Ultimately, it is all but certain that Congress or the Supreme Court will be required to issue guidance on the Provision, particularly in regards to its relation to the FCPA and the overall limitations on its extraterritoriality. This note further suggests that Congress promulgate final rules for the Anti-Retaliation Provision in the aforementioned problem areas of extraterritoriality and interaction with other statutes. This note does not, however, support the idea to repeal Dodd-Frank in its entirety.¹²³

¹²² *Kramer v. Trans-Lux Corp.*, No. 3:11CV1424 (SRU), 2012 WL 4444820 at *4 (D. Conn. Sept. 25, 2012).

¹²³ An Act to repeal the Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 46, 113th Cong. § 1 (2013).