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WHISTLEBLOWERS

George Clooney, Babysitters, and Overseas Employees: Recent Developments in Whistleblower Retaliation Claims

BY TIMOTHY CRUDO AND SEAN KILEY

Recent whistleblower developments have practitioners asking some interesting questions. Are whistleblowers protected even if they don't work at public companies? Should companies be worried about their employees' babysitters? What about their overseas employees? And just how does George Clooney figure into all of this anyway?

Some of these questions spring from the recent Supreme Court decision in *Lawson v. FMR LLC*, 134 S.Ct. 1158 (2014), which examined whether Sarbanes-Oxley's whistleblower protections extend to employees of private contractors working with public companies and, if so, how far. While this decision has attracted much of the public attention, the issue of protection for overseas whistleblowers, which has the potential for significantly greater impact, and a less definitive resolution, than that decided in *Lawson*, has quietly been making its way through the lower courts.

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I. *Lawson*: Much Ado about Nothing?

A. Whistleblowers Needn't Be Employed by a Public Company

The plaintiff-whistleblowers in *Lawson* worked for companies whose privately-owned parent, FMR, provided investment management and advising services to the mutual fund Fidelity. Fidelity, which was not affiliated with FMR, had no employees and so, like most other mutual funds, relied entirely on private contractors like FMR to manage its day-to-day operations. Plaintiffs claimed that they were terminated because they had raised concerns about Fidelity's cost accounting methodologies and inaccuracies in one of its draft registration statements and sued FMR under section 806 of SOX, which provides: ''No [public] company . . . , or any . . . contractor . . . , [may retaliate] against an employee . . . because of [whistleblowing activity].''[1] The district court rejected FMR's argument that section 806 protected only employees of public companies and denied the company's motion to dismiss.[2]

The First Circuit reversed. Although acknowledging that section 806 applied to privately held companies like FMR that contract with public companies, the court held that SOX prohibited retaliation by a contractor

[1] Although Fidelity is not publicly traded, it files periodic reports with the SEC under section 15(d) of the Securities Exchange Act of 1934 and therefore is subject to the whistleblower provision. *See* 18 U.S.C. § 1514A(a).

[2] *Lawson v. FMR LLC*, 724 F. Supp. 2d 141, 163 (D. Mass. 2010).

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only against the public company's employees, not its own.[3] Granting *certiorari* to resolve a contrary interpretation by the Department of Labor's Administrative Review Board (''ARB''), the Supreme Court reversed the First Circuit.

In a majority opinion authored by Justice Ginsburg, the Supreme Court found that the ''plain language'' of section 806 – where the term ''employee'' is not followed by ''of a public company'' – covers contractors' employees as well. This reading also made ''common sense.'' As the Court observed, the statute would have little effect if it barred contractors from retaliating only against another company's employees, something they generally had no ability to do.[4]

Looking at the larger picture, the Court noted that conduct by private contractors themselves was one of Congress' chief concerns in passing SOX. The Enron scandal that prompted SOX was aided in the initial fraud and in its cover up by the company's auditors, whose employees encountered retaliation when they tried to blow the whistle. As a result, SOX contains ''numerous provisions'' aimed at the conduct of third parties, including accountants, auditors, and lawyers retained by public companies.[5] Reading section 806 to include employees of public company contractors was consistent with SOX's broad reach.

Justice Sotomayor's dissenting opinion worried that the Court's reading gave section 806 a ''stunning reach'' that extended federal whistleblower protection to gardeners, housekeepers, and others working for employees of public companies. A babysitter working for a Walmart employee or the employee of a small business cleaning the neighborhood Starbucks could now sue his or her employer under SOX.[6] Under this view advocated by FMR, Congress included contractors in section 806's list of governed actors only to prevent public companies from avoiding liability by employing contractors, like George Clooney's ''ax-wielding specialist'' in the movie *Up in the Air*, to effectuate retaliatory discharges.[7] The majority downplayed this concern, stating that in such cases it was still those who made the termination decision, not contractors who merely conveyed the bad news, who would be subject to SOX. Ax-wielding termination specialists were not the real-world problem that prompted Congress to enact section 806.[8]

B. Does *Lawson* Expand the Reach of Whistleblower Protection?

Many hands have been wrung post-*Lawson* fretting about the impending wave of whistleblowing gardeners, housecleaners, and snow shovelers, but such an onslaught is unlikely. For starters, employees of private contractors have long been protected by SOX's anti-whistleblower provisions without prompting these concerns. From the beginning of the rule-making process in 2004, the DOL, which has primary responsibility for enforcing section 806, has taken the position that the provision applies to the employees of private contractors that service public companies, the same position adopted by the Supreme Court in *Lawson*.[9] Since then the DOL's ARB has regularly applied SOX's whistleblower protections ''not only . . . [to] employees of a publicly traded company, but . . . as well [to] employees that work with, or contract with, publicly traded companies.''[10] Despite this long history, neither FMR, the *amici* supporting its position, nor the dissent could point to even one overreaching babysitter.[11]

Comparable state law protections also have been available in numerous jurisdictions to employees of privately held contractors that work with public companies. Many are available by statute. California, for example, prohibits all employers from retaliating against any employee who discloses a ''violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation,'' even where that violation is committed by a third party.[12] Numerous other states, including Connecticut, Hawaii, Michigan, Maine, Minnesota, New Jersey, New York, Ohio, Oregon, Rhode Island, and Tennessee, have similar laws.[13]

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[3] *Lawson v. FMR, LLC*, 670 F.3d 61, 68-80 (1st Cir. 2012).
[4] *Lawson*, 134 S.Ct. 1161.
[5] *Id.* at 1162.
[6] *Id.* at 1178 (Sotomayor, dissenting).
[7] *Id.* at 1166.
[8] *Id.*

[9] *See* Procedures for the Handling of Discrimination Complaints under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, 69 Fed. Reg. 52104, 52106 (Aug. 24, 2004) (codified at 29 C.F.R. § 1980).
[10] *Spinner v. David Landau & Associates, LLC,* ARB No. 10-111, -115, ALJ No. 2010-SOX-029 (May 21, 2012); *see also, e.g.*, *Charles v. Profit Inv. Mgmt.*, ARB No. 10-071, ALJ No. 2009-SOX-040 (ARB Dec. 16, 2011); *Funke v. Federal Express Corp.*, ARB No. 09004, ALJ No. 2007-SOX-043 (ARB July 8, 2011); *Johnson v. Siemens Building Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011); *Gale v. World Fin. Group*, ARB No. 06-083, ALJ No. 2006-SOX-043 (ARB May 29, 2008); *Kukucka v. Belfort Instrument Co.*, ARB Nos. 06-104, -120, 2006-SOX-057, -081 (ARB Apr. 30, 2008); *Klopfenstein v. PCC Flow Techs.*, ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006).
[11] *Lawson*, 134 S.Ct. at 1168-69.
[12] Cal. Lab. Code § 1102.5; *McVeigh v. Recology San Francisco*, 213 Cal.App.4th 443 (2013).
[13] Conn. Gen. Stat. Ann. § 31-51m (''No employer shall discharge, discipline or otherwise penalize any employee because . . . the employee, or a person acting on behalf of the employee, reports, verbally or in writing, a violation or a suspected violation of any state or federal law or regulation or any municipal ordinance or regulation to a public body . . . .''); Mich. Comp. Laws Ann. § 15.362 (prohibits employers from retaliation against private sector employees who report a violation of a federal, state or local statute); N.J.S.A. 34:19-1-8 (New Jersey statute that specifically includes private as well as public employers from retaliating against employees for whistleblowing); Haw. Rev. Stat. § 378-62 (prohibiting any employer from retaliating against an employee, including a person who performs a service ''under a contract for hire,'' because the employee reports a violation of law, rule, ordinance, or regulation); Me. Rev. Stat. Ann. tit. 26, § 833 (providing that ''no employer'' may retaliate against an employee for reporting a violation of state or federal law); Minn. Stat. Ann. § 181.932 (barring any employer from retaliating against an employee for reporting a violation of state, federal, or common law); N.Y. C.L.S. Labor § 740(2) (1997) (prohibits private employer from taking any retaliatory personnel action against its employee for disclosing certain violations of law, rule or regulation); Ohio Rev. Code Ann. 4113.51 (private sector whistleblowers are protected when they report felonies or other criminal offenses which create a public safety or health hazard, or are likely to cause imminent risk of physical harm); O.R.S. § 659A.230 (unlawful for ''an employer'' to retaliate against ''an employee'' for reporting criminal activity); R.I. Gen. Laws

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Other states offer private-sector whistleblowers common law protections. Massachusetts, where the *Lawson* plaintiffs resided, provides a common law cause of action for termination in violation of public policy.[14] In fact, those plaintiffs included such a claim in their lawsuits against FMR, and the district court recognized that this claim would be available if SOX did not already provide a remedy. Other states providing similar common law causes of action include Kansas, New Mexico, and Washington.[15]

Then there is Dodd-Frank, which provides its own whistleblower protections independent of, and in some respects broader than, those available under SOX. Dodd-Frank does not differentiate between public companies and their contractors. Instead, Section 21F of that act prohibits any ''employer'' from retaliating against ''a whistleblower in the terms and conditions of employment'' because that person provided information to or cooperated with the SEC.[16]

So employees of private companies have had various sources of protection for some time. Perhaps time will tell differently, but from here it doesn't look like *Lawson* will change the landscape.

II. A Storm Brewing Overseas?

While attention has been focused on George Clooney and babysitters, there is another whistleblower issue, one with potentially a more significant impact, that has begun to gather momentum.

In the fiscal year ended September 2013, the SEC received tips to its whistleblower hotline from 3,238 individuals, up about 8% from the prior year. Four hundred four of those came from overseas, an increase of almost 25% over 2012. All told, last year the SEC received tips from 55 different foreign countries, chief among them the United Kingdom, Canada, and the People's Republic of China. In the program's short 2+-year existence, it has received tips from 68 different foreign countries.[17]

There is no small incentive for those outside the U.S. to blow the whistle. Dodd-Frank's SEC bounty program, which awards up to 30% of amounts recovered as a result of such tips, does not on its face limit awards to domestic tipsters.[18] And those awards can be substantial, with the largest in 2013 totaling $14 million.[19] Given the number of large settlements paid over the past several years in FCPA cases, which by their nature tend to involve conduct outside of the U.S., international employees may be particularly well positioned to take advantage of that program.[20] In addition, both SOX and Dodd-Frank provide significant protections for whistleblowers who are subject to retaliation, including a private right of action, back pay (doubled under Dodd-Frank), and attorney's fees.[21]

It's no stretch to predict that a rise in international whistleblowing will be followed by a rise in allegations by international whistleblowers that they have been victims of retaliation. Does SOX or Dodd-Frank protect those employees? Several recent decisions demonstrate that a definitive answer to this question may take some time to sort out.

A. Does SOX or Dodd-Frank Apply?

1. SOX: *Villanueva* and *Carnero*. William Villanueva is a Columbian national who has never been to the U.S. He lived and worked in Columbia for Saybolt Columbia, a Columbian company headquartered in Bogata. Saybolt is an affiliate of Core Labs, a Netherlands company that provides services to petroleum-industry clients from more than 70 offices in over 50 countries and whose stock is publicly traded in the U.S. In 2008, Villanueva raised concerns with employees at Core Labs and Saybolt about fraudulent underreporting of taxes due to Colombia. He claimed that the fraud was perpetrated at the direction of Core Labs officials in Texas, and he copied a Core Labs officer based in Texas on emails raising his concerns. After Villaneuva was passed over for a pay raise and terminated, he filed a complaint with the DOL alleging retaliation in violation of SOX section 806.

An ALJ ruled that the adverse employment actions (denial of pay raise and subsequent termination) took place outside the United States and therefore were not protected by SOX's whistleblower provision, which does not apply extraterritorially. On appeal from the ALJ's ruling, the ARB rejected Villanueva's claim in a 3-2 decision.[22] The majority determined that Villanueva sought extraterritorial application because he reported a violation of Columbian rather than U.S. law and agreed with the ALJ that SOX did not apply extraterri-

§ 28-50-3 (prohibiting employers from retaliating against employees for reporting any violation of state or federal law); Tenn. Code Ann. § 50-1-304 (whistleblower protection statute bars retaliation by private employers against employees who ''refus[e] to remain silent about . . . illegal activities'').

[14] *Lawson v. FMR LLC*, 724 F. Supp.2d 141, 165-66 (D. Mass. 2010) (''There is case law . . . acknowledging a Massachusetts public policy to protect whistleblowers . . . ''); *Smith v. Mitre Corp.*, 949 F. Supp. 943, 950 (D. Mass. 1997) (concluding that the Supreme Judicial Court would apply the public policy exception to include protection for whistleblowers); *Tighe v. Career Systems Development Corp.*, 915 F. Supp. 476, 484 (D. Mass. 1996) (acknowledging ''a legislative policy encouraging persons such as [the plaintiff] to inform the DOL of possible contractual or statutory violations by their employers''); *Shea v. Emmanuel College*, 682 N.E.2d 1348, 1350 (Mass. 1997) (holding that an employer can be liable for discharges based on an employee's internal complaints of alleged criminal violations); *Mello v. Stop & Shop Cos.*, 524 N.E.2d 105, 108 n.6 (Mass. 1988) (''We assume . . . that an at-will employee who 'blew the whistle' within his company on wrongdoing is entitled to protection . . . .'').

[15] *Lumry v. State*, 307 P.3d 232 (Kan. Ct. App. 2013) (observing that Kansas Supreme Court has recognized common law tort for retaliation against whistleblower); *Gutierrez v. Sundancer Indian Jewelry, Inc.*, 868 P.2d 1266 (N.M. 1993) (recognizing common law cause of action for retaliation against employee who reported unsafe working conditions); *Hubbard v. Spokane County*, 50 P.3d 602, 606 (Wash. 2002) (cause of action exists for retaliation for reporting employer misconduct).

[16] 15 U.S.C.§ 78u-6(h)(1)(A).

[17] *See SEC 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program*.

[18] *See* 15 U.S.C.§ 78u-6(b).

[19] *See* SEC Press Release 2013-209 (Oct. 1, 2103).

[20] *See, e.g.*, SEC Press Release 2014-73 (April 9, 2014) (announcing $108 million FCPA settlement with Hewlett-Packard).

[21] 18 U.S.C. § 1514A(c)(2); 15 U.S.C. § 78u-6(h)(1)(C).

[22] *Villanueva v. Core Laboratories NV*, ARB No. 09-108, ALJ No. 2009-SOX-006 (Dec. 22, 2011) (*en banc*).

torially.[23] It also rejected Villanueva's alternate argument that he was invoking domestic rather than extraterritorial application because the fraudulent activity he reported occurred in Columbia.[24]

The dissenting opinion concluded that SOX did apply to Villanueva's claim. That analysis largely turned on the application of *Morrison v. National Australian Bank, Ltd.*,[25] which analyzed the extraterritorial application of section 10(b) of the Securities Exchange Act of 1934 in a case where foreign investors sued a foreign issuer in connection with a stock purchased on a foreign exchange. *Morrison* reaffirmed 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.''[26] The Supreme Court found that, because the text of section 10(b) did not provide for extraterritorial application, there was none.[27]

According to *Villanueva*'s dissenters, although SOX does not expressly provide for extraterritorial application, Congress clearly meant for section 806 to apply beyond U.S. borders because it covers all companies ''with a class of securities registered under section 12 of the Securities Exchange Act of 1934 . . . or that [are] required to file reports under section 15(d) of the Securities Exchange Act of 1934 . . . .''[28] Since this coverage ''by definition[] includes 'foreign private issuers' (corporations incorporated under the laws of a foreign country), which have long been subject to U.S. securities laws by virtue of electing to trade in the U.S.,'' Congress intended the statute to apply extraterritorially.[29] On appeal from the ARB, the Fifth Circuit dodged the issue of extraterritoriality by ruling that Villanueva was not protected by section 806 because that provision protects those who report only a violation of U.S. law or an SEC rule or regulation.[30]

Only one circuit court has directly addressed the extraterritorial application of SOX. In *Carnero v. Boston Scientific Corp.*,[31] Carnero was a citizen of Argentina working in Brazil for a Brazilian company (BSB), which was a subsidiary of an Argentinian company (BSA). Both were subsidiaries of BSC, a medical equipment manufacturer incorporated in Delaware with operations throughout the world. Carnero was terminated by BSB after he reported to his supervisors, who were located in Massachusetts and worked directly for BSC, that BSB, BSA, and other foreign subsidiaries were improperly inflating sales figures. He then filed a SOX whistleblower suit.

The First Circuit rejected his claim, finding that SOX did not apply extraterritorially. SOX is silent as to extraterritorial application, and according to the First Circuit a number of factors indicated that Congress had not considered or provided for extraterritorial application. For example, primary enforcement responsibility was placed in the hands of DOL, a domestic agency, and there were no provisions to deal with problems that might arise when DOL sought to regulate employment relationships with foreign nationals, no special powers or resources granted to it to conduct foreign investigations, and no provision providing for venue as to foreign complainants claiming violations in foreign countries.[32] Without Congressional intent, the statute did not apply extraterritorially. Although *Morrison* would not be decided for another five years, *Carnero* applied essentially the same analytical framework.[33]

2. Dodd-Frank: *Asadi* and *Liu*. What about Dodd-Frank's whistleblower protections — do they apply extraterritorially? That provision does have differences from SOX that may make it more susceptible to extraterritorial application. For example, unlike SOX, which rested primary enforcement responsibility in the DOL, Dodd-Frank permits an aggrieved whistleblower – defined as ''any individual'' who provides information to the SEC — to bring an action directly in federal court.[34]

Still, Dodd-Frank is silent on its extraterritorial application, and the two courts to analyze that issue to date both found that Congress did not so intend. Both *Asadi v. G.E. Energy (USA), LLC*[35] and *Liu v. Siemens AG*[36] reached that conclusion by comparing the silence of Dodd-Frank's whistleblower protection provision with section 929P(b) of that statute, which expressly provides for extraterritorial jurisdiction for certain regulatory enforcement actions. Although the Fifth Circuit in *Asadi* again avoided the extraterritoriality question, this time by affirming on the ground that the plaintiff failed to report the information to the SEC, *Liu*'s appeal remains to be decided by the Second Circuit. Oral argument in *Liu* is scheduled for June 16, 2014.

B. Can Employers Forget About Overseas Whistleblowers?

So far, overseas whistleblowers have gotten the short end of the stick in trying to invoke protections under SOX and Dodd-Frank. But this doesn't mean that employers don't have to worry about retaliation claims. To begin with, many foreign countries – including the three biggest sources of overseas tips to the SEC in FY 2013 – have their own statutes protecting whistleblowers from retaliation that could subject a U.S. employer or its foreign subsidiary to liability.[37] Indeed, in rejecting the extraterritorial application of section 10(b) *Morrison* relied heavily on *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), which ''rejected overseas application of Title VII to all domestically concluded employment contracts or all employment contracts with American employers,'' in part because of the probabil-

[23] *Id.* at Slip op. 11 (citing 15 U.S.C.§ 1514A(a)(1)).
[24] *Id.* at 12.
[25] 130 S.Ct. 2869 (2010).
[26] *Id.* at 2877.
[27] *Id.* at 2881-83.
[28] Slip. Op. 14-15.
[29] *Id.*
[30] *Villanueva v. Department of Labor*, 2014 BL 38323 (5th Cir. Feb. 12, 2014).
[31] 433 F.3d 1 (1st Cir. 2005).
[32] *Carnero*, 433 F.3d at 8-9.
[33] *See id.* at 7-8; *Morrison*, 130 S.Ct. 2877-78.
[34] 15 U.S.C. § 78u-6(a)(6), (h)(1)(B).
[35] 2012 BL 160743 at *4 (S.D. Tex. June 28, 2012), *aff'd on other grounds*, 720 F.3d 620 (5th Cir. 2013).
[36] 2013 BL 289928 at *5 (S.D.N.Y. Oct. 21, 2013).
[37] *See* Public Interest Disclosure Act of 1998, c. 23, § 47B (United Kingdom); Criminal Code of Canada § 425.1; Rachel Beller, *Whistleblower Protection Legislation of the East and West*, 7 N.Y.U. J. L. & Bus., 873, 893 (Spring 2011) (discussing Article 43 of China's ''The Basic Standard for Enterprise Internal Control,'' commonly referred to as China SOX).

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ity of incompatibility between U.S. and foreign laws that could apply to the employment decision at issue.[38]

More pertinent to this article, SOX and Dodd-Frank may yet have some reach overseas. While *Carnero* seems to resolve (at least in the First Circuit) the question of section 806's extraterritorial application, it left open the question of what, exactly, is ''extraterritorial.'' The First Circuit stated that it decided *Carnero* ''on its own facts'' and that ''[o]ne can imagine many other fact patterns that may or may not be covered by our reasoning in today's decision.''[39] *Carnero* did not decide, for example ''whether Congress intended to cover an employee based in the United States who is retaliated against for whistleblowing while on a temporary assignment overseas'' — the very question ducked by the Fifth Circuit in *Asadi*, where the plaintiff was a U.S.-based employee with dual U.S. citizenship located temporarily in Jordan.[40] In *Villanueva* the ARB similarly acknowledged that ''a case where the complainant, for example, is working for a covered company in the United States, but may have worked in a foreign office of the company for part of the time, may require a different outcome.''[41]

By comparison, plaintiffs in *Morrison* argued that U.S. securities law should apply to their claims because the deceptive conduct occurred in Florida, where the company's senior executives had manipulated financial models.[42] But the Supreme Court, rejecting the ''conduct and effects'' test, dismissed plaintiffs' argument because the ''focus'' of the Exchange Act is not upon the deception (which occurred in the U.S.) but upon the plaintiffs' purchase or sale (which occurred in Australia), which is the linchpin of the statute.[43] In *Villanueva*, the ARB majority determined that the ''primary focus of SOX'' was ''financial fraud, criminal conduct in corporate activity, and violations of securities and financial reporting laws,''[44] some or all of which could, depending on the facts in other cases involving a foreign whistleblower, occur in the U.S. The district court in *Asadi* did not try to determine the ''focus'' of Dodd-Frank. In determining extraterritorial application it looked not to the location of the alleged securities law violation reported by the plaintiff but instead to the location of the ''majority of events giving rise to the suit'' — the plaintiff was working in Jordan, his termination email was sent in Jordan, and a termination letter was sent to him in Jordan – which seems to be a different focus from that applied in *Villanueva*.[45]

So what is the ''focus'' of SOX and Dodd-Frank? Can they be different? Can the focus be different for the whistleblower provisions than for other aspects of the statutes? *Asadi* seems to suggest that the focus is on the employment-related conduct. Does that mean that the statutes' ''focus'' is on protecting whistleblowers from retaliation rather than stemming fraud and securities law violations? And if the answers to these questions aren't sufficient for a court to find that Congress intended extraterritorial application, could they be enough to find that the operative conduct is domestic rather than extraterritorial, in which case *Morrison* really doesn't matter? Questions about how the location and nationality of the whistleblower, the nature and location of the reported violation, the location of the alleged retaliation and its decision-makers or –ratifiers, and other factors will impact these cases await further development.

III. Conclusion

Whether the SOX and Dodd-Frank whistleblower protections apply to overseas employees is a significant question. Given distance as well as language and cultural differences, overseas managers – who are likely to be on the front lines of retaliatory conduct directed to local personnel employed by a U.S. company or its subsidiaries – may not be as sensitive as their U.S. colleagues to the nuances of retaliatory conduct under U.S. law despite the best efforts at training and supervision. With the increasingly global reach of many companies, the growing awareness of the FCPA, and the incentives for whistleblowing, a perfect storm could be brewing abroad.

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[38] 130 S.Ct. at 2877-78.
[39] 433 F.3d at 18 n.17.
[40] *Id.*; *Asadi*, 720 F.3d at 622, 630 n.13.
[41] *Villanueva*, Slip op. 10 n.22.
[42] 130 S.Ct. at 2884.
[43] *Id.*
[44] Slip. op. 11.
[45] 2012 BL 160743 at *4.