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CARNERO V. BOSTON SCIENTIFIC CORPORATION: AN ANALYSIS

Daniel Allen Cohn*

INTRODUCTION

Circuit Court's refusal to extend Section 806 whistleblower protection to employees of publicly-traded American businesses operating abroad undermines the effectiveness of the Sarbanes-Oxley Act.

On January 7, 2004, Ruben Carnero ("Carnero") filed a complaint in United States District Court alleging that his employment with a Latin American subsidiary of Boston Scientific Corp. ("BSC") had been terminated in retaliation for "whistleblowing." Carnero had informed BSC that the subsidiary inflated sales figures and created false invoices. The district court determined that Carnero, an Argentinean citizen, residing in Brazil, could not sue BSC under the "whistleblower protection provision" contained in the Sarbanes-Oxley Act of 2002 as the provision is without extraterritorial effect. The U.S. Court...

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1 Carnero v. Boston Sci. Corp., 433 F.3d 1, 2-3 (1st Cir. 2006) (In accordance with the procedural provisions of the Sarbanes-Oxley whistleblower statute, Carnero first sought a judgment from the Department of Labor. It was the Department of Labor that initially concluded that (a) Boston Scientific Corp. was covered by the Sarbanes-Oxley whistleblower provision—because it is a publicly traded company on the New York Stock Exchange, and (b) that the whistleblower protection provision of the Act did not apply to employees of covered companies working outside of the United States.) The United States District Court for the District of Massachusetts then engaged in a de novo judicial review of these findings on January 7, 2004 when Carnero filed a complaint in accordance with 18 U.S.C. § 1514A(b)(1)(B), providing that claimant may bring federal court action if the Secretary of Labor has not issued a final decision within 180 days of filing the complaint and if there is no showing that the delay is due to the claimant's bad faith); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

2 Id.


4 Carnero, 433 F.3d at 1.
of Appeals for the 1st circuit affirmed the judgment, and Carnero’s petition for a Writ of Certiorari to the U.S. Supreme Court was denied in June of 2006.

The Court began by taking Carnero’s satisfaction of the statute’s basic elements as a given—and further, acknowledged that the whistleblower protection provision of the Sarbanes-Oxley Act extends to alleged retaliation against an employee of a subsidiary of a publicly traded domestic company. Nevertheless, the court concluded that Carnero was not entitled to whistleblower protection because Section 806 of the Sarbanes-Oxley Act does not expressly indicate extraterritorial application. Therefore, even though BSC was covered by the Sarbanes-Oxley Act (as a publicly traded company on the New York Stock Exchange), and subject to its provisions, the Court concluded that Section 806 “would not apply to employees of covered companies working outside of the United States.” In formulating this interpretation, the court considered the text, structure, context and legislative history of the statute in order to uncover the nature of Congress’s intended application.

This case note will examine the 1st Circuit’s decision in Carnero v. Boston Scientific Corp., holding the “whistleblower protection provision” of the Sarbanes-Oxley Act to be without extraterritorial application. What follows, is a recapitulation of the methodology used, and an evaluation of the conclusions drawn, by the Court, in surmising congressional intent regarding the whistleblower provision housed in Section 806. This note will then briefly take stock of the legal precedent set by Carnero, and how it has been utilized in recent cases. Finally, the note will conclude with a discussion of the likely policy repercussions of the Carnero holding and its ultimate imprudence.

THE COURT’S RATIONALE

The Court in Carnero uses a traditional canon of statutory interpretation as the essential foundation for its rationale in limiting Section 806 to domestic application. Citing the language of an important 1949 Supreme Court decision in Foley Bros., Inc. v. Filardo, 336 U.S. 281, the Carnero court

5 Id.
7 See 18 U.S.C.A. § 1514A(a)
8 Carnero, 433 F.3d at 6.
9 Id. at 7 (Here, the Court employs a canon of statutory construction set forth in Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949)).
10 Id. at 3 (citing Carnero v. Boston Scientific Corp., 2004-SOX-22 (OSHA Reg’l Adm’r) (Dec. 19, 2003)).
11 Id.
12 See Id. at 3.
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declares "it is a 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." Since Congress does not explicitly state that Section 806 is to be applied extraterritorially and because no contrary intent seems detectable, the Court concludes that the provision ought to be constricted to domestic application. Moreover, the Court finds that the strength of this "Foley-presumption" offsets whatever value overseas application of Section 806 would have for investors.

In searching for a manifestation of congressional intent beyond the plain-language of Section 806, the Court looks to the context and legislative history of the statute. It finds that other provisions in Sarbanes-Oxley, as well as unrelated statutes, clearly evince Congress's consideration of extraterritorial application, whereas no such lucid indication appears in Section 806. Furthermore, by placing the responsibility of enforcement in the hands of the Department of Labor ("DOL"), a domestic agency, Congress has shown a lack of concern for the problems that would arise should that agency seek to regulate employment relationships abroad. For the Court, these considerations (or lack thereof) buttress its initial presumption against extraterritoriality.

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13 Carnero, 433 F.3d at 3.
14 Id.
15 The question of whether "contrary intent appears," is an integral part of the rule set forth in Foley. Indeed, the presumption itself is conditioned upon the Court's inability to find evidence of such intent. Where this note refers to the Foley-presumption, it means only the presumption itself, and not the rule as a whole.
16 Carnero, 433 F.3d at 7 ("In the present case, whatever help to investors its overseas application might in theory provide is offset ... by the absence of any indication that Congress contemplated extraterritoriality..." The Court seems to have concluded here that the strength of the Foley presumption outweighs, in a sort of balancing test, whatever value would derive from protection of foreign whistleblowers under Section 806. This is a highly contentious point, and one which lies at the crux of the decision, and its imprudence. As will be discussed further in this note, the facts of Foley so drastically differ from Carnero, that the presumption, whatever its value, is misplaced here. Moreover, the value that extraterritorial application of Section 806 would provide investors is, in fact, profound; and underappreciated by the Court in Carnero. This important point will also be examined more closely as the note proceeds.).
17 Id. at 8.
18 Id. ("Not only is the text of 18 U.S.C. § 1514A silent as to any intent to apply abroad, the statute's legislative history indicates that Congress gave no consideration to either the possibility or the problems of overseas application. In sharp contrast with this silence, Congress has provided expressly elsewhere in the Sarbanes-Oxley Act for extraterritorial enforcement of a different, criminal, whistleblower statute. By so providing, Congress demonstrated that it was well able to call for extraterritorial application when it so desired.").
19 Id. at 9.
20 Id. ("Where Congress includes particular language in one section of a statute but omits it in
The mechanics of the Carnero court's statutory interpretation seem appropriate, but the substance of its inspection is lacking. The Court first looks to the plain language of Section 806 and concludes, properly, that it makes no mention of territorial application. As such, the Court finds that there exists a presumption against any congressional intention to enforce the provision abroad. The Court then proceeds to consider the context of Section 806, in search of "contrary intent" that would effectively rebut the presumption it has adopted. It finds no such intent on the part of Congress.

It is still an accepted maxim of statutory interpretation, that absent plain language to the contrary, legislation of Congress is presumed to apply only domestically. However, this presumption does not apply where the legislation pertains to concerns that are not inherently domestic. As will be explicated as this note proceeds, Section 806 and the Sarbanes-Oxley Act itself are an effort to protect the American securities market, and its investors, from fraudulent financial activity—both at home and abroad. This fact ought to have rendered the Court's initial presumption inapplicable.

Furthermore, the Court engages in an unprogressive investigation of contrary intent—which would rebut the presumption it mistakenly adopted. In proceeding to make its contextual considerations, the Court really remains transfixed by the lack of any plain language specifying the extraterritorial applicability of Section 806. With the exception of its concerns regarding the DOL, the Court refuses to divert its attention from the text itself to consider the statute's broader context. This failure to adequately explore other indicia of congressional intent, particularly the environment surrounding the Sarbanes-Oxley Act itself and the substantial value the Section 806 provision has

another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." citing Russello v. United States, 464 U.S. 16, 23 (1983); "No reference is made to providing for interpreters, for coordinating with the Department of State, or for the utilization of foreign personnel. Significantly, the DOL is given only sixty days to complete its entire investigation of a complaint and to issue findings under the procedure mandated by 49 U.S.C. § 42121(b)(2)(A). This short time frame seems unrealistic if the DOL were expected to conduct investigations overseas. Moreover, if an administrative hearing is held, the hearing 'shall be conducted expeditiously' under 49 U.S.C. § 42121(b)(2)(A). There is no provision either for the resources or the flexibility that might be needed in dealing with foreign matters.").

21 Carnero, 433 F.3d at 7.
22 Id.
23 Id.
24 Id. at 8.
27 See Bechtel v. Competitive Technologies, Inc. 448 F.3d 469, 484 (2nd Cir. 2006) (Straub, J. dissenting).
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regarding its application, leads to an unsatisfactory judicial conclusion.

Of paramount concern is that the Foley-presumption is misplaced. There are essential differences in both areas of the law and the politics at issue between 1949 Foley, and here, in 2006 Carnero— which the First Circuit failed to recognize. Such oversight led to a holding that is contrary to the goals of Congress and which undermines the effectiveness of the Sarbanes-Oxley Act. Furthermore, in its contextual investigation for “contrary intent,” the court fails to give adequate weight to the overarching context of the Act, and the mechanisms in place to further its ends. It places superior emphasis on the context of Section 806, as it appears within the confines of Sarbanes-Oxley, and undermines the essential legal and political circumstances under which Sarbanes-Oxley, itself, was enacted. The contextual arguments made by the Court seem purposed toward supporting it’s initial conclusion that the Foley-presumption apply.

Indeed, the limited scope of this investigation reflects an essential bias toward substantiating a conclusion the Court has already drawn. Had the Carnero court recognized the important differences between Foley and the case before it, and avoided so abruptly applying the precedent set forth in the former case, it would have probably engaged in a more full-bodied and impartial analysis of the context of Section 806. Such consideration would have revealed the intention and importance of providing whistleblower protection to employees of American companies operating beyond our borders.

A. The Difference with Foley: Misplaced Presumption

The Foley case concerned the applicability of the Eight Hour Law to a contract between the United States and a private contractor it had hired to work on construction projects in Iraq and Iran. The Eight Hour Law provides that every contract made, to which the United States is a party, shall contain a provision that no laborer doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor, shall be required or permitted to work more than eight hours in any one calendar day without specific restitution.

28 Examples of these differences will be dealt with in greater specificity as the note proceeds, but in this instance it refers to the difference between labor law and securities law, as well as, the great progressions in global economics with regard to interconnectedness.
29 As will be later revealed in greater detail, it is the position of the author that Section 806 whistleblower protection ought to be provided to all employees of companies subject to the Sarbanes-Oxley Act—not just those individuals employed by American corporations.
32 Id. at 283 (citing 40 U.S.C. § 324 (2007); 40 U.S.C § 325(a) (2007)).

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In 1941, Foley Bros., Inc. contracted with the United States to build certain public works in the Middle East. When Foley Bros. failed to compensate one of its employees, in accordance with the provisions of the Eight Hour Law, the employee filed suit to recover his unpaid wages. The case made its way up through the New York State Courts before the U.S. Supreme Court granted a Writ of Certiorari; and considered whether Congress intended to extend the Eight Hour Law to work performed in foreign countries. It concluded that no such intent existed.

The Foley court begins its investigation of congressional intent by recognizing that, unless a contrary intent appears, legislation of Congress is meant to apply only within the territorial jurisdiction of the United States. So, even though the Carnero court uses the Foley decision as the backbone of its presumption against extraterritoriality, it must be noted that the Foley case did not establish that maxim of interpretation.

The Foley court references the language of the Supreme Court in *Blackmer v. United States* which, in turn, refers back to an earlier decision in *American Banana Co. v. United Fruit Co.* The *American Banana* holding of 1909 was probably the first to clearly establish the presumption that when Congress legislates, it intends to restrict its laws to domestic application. The Carnero court’s decision to reference Foley, and not *American Banana* (or its closer progeny), is important because it reflects the Court’s conception of Section 806 in terms of employment, and not in terms of market security. This distinction is of the utmost importance, as the presumption is probably not applicable to cases of the later sort.

*American Banana* dealt with the applicability of the Sherman Anti-Trust Act to conduct beyond the territorial limits of the United States. There, the Plaintiff, a domestic corporation, asserted that Defendant, its competitor and...
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also a domestic corporation, had engaged in monopolistic practices in Panama which were forbidden by the Act. The Supreme Court held that it would not apply the Sherman Anti-Trust provisions extraterritorially.

The Court concluded that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." Further, the Court declared that "all legislation is prima facie territorial.

The presumption set forth in American Banana, and referenced by the Foley court (as well as countless others over the last century) still has precedential value. But, in the realm of international relations and the laws that govern those relations, much has changed since 1909. American Banana, itself, has been overturned by Continental Ore Co. v. Union Carbine & Carbon Corp. In that case, the Supreme Court held that "a conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries."

That decision, as well as others that have followed suit, recognize the increasing interconnectedness of Nations, particularly with regard to economics. In 1909, America's interest in regulating business operations

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44 American Banana, 213 U.S. at 357 (at the time of the contentious actions, a border dispute existed between Panama and Costa Rica. Let it suffice to say that the defendant was operating in one of these two nations, clearly beyond the borders of the United States).

45 Id. (defendant had intentionally manipulated shipping routes and trade agreement to favor its own interests. There was no question that such action, had it taken place inside the borders of the United States would have been illegal.).

46 Id.

47 Id.

48 Id. at 357.

49 Id.

50 Foley Bros., 336 U.S. at 285 (citing to Blackmer, 284 U.S. at 437; which in turn cites to American Banana, 213 U.S. 347).


52 Continental Ore, 370 U.S. at 704-705.


54 See Harford Fire Ins. Co. v. California, 509 U.S. 764 (1993) (holding that notions of comity do not require that foreign insurers be granted jurisdictional immunity from the Sherman Act). See also
abroad was minimal. Such conduct simply did not have a substantial enough
effect on our economy to warrant proscribing applicable laws abroad. Doing so
would have been insulting to the sovereignty of other States, and would violate
our nation’s duty of comity toward them. But, as courts and nations have begun
to recognize, this is no longer the case. Indeed, the notion that a State may
properly proscribe law to actions beyond its borders which have a substantial
effect within its territory has been well-established both domestically and
among the States.\textsuperscript{55} This accepted rule of international law is known as the
“effects principle,” and has become a recognized element of comity among
Nations.\textsuperscript{56}

The \textit{Carnero} court conceives of Section 806 in terms of employment
law— a traditionally domestic legal realm with minimal international influence.
This is why the Court references \textit{Foley}, and subscribes to the presumption
against extraterritoriality adopted therein. But, unlike the Eight Hour Law at
issue there, failure to apply Section 806 extraterritorially risks imposing and
restricting the commerce of the United States. As such, \textit{Carnero} fits more
properly into the lineage of \textit{American Banana} and \textit{Continental Ore}; where the
important exception to the presumption against extraterritorial application of
laws has been duly recognized.\textsuperscript{57}

At the heart of the \textit{Foley} decision was the Court’s conclusion that it is
not the intention of the American legislature to overthrow the labor law
provisions of other nations, regardless of how dissimilar such foreign
conceptions of proper employment may be from our own.\textsuperscript{58} It held that the
nature of labor and employment rights is principally a domestic matter.\textsuperscript{59} To
enforce our Eight Hour Law (and its embodiment of our own conceptions of
just employment) abroad would be an inappropriate intrusion on the sovereignty
of foreign nations.\textsuperscript{60}

Certainly, the aforementioned logic of the \textit{Foley} court is sound. It
would be wholly inappropriate, and profoundly poor politics, for America to
force its laws on other nations where the action sought to be regulated has no
direct bearing domestically.\textsuperscript{61} The manner in which Iran chooses to conduct its

\begin{footnotesize}
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\item United States v. Aluminum Co. of America, 148 F.2d 416 (1945).
\item \textit{See \textit{Restatement (Third) of Foreign Rel. Law of the U.S.} \textit{§§} 401, 403 (1987).}
\item \textit{Continental Ore}, 370 U.S. at 705.
\item \textit{Foley Bros.}, 336 U.S. at 286.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{See U.S. v. Corey, 232 F.3d 1166, 1176 (Hawaii 2000) (“For most legislation, the presumption
against extraterritoriality makes perfect sense. First, ‘Congress generally legislates with domestic
concerns in mind,’ Smith v. United States, 507 U.S. 197, 204 n. 5, (1993), so courts can infer from

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domestic labor environment is of no concern to the United States. As such, reason dictates that absent a clear expression to the contrary, our labor laws must reasonably be interpreted to have no effect upon Iranian employment. But, unlike the Eight Hour Law at issue in Foley, Section 806 is not really about labor and employment law. It is about securities law and the protection of American market integrity.

In 2002 Congress passed the Sarbanes-Oxley Act in direct response to a wave of financial scandals that undermined the dependability of the American securities market. Revelations of mass corporate fraud, most notably the Enron and WorldCom scandals, threatened to destroy investors’ faith in the American financial markets and, in so doing, to jeopardize those markets and the American economy. To combat this threat, Congress passed a large body of reporting regulations and oversight provisions, intended as tools to ferret out financial deceit on the part of publicly traded corporations. But Congress also recognized that in order for any of these tools to work, the law would have to protect whistleblowers from retaliation.

Enron Corporation’s deceptive actions had cost its investors hundreds of millions of dollars by the time insider Sherron Watkins stepped forward and “blew the whistle” on its fraudulent practices. The corporate deceit at WorldCom Inc. had taken a similar financial toll on investors when Cynthia Cooper pointed out the fraud that had been perpetuated by her employer. Indeed, whistleblowers like Watkins and Cooper are responsible for bringing to light the very scandals that birthed the Sarbanes-Oxley legislation.

Congress recognized the substantial value of protecting such individuals, and encouraging their actions. In order for the regulations and reporting provisions of Sarbanes-Oxley to take effect, methods of enforcement must be in place. Section 806 was passed into law because Congress recognized congressional silence that the legislature meant to regulate only activities within the nation’s borders. Second, the rule ensures that we do not precipitate ‘unintended clashes between our laws and those of other nations which could result in international discord.’ EE OC v. ARAMCO, 499 U.S. 244, 248 (1991). The Supreme Court has invoked this territorial presumption in numerous cases involving the scope of broad regulatory statutes. See, e.g., Sale v. Haitian Centers Council, Inc. 509 U.S. 155, 173 (1993) (Immigration and Nationality Act); Aramco, 499 U.S. at 248 (Title VII); Filardo, 336 U.S. at 285 (federal overtime law); American Banana, 213 U.S. at 357 (Sherman Act)’).

63 Id.
64 Id. (citing S.Rep. No. 107-146, at 10 (2002), “Often, in complex fraud prosecutions, insiders are the only firsthand witnesses to the fraud.”).
65 John Gibeaut, Culture Clash: Other Countries Don’t Embrace Sarbanes or America’s Reverence of Whistleblowers, 92-MAY A.B.A. J. 10 (May 2006).
66 Id.
two important truths: First, that corporate insiders are in the best (and often the only) position to uncover and witness corporate fraud; and second, that these insiders will be far more likely to report their discovery if they are assured that the law will provide them with financial protection.67

The Carnero court does not challenge the fact that the vast reporting provisions of the Sarbanes-Oxley Act are intended by Congress to apply to any corporation, foreign or domestic, that chooses to list its securities on American exchanges.68 Such a truth has been obvious to both the courts and corporations that have encountered the Act. Yet, in Carnero, Congress’s intention to make use of the single most important tool of effectively ensuring compliance with these provisions is questioned.69 And the 1st Circuit has concluded that no such intention exists.70

The Carnero court seems to have decided that even though Congress intended for BSC to comply with the reporting procedures set forth in Sarbanes-Oxley, and to abstain from fraudulent accounting, it also found the cost of incidental infringement on employment relations abroad to be too high a political price of enforcement. This rationale simply does not follow from legal precedent, or from the context and history of Section 806 and Sarbanes-Oxley.

To apply the Eight Hour Law in Foley extraterritorially would have been to impose American values of individual rights, abroad, as ends in themselves. It would have, without legitimate concern for our nation’s own well-being, mandated that our laws usurp the laws of Iran— and in so doing, belittle that nation’s sovereignty. Alternatively, application of Section 806 to corporate operations abroad would serve only as a means to an end: to protect the American securities market by encouraging whistleblowers to report fraud that may substantially damage it. Thus, whatever infringement upon foreign labor and employment law that would follow from extraterritorial application of Section 806, would be the result of a legitimate domestic concern.

Indeed, the Foley court points out that the presumption against extraterritoriality “is based on the assumption that Congress is primarily concerned with domestic conditions.”71 While enforcement of the Eight Hour Law abroad would have almost no effect on such domestic conditions, application of Section 806 certainly would. As international commerce continues to grow, the effect that foreign business operations have on the

67 See Guyden, 2006 WL 2772695 at *3.
68 Carnero, 433 F.3d at 3.
69 Id. at 4.
70 Id. at 18.
71 Foley, 336 U.S. at 285.
American economy becomes increasingly profound.\textsuperscript{72} This is precisely why all publicly traded companies, both foreign and domestic, have been made subjects of the Sarbanes-Oxley Act. Section 806 is a key tool in ensuring the effectiveness of the provisions contained therein.\textsuperscript{73} Failure to apply its protections extraterritorially creates a serious risk of non-compliance abroad, and thus, financial injury at home.

The presumption against extraterritorial application is "based on the common-sense inference that, where Congress does not indicate otherwise, legislation dealing with domestic matters is not meant to extend beyond the nation's borders."\textsuperscript{74} But the presumption does not apply where the legislation implicates concerns that are not inherently domestic.\textsuperscript{75}

In United States v. Bowman, the Supreme Court held that the presumption against extraterritorial application of our laws does not govern the interpretation of statutes that, by their nature, implicate the legitimate interests of the U.S. abroad. The Bowman case concerned a fraud perpetuated upon a U.S. vessel, outside the territorial waters of the U.S.\textsuperscript{76} Although the statute at issue there did not contain an extraterritoriality provision, the Court concluded that it covered the conduct in question.\textsuperscript{77} If fraud against a single American ship operating abroad has an effect on domestic interests substantial enough to rebut the presumption against extraterritorial application of our laws, then surely the domestic interest in ensuring the propriety of foreign business operations having a multi-billion dollar presence in our markets\textsuperscript{78} provides a rationale for extraterritorial application of Section 806 that is equally, if not much more, compelling.\textsuperscript{79}

\textsuperscript{72} See www.aftermarket.org/International/Foreign_Market_Reports/APAC99.pdf
\textsuperscript{73} Guyden, 2006 WL 2772695 at *3.
\textsuperscript{74} Corey, 232 F.3d at 1170.
\textsuperscript{75} Id.
\textsuperscript{76} U.S. v. Bowman, 260 U.S. 94 (1922).
\textsuperscript{77} Corey, 232 F.3d at 1170. (See also U.S. v. Vasquez-Velasco, 15 F.3d 833, 839 n.4 (applying Bowman to violent crimes associated with international drug trafficking); U.S v. Felix-Gutierrez, 940 F.2d 1200, 1204 (9th Cir.1991) (applying Bowman to accessory after the fact to the murder of a DEA agent in Mexico)).
\textsuperscript{79} Carnero did expressly refer the Court to the decisions in Bowman, and Shoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968) (where civil antifraud provisions of the Exchange Act were given extraterritorial application to protect American investors who purchase foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities). The Court simply found the other factors—namely; the absence of any plain language to contradict the Foley-presumption, the decision to give the
The purpose of applying whistleblower protection abroad has almost nothing to do with America imposing its labor and employment values on other countries, and everything to do with America protecting its legitimate interest in the integrity of its own domestic securities markets. The latter is a compelling and justifiable reason for extraterritorial application of Section 806—one which was wholly absent from the Eight Hour Law at issue in Foley, and which, given the Supreme Court decisions in Bowman and Continental Ore, effectively rebuts the presumption used therein.

B. The Court’s Supplementary Contextual Considerations Are Inadequate

Once the Carnero court adopts the Foley-presumption, it proceeds by considering whether or not Congress manifested a “clear intent” to rebut it. Such an investigation involves the Court’s contextual consideration of Section 806. First, the Court takes into account the structural discrepancies between Section 806 and other related (as well as unrelated) Sarbanes-Oxley statutes. The fact that other provisions have expressly called for extraterritorial application, whereas Section 806 has not, demonstrates to the Carnero court that the presumption was meant to remain intact. Furthermore, the Court finds that this point gains increased support upon consideration of the enforcement context surrounding Section 806. Since the DOL is a domestic body and ill-equipped to deal with the enforcement problems likely to arise in an international setting, the Court finds it most likely that Congress intended to limit enforcement (and application) of Section 806 domestically.

In contrast to Section 806, which makes no express reference to foreign entities, Section 106 of the Sarbanes-Oxley Act deals directly with foreign accounting firms. That provision requires such firms to register with the SEC if they audit public companies. It also carves out exceptions that are tailored to difficulties inherent in American regulation of overseas professionals. The Court finds that this accounting provision “reflects

Department of Labor enforcement responsibility, and the fact that other provisions did expressly indicate congressional intention of application abroad, to be greater indications of Section 806’s territorial scope.

80 Carnero, 433 F.3d at 8.
81 Id.
82 See id. at 8.
83 Id.
84 Id. at 9.
85 The firms are technically required to register with a Board appointed by the SEC.
86 Carnero, 433 F.3d at 9.
87 Id. (citing 15 U.S.C. § 7216(c), providing that the SEC or the Board may, as it ‘determines necessary or appropriate in the public interest or for the protection of investors,’ exempt a foreign
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Congress’s recognition that the application of domestic U.S. regulatory statutes to persons abroad presents problems in addition to those of purely domestic application, and of the need to address those problems specifically.\(^8\)

In drawing this comparison between the Sarbanes-Oxley accounting provision and the Section 806 whistleblower protection provision, the Court clearly establishes that, in drafting the Sarbanes-Oxley Act, Congress was mindful of its overseas application (and the problems which may arise there from). This seems, at least on its face, to suggest that the Sarbanes-Oxley Act is a body of legislation Congress intended to have an international personality—and indeed it is.

However, rather than placing contextual emphasis on the Act itself, the events which brought it about and the ends it sought to realize, the Court focuses its attention on Section 806 as it compares to other provisions within the confines of the Act. This myopic approach to contextual evaluation strengthened the Court’s initial determination that a presumption against extraterritoriality, as it pertains to Section 806, remained in force; and that Congress had not evinced a clear intent to rebut that presumption.

In keeping with this method of internal contextual comparison, the Court then refers to the other whistleblower provision found in Sarbanes-Oxley.\(^9\) Though the Court continues to mistakenly value the more immediate context of Section 806 over the broader circumstances surrounding the Act itself, comparison with a similar provision does seem a worthwhile investigation. Section 1107\(^9\) provides criminal sanctions for retaliation against anyone giving truthful information to law enforcement officers relating to the commission of any federal offense.\(^9\) A subsection of that provision expressly provides for extraterritorial jurisdiction over such offenses.\(^9\)

The Court reasons as follows: “That Congress provided for extraterritorial reach as to Section 1107 but did not do so as to Section 806 conveys the implications that Congress did not mean Section 806 to have extraterritorial effect.”\(^9\) Though this conclusion does have an appreciable logic,

\(^8\) Id. (this perceived failure of Congress to specifically acknowledge difficulties inherent in extraterritorial enforcement also plays an important role in the Court’s conclusion that the Department of Labor’s enforcement role is indicative of Congress’s intent to limit Section 806 to domestic application.).

\(^9\) Id. at 10.


\(^9\) Id.

\(^9\) Carnero, 433 F.3d at 10.

\(^9\) Id. at 10-11(citing Russello v. United States, 464 US 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is
its appropriateness here is undercut both by persuasive legal precedent, and by practical considerations of context.

In *United States v. Corey*, the Court of Appeals for the 9th Circuit resoundingly rejected the notion that express statutory language, providing for the extraterritorial application of one provision, means that other provisions of the same act are intended, by Congress, to be without such application. The question of whether or not Congress enacted the statute with extraterritorial concerns in mind is the vital consideration, and one which cannot be ascertained simply by looking to the express language of other provisions similarly situated to the one at issue.

Furthermore, it is important to take the practical circumstances surrounding Section 806 (and Sarbanes-Oxley) into just consideration. As the *Carnero* court points out, “the Sarbanes-Oxley Act itself is a major piece of legislation bundling together a large number of diverse and independent statutes, all designed to improve the quality of, and transparency in, financial reporting and auditing of public companies.” The scandals that precipitated legislation of the Sarbanes-Oxley Act were both unexpected, and seriously harmful to the American economy. Congress properly decided to act quickly, and boldly, in drafting a comprehensive series of laws that would counter the threat, and provide redress, in the event of similar corporate deceit in the future.

Had the *Carnero* court placed proper emphasis on the broader contextual elements surrounding Section 806, it would have determined, not only that the statute is part of an encompassing protectionist Act, but also, that it was drafted in some haste—in the hope of providing immediate shelter from impending financial scandals. In fact, the *Carnero* court seems to have uncovered tangible evidence of the expeditious manner in which Sarbanes-Oxley was composed. In footnote 9 of the decision, the Court points out that “it appears that through a drafting error, Congress enacted two subsections (e).” Yet, this observation, and the statutory circumstance it tends to evince, is given no value in the Court’s contextual consideration of Section 806.

In its brief departure from the textual confines of the Sarbanes-Oxley Act, the *Carnero* court considers the manner in which Section 806 would be generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

94 *Corey*, 232 F.3d at 1176 (rejecting the holding in *United States v. Gatlin*, 216 F.3d 207 (2d Cir. NY 2000) where the Court concluded “that if Congress wanted to extend the jurisdiction of the federal courts beyond the borders of the collective states, it had to express its intent in each relevant subsection. (‘Subsections like § 7(7) confirm that Congress knows how to legislate extraterritorially when it so desires.’). We see no reason to impose such a burden on Congress.).

95 Id.

96 *Carnero*, 433 F.3d at 9.
practically enforced, if applied abroad. It raises the concern that “if the whistleblower protection provision is given extraterritorial reach in a case like the present one, it would empower U.S. courts and a U.S. agency, the DOL, to delve into the employment relationship between foreign employers and their foreign employees.” Further, the court notes that “in enacting other laws that affect employment relationships extraterritorially, members of Congress have recognized ‘the well-established principle of sovereignty. . . that no nation has the right to impose its labor standards on another country.’” The Court found that if Section 806 had been intended, by Congress, to apply abroad, “it would have said so; and certainly would have considered, before enacting the law, the problems and limits of extraterritorial enforcement.”

This concern, that Congress understands the enforcement of domestic labor laws abroad to constitute a threat to the sovereignty of foreign nations, and that it would have expressly dealt with those concerns if it had intended to apply Section 806 abroad, is simply a restatement of the rationale behind the Foley-presumption. The impropriety of that presumption, as applied to the Carnero case, has already been explicated. Furthermore, the Court’s apprehension regarding the lack of any explicit acknowledgement of the concern, by Congress, is given undue value. Had Congress explicitly dealt with the territorial scope of Section 806, the whole process of interpretation would essentially be rendered moot. The fact that it did not, represents to the Court an intention to limit its application domestically. This line of reasoning betrays the Court’s failure to move beyond the Foley-presumption and objectively consider contextual circumstances that evince an “appearance of contrary intent.”

This latter inquiry is an essential part of the rule set forth in Foley, and one upon which the presumption itself depends. The contextual investigation of contrary intent must be engaged separately from the presumption it would eviscerate. Thus, the Court ought to have framed the issue as follows: had Congress considered extraterritorial application of Section 806, given the context in which the law was passed, what would its conclusion have been? Such a consideration would have probably revealed “contrary intent”—the search for which was the very purpose of the Court’s investigation of statutory context.

Finally, the Court explores the relevance of Congress’s decision to put
the DOL in charge of enforcing Section 806. It concludes that “further suggestive of Congress’s lack of extraterritorial intent is its failure to provide any mechanism for enforcing the whistleblower protections in a foreign setting.\textsuperscript{101} Congress did not grant, or even discuss the granting of, extraterritorial investigatory powers to the DOL, the agency charged with administering whistleblower complaints.”\textsuperscript{102}

The idea that the DOL is a domestic agency\textsuperscript{103} and that it has not been equipped with additional tools the Court perceives as necessary to do its job abroad, suggests to the Court that Congress did not expect the DOL to encounter the problem of extraterritorial application. The Court properly points out that the DOL has not been statutorily provided with interpreters, or with coordination procedures involving the Department of State.\textsuperscript{104} Furthermore, the Court finds it significant that the DOL has only been given sixty days to complete its investigation and to issue findings under the procedure mandated by 49 U.S.C. § 42121(b)(2)(A).\textsuperscript{105} For the Court, “this short time frame seems unrealistic if the DOL were expected to conduct investigations overseas.”\textsuperscript{106} Moreover, the Court notes that if given extraterritorial scope, the “broad coverage [of the statute] would create an expansive class of potential whistleblowers by extending its protections to countless employees in countless areas around the world.”\textsuperscript{107} The lack of any statutory provisions providing the DOL with a means of handling this increased administrative and logistical burden is, to the Court, “striking.”\textsuperscript{108}

The aforementioned considerations regarding the DOL and the

\textsuperscript{101} Carnero, 433 F.3d at 15.
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{Id.} at 15 n.13 (acknowledging that “the DOL has been charged with administering whistleblower complaints in a variety of employment contexts, even where another agency, having the technical expertise in the subject area of the complaints (such as the SEC here), has overall control.” This shows that, on occasion, Congress will use the DOL as a means of administering laws that are not essentially about employment. This is one of those circumstances. The Court’s failure to appreciate that the DOL is here enforcing a law pertaining to market security, and not labor values, is responsible for its misplaced Foley-presumption).
\textsuperscript{104} \textit{Id.} at 15.
\textsuperscript{105} \textit{Id.} at 15-16 (noting the following statutory language: “Not later than 60 days after the date of receipt of a complaint ... and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit…”).
\textsuperscript{106} Carnero, 433 F.3d at 15.
\textsuperscript{107} \textit{Id.} at 16.
\textsuperscript{108} \textit{Id.}
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practical context of its enforcement duties pertaining to Section 806, is a legitimate interpretive exercise. Here, the Court seems to have finally put the Foley-presumption aside, and considered contextual evidence of intent, objectively. However, even though the Court’s concern with the DOL’s inability to get their job done abroad may be well-founded, Congress’s failure to address the issue is not strongly indicative of its intention to limit Section 806 domestically.

Certainly, whatever intention is revealed by Congress’s failure to provide practical measures of enforcement to the DOL, is dwarfed by the other contextual consideration surrounding the statute. The enormous scope of Sarbanes-Oxley itself (in terms of both statutory volume and to whom its regulatory procedures apply), Congress’s express acknowledgement that whistleblower protection provisions are a necessary means of revealing transgressions against the Act’s provisions, and the expeditious manner in which the Act was enacted are contextual considerations that, when taken together, evince a congressional intent to apply Section 806 of Sarbanes-Oxley extraterritorially. Such a conclusion is not offset by a perceived failure of Congress to provide for practical challenges that may or may not confront the DOL upon executing its statutory responsibilities. The theoretical possibility that the DOL would be unable to properly do its job is simply not, in itself, convincing evidence that it was never assigned the job in the first place.

The Court has essentially posited that if it were a legislative body, and it intended to apply Section 806 abroad, it would have addressed concerns that Congress did not. But, the Court is not a legislative body; and it should not place too much emphasis on what it concludes would be imprudence on the part of Congress. When the other contextual indicia are considered, what the Court perceives as intent to limit Section 806 domestically seems more likely to be legislative oversight.

CITING CARNERO

The First Circuit’s holding in Carnero has already begun to safeguard potentially fraudulent financial operations abroad, and in so doing, undermine the security of American market integrity. On August 1, 2006, Thomas Beck ("Beck"), formerly of Citigroup, Inc., was denied whistleblower protection under Section 806.109 His claim was dismissed for lack of jurisdiction by the Department of Labor.110 The decision relied heavily on Carnero and the

110 Id.
Beck was a German national employed as an investment banker by a subsidiary of Citigroup, Inc. He worked in the global mergers and acquisitions business. Though based in Frankfurt, the nature of Beck’s employment required him to travel regularly to the United States, and communicate daily with Citigroup’s New York headquarters. Approximately 60% of his business was generated outside of Germany, and his compensation included stock options in Citigroup, Inc.

On or about February 1, 2005, Beck began providing Citigroup executives with information regarding what he reasonably believed to be his company’s fraudulent business practices. On March 9, 2005, (the day before Beck was scheduled to meet with Citigroup’s head of European Investments, to report his concerns) he was abruptly terminated. The decision to discharge him was made, or ratified, by officials of Citigroup, Inc. located in New York.

As the world’s largest company, the operations of Citigroup, Inc., both domestically and abroad, may have a more substantial impact on the American marketplace than any other single publicly traded entity. This is a corporation, traded publicly on our domestic exchanges, that generates billions of dollars in revenue abroad. As such, Citigroup, Inc. provides an ideal example of a multinational corporation whose global business operations have substantial market effects at home. Yet, the holding in Carnero, Beck and the progeny sure to follow, drastically hinders the U.S.’s ability to scrutinize those operations—a hindrance that compromises the very spirit of the Sarbanes-Oxley Act.

Congress has clearly recognized that whistleblower protection is an

111 Id.
112 Id. (The Citigroup subsidiary, Citigroup Global Markets Deutschland AG & Co. KGaA)
113 Id.
115 Id.
116 Id. (stating that the alleged violations included (1) misrepresentations of projected revenues of Citigroup, Inc.’s German investment banking business; (2) misrepresentations by certain senior employees of their credentials and employment histories; (3) misrepresentations concerning the value of a German company to a client based in the United States who was considering it as a potential acquisition; and (4) fraudulent attempts to obtain investment banking business and mislead investors by inflating Citigroup, Inc.’s market position.)
117 Id.
118 Id.
important mechanism for bringing fraudulent business practices to light.120 Given the significant effect that such practices abroad would likely have upon our domestic marketplace, it is illogical to suppose that Congress intended to deprive foreign whistleblowers of protection.

DANGEROUS POLICY REPERCUSSIONS

Ruben Carnero argued that limiting the protection afforded by the whistleblower statute, improperly insulates the foreign operations of companies subject to the Sarbanes-Oxley Act.121 In so doing, the basic purpose of the Act—to protect the integrity of U.S. securities markets and the interests of investors therein— is frustrated.122 The large corporations to whom Sarbanes-Oxley applies conduct a great deal of business abroad that substantially affects the American marketplace.123 Indeed, there is evidence that such foreign operation has already increased in response to the demands of Sarbanes-Oxley.124 Failure to extend whistleblower protection to those employed in these operations, is likely to stifle their willingness to come forward and report accounting improprieties.

The global presence of multinational corporations, such as the Defendant in Carnero, is profound—as is the effect their foreign operations have on the American investor.125 It is the duty of our judicial system, and our citizenry, to protect the foreign employee who has the courage to risk his job for our financial security.

Carnero correctly pointed out that a failure to interpret Section 806 of Sarbanes-Oxley to have extraterritorial application, wrongfully insulates the foreign operations of corporations— and is contrary to the over-arching purpose of Sarbanes-Oxley itself. The Court underappreciated the significance of this point.

The financial burden of complying with the Sarbanes-Oxley reporting provisions is substantial.126 Indeed, that burden has already proved too great for many publicly traded companies.127 These corporations, both foreign and

120 Bechtel, 448 F.3d at 484.
121 Carnero, 433 F.3d at 7.
122 Id.
125 Gibeaut, supra note 65.
126 Ascarelli, supra note 124.
127 Id.
domestic, which had formerly listed securities on American exchanges, have been forced to delist as a result of an inability to make compliance economically viable. The companies that have been able to shoulder the fiscal load of Sarbanes-Oxley, must compensate for the monetary loss they endure. The often-cheaper operational environments of South America, India, and other developing areas have already fueled an enormous surge in outsourcing and relocation. In an effort to maximize profits, domestic corporations are leaving the United States—taking the jobs and money they provide our economy with them. The policy repercussions of the Carnero decision will be to encourage this domestically-injurious process.

The Carnero holding will serve to dissuade potential whistleblowers, employed abroad, from stepping forward and reporting their employers’ fraud. The financial liability these companies carry, pertaining to such fraud, is enormous; and they will inevitably seek to protect themselves from it by all available means. So, as progressions in education, communication, transportation and international law all make corporate operation abroad an increasingly desirable business option, the Carnero court has added yet another element to the lure of foreign operation. One which, when coupled with the monetary loss necessarily incurred through compliance with Sarbanes-Oxley itself, is sure to be actively considered by executives.

**CONCLUSION**

In Carnero, the Court begins by incorrectly applying the legal precedent set forth in Foley, as it fails to appreciate that Section 806 is a law that “involves concerns that are not inherently domestic;” and is therefore not subject to the presumption against extraterritorial application. Furthermore, upon applying the interpretive method set forth in Foley, the Court fails to properly uncover “contrary intent,” by engaging in a contextual investigation that remains influenced by the presumption and which fails to adequately value the context of the Sarbanes-Oxley Act. The result is a decision that, on its face, reeks of injustice—and which is likely to bring about undesirable repercussions in our domestic economy.

Ruben Carnero did us a service when he stepped forward and reported what he thought to be the fraudulent business practices of his employer. He risked (and eventually lost) his job for the security of our domestic markets and the financial welfare of its investors. Though Congress meant to protect Camero, and to encourage his actions, our Court turned its back on him. Seeing the lack of appreciation our judiciary has shown for whistleblowers like Ruben

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128 *Id.*
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Carnero, what foreign employee will now step forward and risk their livelihood for our protection?

We are living in a world where transnational fraud is more common than it ever has been in the past. Until the Courts extend Section 806 whistleblower protection extraterritorially, the efforts of Congress to protect America from the damage such fraud can do, will be undermined.

129 Gibeaut, supra note 65.
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