Customs Law Committee

What’s Coming Up at the Spring Meeting

From April 1 to April 15, the Section of International Law will hold its spring meeting at the Waldorf-Astoria Hotel in New York City. As part of the conference, the Customs Law Committee is sponsoring and co-sponsoring several programs, as well as a reception for the judges of the U.S. Court of International Trade. The programs are as follows:

April 2, 10:45 am: Are We Adequately Protecting Our Food Supplies? A Primer for Those with Discriminating Taste. Panelists representing Campbell Soup Company, the Food & Drug Administration, Administration, non-profits, and the private bar will discuss the new requirements of the Food Safety Modernization Act, as well as provide an overview of current food safety regulations and case examples with respect to food safety initiatives.

April 2, 2:00 pm: Serving Humanitarian Hotspots Without Getting Burned. The program will discuss issues created by the cooperation of non-governmental organizations with private donors, including issues arising from the importation of goods and equipment for humanitarian purposes.

April 3, 9:00 am, There is No DNA Test That Will Give You the Origin of Goods—So, What Tests Are Applied? Panelists including former Committee vice-chairs Cyndee Todgham-Cherniak and Susan Ross will discuss country of origin tests applied with respect to imports for various purposes (including antidumping and countervailing duties and food safety determinations) under U.S., Canadian, EU, and Australian law.

A reception for the judges of the U.S. Court of International Trade, jointly sponsored by the Customs Law and International Trade Committees, will take place on April 3 at 6:00 p.m., and will be followed by a joint committee dinner at BXL East, located at 210 E. 51st Street, a short walk from the hotel where the spring meeting is being held. The reception is free, but the Committee requests that you RSVP. The price for dinner will be $70/person, inclusive of gratuity. Drinks are not included in the set price. If you are interested in attending the dinner, please respond to Christine Martinez or Terry Polino by Friday, March 28, 2014.

Please join us at the table reserved for the Customs Law Committee at the conference hotel for breakfast Thursday and Friday; there will also be a meeting for those working on updating the ABA Customs Law Handbook, on Thursday, April 3, at 7 a.m. Please contact Brandi Frederick for more information on the contributors’ meeting.

Prior Disclosure and the False Claims Act

by Josh Levy, Barnes, Richardson & Colburn LLP

Importers who fail to use reasonable care when entering merchandise into the U.S. know all too well that Customs can collect monetary penalties for even the slightest of errors. False information on entry documentation involving classification, valuation, and country of origin can result in large penalties under 19 U.S.C. § 1592. Customs can impose penalties regardless of whether the importer commits fraud or negligence. Importers are not without relief from the prospect of penalties under Section 1592 however.

As part of its “shared responsibility” policy with the importing community to enforce U.S. Customs laws, the agency encourages importers to self-police errors made during the entry process by taking advantage of a “prior disclosure” process. 19 U.S.C. § 1592(c)(4) and 19 C.F.R. § 162.74 permit the importer to submit a prior disclosure of violations, giving them opportunity to reduce or even eliminate penalties. As long as Customs hasn’t started an investigation of the alleged violations before the disclosure, or the importer has no knowledge of that investigation, then disclosure may afford the importer the opportunity to mitigate penalties.

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Tips and Tricks from the Court of International Trade
by Maureen Thorson, Wiley Rein LLP

On Wednesday, January 15, 2014, the Customs Law Committee and the International Trade Committee co-sponsored a discussion with Tina Potuto Kimble, Clerk of the United States Court of International Trade ("CIT"). The discussion was hosted by David Salkeld of Arent Fox LLP, one of the Committee’s Vice-Chairs for Programs, and was hosted by Nancy Noonan, also of Arent Fox, and a member of the court’s statutory Advisory Committee.

Ms. Kimble began by discussing the Court’s subject jurisdiction. The CIT is an Article III court, but one with a limited jurisdiction covering Customs-related matters, appeals from the antidumping and countervailing duty-related determinations of the Department of Commerce and International Trade Commission, and appeals from determinations regarding Trade Adjustment Assistance. All of the cases that the CIT hears are either brought by or against the Government.

These include Customs penalty actions, as well as appeals of denied protests. Ms. Kimble noted that one new development in penalty actions is Customs’ willingness to bring cases to enforce penalties of relatively low dollar value. With respect to importers’ own appeals, one unusual feature of Customs litigation at the CIT is that an importer may file an appeal of a denied protest and then, rather than prosecute it immediately, let the appeal sit on the Court’s “reserve” calendar for up to eighteen months while entries/protest denials sufficient to make litigation worth the candle accrue. Customs actions may involve both discovery and trials. While trials are more common in importers’ appeals of denied protests, juries may also be convened to hear Customs penalty actions. This, however, has not happened since the 1990s.

Ms. Kimble also discussed the case assignment process at the CIT. The CIT does not use a "wheel" by which cases are simply assigned to judges in order. Rather, when an appeal is filed, the Clerk’s Office will review the substance of the summons and complaint, and will recommend an assignment to the Chief Judge based on the type of case and the judges’ individual case loads for those types of cases. The Chief Judge then does a considered review of the Clerk’s Office analysis and assigns the case.

At this point, Ms. Noonan opened the floor to questions from those attending the discussion. One attendee requested information on how budgetary pressures have affected the Court’s work. Mr. Kimble stated that the Court’s response to the sequestration was helped along by the fact that there were two judicial vacancies at the time. While there are vacancies, the Court is permitted to keep the funds that would otherwise go to the chambers of the additional judges. The Court was able to make it through sequestration without furloughs but was also unable to hire or provide any training to the bar in 2013.

One effect of budgetary pressures is that the Court’s docketing system, which formerly was free for access, is now part of the PACER system, which charges for viewing/printing documents. The Court is also trying to streamline the process of delivering summonses to Customs in protest appeals, as well as electronic delivery and storage of the entry papers associated with Customs actions.

Ms. Kimble stressed that the Clerk’s Office is ready and willing to help parties that experience any doubts or difficulties in filing. She also stressed that it pays to be polite to Case Managers. Case Managers work very closely with their and can provide real help to the parties. Case Management plays an active role in docket management, reading submissions as they come in to ensure timely action by the Court. As an illustration, Ms. Kimble discussed a situation in which a party filed a document with unredacted business proprietary information subject to an Administrative Protective Order. The next day, the party filed a notice to this effect with the Court; the case manager read the document and was able to respond appropriately to the breach.

Ms. Kimble also discussed the Court’s two new judges, both of whom were sworn in in 2013: Judge Barnett, formerly of the Department of Commerce's International Trade Administration and Judge Kelly, formerly of Brooklyn Law School. Judge Barnett is precluded from hearing appeals involving his former agency for eighteen months, while Judge Kelly is able to hear all of the types of cases. Their respective judicial styles are still in developments; they are also attending training that is given to all new federal judges.

Ms. Kimble discussed new developments regarding confidential data. The Court has for several years permitted the filing of confidential data on the court’s docket by “Confidential Information Filers.” This process has thus far been relevant only in antidumping/countervailing duty actions. However, once the Court concludes its project of having CBP entry papers filed electronically on the docket, Customs attorneys will also need to obtain CIF status in order to view those records. Finally, Ms. Kimble discussed an issue that has caused some confusion over the past few years: that of when the Court is open or closed. When the Court itself is closed, all deadlines in appeals are tolled. However, the court house may be closed (due to inclement weather, for example) without tolling deadlines if the Court’s electronic filing system remains accessible. Parties should look to the court’s website (www.cit.uscourts.gov) for notices of both court and court house closures.

The committee welcomes contributions to the newsletter, including summaries of committee events and developments from other jurisdictions. If you are interested in contributing, please contact the Committee’s vice-chairs for Publications.
Although the U.S. has traditionally relied upon as legal or expert advice. Consult your own legal counsel before taking action or refraining from action based upon any of the contents of this e-Newsletter, for possible inclusion in a future issue. If any U.S. federal tax issue is discussed in this e-Newsletter, it was not intended or written by the author or sender for, and cannot be used for the purpose of, avoiding penalties under the Internal Revenue Code or promoting, marketing, or recommending to another party any transaction or tax-related matter.

Prior Disclosure and the False Claims Act (cont’d from page 1)

The current version of the False Claims Act is codified at 31 U.S.C. §§ 3729 - 3733. The FCA allows the Government, or a relator on behalf of the Government, to sue any person who knowingly submits a false claim for payment to the Government. The statute also permits suits against any person who delivers less than the proper amount of money owed to the Government. Defendants can be liable for up to a $10,000 plus, three times the damages suffered by the Government.

Importer violations that result in lost customs revenue are fertile ground for qui tam actions by importers or the Government. Since 2012, the U.S. and relators have settled three major FCA actions against importers. In one case, the U.S. recovered $6.3 million from an importer who misclassified auto parts. In another, the U.S. recovered $45 million based on the importer’s false declaration of country of origin to avoid antidumping duties. A third case, U.S. ex rel. Jiménez v. Otter Products, LLC d/b/a OtterBox, No. 1:11-cv-02937, settled earlier this year for an undisclosed amount.

The recent uptick in FCA suits based on Customs law violations raises an interesting issue. Does an importer’s prior disclosure act as a safe harbor from the FCA? The FCA contains a jurisdictional exclusion known as the “government action” bar. This provision bars an FCA action “based upon allegations or transactions which are the subject of an administrative civil money penalty proceeding”. If the importer makes a prior disclosure of its violations to mitigate penalties before the FCA action commences, the importer could assert that the disclosure process equates to the kind of administrative penalty proceeding that warrants dismissal under the government action bar.

U.S. courts have yet to decide this novel issue. But the scenario was squarely before the court in Jiménez v. Otter Products. In 2009, the customs compliance manager at Otter Products discovered that the company had failed to declare assists on imported electronic devices, undervaluing them, and underpaying duties for the previous four years. Shortly after the discrepancy was revealed, the company made its prior disclosure to Customs. One year later, the compliance manager brought an FCA action on behalf of the U.S. alleging that the company knowingly undervalued its imports in the same transactions previously disclosed. The company moved to dismiss the FCA action for lack of subject matter jurisdiction based on the government action bar.

There were sound arguments on both sides of the issue. Otter Products argued that it was insulated from FCA liability by virtue of its prior disclosure. According to the company, the disclosure self-initiated a type of “administrative civil money penalty proceeding” that precluded the FCA action. Some courts have held that a pre-penalty investigation of the same transactions qualified as a “penalty proceeding”, where the investigation would result in “compromise relief”. Otter Products asserted that the prior disclosure process was analogous to a pre-penalty investigation that could result in compromise relief in the form of lower penalties.

On the other side, the U.S. (which filed the brief) contended that prior disclosure and the investigation of the disclosed violations was at most a pre-penalty process that did not rise to the level of an administrative “penalty proceeding”. According to the Government, an importer’s prior disclosure might initiate an investigation, but the process is not necessarily designed to impose a monetary penalty. Various courts have held that government audits and investigations are not the kind of formal penalty proceedings that trigger the government action bar to FCA jurisdiction.

Unfortunately the court did not decide the issue because the parties reached a settlement. The issue is likely to appear again in the near future. Importers continue to rely on the prior disclosure process as an incentive to correct errors in exchange for reduced, or no penalties. The Government’s recent decisions to prosecute FCA actions as an alternative to seeking Section 1592 penalties indicates that the actions for Customs law violations are here to stay. In cases where there is a prior disclosure, the question remains whether the disclosure is sufficient grounds to preclude the FCA action. The answer may be around the corner. Stay tuned.
Spotlight on Committee Leadership

Vice-Chair Sidney N. Weiss

Sidney Weiss is a distinguished customs and international trade attorney in New York. A member of the California and New York Bars, he began his career with the U.S. Department of Justice trying customs and international trade cases. After leaving Justice he spent a few years as a copyright and intellectual property lawyer before returning to customs and international trade law and commercial litigation.

He represents clients from around the world who are doing business with the United States, and United States companies doing business abroad. His clients are in many different industries and his work for them involves all phases of customs law, including classification, value, transfer pricing, and origin issues, as well as administrative compliance and audits and litigation in all courts. He also represents clients in export controls and sanctions matters, international trade and transactions, information technology, and commercial litigation.

In addition to his work with the ABA, he has served as president of the Customs and International Bar Association, vice president and director of the American Foreign Law Association, member of the U.S. Court of International Trade’s Advisory Committee, and vice president of the Finnish American Chamber of Commerce.

He travels and lectures widely and speaks several foreign languages. He has three grown children, and reads extensively and loves to hike and swim.

Vice-Chair Maureen Thorson

Maureen Thorson is a partner with the law firm of Wiley Rein LLP in Washington, DC. Her practice covers customs law, antidumping and countervailing duty law, and export controls. In addition to assisting clients with matters directly regulated by U.S. Customs & Border Protection, she also provides advice regarding other agencies’ regulation of imports, most notably the U.S. Food & Drug Administration, U.S. Department of Agriculture, and U.S. Environmental Protection Agency.

Maureen is a member of the U.S. Court of International Trade’s statutory advisory committee, as well as one of the Customs Law Committee’s vice-chairs for publications. She also is a member of the U.S. Chamber of Commerce’s Transportation, Infrastructure, and Logistics Committee.

Before joining Wiley Rein in 2005, Maureen was law clerk to Chief Judge Donald C. Pogue of the U.S. Court of International Trade. She has also worked for the U.S. Federal Trade Commission and the Electronic Privacy Information Center, where she once wrote an amicus brief to the Supreme Court about whether it violates the Federal Educational Right to Privacy Act for teachers to have third-graders exchange spelling tests for grading. (As the Court eventually found, it doesn’t, no matter what the Tenth Circuit Court of Appeals thinks about it).

In her spare time, Maureen writes poetry, but no fear – she does not spring her verse upon the unwary. So feel free to say hello at the upcoming Section of International Law Meeting in New York; you will not be treated to unwanted sonnets, villanelles, or even couplets.