Exploring The False Claims Act

On Friday, April 26, at the Section of International Law's spring meeting, the Customs Law Committee sponsored a panel discussion on "The False Claims Act and International Trade Rules: A New Compliance Challenge." The panel was moderated by Lisa Crosby of Sidley Austin LLP's DC office. The panelists were Jocks Dickson, of Nation Ford Chemical Company; Mary Andres, of Arent Fox's LA office (formerly with the Department of Justice); and Kevin McCall, Assistant General Counsel for Investigations at Northrop Grumman.

Ms. Crosby began by offering an overview of the False Claims Act ("FCA"). The FCA, otherwise known as "Lincoln's Law," was enacted in 1863. The act allows private persons to bring "whistleblower" suits on behalf of the Federal Government. The FCA thus allows private persons with knowledge of fraud against the Government to bring suit. The Government may then choose to intervene in the suit. Private parties bringing FCA actions are known as "relators," and are generally entitled to a portion of any recovery that the Government obtains through the action. Importantly in the customs and trade context, the FCA permits private parties to bring suit not only where a false claim or statement results in the Government's payment of moneys (such as false claims in respect of a Government contract), but where false claims or statements result in the non-payment to the Government of moneys properly due. This implicates customs fraud, and allows a party that learns of such fraud to bring an FCA action and then, to the extent the Government intervenes, to obtain a portion of any recovery.

Continued on page 3.

Hubs and Spokes – Free Trade Agreements

Also as the Section's Spring Meeting, the Committee sponsored a panel discussion at the ABA Section of International Law's spring meeting entitled "Hubs and Spokes – Who is Doing What in Free Trade Agreement Negotiations and What Does it All Mean for Global Companies?" Moderating the panel were Peter Kirby, of Fasken Martineau DuMoulin LLP and David Stepp, of Bryan Cave LLP. The panelists, who represented the views of numerous countries currently involved in FTA negotiations, were John Carlin, of Bell Davies (UK), Francisco Cortina, of Chevez, Ruiz, Zamarripa y CIA, S.C. (Mexico), and Bert Gevers, of Loyens & Loeff (Belgium). The panel covered issues ranging from common concerns that arise during negotiations to hesitations associated with President Obama's current lack of fast-track authority to issues associated with the new thinking related to enforcement of importer and exporter compliance with the individual FTA rules. Each of these areas is discussed further below.

In negotiating FTAs, many countries face the same set of thorny issues. Agriculture, intellectual property, and labor/environmental issues require particular care, and parties to the negotiations often face entrenched interests at home. An emerging issue for all FTA negotiations is trade in services.

Continued on page 4.
CBP Introduces New Entry Type for Reporting Residual Cargo in Returned IIT’s

During the May 20th brown bag lunch event committee members were treated to what may be the last Customs Committee event featuring Jeremy Baskin, CBP Executive Director, Regulations and Rulings in CBP’s Office of International Trade, as he allegedly enters retirement, and an insider’s look into CBP’s plans for handling “Residual Cargo in Instruments of International Traffic.”

In order to increase safety and security at U.S. borders, CBP issued HQ Ruling 113219 in July, 2009, requiring that entry be made for all containers carrying residue when returned to the United States. According to Mr. Baskin, since that time, there has been much discussion at CBP internally and with industry stakeholders regarding how this requirement will best be implemented. Ultimately, CBP determined to use its authority under 19 C.F.R. §101.9 to run an Operational Test introducing a new entry type: Residue Entries. A Federal Register Notice announcing the test is expected to be issued soon. The Test Program will answer a number of open questions:

- What qualifies as residual cargo (the answer ranges from 3 – 7 percent, depending on mode of conveyance)?
- How should residual cargo be valued (a $0 or nominal $1 value will be accepted, depending on mode)?
- How accurate or precise does the information reported need to be (a reasonable estimate based on the information included on the manifest will be sufficient)?
- Who will be the Importer of Record (the carrier will be the default option)?
- What is the country of origin of the residue (the exporting country, unless better information is readily available)?
- Will User Fees apply (no)? Is a separate body required (no)?
- What recordkeeping requirements apply (the manifest record must be kept by the filer for five years)?
- How must the cargo be described (the six-digit HTSUS number or whatever reference is available from the manifest should be sufficient)?
- What is the country of origin of the residue (the answer ranges from 3 – 7 percent, depending on mode of conveyance)?
- How accurate or precise does the information reported need to be (a reasonable estimate based on the information included on the manifest will be sufficient)?
- Who will be the Importer of Record (the carrier will be the default option)?

Once Notice of the Test is published in the Federal Register, any interested carriers may participate; there will be no application process. In addition, CBP will offer an “Informed Compliance Period” where no penalties (for reasonable violations) will be issued. CBP is still working with other government agencies to finalize how other reporting obligations will need to be met. Look for more information to come!

A Close Look at the Courts

On Friday, April 26, at the Section of International Law’s Spring Meeting, the Customs Law Committee sponsored discussion on “A Close Look at the U.S. Court of Appeals for the Federal Circuit (CAFC) and the U.S. Court of International Trade (CIT): Recent Developments, Trends, and Keys to Effective Advocacy. Geoffrey Goodale, co-chair of the ABA International Trade Committee, moderated the panel. The panelists were the Hon. Evan J. Wallach, formerly a judge of the CIT and now a judge of the CAFC; Tina Potuto Kimble, the CIT’s Clerk of the Court; Nancy Noonan of Arent Fox LLP’s DC Office; and Jeffrey M. Telep of King & Spalding LLP’s DC Office. The session took the form of an informal discussion between the panelists and the audience, with most of the questions aimed at Judge Wallach and his view of practice at both courts.

Judge Wallach began by talking about the differences between judging at the two courts. Most cases at the CIT involve only a single judge, whereas cases at the CAFC are judged by three-judge panels. At the CAFC, cases are assigned approximately two months prior to oral argument. While a CIT judge is assigned early in the action, and then can exercise as much or as little influence over the development of the case as he or she prefers, the CAFC judge has much less control over the process. Moreover, the case load at the court of appeals is much heavier.

Continued on page 4.
Exploring the False Claims Act, cont’d

Continued from Page 1.

Importantly, FCA actions are required to be filed “under seal” – such that the Government, but not the target, is served with the suit. The actions generally remain “under seal” until such time as the Government determines to intervene. As such, the identity of neither the relator nor the target of the suit are made public until after an intervention decision occurs.

Ms. Crosby then asked Mr. Dickson to speak about his experience as a relator in an FCA action. Mr. Dickson’s company, Nation Ford Chemical Co., was the petitioner in the antidumping duty investigation involving a certain chemical pigment from China. Subsequent to the enactment of the order, Mr. Dickson came into possession of information suggesting that Toyo, Inc., a Japanese company, was bringing crude Chinese pigment through Japan, subjecting it to minor processing operations, and then importing it into the United States as a product of Japan.

He indicated that it took a significant amount of time for the Government to determine to intervene, and that he believed that the turning point was when his company obtained a formal ruling from the Department of Commerce that minor processing of the raw pigment did not “substantially transform” the crude product.

Ms. Andrués spoke about how the Government makes its decision to intervene in an FCA case. While an FCA action remains under seal, the Government may issue subpoenas to the target, in order to develop the record. Ms. Andrués noted that cases involving customs fraud, and particularly antidumping/countervailing duty fraud, are complicated, fact-intensive, and generally outside of the expertise of reviewing attorneys at the Department of Justice.

Accordingly, it may take substantial time for the agency to make a decision. Relators may be able to ease the process by continuing to provide information after the initial filing of the action. In Mr. Dickson’s case, it appears that obtaining the ruling from the Department of Commerce after the action was filed gave the Government confidence that the imports at issue were in fact fraudulent.

Ms. McCall discussed the manner in which a company that receives a Government subpoena should react. While the Government generally does not disclose that the subpoena is related to an FCA action, the receipt of a subpoena itself should alert the recipient company that something is at issue. Moreover, because FCA actions remain under seal until the Government decides whether to intervene, the Government is the only source of information for a target company. Ms. McCall thus stated that subpoena recipients should be in active contact with the Government. Rather than stonewalling the Government’s investigation, the subpoena recipient should use the opportunity to learn more about the investigation.

During the question and answer period, the panel discussed the issue of “public data” in FCA proceedings. Ostensibly in order to prevent “parasitic” lawsuits brought by relators with no actual ties to dispute at issue, the FCA prohibits suits based on publicly disclosed information. This could implicate customs fraud actions, to the extent that they are supported by publicly available import statistics.

The panelists also discussed the possibility of Customs officials themselves filing FCA suits as relators, based on information discovered in the course of their duties. Apparently, there is nothing to prevent such suits, although the panelists in general expressed their view that it would amount to a conflict of interest. Finally, Ms. McCall stressed the importance of self-audits of compliance programs and the need for companies to actively engage in the prior disclosure process. This allows companies that could otherwise find themselves the target of FCA suits to “get out in front of the problem” and to drive the narrative regarding the disclosed behavior.
Hubs and Spokes - Free Trade Agreements, cont’d

Continued from Page 1.

While most current agreements have focused on this point, there is increasing interest in market access for services. Negotiations on these points create their own set of difficulties. For example, particularly in light of the global banking crisis, in exchange for more open access in the banking and financial services sector, parties must attempt to strike a balance between the advantages of free trade and the need to protect their financial systems from the destabilizing effects of boom and bust cycles.

The negotiation of the Trans-Pacific Partnership (TPP) is currently of great interest across the globe. One important issue of some concern to many observers, however, is the President’s current lack of trade promotion or “fast-track” authority to enter into agreements. Nonetheless, the United States is aggressively pursuing these negotiations, with the hope of concluding them by October. To further those efforts, the Trade Subcommittee of the House Ways & Means Committee has drafted a bill to re-establish the President’s trade promotion authority, but there is a perception that the White House is not focused on this issue. Accordingly, there is some worry that negotiations will be successful, but that the United States will not be able to quickly or efficiently approve the agreement that it has negotiated.

Beyond the question of approval for any agreement, the TPP negotiations themselves involve as-yet-unsolved issues. For example, Japan’s inclusion within TPP creates significant hurdles regarding agricultural issues, particularly for the dairy and beef industries. Intellectual property issues are a hot-topic, as is the question of what will happen with respect to the many bilateral agreements that already exist between TPP parties. In particular, it is not yet clear how the differing rules of origin in these agreements will be incorporated into (or affected by) TPP.

Finally, enforcement remains a continuing issue for FTA parties. One trend that has been particularly noticeable in agreements involving Asian countries is the move away from a “front-loaded” enforcement regime in which governments issue origin certificates to importers/exporters. This practice generated corruption concerns and created a drag on trade. The new trend is toward regimes in which importers/exporters self-certify that their goods meet the applicable rules of origin for preferential treatment. Enforcement then becomes a matter of verifying or auditing these self-certifications after-the-fact. A successful example of this structure is in the current NAFTA verification regime. In the bigger (global) picture, this change requires a significant shift in government resources and mind-sets.

A Close Look at the Courts, cont’d.

Continued from Page 2.

Judge Wallach discussed the role of intervenors at both courts. He indicated that at the CIT, he often found intervenors’ briefs very helpful, but that intervenors’ presentations at oral argument could too often be repetitive of the Government’s presentation. He stressed that in oral argument, particularly at the CAFC (which maintains strict time limits), intervenors should focus their presentation on areas of specific disagreement with the Government or on areas that require clarification. The judge stressed the importance for practitioners of knowing the record cold, stating that this was an important consideration in oral advocacy.

Judge Wallach expressed his belief that briefs at the CAFC should, to the extent possible, not focus specifically on either the lower court decision or the agency decision, but should address both. He also stated that inflammatory language is never a good idea in briefs; attacks against opposing counsel are unnecessary and do not lend any force to your substantive arguments. Instead, lawyers should strive to be the most reasonable and credible advocate in any proceeding. On a more technical point, he expressed his distaste for “pre-highlighting” in briefs – i.e., filing briefs with certain passages or sections already highlighted – as it interferes with the judges’ own marking-up of the documents.

There was significant discussion of the CAFC’s intention to move forward with requiring hyper-linking of briefs. Many practitioners, in both the private and Government bar, expressed concern with the additional time and cost that hyper-linking will impose on litigants, as well as doubts as to the need for hyper-linking. There are also concerns as to the handling of confidential data in the context of out-sourcing hyper-linking services. Judge Wallach expressed the view that hyper-linking would be of great service to the Court, as it will significantly reduce the amount of time spent in assessing the record. Moreover, the Court’s research indicates that the cost of hyper-linking will not be prohibitive.
Spotlight on Committee Leadership

Vice Chair Matt Nakachi

The Committee welcomes a returning member of the committee: Matt Nakachi, who is serving this year as a vice chair. Matt has previously been heavily involved with the Customs Committee, having served on multiple occasions as vice-chair, and as a past Co-Chair (from 2006 to 2008). His legal practice is dedicated to Customs matters at the firm Sandler Travis & Rosenberg where he defends companies subject to CBP enforcement actions, represents companies in CBP audits, advises companies on their legal obligations vis-à-vis the international trade laws, and implements duty-savings programs to improve a company’s bottom line.

Matt lives in the suburbs of Danville, California where he can be found on weekends shepherding his children to their athletic events. He is always interested in chatting about trade issues and can be reached at mnakachi@strtrade.com.

Vice Chair David Stepp

David Stepp’s practice spans a variety of customs and international trade issues, including those related to motor vehicles, steel, textile and apparel products, footwear, retailing, electronic products and other consumer goods. Mr. Stepp’s practice focuses on customs compliance and counseling, including tariff classification, valuation, country of origin marking, Customs-Trade Partnership Against Terrorism (CTPAT) participation and other regulatory requirements. His practice includes global customs and international trade audits of multinationals and advice on improving and benchmarking compliance programs. He also advises clients on local trade and customs options for companies in China, Indonesia, Japan, Malaysia, Philippines, Singapore and Thailand.

Mr. Stepp began his career in Los Angeles, where he was associated with a major U.S. customhouse broker and advised the company’s importing clients on U.S. customs practices and procedures. Later, he worked in Washington, D.C., where he represented electronics and automotive companies in the negotiation of the NAFTA rules of origin for their products. Mr. Stepp authored a guidebook on NAFTA procedures for a major U.S. electronics trade association and lectured in Japan on the scope and effect of the rules.

Mr. Stepp resumed his L.A. practice in 1997, where he served as chair of the Los Angeles County Bar Association’s Customs Law Committee from 1998 to 2000. He is active in the international trade community in Southern California and, on behalf of the Los Angeles Customs Brokers and Freight Forwarders Association, was the instructor for the association’s semi-annual course preparing students who intend to take the customs brokers licensing test for ten years. Mr. Stepp’s legal publications include articles on textile country of origin issues and an analysis of the criminal customs statutes in the United States, Mexico and Canada. He is a frequent speaker on global customs and international trade issues.

Previous issues of the newsletter are available on the Committee webpage at the ABA. In those newsletters you can find spotlight articles introducing current Co-Chairs Damon Pike, Cyndee Todgham Cherniak, and Terry Polino and read about past programming, which included updates from CBP and other Customs agencies, summaries of past Spring and Fall meeting programs, and more.

If you would like to be involved with a future issue of the newsletter, contributions are strongly encouraged and always welcome. Please contact one of the Co-Chairs.

We welcome volunteer authors to write up summaries of recent committee events. If you are interested, please contact one of the Co-Chairs.