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Add Importers to Those Facing Expanding Whistleblower Claims under the False Claims Act

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On February 12, 2015, the ***Department of Justice (DOJ)*** announced that three U.S.-based importers had agreed to pay more than $3 million to resolve a lawsuit brought by the United States under the ***False Claims Act (FCA)*** alleging that they had made false declarations to ***U.S. Customs and Border Protection (CBP)*** and conspired with other domestic companies to make false declarations to CBP in order avoid paying "*antidumping*" and "*countervailing*" duties. No government contracts were involved. These were "reverse" FCA claims based upon underpayment of duties for private sector import transactions.

DOJ alleged that the companies misrepresented the "country of origin" of aluminum extrusions – which are used by the importers to make shower doors and shower enclosures – to be Malaysia when the goods were manufactured in the ***People's Republic of China (PRC)*** and merely shipped through Malaysia, known in antidumping and countervailing duty cases as "circumvention." Imports of PRC-manufactured aluminum extrusions have been subject to antidumping and countervailing duties since 2010; no such duties are due on such imports from Malaysia.

The allegations resolved by the settlements, however, were not originally brought by U.S. Customs but by a whistleblower under the ***qui tam*** provisions of the FCA. The FCA permits private parties to sue on behalf of the government those who falsely claim federal funds or, as in this case, avoid paying funds owed to the government. The United States may intervene in and take over the lawsuit, as it did in this case. The FCA allows the whistleblower to receive a share of any funds recovered from the lawsuit. In this case, the whistleblower received $555,100 as his share of the settlements.

"Antidumping and countervailing duties are critical to ensure fair competition for U.S. manufacturers," said Commissioner R. Gil Kerlikowske of CBP. "U.S. Customs and Border Protection works diligently with the Department of Justice, U.S. Immigration and Customs Enforcement, Homeland Security Investigations, and the U.S. Department of Commerce to aggressively pursue duty evasion."

The case is ***United States ex rel. Valenti v. Tai Shan Golden Gain Aluminum Products Ltd.,*** *et al.*, Case No. 11-cv-368 (M.D. Fla.). One of the importers released a statement following settlement asserting that the imports at issue were purchased on Free in Store terms making the seller responsible for importing the goods into the U.S., including payment of the appropriate duties.

Importers sometimes assume that the importer of record is the only party with real exposure for Customs entry errors. In addition to illustrating an important caveat on that point, the whistleblower's half million dollar award in this case is sure to be a temptation to personnel in other companies who learn of Customs irregularities. After this precedent, can industry really expect its employees to continue suggesting a mundane Customs Prior Disclosure when the prospect of a rich whistleblower recovery beckons if they can frame a colorable claim of company fraud, especially at a time when the government has been seeking steadily to erode the standard of scienter under the FCA ?

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