The False Claims Act and Customs Law:
2012 Was a Very Good Year

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Two thousand twelve saw U.S. Customs and Border Protection ("Customs") recover large amounts of unpaid duties as a result of settlements of suits filed under the False Claims Act ("FCA").[1] First, in June of 2012 the U.S. Attorney for the Eastern District of Michigan and U.S. Immigration and Customs Enforcement's (ICE) Homeland Security Investigations (HSI) unit announced a settlement in *United States v. CMAI Industries*, resulting in the recovery of $6.3 million dollars in damages and fines from a company that underpaid duties by misclassifying auto parts manufactured in China.[2] Later in the year, in *United States of America ex rel John Dickson v. Toyo Ink Manufacturing Co.*, the government recovered $45 million dollars in damages and fines based on an importer misrepresenting the country of origin of the imported product, resulting in that importer's failure to pay antidumping duties.[3] While FCA actions are typically commenced by private parties, with the government allowed to step in, investigate and litigate if it so chooses, in light of these recent windfalls it raises the question of whether Customs has added another tool to its enforcement tool belt?

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1 31 U.S.C. §3729 *et. seq.*

2 *See* Joint Press Release of Barbara L. McQuade, U.S. Attorney for the Eastern District of Michigan and Special Agent in Charge Brian Moskowitz of ICE HSI, June 17, 2012 at http://www.justice.gov/usao/mie/news/2012/2012_6_7_cmaiindustries.html

3 *See* Press Release of the U.S. Department of Justice, Dec. 17, 2012 at http://www.justice.gov/opa/pr/2012/December/12-civ-1504.html.

The False Claims Act – A Quick Overview

The FCA is a federal whistleblower statute that seeks to remedy frauds committed against the United States. An FCA action may be commenced in one of two ways. First, the Government itself may bring a civil action against the alleged false claimant.[4] Second, a private person (known as the "relator") may bring a *qui tam* civil action "for the person and for the United States Government" against the alleged false claimant, "in the name of the Government."[5] This second path is the more common one.

Qui tam, short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, means "who pursues this action on our Lord the King's behalf as well as his own".[6] The nature of a *qui tam* action means that in certain circumstances private parties can pursue an action on the government's behalf. Originally enacted in 1863, the FCA is the most commonly used Federal *qui tam* law.

The statute provides a number of different grounds upon which liability for making a false claim can arise.[7] The most common basis is when a person knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval, to an officer or employee of the U.S. government.[8] However, among other grounds, the FCA also imposes civil liability upon "any person" who, "knowingly makes, uses, or

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4 31 U.S.C § 3730(a).

5 *Id.* at § 3730(b)(1).

6 *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768 n. 1, 120 S.Ct. 1858, 1860 n. 1, 146 L.Ed.2d 836 (2000).

7 31 U.S.C § 3729.

8 *Id.* at § 3729(a).

causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government."[9] This is known as a "reverse false claims act" claim, in that the violator is not filing a false claim to receive an unwarranted refund but rather is taking an action to avoid paying money to the government. The reverse FCA claims act is utilized often in Customs matters, where an importer's bad action results in the nonpayment or underpayment of duty.

Relevant terms are defined in the statute.[10] The terms "knowing" and "knowingly" are stated to mean that a person, with respect to information that forms the basis of a *qui tam* case, has actual knowledge of the information, acts in deliberate ignorance of the truth or falsity of the information, or acts in reckless disregard of the truth or falsity of the information.[11] No proof of specific intent to defraud is required. The term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.[12] The term "material" is defined to mean having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.[13]

If a relator initiates the FCA action, then he must deliver to the Government a

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9 *Id.* at § 3729 (a)(1)(G).

10 *Id.* at § 3729 (b).

11 *Id.* at § 3729 (b)(1).

12 *Id.* at § 3729 (b)(3).

13 *Id.* at § 3729 (b)(4).

copy of the complaint and a written statement setting out the relevant facts and any supporting evidence.[14] The filing is done under seal. The United States is given notice via service of the complaint on the U.S. Attorneys' office in the filing district and on the Department of Justice, which handles these matters through the Fraud Section of its Civil Division.

The filing triggers a 60 day period during which the U.S. can intervene in the action.[15] The government uses this period to investigate the complaint, which it can do without the knowledge of the named defendant, or with its knowledge by serving upon it a civil investigation demand seeking the production of documents and answers to interrogatories. The complaint remains under seal during this period, and the 60 day period may be extended to accommodate the government during its investigation.

At the completion of its investigation the U.S. has to choose its course of action. If it elects to intervene in the matter, then it assumes primary responsibility for prosecuting the action,[16] though the relator may continue to participate in the litigation and is entitled to a hearing before voluntary dismissal and to a court determination of reasonableness before settlement.[17] If the Government declines to intervene in the case, then the relator has the exclusive right to conduct the action,[18] and the Government may subsequently intervene only on a showing of "good cause."[19]

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14 *Id.* at § 3730(b)(2).

15 *Id.* at §§ 3730(b)(2), (4).

16 *Id.* at § 3730(c)(1).

17 *Id.* at § 3730(c)(2).

18 *Id.* at § 3730(b)(4).

19 *Id.* at § 3730(c)(3).

The consequences of being a defendant in a FCA action can be dire financially. The defendant may be liable for up to treble damages and a civil penalty of between $5,500 and $ 11,000 per claim. As mentioned at the beginning of this paper, in the two cases that settled in 2012 involving violations of the Customs law, the defendants paid $6.3 million in the *CMAI* case and $45 million in the *Toyo Ink* case.

On the other hand, FCA actions brought by a *qui tam* relator can be extremely lucrative for the relator. The relator receives a share of any proceeds from the action -- generally ranging from 15 to 25 percent if the Government intervenes (depending upon the relator's contribution to the prosecution), and from 25 to 30 percent if it does not (depending upon the court's assessment of what is reasonable) -- plus attorney's fees and costs.[20] Turning again to the 2012 cases, the relators took home shares of $1.2 million in *CMAI* and $7.87 million in *Toyo Ink*.

The Intersection of the FCA and Customs Law

The typical headline grabbing FCA claim involves government procurement or fraud committed against government healthcare programs such as Medicare or Medicaid. More recently, cyclist Floyd Landis' FCA case against cyclist Lance Armstrong, based on Armstrong's participation on a cycling team sponsored by the U.S. Postal Service, has been media fodder. While not as sexy, violations of U.S. trade laws easily serve as a bases for FCA activity.

This makes sense given that a goal of the Customs and international trade laws is to raise revenue for the United States. As such, false statements as to tariff classification, entered valuation, country of origin, free trade eligibility, or the applicability of

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[20] 31 U.S.C. §§ 3730(d)(1)-(2).

antidumping or countervailing duties would all fall under the language of the reverse FCA. Likewise, false claims for payment, submitted in the guise of fraudulent drawback claims or protests, would be actionable under the FCA also.

This premise is supported by years of FCA cases involving violations of the Customs laws. As mentioned above, *CMAI* involved violations of tariff classification laws. Undervaluation of merchandise has been the subject of other FCA actions. *U.S. v. Intertex Apparel* (S.D.N.Y. June 2008)[21]; *U.S. v. Noble Jewelry* (S.D.N.Y. Aug 2011).[22] A wrong declaration of the quantity (in this case the weight) of cigarettes resulted in an FCA action where the tariff rate was not calculated on an *ad valorem* but rather on a specific rate based on the weight of the imported product. *U.S. v. Premier Manufacturing, Inc.* (D.S.C. 2007).[23] In addition to the allegation that the defendant circumvented the antidumping duty laws, the *qui tam* action in *Toyo Inks* included allegations as separate violations that the importer declared the wrong country of origin of the imported merchandise on each entry, thus subjecting the importer to additional marking duties and allowing it to make false NAFTA claims.

But 2012 is noteworthy for *CMAI* and *Toyo Inks*. *CMAI* involved the fraudulent declaration and misclassification of commercial vehicle exhaust manifests, with the defendant classifying the imports as "unfinished", and entering them under a duty-free

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[21] "Department of Justice Intervenes in and Settles a Customs False Claims Act Case", PR Newswire, at http://www.prnewswire.com/news-releases/department-of-justice-intervenes-in-and-settles-a-customs-false-claims-act-case-57242962.html.

[22] *See* Joint Press Release of Preet Bharara, U.S. Attorney for the Southern District of New York and Special Agent in Charge James T. Hayes, Jr. of ICE HSI, Aug. 31, 2011 at http://www.justice.gov/usao/nys/pressreleases/August11/noblejewelrysettlementpr.pdf

[23] *See* Press Release of Michael F. Hertz, Deputy Assistant Attorney General for the Civil Division, U.S. Department of Justice, Dec. 4, 2007Aug. 31, 2011 at http://www.justice.gov/opa/pr/2007/December/07_civ_966.html.

provision. The products, however, should have been classified under a different HTSUS provision, and the defendant should have paid duty at 2.5 percent *ad valorem*.[24] The defendant further complicated its bad act by charging its customers a price that included duty at 2.5 percent *ad valorem*, thus profiting from the spread. The fraud was discovered by a former CMAI employee, who commenced the FCA case. The matter was investigated by ICE agents, who discovered that CMAI had evaded $2,549,000 in duties between 2004 and 2011. The mattered settled for the $6.3 million referenced above. Related criminal proceedings resulted in a guilty plea by the corporation, probation and an additional fine of $25,000.[25]

The relator in *Toyo Ink* was a competitor. In fact he was an executive of the company that had been the petitioner in the antidumping duty ("ADD") matter that served as the basis for the *qui tam* action.[26] The dumping order covered a colorant known as carbazole violet pigment 23 ("CVP23) from China, including CVP23 in its crude form from which the finished product is manufactured. Toyo had been producing finished CVP23 in Japan or Mexico using Japanese origin crude and shipping it to the US as Japanese origin and thus outside the scope of the ADD; however, at a point in time the crude source shifted to China.[27] Toyo continued to declare the origin of the product as Japan or Mexico, the situs of the production of the finished product, rather than China

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[24] *See* Joint Press Release of Barbara L. McQuade, U.S. Attorney for the Eastern District of Michigan and Special Agent in Charge Brian Moskowitz of ICE HSI, June 17, 2012 at http://www.justice.gov/usao/mie/news/2012/2012_6_7_cmaiindustries.html.

[25] *Id.*

[26] Bill Donahue, Japanese Ink Co. to Pay $45M to Settle Duty-Dodging Claims, *Law 360* (Dec. 18, 2012).

[27] Amended Complaint Filed Under Seal Pursuant to 31 U.S.C. § 3730(b)(2), pp 47-84, *United States of America ex rel John Dickson v. Toyo Ink Manufacturing Co., Ltd., et al*., Civ. Act. No. 3:09cv00438 (WDNC)(hereafter "Amended Complaint").

where the crude originated, and continued to treat the goods as if outside the scope of the ADD on Chinese CVP23.

The relator alleged three violations. First, it alleged that the declaration of the wrong country of origin resulted in the filing of false records with the U.S. that were material to their obligations to pay duty.[28] Related to this claim was its second claim that the declaration of the wrong origin resulted in the submission by Toyo Ink of claims that the shipments from Mexico to the U.S. were NAFTA eligible and duty-free, rather than subject to the most-favored-nation duty rate that would apply to CVP23 from China.

But this case was all about the ADD, which the relator alleged Toyo Ink evaded by declaring the product Japanese or Mexican origin rather that Chinese.[29] The dumping rate on most CVP23 from China for the entries at issue in the case was 241.32 percent. After its investigation the U.S. intervened in part of the case, and unsealed the relator's complaint. In December 2012 the matter settled for $45 million.[30]

The government does not always intervene in FCA. At this time a high profile FCA action, *Doe v. Staples, Inc.*, et al., involving allegations of circumvention of ADD is proceeding despite the decision of the U.S. not to intervene.[31] The relator in the *Staples*

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[28] Amended Complaint at pp. 92-102.

[29] Amended Complaint at pp. 113-124.

[30] As mentioned above, the relator received $7.87 million as his portion of the *qui tam* recovery. One would presume that the portion of the $45 million directly attributable to the unpaid ADD would be treated in the same manner as other ADD would have been treated on entries made at the time the *Toyo Ink* entries were made. In other words, the ADD would be distributed pursuant to the Continued Dumping and Subsidy Offset Act ("CDSOA", also known as the "Byrd Amendment"). Given that the relator's company was a member of the U.S. domestic industry (if not the only member), it stands to reason that the relator received his personal award, and then his company was able to its share of the recovered ADD via the CDSOA.

[31] *Doe v. Staples, Inc., et al*, No 08cv-00846 RJL (DDC). Target, Office Max and Industries for the Blind are also defendants in this matter.

matter has alleged that the defendants evaded a 114.9 percent ADD order on pencils from China by transshipping Chinese pencils through, and declaring as the country of origin of the pencils, Taiwan, Indonesia and Vietnam.[32] The District Court for the District of Columbia has stayed discovery in this case while it decides the defendants' motions to dismiss the case. A decision should issue shortly.

The Role of the U.S. Court of International Trade in FCA Actions

A common thread among the cases cited above is their *situs* in a Federal District court[33], notwithstanding the fact that the substantive law issues underlying the *qui tam* actions would be within the exclusive jurisdiction of the United States Court of International Trade ("CIT").[34] This begs the question then, does the CIT have a role to play in FCA cases?

This issue has been adjudictated, with the CIT limiting its jurisdiction in FCA matters. In *U.S. v. Universal Fruits and Vegetables, et.al*, a FCA case initiated by the government, rather than a relator, was filed in the U.S. District Court for the Central District of California, Western Division seeking treble damages and penalties against the

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[32] *See*, Press Release of The Cullen Law Firm, PLLC, "Target Corp., Staples Inc., and OfficeMax, Inc., Among Pencil Importers The Subject of a False Claims Act Case Brought by The Cullen Law Firm, PLLC", at http://www.cullenlaw.com/docs/Target%20Staples%20Officemax%20Pencil%20False%20Claims%20Act%20Qui%20Tam%20Lawsuit%20Press%20Release.pdf

[33] Section 3732 of 31 U.S.C. is entitled "False claims jurisdiction" and it provides that "[a]ny action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant, can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred . . . ." Whether this is jurisdictional or merely venue setting is a matter of debate. *Compare Thistlethwaite v. Dowty Woodville Polymer, Ltd*. 110 F.3d 861 (2d. Cir 1997)(venue setting) *with LeBlanc v. United States*, 50 F.3d 1025 (Fed. Cir. 1995)(jurisdiction setting).

[34] 28 U.S.C. § 1582(3). This subsection of the statute vests in the CIT exclusive jurisdiction over any civil action arising out of an import transaction and which is commenced by the U.S. to recover customs duties. In addition, 28 U.S.C. § 1340 reserves to the jurisdiction of the district courts any action arising out of an Act of Congress providing for internal revenue or revenue for imports "except matters within the jurisdiction of the Court of International Trade."

defendants. The issue involved allegations that the defendants had avoided paying antidumping duties. Summary judgment was granted to the U.S., and the defendants appealed to the Ninth Circuit, arguing that jurisdiction resided in the CIT. The Ninth Circuit reversed, finding the district court lacked subject matter jurisdiction.[35] Eventually the Ninth Circuit remanded the case to the trial court for transfer to the CIT, so that the CIT could determine whether it had jurisdiction over the case.[36]

The CIT in its first decision held that jurisdiction over the matter was within its grant of jurisdiction pursuant to 28 U.S.C. § 1582(3) because this matter involved an action commenced by the U.S. for the collection of antidumping duties.[37] It distinguished the holding of an earlier FCA action brought at the CIT, *U.S. ex rel Felton v. Allflex USA, Inc.*,[38] where the CIT had rejected FCA jurisdiction, by noting that the *Allflex* matter was commenced by a *qui tam* relator. As such, it was not a matter commenced by the government, a jurisdictional requirement of 28 U.S.C. § 1582(3). On the other hand, *Universal Fruits* was an FCA action commenced by the government, thus overcoming that jurisdictional hurdle. The case was allowed to remain at the CIT.

It did not remain there long. The issue of jurisdiction was raised again in a motion to dismiss, only this time the defendants focused on whether this action brought pursuant to the FCA was seeking the recovery of "customs duties" (a predicate for 28 U.S.C. § 1582(3) jurisdiction) or an award of "damages" (albeit calculated as a trebling

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35 *United States v. Universal Fruits & Vegetables Corp*., 362 F. 3d 551 (9th Cir. 2004).

36 *United States v. Universal Fruits & Vegetables Corp*., 370 F. 3d 829 (9th Cir. 2004).

37 *United States v. Universal Fruits & Vegetables Corp*., 387 F.Supp 2d 1251 (CIT 2005).

38 989 F. Supp. 259 (1997).

of the amount of unpaid duty).[39] Now, the CIT held that it lacked jurisdiction to grant the relief requested because the relief sought was not the recovery of Customs duties.[40] It reached this conclusion by parsing the words of 28 U.S.C. § 1582(3), and concluding that the plain language of the statute did not provide for actions commenced by the U.S. to recovery penalties and "damages." Because the FCA complaint sought damages and penalties and not customs duties, the CIT held the matter was not properly before it.

Neither of the *Universal Fruit* decisions was appealed, so the value of these cases as precedent is limited. That being said, it would appear unlikely that any government-initiated FCA actions will be commenced in the CIT in the near future, unless the request for relief were tailored to seek recovery of unpaid duties only and no penalties or treble damages. This option is unlikely as well, because the U.S. can get that same relief (and more) via the tried and true 19 U.S.C. § 1592 action, without worrying about any jurisdictional hurdles.

OTHER TENSIONS THAT CAN ARISE BY USING THE FCA IN CUSTOMS MATTERS

In section 3730(e), the FCA statute provides for bars to FCA actions. Two of these bars could be highly relevant to matters founded on allegations that Customs laws were violated. The first of these relevant bars states that "[i]n no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative money penalty proceeding in

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39 *United States v. Universal Fruits & Vegetables Corp*., 433 F.Supp 2d 1351 (CIT 2006).

40 *Id*. at 1356.

which the government is already a party."[41]

Given the language of the bar, does the existence of an importer-initiated prior disclosure[42] filed prior to the commencement of the FCA action constitute "an administrative money penalty proceeding in which the government is already a party" and thus trump the FCA action? The answer, it appears, is "it depends."

The Impact of a Prior Disclosure

The bar in the statute is against a "person" bringing the action, rather than the government bringing the action. Because of this, in a scenario where a disclosure had been made if the defendant argued that the action was barred in a situation where the government brought the action without a relator or intervened in a *qui tam* action then the likely result of arguing the matter is barred would be unfavorable to the defendant. Throughout the statute the terms "persons" and "Government" are used to distinguish between the two classes. Furthermore, the statute requires the Attorney General of the United States to "diligently . . . investigate a violation under section [31 U.S.C. §] 3729,"[43] a responsibility independent of the bar against the person/relator. Therefore, 31 U.S.C. § 3730(e)(3) does not appear to bar the government if it proceeds with the FCA action notwithstanding a disclosure that predated the FCA action.

Not all is lost to the importer who acted in a proactive manner. The FCA statute provides for reduced damages of two times the amount of the damages in those situations

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41 31 U.S.C. §3730(e)(3).

42 A prior disclosure is the mechanism in U.S. Customs law whereby parties self-disclose errors to Customs. 19 U.S.C. §1592(c)(4) and 19 C.F.R. §162.74 *et seq*. Section 1592 of 19 U.S.C. is the Customs civil penalty law, and the filing of a prior disclosure commences a penalty proceeding under that statute, but caps the discloser's potential liability.

43 31 U.S.C. § 3730(a).

where the alleged violator has brought the violation to the attention of the U.S.[44] The disclosure must occur within 30 days of when the violator first learned of the violation.

Importers use the Customs prior disclosure law to insulate themselves from the steep penalties that can flow from being caught by Customs. For example, a fraud disclosure results in the payment to Customs of any unpaid duties and a penalty of 100 percent of the loss of duties if a dutiable violation was involved, or ten percent of the dutiable value of the merchandise if the violation did not impact the revenue.[45] Yet, if Customs so chose, it could seek additional monies under the FCA of two times the damages (*i.e.*, the unpaid duties) as the prior disclosure does not insulate the importer from the FCA in those situations where the violation satisfies the requirements of the FCA. The FCA and 19 U.S.C. § 1592 are independent statutes with separate remedies. One can speculate the chilling effect on importers if Customs were to utilize aggressively the FCA in those situations where the importer comes forward with fraud disclosures.

On the other hand, if the defendant won the "race to the courthouse doors" by disclosing the violation prior to commencement of the FCA case, and the government passed on the FCA action but the relator continued on with the litigation, then the existence of the disclosure would likely provide the defendant a solid defense. This result would make sense and satisfies the statutory language of 31 U.S.C. § 3730 in that the disclosure commences a civil penalty matter with the relevant Office of Fines and Penalties within Customs and results in the assignment of a civil penalty case number to the disclosure. Otherwise, the Customs prior disclosure statute would be rendered ineffectual and meaningless if a FCA suit were to proceed predicated upon the same

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[44] Id. at § 3729(a)(2).

[45] 19 C.F.R. 171 App. B(F)(2)(f)(1)(a) and (b).

ground already voluntarily disclosed to the U.S. by the alleged wrongdoer.

FOIA and the Original Source Requirement

The second area of potential tension has to do with whether a relator is an "original source" if its complaint is based on allegation derived from analyzing certain publicly disclosed trade statistics and publicly available data compilations disclosed via the Freedom of Information Act ("FOIA"). Does the relator have "direct and independent knowledge of the information on which the allegations . . . are based", if the allegations in the *qui tam* complaint are based on such information?

The False Claims Act does not support claims based on publicly disclosed information. Section 3130(e)(4) of 31 U.S.C. provides that certain actions are barred, stating that:

> "(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [2] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

This becomes an issue given the amount of publicly available information in the form of trade statistic on government websites or culled from inward maritime cargo manifests, which information Customs releases via the FOIA and 19 C.F.R. § 103.31 or via the news media exemption. Companies such as Zepol, PIERS and Datamyne use the

FOIA and 19 C.F.R. § 103.31 to retrieve maritime cargo manifest information, which in turn those companies makes public to their subscribers.[46]

The U.S. Supreme Court recently analyzed whether a *qui tam* complaint based on information made available via the FOIA was based on publicly disclosed information and thus barred under 31 U.S.C. § 3130(e)(4). The Court held it was in *Schindler Elevator Corp. v. United States ex rel. Kirk*.[47] In this case, the Supreme Court was deciding whether the 31 U.S.C. §3130(e)(4) bar prevented a *qui tam* action by a former employee against his employer. The relator alleged that his employer had submitted false claims for government contracts, and supported this allegation by pointing to information that his wife received from the Department of Labor under FOIA requests.[48]

Examining the words of the FCA, the Court looked at dictionary definitions of the word "report", as the word is not defined in the statute.[49] The Court found the dictionary definitions to be very broad, ranging from something that gives information or a notification to, or a formal statement of facts and proceedings, *etc*. The Court construed this broad meaning as consistent with the generally broad scope of the FCA's public disclosure bar. Furthermore, the Court interpreted other parts of the statute, including the other sources of public disclosure, (especially "news media"), and the phrase "allegations

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[46] Manifests are lists of what is in a shipment and are prepared by the common carrier, not the U.S. importer, based on information provided by the shipper/exporter. More importantly, manifests are not the CF 7501[46] or CF 3461 that importers file with Customs, wherein the importers report to Customs information such as the tariff classification, the entered value, or the country of origin. The CF 7501 and the CF 3461, and the information thereon, are not subject to FOIA release unless authorized by the importer.

[47] 131 S. Ct. 1885 (March 1, 2011).

[48] *Id.* at 1890.

[49] *Id.* at 1891.

or transactions," set out in § 3730(e)(4)(A), as supporting a broad interpretation of the public disclosure bar.[50]

In turn, the Supreme Court held that an agency response to a FOIA request, and the information contained therein, was a "report" for purposes of section 3730(e)(4)(A). The Court, noting that the drafting history agreed with its holding, found that:

> [t]he sort of case that Kirk has brought seems to us a classic example of the "opportunistic" litigation that the public disclosure bar is designed to discourage…although Kirk alleges that he became suspicious from his own experiences as a veteran working at Schindler, anyone could have filed the same FOIA requests and then filed the same suit. Similarly, anyone could identify a few regulatory filing and certification requirements, submit FOIA requests until he discovers a federal contractor who is out of compliance, and potentially reap a windfall in a qui tam action under the FCA.[51]

Can this pose an issue in the context of commencing FCA actions to remedy alleged Customs law violation? A review of the relator's now unsealed complaint in *Toyo Ink* shows that the allegations were supported by citations to information compiled by the U.S. International Trade Commission in its publicly available "Dataweb" service,[52] and by maritime manifest information provided by Customs via the FOIA or news media exemption to Zepol Corporation, one of the import/export data firm identified *supra*.[53] The issue, however, was not litigated as the case settled, so whether this would have provided the defendant a defense did not come to the fore. Whether the

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50 *Id.* at 1892, 1893.

51 *Id.* at 1894.

52 Dataweb is an open source forum that aggregates trade statistics and other import information taken from a variety of databases. Information about individual importers, however, is not available from Dataweb. Here is a link to the USITC's Dataweb web site: http://dataweb.usitc.gov/.

53 Amended Complaint at pp. 61, 67, 69, 70, 74, 76, 92, 96, 103, 107, 109, 110, 111.

fact that the FOIA-authorized disclosures were made to the third-party Zepol, which made that information available to its subscribers including the relator, rather than directly to the relator likely would not have distinguished *Toyo Ink* from the holding of *Schindler Elevator.* Arguably, anyone could have made the same FOIA request for Toyo Ink's manifest data, or subscribed to Zepol or a similar data mining company that gets its info as a result of the FOIA, and filed the same suit that the *Toyo Ink* relator did.

The *Schindler Elevator* case also addressed the issue of whether general knowledge of the industry could support a *qui tam* relator's status as an original source of an FCA action, an important consideration given that many FCA actions are commenced by employees or competitors. The Supreme Court in *Schindler Elevator* dismissed the presence of mere suspicion (rather than factual knowledge) based on industry experience as a basis for a *qui tam* absent other information at the factual knowledge level. Thus, a relator needs hard and cold facts, not a belief based on experience with the market or company, to support the institution of an FCA action.

Conclusion

International trade transactions create obligations on the participant to make representations to Customs and other U.S. government entities. If false, these representations could result in the underpayment of money or the payment of unwarranted claims. Companies are invested in personnel to oversee compliance in these areas, but the goal of business to drive costs down could and sometimes does blur over the line of legally supportable actions into the area of false statements or fraudulent actions. Sometimes this blurring will result from simple negligence; however, other times it will result from purposeful or fraudulent actions. When that occurs, the FCA is a

potent statute for either the U.S. or the discoverer of the bad act to seek redress.