

Unexpected 9th Circ. Inquiry May Curb Customs Fraud Cases

By **Daniel Wilson**

Law360 (February 23, 2023, 10:03 PM EST) -- A Ninth Circuit judge's unexpected query into whether district courts can hear False Claims Act cases alleging customs fraud threatens the ability of whistleblowers to pursue allegations involving billions of dollars of imports brought into some of the country's busiest harbors.

During oral arguments in importer Sigma Corp.'s appeal of \$26 million in FCA damages and penalties for failing to pay anti-dumping duties on Chinese pipe fittings, U.S. Circuit Judge Michelle Friedland raised an issue that none of the parties, including the federal government and relator Island Industries Inc., had previously addressed: whether the California district court that decided the case even had jurisdiction to decide a qui tam FCA case, in which whistleblowers launch the legal action as relators instead of the government itself.

The circuit court subsequently asked the parties for additional briefing on that question. If the appellate court decides that district courts lack jurisdiction to hear such cases, that effectively cuts off whistleblowers' ability to bring customs fraud FCA cases at all in the Ninth Circuit, which covers the entire U.S. West Coast, said Gregg Shapiro of Gregg Shapiro Law LLC, a whistleblower attorney who has represented relators in customs fraud cases.

"A substantial percentage of the United States' imports come in through those ports, and it would have an enormous effect on False Claims Act enforcement involving customs," Shapiro said.

The Ninth Circuit includes several of the country's busiest ports, including the Port of Los Angeles and the contiguous Port of Long Beach in southern California, the Ports of Oakland and Richmond in the San Francisco Bay area, and the Ports of Seattle and Tacoma in Washington.

The jurisdictional question hinges on how the Ninth Circuit decides to interpret its own 2004 decision in a customs fraud FCA case filed by the government, *U.S. v. Universal Fruits & Vegetables Corp.* The circuit found in that case that there is no district court jurisdiction for customs fraud cases filed by the government, because the Court of International Trade, or CIT, has exclusive jurisdiction over FCA actions to recover customs duties "commenced by the United States." The panel in the Sigma Corp. case has asked whether that "commenced by" language includes qui tam cases.

But that 2004 decision doesn't mean whistleblowers can turn to the CIT for relief because after the Ninth Circuit case was transferred to the trade court, the CIT ended up concluding that it too lacked

jurisdiction over FCA cases because they are not brought to "recover customs duties" but to impose damages and penalties for fraud.

That could potentially leave whistleblowers with nowhere to take their customs fraud allegations, unless they try to overturn the Universal Fruits decision or an adverse decision in the Sigma Corp. case through en banc review at the Ninth Circuit or at the U.S. Supreme Court.

But many such whistleblowers are individuals or small businesses who simply "don't have the resources to commence a case knowing that they're going to lose in the district court," Shapiro said.

"So the practical effect would be that far fewer qui tam involving customs would be brought by relators," he said.

Larger plaintiffs with more resources could seek to establish jurisdiction in a district court outside the Ninth Circuit, even if the relevant imports arrived in the U.S. through a West Coast port of entry, said Morgan Lewis & Bockius LLP partner Douglas Baruch, who frequently represents FCA defendants.

"A lot of times, what we see in these customs-related FCA cases is the relators are competitors, domestic manufacturers of the same type of product," he said. "They can be anywhere in the country. I don't think there's any particular reason why this [case] wouldn't have nationwide impact."

That, in turn, would likely lead to FCA defendants trying to make arguments about a lack of jurisdiction in courts outside the Ninth Circuit, and potentially precipitate a divide in the case law, said Jason Crawford, a Crowell & Moring LLP partner whose practice focuses on FCA defense, including for importers.

"I think the relators' bar would just avoid the Ninth Circuit and bring cases elsewhere and, presumably, some defendant would then make the same argument and there could very well be a [circuit] split," he said.

That scenario isn't far-fetched given the CIT's view on the Ninth Circuit's Universal Fruits decision. The trade court found the decision "to be flawed, and courts generally don't expand on rulings that are apparent mistakes," said Mark Strauss, founder and managing member of whistleblower firm Mark A. Strauss Law PLLC.

"Probably for this reason, no other appellate courts have followed Universal Fruit," he said. "Rather, courts across the country, appellate and district, have fully adjudicated customs-related FCA cases without regard to it."

If the Ninth Circuit rules that the Universal Fruits decision doesn't extend to qui tam cases, that could still affect how such cases are litigated on the plaintiffs' side, according to Baruch of Morgan Lewis, who had represented industry groups that filed an amicus brief in Sigma Corp.'s appeal prior to the court raising the jurisdictional issue, but noted he was only speaking on his own behalf.

The government, for example, would have a strategic incentive to avoid any jurisdictional concerns and not intervene in qui tam customs fraud cases in the Ninth Circuit, even if it thinks a case has merit, Baruch said.

Ultimately, the Ninth Circuit's jurisdictional question of whether a qui tam customs fraud FCA case has

been "commenced by the United States," although simple in theory, is not straightforward for the court to decide.

Just as in the supplemental briefs filed by the parties in the Sigma Corp. case, attorneys on either side of the FCA bar are divided on whether the Ninth Circuit should find jurisdiction for qui tam customs fraud cases.

For example, to find that district courts lack jurisdiction over those cases, the circuit court panel would have to go beyond the reasoning in the Universal Fruits case and find that it applies "not just to government-commenced FCA actions, but also to relator-commenced FCA actions, even though Universal Fruits expressly didn't go that far," Strauss said.

But although whistleblowers may bring qui tam cases for their own reasons, they are also clearly acting on behalf of the U.S. government, and the phrase "commenced by the United States" should be read broadly to include qui tam cases, Baruch said.

"It seems to me that it's hard to make legitimate argument that Congress would have said that the Court of International Trade has exclusive jurisdiction to hear customs cases based on the failure to pay import duties brought by the United States, and [also] said, 'But we're carving out suits that are brought by relators,'" he said.

--Editing by Jill Coffey.