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The Intersection of Customs Duties and Bankruptcy

By Stephen T. Bobo and John P. Donohue*

This article explains how various U.S. Customs and Border Protection claims are imposed and highlights ways in which a bankruptcy filing can affect claims arising from Customs duties. In addition, the article explores the impact of a bankruptcy filing on procedures governing disputes with Customs.

The American economy is increasingly dependent upon the importation of merchandise, both raw materials and finished goods. Many of these imported goods are subject to duties imposed by U.S. Customs and Border Protection ("Customs"), known as "ordinary duties." In some situations, supplemental duties such as antidumping and countervailing duties, and now the new duties on aluminum and steel imposed by Executive Order, are also assessed. In a growing number of cases, the combined effect of the amount of these duties and the manner in which they are imposed can be so detrimental as to require importers to seek bankruptcy protection.

These risks highlight the impact of bankruptcy upon many aspects of Customs duty claims as they affect importers as well as other parties. Customs and bankruptcy are governed by two separate statutory and regulatory schemes, each with its share of complexities and idiosyncrasies. The intersection between these two very different areas of law, each having separate histories and objectives, is not always clear or intuitive. There are also a limited number of reported decisions dealing with how Customs-related claims are treated in bankruptcy. This article explains how various Customs claims are imposed and highlights ways in which a bankruptcy filing can affect claims arising from Customs duties. In addition, the article explores the impact of a bankruptcy filing on procedures governing disputes with Customs.

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CUSTOMS DUTIES OVERVIEW

Until the enactment of the Internal Revenue Act of 1914, except during the Civil War, the collection of Customs duties was the primary vehicle for generating revenue for the federal government. Since the Reciprocal Trade Agreements Act of 1934, rates of duty on imported goods have declined, but Customs duty revenues have generally increased in absolute terms. For example, in 1996 the United States collected $18.6 billion in Customs duties, and by 2015 that figure had nearly doubled to $36 billion.[1] During that same period, however, the average rate of duty on merchandise imported into the United States fell from 2.56 percent to 1.64 percent. Yet, while the "average" rate of duty is comparatively low in the U.S., duty rates vary widely from a "free" rate, applicable to a large class of products, to 25 percent in the case of certain wearing apparel and trucks, with even higher rates applying to certain food products.

Two factors are attributed to the rise in Customs duty revenue in the face of declining rates of duty. The first, obviously, is the growth in the volume and value of imports into the United States. But the second factor, and the one particularly relevant to this analysis, is the increase in supplemental assessments, most notably those under the antidumping and countervailing duty laws.

Process of Assessing Duties—Liquidation and the Doctrine of the "Finality of Liquidation"

An assessment of ordinary duties is a simple arithmetic calculation. The value of the merchandise times the rate of duty equals the amount of duty owed. At the time of entry, an importer submits a declaration to Customs estimating the value of the merchandise and the applicable rate of duty. The importer calculates the duties owing and deposits them with Customs. A change by Customs in either the determination of the value of the goods or the applicable rate of duty will change the assessment.

An importer's deposit of estimated duties, regardless of the good faith exercised in its calculation, confers no rights upon the importer. In the ordinary course, Customs withholds taking action to finalize, or "liquidate," the assessment on an entry for 314 days. This period is designed to give other government agencies with jurisdiction over the imported goods time to review compliance with applicable laws. Once an entry is liquidated, then "all issues" are deemed finally resolved, unless challenged by the importer within 180 days from the date of liquidation or unless the entry is reliquidated by Customs

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[1] Office of Management and the Budget, Fiscal Year 2017, Chart 2.5.

within 90 days of the date of the original liquidation. The "liquidation" of the entry, therefore, is that process by which Customs finally determines, among other things, the value of the goods, the rate of duty to be applied, and their admissibility into the United States.[2]

For example, if an already-liquidated entry of food products is later determined by the Food and Drug Administration to be contaminated, the FDA is precluded from ordering the merchandise to be returned for export because the liquidation of the entry was also the government's determination as to admissibility.[3]

Any entry not liquidated within one year from the date of entry is ordinarily "deemed liquidated" at the "rate of duty, value, quantity, and amount of duties asserted [in the entry documents] by the importer of record."[4] However, Customs may legally extend the liquidation date for up to three additional years. In effect, Customs could have up to four years from the date of entry to withhold action before it is compelled to liquidate.[5] The combination of an extended period for liquidation plus the right to apply any change retroactively to all unliquidated entries can be very destabilizing to an importer.[6]

Antidumping Duties and Countervailing Duties Summary

The same statute which authorizes Customs to extend liquidation of an entry also provides that liquidation can be suspended indefinitely if the entry is the subject of any statutory provisions that authorize such suspension.[7] The two statutes most frequently invoked for authorizing a suspension of liquidation are the antidumping and countervailing duty laws. The application of these laws greatly increases the risks of bankruptcy for importers.

In general, the antidumping statutory provision[8] provides that if merchandise is sold for export to the United States at a price which is lower than the price at which the same goods are sold in the home market, and those below-market prices injure an industry in the United States, then the U.S.

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[2] 19 C.F.R. § 159.1.

[3] *United States v. Utex International,* 857 F.2d 1408 (Fed. Cir. 1988).

[4] 19 U.S.C. § 1504(a).

[5] 19 U.S.C. § 1504(b).

[6] *See, e.g.*, *International Custom Products v. United States,* 77 F. Supp. 3d 1319 (Ct. Int'l Trade 2015), *aff'd*, 843 F.3d 1355 (Fed. Cir. 2016), where Customs reversed the classification of a product, increased the rate of duty by 2400 percent, and then applied this decision retroactively to 87 unliquidated entries.

[7] 19 U.S.C. § 1504(c).

[8] 19 U.S.C. § 1673.

government may impose an additional duty equal to the difference between the home market price and the export price to the United States. The countervailing duty law provides that if a foreign government subsidizes the exports of merchandise to the United States, and those subsidies injure an industry in the United States, then the U.S. government may impose an additional duty equal to the net amount of that subsidy.[9]

The application of the antidumping duty law, including the ability to suspend the liquidation of entries, has caused the greatest risk of unmanageable customs duty debt. In a Government Accountability Office report issued to the Committee on Finance of the U.S. Senate entitled *Antidumping and Countervailing Duties; CBP Action Needed to Reduce Duty Processing Errors and Mitigate Nonpayment Risks*,[10] the GAO reported that between fiscal years 2001 and 2014, Customs issued antidumping duty bills totaling $2.3 billion dollars. For the same time period, Customs reported that it did not expect to collect as much as $1.6 billion of those bills, almost 70 percent of the amounts assessed.[11] The same report also found that:

- 20 U.S. companies had outstanding antidumping duty bills in excess of $24 million each;
- four U.S. companies had unpaid antidumping duty assessments of more than $100 million;
- one U.S. company had antidumping duty assessments of more than $200 million.[12]

Few U.S. companies would be able to manage such debt.

Difficulty and Delay in Reaching Closure on Amount of Antidumping Duties

These statistics might suggest that businesses incurring such large duty assessments were negligent in their supply chain decisions or, even worse, had intentionally evaded their Customs duty obligations. For the most part that is not the case. The problem does not lie in nefarious intentions or fundamental incompetence of management; rather, it arises from both the theory and the application of the U.S. laws. As will be discussed, that theory and application differ from those relied upon by our European counterparts.

An antidumping pricing investigation is, by definition, backwards looking.

[9] 19 U.S.C. § 1671.

[10] GAO-16-542, July 2016 (hereinafter "GAO Report").

[11] GAO Report, at 13.

[12] GAO Report, Chart 1, page 20.

For example, Foreign Company A sells for export to the United States in years 1 and 2; an allegation of dumping pricing is raised in year 3 by an allegedly injured domestic industry; an investigation of the pricing in years 1 and 2 is completed in year 4; and antidumping duties are thereafter assessed. The antidumping duty statute allows for a suspension of the liquidation of the entries until the investigation is complete, so findings of selling below normal value (i.e., at a price for export to the United States below the price at which the goods are sold in the home market) are made well after the goods have been imported and sold. Then, assuming that dumping has been found to have occurred, in year 5 the U.S. Commerce Department (which conducts such investigations) will begin a review of the pricing practices in year 3, and this review might not be concluded until year 6 or 7. And the process continues thereafter.

To complicate matters further, if there are multiple producers of the same product for export to the United States, the Commerce Department will typically examine the pricing practices of only selected foreign producers to minimize the time and the cost of the investigation. Consequently, an exporter could have an antidumping duty applied to its goods without having its pricing practices actually investigated.

The Problem of Retrospective Assessment in Antidumping and Countervailing Duty Cases

In order to illustrate the problems arising from these points, we present the hypothetical case of the Ajax Importing Company. Ajax has been importing wooden bedroom furniture into the United States from the Peoples Republic of China since 2010. Wooden bedroom furniture from China is the subject of an antidumping duty order, and Ajax is very careful to select a Chinese supplier, the Shanghai Furniture Company, that has been selling at prices that are above "normal value." Twenty-two other Chinese manufacturers of wooden bedroom furniture export to the United States, and the antidumping duty margins that have been applied to these producers range from a "zero rate assessment" (i.e., the goods are not being sold below normal value) to a 216 percent assessment on the high end.

Shanghai has a history of selling above normal value, so no antidumping duties are assessed on its exports. Each year, Shanghai makes significant expenditures of legal and accounting fees to defend its pricing practices before the Commerce Department.

In 2014 and 2015, Ajax imports furniture from Shanghai having total values of $6 million and $8 million, respectively. Because Shanghai's margins of selling in these years have not yet been investigated, Customs suspends liquidation of Ajax's entries until the pricing review of Shanghai has been completed. And

because the Shanghai pricing in the past has always been above normal value, Ajax is not required to make any deposit of antidumping duties as the goods are entered.

In 2016, the Commerce Department announces that it will investigate the pricing practices of Chinese exporters of wooden bedroom furniture for the year 2014 (which is called an "administrative review"). Unbeknownst to Ajax, because of the exceedingly high legal and accounting fees incurred by Shanghai, it has been exploring other markets, and by 2016 it has found a significant customer in Europe and withdraws from the U.S. market. Shanghai announces that it will decline to participate in the administrative review of the 2014 pricing, and ultimately, the 2015 pricing. It will not allow Commerce Department investigators to review its books and records because it no longer has any interest in the U.S. market. Because Shanghai refuses to participate, its furniture is assessed with the highest antidumping rate applied to any Chinese exporters—216 percent. Two years' worth of Ajax entries valued at $14 million are unliquidated. At liquidation, because of Shanghai's refusal to participate in the administrative review, all of the Ajax entries will be assessed the 216 percent rate, and Ajax will get an unexpected bill for $30,024,000. Ajax has learned the theory of "retrospective assessment" the hard way. Ajax cannot afford to pay this assessment and faces bankruptcy.

In theory, the U.S. view of backwards-looking antidumping assessments is correct. By definition, pricing investigations are always retrospective because the fairness of a price cannot be determined until after the sale has been completed. And if the purpose of assessing such duties is to remedy prior years' pricing practices, the assessment of these duties should also be retrospective. In practice, of course, these procedures create enormous risks for importers, and the GAO study confirms the point. In fact, the U.S. is the only country in the world that uses a retrospective system of duty assessment.[13] The risk to importers also

[13] Raj Baha, Dictionary of International Trade Law (3d ed. 2015), at 834. In Europe, duties are assessed very differently. While the European Union acknowledges that the theory of the antidumping assessment is retrospective, it distinguishes between the *finding* of selling below normal value, which is based on historical sales, and the *assessment*, which is prospective only. *Id.* So, in EU member states, if a product is found to have been sold below fair value, the assessment is made prospectively on imports after the date of the finding until any one of the parties to the dumping investigation (the foreign producer; the European importer; or the allegedly affected domestic industry) requests a new investigation of pricing practices. If a new investigation is undertaken, then the results of the new pricing investigation are applied prospectively. Notions of suspension of liquidation and retroactive application of a dumping finding do not exist in other dumping regimes. The theory of its law may suffer somewhat, but its prospective application creates a level of certainty that is far more workable than the American model.

creates risks for their creditors and other parties such as sureties, Customs brokers, and insiders.

Penalties and Customs Jurisprudence

In addition to duties, other types of Customs debts can arise in the form of damages from a contract breach or as a penalty under U.S. international trade law. As a contract matter, each importer is required to undertake to abide by certain requirements at time of entry. These include the obligation "to deposit within the time prescribed by law or regulation, any duties . . . imposed or estimated to be due";[14] "to furnish Customs with any document or evidence as required by law";[15] and "to pay the compensation and expenses of any Customs officer, as required by law or regulation."[16] For breach of any such promises, Customs can file a claim for the payment of liquidated damages.[17] The importer's promise is backed by a Customs bond issued by a surety, with the bond amount generally calculated as a percentage of prior years' duty payments. If the importer is unable to pay the liquidated damages, Customs has the right to proceed against the surety on its bond.

Customs can also make penalty assessments under Section 592 of the 1930 Tariff Act, as amended and added.[18] This statute directs that if any merchandise is entered into the United States by means of a document that is both material and false, then Customs shall impose a penalty based upon the illegal conduct identified and the amount of duties avoided.

Calculating the Penalty

The extraordinarily high antidumping assessments, particularly those imposed on Chinese origin goods, act as a multiplying force in calculating the amount of penalties that can be imposed and thus create their own issue in terms of the total overall debt to the United States. This, in turn, increases bankruptcy risks. Section 1592 caps the penalty in any action at twice the duties underpaid in the event of negligent conduct,[19] four times the duties underpaid in the event of grossly negligent conduct,[20] and the value of the merchandise

[14] 19 C.F.R. § 113.62(a)(1).

[15] 19 C.F.R. § 113.62(c).

[16] 19 C.F.R. § 113.62(g)(1).

[17] 19 C.F.R. § 172.1.

[18] 19 U.S.C. § 1952.

[19] 19 U.S.C. § 1592(c)(3).

[20] 19 U.S.C. § 1592(c)(2).

in the event of fraudulent conduct,[21] but in no case may the penalty exceed the "domestic value" of the merchandise. So if, for example, an importer avoided paying an antidumping duty equal to eight percent on a shipment valued at $1,000,000, then the government penalty for negligent conduct would be $160,000; it would be $320,000 in the event of grossly negligent conduct; and up to $1,000,000 in the event of fraudulent conduct. In all cases, the penalty would be capped at the "domestic value" of the goods.[22]

Historically, however, Customs typically settles even intentional conduct cases at an amount between five and eight times the loss of revenue. In addition, however, like most taxing statutes, if a prima facie violation can be established, Customs can demand the restoration of duties unpaid, whether or not the statute of limitations on an ordinary assessment has expired and whether or not a monetary penalty has been assessed.[23] In cases such as these, how a "domestic value" of an article can be defined is addressed in the Customs regulations but only adds greater complexity in determining the maximum penalties assessable.[24]

False Claims Act Risks

Issues giving rise to Customs penalties could also trigger separate litigation against an importer and related parties under the "reverse false claims" provision of the False Claims Act.[25] This could result in the importer being assessed treble damages for submitting false information on the entry documents, if the entry

[21] 19 U.S.C. § 1592(c)(1).

[22] 19 U.S.C. § 1592(c)(1).

[23] 19 U.S.C. § 1592(d).

[24] The Customs Regulations define the "domestic value" of the merchandise as "the price at which such or similar property is freely offered for sale at the time and place of appraisement, in the same quantity or quantities as seized, and in the ordinary course of trade." 19 C.F.R. § 162.43(a). Yet even this definition is capable of varied interpretations. Customs effectively calculates a "domestic value" by calculating a total landed cost of the goods under seizure or subject to penalty (i.e., Customs begins with the transfer price of the goods; then adds the amount for international freight and insurance plus all duties due both ordinary and specially assessed, such as antidumping duties. So, for example, a $500,000 shipment of bedroom furniture landed at the Port of New York with a one percent ordinary duty; a 250 percent dumping duty; and a $10,000 freight and insurance charge would be appraised at $1,765,000 for penalty assessment purposes. By contrast, an importer would argue that the domestic value of the goods is the price that is obtainable in the New York wholesale marketplace for a similarly-sized quantity of furniture. The problem with the government calculation, especially when a False Claims Act penalty is added to this amount, is that it can be so extreme as to constitute an "excessive fine" under the Eighth Amendment to the Constitution. *See, e.g. United States v. Bajakajian,* 524 U.S. 321 (1998).

[25] 31 U.S.C. § 3729.

was made either with "deliberate ignorance of the truth or falsity of the information" or in "reckless disregard of the truth."[26] These treble damages would be in addition to the duties and penalties assessed by Customs.

It is important to be aware that the False Claims Act, including its "reverse false claims" provisions, allows for *qui tam* or "whistleblower" rights. *Qui tam* plaintiffs who provide information to the government of a violation are entitled to receive rewards of not less than 15 percent nor more than 25 percent of the proceeds of the recovery, pursuant to 31 U.S.C. § 3730(d).[27] This generous "reward" payment increases the risk level for importers who may have either purposefully evaded duties or been reckless in the management of them, especially with respect to antidumping and countervailing duties.

BANKRUPTCY IMPACT ON DISPUTES WITH CUSTOMS

Jurisdiction to Resolve Disputed Customs Claims

Outside of a bankruptcy proceeding, civil disputes involving Customs duty assessments, including antidumping and countervailing duty assessments, are subject to the exclusive jurisdiction of the U.S. Court of International Trade (the "CIT"), pursuant to 28 U.S.C. § 1581(a). In addition, 28 U.S.C. § 1337(c) provides that "[t]he district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title." In order to invoke the CIT's jurisdiction, the party challenging the duties is required to prepay them to under 28 U.S.C. § 2637(a).[28] In addition, the plaintiff is required to have exhausted its administrative remedies. This requirement of prior payment may preclude an importer in financial distress from accessing the CIT to resolve disputes with Customs.

As absolute as the grant of exclusive jurisdiction to the CIT may seem, it appears to be altered in bankruptcy cases. In its grant of bankruptcy jurisdiction in 28 U.S.C. § 1334(b), Congress provided that "*Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts*, the district court shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases

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[26] 31 U.S.C. § 3729(b) (2-3).

[27] *See, e.g., U.S. ex rel. Customs Fraud Investigations, LLC v. Victaulic Company*, 839 F. 3d. 242 (3d Cir. 2016).

[28] *International Custom Products, Inc. v. United States*, 791 F.3d 1329 (Fed. Cir. 2015) (upholding the constitutionality of such requirement).

under title 11."[29] "Related to" jurisdiction in bankruptcy under 28 U.S.C. § 1334(b) is very broad—it encompasses any matter whose outcome "could conceivably have any effect on the estate being administered in bankruptcy."[30] Therefore, Congress intended for both the CIT and the federal district courts (which automatically refer bankruptcy matters to the bankruptcy courts) to have concurrent nonexclusive jurisdiction over a bankrupt debtor's disputes with Customs.

Several courts have grappled with whether bankruptcy alters which court has jurisdiction to resolve disputes over Customs duties. The concurrent jurisdiction of the bankruptcy courts was first addressed in the Apex Oil bankruptcy, where the post-confirmation debtor disputed claims for duties and contended that it lacked the ability to pay the amount in question in order to initiate an action in the CIT.[31] The bankruptcy court found that it had jurisdiction to determine Customs' claim under 28 U.S.C. § 1334(b) but determined to abstain from hearing the matter because of the CIT's greater expertise in Customs issues. On appeal, the district court agreed that bankruptcy jurisdiction existed to hear Customs' claim but reversed on the issue of abstention. The district court found that the CIT was not an available forum given the debtor's inability to satisfy the CIT's jurisdictional requirements. The debtor would have first needed to exhaust its administrative remedies, which would have resulted in considerable delay. The debtor was also not able under its Chapter 11 plan to prepay the amount of the duty claims in question, including penalty claims, as required in order to invoke the jurisdiction of the CIT. Therefore, it was not in the interests of justice for the bankruptcy court to abstain from hearing Customs' claim.[32]

This decision was followed by a CIT decision in *Bousa, Inc. v. United States*,[33] a case which followed a particularly tortuous procedural path through three different courts. The case arose from a petroleum importer's disputes with Customs over the classification of certain petroleum products. The importer filed for Chapter 11 bankruptcy and thereafter filed an action in the CIT challenging Customs' denial of its protests, but without first paying all of the duties at issue. In lieu of dismissing the case for lack of jurisdiction, the CIT

[29] Emphasis supplied.

[30] *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1985), *overruled on other grounds*, 516 U.S. 124 (1995).

[31] *In re Apex Oil Company*, 122 B.R. 559, 567 (Bankr. E.D. Mo. 1990), *aff'd in part, rev'd in part*, 131 B.R 712 (E.D. Mo. 1991).

[32] 131 B.R. at 716.

[33] 17 C.I.T. 568, 15 Int'l Trade Rep. (BNA) 1793 (Ct. Int'l Trade 1993).

recognized the *Apex Oil* decision finding concurrent bankruptcy jurisdiction and transferred the case to the federal district court under 28 U.S.C. § 1631. The transfer was determined to be in the interest of justice because an outright dismissal would have deprived the importer of its right to be heard on its classification claim unless the original filing date was preserved.

Thereafter the district court referred the case to the bankruptcy court for resolution, but several years later Customs moved to withdraw the reference to have the case determined by the district court. Relying on 28 U.S.C. § 157(d), the district court ordered that the reference be withdrawn from the bankruptcy court because the classification dispute required a significant interpretation of the tariff laws rather than a simple application of them. The case was then stayed while the parties awaited a resolution by the CIT of some, but not all, of the issues.[34]

A different CIT judge subsequently expressed a contrary view regarding the exclusivity of that court's jurisdiction in *Washington International Insurance Co. v. United States*.[35] In that case, Customs had reliquidated certain entries of a bankrupt importer pursuant to a bankruptcy court order approving and "so-ordering" a settlement between the importer and Customs. Prior to the reliquidation, the surety had filed a lawsuit in the CIT challenging the original amount of those duties. The CIT held that the pendency of this litigation concerning the original duties made Customs' reliquidation a nullity.[36] According to the CIT, the fact that Customs had acted pursuant to the bankruptcy settlement order was irrelevant and the order was of no effect because it was "outside the scope of its jurisdiction and compel[ed] a party to take actions for which it does not possess authority."[37] "The [CIT] has been granted exclusive jurisdiction over issues arising out of the trade laws and it is clear that reliquidation for this or any other purpose falls squarely within this exclusive jurisdiction."[38]

Bankruptcy Impact on Time for Protesting Duty Assessments

Outside of bankruptcy, a party has a limited amount of time to challenge determinations by Customs concerning the classification of imported goods, the amount of duties, or the liquidation or reliquidation of an entry. If not timely challenged, the determinations of Customs are final and conclusive. An

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[34] *Bousa, Inc. v. United States,* 2007 U.S. Dist. LEXIS 27346 (S.D.N.Y. Apr. 11, 2007).

[35] 138 F. Supp. 2d 1314 (Ct. Int'l Trade 2001).

[36] *Id*. at 1326.

[37] *Id*.

[38] *Id*.

administrative protest must be filed with Customs within 180 days of the date of the liquidation of the entry (i.e., the date on which Customs makes those findings of facts and conclusions of law necessary to ascertain the Customs duty owed).[39] If such protest is denied in full or in part, an action contesting the denial must be commenced in the CIT within 180 days of the date of mailing of Customs' denial of the protest, as specified in 28 U.S.C. § 2636.

The filing of a bankruptcy extends certain time periods available to the debtor, including for challenging determinations of Customs. Section 108(a) of the Bankruptcy Code provides that if the debtor is required to commence an action under non-bankruptcy law within a certain time period which has not expired before the commencement of the bankruptcy, then the debtor may commence the action by the later of the end of such period and two years after the commencement of the bankruptcy.

BANKRUPTCY TREATMENT OF CUSTOMS CLAIMS

Priority Treatment for Customs Duties

Outside of bankruptcy, Customs duties are among the broad range of obligations owing to the United States that are entitled to first priority of payment pursuant to the Federal Priority Statute.[40] However, this statute does not apply in bankruptcy proceedings. Instead, Congress created an entirely different set of bankruptcy priorities, set forth in Section 507(a) of the Bankruptcy Code. Section 507(a)(8) grants priority status to certain categories of Customs duties, along with certain types of taxes. Section 507(a)(8) provides priority status for customs duties which arise out of the importation of merchandise that is either: (1) entered for consumption[41] within one year before the bankruptcy petition date; (2) covered by an entry liquidated or reliquidated within one year before the date of the bankruptcy filing; or (3) entered for consumption within four years before the bankruptcy filing date but unliquidated on that date, if the Secretary of the Treasury certifies that the failure to liquidate such entry was due to an investigation into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available.[42]

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[39] 19 U.S.C. § 1514(c)(3).

[40] 31 U.S.C. § 3713.

[41] "Entered for consumption" means that an entry summary for consumption has been filed with customs in proper form, with estimated duties attached. *In re Behring Int'l, Inc.*, 61 B.R. 896, 911 (Bankr. N.D. Tex. 1986).

[42] The time periods set forth in Section 507(a)(8) are subject to possible enlargement. In

Claims for Customs duties that do not qualify for priority are treated as general unsecured claims.

Impact of Customs Priority Claims upon Chapter 11 Reorganizations

The existence of substantial Customs claims entitled to priority can have a major impact upon the ability of importers to reorganize through Chapter 11 proceedings. Unless Customs agrees otherwise, a Chapter 11 plan of reorganization must provide for full payment of such priority claims. Section 1129(a)(9)(C) of the Bankruptcy Code allows such payment to be made by way of regular installment payments with interest over a period of up to five years. A bankruptcy court cannot confirm a Chapter 11 plan unless either the plan complies with this requirement or Customs agrees otherwise.

If a Customs priority claim exceeds what the importer is able to pay over the five-year payment period, Customs would effectively hold a veto power over the importer's ability to reorganize. However, Customs might be willing to negotiate a lesser recovery on its claim if the alternative to a proposed reorganization plan is a liquidation of the importer that would result in a lesser recovery on Customs' claim. In addition, a plan may not otherwise impair a Customs priority claim or place it in a class with other creditors for purposes of voting on the plan. Customs is not entitled to vote its priority claim to accept or reject the plan, though it retains the right to object if the requirements of Section 1129(a)(9)(C) are not met.

Priority Status of Certain Penalties

Customs' penalty assessments may also be entitled to priority status in bankruptcy. In addition to those types of Customs duties entitled to priority status discussed above, a penalty relating to such duties that compensates for actual pecuniary loss is also entitled to priority treatment pursuant to Section 507(a)(8)(G) of the Bankruptcy Code.

In determining whether a governmental penalty claim is entitled to priority under this section, the first consideration is whether the substance of the claim is a penalty or instead a tax or Customs duty. The U.S. Supreme Court has explained that a tax is a "pecuniary burden laid upon individuals or property for

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2005, the Bankruptcy Code was amended to add an unnumbered paragraph at the end of Section 507(a)(8) which provides that all time periods set forth in Section 507(a)(8) shall be suspended (1) for any period during which a governmental unit is prohibited under applicable non-bankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus an additional 90 days; plus (2) any time during which a stay was in effect in a prior bankruptcy case or during which collection was precluded by the existence of a confirmed plan, plus 90 days.

the purpose of supporting the government," whereas a penalty is "an exaction imposed by statute as punishment for an unlawful act."[43] In that case, a corporation had underfunded certain pension plans before it filed for Chapter 11. The Internal Revenue Service filed a claim for a 10 percent "tax" for an accumulated funding deficiency in a sponsored benefit plan imposed under the Internal Revenue Code.[44] The Supreme Court concluded that this statutory provision was punitive in function, and therefore it constituted a penalty, not a "tax," despite the language used in the applicable provision of the Internal Revenue Code.[45]

Similarly, in *In re DeJesus*,[46] a New Jersey motor vehicle surcharge was held to be a civil penalty not entitled to priority treatment in bankruptcy. Conversely, in *In re Juvenile Shoe Corp. of Am.*,[47] the court looked beyond the "tax" label in determining that a 15 percent tax on the amount of a pension reversion to the employer was in the nature of a tax and not a penalty. Therefore, it was entitled to priority as an "excise tax."

If the claim is determined to be in the nature of a "penalty," the second question is whether it is in compensation for actual pecuniary loss. In many cases, a penalty is intended to punish a wrongdoer or deter future misconduct, not to compensate the aggrieved party.[48] Where the government assesses a penalty in addition to interest, that penalty is not considered compensatory and will not be entitled to priority.[49]

Treatment of Non-Priority Penalty Claims in Bankruptcy

Priority treatment of penalty claims can significantly impact distributions in

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[43] *United States v. CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996).

[44] *Id.* at 216–17.

[45] *Id.* at 226.

[46] 243 B.R. 241, 250–51 (Bankr. D.N.J. 1999), *aff'd, In re Marcucci*, 256 B.R. 685, 694–97 (D.N.J. 2000).

[47] 99 F.3d 898, 903 (8th Cir. 1996).

[48] *See In re Hovan, Inc.*, 96 F.3d 1254, 1256–59 (9th Cir. 1996) (penalty portions of debtor's state tax obligations were punitive, not compensatory, since they were determined on an escalating percentage-basis having no direct relation to any specific costs incurred by the state and were imposed in addition to interest); *In re Suburban Motor Freight, Inc.*, 36 F.3d 484, 489–90 (6th Cir. 1994) (workers' compensation agency's claim for reimbursement of payments required to be made to workers' compensation claimants was punitive and not compensatory in nature); *In re Bradford*, 534 B.R. 839 (Bankr. M.D. Ga. 2015) (charge for debtor's early withdrawal of funds from an Individual Retirement Account constituted a penalty); *In re New England Carpet Co.*, 26 B.R. 934, 936–37 (Bankr. D. Vt. 1983) (penalty claim was not entitled to priority where claimant failed to present evidence that the penalties were not punitive).

[49] *See Hovan, Inc.*, 96 F.3d at 1257–59; *New England Carpet Co.*, 26 B.R. at 941.

bankruptcy cases. Claims entitled to priority receive payment from bankruptcy estates *before* general unsecured claims. Conversely, penalty claims not entitled to priority will not be paid until *after* general unsecured claims are fully satisfied in Chapter 7 liquidation cases, where they are automatically subordinated to general unsecured creditors pursuant to Section 726(a)(4) of the Bankruptcy Code. The policy behind subordination of penalties that are not in compensation for pecuniary loss is grounded in the notion that such penalties are intended to punish the debtor. Giving a penalty claim priority over (or even parity with) general unsecured claims in a liquidation has the effect of punishing the other creditors instead of the defunct debtor. In the vast majority of Chapter 7 cases, general unsecured creditors are not paid in full, so treating penalty claims on a par with them would dilute their distributions. Instead, subordinated penalty claims rarely receive any distribution in such cases.

Although such penalty claims are not automatically subordinated in Chapter 11 cases, *United States v. CF&I Fabricators of Utah, Inc.*,[50] and *United States v. Noland*,[51] they could still be susceptible to subordination on a case by case basis. Treating large penalty claims on a par with the claims of general unsecured creditors could prevent those other creditors from receiving as much under a plan as they would in a Chapter 7 liquidation (where such penalties are automatically subordinated). This result is inconsistent with the "best interests" standard provided for Chapter 11 plans in Section 1129(a)(7) of the Bankruptcy Code. This requires that creditors not voting to accept the plan receive at least as much as they would have received if the debtor were instead liquidated under Chapter 7. Therefore, such penalty claims might preclude plan confirmation.

Such a situation calls into question whether it may be permissible for the plan to place non-compensatory penalty claims in a separate class that is subordinated to general unsecured creditors pursuant to Section 1122(a) of the Bankruptcy Code. This might seem particularly appropriate where the debtor is being liquidated through Chapter 11 plan. The *CF&I Fabricators* decision expressly left open the possibility that subordination of penalty claims might be permitted on such a basis.[52]

Discharging Customs Duty Claims

Whether a Customs claim can be discharged in bankruptcy is another issue requiring consideration of the underlying facts. A debtor's discharge prevents

[50] 518 U.S. 213 (1996).

[51] 517 U.S. 535 (1996).

[52] 518 U.S. at 228.

claims from being enforceable against the debtor following bankruptcy. Obtaining a discharge is often one of the primary reasons for filing a bankruptcy, particularly for individuals. In bankruptcy cases involving an individual debtor, Section 523(a) of the Bankruptcy Code provides for several categories of tax and Customs claims that cannot be discharged. Section 523(a)(1) provides that Customs duties entitled to priority cannot be discharged. In addition, duties cannot be discharged where the debtor did not timely file required returns or reports, made a fraudulent filing or willfully attempted to evade or defeat the duties.

In addition, Section 523(a)(7) expands the types of duties that an individual debtor cannot discharge. Certain Customs claims that are fines, penalties or forfeitures and that do not compensate for a pecuniary loss are included among the claims not entitled to be discharged. The Court of International Trade held a large penalty assessment that Customs made against an individual debtor under 19 U.S.C. § 1592 was not in compensation for actual pecuniary loss in *United States v. DeBellas Enterprises Inc.*[53] The CIT found the purpose of the penalty was to ensure accurate completion of entry documents and that the amount was based on the degree of the defendant's culpability rather than the amount of the government's loss. Therefore, this penalty was not dischargeable.[54]

Corporate debtors that have engaged in wrongful conduct with respect to Customs may not be discharged from corresponding Customs claims under a Chapter 11 plan of reorganization. Section 1141(d)(6)(B) of the Bankruptcy Code prevents a Chapter 11 plan from discharging a corporate debtor from a tax or customs duty where the debtor made a fraudulent return or willfully attempted to evade or defeat the tax or customs duty. In addition, liability for claims brought under the False Claims Act or equivalent state statutes is not able to be discharged under a Chapter 11 plan, pursuant to Section 1141(d)(6)(A).

Recovering Overpayments from Customs

A bankrupt importer's claim for refund of Customs duties it overpaid becomes property of its bankruptcy estate. However, such a refund could be subject to setoff against any amounts the importer owes to either Customs or any other government agency or department of the United States. For purposes of setoff in bankruptcy, the various agencies and departments of the United States are treated as a single creditor.[55] The result is to reduce any overpayment

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[53] 23 C.I.T. 600, 21 Int'l Trade Rep. (BNA) 1725 (Ct. Int'l Trade 1999).

[54] *Id.*

[55] *See In re Myers*, 362 F.3d 667, 671 (10th Cir. 2004); *In re HAL, Inc.*, 122 F.3d 851, 854 (9th Cir. 1997).

recovery by those amounts the debtor owes to the United States government. Therefore, it is important to evaluate whether any amounts are owed to other federal governmental entities before commencing litigation to recover overpayments of duties.

This is materially different from how claims for overpayment of duties are handled outside of bankruptcy. As a matter of Customs law, only one regulation addresses the right of setoff, and it tilts squarely in favor of a right of setoff for Customs, but not for the importer. Customs Regulation 19 CFR § 24.72 provides:

> [w]hen an importer of record or other party has a judgment or other claim allowed by legal authority against the United States, and he is indebted to the United States, either as principal or surety, for an amount which is legally fixed and undisputed, the port director shall set off so much of the judgment or other claim as will equal the amount of the debt due the government.

In *Brother International Corp. v. United States*,[56] the CIT held that duties paid in a voluntary disclosure of entries made five years earlier could not be reduced by offsetting the debt against duties allegedly overpaid during the same time period, where the importer had failed to timely challenge the overpayment.

However, in a 2002 amendment to the Customs audit statute, Congress granted some rights of offset to the importer when an audit identifies both underpayments and overpayments during the audit period and the importer was voluntarily paying the underpayments for purposes of limiting its exposure under the penalty statutes.[57]

HOW THE AUTOMATIC STAY APPLIES TO CUSTOMS

A cornerstone of the Bankruptcy Code is the automatic stay, set forth in 11 U.S.C. § 362(a), which protects against actions to assert or collect on claims against a debtor or its property. Customs' efforts to liquidate entries post-petition have been held to violate the automatic stay and were therefore void *ab initio*.[58] Among the reasons for this ruling is that liquidation is not a mere ministerial action. It triggers certain obligations and becomes final and unreviewable unless a protest is filed within 180 days of the liquidation.

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[56] 294 F. Supp. 2d 1373 (Ct. Int'l Trade 2003).

[57] 19 U.S.C. § 1509(b)(6)(A).

[58] *In re Apex Oil Company*, 122 B.R. 559, 567 (Bankr. E.D. Mo. 1990), *aff'd in part, rev'd in part*, 131 B.R 712 (E.D. Mo. 1991).

However, in *United States v. Washington International Insurance Co.*,[59] the CIT rebuffed a surety's attempt to use the automatic stay as a defense against its own liability. The surety, which had issued a Customs bond, contended that there had not been a lawful liquidation of the debtor's entries because Customs' post-petition liquidation of them was void as a violation of the automatic stay. It contended that no obligation was due from either the importer or the surety as a result. The court rejected this argument, holding that the automatic stay was intended to protect the debtor, not third parties such as sureties or guarantors. Customs was free to pursue its claim against the surety under its Customs bond.

Customs' denial of the debtor's protest of a pre-petition duty assessment was held not to violate the automatic stay in another of the decisions in *In re Bousa, Inc*.[60] The importer attempted to avoid a statute of limitations defense by contending that Customs' protest denial was null and void because it violated the automatic stay. The importer argued that Customs' action constituted the continuation "of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy] case," which is enjoined by Section 362(a) of the Bankruptcy Code. However, the district court found that the stay only applied to claims against the debtor and not to claims the debtor had brought. Not only was the denial of the protest not an action to "collect, recover or offset" a debt, but it also did not threaten to reduce the assets available to the debtor. The court ruled that the denial of the protest was merely an adverse determination on the debtor's efforts to alter its preexisting obligation.

In another case, an importer filed for bankruptcy in the midst of a patent infringement investigation by the International Trade Commission. The importer then asked the bankruptcy court to enjoin the investigation on the basis it had been initiated at the request of a private party, so the requested injunction would not actually be a restraint upon the federal government. The bankruptcy court held that the investigation was subject to the automatic stay, but was reversed on appeal by the district court, which concluded that the International Trade Commission's investigation fit squarely within the police and regulatory power exception to the automatic stay in Section 362(b)(4).[61]

BANKRUPTCY IMPACT ON THIRD PARTIES

If an importer is unable to pay its Customs duties, then Customs often seeks

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[59] 177 F. Supp. 2d 1313 (Ct. Intl Trade 2001).

[60] No. 93-4492 (S.D.N.Y. May 17, 2005).

[61] *International Trade Commission v. Jaffe*, 433 B.R. 538 (E.D. Va. 2010).

to collect them from various third parties. These could include sureties, customs brokers, insiders and successors in interest. An importer's bankruptcy also affects the rights of these other parties in various respects.

Treatment of Sureties' Claims for Indemnification

Faced with a bankrupt importer unable to pay its Customs duties, Customs typically looks first to the surety that issued its Customs bond for payment. To the extent that the surety pays out on its bond, it would have a claim back against the debtor for indemnification or reimbursement. Until it has made payment to Customs, the surety's right to payment from the debtor would be merely contingent and unliquidated, but it is still considered to be a "claim" as defined by Section 101(5) of the Bankruptcy Code.

It is common in bankruptcy cases to fix a date by which proofs of claim against the debtor must be filed. If a claim is not timely filed, it is subject to disallowance under Section 502(b)(9) of the Bankruptcy Code. Sureties that have not yet incurred actual liability should file contingent proofs of claim identifying the nature of their claims, even though the claims cannot yet be quantified. Once the liability amounts become fixed, the sureties can amend their proofs of claim.

Despite the requirement for a surety or other entity that is liable with the debtor to file a proof of claim in order to preserve its right to assert its claim for indemnification or contribution, such contingent and unliquidated claims are not allowable pursuant to Section 502(e)(1) of the Bankruptcy Code. Such a claim could become allowable in the future once the indemnification amount becomes fixed and no longer contingent, as provided in Section 502(e)(2). Where the time required to liquidate a contingent or unliquidated claim would unduly delay administration of the bankruptcy case, the claim can be estimated for certain specific purposes, as contemplated under Section 502(c). A typical use of claim estimation is to permit claims not yet allowed to vote in estimated amounts on a Chapter 11 plan.

Customs Brokers

Importers typically retain an outside customs broker to convert their commercial transactions into Customs declarations. It is generally the customs broker who prepares the entry documents, calculates the estimate of the duties owed, and pays to Customs the estimated duties on the importer's behalf. Because the broker holds funds for the benefit of the United States, the broker must be licensed by Customs. Among other rights granted to a customs broker is the right to act as the importer of record of the goods, as agent for the ultimate consignee. The unique position of the broker acting both as agent of its principal and licensee of the United States confers on it special rights (e.g.,

the right to make entry on its principal's behalf) as well as unique risks.

The bankruptcy issues arising from the importer-government-broker relationship usually fall into two categories. The first category involves the rights of a broker who has advanced Customs duties on its principal's behalf where the principal files bankruptcy before repaying the broker for the duties advanced. Is the broker merely a general unsecured creditor, or does it assume the priority that the government would have had if the broker not advanced the duties?

The courts historically held that a broker is only a general creditor that assumes no special status because it paid the debt to the government.[62] Customs enacted a regulation purporting to change the broker's status.[63] This provides that "[t]o the extent that a broker or a surety pays duties on behalf of an importer which files for bankruptcy protection, the broker or surety shall be entitled to assume the priority status of Customs . . . for that portion of Customs claim which the surety or broker has paid."

However, this regulation directly conflicts with Bankruptcy Code Section 507(d), which provides that when an entity is subrogated to the rights of a creditor holding a claim that is otherwise entitled to priority, the entity does not succeed to such creditor's priority rights.[64] Courts considering this conflict have held that the assignment of a Customs claim under this Customs regulation cannot circumvent Section 507(d). In *In re Chalk Line Mfg.*,[65] the court held that the rights of the broker were really those of a subrogee and that Customs exceeded its authority in enacting this regulation that attempts to treat the paying entity as an assignee rather than a subrogee, because the Bankruptcy Code already deals directly with the rights of a subrogee of such a claim in Section 507(d). Therefore, the broker was not entitled to priority status for a claim it had paid and supposedly been "assigned" by Customs under 19 CFR § 141.1.[66]

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[62] *R. J. Saunders Co. Inc. v. Donald Vincent,* 309 F.2d 65 (2d Cir. 1962); *see also Top Form Brassiere v. United States,* 342 F. Supp. 1167 (Ct. Int'l Trade 1972).

[63] 19 C.F.R. § 141.1.

[64] Section 507(d) provides: "An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(1), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection." 11 U.S.C. § 507(d).

[65] 181 B.R. 605 (Bankr. N.D. Ala. 1995).

[66] *Accord In re Brickel Assocs., Inc.*, 170 B.R. 140, 141, 143 (Bankr. W.D. Wis. 1994) (same result and essentially the same analysis). *See also In re Woerner*, 19 B.R. 708, 712 (Bankr. D. Kan. 1982) (holding that assignment of governmental creditor's claim to co-obligor was actually subrogation subject to § 507(d)).

However, Section 507(d) does not strip a subrogee of all of a creditor's rights—a subrogee succeeds to the creditor's claim and may be able to assert any rights held by the creditor to seek nondischargeability of the debt. Section 507(d) also does not refer to subrogation involving administrative expense claims allowed under § 503(b), which would be entitled to priority under Section 507(a)(2).[67] Therefore, a subrogee should be able to obtain administrative expense status for post-petition duties it pays as well as pursue any rights to challenge the dischargeability of any portion of its claim based on pre-petition duties.

The second category of customs broker issues is the logical converse of the first one. What are the rights of an importer that has advanced funds to its broker who declares bankruptcy before paying the duties to the United States? Can the importer seek relief from paying a second time on the grounds that the broker, as a licensee of the United States, is the *de facto* or *de jure* agent of the United States so that the importer's payment to the broker is deemed a payment to the United States? In *United States v. Federal Insurance Company and Cometals, Inc.*,[68] an importer of metal products advanced a significant sum of money to its customs broker to pay estimated duties on a shipment of merchandise. The customs broker failed to use those funds to pay the estimated duties. Shortly thereafter, the broker filed for bankruptcy. The Customs regulations do not require a customs broker to segregate funds advanced to it for the payment of duties, and the broker had permissibly comingled the advance of Customs duties with its other accounts.

The importer contended that its payment to the broker, who was both a licensee of the United States and an agent of the importer (thus holding conflicting allegiances), was a *de facto* payment to the United States. The CIT held that the importer was absolved of further payment obligations, but its ruling was based on the narrow grounds that shortly before the bankruptcy Customs had audited the broker, whose precarious financial position was obvious. This shifted to Customs some burden to act.[69] The CIT imputed to Customs an obligation to warn the importer, and Customs' failure to warn equitably estopped it from asserting a right of recovery of the unpaid duties.[70] However, the U.S. Court of Appeals for the Federal Circuit reversed this ruling on appeal. It both dismissed any Customs obligation to warn and noted that

[67] *See In re Trasks' Charolais*, 84 B.R. 646, 651–2 (Bankr. D.S.D. 1988) (dealing with county tax claims).

[68] 805 F.2d 1012 (Fed. Cir. 1986).

[69] 605 F. Supp. 298, 299-300, 9 C.I.T. 124 (Ct. Int'l Trade 1985).

[70] 605 F. Supp. at 303.

under the Customs regulations, the importer had the right to draw a separate check payable to Customs, effectively assuming the risk of non-payment.[71]

Liability of Officers, Directors, and Shareholders

Where Customs is not able to fully collect duties owed from a bankrupt importer or its surety, it may attempt to collect unpaid duties from the importer's officers, directors and shareholders in certain circumstances. Although Congress has not provided Customs with enhanced power to pierce the corporate veil, Customs recently succeeded in imposing personal liability for unpaid duties and penalties under egregious circumstances. In *United States v. Trek Leather, Inc.*,[72] the president and sole shareholder of an importer was found jointly liable along with his company for both duties and penalties under the Customs penalty statute. The imposition of personal liability was based on the grossly negligent actions taken personally by the owner/president that violated the statute. The decision specifically notes that the court did not pierce the corporate veil to find the owner/president liable.[73]

Successor Liability for Customs Claims

Customs' efforts to collect unpaid duties from third parties include taking a more aggressive approach towards imposing successor liability. A typical situation where this could arise is where an importer facing large Customs liability sells its business, whether as a going concern or on a liquidation basis.

Customs has no enhanced statutory authority to impose successor liability for unpaid duties. Instead, the CIT has made clear that successor liability is based on applicable state or federal common law standards, which typically find a corporate successor to be "responsible for its predecessor's debts only if (1) there is an express or implied agreement to assume past debts, (2) the change in corporate form constitutes a *de facto* merger, (3) the successor is a mere continuation of its predecessor, or (4) the change in corporate form was motivated by the intent to defraud creditors."[74]

Similarly, in *United States v. Adaptive Microsystems, LLC, et al.*,[75] Customs asserted claims for unpaid duties and penalties against the purchaser of the

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[71] 805 F. 2d. at 1016.

[72] 767 F.3d 1288 (Fed. Cir. 2014) (en banc), *cert. denied sub nom. Shadapuri v. United States,* 135 S. Ct. 2350 (2015).

[73] *Id*. at 1299.

[74] *United States v. Ataka America, Inc.*, 826 F. Supp. 495, 17 C.I.T. 598 (Ct. Int'l Trade 1993).

[75] 914 F. Supp. 2d 1331 (Ct. Int'l Trade 2013).

assets of the importer. The importer had been liquidated in a state court receivership proceeding equivalent to a Chapter 7 bankruptcy. The purchaser's executive vice president had served in the same position with the former company, and he was also an owner of its parent entity. The CIT applied the law of Wisconsin, the debtor's state of organization, to resolve the successor liability issue.[76]

A more recent example is *United States v. CTS Holding, LLC*,[77] in which Customs sought to impose successor liability upon the purchaser of the business of a defunct importer. The CIT denied the purchaser's summary judgment motion because the facts indicated substantial overlap between the business and management of the entities. The court found sufficient factual issues requiring a trial regarding whether the purchaser was a "mere continuation" of the importer and thereby liable for the duties and penalties assessed against it. The CIT ruled it did not have to decide whether to apply Michigan law or federal common law because they have similar standards for successor liability and would result in the same outcome.

A party considering acquiring the assets of a business that is facing substantial liability to Customs may want to consider requiring the seller to file a Chapter 11 proceeding and seeking court approval for the sale under Section 363 of the Bankruptcy Code. Section 363(f) of the Bankruptcy Code permits a debtor's assets to be sold free and clear of interests in those assets, including liens and claims.[78] Bankruptcy law does not preclude an entity controlled by insiders of the debtor from becoming the purchaser at such a sale. Section 363 of the Bankruptcy Code would appear to provide substantial protection against successor liability claims arising from a sale of the business, but that protection may not be absolute. In addition, court approval of such a sale is generally premised on a full and fair opportunity for competing offers for the assets from other parties.

CONCLUSION

U.S. companies looking to import goods, particularly, but not exclusively, from China, should examine thoroughly, and as early as possible, whether the goods they intend to buy may be the subject to high assessments and could trigger a penalty assessment. As rates of ordinary duties decline, the likelihood that an assessment of such duties will create a substantial risk may not be great.

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[76] *Id.* at 1337.

[77] No. 12-00327 (Ct. Int'l Trade June 30, 2015).

[78] *See*, *e.g., In re Trans World Airlines, Inc*., 322 F.3d 283 (3d Cir. 2003) (purchaser not liable for claims of seller's employees and claim of federal agency against seller).

But the impact of retrospective assessment of special antidumping and countervailing duties, coupled with the multiplying effect of the enforcement statutes, creates a substantial risk to virtually every importer. As identified above, an antidumping or countervailing duty that is not declared and paid, even if only negligently overlooked, can put an entire corporation, and in some cases its officers and directors and others, at risk of bankruptcy. The earlier in the purchase process that these risks are addressed, the greater is the likelihood that fatal corporate errors can be avoided.

If substantial Customs duties drive an importer into bankruptcy, the impact of the bankruptcy will affect its dealings with Customs and other parties in various ways. Bankruptcy may provide certain benefits to an importer, such as the ability to contest the duties in the Bankruptcy Court without first paying the amount in question. However, Customs may be able to exert substantial leverage over a Chapter 11 reorganization through its right to full payment of duties entitled to priority. Notwithstanding a bankruptcy filing, Customs retains its rights against other parties, including sureties and insiders. The complexities of dealing with both Customs and bankruptcy law require the advice of experienced professionals to help navigate through the many obstacles.