Litigation, Business, International Trade, and Transportation Law Newsletter

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UPS beats up on CBP in court...again!

In A Few Good Men, Demi Moore played an attorney defending two marines against criminal charges. When testimony was not going her way, she objected, and the judge overruled her objection. She then "strenuously" objected, was overruled.

and then

asked that

the judge to reconsider his ruling, which he, of course, did not do. She was Sisyphus in fast motion, futilely pushing up the same hill and before the same arbiter, and her co-

counsel castigated her for her persistence.

It is hard to convince anyone they are wrong, especially judges. We lawyers (judges are lawyers) are a haughty bunch by training and disposition. Surrendering a centimeter to the other side diminishes us and our clients. For a court, the loss of face can be devastating. Revising a previous ruling suggests the possibility of inattention to detail or flouting of the law. Rather than self-flagellate, judges and parties tend to rely on the speculative system of appeals to make the necessary adjustments and balance the scales of justice.

The Court of International Trade (CIT) rejected the US Government's request for the court to reconsider its judgment in favor of UPS, the defendant. The Government has long tried to collect a \$75,000 penalty against UPS for misclassifying imported items and for not

exercising "reasonable supervision and control" over its customs business as required by 19 USC 1641(b)(4) and 19 CFR 111.1. Previously, the Court of International Trade and, upon the appeal, the Court of Appeals for the Federal Circuit both agreed that UPS failed to

UPS still won (as it now stands) because the Government (specifically the CBP FP&F officer) failed to testify in the original trial that he considered all ten factors under the definition of "reasonable supervision and control."

properly classify the items.

See 19 CFR 111.1. The CIT recently rejected the Government's request to reopen the trial to introduce the "ten factors" testimony and to reconsider the judgment it previously entered in UPS's favor. The CIT refused to concede that it had committed "multiple and manifest errors" as alleged by the Government.

Although UPS won this latest skirmish, one of the most important issues to customs brokers remains unsettled in this prolonged litigation, namely whether CBP can penalize brokers beyond \$30,000 for multiple violations under 19 CFR 111.91.

One certainty is that from now on, CBP will regurgitate the ten factors each time it penalizes a customs broker. FP&F officers now have a lot more hoops to jump through.

For the curious, here are the ten factors under 19 CFR 111.1:

1. the training required of employees of the broker;

(continued on page 3)

Can An Importer Protest Antidumping Duties It Paid If US CBP Suspends Liquidation?

Here is the problem: If filing a protest is the only way an importer can get back any duties it thinks it was wrongly forced to pay US CBP, and if an importer can only file a protest after liquidation, how does an importer get back the antidumping duties it paid if US CBP has not liquidated the entries?



The Government may suspend liquidation of entries if there is an ongoing administrative review of the relevant antidumping and countervailing duty orders. Thus, importers may not file a protest with US CBP to collect the antidumping duties the importers already paid as long as there is a suspension of liquidation. Once the suspension is over and the entry has been liquidated, then the importer can file its protest to get a refund. In the alternative, importers may seek review of antidumping or countervailing duties by requesting a scope ruling from the Department of Commerce. If the Department of Commerce concludes that the imported merchandise is not within the scope of the antidumping or countervailing duty order, Commerce will order US CBP to refund any cash deposits paid by the importer. If the Department of Commerce concludes that the imported merchandise is within the scope of the relevant order, the importer may seek review of that decision in the Court of International Trade.

Broker Boot Camp comes to Manhattan!

August 2-5

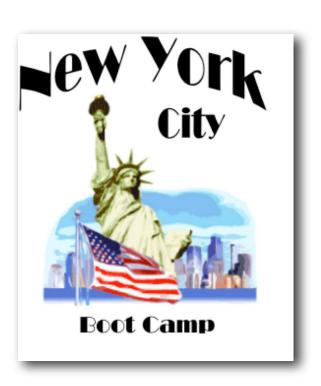
Start spreading the news, the Best Customs Broker Study Course is coming to New York City from August 2-5.

The boot camp will be held in trendy lower Manhattan, close to the theater district. The boot camp's address is 71 West 23rd Street, Suite 515.

Price includes: books and materials, online material, weekly tutoring sessions, guaranteed results, personalized homework, boot camps, and the most respected review course around (we have a 94% pass rate).

Broker Course boot camps also held in Dallas and Los Angeles.

To find out more, go to www.bestcustomsbrokercourse.com or contact us at info@bestcustomsbrokercourse.com or 214-720-7720, ext. 1.



(continued from page 1)

2. the issuance of written instructions and guidelines to employees of the broker;

- 3. the volume and type of business of the broker
- 4. the reject rate for the various customs transactions;
- 5. the maintenance of current editions of CBP
 Regulations, the Harmonized Tariff Schedule of the
 United States, and CBP issuances;
- the availability of an individually licensed broker for necessary consultation with employees of the broker;
- the frequency of supervisory visits of an individually licensed broker to another office of the broker that does not have a resident individually licensed broker;
- the frequency of audits and reviews by an individually licensed broker of the customs transactions handled by employees of the broker;
- the extent to which the individually licensed broker who qualifies the district permit is involved in the operation of the brokerage;
- 10. any circumstance which indicates that an individually licensed broker has a real interest in the operations of a broker.

CBP can exclude merchandise that violates someone's intellectual property, even if the merchandise belongs to an importer in bankruptcy

You pour money, sweat, and tears into developing a nifty new technology. You want to make sure no one steals your hard work, so you file for and receive a patent from the US Government. You find out that one of your competitors is infringing your patent. You file a complaint with the International Trade Commission (ITC) under 19 USC § 1337(a)(1)(B). That section makes unlawful "[t]he importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that ... infringe a valid and enforceable United States patent." The ITC finds merit in your complaint and orders a formal investigation. You are confident that the ITC will order (upon the President's approval) US Customs and Border Protection

(CBP) to exclude the infringing merchandise. Then your competitor (the company importing the infringing merchandise) files for bankruptcy. You are stunned when the bankruptcy judge orders the ITC to immediately stop its investigation. While the automatic stay in bankruptcy stops collections activities against the bankrupt debtor, it normally cannot stop federal agencies from doing their job. However, this bankruptcy judge views the ITC investigation as different because it was initiated at the request of a private party, so it was not really the federal government that was being restrained.



Do you think the bankruptcy judge was correct?

The federal court from the Eastern District of Virginia did not in ITC v. Jaffe, a decision rendered on June 28, 2010. The court concluded that the bankruptcy judge made a mistake. The automatic stay in bankruptcy could not prevent the ITC from continuing to investigate the bankrupt debtor. While the patent owner filed the complaint with the ITC, it was the ITC that initiated the investigation pursuant to its police and regulatory power. That the patent holder stood to inherit the bond posted by the infringing importer did not mean the patent holder was a creditor, the court reasoned.

The lesson here is that bankruptcy can give companies and individuals valuable breathing room and keep bill collectors at bay, but it does not work to prevent the ITC from investigating whether the bankrupt debtor is violating someone's intellectual property rights and it does not prevent CBP from excluding infringing merchandise.

Webinar: Protecting Your Intellectual Property at the U.S. Border, September 9, 2010. \$99 per person. Register at www.exportimportlaw.com.



Registration: \$495 per person. You may register and see the topics to be covered at www.globaltrainingcenter.com or http://bit.ly/cStCKG.

Hotels Nearby: http://bit.ly/9X9P5U

Deadline: You must register and pay by July 22, 2010.

Questions 1-800-860-5030 or contact@globaltrainingcenter.com.

NAFTA Rules of Origin Seminar New York, New York

August 6, 2010 (Friday) 8:30 am - 4 pm

NYC Seminar and Conference Center 71 West 23rd Street, Suite 515 New York, New York 10010

C-TPAT's Enforcement and Appeal Process

(excerpted from CBP)

C-TPAT members may be suspended or removed from the program for several reasons including, but not limited to, the following: narcotics seizures or other security related incidents such as human smuggling; failed validations or lack of compliance with C-TPAT requirements regarding supply chain or other security measures; failure to provide required information or filing false or misleading information; or actions or inaction that shows a lack of commitment to the program.

The C-TPAT Headquarters (HQ) Program Director makes the final decision to suspend or remove a member based on all available information, including reports and recommendations made by C-TPAT Field Managers. In certain aggravated circumstances companies may be immediately removed from the program, for example, when they are found to have provided false information, have demonstrated inadequate security, or have demonstrated a flagrant disregard for the program's requirements. In other instances, which may not be as egregious, but are nonetheless significant, a company may be suspended from C-TPAT with an opportunity to resume membership once it comes into compliance with program requirements.

Once a security related incident or other program violation occurs, C-TPAT officials determine the appropriate next steps on a case-by-case basis. These steps normally include suspending benefits such as FAST lane access and allowances in the risk assessment process, as well as conducting a post incident analysis to determine the circumstances that led to the violation.

G-TPAT

To be reinstated into the program after an incident or violation, the company must agree to a corrective action plan which identifies specific objectives and time frames within which those objectives should be reached. In addition, the company must consent to un-announced visits by C-TPAT staff to monitor progress. In the ca

must consent to un-announced visits by C-TPAT staff to monitor progress. In the case of a failed validation, the company must demonstrate that it has successfully addressed all vulnerabilities and complied with all other requirements before being fully reinstated.

Companies that are suspended or removed may appeal this decision to CBP HQ. Appeals should include all relevant information which demonstrates how the company has addressed the issues which resulted in the suspension or removal, or provide corrected factual information in the case where a company claims that a mistake of fact or other misunderstanding has resulted in the suspension or removal. CBP will decide the appeal in a timely fashion.

The Oil Hits The Fan

If they only made GPS for legal compliance

by Oscar Gonzalez, Attorney



So you're driving your family from Texas to visit the new Harry Potter theme park in Orlando. You're under the gun. You must complete the long drive before tomorrow afternoon because you made special reservations and plans for your daughter to spend her birthday at the park. You can't be late. But you've never been to Florida. "How hard can it be to find this park?" you think to yourself, confident that your advanced, albeit largely untested, driving and navigation skills will get you there in time and without a hitch. But your spouse keeps bugging you to buy a map "just in case" (you draw the line at GPS because you view the technology as undignified and wimpy). You give in to her demand (you hate it when she's

completely correct) and, while gassing up the car, you rifle through the collection of maps at the local convenience store. This is Texas, so the store does not have an Orlando map, but it does have a map to Plano, Texas, a city of comparable population and geographic configuration. You plop down \$10.27 (includes tax) and stick the map in the glove compartment. The drive proves more challenging than you anticipated, and you need to make up several hours that you lost somewhere along the Gulf Coast. You finally reach the Florida border, but there are no road signs to the Harry Potter theme park or Orlando. You are fast approaching a fork in the road. You're probably doomed anyway, but take the wrong road and your fate is sealed. Everyone in the car starts to panic, so your wife pulls out the new map from the glove compartment, opens it and asks "Honey, where's the map to Orlando?" [Disclaimer: the story you just read is completely fictional, except the part about the new Harry Potter park, which rocks from all accounts].

I know what you are thinking. There isn't an idiot on earth that would buy a map to a city he/she is not visiting. I respectfully disagree. Lawyers see this kind of thing happen every day, not with cartography, but with compliance manuals and procedures. Manuals and procedures are maps of sorts that lead companies to legal compliance. You would think that their importance would be more widely recognized. Companies regularly buy off-the-shelf compliance templates, "borrow" some other company's manual, or fail to update a good compliance manual that may have been correct and helpful in the distant past.

While we are on the subject of the Gulf Coast, let's talk about BP's oil spill and the importance of good compliance policies.

BP's emergency cleanup plan instructs its employees to look out for walruses, sea otters, sea lions and seals during oil spills in the Gulf of Mexico. The problem is that none of these mammals live in the Gulf (I guess we should all be thankful that BP did not also list orcas, penguins, and flying reindeer). BP's emergency plan also lists the contact information for an ocean biologist who has been dead for five years, and unless BP or Kevin Costner know a reputable medium, that information is likely to be of little value in cleaning up the spill or mitigating BP's legal exposure. It is not that BP is exceptionally bad when it comes to its emergency procedures, just equally bad. The news services are reporting that BP copied verbatim its emergency cleanup plan from other major companies.

I cannot predict whether BP will be indicted for its misdeeds and mistakes in the Gulf. However, I can predict with some confidence that if BP is indicted and convicted, the Government will trot out BP's shoddy emergency cleanup plan to convince the judge to inflict the most severe punishment possible.

BP's oil spill is a nightmare that keeps on giving, but it may be possible to find an untainted, healthy anemone in all the oily muck. Maybe companies will more often evaluate their compliance procedures before emergencies pop up. Maybe it will finally sink in that due diligence requires that they DO diligence.

If your compliance procedures are not customized to fit your company's unique needs and culture, and if they are not updated regularly to accommodate rapidly evolving laws, technology, and changes within a company, then they are as helpful as a Texas map in Florida.

Do Gooder Corner: National Center for Refugee and Immigrant Children

[note: we happily announce that this month one of our very own lawyers, Oscar Gonzalez, helped out this dogooder do good].

National Children's Center

An Immigration Law Novice Beats the Odds to Reunite a Child
from El Salvador with Her Family in America

"There is nothing I can do to help your case." The immigration attorney barely finished his sentence when the world came crashing down for 16-year-old Deysi Torres. She did not have to speak English to know what he meant—the lawyer's tone and grim facial expression clearly conveyed the hopelessness of her situation.

Originally from San Alejo, El Salvador, Deysi is one of thousands of people from Latin America who travel thousands of miles in search of a better life in the United States. Roughly five percent of these migrants are underage children like Deysi was when she left her home country.

When Deysi was five years old her mother became ill and died. Never having known their father, Deysi and her siblings were raised by their grandparents. Growing up, Deysi had big dreams of becoming a nurse and living with her uncle in America. "I remember always talking to my sister about going to stay with our uncle," said Deysi, whose aging grandparents did not have the means to provide for their young grandchildren. By the time she turned 16, Deysi was determined to go after those childhood dreams. This meant making the treacherous journey by bus and foot through El Salvador, Guatemala, Mexico, and across the U.S. border to the City of Anna, Texas, where her uncle and his family live. Aware of their limited ability to take care of their grandchildren, Deysi's grandparents had no choice but to allow her to leave the country in search of a better future in America.

For many unaccompanied children, menaced by predatory smugglers and corrupt police, this dangerous journey ends tragically. Thousands are stopped by authorities as they try to cross the North American border and are taken to detention centers before being deported. This was the case with Deysi. She had been travelling by bus and foot for close to a month before U.S. Immigration and Customs Enforcement (ICE) officers caught up with her and sent her to an immigration detention center for minors in Miami. "I was so tired from walking for days, I was almost relieved," she said of the encounter with ICE officers. "I was dirty and stinky. I hadn't showered in days."

Many child migrants end up spending months in detention centers, tangled up in the bureaucratic legal process. "I was confused and nervous. I didn't know if the immigration people were good or bad. I didn't know what to do or think," said Deysi, recalling the month she spent at a facility in Miami. Fortunately, she was eventually able to stay with her uncle in Texas while awaiting immigration court proceedings.

She and her uncle tried everything they could to find a way for her to obtain legal status in the United States—a process made that much more difficult by their inability to speak English. But they had a difficult time finding an attorney to represent them and were continuously told that there was nothing anyone could do to keep Deysi in the United States legally. By a lucky twist of

fate (or "God's hand," as Deysi put it) she came across a flyer from the National Center for Refugee and Immigrant Children (NCRIC) and called for help. The organization—a division of the U.S. Committee for Refugees and Immigrants (USCRI) dedicated to providing pro bono legal services for unaccompanied immigrant children—assigned Deysi's case to Dallas-based attorney Oscar Gonzalez.

"I took the case after reading news stories about the warehousing of immigrant children," said Oscar, a founding member of Gonzalez Rolon Valdespino and Rodriguez, LLC (GRVR), a law firm specializing in international trade. Even though his

experience in immigration law was admittedly limited, Oscar signed on to the case because he wanted to ensure that Deysi can remain in the United States with her family.



Deysi Torres, now 20, lives with her aunt, uncle, and their four children in Texas.

Over the course of three years, Oscar would spend hundreds of hours working on Deysi's case, guided along the way by NCRIC's in-house immigration law experts. "The good will created by taking on pro bono projects is much more pronounced in a small firm. It permeates the whole place with a sense of accomplishment, or a feeling that we changed the world positively," said Oscar. "But there were other angels along the way that helped, including translators, health practitioners, teachers, and school staff."

The hard work paid off: Deysi, now 20, received her green card in October 2009. She continues to live in Texas with her aunt and uncle and their four children. By now she has graduated from high school and speaks fluent English. Deysi is bursting with pride when she talks about her brother back in El Salvador who has recently graduated from college with a degree in engineering. She too is well on her way to making her childhood dreams a reality: she is currently applying to nursing schools. "I still want to be a nurse," she said. "I like to help people."

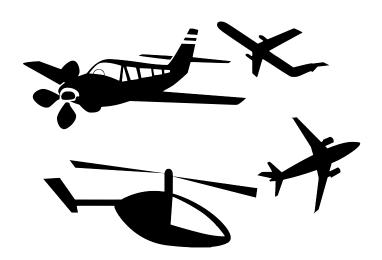
Oscar describes Deysi as a quiet young woman with a soft smile and trusting eyes. "Deysi's gratitude disarmed me and almost brought me to tears after each successive step in her case," he said. "It is a true honor to be invited to the beginning of this young woman's life in the United States."

Help a child like Deysi today. Make a financial contribution of as much or as little as you can afford at http://bit.ly/bazmT0

National Center for Refugee and Immigrant Children http://www.refugees.org/

Import Compliance, Logistics Management, and Inventory Control for Aviation/Aerospace Companies Webinar

September 13, 2010, Monday 11 am - 1 pm Central



Importing Aviation Parts

Classification, Value, Procedures, and Focused Assessments

Vincent A. Enea. Mr. Enea is an import compliance consultant. He is the former trade compliance manager for Texas Aero Engine Services LLC, a joint venture between American Airlines and Rolls-Royce, and has extensive experience in classifying aviation parts and performing the due diligence necessary under federal import law.

Intro to Customs and the Customs Broker's Role

What importers of aviation-specific items need to know

Marva E. Washburn. Ms. Washburn is the Vice President of Mach1 Global Trade Services, LLC. She is a licensed customs broker with extensive experience in all facets of import compliance.

Logistics, Warehouse, and Purchase/Inventory Controls for Aviation Companies

Lesson from the Pit

Jerry L. Coles. Mr. Coles is a Supply Chain Specialist and is president of Coles Supply Chain Consulting, LLC. He is formerly the Managing Director of Customs, Logistics and Hazardous Materials with previous titles in Purchasing/Inventory Management in his 20 years at American Airlines. He also was Manager of Warranty and Customer Service for Douglas Aircraft and has extensive experience working for companies to comply with regulations from the Department of Transportation (DOT), the Transportation and Security Administration (TSA), Customs Border Protection (CBP), the Federal Aviation Administration (FAA) and both domestic and International Suppliers.

Duty Savings under HTS 9801 and 9802

US goods returned, articles assembled abroad with US components and Repairs

Michael Erfe. Mr. Erfe is an associate lawyer with GRVR Attorneys and a licensed customs broker, who represents clients in the aviation and aerospace industry. He is well-versed in a variety of duty saving strategies.

Fines, Penalties, and Forfeitures

Avoiding and Getting Out of Trouble with CBP

Ruth R. Rodriguez. Ms. Rodriguez is a founding member of GRVR Attorneys. She represents airlines and aerospace companies and assists them in complying with US import laws. She also gets them out of trouble with government services.

Registration: \$49 (forty nine dollars). Free for clients (former, current, and future) and currently-enrolled students of our customs broker exam review course. Register by clicking on this graphic to register or go to www.exportimportlaw.com/calendar or contact us at (214) 720-7720, extension 1. This is approved by the NCBFAA for 2.0 CSS credits.





Calendar

Seminar NAFTA Rules of Origin (New York, NY)

August 6, 2010 8:30 am - 4:00 pm Register by calling 800-860-5030

July August September O30 October November December

Seminar Import Audits

August 13, 2010 Houston, Texas

Register by calling: 800-860-5030

Webinar

Protecting Your Intellectual Property at the U.S. Border,

September 9, 2010

11 am - 12 noon Central

Cost: \$99

Register at www.exportimportlaw.com or info@exportimportlaw.com

Webinar

Aviation Industry: Import and Logistics Compliance

September 13, 2010

Cost: \$49

Register at www.exportimportlaw.com or info@exportimportlaw.com

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- glowing testimonials
- 50% discount for switching from another broker exam prep course
- boot camps in New York, NY (Aug 2-5), Dallas (Sept 20-23), and Los Angeles (March 14-17, 2011)
- Special prices for former, current, and future clients

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For two decades, GRVR has delivered excellent legal representation to our clients. With offices in six cities, four countries, and three continents, we can fill your legal needs regardless of your location.

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