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False Claims Act seen as potential tool to enforce tariffs

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While their form has been in flux, tariffs will seemingly be a fact of life in the second Trump administration.

As they take effect, the incentive to try to evade them will follow. Eventually, attorneys agree, that will mean a new wave of "reverse" False Claims Act cases: Instead of taking too much from the government, the alleged violation will be giving too little.

Indeed, to the extent that there are tea leaves to be read, the second Trump administration may be gearing up to use the False Claims Act even more aggressively than it had in its first term.

Among the clues are remarks by Deputy Assistant Attorney General Michael Granston in a "fireside chat" at a recent conference focused on the False Claims Act. The comments were perceived as extending an open invitation to relators' attorneys to bring FCA qui tam actions on behalf of whistleblowers to combat customs duty evasion.

Perhaps an even stronger signal — though not immediately recognizable as related — came from an executive order the president issued on his second day in office.

The order titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunities" targets diversity, equity and inclusion policies. It requires the head of each federal agency to include in every contract or grant award a term requiring the other party or grant recipient to agree that its compliance in all respects with all applicable federal anti-discrimination laws is "material to the government's payment decisions."

The False Claims Act figures to be a primary enforcement mechanism of that provision. As the theory goes, if the government is relishing the utility of the False Claims Act to pursue that policy goal, the same mindset will extend to the justifications for imposing the tariffs, which include stopping fentanyl or migrants from entering the country and boosting companies that produce steel and aluminum domestically.

There is, however, at least some uncertainty about the legal landscape. Appeals are pending over both the government's use of whistleblowers in FCA cases writ large and the use of the FCA in the customs fraud context specifically.

Nonetheless, attorneys with experience on both sides of False Claims Act cases believe it will remain a part of the tariff enforcement environment for the foreseeable future.

"The FCA has been around since 1863," Roanoke attorney Michael J. Finney noted. It is a broad and flexible statute and applies to false or fraudulent claims made to the United States in almost all contexts. This means that, as government practices or requirements change, or even [in terms of] enforcement policies, the FCA can fit those new circumstances."

TARIFF ENFORCEMENT

As tariffs from the Trump administration take shape, any increase in False Claims Act actions "will take a little bit

of time to percolate their way through," noted Vienna attorney Zachary Kitts.

Another reason FCA cases might be slow to materialize is because customs fraud can be a complex area in terms of what tariffs apply when and what exceptions might apply, said whistleblower attorney Bruce C. Judge of Boston.

"While overall, I think this idea that there will be an increased emphasis on making sure people are reporting and paying the correct tariffs [is right], there's a fair amount of complexity within that that's going to play a part in this as well," he said.

Kitts said the reason the statute is "so powerful" is that it enables individuals with firsthand knowledge to file a case, such as employees of importers that make inaccurate declarations on CBP Form 7501 to avoid import costs.

"It's important to have that person on the inside, because otherwise it can be nearly impossible for the [U.S. Customs and Border Protection] agents to detect fraud," Kitts said.

Washington, D.C., attorney Adam R. Tarosky told Lawyers Weekly that the False Claims Act had been in heavy use even prior to Trump's return to the Oval Office, notably in combatting fraud in COVID-19 relief programs.

"We haven't really gotten indications from this administration that they're going to back away from cases brought by whistleblowers or back away from False Claims Act cases in general," Tarosky said.

Another way for importers to potentially circumvent tariffs is via "transshipping," in which a company may "transship" its product through a country with a free trade agreement with the United States.

"If somebody says ink pens were manufactured in France, it would be a radically different thing from them being manufactured in China," Kitts said. "How can they really prove that those pens were manufactured in France? They can't. They have to accept what the person submits."

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— Zachary Kitts, Vienna

Boston attorney B. Stepanie Siegmann said artificial intelligence is a tool that is increasingly helping detect transshipping, in addition to assistance from whistleblowers.

"We have so many imports and exports going in and out of the United States every day, and a human can't read all those entries – it's a voluminous task," Siegmann said.

QUI TAM PROVISION

Courts in recent years have taken up cases that pose the potential to alter the legal landscape surrounding False Claims Act cases.

Most notably, the U.S. District Court for the Middle District of Florida held in U.S. ex rel. Zafirov v. Florida Medical Associates, LLC, et al. that the qui tam enforcement of the FCA is unconstitutional. The qui tam provisions allow private parties to file suit on behalf of the government for the purpose of upholding the government's interest.

While Zafirov is still working its way through the appellate process, a removal of the qui tam provision would drastically alter the landscape of FCA law.

Kitts called the provision "a time-honored tradition of American law."

"I think it's pretty clear that the qui tam provision is constitutional," Kitts said.

He further pointed to a recent U.S. Supreme Court opinion, Polansky v. Executive Health Resources Inc., which gave the government broad authority to dismiss whistleblower lawsuits. Specifically, Kitts cited Justice Clarence Thomas' dissenting opinion in which he stated the qui tam provisions "have long inhabited something of a constitutional twilight zone."

"There are substantial arguments that the qui tam device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation," Thomas wrote.

In a letter to U.S. Attorney General Pam Bondi, Sen. Chuck Grassley, R-Iowa, referred to the qui tam provision as "a critical part of the FCA."

"Since the updates I authored to the qui tam provision were enacted into law, the FCA has recovered over $78 billion in taxpayer dollars and saved billions more by deterring would be fraudsters," Grassley's letter stated.

LOCAL IMPACT

An increase in False Claims Act actions related to tariffs could be especially important for Virginia lawyers.

In the Hampton Roads region, the Port of Virginia maintains one of the deepest port harbors on the East Coast and has six terminals to handle cargo from around the world.

In fiscal year 2022, the port handled a record-setting amount of units, making it one of the busiest ports on the East Coast.

With Virginia home to the port, Kitts said the bar should be aware of a potential rise in FCA claims stemming from the new tariff policies, noting there could be "a lot of action in Virginia."

"There's going to be a tremendous opportunity for qui tam lawyers and for lawyers in the Hampton Roads area to litigate these cases," Kitts said. "There's no way to tell if there will be a lot of these cases coming forward, but the Trump administration has certainly made it clear that it hopes to use the qui tam provisions of the False Claims Act to make sure people are complying with its tariff requirements."