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False Claims Act seen as key tool to enforce Trump tariffs

Kris Olson

While their form has been in flux a 25-percent surcharge on steel and aluminum imports is in, while across-the-board levies on goods from Canada and Mexico are out, at least for now tariffs will seemingly be a fact of life in the second Trump administration.

What's the story?

The False Claims Act is expected to be used as one of the main tools to combat tariff evasion in the second Trump administration, particularly with new tariffs including a 25 percent surcharge on steel and aluminum imports.

Federal authorities are increasingly using artificial intelligence tools to detect customs fraud patterns, particularly in identifying suspicious shipping routes and potential transshipping schemes. Recent cases have resulted in significant settlements, including a \$22.2 million settlement with a company headquartered in Germany, Linde GmbH.

The legal landscape for FCA enforcement faces some uncertainty, with pending appeals challenging both the constitutionality of whistleblower provisions and the use of the FCA specifically in customs fraud cases. However, attorneys believe the challenges are unlikely to significantly impact the use of the FCA in the immediate future.

As the tariffs 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.

Shape of a customs fraud case

Even though the 10 percent additional tariff on imports from China is already in place and the 25 percent tariff on steel and aluminum imports is imminent (effective March 4), a flurry of False Claims Act activity may not ensue immediately, said Gregg Shapiro of Brookline, who led FCA investigations for the Department of Justice for 16 years before leaving government four years ago to specialize in representing whistleblowers.

"It may take a while for them to develop because in order to make a viable False Claims Act case there has to be damages, and the damages won't materialize immediately," he said.

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.

Over the last couple of decades, the False Claims Act has been most frequently used to target health care fraud, with defense contracting fraud a distant second, "and then customs fraud somewhere below that," Shapiro said.

Customs fraud cases can be far more black and white than other False Claims Act cases, he added.

"If a company just uses two sets of books, one to reflect the real price that they paid for material that they imported and another to reflect the price that they reported to customs, that's a pretty simple case," he said.

While there are simple health care fraud cases, too, most are more complicated and center on questions of whether the parties really intended to violate the law or whether they merely did not fully understand it, Shapiro said.

Still, there are more complicated customs fraud schemes, too, he said. For example, a Chinese company might "transship" its product through a country with a free trade agreement with the United States, like at least for the moment Mexico.

"Then there's a question of was the product made in Mexico or was it made in China?" Shapiro said. "That becomes a harder question to answer."

Boston attorney B. Stephanie Siegmann was the national security chief in the U.S. Attorney's Office in Massachusetts from 2018 to 2022 when the office reached a \$22.2 million settlement with Linde GmbH, a multinational corporation headquartered in Germany, and its U.S. subsidiary to resolve allegations that Linde violated the FCA by knowingly making false statements on customs declarations to avoid paying duties owed on the companies' imports. That settlement netted a whistleblower \$3.7 million.

In addition to assistance from whistleblowers, artificial intelligence is increasingly helping federal authorities detect instances of transshipping and other forms of customs fraud, she noted.

"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," she said.

Instances of possible transshipping can be more easily detected when an AI analytical tool can quickly identify that an item manufactured most frequently in, say, China is entering the U.S. purportedly from another country, Siegmann said.

Forewarned is forearmed

Siegmann also noted that engaging in transshipping for the purposes of evading responsibilities under U.S. law can have consequences beyond civil and criminal penalties under the False Claims Act.

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[S]ome of the executive orders have suggested that the False Claims Act will be one of the enforcement mechanisms that the government will use to enforce new administration priorities.

Adam R. Tarosky, Washington, D.C.

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For example, late last year, a Miami man, Hector S. Esquijerosa, admitted to having participated in a conspiracy to smuggle Chinese-made truck tires into the country by transshipping them through third countries, including Canada and Malaysia, Siegmann said. Esquijerosa had been charged with conspiracy to commit an offense against the United States.

Adam R. Tarosky, who leads his firm's national False Claims Act team, agreed. He pointed to the \$365 million Ford Motor Co. agreed to pay last March to resolve allegations that it had violated the Tariff Act of 1930 by installing sham rear seats and other temporary features to make the vans appear to be passenger vehicles instead of cargo vehicles, which were subject to a 25 percent duty rate.

But while the government may have several tools at its disposal, the False Claims Act will remain one of its most useful, Tarosky said. Even before Trump's return to the White House, the FCA had been in heavy use, most recently to combat a rash of fraud related to the government's coronavirus relief programs, with relators initiating many of those cases, he noted.

"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," he said. "In fact, some of the executive orders have

suggested that the False Claims Act will be one of the enforcement mechanisms that the government will use to enforce new administration priorities."

The DEI order is a prime example of the need to be fastidious in making statements to the government, Tarosky said.

"Even if it might seem insignificant or immaterial, the government may feel differently," he said.

The unwary could unwittingly give the government the basis of a false statement claim, Tarosky continued.

"Understanding what certifications you're making and the importance of those to the government is going to be really important," he said.

Shifting legal landscape

Hovering over the enterprise of holding tariff scofflaws accountable through the False Claims Act are some pending legal challenges that could alter the legal landscape significantly, though attorneys generally agree they do not pose an immediate threat.

Last fall, in the case *U.S. ex rel. Zafirov v. Florida Medical Associates, LLC, et al.*, U.S. District Court Judge Kathryn Kimball Mizelle in Florida, Trump's youngest judicial nominee during his first term, held that qui tam enforcement of the False Claims Act is unconstitutional. Specifically, Mizelle concluded that a relator in a Medicare fraud dispute met the definition of an "officer" of the executive branch who had been "improperly appointed" in violation of the Appointments Clause of Article II of the Constitution.

As many as three U.S. Supreme Court justices may share that view, given a dissent written by Justice Clarence Thomas and a concurrence by Justice Brett Kavanaugh, which was joined by Justice Amy Coney Barrett, in the case *U.S. ex rel. Polansky v. Executive Health Resources, Inc.*

But even if Mizelle's decision survives review at the 11th Circuit, attorneys are not overly concerned that it would be the prevailing view of the Supreme Court.

Shapiro noted that during U.S. Attorney General Pam Bondi's recent confirmation hearing, Iowa Sen. Chuck Grassley extracted from her a commitment to defend the constitutionality of the FCA, which she provided enthusiastically.

"Senator, the False Claims Act is so important," she said.

A more direct threat to using the False Claims Act specifically in the customs fraud context is an appeal that has been languishing since it was argued over a year ago in the 9th U.S. Circuit Court of Appeals, *United States ex rel. Island Indus. v. Vandewater Int'l*, Shapiro said.

In that case, the defendant is arguing that you should not be able to use the False Claims Act for customs cases, and that the exclusive remedy is for the government to bring a case in the U.S. Court of International Trade in Washington, D.C.

The 9th Circuit covers some of the biggest harbors in the United States, Shapiro said.

"If [the defense's position] becomes the law in the 9th Circuit, that would have a major negative effect on False Claims Act cases based on custom violations," Shapiro said.

But with respect to the 9th Circuit's pending decision, Judge said he takes comfort in the fact that other circuits, including most clearly the 3rd Circuit, have specifically endorsed the FCA as "exactly the right governmental response to customs fraud," allowing for not only the recoupment of money due to the government but also the prospect of treble damages and other penalties.

"What the 3rd Circuit said is this is exactly the kind of failure to pay that should be subject to False Claims Act potential liability in order to dissuade people from doing this and encourage compliance," Judge said.

Alexis S. Hamdan of Boston said she is also waiting to see whether there is an appeal filed in a Southern District of New York case in which Amazon on Jan. 3 was able to secure dismissal of allegations that it had conspired with foreign companies to import fur products into the U.S. without paying the necessary fees and tariffs.

Even though she is often on the defense side of cases, Hamdan suggested that anyone who believes the False Claims Act has a place in society to discourage ripping off the government should want to see that decision reviewed.

"I hope it is being appealed, and I hope it is reversed," she said.

---- Index References ----

Company: FORD MOTOR COMPANY; Linde GmbH

News Subject: (Crime (1CR87); Criminal Law (1CR79); Emerging Market Countries (1EM65); Fraud (1FR30); Government Litigation (1GO18); Judicial Cases & Rulings (1JU36); Legal (1LE33); Liability (1LI55); Social Issues (1SO05))

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Other Indexing: (Department of Justice; U.S. Attorney's Office; Florida Medical Associates, LLC; U.S. District Court; U.S. Supreme Court; 9th U.S. Circuit Court of Appeals, United States; U.S. Court of International Trade; Ford Motor Co.; Linde GmbH) (Trump)

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