MARK K. NEVILLE, JR.

Antidumping Duties

Status, Interest, and Liquidation Questions

A recent decision of the U.S. Court of International Trade (CIT) answered one of the many riddles surrounding the antidumping law: "When is a duty not a duty?" Answer: "When the duty is an antidumping duty." As discussed below, however, the court left open one important riddle about the customs administrative process: "When can an illegal liquidation be the basis for an obligation to pay duty on a customs entry?" Answer: "When the liquidation is not protested." The state of the law on the point as shown in the second answer beggars belief.

American Home

The title, *United States v. American Home Assurance Co.* (*American Home*),[1] with the United States as the plaintiff, indicates that this is probably a collection case involving either a penalty under 19 U.S.C. section 1592 or a collection case for an unpaid duty. The defendant's status as a surety company cinches it. The caption suggests further, even before reading a line of the opinion, that the government is seeking to collect on duties or fees and that, as in most collection cases, interest on the debt will probably be an issue.

And that is exactly what this case is all about. The government was seeking to collect unpaid antidumping duties and both statutory and equitable interest from a surety. Each party filed motions for summary judgment, in effect stating that there were no material issues of fact that were in dispute and that the case could be decided as a matter of legal principles applied to those settled facts. The government was seeking to collect on a continuous bond that the surety company had issued,[2] the terms of which left the importer and the surety company jointly and severally liable for the payment of all duties and fees owing to the government.

The government's motion was granted in part (surety liable for the debt up to the limit of its bond and also obligated to pay equitable interest) and denied in part (surety not obligated to pay statutory interest), as was the defendant's motion. The government's win was much more significant than the partial victory that the surety salvaged on the statutory *viz.* equitable interest point.

Issues

There were two principal questions that were central to *American Home.* The first was whether there was a valid and unpaid debt for duty. If that question was answered "yes," the second question was whether the surety company would be liable for interest on the debt. That question was answered "yes"—and "no"—and it is discussed first below.

Interest on Antidumping Duty

Having decided that there was valid debt in the form of an unpaid antidumping duty, for which the surety company was liable to the extent of its bond, the CIT was required to decide whether the surety also owed any interest on that debt.

Statutory interest. The court first reviewed whether the government had a statutory right to interest. The general rule on statutory interest is in 19 U.S.C. section 580, the customs statute (dating to 1799) that governs interest in suits on bonds for the recovery of duties. The text is brief: "Upon all bonds, on which suits are brought for the recov-

MARK K. NEVILLE, JR., LL.M. (International Legal Studies), NYU, is Principal of International Trade Counsellors and may be reached at mkneville@itctradelaw.com. He has served as an adjunct professor at the University of California, Berkeley's Haas School of Business and NYU's Stern School. Mr. Neville is the Journal's Customs & Trade correspondent and a member of the Board of Advisors.

ery of duties, interest shall be allowed, at the rate of 6 per centum a year, from the time when said bonds became due."

The key issue was whether antidumping duties are "duties" under the statute. Stated another way, is there a valid distinction between "normal" duties and "antidumping" duties?

The court said that this specific question was a matter of first impression. The statute has remained unchanged since its inception and there have been no previous court rulings on this point. The court focused on the point that when the statute was enacted, "normal" customs duties were the only duties known. U.S. trade law did not provide for antidumping duties until the 1921 Antidumping Act.[3] The court acknowledged that a statute's meaning might change over time, and specifically looked to the original statute's meaning and intent to determine whether it fairly and clearly includes a new concept.

The court concluded that duties collected by the government that were the subject of the 1799 legislation providing for interest were collected as a matter of revenue. Antidumping duty serves as a trade remedy for unfair trade practices, a very different purpose. Indeed, since the statute's enactment over 200 years ago, Congress, courts, and the government itself have counseled that antidumping duties are not comparable to normal customs duties in function, purpose, and character. Separate agencies administer normal duties (Customs and Border Protection (CBP)) and antidumping duties (Commerce Department). Moreover, regular customs duties are assessable on all imports of particular merchandise and are permanent unless modified by Congress, whereas antidumping duties are levied against only certain imports, are subject to administrative review annually, and terminate after five years unless Commerce and the International Trade Commission determine that revocation would lead to continuation or recurrence of dumping and material injury.

The court also noted that in an earlier case an importer had argued that, even though it was not entitled to interest on an overpaid antidumping duty under the antidumping law,[4] it was entitled to interest under 19 U.S.C. section 1505(c), contending that an antidumping duty was a "normal" duty for those purposes.[5] That court concluded that "antidumping and countervailing duties were never intended to be regular or general duties." The government had previously made the exact opposite argument on the status of antidumping duties before the Federal Circuit (safeguard duties were like special antidumping duties and both should be distinguished from normal or ordinary customs duties).[6]

The *American Home* court followed the earlier courts and concluded that Congress could not have intended antidumping duties to be duties under 19 U.S.C. section 580 and that statutory interest was not available to the government.

Equitable interest. As a separate matter, the court examined whether the government was entitled to prejudgment interest under principles of equity. According to the *American Home* court, prejudgment interest is based on the idea that it is "inequitable and unfair for the government to make an interest-free loan ... from the date of final demand to the date of judgment."

Sureties are normally liable only for duties, fees, and interest up to the bond limit.[7] If the amount of the bond (here $600,000) were to serve as a cap on liability for the surety, whether the amount paid represented the principal (here roughly $2 million), interest, or a combination was an academic question. But customs law holds that a surety might be liable for interest in excess of its bond amount. The Supreme Court stated that this liability arises from the sureties' "own default in *unjustly* withholding payment after being notified of the default of the principal."[8]

The court next considered the relevant factors in determining whether a surety's conduct has been unjust. The court rejected the surety's argument that a bad faith criterion was required, looking to a 1991 Federal Circuit opinion that stated that liability accrued if and when there was a delay in payment beyond proper notification of liability.[9] On balance, such an interpretation appears to either write the criterion "unjustly" right out of the Supreme Court holding or reduce it to a superfluity. Any delay in payment exposed the surety to a potential interest charge.

The court then balanced the equities and found no exceptional circumstances to justify not charging the surety interest, and instead found a rationale for full compensation for the government. The court said that there was some balancing in the surety's favor, since the government was

seeking only prejudgment interest from the second formal demand for payment, which was issued a year after the first demand. In its conclusion on the interest question, the court awarded prejudgment[10] as well as postjudgment interest.[11]

Obligation of Surety for Duty

And so we come to the belief-beggaring riddle of the underlying debt. Liability for duty becomes final at liquidation. The importer tenders duty initially at an estimated amount. Then at liquidation there are three possible outcomes: the importer (1) pays no additional amount because the entry is liquidated as entered; (2) receives a bill for a greater amount; or (3) receives a refund. The ever-present awareness that the amount finally owing may change applies particularly in antidumping cases because the Commerce Department will conduct either an initial investigation or an annual review and the antidumping duty rate fixed at liquidation changes frequently and significantly many months later (after liquidation has been suspended).

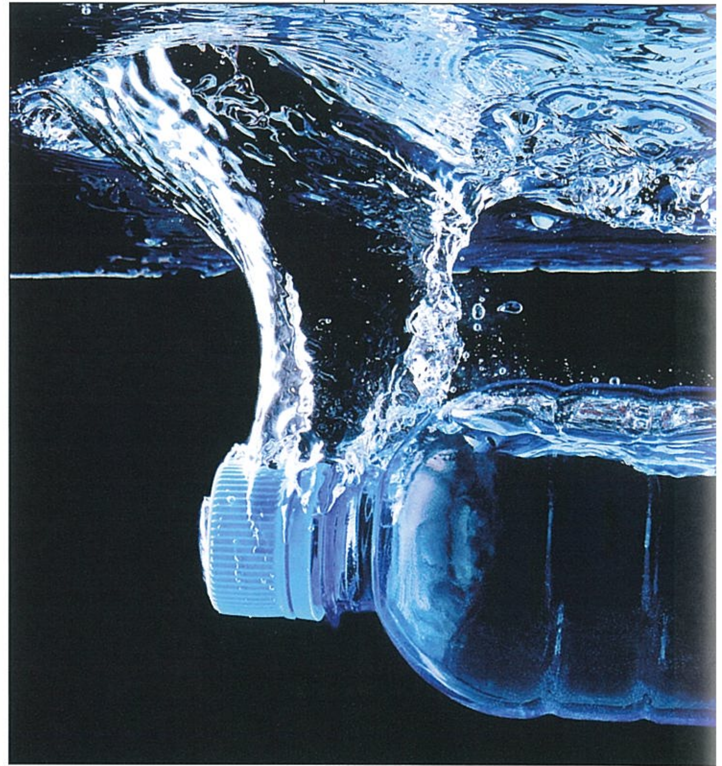
In this case, the products were crawfish from China that the importer entered in November 2001 with an estimated antidumping duty rate of 0.0%. As a result of the administrative review for the period September 1, 2001-August 31, 2002, Commerce assigned a 223.01% antidumping duty rate for imports of products from the relevant exporter.

The final results of the Commerce review were published in the Federal Register on February 13, 2004. That date is significant as CBP has six months from that date to liquidate pursuant to that Commerce determination.[12] Commerce issued separate liquidation instructions to CBP on May 12, 2004, and CBP duly liquidated the entries on June 25, 2004—within the six-month period. The importer failed to make payment and CBP thereafter made a formal demand on the surety. The surety protested that original liquidation. The protest was denied on July 8, 2005, and the surety did not initiate litigation on the denial.

Another Chinese exporter challenged the Commerce Department final determination by bringing a suit in the CIT. CBP erroneously reliquidated the two entries on June 3, 2005 (roughly a month before the original protest was denied) and issued a second demand for payment. Once again, the surety filed a protest that was denied. That denial was not the subject of a challenge at the CIT. CBP issued a demand for payment in February 2007, seeking approximately $1.9 million in antidumping duty plus interest. The surety denied liability, and the government initiated the instant collection action in June 2010.

The issue was the legal validity of the two overt liquidations by CBP, and whether there was a deemed liquidation. On the latter question, the court's conclusion that there was no "deemed liquidation," which refers to a liquidation "by operation of law," at first appears correct. A customs law provision, 19 U.S.C. section 1504(d), is the source of the rule that CBP liquidate an entry within six months of notice of the removal from suspension. CBP's failure to do so results in the entry being liquidated as entered. For these purposes, that triggering notice consisted of the February 13, 2004, Federal Register notice. Thus, CBP had until August 11, 2004, to liquidate the entries and it timely liquidated on June 25, 2004. The June 2005 "reliquidation," however, occurred more than 90 days after the original timely liquidation, and cannot have been supported by 19 U.S.C. section 1501.

Thus, on these facts, the timely 2004 liquidation was no longer in force and effect, as it had been superseded by



1 Slip Op. 14-7 (CIT, January 23, 2014) at 48 Cust. Bull. & Dec. No. 9 (March 5, 2014) at 11.

2 All commercial importations into the United States must be backed by security. In antidumping duty cases, the security may be in the form of a required cash deposit but generally it is a bond issued by an approved surety company. As the *American Home* decision put it, "[i]mporters must generally post security before U.S. Customs and Border Protection ("Customs") will release imported merchandise from its custody. *Hartford Fire Ins. Co.*, 648 F.3d 1371, 1372 (CA-F.C., 2011). Importers often use surety companies to post the required security. *Id.* A 'surety bond creates a three-party relationship, in which the surety becomes liable for the principal's debt or duty to the third party obligee.' *Ins. Co. of the W.*, 243 F.3d 1367, 1370' (CA-F.C., 2001)."

3 As an academic point, the 1916 Antidumping Act called for treble damages for sales at less than market value or wholesale price and was a hybrid trade/unfair competition law. That statute, 15 U.S.C. section 72, was attacked by the EU and other U.S. trade partners and was repealed in 2004.

4 19 U.S.C. section 1677g.

5 *Dynacraft Indus.*, 24 CIT 987, 118 F. Supp. 2d 1286 (2000).

6 *WheatlandTube Co.*, 495 F.3d 1355, 1361 (CA-F.C., 2007).

7 The *American Home* court cited *Wash. Int'l Ins. Co.*, 25 CIT 1239, 1241-1242, 177 F. Supp. 2d 1313, 1316 (2001).

8 *U.S. Fid. & Guar. Co.*, 236 U.S. 512, 530-531 (1915) (emphasis added); accord *Ins. Co. of N. Am.*, 951 F.2d 1244, 1246 (CA-F.C., 1991).

9 *Ins. Co. of N. Am., supra* note 8.

10 At the rate in 26 U.S.C. section 6621.

11 Pursuant to 28 U.S.C. section 1961.

12 19 U.S.C. section 1504(d).

the 2005 "reliquidation," which was itself a nullity. Would that not lead to the conclusion that there was, in fact, no valid liquidation on which the government might stake a claim, as neither the 2004 nor the 2005 liquidations were valid, and thus a deemed liquidation arose?

The court cited precedents holding that an untimely liquidation is merely voidable and not void *ab initio* and must be protested. The court distinguished a Federal Circuit case, *Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1560 (CA-F.C., 1997), which carved out an exception, holding that an erroneous and invalid liquidation need not be protested if the original entry had been deemed liquidated by operation of law and thus had become final. Clearly, the entire point of the strict 90-day window in 19 U.S.C. section 1501 for reliquidations (notably, not lengthened to parallel the 180-day season for the filing of protests by importers) is that, as far as CBP is concerned, the entry will in fact become final after that 90-day window closes.

The court's distinction of the *Cherry Hill* precedent is artificial. For one thing, the law has changed. At the time of that decision, voluntary reliquidations under 19 U.S.C. section 1501 could not apply to deemed liquidations. Since 2004, that has not been so. The point that the *Cherry Hill* court made was not so much that a deemed liquidation could not be disturbed, but that a final liquidation could not be disturbed.

The court maintained that the original entry had been protested and that somehow left it open to reliquidation by CBP, which had to be protested. What if the 2004 liquidation had not been protested? Would that not result in its having been made final and conclusive against all parties, including CBP, by operation of 19 U.S.C. section 1514? CBP's subsequent 2005 putative liquidation superseded the 2004 liquidation. Would *Cherry Hill* really not apply here? If so, could it not be argued that the government faced a deemed liquidation, a timely liquidation having been replaced by an untimely one and thus void liquidation that need not be protested, per *Cherry Hill?*

The court made much of 19 U.S.C. section 1504 being designed to "eliminate unanticipated requests for additional duties coming years after the original entry." The court said: "An erroneous reliquidation occurring before a timely liquidation had even become final does not fall within the statute's intended reach." This is too confining a construction of the statute, which was also intended to foster finality in CBP's actions and, if it is left to stand, a thwarting of the congressional purpose in enacting 19 U.S.C. section 1504. Would it not be the height of absurdity if the validity of a purported but fatally flawed liquidation hangs on whether the liquidation was protested? If the liquidation is invalid, what logic would support the flaw being erased and the liquidation vivified to the point of supporting a collection effort simply because of the inaction of the importer or surety in not filing a protest? Is not this perversity a bit like the villagers animating Frankenstein's monster if they fail to take up their pitchforks?

Ultimately, of course, this brings the discussion back to the problem for importers and sureties, as expressed in the cases discussed above—that an untimely and illegal liquidation must nevertheless be protested, with the sole exception laid out by *Cherry Hill*. And as the *American Home* court would have it, that exception is limited to deemed liquidations. If the courts make no distinction between void or voidable liquidations, it might appear that a liquidation, regardless of its validity and even if void in all other respects, can serve as the valid basis for an enforcement action by the government.

Consider the following paragraph (no. 48) from *Cherry Hill:*

> If an importer or surety were invariably required to protest a liquidation in order to preserve the right to challenge it, the opportunities for abuse would be manifest. *Under the government's proposed construction of section 1514, there would be nothing, in theory, that would prevent Customs from conducting multiple successive liquidations of the same entry and requiring the importer or surety to assume the burdens of protesting each one.* Likewise, Customs could purport to liquidate an entry anew, years after the first liquidation had become final, and thereby impose liability on the importer or surety if the importer or surety were not vigilant in watching for notice of such untimely liquidations or if it were no longer able to undertake the burden of filing and pursuing a protest. (Emphasis added.)

Why does this not apply to *American Home?* Surely there is something very wrong and vexatious with the decision. Both parties are appealing it so there may be further clarity from the Federal Circuit. A change in the logic would be best. ●