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Case on Criminal Charges for Redelivery Violation a Sign of Increased Criminalization, Complexity of Regulation

The 11th Circuit Appeals Court's Decision in U.S. v. Izurieta is representative of the trend toward criminalization of customs violations, and federal criminal prosecutions in general, said several lawyers. The decision won't have much effect on the ability of the government to prosecute criminal cases for customs violations, they said. But the government's case suffered from a flawed indictment, and the Justice Department may be more careful in the future when drafting indictments for customs violations, the lawyers said.

"This is not a safe harbor for importers," said white collar defense attorney Elliot Sagor of Hogan Lovells. Many other statutes can be used to prosecute for violations like false labeling or country of origin, or for violations of laws like the Lacey Act or the Food, Drug and Cosmetic Act, he said: In this case, "the government could have perhaps done a better job of citing under other statutes."

Appeals Court Vacated Criminal Convictions for Failure to Redeliver

The Izurieta case involved two importers who failed to redeliver merchandise to CBP that FDA had found to be potentially adulterated, in violation of 19 CFR 141.113(c). The defendants were charged with smuggling into the U.S. (18 USC 545) based on the failed redeliveries. The Southern Florida District Court found the two defendants guilty, and sentenced them to 30 and 27 months in prison, respectively.

On appeal, however, the 11th Circuit court vacated the criminal convictions because it said violations of 19 CFR 141.113(c) can't be prosecuted under the smuggling statute. In contrast to an earlier decision by the 9th Circuit, the 11th Circuit court said regulations are laws that can be criminally prosecuted under Section 545 (which only mentions "violations of law"). But 19 CFR 141.113(c) is a "civil law" because of the expectation it creates that violations will only be punished by liquidated damages, the court said.

The split between the 9th Circuit, which says Section 545 can only be used to prosecute violations of statutes, and the 4th, 5th, and now 11th circuits, which say it may be used to prosecute violations of statute or regulation, means the case is ripe for appeal to the Supreme Court, experts said. But according to Alicia Valle, special counsel at the U.S. Attorney's Office – Southern District of Florida, the government still hasn't decided its course of action.

Part of Broader Trend Toward Criminalization of Customs Violations

“The case is very interesting because it really gets to a fundamental question, which is what elements of Customs regulations can you address under a criminal statute,” said Sydney Mintzer of Mayer Brown. The issues faced by the court were relatively new, he said, but are becoming more important because of an increase in criminal prosecutions for customs violations.

“There have always been criminal statutes that involved Customs violations,” he said. **“But historically, only the most egregious violations were referred to the U.S. attorney's office [for criminal prosecution], where fraud was pretty obvious or there was clear smuggling. It clearly fell within the criminal realm.”**

According to Mintzer, the rise in criminal prosecutions began five or six years ago, for reasons including more attention to import safety and more interest in combating duty evasion and illegal transshipment, he said. Cases are now being referred to the U.S. Attorney's Office for criminal prosecution even where fraud isn't obvious, he said. “And so you've really seen a ramp up in the use of criminal statutes to go after Customs violations.”

The case is a “perfect example of the massive explosion in federal criminal prosecutions,” said Paul Kish of Kish & Lietz. “It's just very difficult now, because it's so difficult to find out where the [government] wants to go with things,” he said.” Most businesspeople have a fairly good idea about what's close to the line and what's not, but not always.” This makes life harder for business, not only in the Customs world, but in many heavily-regulated areas, he said.

Could Result in Better Indictments from Justice Department

Part of the reason the government's case in Izurieta wasn't successful was a limited indictment that only relied on the Section 545 smuggling statute, rather than cite to other regulations. Even the 9th circuit case that found Section 545 doesn't apply to regulations, *U.S. v. Alghazouli*, resulted in a conviction because the regulation at issue was criminalized under the Clean Air Act, and so was covered as a “law” under the 9th circuit's definition of Section 545. **“I think it was a poorly drafted indictment,”** said Mintzer. **The decision says the government failed to raise a claim under Section**

545, “but the government didn’t try to bring the activity under any other statute under which it may have qualified,” he said.

“My sense is that there’s not a lot of expertise in Customs law within the Justice Department,” Mintzer said. This case may make the Justice Department more careful. “They’ll have to craft better indictments going forward in order to make sure they haven’t done anything that may get captured in an 11th Circuit-style decision,” he said. Mintzer doesn’t think the case will have any effect on the criminalization of Customs violations. “I just think you’re going to get better indictments,” he said.

Faulty Indictment Reached Appeals Court Before Questioned

Also noteworthy is how far the case progressed before the deficiencies in the indictment were identified. The appeals court was the first to look into the question of whether a violation of 19 CFR 141.113(c) could be prosecuted under Section 545, and did so on its own initiative. “The lawyers, and the trial judge, apparently never picked up on something that was very obvious to the court of appeals,” said Kish. “The judges on the court of appeals were the first ones to even look at the thing closely enough to realize that what these people were accused of was not a crime.”

The case is just another sign of the increasing complexity of government regulation, Kish said. “I don’t think the case is really going to apply to a whole lot of Customs areas, other than the fact that it does show that prosecutors need to be careful,” he said. To Kish, the lesson is that anybody “facing charges for a Customs violation needs to hire a lawyer ... who knows they need to closely read the law.” – *Brian Feito*

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