DUE YOUR DUTY

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With the ever-increasing scrutiny being brought to compliance and the payment of duties on imported goods by Customs and Border Protection (CBP), it is worth commenting that any duties which are due when an entry liquidates may, in fact, end up having to be paid even if the related protest remains pending due to the legal and contractual relationship between the importer and his surety company. Simply put, if a surety insists on receiving payment of any amounts demanded by CBP upon liquidation, the importer does not have any solid grounds to object. Why would the surety do so if a protest is pending? Because the surety is looking to mitigate its risk. If the importer does not pay, the surety will have to do so, at least up to the face amount of any bonds it has written, and sureties try their best not to be put in that position.

Pursuant to the provisions of 19 U.S.C. 1514(a), when CBP liquidates an entry, that decision is final and so any monies owed are due, unless a protest is filed. While the protest is pending, the importer is not obligated to pay any additional funds to CBP as the liquidation is not final. However, as mentioned above, the mere possibility of financial exposure resulting in the surety having to pay the monies owed results in the surety typically demanding upfront payment. If the protest is granted, CBP reliquidates the entry accordingly. The outcome could be as simple as the entry being reliquidated with nothing more due. Alternatively, the protest could be granted but with additional monies due related to the approved change(s). At that point, the liquidation becomes final, unless there are grounds to again protest if there is a belief the reliquidation was done incorrectly (see the reliquidation limitation in 19 U.S.C. 1514(d)). If the protest is denied, the importer must, of course, pay all that is due, including interest, even if he desires to further challenge CBP in court. Given it generally takes 2+ years to get a decision on a protest once referred to Regulations and Rulings, the amount of interest owed can be staggering. In fact, it is not unusual with antidumping and countervailing duty cases to have the amount of interest be equal to 50% or more of the principal amount owed and that is just at time of liquidation!

Sureties have a similar right to protest, but the key for them these days is not whether the protest, even if filed by the importer, is likely to be successful. Rather, given how long it takes CBP to decide protests, the surety is worried whether the importer can afford the amount demanded or, frankly, if the importer will even still be in business by the time a definitive determination is announced! Admittedly, these issues come up most often when antidumping or countervailing duty is involved, but even significant duty increases can trigger concern for sureties.

As such, it is becoming commonplace for sureties to cause more short term damage to the importer's financial position than CBP's original demand, especially as is often the case, when in the end, CBP grants the protest. This financial harm arises typically in one of two ways. What often occurs with penalty cases in particular is it takes so long for CBP to review the case and issue its decision that statute of limitations waivers are needed from both the importer and the surety. Sureties will often condition their agreement to execute a statute of limitations waiver on

payment of some or all of the amounts due by the importer. Alternatively, as a condition of not seeking recovery from the importer before the protest is decided, the surety insists on receiving collateral in the form of a stand-by letter of credit.

Absent the importer paying, and to force the issue, the surety may bring an exoneration or a *quia timet* claim. It is the right of a surety to demand the importer place funds with it when there are reasonable grounds for the surety to conclude it will suffer a loss in the future because the importer is likely to default on its primary obligation to CBP. This principal is recognized at both the federal and state level. It is not unique to import bonds, but rather applies to all types of bonds. For the surety to succeed, it only needs to establish [1] the debt is presently due (exoneration) or will come due (*quia timet*), [2] the principal is or will be liable for the debt, and, [3] absent the relief sought, the surety will be prejudiced because it will be forced to advance money to CBP. Given the level of proof to get a judgment is relatively straightforward, the importer is left with few options in the face of a surety demand.

What should importers due is such circumstances? There are not a lot of options since the only case holding for the principal involved fraud by the surety. So, what to do? One option is to satisfy the surety the amount due can be paid, which typically takes the form of presenting strong financial statements. If that does not work, the only real option is to pay the amounts due to CBP. This has two advantages. First, as payment is made, the interest ends or is reduced appropriately. Second, if the importer pays the surety, that could mean it will have to pay CBP and wait for a refund from the surety, so better to pay once to CBP, than pay twice and not know when you will get the refund from the surety!