

*The CIT's Residual Jurisdiction: Leveling the Playing Field for Customs Bond Sureties Left*

*“Holding the Bag”*

*Why “Voidance” is a Fair Remedy for Customs’ Failure to Inform the Surety of Events that*

*Materially Enhance its Bond Obligations \**

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**Introduction**

This article explores and discusses the jurisdictional and related difficulties faced by customs bond sureties who seek judicial review and relief in the United States Court of International Trade (“CIT”) for injuries caused by the Government’s intentional decision to not timely apprise the surety of events that the Government knows or should know will materially increase the surety’s risk under its bond, thereby improperly altering the suretyship contract from the undertaking of known and ascertainable risk to an undertaking of an unknown and extraordinary risk. This writer believes that the unilateral, secret alteration of the arrangement by the government is unlawful, improper and jeopardizes the integrity of the customs surety bond system. This paper will also answer the question: “When is a surety bond like a taxi cab?”

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The following import duty statistics,<sup>2</sup> which have been recognized by Customs and the surety community for many years, set the stage for this article:

- 95% of all entries are liquidated with no change in duties;
- 2% of entries are liquidated with a refund of duties;
- 3% of entries are liquidated with an increase in duties.

Keeping these statistics in mind will explain a great deal as we proceed through our analysis of what the customs bond surety knows and when. The key figure is that only 3% of all entries of merchandise into the United States result in an increase in duties and a potential for a claim under the bond. Of these 3%, approximately 87% of all increased duty bills are paid by someone other than the surety within 120 days of liquidation, with 60% being paid within 90 days. Importantly, for purposes of this discussion, the remaining 13% of all increased duty bills result in a demand against the surety community. In other words, for less than one-half of one percent of all entries filed with U.S. Customs and Border Protection (“Customs” or “CBP”) (i.e., .39%), Customs looks to the surety to answer for the importer’s default.

The surety community is left with the unenviable task of dealing with the most difficult 13% of Customs bills issued. Of those, many bills are paid by the surety because the importer is out of business or bankrupt simply due to the vagaries of business in general. Other bills are paid by the sureties with no possibility of reimbursement because the importers have been out of business since the date of entry or never went into business other than to illegally import the merchandise in the first place. Given the statistics, and the limited resources of Customs, the customhouse brokers, and the sureties generally, it is not economically or practically feasible for

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<sup>2</sup> The statistics were provided to me for use in this article by the International Trade Surety Association (“ITSA”) and are a standard set of statistics used in discussions between that association and the government. I am advised that individual sureties have statistics that vary to the extent that some surety companies experience a 99% “No Change” Liquidation factor.

Customs or customhouse brokers to provide sureties with detailed files and information on all bond and entry transactions for the whole life of an entry.

This article will first address the purposes of the Customs surety bond and explain what information the surety knows (and does not know) at various stages of the import transaction. Next I will explore the tools available to the surety to minimize its bond risks. Finally, I conclude with a discussion of why bond voidability is the proper remedy when the Government fails to inform the surety of events that materially increase its bond risks and obligations, and how the CIT's residual jurisdiction (and the court's equitable powers) can provide sureties with a forum to ensure that the sanctity of surety contract is upheld.

#### **A. The Customs Entry Bond – Keeping Trade Moving, Protecting the Public Fisc**

The “Basic Importation and Entry Bond”<sup>3</sup> is perhaps the single most important tool used to facilitate international trade and commerce entering into the United States. The bond allows for the immediate release of merchandise to the importer to give Customs time to verify the admissibility of the merchandise, the dutiable value of the merchandise, and the proper tariff classification with its attendant rate of duty to assess against the appraised value of the merchandise. The United States has long held up our system to the trading nations of the world as the model which should be adopted in order to facilitate U.S. exports, speed our access to foreign markets, and to avoid border corruption.

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<sup>3</sup> 19 C.F.R. § 113.62 sets out the terms and conditions of the Basic Importation and Entry Bond. The bond itself is printed on the Customs Form 301 and does not carry any terms and conditions in the text of the bond.

All of the foregoing tasks are ultimately subsumed in the “liquidation”<sup>4</sup> of the entry. In the ordinary course, Customs takes from one to four years to “liquidate” an entry; but liquidation can be suspended indefinitely for merchandise subject to tariffs that seek to remedy unfair trade practices (antidumping and countervailing duties). Imagine the bottleneck without the bond to guarantee the redelivery of merchandise found inadmissible within 30 days of its release; or the collection of duties within the one to four year period after entry. If imported merchandise was required to stay in Customs’ custody pending the decisions on admissibility, appraisement and tariff rate, the Ports of San Francisco and Los Angeles alone would create a parking lot of vessels carrying imported merchandise extending from California to China. The customs bond, one simple piece of paper (and someday a simple electronic transmission), removes the log jam and allows trade to flow into the United States. However, when the bond is misused by the importer it facilitates fraud and smuggling. Less obvious is the fact that when the bond is misused by the Government, it facilitates fraud, smuggling and injustice.

Bonds are required because there is no “right” to import merchandise into the United States. The importation of merchandise into the United States is only a privilege, and it is not free. At or near the time of entry, importers are responsible for the deposit of estimated tariff duties, taxes, and/or various fees and charges.<sup>5</sup> The amount of these duties, taxes, and fees might

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<sup>4</sup> Liquidation is “final reckoning” of the entry by Customs. Liquidation is defined as the final computation by the Customs of all duties (including any antidumping and countervailing duties) accruing on an entry. *American Permac, Inc. v. United States*, 10 CIT 535, 537 (1986), 642 F. Supp. 1187 (1986).

<sup>5</sup> Goods imported into the United States are classified in accordance with the Harmonized Tariff Schedule of the United States (“HTSUS”). The HTSUS sets forth complex rules for how goods are to be classified, and sets forth the rates of duty for each merchandise category, expressed as 10-digit tariff numbers known as a subheadings. Applying the HTSUS rules, Customs applies the applicable rate of import duty indicated for the particular tariff subheading. In most cases, the rate of duty, expressed as a percentage, is determined on an *ad valorem* basis. Certain other “duties” such as antidumping and countervailing duties, are determined based upon the findings of the Department of Commerce, relegating

depend upon the nature of merchandise, its country of origin, and its value, weight, or eligibility for preferential tariff treatment (think “NAFTA”). The importer is primarily and personally liable for payment of these charges and any additional charges later found by Customs to be due after liquidation of the entry.

To help minimize the risk of payment default, Customs, the agency tasked with overseeing and administering imports<sup>6</sup> and collecting these sums, requires as a condition of importation that a surety bond be posted.<sup>7</sup> A long list of surety companies are pre-approved by the Government to underwrite government obligations including the bonds which secure importers’ obligations on the import transactions,<sup>8</sup> promising to pay, upon the default of the importer, all such duties, taxes and fees that are found to be legally due and owing, up to the bond limit. In addition, the bond secures the importer’s promise to redeliver merchandise found by Customs or other Federal agencies to be inadmissible or upon default to pay liquidated damages<sup>9</sup> for the failure to redeliver.

## **B. What the Surety Knows, Does Not Know, or is Not Told**

Those not versed in customs law practice may find remarkable how little a surety actually knows about the potential liability under its bonds until after a claim has been made by Customs

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Customs to a ministerial role in collecting (rather than determining) such antidumping and countervailing duties.

<sup>6</sup> CBP is part of the U.S. Department of Homeland Security.

<sup>7</sup> 19 U.S.C. §1623 and 19 C.F.R. Part 113, sections 113.01 *et. seq.*

<sup>8</sup> The list of Approved Sureties is maintained by the U.S. Department of Treasury. See Department Circular 570, <http://www.fms.treas.gov/c570/c570.html> (last visited Oct. 12, 2012).

<sup>9</sup> Calculated in an amount equal from one to three times the value of the merchandise. See 19 C.F.R. § 113.62(m).

and then, how difficult it is for a surety to obtain the necessary information to fully protect itself via the filing of an administrative protest under 19 U.S.C. § 1514 or in a court challenge under 28 U.S.C. § 1581(i). At this point, it is helpful to draw a parallel between a traditional father and a surety. The old (if not antiquated) saying that, in the workings of a traditional family, “the father always is the last to know . . .,” best describes the surety’s typical posture. Indeed, in the greater customs’ family, the surety is most always the last to know. To understand the parallel, we need to examine what the surety knows and when.

A good place to start is to answer the first question asked by Customs with almost every claim issued by Customs against a bond: “Why doesn’t the surety have a copy of its own bond?” We must look back to 1985 to find the simple answer to that question. In 1985, a new customs bond form, the “CF 301,” was implemented. This bond was designed and created by Customs for Customs’ use and administrative convenience. It was designed as a multipart carbon<sup>10</sup> document with one copy for Customs, one copy for the customhouse broker, and one copy for the surety. When the bond was filed with Customs, it was the intention of the drafters that the surety copy would be mailed by Customs at the port of entry to the surety. The point of the surety copy was to eliminate the need for Customs to send a copy of the bond upon making a demand against the bond which resulted because the prior (i.e., pre-1985) bond form did not have a surety copy for distribution upon posting. The surety copy also was provided so that a surety would have accurate and timely information on its bonds, indicating the amounts and principals in order to accurately evaluate its exposure and to collect premiums. However, “exposure” is not “risk” and it must be noted that the surety copy of the bond would not allow

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<sup>10</sup> Thankfully, the use of multipart “carbon” forms have entered the realm of antiquity.

the surety to evaluate its risk because the bond copy provides no information as to the nature of the merchandise, its country of origin or its value.

All good plans have a short life span, and within 60 days after implementation of the CF 301 bond form in 1985, District Directors at many Customs Ports decided, apparently due to administrative difficulties, that their Districts would no longer provide all of the various sureties with the “Surety Copy” of all the Forms 301 on file with Customs. Rather, Customs in those Districts would provide the surety with copies on request only **after** a claim was made by CBP against the bond but not before. While this was in one sense a step backward, it made perfect sense when you consider the statistics.<sup>11</sup>

The second question Customs normally asks at the time of a bond claim is: “Why doesn’t the surety know what (risk) it has undertaken?” The answer to that question is that neither Customs, nor the customhouse brokers nor the importers, nor the sureties want to expend the resources necessary to inform the surety until Customs makes a claim against the bond. This fact raises the question as to what exactly the surety knows about its bond, and when.

### **1. The Period Between Entry and Liquidation**

In the ordinary course, a surety knows that a bond has been undertaken and that an entry has been filed with Customs **after** the bond and entry have been submitted. The first knowledge of the existence of the bond usually occurs when the bond is reported by the broker or producer

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<sup>11</sup> I learned of this change of Customs policy in 1985 through a discussion with the Entry Supervisor at the San Francisco Customs District. I was advised, as counsel for a number of the sureties, that Customs at least at the district level did not have the staff (to pull, sort and address) or the financial resources (envelopes and stamps) to provide all of the various sureties with copies of the bonds on file with Customs.

to the surety company (i.e., the surety's agent). The vast majority of bonds are undertaken and reported in this way.

The brokers and the producers have broad authority to "underwrite" entries of general merchandise. They do not have a regulatory or contractual obligation, nor do they have the resources, to report the details of each entry underwritten by each bond. Indeed, the surety itself does not have the resources to process and store the details of each entry. So, as a practical matter, the surety industry does not know from its producers or principals the nature of the imported merchandise, the declared value of the imported merchandise, or the Harmonized Tariff Classification of the imported merchandise until a claim is made by Customs upon the surety against the bond.

There are two exceptions to this general rule and practice. The exceptions are limited to entries of (1) merchandise subject to antidumping/countervailing duties ("ADD/CVD entries") and (2) entries of merchandise regulated by the United States Food and Drug Administration ("FDA" regulated entries). The surety companies have particular interest in these two categories of entries as each of the two are high risk and account for the vast majority of surety losses each year. Surety companies contractually limit the underwriting authority of their brokers and producers to bind the surety to ADD/CVD or FDA transactions. These high risk transactions usually require a formal application to be filed by the importer through the broker or producer for specific permission from the surety to issue the bond. The applications usually require partial or full collateral and further indemnification from the principal and its owners. Unfortunately, not all brokers and producers make the necessary application and follow the guidelines for high risk bond transactions. In such instances the loss to the surety community is legend. As we will explore below, with regard to these exceptional instances, what Customs knows, but does not



tell, may constitute the basis for surety civil actions initiated against the Government under 28 U.S.C. §1581(i) or the basis for a surety defense to an action initiated by the United States under 28 U.S.C. § 1582(2) to collect upon the bond.

## 2. Notice of Suspension of Liquidation: High Risk Entries

Customs is required by statute to give a surety notice when the liquidation<sup>12</sup> of an entry is “suspended.”<sup>13</sup> Entries are “suspended” in all cases when the entry covers merchandise subject to an ADD or CVD order.<sup>14</sup> Liquidation of an ADD/CVD entry is suspended pending a final determination by the Department of Commerce of the antidumping or countervailing duty rate (or rates) to be ultimately assessed by Customs. Customs liquidates ADD/CVD entries following the Liquidation Instructions issued to Customs by Commerce. Unfortunately, the very surety who needs such notice to manage its risk does not always receive the statutory notice. If

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<sup>12</sup> See n.4, *infra*. When the merchandise covered by an entry is subject to antidumping or countervailing duties, liquidation is the “final reckoning” of the value, classification, admissibility and application of regular import duties and any “special” duties such as antidumping and countervailing duties as may be ordered to be assessed by the Department of Commerce, International Trade Administration.

<sup>13</sup> 19 U.S.C. § 1504(c) provides:

If the liquidation of any entry is suspended, the Secretary shall by regulation require that notice of the suspension be provided, in such manner as the Secretary considers appropriate, to the importer of record and to any authorized agent and surety of such importer of record.

<sup>14</sup> The liquidation of all antidumping and countervailing duties is suspended upon receipt of notification from the Department of Commerce to suspend liquidation on or after the date of publication of the Notice of Preliminary Affirmative Antidumping Determination (19 U.S.C. § 1673b(d)(2)) or Notice of Preliminary Countervailing Determination (19 U.S.C. § 1671b(d)(2)), 19 C.F.R. § 159.58. It is interesting and significant that the statute, 19 U.S.C. §1504(c) requires that Customs notify the “importer, consignee concerned and any authorized agent **and surety** of such importer or consignee” (emphasis added) of the suspension of liquidation. However, it is interesting to note the internal inconsistency in the regulations with respect to Notice to the sureties of suspension of liquidation. The regulation at 19 C.F.R. § 159.58, **does not** include the surety in the list of parties to be notified of the suspension of liquidation of entries subject to antidumping and countervailing duty assessments, while the regulation at 19 C.F.R. § 159.12(c) does include the surety in the list of parties to be notified.

there are two sureties on the transaction, a continuous bond to cover the general entry obligations and a single transaction bond to cover the ADD/CVD, CBP as a matter of practice (driven by its computer program) provides notice to only one surety and that surety is the continuous bond surety in virtually every case. The higher risk single transaction bond surety will not receive such notice.<sup>15</sup> As a result, the single transaction bond surety's risk calculus is foreclosed and confounded by the failure of Customs to provide the statutory notice to more than one surety on an entry at a time. As a result, the surety bearing the highest risk, the single transaction bond surety on the transaction, is not given notice of suspension of liquidation of the entry.

Notice of suspension of liquidation may be the surety's first and only notice that the bond is at risk for antidumping or countervailing duties. The notice of suspension gives the surety company the opportunity to enter into the antidumping or countervailing duty proceeding to defend against any assault upon a low antidumping duty rate initiated by a domestic petitioner or to step in and aid a foreign exporter maintain or achieve a lower antidumping duty rate than that which was required to be deposited at the time of entry.<sup>16</sup> Participation in the ADD/CVD administrative proceeding is critical to the protection of the surety's interest. And participation is dependent in no small measure upon prior notice of "suspension" pending the outcome of the ADD/CVD administrative proceeding.

Without having participated or at least having the opportunity to participate in the administrative proceeding, the surety is divested of its only administrative and judicial

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<sup>15</sup> The issue of whether the failure of notice of the suspension of liquidation voids the obligation of the single transaction bond surety is the subject of continuing litigation. *See United States v. Great American Ins. Co. of New York and Washington Int'l. Ins. Co.*, 791 F.Supp.2d 1337 (Ct. Int'l. Trade 2011), *appeal pending*.

<sup>16</sup> *Lincoln General Ins. Co. v. United States*, 341 F. Supp. 2d 1265, 1269 (Ct. Int'l Trade 2004) (The surety stands in the shoes of the importer and has the right to participate as an "interested party" in antidumping administrative proceedings.)

opportunity to challenge the substantive decision of the Department of Commerce, International Trade Administration, leaving the surety absolutely defenseless against the assessment of the Final Rate. Once the proceedings have terminated and the “Final Results of Administrative Review” have been published in the Federal Register setting out the “Final” ADD or CVD rates to be assessed, only the “participants” in the ADD or CVD administrative proceeding have standing to judicially challenge published “Final” rates.<sup>17</sup> Any such challenge must take place within 30 days of the publication of the final rates in the Federal Register.<sup>18</sup> Once the 30 day period has expired, the ADD/CVD rates cannot be challenged and are transmitted by the Department of Commerce to Customs with instructions (“Liquidation Instructions”) to liquidate the entries in accordance with the Final Results. The rates assessed in accord with the published “Final Results” cannot be protested.<sup>19</sup> However, errors made by Commerce in preparation of the Liquidation Instructions can be challenged.<sup>20</sup> Likewise, errors made by Customs in following Commerce’s Liquidation Instructions may be protested<sup>21</sup> after liquidation.

Even if a surety does not have the contacts or ability to participate in the ADD/CVD administrative review, the statutory notice of suspension alerts a surety who was not previously advised of the ADD or CVD risk at the time of entry to the opportunity to collect collateral from the importer and otherwise protect itself from loss prior to liquidation of the entry.

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<sup>17</sup> See 28 U.S.C. § 2631(c).

<sup>18</sup> See 19 U.S.C. § 1516A.

<sup>19</sup> *Mitsubishi Electronics America, Inc. v. United States*, 44 F. 3<sup>rd</sup> 973, 977 (Fed. Cir. 1994); *Royal Business Machines, Inc. v. United States* 507 F. Supp. 1007, 1014 n. 18 (Ct. Int’l Trade. 1980), aff’d, 669 F.2d 692 (C.C.P.A. 1982).

<sup>20</sup> *Hynix Semiconductor America, Inc. v. United States*, 30 C.I.T. 103 (2006), 414 F. Supp. 2d 1317 (2006).

<sup>21</sup> *ABC Int’l Traders v. United States*, 19 C.I.T. 787, 791 (1995).

While it might be difficult to imagine that a surety would not know that an entry is subject to antidumping duties at the time of undertaking the bond, such knowledge is often not reported by negligent importers or brokers or, all too frequently, such information is purposely kept from the surety companies by unscrupulous importers or brokers in order to avoid the strict underwriting guidelines and collateral deposit requirements. Customs too has intentionally kept such information under wraps and from the surety allowing entry of merchandise under bond in furtherance of fraud investigations into the activities of importers and foreign exporters who are illegally entering merchandise into the commerce of the United States without properly declaring the merchandise as subject to antidumping and/or countervailing duties.

## **2. The Post-Liquidation Period: What Happened?**

Upon liquidation of an entry, the information provided to the surety community is minimal under the Automated Surety Interface System (ASI).<sup>22</sup> At liquidation of the entry, Customs does not reveal any information to the surety other than the surety's ID Number and address, the importer's ID Number and address, the bill number, the date of the bill, the entry number, and the date of entry, the principal amount of the bill, the post liquidation interest accrued, and the age of the bill. All of the foregoing information appears on a Customs Form "ACSR-CL-612 Formal Demand On Surety For Payment of Delinquent Amounts Due – All Bills Other Than Fine, Penalty and Liquidated Damage Bills" (the "612"). There is no description of the merchandise, no statement of the appraised value of the merchandise, no statement of the basis for the liquidation or explanation of the amounts demanded on the 612. It is up to the

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<sup>22</sup> See n. 41, *infra*, for a discussion of the pre-liquidation information provided by Customs to the surety community under ASI.

surety to figure all that out within the statutory period for filing a formal and legally sufficient protest which, as we know, is the basic administrative requirement for jurisdiction in the CIT.

The surety has three sources of information to unravel the mystery of a liquidation: the importer; the importer's customhouse broker; and Customs. The importer is usually the least likely source because in most cases the importer has disappeared or gone out of business in the one to four or more year period that Customs has to liquidate an entry.<sup>23</sup> Obviously, the importer who is most likely to default on its obligations to Customs is the least likely to cooperate with a surety who, in turn, will attempt to hold the importer responsible for the debt demanded of the surety.

The broker is usually a more reliable source so long as the entry has not been suspended for five or more years. The customs regulations only require that a broker keep its records for five years from the date of the entry transaction.<sup>24</sup> Thereafter, brokers tend to destroy files immediately to manage their space and costs. Unfortunately, it is not unusual for the liquidation of a high risk entry subject to ADD and CVD proceedings to be suspended for more than five years. Moreover, the customs regulations do not require that the broker provide entry information to the surety. Rather, the regulations only instruct that a broker may provide the

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<sup>23</sup> Under 19 U.S.C. § 1504, all entries must be liquidated within one year of the date of entry unless "extended" for a period not to exceed four years, or "suspended" for a longer period by operation of law or court order. Entries not properly extended or liquidated within the time frames set out by the statute are "deemed liquidated" at the rate and value of the merchandise asserted by the importer at the time of entry.

<sup>24</sup> 19 C.F.R. § 111.23(2).

surety on an entry transaction with information concerning the entry transaction and that such information is not “confidential” as to the surety.<sup>25</sup>

The best source of information is Customs itself. Only the documents in the official customs entry file indicate the decisions that underlie the liquidation of the entry. On the face of the Customs Entry Summary (CF 7501) the liquidation decision is notated in red pen. If Customs has changed the Harmonized Tariff Schedule (HTS) classification and set an attendant higher rate of duty, the Entry Summary will be notated with a red “RA” (indicating a rate advance), the original tariff number and rate will be slashed with a red line and the new tariff number and rate will be interlineated with red ink.<sup>26</sup>

There may be other notes: if Customs has been instructed by the Department of Commerce to increase antidumping or countervailing duties, such increase in the rate will be indicated in red on the Entry Summary. In such cases, either the Entry Summary or the Liquidation Worksheet will be annotated with the Department of Commerce Message Number and date thereof which sets out the Department of Commerce Liquidation Instructions. If the Liquidation Instructions are public, the surety has easy access thereto through the ADD/CVD portal at the CBP website. If the liquidation instructions are “Confidential,” the surety may or may not have access to the instructions through Freedom of Information Act (FOIA) requests directly from the Department of Commerce.

If marking duties have been assessed for a failure to properly mark the merchandise with the country of origin before liquidation, those duties will be interlineated in red ink. If ADD or

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<sup>25</sup> 19 C.F.R. § 111.24.

<sup>26</sup> Likewise, if the customs officer has reappraised the merchandise at a higher value, the entry summary will bear the notation “VA” in red ink, with a red strike through the declared entered value and the new value for purposes of liquidation interlineated adjacent to the old value.

CVD have been doubled for failure of the importer to certify to Customs in writing that he entered into no agreement with the foreign seller for reimbursement of the ADD or CVD paid by the importer, the doubling of duties will be indicated in the same red ink. The official file may also contain a “liquidation worksheet” which may give more valuable information into the basis for the increased duty bill on liquidation. The file may contain a “CF 28 Request for Information” from Customs to the importer concerning the classification or valuation of the merchandise. The official file also may contain a “CF 29 Notice of Proposed or Final Action” which details the basis and rationale for Customs’ decision to increase the duties on liquidation of the entry. All of the foregoing information is essential to a decision as to whether or not the surety company (and its principal, the importer) has grounds upon which to base a formal protest. For that reason, we may now begin to properly analyze a surety’s access to jurisdiction under 28 U.S.C. § 1581(a) or 28 U.S.C. § 1581(i).

A surety will have access to jurisdiction in the CIT under 28 U.S.C. § 1581(a) if: (1) the surety has a protestable issue; (2) has filed a timely protest; (3) the protest has been denied in whole or in part; and (4) the surety has met all other requirements for jurisdiction.<sup>27</sup> A surety may protest the classification and the valuation decisions made by Customs in liquidating the entry. A surety knows the protestable issue only through access to the official customs entry file. Some customs ports make the official entry documents available to the surety, the importer and the importers agents and attorneys for inspection. Other ports, for example Los Angeles Harbor, will only grant access to the official entry files through the FOIA process. It makes a difference. In order to file a legally sufficient protest, documents must be received, evaluated and reacted to

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<sup>27</sup> 28 U.S.C. § 2637(a). All duties and interest must be paid up to the penal limit of the surety’s bond obligation prior to filing summons in the CIT and pursuant to 28 U.S.C. § 2636 the summons must be filed in the CIT within 180 days of the date of mailing of the denied protest.

within the 180 day protest period.<sup>28</sup> Unfortunately, as a matter of practice (not law), FOIA requests can and often exceed the 180 day period.

If the files are made available for inspection upon reasonable request, a failure to protest within the applicable statutory period will cut off the right of the interested party to the administrative protest remedy and thereby the right to judicial review of any issue concerning the classification and valuation of the merchandise covered by the entry. If the files are not made available or cannot be made available for inspection after a reasonable request has been made, the CIT has held that the protest period is “tolled” until such time as the documents are made available.<sup>29</sup> The burden of proof as to the factual issues establishing that a request for documents was made and that it was reasonable is on the protesting party. The court will not assume that the request was either timely or reasonable.

### **C. Tools Available to the Surety to Minimize Risk**

In exchange for taking on significant risks in writing these bonds, and in recognition of the fact that the surety is not providing the United States with “insurance” against loss and performance, the surety bond and the laws and regulations governing the bond agreement contract confer certain rights upon the surety. In addition to the usual rights to indemnification, subrogation, and reimbursement, customs bond sureties have specific rights to challenge the demand for payment, and are statutorily entitled to notice of certain events that affect its bond risk, including suspension and extension of liquidation (discussed previously in this article).

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<sup>28</sup> For entries made prior to December 18, 2004, the protest period is limited to 90 days.

<sup>29</sup> *Alyeska Pipeline Service Co. v. United States*, 10 C.I.T. 510, (1986), 643 F. Supp. 1128 (1986) (citing *Schering Corp. v. United States*, 67 CCPA 83, C.A.D. 1250, 626 F.2d 162 (1980) (citing *General Petroleum Corp. v. United States*, 56 Cust. Ct. 249, 251 C.D. 2632 (1966)).



Moreover, sureties may assert not only traditional suretyship rights and defenses arising out of the bond contract, but may “step into the shoes” of an importer and assert any such rights that the importer has under the law.<sup>30</sup> Importantly, and central to the topic of this article, is the surety’s right to be discharged of its bond obligation when the United States, the third-party obligee (or creditor) in the suretyship contact, takes or fails to take certain actions that invalidate the suretyship contract, or otherwise discharges the bond under a theory of bond avoidance. The surety may be relieved of its payment obligations when such actions or inactions on the part of Customs, either at the time of contract formation, during the administrative protest period, or anytime thereafter, cause a material increase in the surety’s bond risk.

When a surety has been exposed to undue and extraordinary risk, the surety has four arrows in its quiver to defeat a claim upon the bond.

First, if the surety learns of the action of Customs that exposed the surety to undue risk, the surety may do nothing and simply wait to be sued by the government in an action upon the bond under 28 U.S.C. § 1582(2).<sup>31</sup> In such action, the surety may raise the defense of avoidance and other such issues as a counter claim or as an affirmative defense. See *St. Paul Fire and Marine Ins. Co. v. United States*, 959 F.2d 960 (Fed. Cir. 1992) (“If St. Paul had not filed a protest, and had refused to comply with the government’s demand for payment, and the

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<sup>30</sup> See *Lincoln General*, *supra*, 28 C.I.T. at 936;341 F. Supp. 2d at 1269; see also *St. Paul Fire and Marine Ins. Co. v. United States*, 525 F. Supp. 880, 883 (Ct. Int’l Trade, 1981).

<sup>31</sup> 19 U.S.C. § 1582(2) provides:

“The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is Commenced by the United States –

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(2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury.”

government had proceeded to sue St. Paul, no protest would have been required to assert contractual defenses against the government's claim") (citing *United States v. Utex Int'l*, 857 F.2d 1408, 1413-1414 (Fed. Cir. 1988)). Given the CIT's recent decision in *Hartford Insurance Co. v. United States*, Slip Op. 12-107, 2012 WL 3291854, discussed below, this first option may be the best course of action for the surety over and above the alternatives of the protest/28 U.S.C. § 1581(a) remedy or the 28 U.S.C. § 1581(i) direct challenge.

Second, if the surety learns of the action on the part of Customs that exposed the surety to undue risk after liquidation of the entry and before the expiration of the protest period, the surety may file a protest raising the contractual defenses and, if the protest is denied, pay the claim to the extent of its bond liability and sue the United States for a refund of the duties under 19 U.S.C. § 1581(a). See e.g., *St. Paul Fire and Marine, supra*, 959 F.2d at 964.

Third, if the surety does not know of the Customs activity that unduly burdened its bond until after the protest period expires, the surety may file an action directly in the CIT for relief under 28 U.S.C. § 1581(i) within two years after first learning of the cause of action and raise the previously concealed basis for the contract challenge. See *St. Paul Fire and Marine, supra*, 959 F.2d at 964.

Fourth, if the surety learns that Customs is releasing merchandise that CBP reasonably knows to be entered at a false rate of duty or value, the surety may be able to seek an injunction using 28 U.S.C. § 1581(i) as a basis for jurisdiction to restrain Customs from continuing to aggregate a known loss to the surety.

In 1993, Congress passed the Customs Modernization Act of 1993 (the “Mod Act”).<sup>32</sup> The Mod Act created two new concepts: informed compliance on the part of the importer and shared responsibility between the importing public and Customs tasking Customs with the responsibility of providing the trade community with improved information concerning the trade community’s rights and responsibilities under the customs laws and regulations.<sup>33</sup> If there was ever any question before, enactment of the Mod Act emphasized the responsibility of Customs to deliver clear and concise information to the trade community concerning its “rights” and “responsibilities.” That would include the right of the surety as an integral member of the trade community to know of any extraordinary or enhanced risk that the surety was undertaking. Such notice is easily accomplished by Customs publishing periodic lists of suspect merchandise. Such alerts would not do violence to any single importer’s privacy but would allow the surety community to vet its importers and their merchandise prior to undertaking a bond on transactions that Customs believes or knows to be suspect or high risk.

#### **D. Bond Voidability and the CIT’s Residual Jurisdiction**

The U.S. Court of Appeals for the Federal Circuit (“CAFC”) has been fair in its recognition of what a surety can and should know and when such knowledge is or is not

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<sup>32</sup> On December 8, 1993, Title VI of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), also known as the Customs Modernization or “Mod” Act, became effective.

<sup>33</sup> “Two new concepts that emerge[d] from the Mod Act are “**informed compliance**” and “**shared responsibility**,” which are premised on the idea that in order to maximize voluntary compliance with laws and regulations of U.S. Customs and Border Protection, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the Mod Act impose[d] a greater obligation on CBP to provide the public with improved information concerning the trade community’s rights and responsibilities under customs regulations and related laws. In addition, both the trade and U.S. Customs and Border Protection share responsibility for carrying out these requirements.” “Preface,” *What Every Member of the Trade Community Should Know About: Reasonable Care (A Checklist for Compliance), An Informed Compliance Publication, February 2004* (emphasis added).

reasonably available at entry of the merchandise and thereafter all the way through the protest period. The CAFC has allowed jurisdiction under 28 U.S.C. § 1581(i) even when the CIT has been reluctant to do so. Notwithstanding the CAFC's fair recognition of section 1581(i) as means to jurisdiction into the CIT, the CIT has not been sympathetic to direct challenges raised under 1581(i) against the enforceability of the bond under the law of suretyship.<sup>34</sup>

In a recent case, *Hartford Insurance Company v. United States*,<sup>35</sup> the CAFC found error in, and reversed, a CIT holding that denied jurisdiction to the surety to raise claims under 28 U.S.C. § 1581(i) because, according to the lower court, (1) the surety could and should have reasonably known of the existence of its claims against Customs within the statutorily prescribed time period for filing a protest, and (2) the claims were within the scope of protestable claims under 19 U.S.C. § 1514(c)(3). Some jurisdictional background is warranted. The usual path to jurisdiction in the CIT is 28 U.S.C. § 1581(a)<sup>36</sup> which provides for jurisdiction to contest the denial of a protest challenging an administrative action or decision of Customs. The list of

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<sup>34</sup> *St. Paul Fire and Marine Insurance Company v. United States*, 795 F. Supp. 453 (Ct. Int'l Tr. 1992) following remand, the CIT denied the motion of St. Paul to amend its complaint to raise the contract issues recognized by the CAFC in 959 F.2d 960 on the grounds that the plaintiff exercised undue delay in bringing its motion to amend causing prejudice to the defendant United States; *see also Hartford Ins. Co. v. United States*, Slip Op. 12-107, 2012 WL 3291854 (Ct. Int'l Trade, August 13, 2012) holding FOIA preemption precludes Customs' common law duty to disclose information concerning material risk to surety. The court did grant leave to amend the complaint on the issue of whether Customs' decision to accept the bond was an abuse of discretion when, under the circumstances, Customs could have demanded a cash deposit of the duties in question in lieu of a bond. The Court also reiterated the right of Hartford, to have simply waited to raise the contract defenses in any collection action that Customs may have initiated under section 1582(2).

<sup>35</sup> 648 F.3d 1371 (Fed. Cir. 2011).

<sup>36</sup> 28 U.S.C. § 1581(a) provides:

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

actions and decisions that are protestable is set forth in section 514 of the Tariff Act of 1939 (hereinafter the “Tariff Act”), 19 U.S.C. § 1514(a)(1) through (7).<sup>37</sup> The Courts have construed the language of the enumerated items listed in section 514 to include matters well beyond the normal valuation, classification, admissibility and liquidation issues set out in that section. Of particular importance to the surety community, the Court has construed section 514(a)(3), the “all charges or exactions” provision, to include basic contract and suretyship issues as items which may be protested.

However, as will be discussed herein, not all issues are readily apparent to a surety during the protest period to the degree necessary to file a formal, articulate protest setting forth the specific decision protested, the basis for the protest and the surety’s claim setting out the correct course of action that should have been taken by Customs in liquidation or should be taken in remedy of an incorrect liquidation decision. Understanding what a surety knows and does not know during the period from entry through liquidation and beyond is important because, most

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<sup>37</sup> 19 U.S.C. § 1514 (a) provides:

- (a) ...decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to-
  - (1) the appraised value of merchandise;
  - (2) the classification and rate and amount of duties chargeable;
  - (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
  - (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
  - (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modifications thereof, including the liquidation of an entry, pursuant to either section 1500 or section 1504 of this title;
  - (6) the refusal to pay a claim for drawback; or
  - (7) the refusal to reliquidate an entry under subsection (d) of section 1520 of this title; shall be final and conclusive upon all persons (including the United States and any officer thereto) unless a protest is filed in accordance with this section...”

simply stated, a surety cannot protest what it does not know. See *St. Paul Fire and Marine, supra*, 959 F.2d at 964.

Although the statutorily preferred portal to the CIT is under 19 U.S.C. § 1581(a) through the administrative protest procedure set out at 19 U.S.C. § 1514, the line of what is and is not protestable is not quite so bright in matters that do not directly involve classification, valuation and admissibility. In fact, once we step outside of traditional issues of classification, valuation and admissibility, the issue of what is and what is not protestable becomes a matter of “discovery” by the CIT and the CAFC on a case-by-case basis.

The issue addressed by the CIT in the recent *Hartford* case<sup>38</sup> was not an issue of classification, value or appraisalment; nor was it an issue concerning the calculation or assessment of duties or taxes. The issue was a question of the law of suretyship, a question of the principal of voidability, specifically, whether performance under Hartford’s bond was voidable as a result of Customs’ acceptance of the bond and concomitant release of cargo known by Customs to be fraudulently entered by the importer. Customs knew that the entry was fraudulent, as a result of an ongoing investigation into the criminal activities of the importer. When such releases of merchandise under bond are part of what is known in customs law enforcement as “controlled delivery,” a subsequent claim upon the bond for the payment of duties is nothing less than an abuse of the bond. “Controlled deliveries” are used by Customs to track the smuggled merchandise in the hope of identifying and apprehending all culpable parties. The technique is also used to ascertain the degree of culpability of the participants. A “controlled delivery” operation may begin in the foreign country or at the Customs port of entry. The question of voidability is grounded in the question of the degree of unnecessary and

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<sup>38</sup> See Slip Op. 12-107, 2012 WL 3291854 (Ct. Int’l Trade, 2012).

extraordinary risk placed upon an unknowing surety by Customs when other equally practical methods for the interdiction of the smuggled merchandise are available. If Customs loses track of the controlled delivery or allows the merchandise into the commerce of the United States as a part of its investigation, the bond should not be bound for the duties in controversy. The bond is not an insurance policy; the surety does not insure against governmental error. See *United States v. Utex Int'l*, 857 F.2d 1408, 1412 (Fed. Cir. 1988).<sup>39</sup>

Clearly, if Customs advises the surety of its suspicion that a particular importer or certain type of merchandise<sup>40</sup> may carry a greater than ordinary risk to the surety, there is no question that with such knowledge, the surety voluntarily and knowingly undertakes the additional risk. But that is not the usual case at all. The question of extraordinary risk arises when Customs has reason to believe that the importer may be evading the payment of proper duties and taxes at the time of entry by misdescribing the merchandise for classification purposes, or the source of the merchandise, or undervaluing the merchandise or all three. Customs may not know immediately that merchandise is being misdeclared or misdescribed and the surety companies accept such risk.

However, once Customs begins its investigation, is there a point at which Customs' continued release of the merchandise under bond at the questionable tariff rate or value is beneficial only to the smuggler and harmful only to the surety, regardless of the potential benefit

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<sup>39</sup> In *Utex*, Customs prematurely liquidated an entry thereby establishing admissibility before FDA could test and refuse admission of merchandise it found in the entry to be adulterated. The court would not hold liable the surety for the bond obligation to redeliver merchandise once admissibility became final in the liquidation of the entry.

<sup>40</sup> For example, in the first Quarter of 2012, CBP was targeting imports of honey from Malaysia and other countries in a fraud investigation that was seeking to determine whether honey from China, subject to a 165% antidumping duty rate, was being transshipped through Malaysia and certain other countries to avoid the deposit and payment of antidumping duties on the honey at the time of entry.

to the United States? Yes, if the investigation is only to establish a pattern of conduct. In that case, is it the responsibility of an unknowing surety to cover the potential loss in tariffs while the investigation proceeds? Clearly, it should not be. There is no bond provision that underwrites or guarantees that sort of known and calculated loss to the surety for the benefit of the United States.

Does interdiction of importations in violation of the law really depend upon how many transactions can be brought under one civil or criminal action? Perhaps so, but it offends all notions of fundamental fairness to stick the surety with the bill when the relevant risk is actively and intentionally kept secret from the surety by Customs during and after the law enforcement proceedings. In that case, we are no longer dealing with any notion of “risk”. On the contrary, we are dealing with known “loss”, which CBP is empowered to eliminate by requiring entry in accordance with its determination.

Is it the responsibility of Customs to stop illegal activity at the earliest possible moment or to “build” the largest case possible with the largest actual or potential loss of revenue? Why should the surety community be burdened with any aggregate loss of revenue that accrues after Customs knows or should know that an importer is breaking the law and evading the payment of duties? If Customs knows that the importer is violating its reporting obligations, Customs also knows enough about the importer to know that most likely it is a shell operation, conducting business with a pay-per-use disposable cell phone and working out of a post office box address that disguises the P.O Box number with a “Suite” number. Under such circumstances, Customs knows there is no revenue to be had from the importer. Under such circumstances, Customs allowing the continued release of the subject merchandise under bond to the importer is at best a misuse of the bond and misconduct on the part of Customs if and when Customs intends to hold



only the surety liable for the debt. In the end, although Customs will “get their man” invariably, it is misconduct to require the surety to pay the duties. In such cases, whether the surety challenge is brought under section 1581(a) or section 1581(i) or in defense to a collection action maintained by Customs on the bond under section 1582(2), the questions of misconduct resulting in the voidability of surety liability will be: (1) What did Customs know; (2) When did Customs know; and (3) How long did Customs know?

It does not take any imagination to conjure up the alternatives available to Customs to avoid an unjust result. Customs’ first option after the agency has reason to believe that duties are being evaded is to simply reject any entry that Customs has reasonable cause to believe may be misclassified or undervalued at the time of the attempted entry and require entry to be made at the tariff rate and value that Customs reasonably believes to be correct. The burden is then placed on the importer to prove the correct classification to Customs prior to liquidation. If the importer is able to do so, the importer will receive a refund of the estimated duties paid with interest upon liquidation of the entry. I submit that this alternative is employed on a regular basis by CBP.

A second alternative is for Customs to advise the surety that its bonds are in jeopardy in underwriting certain classes of merchandise. I know from personal experience that this alternative was employed first in 2003 and again in 2012, when the Customs officers at the Customs Port of Los Angeles alerted counsel for various sureties that their bonds were in jeopardy.

In 2003, a Customs field officer advised sureties that merchandise subject to antidumping duties was being entered from exporters subject to very high ADD rates using counterfeit

invoices identifying exporters whose merchandise was subject to the lowest antidumping margins. In exchange for the information, the sureties went into partnership with Customs to halt the illegal practice. Counsel for several sureties testified before the House Ways and Means Committee concerning the use of bonds by importers to circumvent the antidumping statutes. The sureties worked with the various Customs field offices to identify shipments and verify the origin thereof sharing the information with Customs to interdict the fraudulent entries and to underwrite with high collateral requirements any suspect shipment which was released. In that manner, the revenue was protected and the counterfeiting dried up.

In 2012, a similar situation arose and concerned the importation of Honey from Malaysia. In early 2012, Customs believed that several importers were importing ADD subject merchandise (honey) that had been transshipped through countries not subject to an ADD order (Malaysia and Indonesia) in order to avoid the requirement of depositing the required estimated antidumping duties due on honey from China at the time of entry. Rather than demanding cash deposits for the potential ADD on Chinese honey, or detaining the merchandise until country of origin could be confirmed, Customs Headquarters instructed the field officers to demand single transaction bonds in the amount of the “potential” antidumping duties applicable to Honey from China. The casual reader might think there was nothing wrong with the actions taken by Customs in the honey matter. However, what was very wrong was that Headquarters instructed the field officers *not to* alert or otherwise advise the importer or the broker or the surety of the reason for the enhanced bond requirement. So far as all parties knew, the entries were being released as general merchandise transactions under normal low risk bonding procedures. There was no opportunity for the sureties to set into motion the underwriting guidelines and procedures required by the sureties for high risk ADD bond transactions. Customs was fully aware, at both

the field and headquarters level, that the sureties would not have undertaken the ADD bonds without full collateral from the principals.

Fortunately, a concerned Customs field officer alerted the sureties of the possible honey smuggling operation and surreptitious agency practice. The sureties met with Customs at the field office level and, later, with Headquarters personnel in order to bring a stop the continuation of the practice. When the sureties attempted to obtain the entry documents through FOIA from the various ports, several ports cooperated readily; others refused access under the interference to a criminal investigation exception to FOIA; and one port refused any information whatsoever other than what should have appeared in the ASI report.<sup>41</sup> After meetings with Customs, Customs set out new guidelines for obtaining single transaction bonds on suspect merchandise. While the guidelines call for specific advisement to the broker and the importer that a single transaction bond will be required for a particular transaction, the guidelines do not call for a disclosure by Customs for the reason behind the enhanced bonding requirement.

Well, one step at a time forward is better than two steps backward. The surety community will continue to press congressionally, administratively and judicially for greater transparency because it is truly astounding how quickly a smuggling practice dries up when

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<sup>41</sup> For its part, Customs tracks bond and entry activity through the Automated Surety Interface system (“ASI”). Since the inception of ASI in 1988, Customs reports select bond information to the sureties after entry and prior to liquidation. However, due to Customs’ concern for the commercial privacy of the importer, none of the information provided under the ASI prior to liquidation of an entry identifies the nature of the merchandise (i.e. what it is) or its tariff classification. Unfortunately, notwithstanding how limited the reported information may be, not all of the sureties on a given entry transaction are provided with the information in the ASI. For example, if a surety company is the only surety on the entry, the surety will receive the ASI data. However, *unless the entry clearly covers antidumping or countervailing duties*, if there is more than one surety on the entry, as is often the case with an entry being covered by a continuous bond (“CTB”) from one surety and supplemented by a single transaction bond (“STB”) undertaken by a different surety, ASI is programmed to report only to the continuous bond surety. In those cases, the single transaction bond surety who is at the greatest level of risk, receives no information whatsoever from Customs prior to liquidation of the entry.

publically exposed. Bonds can only be used to circumvent the law when the smuggler believes that he is working well beneath the radar of Customs and the surety community. Public exposure is the best interdiction tool available to the United States.

Notwithstanding, Customs zealously protects the confidentiality of its investigations. Customs argues that it cannot forewarn the surety. It is Customs' position that to be effective, CBP must keep its investigations confidential until such time as criminal or civil proceedings are initiated. Even then, and after a criminal conviction, the *Hartford* and *St. Paul* cases demonstrate that enhancement of risk is not easily knowable or readily ascertainable by a surety from the date of entry through the protest period and thereafter until many years down the road. It is this very need for confidentiality that, for all practical purposes, eliminates the 19 U.S.C. § 1514 protest remedy as an effective means to protect the surety. This is precisely where 28 U.S.C. § 1581(i) becomes a very effective tool to protect the interests of a surety who lacks the ability to ascertain sufficient knowledge to protect itself from improper use of the bond mechanism to facilitate investigations. Section 1581(i) provides an avenue to jurisdiction into the CIT for relief from activities of Customs that are intentionally withheld from the ken of the surety and that adversely affect claims against the bonds that were underwritten by the surety.

Clearly, the sureties were fortunate in the matter of honey from Malaysia. There was no way to protest the ongoing activity of Customs and find judicial relief under 28 U.S.C. § 1581(a). However, had Customs continued its activity in this matter, the surety would have sought jurisdiction to proceed immediately under 28 U.S.C. § 1581(i) with an injunction to stop the misuse of customs bonds by the agency. On the other hand, should any of the subject bonds be burdened on liquidation with ADD duties applicable to Honey from China, the surety shall either protest on the grounds of affirmative government misconduct resulting in the voidability of

liability for the particular antidumping duties under the posted bonds and proceed if necessary for reimbursement of duties paid under 28 U.S.C. § 1581(a). For those transactions which have still been kept from the sureties after reasonable inquiry, and which are not discovered or reasonably discoverable before the protest period expires, the surety may proceed to have its bonds voided without payment in the future either in defense to a collection action under 28 U.S.C. § 1582(2); or by an affirmative cause initiated under 28 U.S.C. § 1581(i).

On the other hand and under the circumstances, one must ask why the surety should pay the duties and seek reimbursement under section 1581(a), or if lately discovered, be burdened by the cost of a direct challenge under section 1581(i), when the surety is entitled to raise the defense as a contractual defense in a 1582(2) proceeding?

### **So, when is a surety bond like a taxi cab?**

Imagine for a moment, a cop hails down a cab and orders the driver to “Follow that car!!” The cab races forward and thrusts itself into traffic at breakneck speed, careening around each corner in hot pursuit, disrupting traffic in its effort to accommodate the cop. But, alas, around one corner the suspect is lost and the officer orders the cab to the curb.

A surety bond is like a taxi cab when the cop gets out of the cab and writes the cabby a ticket for speeding, reckless driving and running three stop lights. It only gets worse if the suspect is apprehended and the cop gets out of the cab and still writes the cabby the same ticket. That is when sections 1581(i) and 1582(2) come into play.

## Conclusion

When the good faith relationship between surety and its creditor is debased by the intentional acts of Customs, 1581(i) and 1582(2) open the jurisdictional door to contract remedies and defenses under the law of suretyship. The issues discussed herein only arise in a very small and unique number of instances that can have catastrophic financial impact upon the surety industry. I have not addressed instances in which, after entry and release of merchandise, both Customs and the surety first learn of the fraud upon the government. The sureties accept that risk in the ordinary course. Rather, I have limited the scope of my discussion to circumstances in which Customs knows or has reason to know that an importer is violating the U.S. customs laws at the time of entry and, notwithstanding, Customs allows release of the merchandise under bond into the Commerce of the United States. I have attempted to illustrate why the surety cannot readily underwrite itself out of harm's way when an importer is bent on breaking the import laws of the United States. It was the purpose of this article to demonstrate that fundamental fairness requires that Customs, as creditor on the bond, take no step, or fail to take any step, that knowingly and intentionally places the surety at greater risk of unrecoverable loss than is undertaken by a surety in the ordinary course. It is hoped that I have achieved that goal.

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