

Season 3- Episode 4

Olga Torres: For the FCA, I'm thinking customs, right? It's very clear we have the reverse FCA. But I was thinking maybe in cases of let's say export controls, I know we've had recently, it's actually a really interesting case here in the Northern District of Texas. What was the name? I'm blanking on the case name, but it was an export controls/economic sanctions case. And if you think about it, those don't have revenue impact because that's more like national security. The way they brought that case was there was a government contract component and as part of the government contracts, you certify to the government that you are in compliance with the export controls and the economic sanctions. I think in the case they had a situation with Iran. There was something related to Iran. And there were exports to China, if I remember correctly. That's how they said, OK, well, you are making as a government contractor, you're making these statements to us that you are compliant and you're not because you had exports to China, et cetera. That's how they got the FCA to have an export/sanctions case. Otherwise, I'm thinking in cases where you have a whistleblower and there's no revenue impact and they're not a government contractor. What would be the trigger to do an FCA because the government was not owed anything. It hasn't paid anything. I'm thinking that's maybe the only route that you go through with that new program maybe because you don't have the revenue impact. Now if we're just talking about customs cases, maybe, because we do have the FCA and we have plenty of cases and you kind of have a better structure of what to expect. I was thinking maybe the other one will be used more for exports and sanctions cases potentially where there's no revenue.

Andrew Miller: I think that's and I think I believe that case you're referring to is 3D systems.

Olga Torres: Yes, it is.

Andrew Miller: 3D Systems and I actually, I talked with the civil chief from the U.S. Attorney's Office for the Northern District of Texas shortly after that settlement, just because I was curious like you are. This has usually been hands off from DOJ and the FCA perspective. But in that case, there were actually NASA contracts that had flowed down requirements that actually touched upon ITAR and export control, which are very rare in government contracts. It's a unicorn, so to speak.

Olga Torres: Yeah, it's one of those that everything just lined up. But I mean if you don't have that unicorn, I'm thinking if you're still, hey, we have still crazy violations, let's say, I don't know, I'm thinking like the top cases lately, recently are China semiconductors or something and you don't have that revenue impact. Maybe that program and maybe that's why they created it because you had that sort of loophole or gap in in the FCA.

Andrew Miller: That's exactly right. In the pilot program and again, I did have some conversations with folks that that are kind of near the leadership that are heading up that program. It's a catch-all. It's a catch-all intended. . . if there's like a Foreign Corrupt Practices Act case that involves a company that the government wouldn't have jurisdiction over otherwise, this allows them to go after them. If there's an SEC case, that's where it involves a company securities violation, but they're not traded on U.S. Stock Exchange, this program addresses that. You're exactly right for trade issues/trade compliance violations where you don't have a false claim made against the government or an obligation to pay in the traditional reverse claim, false claim under the FCA, this pilot program is something you're definitely going to see investigations arise from.

Olga Torres: It's interesting and it's somewhat unrelated, I suppose, but going back to when you don't have a false claim made to the government, I had seen, and I don't know that it was in the FCA context, but I had seen some criminal cases where DOJ would have this announcement and I was like, "That's crazy," because every time there's an export from the U.S. – let's say you're exporting widgets or whatever – there's a filing. It's called the electronic export information. And I've seen it in investigations where companies don't file the right information, the correct information, and it's very technical. Typically, the company is not preparing it, it's like someone like, you know, your forwarder, and sometimes there are typos; sometimes they don't 100% match what the description of the product. There's no revenue on the export side. I have seen cases, criminal cases, where what the government was focused on was the EEI. That to us as kind of compliance attorneys were like, "That's nuts. That actually came out in the press release by DOJ," and because that was the statement that they could find that said you did not send this. It wasn't the description. It wasn't the classification. Because there's no revenue otherwise, and there's no other statement. I think you're right. Going back to that probably is going to capture more things that will not be 100% would not fall under an FCA or a typical FCA case.

In terms of trends, are you seeing – we talked about Section 301, so China – are you seeing any other kind of trends in terms of industries, like certain industries or certain other regions outside of China, that could lead to tariff evasion, or have you seen any export cases with a whistleblower situation in the past few years?

Andrew Miller: I mean in terms of the actual, the goods themselves, the types of schemes that we're seeing, or alleged schemes, sorry, it involves all kinds of products. Right when you start to think that we may be trending towards a specific type of industry, then it shifts again. I think at this stage, it could be anything. Whenever we get a new inquiry, it's always interesting like, "What's it going to be today?" Is it textiles? Is it party supplies? What is it going to be? Is it steel or aluminum from China? More traditional types of tariff evasion schemes. Thus far we have not seen it coalesce into any specific trend. I think at this stage it's kind of all of the above.

Olga Torres: Yeah, I'm expecting to see a lot more transshipment. I don't know how difficult it is

for the government to find out. I suppose we're talking whistleblowers. But I do think, especially if the IEEPA tariffs stay, I do feel like a lot of people were caught, I guess in a way, off-guard. Like if you're a business, you're running, you're importing and you have 5% profit margin or whatever the case may be, and all of a sudden it comes in that quickly. I do see like a desperation by industry of, like, "Oh my god, this can't be happening to us." I think people may make mistakes. The reason I think that is one, the government seems to think that, at least on the civil side, they've issued, like, "Hey, if there's transshipment, we won't give you any mitigation." And there was some controversy as to what they meant. I think the government is aware of it, but also even just the lines of questions that we were getting right after "Liberation Day." "What if I just send my products to a third country?" It goes back . . . those are actually quite easy to prove. If we talk about the schemes that I've seen in the custom side: A lot of valuation, of course. They lower the price of the products. And valuation with customs, it's not very clear sometimes. Things come in, things that you wouldn't think from a profit perspective like assists and things like that. It gets very technical. But those are areas that we typically see in the scheme's valuation. I'm sure you've seen a classification. They change the codes. The code automatically, the new one that they've never declared before, it just lowers their duty dramatically. But then transshipment, historically, I hadn't seen it as much. We've seen a bit, especially like oh, Xinjiang region of China with forced labor and things like that where you're like "eh," or ADD/CVD. But to this extent to have basically duties on every country in the world for the most part right now, I think transshipment may be one that I'm expecting. I haven't seen an investigation yet. Like you said, it typically it takes a while for it, but I'm expecting to see more of those cases. Just saying.

Andrew Miller: I think you're right too. And I think that lines up with our experience as well. Misclassifying products, misstating country of origin, undervaluing products, those have been the three that we see primarily. Transshipments that's obviously the fourth category, but, for whatever reason, we don't see a lot of that. If that is the case that these current tariffs are upheld by the Supreme Court, I think you're right. I think that we are going to see it because that's probably the easiest way to avoid for those who don't want to pay what is owed. I think that's probably the most straightforward way of getting around it.

Olga Torres: Yeah. What are your nightmare stories, or "Don't do this if you are considering whistleblowing." And we talked about, OK, well to have a strong case, document, document, document, not that you're going to be expecting someone to get outside of their context or their job description, et cetera. But what are the no, don't do that. Like do not go and do such and such. Do you have any stories to share?

Andrew Miller: I mean being truthful always helps. I mean it doesn't help to make something more than it is. That's something that we do in our evaluation of cases. I think ultimately, we turn down more cases than we take because they're either blind spots in the story, not any fault of the potential client, just because it wouldn't have access to the type of evidence.

Olga Torres: Just difficult to prove the allegations, basically?

Andrew Miller: We don't need all the pieces, but we need enough pieces to be able to have a level of confidence that we can file a case in federal court and in good faith and be able to allege the fraud according to the requirements under the federal rules. Sometimes it is just that they're close. We tell them, "If you learn new information, come back and let us know." Other times there are credibility issues. I think if we get a sense that their motivations are not aligned with kind of what our goal is to just bring real allegations of fraud to the government's attention. Then we won't move forward. I think just being truthful, I mean if you can't create a case out of whole cloth. It either exists or it doesn't. I think that's kind of the way that we look at these from the from the get-go.

Olga Torres: Have you ever seen serial whistleblowers, like where they go one company and another? Is that even happening?

Andrew Miller: Not so much in the customs fraud case space, at least not yet. I've seen it in healthcare fraud cases where maybe there's a physician that's been promoted certain drugs or devices by drug manufacturers for purposes that the FDA hasn't approved, and so they can become a serial relator. But I think, I think you're probably right that we might see more and more in the customs fraud space because I think there are databases out there. There's information that's publicly available, with a subscription or not, that I understand folks are using to identify outliers that may have the indicia of fraud. I think the Whirlpool example that you're probably familiar with. That's kind of how they got to where they were, and then ultimately it turned out that the assumptions they were making were not correct. I think you may, if people figure out how to use that data and actually can connect it to fraudulent schemes, then you're going to see more, I think, serial relators in the custom space.

Olga Torres: That reminded me of something. I mentioned that now, when we know we have an issue and we're trying to decide do we self-report, to whom? Like do we just self-report to Customs are we concerned about anything else? I wonder if we're going to start seeing a trend of . . . and I know like the settlements are global. Like, "Hey, we settle and Customs, we're not expecting you to come back and with a different statute," for example. But I have heard and read of cases, where one case was another attorney speaking at a conference, and she mentioned this case to me. It sounded crazy, but I think it could happen more because there's just more revenue and there's just more aggressive enforcement. One of them was a situation where she said, and it goes back to my fear, they did a prior disclosure, and it was multimillion dollar penalty to Customs. Then after they paid, they agreed, Customs walks away. All of a sudden, she gets a False Claims Act, and then it was a different statute. When she settled with Customs and she went through the we pay you, close a PD. Typically you wouldn't think, "OK, well, you're agreeing we're not going to be referring this to anybody else." That happened to her, which I've never experienced in my career, and I hope I never have to experience that. But it is a concern of mine. And then the other way, and I think it was a relatively recent case. It may have been out of New York. Where they settle the FCA, the civil side, they pay whatever the restitution was, and all of a sudden, they get a referral and it goes to the Criminal Division. Do you expect anything

like that? Is there something? I know going back to global settlements and making sure but typically in the settlements, I don't think they add like, "We're not going to refer to criminal." I think that's something that is not going to be added or I don't know, I'm asking you, I guess. Have you seen that? Do you expect that? Are you concerned of any of that? And I know you're not coming in from like the defense side, but I'm just curious.

Andrew Miller: Sure. It's not something that we've seen or experienced or even heard of until, I mean, the examples that you just gave are really the first ones. I know that when we file a case, it's on the civil side, DOJ starts investigating. If they think that the conduct rises to a certain level, they will bring in Criminal, who will do a parallel criminal investigation. Then typically what happens in that instance is the civil side puts their pencils down to allow the criminal side to do their investigation, and then Criminal makes a decision one way or the other. Are they going to take action or not? And then after that determination is made, then Civil gets back into it. That's the dynamic I'm familiar with. The idea of coming to a resolution on the civil side.

Olga Torres: And then getting the referral. . .

Andrew Miller: That's foreign to me, and I've not experienced that.

Olga Torres: Yeah, and I hope it doesn't happen more than what I've heard or read. But that is a concern, especially if you have multiple divisions involved, multiple programs. Now you have the Criminal Division with their memo and their whistleblower program, and you have the FCA, Civil Division. I wonder if it's like, "Hey, I want a piece of it," and I hope it doesn't go that way. But I think it is something to keep in mind when negotiating settlements. And now for us on the civil administrative side to sort of consider when you're doing your prior disclosure filings, especially if we think "Is this really just closing it here or could we open some other doors?" In that case that I mentioned, she says, this attorney said, "I didn't see any indication of any kind of criminal, but it was an employee that claimed that the prior disclosure didn't include everything." But she said that she didn't think she saw anything outside of what she had included in the in the prior disclosure. She was very blindsided by the whole thing.

To close it up, because I think we're running out of time, we talked about trends, we talked about different divisions, we talked about customs versus exports, and maybe there's, sometimes there's an interrelation there. Like, I think in terms of the culture compliance of the company, if you're like violating customs laws, you are likely violating some other laws as well. What are your closing thoughts? If you are counseling on your side, from your point of view, a whistleblower, and they're thinking about it, but they're not sure how to proceed, they don't know how to document, what is your closing thoughts advice to someone like that?

Andrew Miller: Well, if I'm somebody who I think has come across evidence of potential customs fraud, I think talking internally with the company I would always say that that's probably the first step. You want to make sure that you understand the context for everything that you're seeing. Then in the examples I provided to you before, if you feel like you're not being

listened to, then like in anything in life, getting advice from somebody who's experienced in that space is probably pretty important. Even if it's . . . a lot of times what we'll do is we'll meet with somebody, listen to their information and tell them, you know what that's actually not fraud. That's something else. And it certainly would not be the basis for a False Claims Act case. And so that makes them in that instance, kind of everybody wins. The company doesn't have to deal with a False Claims Act investigation, DOJ does not have to spend resources on it, and the client and us, we don't have to worry about pursuing a case that ultimately isn't going to go anywhere. I think always arming yourself with as much relevant information is critical, at least from the potential whistleblower perspective.

Olga Torres: Yeah. I lied because as you were talking, I just thought of something else I wanted to ask you. How does it work when, especially if you're trying to decide, “OK, is this a good case or not?” And I'm sure because you deal with all sorts of fraud, healthcare and other areas, customs, whatever, whatever the case may be. I'm sure at some point you may have to reach out to experts in those areas or kind of dig more. Do you ever actually talk to the government at that stage, or is it always more formal, kind of like a complaint being filed?

Andrew Miller: It kind of depends on the issue. Sometimes I know based on prior relationships with DOJ, certain U.S. Attorney's Offices that this set of facts is something that they would be definitely interested in. If it's a new theory of liability, then yeah, maybe that's just kind of a very kind of informal conversation, not naming names, no company names or anything like that, no client names. Just saying if this were the fact pattern, is that something that you've seen the government has an interest in? Because again, it's in our best interests, it's in our clients' best, it's in everyone's best interest to really only move forward on cases that we think are going to gain traction with the Department of Justice.

Olga Torres: Yeah, that makes sense. Well, thank you so much, Andrew, for your time. Again, this was fun. For our audience, please stay tuned for the next episode. Thank you so much for joining us.