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Trek Leather: A New Avenue for CBP Enforcement

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The recent decision by the U.S. Court of Appeals for the Federal Circuit (CAFC) in *U.S. v. Trek Leather, Inc. and Harish Shadadpuri* invites U.S. Customs and Border Protection (CBP) to increase its enforcement and penalty activities and serves as a warning that should encourage enhanced import compliance procedures and other actions to protect against liability under CBP laws.

The case involved Trek Leather (the importer of record) and its president, Mr. Shadadpuri, who failed to declare certain fabric assists when entering a number of men's suits and thereby undervalued the goods. Mr. Shadadpuri was personally involved in furnishing the false invoices to the CBP broker filing the entries. Moreover, he had a choice as to which company would actually enter the goods and specifically selected Trek Leather. This was not Mr. Shadadpuri's first brush with CBP. A few years before the Trek Leather undervaluation was discovered, a CBP import specialist central to the Trek Leather investigation discovered that a different company which Mr. Shadadpuri owned had failed to include certain assists in the dutiable value of the goods. In the appealed case, Mr. Shadadpuri conceded that he knew Trek Leather should have included the fabric assists in the dutiable value of the goods.

The government prosecuted Trek Leather and Mr. Shadadpuri personally under 19 USC § 1592, which is the most common statute CBP employs when the violation concerns a revenue loss attributable to false documents. Section 1592 states that "no person, by fraud, gross negligence, or negligence … *may enter, introduce, or attempt to enter or introduce* any merchandise into the commerce of the United States by means of" a false document.

The government initially charged both Trek Leather and Mr. Shadadpuri with fraud. However, Trek Leather admitted to gross negligence leading the

government to drop the fraud charges against both defendants. Mr. Shadadpuri did not concede liability under any standard of wrongdoing. Initially, the U.S. Court of International Trade (CIT) found Mr. Shadadpuri guilty of gross negligence under Section 1592. In July 2013, the CAFC issued a split decision (2-1) reversing the CIT finding and holding that a violation regarding an "entry" or entering goods under Section 1592, was limited to actions by an importer of record. The CAFC noted that under the statute defining importers of record (19 USC § 1484), Mr. Shadadpuri did not qualify as such. Consequently, the court reasoned that since Mr. Shadadpuri was not an importer of record he could not be held liable for violations tied to entry of the goods.

The CAFC's three-judge panel decision was subsequently vacated for a rehearing by the full court, which issued its current unanimous (10-0) decision on September 16, 2014. As opposed to previous decisions focusing on who is eligible to "enter" goods, the CAFC's en banc decision examined an issue not previously raised or briefed by the plaintiffs or the defendants; the meaning of "introduce" in Section 1592. The CAFC held that Mr. Shadadpuri's actions "introduced" the suits into the commerce of the U.S. at an improperly low value. In support of its decision, the court cited a CBP penalty statute from 1909, which included the word "introduce" and a U.S. Supreme Court case decided in 1913 concerning that penalty statute. Based on those supporting materials the CAFC defined "introduce" in the context of Section 1592 as follows:

> [T]he term covers actions that bring goods to the threshold of the process of entry by moving goods into CBP custody in the United States and providing critical documents (such as invoices indicating value) for use in the filing of papers for a contemplated release into United States commerce even if no release ever occurs.

As for issues raised concerning "entry" of the goods, the CAFC stated:

> We need not and do not decide whether Mr. Shadadpuri attempted to or did "enter" the merchandise at issue, and we therefore do not address the relevance to that question of statutory limitations on what persons are authorized to "enter" the merchandise at issue….

Thus, after a CIT opinion and two CAFC opinions, the question of what constitutes "entry" under Section 1592 remains open. However, "introducing" goods now has been broadly construed to cover action by parties other than the importer of record.

Opening the door to increased CBP penalty actions under Section 1592

At the outset, it is important to be clear about what *Trek Leather* does not establish. Specifically, this case does not stand for the proposition that a corporate officer or shareholder – in their capacity as a corporate officer or shareholder - may be automatically liable for the wrongdoing of the company. The CAFC was clear that it was Mr. Shadadpuri's actions that created his personal liability, not his status

as president of the company. In that light, *Trek Leather* establishes precedent that *any* person engaging in wrongful conduct causing goods to be "introduced" into the U.S. could have liability under Section 1592, irrespective of that person's corporate status.

Although *Trek Leather* does not create liability for officers and shareholders by virtue of their corporate identity, it confirms liability for any number of individuals responsible in some manner for importing goods into the United States. Import managers, customs compliance analysts, logistics specialists and other individuals whose actions are responsible for creating entry documents, bringing goods to the threshold of entry and/or providing entry documents to the customs broker or CBP must reassess the possibility of personal liability in light of *Trek Leather*.

When evaluating that possibility, it should be noted that *Trek Leather* opens the door for aggressive CBP enforcement action for violations much less egregious than those evidenced by Mr. Shadadpuri's conduct. We reiterate that the case was attributable to grossly negligent conduct and involved "introducing" goods into the United States. But Section 1592 also treats a mere "attempt" to introduce goods based on a false document as a violation. Based on the *Trek Leather* opinion, introducing goods into the United States encompasses actions up to the threshold of submitting the entry documents. In that light, what constitutes an "attempt" to introduce false documents is not clear, but certainly includes actions taken in advance of submitting the actual entry documents.

Also, actions need not be grossly negligent to violate Section 1592. Mere negligence will suffice. The regulatory standard for "negligence" under Section 1592 is low: a failure to exercise "reasonable care and competence." Consider, then, what type of negligent conduct could be viewed as introducing or attempting to introduce goods into the United States. We hope that CBP will administer Section 1592 judiciously in a post-*Trek Leather* environment. Every erroneous invoice or misclassified product should not be treated as a per se violation of Section 1592. Nevertheless, as applied to the numerous import managers, logistics specialists, customs brokers and other personnel responsible for bringing goods to the threshold of entry and providing entry documents, the low bar to a violation of Section 1592 – and personal liability thereunder - becomes readily apparent and a matter of concern.

What This Means to You

In our experience, most importers and logistics personnel recognize the seriousness of CBP compliance. However, *Trek Leather* requires heightened scrutiny. At a minimum, companies should be aware of and take actions widely accepted as evidence of reasonable care: written policies and procedures should be updated; periodic testing and internal auditing should be documented; personnel should confirm access to compliance materials on the CBP website and elsewhere; and companies should document training and consultations with a customs expert.

Two other developments are also likely. First, companies may consider obtaining an Errors and Omissions/Professional Liability insurance policy covering negligent violations of Section 1592. We are not aware of current insurance covering this type of error and believe that while entirely possible, it would have to be specially structured. Second, certain logistics personnel may start to ask their employers to provide an indemnity for negligent violations of Section 1592.

Contact Us

In light of this major development in enforcement, all importers should review the implications for their operations and take action to address this new risk factor. If you have any questions regarding this alert, please contact Robert Stang or Cortney Morgan.