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Abstract

This Article canvasses the experience of importers under revised section 592 over the past eight years as reflected in judicial proceedings in the federal courts, particularly the United States Court of International Trade (CIT) and the Court of Appeals for the Federal Circuit (CAFC or Federal Circuit). Part I of this Article presents an overview of section 592, both its predecessor and the 1978 revisions enacted by Congress. Part II analyzes section 592 subsection by subsection, with a special focus on the case law under revised section 592. Finally, Part III concludes that although the 1978 legislative revisions of section 592 went far in remedying the section's harshness to the importing public, Customs' administration of the section has not effectuated these changes.

CIVIL PENALTY PROCEEDINGS UNDER SECTION 592 OF THE TARIFF ACT OF 1930

Kevin C. Kennedy*

INTRODUCTION

Amid strong criticism from all segments of the importing public that the civil penalty provisions of the Tariff Act of 1930¹ were far too stringent,² lacked due process safeguards,³ and did not permit effective judicial review,⁴ Congress overhauled the civil penalty provisions contained in 19 U.S.C.

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1. Tariff Act of 1930, ch. 497, § 592, 46 Stat. 590, 750 (codified as amended at 19 U.S.C. § 1592 (1982)).

2. See Dickey, *Survivals from More Primitive Times: Customs Forfeitures in the Modern Commercial Setting under Sections 592 and 618 of the Tariff Act of 1930*, 7 LAW & POL'Y INT'L BUS. 691, 711-29 (1975); *Customs Procedural Reform Act of 1977: Hearings on H.R. 8149 and H.R. 8222 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. 287-88 (1977).

3. See Dickey, *supra* note 2.

4. See S. REP. NO. 778, 95th Cong., 2d Sess. 2 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 2211-14 [hereinafter S. REP. NO. 778]. The Senate Finance Committee elaborated on these importer criticisms in its Report on the Customs Procedural Reform and Simplification Act of 1978 (the Act):

The penalty under section 592 [forfeiture of the merchandise or a fine equal to its domestic value] applies without regard to the degree of culpability. The penalty of forfeiture value may be applied to a violation occurring as a result of simple negligence. While Customs has procedures for mitigation of a section 592 penalty, the issuance of the original unmitigated claim creates several problems. For example, publicly held corporations must disclose penalty claims as contingent liabilities leading to difficulties involving the corporation's financial relationships. H.R. 8149 would provide different penalties for three different degrees of culpability: fraud, gross negligence, and negligence.

Section 592 also lacks procedural safeguards for the alleged violator and does not permit effective judicial review. The respondent is forced to choose between accepting the mitigated administrative penalty or face a Government suit, in which case the claim is for full forfeiture value. The

§ 1592 with the enactment of the Customs Procedural Reform and Simplification Act (Procedural Reform Act) in 1978.⁵ One of the major objectives of the Procedural Reform Act was "to relate the amount of the customs penalty for false and material statements to Customs to the culpability of the offender and insure due process for persons potentially liable for penalties"⁶

Section 592 of the Tariff Act of 1930⁷ is the Customs Service's (Customs) civil enforcement mechanism to combat the use of false statements made by importers when entering merchandise into the customs territory of the United States. It is intended to deter the use of inaccurate documentation in introducing merchandise into the United States: documentation upon which the Customs Service must rely when assessing du-

court can only decide whether or not a violation occurred. It cannot change the amount of the statutory penalty, domestic value.

The risks of litigation are enormous when the initial penalty may become the final assessment. H.R. 8149, as amended by the committee, provides procedural rules for Customs consideration of penalty cases and provides for a trial in the Federal district courts on all issues if the matter is not resolved administratively.

S. REP. NO. 778, *supra*, at 2-3. Under a 1980 conforming amendment to section 592 contained in the Customs Courts Act of 1980, the United States Court of International Trade (CIT) was given exclusive jurisdiction over all section 592 penalty actions. *See* Customs Courts Act of 1980, § 609, Pub. L. No. 96-417, 94 Stat. 1727, 1746 (1980).

5. Section 592 of the Tariff Act of 1930, *amended by* 19 U.S.C. § 1592 (1976), *repealed by* Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, 92 Stat. 888, 893-97 (1978).

Section 592 of the Tariff Act of 1930 was superseded by section 110 of the Customs Procedural Reform and Simplification Act of 1978. Throughout this Article, however, reference will be made to section 592 instead of section 110 as this is how the legal community refers to the civil penalty provisions of 19 U.S.C. § 1592.

6. S. REP. NO. 778, *supra* note 4, at 1. The Senate Finance Committee identified two other major goals which the Customs Procedural Reform and Simplification Act intended to achieve:

1. To permit the establishment of more efficient and flexible procedures for handling the documentary and financial aspects of import transactions while insuring compliance with customs laws and the collection of accurate import statistics . . . and

3. to modify numerous customs procedures to expedite the processing of goods and individuals while reducing administrative costs for the government.

Id. *See generally* Dickey, *Customs: Fines and Forfeiture Under Section 592 of the Tariff Act of 1930 -- Revisited*, 35 BUS. LAW. 149 (1979); Rossides, *The Customs Procedural Reform and Simplification Act of 1978*, 34 BUS. LAW. 1789 (1979).

7. 19 U.S.C. § 1592 (1982).

ties and administering United States customs laws.⁸

This Article canvasses the experience of importers under revised section 592 over the past eight years as reflected in judicial proceedings in the federal courts, particularly the United States Court of International Trade (CIT) and the Court of Appeals for the Federal Circuit (CAFC or Federal Circuit). As will be explored in greater depth, revised section 592 is far from a model of drafting clarity. It raises many thorny issues, particularly the propriety of forfeiting merchandise pursuant to section 592(c)(5)⁹ entered in purported violation of section 592(a).

Part I of this Article presents an overview of section 592, both its predecessor and the 1978 revisions enacted by Congress. Part II analyzes section 592 subsection by subsection, with a special focus on the case law under revised section 592. Finally, Part III concludes that although the 1978 legislative revisions of section 592 went far in remedying the section's harshness to the importing public, Customs' administration of the section has not effectuated these changes.

I. OVERVIEW OF SECTION 592

A. *The Prior Law*

Section 592 is the most frequently used customs penalty provision.¹⁰ Former section 592 made it unlawful for any person to import merchandise into the United States

by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement . . . without reasonable cause to believe the truth of such statement, . . . whether or not the United States shall or may be deprived of the lawful duties . . . accruing upon the merchandise¹¹

Former section 592 made no distinction between fraudulent and negligent violations. Thus, regardless of the degree of the

8. *Id.*

9. 19 U.S.C. § 1592(c)(5) (1982).

10. S. REP. NO. 778, *supra* note 4, at 17.

11. 19 U.S.C. § 1592 (1976). The Customs Service considered the term "false statement" to include negligent as well as intentional statements. *See United States v. R.I.T.A. Organics, Inc.*, 487 F. Supp. 75, 77 (N.D. Ill. 1980); Herzstein, *The Need to Reform Section 592 of the Tariff Act of 1930*, 10 INT'L LAW. 285, 286 & n.1 (1976).

violator's culpability, the only penalty for violating former section 592 was forfeiture of the merchandise or a fine equal to its domestic value.¹² To some commentators,¹³ former section 592 created an anomaly in that the penalty for violating this civil statute could easily exceed the maximum criminal fine of U.S.\$5000 under 18 U.S.C. § 542,¹⁴ the criminal analogue to section 592.

12. "Domestic value" is the U.S. sales price of the merchandise at the time and place of appraisal. 19 C.F.R. § 162.43(a) (1986); cf. S. REP. NO. 778, *supra* note 4, at 20. A fine equal to its domestic value was imposed in situations where the merchandise was not seized by the Customs Service or had already entered the stream of commerce of the United States. 19 C.F.R. § 162.43(b) (1986). *United States v. One Red Lamborghini*, 625 F. Supp. 986, 989 n.6 (Ct. Int'l Trade 1986). In addition, the applicable statute of limitations was five years from the date of discovery of a violation. See 19 U.S.C. § 1621 (1976). Under the Act, the statute of limitations runs five years from the date an alleged violation is committed in the case of negligent or grossly negligent violations. See 19 U.S.C. § 1621 (1982), as amended by Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, § 110(e), 92 Stat. 897 (1978).

13. See, e.g., Herzstein, *supra* note 11, at 287; see also Note, *Anachronism Laid to Rest: Customs Reform Act Accomplishes Long Overdue Reform of Section 592 of the Tariff Act of 1930*, 10 *LAW & POL'Y INT'L BUS.* 1305, 1311-12 (1978).

14. 18 U.S.C. § 542 (1982) provides in part:

Entry of goods by means of false statements

Whoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of any lawful duties; . . . or Shall be fined for each offense not more than [U.S.]\$5,000 or imprisoned not more than two years, or both.

Nothing in this section shall be construed to relieve imported merchandise from forfeiture under other provisions of law.

Id. Thus, although section 542 places a cap of U.S.\$5,000 on any fine that may be imposed for a violation, that section is nevertheless cumulative with other statutes which provide for forfeitures, such as section 592.

It was also argued that the stiff penalties imposed under former section 592 contravened the commitment made by the contracting parties to the General Agreement on Tariffs and Trade not to

impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.

Upon discovery of an apparent section 592 violation, an investigation would be conducted by lower echelon Customs Service personnel to determine whether a section 592 violation had in fact occurred.¹⁵ If they reached an affirmative determination, the matter eventually would be referred to the district director of Customs who would in turn decide whether to seek forfeiture or forfeiture value. If so, the district director would then issue to the alleged violator a pre-penalty notice of Customs' intent to seek forfeiture under section 592.¹⁶ In the pre-penalty notice the alleged violator would be informed of the statutory provisions violated, the acts or omissions constituting the violations, a description of the merchandise and each entry involved in the violation, and the total loss of revenue, if any.¹⁷ The violator would then be given thirty days in which to respond or pay the claim for forfeiture or forfeiture value.¹⁸ If the alleged violator elected to respond, he would have the burden of either refuting the allegations or showing that the acts or omissions described in the pre-penalty notice were not in violation of the law.¹⁹

If the alleged violator's presentation did not persuade the district director, the section 592 proceeding would then move to the penalty notice stage. The penalty notice was in all material respects a carbon copy of the pre-penalty notice, but might

General Agreement on Tariffs and Trade, Oct. 30, 1947, art. VIII (3), 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 194, 220; see Herzstein, *supra* note 11, at 288.

15. For a description of the former section 592 administrative process, see Dickey, *supra* note 2; Gerhart, *Judicial Review of Customs Service Actions*, 9 LAW & POL'Y INT'L BUS. 1101, 1130-35 (1977).

16. A pre-penalty notice would issue only if the forfeiture exceeded \$25,000 and more than one year remained on the running of the statute of limitations. 19 C.F.R. § 171.1(b)(1) (1978). In serious cases, a district director could refer the matter to the local United States Attorney's office for criminal prosecution, which would usually be under 18 U.S.C. § 542 and/or 545. In de minimis cases (e.g., where the loss of revenue was less than U.S.\$250), no claim for forfeiture would issue, provided the violator paid the duty. S. REP. NO. 778, *supra* note 4, at 18; U.S. Customs Circular ENF-4-R:E:P (Dec. 15, 1976), reprinted in *Customs Procedural Reform Act of 1977: Hearings on H.R. 8149 and H.R. 8222 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. 98 (1977). In addition, Customs could mitigate any forfeiture claim to 100 percent of the total loss of revenue, if the section 592 violation was voluntarily disclosed. See 19 C.F.R. § 171.1(a)(1)(vi) (1978). Customs considered a disclosure voluntary if it was made prior to initiation of an investigation. *Id.* § 171.1(a)(1).

17. 19 C.F.R. §§ 162.31(b), 171.1(b) (1978).

18. 19 C.F.R. § 171.1(b)(2).

19. *Id.*

include any additional information discovered after issuance of the pre-penalty notice.²⁰ A person receiving a penalty notice would have sixty days in which either to pay the claim or to petition for mitigation of the claim²¹ pursuant to section 618 of the Tariff Act of 1930.²²

Proceedings relating to a petition for mitigation were informal and discretionary with Customs. Section 618 vests the Secretary of the Treasury with discretion to remit or mitigate any fine, penalty, or forfeiture "upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto."²³ Guidelines relating to mitigation provided that Customs consider the accused's cooperation in the investigation, prior record of violations, and experience in importing, among other things.²⁴ However, no time periods were provided within which Customs had to act on the petition for mitigation.²⁵ If the alleged violator's merchandise had been seized by Customs, he was, of course, placed at a serious disadvantage during the administrative proceedings. Seized merchandise would be released only if the claimant paid Customs an amount equal to the appraised domestic value of the merchandise.²⁶ Therefore, the economic pressures to settle quickly at the mitigated amount could be quite great for the alleged violator, although the alleged violator could have the matter judicially referred.

If at the end of this administrative proceeding Customs had not remitted the penalty, or if the alleged violator failed to pay the assessed penalty, Customs would refer the matter to the United States Attorney for the institution of forfeiture proceedings in a United States district court.²⁷ In such proceed-

20. 19 C.F.R. § 171.1(b)(3).

21. 19 C.F.R. § 171.12(b); see S. REP. NO. 778, *supra* note 4, at 18 ("Virtually every importer petitions for mitigation.").

22. 19 U.S.C. § 1618 (1976).

23. *Id.*; see S. REP. NO. 778, *supra* note 4, at 18 ("Section 592 penalties are almost always mitigated by Customs to a multiple of the underpayment of duties resulting from the violation, usually between two and ten times the underpayment.").

24. *Guidelines for the Remission or Mitigation of Forfeitures and Claims for Forfeiture Value*, 39 Fed. Reg. 39,061 (1974); see also 40 Fed. Reg. 2,797 (1975).

25. If the petition for mitigation was not resolved to the alleged violator's satisfaction, that person could file a petition for reconsideration within 60 days of Customs' decision on the mitigation petition. 19 C.F.R. § 171.32 (1978).

26. 19 C.F.R. § 162.44 (1978).

27. *Id.*; 19 U.S.C. § 1604 (1976). See generally Dickey, *Customs: Fines, Forfeitures*,

ings, the district courts would only determine whether section 592 had been violated. The district courts had no discretion to impose any penalty less than that sought by the Government, and would refuse to review Customs' mitigation decision.²⁸ More importantly, from the perspective of the alleged violator, the Government only had to show probable cause for the institution of the suit.²⁹ Upon that showing, the burden was then placed on the alleged violator to prove that section 592 had not been violated.³⁰

As noted above,³¹ both importers and commentators charged that proceedings under former section 592 violated both substantive and procedural due process. A section 592 penalty could violate substantive due process by being disproportionate to the nature of the offense.³² It was argued that procedural due process was violated because during the course of the administrative proceeding, Customs did not provide the alleged violator with adequate notice of the facts upon which Customs based its conclusion that a section 592 violation had occurred, making it practically impossible to respond to pre-penalty and penalty notices.³³ Finally, critics complained that judicial review of section 592 penalty decisions was inadequate, especially because the burden of proof was placed on the alleged violator rather than the Government.³⁴ As the Sen-

Penalties and the Mitigation Procedures — Sections 592 and 618 of the Tariff Act of 1930, 30 BUS. LAW. 299 (1975). As one commentator has noted, "The sole method for obtaining judicial review of a [section 592] penalty . . . has been for the person who has been penalized to refuse to pay the penalty." Herzstein, *supra* note 11, at 290.

28. S. REP. NO. 778, *supra* note 4, at 18. The Senate Finance Committee noted in this connection:

The court has no power to reduce the penalty or to impose a mitigated penalty proposed by Customs. Because of the all or nothing nature of litigation under section 592, most importers pay the mitigated penalty proposed by the Customs Service under section 618. The appropriateness of the mitigated penalty is not subject to judicial review.

Id.; see, e.g., *United States v. One 1970 Buick Riviera*, 463 F.2d 1168, 1170 (5th Cir. 1972), *cert. denied*, 409 U.S. 980 (1972); *United States v. One 1961 Cadillac*, 337 F.2d 730, 732 (6th Cir. 1964); *United States v. One 1941 Plymouth Tudor Sedan*, 153 F.2d 19, 20-21 (10th Cir. 1946).

29. 19 U.S.C. § 1615 (1976).

30. *Id.*

31. See *supra* notes 2 and 4.

32. See Dickey, *supra* note 2, at 711-19; Herzstein, *supra* note 11, at 286-88.

33. See Dickey, *supra* note 2, at 721-25; Herzstein, *supra* note 11, at 288-90.

34. See Dickey, *supra* note 2, at 725-26; Herzstein, *supra* note 11, at 290-92. An additional criticism levelled at former section 592 was its frequently astronomic pen-

ate Finance Committee in its Report on the Procedural Reform Act noted: "[T]he respondent is forced to choose between accepting the mitigated administrative penalty or face a Government suit, in which case the claim is for full forfeiture value. The court can only decide whether or not a violation occurred. It cannot change the amount of the statutory penalty, domestic value."³⁵ For these reasons, the situation was ripe for reform in 1978.

B. *The Current Law*

Compared with its predecessor provision, amended section 592 is prolix. Formerly only one paragraph, section 592 is now comprised of no fewer than five subsections, some of which cover subjects previously not addressed. However, parts of revised section 592 border on the arcane. The 1978 revisions to section 592 are generally more procedural than substantive. Thus, before examining revised section 592 in detail, it is helpful to review that provision generally in order to acquire a better understanding of its various subsections.

Although Congress completely revised section 592, the persons covered and the nature of the prohibition remain essentially the same.³⁶ As a general rule, it is unlawful for any person to enter or attempt to enter merchandise into the commerce of the United States by means of false and material statements, documents, or by means of omissions which are material.³⁷ Clerical errors and mistakes of fact are expressly excepted unless they represent "a pattern of negligent conduct."³⁸ More importantly, Congress for the first time has provided for three levels of culpability, namely: fraud, gross negligence, and negligence.³⁹ Each level is pegged to maximum

alty assessments. For publicly held corporations this fact caused particular concern, as noted by the Senate Finance Committee in its report on the Customs Procedural Reform and Simplification Act: "[P]ublicly held corporations must disclose penalty claims as contingent liabilities leading to difficulties involving the corporation's financial relationships." S. REP. NO. 778, *supra* note 4, at 2.

35. S. REP. NO. 778, *supra* note 4, at 2.

36. See 19 U.S.C. § 1592(a) (1982); S. REP. NO. 778, *supra* note 4, at 18; H.R. CONF. REP. NO. 1517, 95th Cong., 2d Sess. 10 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 2249, 2252 [hereinafter H.R. CONF. REP. NO. 1517].

37. 19 U.S.C. § 1592(a)(1)(A)(i) (1982).

38. 19 U.S.C. § 1592(a)(2) (1982).

39. 19 U.S.C. § 1592(a)(1) (1982).

penalties ranging from a penalty not to exceed the domestic value of the merchandise in the case of fraud;⁴⁰ a penalty not to exceed the lesser of the domestic value of the merchandise or four times the loss of duties, in the case of gross negligence;⁴¹ and in the case of negligence, to a penalty not to exceed the lesser of the domestic value of the merchandise or two times the lawful duties of which the United States is or may be deprived.⁴² The penalty for a violation of section 592 thus was changed from an in rem penalty, forfeiture of the merchandise under former section 592, to an in personam monetary penalty against the importer.⁴³ The penalty was also changed from a fixed amount, the domestic value of the merchandise, to an amount varying with the culpability of the importer.

Whereas former section 592 contained no references to the administrative procedures to be followed in processing a section 592 claim, revised section 592 incorporates many of Customs' former regulations and guidelines, but with two major changes.⁴⁴ First, the minimum penalty amount for which a pre-penalty notice is required was reduced from U.S.\$25,000 to U.S.\$1,000.⁴⁵ Second, the pre-penalty notice must now in-

40. 19 U.S.C. § 1592(c)(1) (1982).

41. 19 U.S.C. § 1592(c)(2)(A)(i) & (ii) (1982). If the violation does not affect the assessment of duties, the penalty for a grossly negligent violation of section 592 cannot exceed 40 percent of the dutiable value of the merchandise. 19 U.S.C. § 1592(c)(2)(B).

42. 19 U.S.C. § 1592(c)(3)(A)(i) & (ii) (1982). In the case of a negligent violation of section 592 which does not affect the assessment of duties, e.g., where the merchandise is duty free, the penalty is not to exceed 20 percent of the dutiable value of the merchandise. 19 U.S.C. § 1592(c)(3)(B) (1982).

43. H.R. CONF. REP. 1517, *supra* note 36, at 10. *But see* United States v. Murray, 561 F. Supp. 448, 457 (Ct. Int'l Trade 1983) (former section 592 provided for in personam and in rem proceedings). Even though the penalty under section 592 is now in personam, Congress has still authorized Customs to seize merchandise in connection with an alleged section 592 violation if Customs has reasonable cause to believe (1) that the alleged violator is insolvent, (2) that the alleged violator is beyond the jurisdiction of the United States, (3) that seizure is essential to protect the revenue of the United States, or (4) that seizure is essential to prevent introduction of prohibited or restricted merchandise into the customs territory of the United States. 19 U.S.C. § 1592(c)(5) (1982). For a further discussion of section 592(c)(5), see *infra* notes 263-295 and accompanying text.

44. 19 U.S.C. § 1592(b) (1982); see H.R. CONF. REP. NO. 1517, *supra* note 36, at 18.

45. See 19 U.S.C. § 1592(b)(1)(B)(ii) (1982); H.R. CONF. REP. NO. 1517, *supra* note 36, at 10.

clude all material facts which establish the violation.⁴⁶ Under section 592(b), if a customs officer has reasonable cause to believe that a section 592(a) violation has occurred and determines that further proceedings are warranted, the district director must issue a pre-penalty notice to the alleged violator.⁴⁷ The notice must describe the merchandise, set forth the details of the entry, specify all laws and regulations allegedly violated, disclose all material facts, state the degree of culpability and the estimated loss of duties, and inform the alleged violator of his right to make a defense.⁴⁸ The person named in the pre-penalty notice has thirty days within which to respond.⁴⁹

Excepted from the pre-penalty notice requirement are noncommercial importations and importations in which the amount of the penalty is U.S.\$1,000 or less.⁵⁰ By regulation, no penalty case will be initiated for a small revenue-loss violation, provided the district director is satisfied that the violation has resulted from negligence, that the actual and potential loss of revenue is U.S.\$500 or less, and that the violation does not extend to other districts.⁵¹ This represents a minor change from previous administrative practice where the revenue-loss threshold was U.S.\$250.⁵²

After considering the importer's presentation, Customs must make a violation determination and notify the importer of that decision "promptly."⁵³ In determining whether or not to issue a penalty notice, the district director is to consider "all available evidence with respect to the existence of material false statements or omissions (including evidence presented by the alleged violator), the degree of culpability, the existence of a prior disclosure, the seriousness of the violation, and the existence of mitigating, aggravating, or extraordinary fac-

46. 19 U.S.C. § 1592(b)(1)(A)(iv) (1982).

47. 19 U.S.C. § 1592(b)(1)(A) (1982); 19 C.F.R. § 162.77 (1985).

48. 19 U.S.C. § 1592(b)(1)(A)(i)-(vii) (1982). Although this provision is designed to afford the alleged violator with more information than was previously the practice at the pre-penalty notice stage, the author has found that pre-penalty notices continue to be brief and conclusory, rarely disclosing "all the material facts which establish the alleged violation." 19 U.S.C. § 1592(b)(1)(A)(iv) (1982).

49. 19 C.F.R. § 162.77(b)(2) (1986).

50. 19 U.S.C. § 1592(b)(1)(B)(i) & (ii) (1982); 19 C.F.R. § 162.77(b)(2)(C)(1) & (2) (1986).

51. 19 C.F.R. pt. 171, app. B, (C)(2)(b) (1986) [hereinafter Appendix B].

52. See S. REP. NO. 778, *supra* note 4, at 18.

53. 19 U.S.C. § 1592(b)(2) (1982); 19 C.F.R. § 162.79(a)-(b) (1986).

tors.”⁵⁴ Regarding prior disclosure, Congress added a new provision to section 592⁵⁵ that allows the penalty in fraud cases to be reduced to one hundred percent of the duty underpayment, or to ten percent of the dutiable value of the merchandise in instances where the violation did not affect the assessment of duties⁵⁶ if the alleged violator discloses the violation before commencement of a formal investigation.⁵⁷ In cases involving grossly negligent or negligent violations, a voluntary disclosure will result in the penalty being reduced to the amount of interest due on the underpaid duties.⁵⁸

If the district director determines that there was no violation, “he promptly shall notify the person in writing of that determination and that no claim for a monetary penalty will be issued.”⁵⁹ If the district director decides to issue a notice of a claim for a monetary penalty, he also must do so promptly.⁶⁰ The notice must contain any changes to the information provided in the pre-penalty notice⁶¹ and must inform the person named in the notice of his right to petition for mitigation or remission of the penalty pursuant to section 618.⁶²

By statute, the alleged violator is to be given “a reasonable opportunity”⁶³ to make both a written and oral representation when applying for mitigation or remission.⁶⁴ By regulation, the alleged violator has sixty days from the date of mailing of the penalty notice within which to file a petition for mitigation.⁶⁵ No particular form is required for the petition.⁶⁶ It must contain a description of the property involved, the date and place of the violation, and the facts and circumstances relied upon by the petitioner justifying remission or mitigation.⁶⁷

54. Appendix B, *supra* note 51, at (C)(2)(a).

55. 19 U.S.C. § 1592(c)(4) (1982).

56. 19 U.S.C. § 1592(c)(4)(A) (1982).

57. The person asserting lack of knowledge of an investigation carries the burden of proving such lack of knowledge. 19 U.S.C. § 1592(c)(4) (1982).

58. 19 U.S.C. § 1592(c)(4)(B) (1982).

59. 19 C.F.R. § 162.79(a) (1986).

60. 19 C.F.R. § 162.79(b)(1) (1986).

61. 19 U.S.C. § 1592(b)(2) (1982); 19 C.F.R. § 162.79(b)(2) (1986).

62. *Id.*

63. 19 U.S.C. § 1592(b)(2) (1982).

64. *Id.*

65. 19 C.F.R. § 171.12(b) (1986).

66. 19 C.F.R. § 171.11(c) (1986).

67. *Id.*

If the petitioner desires to make an oral presentation, he must so request in his petition for mitigation.⁶⁸

The district director is authorized to remit or mitigate section 592 penalties which do not exceed U.S.\$25,000.⁶⁹ Penalties not in excess of U.S.\$100,000 may be remitted or mitigated by the Commissioner of Customs.⁷⁰ The Secretary of the Treasury retains authority to remit or mitigate penalties in excess of U.S.\$100,000.⁷¹ The district director still retains the authority to cancel a penalty, however, "[i]f it is definitely determined that the act or omission forming the basis of [the] penalty . . . did not in fact occur"⁷² In processing petitions for mitigation, the district director or appropriate customs officer is to consider "all the information in the petition and all available evidence, taking into account mitigating, aggravating, and extraordinary factors"⁷³ In a departure from past practice, Customs is now required to provide "a

68. 19 C.F.R. § 171.14(a)(2) (1986).

69. 19 C.F.R. § 171.21 (1986).

70. See T.D. 85-25, 50 Fed. Reg. 7,335 (1985).

71. *Id.*

72. 19 C.F.R. § 171.31 (1986). If cancellation turns on a construction of law, approval of the Commissioner of Customs is required before a penalty may be canceled. *Id.*

73. Appendix B, *supra* note 51, at (D)(1). A nonexhaustive list of mitigating, aggravating, and extraordinary factors are found in Appendix B. See Appendix B, *supra* note 51, at (F), (G), and (H). Among the mitigating factors are contributory customs error, such as misleading or erroneous advice; cooperation with the investigation, such as assisting in an audit of the alleged violator's books and records; immediate remedial action, such as the correction of organizational defects; inexperience in importing, in the case of a negligent violation; and a prior good record, in the case of a grossly negligent or negligent violation. Appendix B, *supra* note 51, at (F)(1)-(5). As for aggravating factors, Appendix B provides:

(G) *Aggravating Factors*

Certain factors may be determined to be aggravating factors in arriving at the final mitigated penalty decision. Examples of aggravating factors include obstructing the investigation, withholding evidence, providing misleading information concerning the violation, and prior substantive violations of section 592 for which a final administrative finding of culpability has been made.

Id. at (G). Finally, four extraordinary factors justifying further relief are listed in Appendix B: (1) the inability to obtain jurisdiction over the violator or the inability to satisfy a judgment against the violator; (2) the documented inability to pay the mitigated penalty; (3) extraordinary expenses, such as a one-time computer run solely for submission to Customs to assist it in analyzing a case involving an unusual number of entries; and (4) in non-fraud cases, actual knowledge by Customs of a violation of which it failed to inform the violator so that the violator could have taken earlier corrective action. Appendix B, *supra* note 51, at (H)(a)-(d).

written statement which sets forth the final determination and the findings of fact and conclusions of law on which such [section 618] determination is based.”⁷⁴ In a further departure from prior administrative practice,⁷⁵ Customs has now disclosed the multiples it uses in arriving at a mitigated penalty.⁷⁶

74. 19 U.S.C. § 1592(b)(2) (1982).

75. See Herzstein, *supra* note 11, at 290.

76. In the guidelines Customs published in 1974 and 1975, it indicated that the usual mitigated penalty consisted of a multiple of the duty underpayment and that the multiple varied with the violator’s state of mind. In Appendix B, *supra* note 51, promulgated in 1984, at T.D. 84-18, 49 Fed. Reg. 1,682, those multiples were finally publicly disclosed:

(D) *Disposition of Cases*

(1) *In General.* . . .

(2) *Violations Determined to be Fraudulent.*

Absent extraordinary factors justifying further relief, a penalty for a fraudulent violation shall be mitigated as follows:

(a) For revenue-loss violations, to an amount ranging from a minimum of five times the loss of revenue to a maximum of the lesser of the domestic value of the merchandise or eight times the loss of revenue. However, a penalty equal to the greater of the domestic value of the merchandise or eight times the loss of revenue may be warranted due to the existence of aggravating factors.

(b) For non-revenue-loss violations, to an amount ranging from 50 to 80 percent of the dutiable value of the merchandise. However, a penalty equal to the domestic value of the merchandise may be warranted due to the existence of aggravating factors.

(3) *Violations Determined to be Grossly Negligent.* Absent extraordinary factors justifying further relief, a penalty for a grossly negligent violation shall be mitigated as follows:

(a) For revenue-loss violations, to an amount ranging from a minimum of two and one-half times the loss of revenue to a maximum of the lesser of the domestic value of the merchandise or four times the loss of revenue;

(b) For non-revenue-loss violations, to an amount ranging from 25 to 40 percent of the dutiable value of merchandise.

(4) *Violations Determined to be Negligent.* Absent extraordinary factors justifying further relief, a penalty for a negligent violation shall be mitigated as follows:

(a) For revenue-loss violations, to an amount ranging from a minimum of one-half the loss of revenue to a maximum of the lesser of the domestic value of the merchandise or two times the loss of revenue.

(b) For non-revenue-loss violations, to an amount ranging from five to 20 percent of the dutiable value of the merchandise.

“Domestic value” is generally equivalent to retail value, while “dutiable value” is generally equivalent to wholesale value. S. REP. NO. 778, *supra* note 4, at 20.

A petitioner is entitled to file a supplemental petition following an unsatisfactory disposition of his initial petition for mitigation. 19 C.F.R. § 171.33(a) (1986). A second supplemental petition may also be filed, but only if accompanied by payment of the penalty and duties. 19 C.F.R. § 171.33(c) (1986). A petitioner may request that a supplemental petition from a decision of the Commissioner of Customs be treated as

If at the conclusion of this administrative process the matter has not been resolved, Customs will make a referral to the Commercial Litigation Branch of the Department of Justice in Washington, D.C., for the institution of proceedings in the CIT.⁷⁷ In these proceedings all issues, including the amount of the penalty, are subject to trial de novo.⁷⁸ Previously the

an appeal to the Secretary of the Treasury, but the Secretary will only consider such a petition if it raises important factual, legal, or policy questions. 19 C.F.R. § 171.33(d). If the Secretary declines to consider the petition, it is returned to the appropriate customs official for consideration.

77. 19 U.S.C. § 1604 (1982). That sections provides:

It shall be the duty of the Attorney General of the United States immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and, if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court or the Court of International Trade is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case provided, unless, upon inquiry and examination, the Attorney General decides that such proceedings cannot probably be sustained or that the ends of justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises.

Id. The CIT, located in New York City, has had exclusive jurisdiction of all section 592 penalty actions since 1980. 28 U.S.C. § 1582 (1982).

78. 19 U.S.C. § 1592(e)(1) (1982). A section 592 defendant is entitled to a jury trial. *See* *United States v. Priority Prods., Inc.*, 615 F. Supp. 593 (Ct. Int'l Trade). *But see* O'Kelly, *infra* note 308:

I think a case can be made for limiting the amount of the government's claim in court to the mitigated penalty. Under section 592(b)(2), at the conclusion of the mitigation proceedings, Customs is required to furnish the importer with a written statement that sets forth the final determination on mitigation, and the findings of fact and conclusions of law on which such determination is based.

It seems clear that Congress intended the mitigation proceeding to be something more than a mere steppingstone or prerequisite to filing suit in court for collection of the penalty.

Id. at 818-19 (footnote omitted).

The United States is not limited in its monetary claim to the amount of the mitigated penalty. *Priority Prods., Inc.*, 615 F. Supp. at 593. Conversely, even if it successfully prosecutes the action, the United States might not necessarily obtain a judgment for the total amount of the penalty it is seeking. *See* H.R. CONF. REP. NO. 1517, *supra* note 36, at 11 ("This provision would change existing law by (1) permitting a court to make its own judgment about the appropriate remedy for a section 592 violation."). In *Kritschker v. Greenleaf*, No. 85-5-00657 (Ct. Int'l Trade July 18, 1986), the court entered a default judgment on the Government's section 592 counterclaim, limiting the Government's recovery to the proceeds of sale of the seized merchandise. The court did not articulate any reasons for ordering a penalty in an amount less than what the Government sought to recover.

Although the amount of the penalty is tried de novo along with all other issues,

district court had no discretion to modify the penalty.⁷⁹ A second major change in this regard is that the United States now generally shoulders the burden of proof in section 592 actions.⁸⁰ In fraud actions the burden of proof is clear and convincing evidence.⁸¹ In actions involving a grossly negligent violation, the United States must establish all the elements of the alleged violation.⁸² In negligence actions, the United States has to prove the act or omission constituting the violation, and the alleged violator must show that the act or omission did not occur as a result of negligence.⁸³

Finally, an action filed to enforce a section 592 penalty arising out of a grossly negligent or negligent violation must be brought within five years of the violation.⁸⁴ Under prior law, a section 592 action could be brought within five years after the violation was discovered.⁸⁵ The limitations period for fraudulent violations of section 592 continues to be five years from the date of discovery of the violation.⁸⁶

the question arises whether the CIT has a totally free hand in imposing a penalty, or whether its discretion in this regard is in some way limited. Because there is nothing in section 592 or 28 U.S.C. § 1295 (a) (5) providing that the CIT's penalty imposition decisions are insulated from appellate review, the CIT's exercise of discretion in this connection ought to be subject to review and reversal on appeal for abuse of discretion. The CIT would either have to articulate some reason for imposing the penalty it did in order for the Federal Circuit to be able to review the CIT's exercise of discretion, or the record would have to show that the CIT had some basis for imposing the penalty it did, e.g., it was the amount which the Government sought to recover. Taking a worst case scenario, if the CIT imposed a penalty of U.S.\$1.00 fraud case involving a maximum penalty of U.S.\$1,000,000, could it be said that the CIT had not abused its discretion under section 592(e)(1)? *See United States v. Gordon*, 634 F. Supp. 409, 415 (Ct. Int'l Trade 1986) ("[T]he trier of fact may award penalties in an amount far below the maximum allowable, presumably based on any rational reason including the degree of damages sustained.").

79. *See supra* note 28 and accompanying text.

80. 19 U.S.C. § 1592(e)(2)-(4) (1982).

81. 19 U.S.C. § 1592(e)(2) (1982).

82. 19 U.S.C. § 1592(e)(3). "This means the Government would have to prove, by a preponderance of the evidence, that the importer acted in reckless disregard of his legal duties" S. REP. No. 778, *supra* note 4, at 20.

83. 19 U.S.C. § 1592(e)(4) (1982).

84. 19 U.S.C. § 1621 (1982).

85. 19 U.S.C. § 1621 (1976).

86. 19 U.S.C. § 1621 (1982). *See United States v. R.I.T.A. Organics, Inc.*, 487 F. Supp. 75 (N.D. Ill. 1980).

II. ANALYSIS OF REVISED SECTION 592

A. Prohibited Acts Under Section 592(a)

Section 592(a) provides:

Prohibition

(1) General rule

Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence --

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of —

(i) any document, written or oral statement, or act which is material and false, or

(ii) any omission which is material, or

(B) may aid or abet any other person to violate subparagraph (A).

(2) Exception

Clerical errors or mistakes of fact are not violations of paragraph (1) unless they are part of a pattern of negligent conduct.

1. Persons Liable

Whereas former section 592 listed the persons liable for a violation of the statute as “[a]ny consignor, seller, owner, importer, consignee, agent, or other person or persons,” new section 592 eliminates this list and instead simply refers to “no person.” This change does not affect the reach of section 592.⁸⁷ The scope of section 592’s prohibition, like its prede-

87. See S. REP. NO. 778, *supra* note 4, at 20 (“[I]n its amendment, the committee does not change the scope of present section 592 either with respect to the persons potentially liable or the acts prohibited.”); H.R. CONF. REP. 1517, *supra* note 36, at 12. In *United States v. Appendagez, Inc.*, 560 F. Supp. 50 (Ct. Int’l Trade 1983), the CIT held that merely because an individual purportedly had acted solely in his corporate capacity was no shield against a section 592 action:

We conclude that there is nothing in the Act nor its legislative history to indicate that the Congress intended to restrict the applicability of the penalties to corporations and to exclude from the applicability of the penalties officers of corporations merely because of a claim that they were acting in their corporate capacities.

560 F. Supp. at 55.

The aiding and abetting provision “relates to a material and false statement or

cessor, extends to the entry, introduction, or attempt to enter or introduce merchandise into the commerce of the United States.⁸⁸ However, in a departure from former section 592, new section 592 specifies three degrees of culpability — fraud, gross negligence, and negligence⁸⁹ — as elements of a section 592 violation. Generally, complaints filed by the United States allege in the alternative fraudulent, grossly negligent, and negligent violations of section 592.⁹⁰ Alleged failures to plead fraud with sufficient specificity have been the subject of several motions to dismiss in the CIT.⁹¹ Rule 9(b) of the rules of the CIT, mirroring its counterpart in the Federal Rules of Civil Procedure,⁹² provides that “[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity.” However, in *United States v. F.A.G. Bearings Corp.*,⁹³ for example, the defendant filed a Rule 9(b) motion to dismiss,⁹⁴ claiming that the Government’s amended complaint⁹⁵ failed to

act, and not merely the entry of merchandise. This is meant to prevent innocent parties who are somehow involved in the entry from being charged with a 592 violation.” H.R. CONF. REP. 1517, *supra* note 36, at 11-12.

88. Merchandise is entered into the commerce of the United States when it clears Customs. Merchandise is introduced into the United States when it arrives within the territory of the United States but has not passed Customs.

89. The elements of fraud, gross negligence, and negligence are discussed *infra* at notes 215-47 and accompanying text.

90. *See, e.g.*, *United States v. Gold Mountain Coffee, Ltd.*, 601 F. Supp. 212 (Ct. Int’l Trade 1984); *United States v. F.A.G. Bearings Corp.*, 615 F. Supp. 562 (Ct. Int’l Trade 1984).

91. *See, e.g.*, *United States v. Scope Imports, Inc.*, No. 85-5-00646, slip op. 86-59 (Ct. Int’l Trade June 2, 1986); *United States v. Priscilla Modes, Inc.*, No. 84-4-00493, slip op. 85-122 (Ct. Int’l Trade Nov. 27, 1985); *United States v. F.A.G. Bearings Corp.*, 615 F. Supp. 562 (Ct. Int’l Trade 1984).

92. FED. R. CIV. P. 9(b).

93. 615 F. Supp. 562 (Ct. Int’l Trade 1984).

94. *Id.* at 564.

95. On a prior motion to dismiss in the same case, the CIT found certain averments in the Government’s complaint insufficiently particularized to satisfy Rule 9(b). *United States v. F.A.G. Bearings Corp.*, No. 83-9-01314, slip op. 84-4 (Ct. Int’l Trade Jan. 25 1984); *see F.A.G. Bearings Corp.*, 615 F. Supp. at 564 n.2. The averments of fraud in the first amended complaint stated:

6. The documents filed with the United States Customs Service in connection with the aforementioned consumption entries were material and false in that at least 14% of the merchandise entered, introduced or attempted to be entered or introduced into the United States was falsely described and, specifically, the ball/roller bearings and components thereof were described by a part number different from the part number of the actual bearing or component thereof entered into the United States.

7. The documents filed with the United States Customs Service in connec-

conform with the particularity requirement of Rule 9(b) and the notice requirement of Rule 8(a)(2).⁹⁶ F.A.G. Bearings contended that the Government should specify which of the 27,000 entries were implicated in the alleged fraud, which merchandise was entered by means of false statements, and which

tion with the aforementioned consumption entries were material and false in that the price stated for the merchandise on said documents was represented on said documents and/or by written or oral statements to be the price paid by F.A.G. for said merchandise when in fact it was not.

8. Defendant F.A.G. knew or should have known that the part numbers of the bearings or components thereof actually entered, introduced or attempted to be entered or introduced into the United States were different from the part numbers stated on the documents submitted to the United States Customs Service in connection with said entry introduction or attempted introduction. Defendant F.A.G. knew or should have known that the prices stated for the imported merchandise on the documents submitted to the U.S. Customs Service in connection with the entry, introduction or attempted entry or introduction of said merchandise were not the prices it paid for said merchandise.

F.A.G. Bearings Corp., 615 F. Supp. at 564 n.2. The CIT found that the allegations of fraud were conclusory and failed to set forth the circumstances of fraud with particularity, especially the allegation in paragraph 6 that "at least 14% of the merchandise . . . was falsely described." See *id.* The CIT therefore ordered the Government to file an amended complaint or risk dismissal. *Id.*

In the Government's second amended complaint, several paragraphs were added describing the alleged fraud:

6. On or about November 28, 1978, a customs officer discovered, during an inspection of a shipment of bearings being entered into the commerce of the United States from the Toledo Foreign Trade Zone by F.A.G.-U.S., that many of the part numbers appearing on the individual bearing boxes had been altered by inking-out or obliterating a suffix portion of the part number. Upon further examination, the customs officer discovered that the part numbers appearing on some of the boxes were different from the part numbers appearing on the bearings contained in the boxes.

7. On or about December 28, 1978, in response to a Customs Service request for information as to the "marking-out" of bearing descriptions, F.A.G.-U.S. submitted to Customs . . . computer printouts purportedly listing all of the "substituted" bearings shipped to the Toledo Foreign Trade Zone during the period December 1, 1977 through November 30, 1978.

13. The computer printouts referred to in paragraph 7 [which listed some 27,000 entries] . . . above indicate that during 1978 at least 14% of the bearings shipped to F.A.G.-U.S.'s warehouse in the Toledo Foreign Trade Zone by F.A.G.-Germany were falsely described on customs entry documents.

615 F. Supp. at 564-65. The second amended complaint concluded with essentially the same allegation of fraud as contained in paragraph eight of the Government's first amended complaint discussed *supra*; see 615 F. Supp. at 565-66.

96. *F.A.G. Bearings Corp.*, 615 F. Supp. at 564. With few exceptions, the CIT rules are modelled after and track verbatim the Federal Rules of Civil Procedure.

particular statements or descriptions were false and material.⁹⁷ In denying the defendant's motion to dismiss, the CIT noted that the Government had set forth the time, place, and contents of the false representations and that when many complicated transactions are involved, courts relax the particularity requirement. The CIT also noted that Rule 9(b) particularity is subject to the Rule 8(a) enjoiner that pleadings set forth a "short and plain statement" of the claim.⁹⁸ The court also rejected the defendant's argument that a fraud complaint must allege facts establishing that misstatements were made with an intent to defraud,⁹⁹ relying on much the same rationale it used in connection with defendant's contention that the Government's complaint lacked particularity.¹⁰⁰

The allegations of fraud in the Government's second amended complaint in *F.A.G. Bearings Corp.* certainly complies with Official Form 13, which is set out as illustrative of a fraud claim in the Federal Rules of Civil Procedure.¹⁰¹ There is no requirement that a plaintiff plead evidence.¹⁰² In addition, the CIT correctly pointed out that Rule 9(b)'s particularity requirement must be read in conjunction with the simplicity and flexibility contemplated by Rule 8.¹⁰³ Still, as Professors Wright and Miller note, context is everything.¹⁰⁴ Thus, for example, "considerable particularity may be necessary to state a claim under the federal civil false claim statutes" ¹⁰⁵ Nevertheless, Rule 9(b) only requires pleading "circumstances;"

97. 615 F. Supp. at 567.

98. *Id.*

99. *Id.* at 568.

100. *Id.* While acknowledging the harshness of the section 592 fraud penalty, the CIT stated rather surprisingly that "the severity of these remedies has been a jealously guarded tradition in American law." *Id.* at 568 n.7.

101. The allegation of fraud in Official Form 13 states:

Defendant C.D. on or about _____ conveyed all his property, real and personal [or specify and describe] to defendant E.F. for the purpose of defrauding plaintiff and hindering and delaying the collection of indebtedness evidenced by the note above referred to.

102. *United States v. Scope Imports, Inc.*, No. 85-5-00646, slip op. 86-59 (Ct. Int'l Trade June 2, 1986); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1298, at 409 (1969).

103. 5 C. WRIGHT & A. MILLER, *supra* note 102, § 1298 at 406-07.

104. *Id.* at 410.

105. *Id.* at 410-12. See, e.g., *Tryco Trucking Co. v. Belk Store Servs., Inc.*, 608 F. Supp. 812, 816 (W.D.N.C. 1985), where the district court sustained a complaint filed under the Racketeer Influenced and Corrupt Organizations Act that identified the

neither Rule 9(b) nor Rule 8 requires fact pleading.¹⁰⁶ In sum, the CIT correctly denied the defendant's motion to dismiss in *F.A.G. Bearings Corp.*

2. The "By Means Of" Requirement

Section 592(a) maintains the requirement that the entry, introduction, or attempt be "by means of" a false and material document, statement, act, or material omission.¹⁰⁷ The term "by means of" has been the focus of several recent decisions.¹⁰⁸ The Ninth Circuit's decision in *United States v. Teraoka* is the source of some controversy.¹⁰⁹ That case involved the criminal counterpart to section 592, 18 U.S.C. § 542.¹¹⁰ Like its civil analogue, section 542 requires that the entry or introduction of merchandise be "by means of" a false or fraudulent statement. The Ninth Circuit construed the "by means of" language to require a causal nexus between the false document and the actual entry of the merchandise into the United States.¹¹¹ In other words, the merchandise itself had to be otherwise prohibited or excludable before it could be said that merchandise had been entered "by means of" a false statement.¹¹² The court rejected the Government's argument that the question was whether the false statements materially re-

transactions, the fraudulent representations, the material concealments, the parties, and their intent with the particularity required by Rule 9(b).

106. *See* McGinty v. Beranger Volkswagen, Inc., 633 F.2d 226, 228 (1st Cir. 1980); 5 C. WRIGHT & A. MILLER, *supra* note 102, § 1298, at 410.

107. 19 U.S.C. § 1592(a)(1)(A)(i)-(ii) (1982).

108. *See, e.g.*, *United States v. Ven-Fuel, Inc.*, 758 F.2d 741 (1st Cir. 1985); *United States v. Teraoka*, 669 F.2d 577 (9th Cir. 1982); *United States v. F.A.G. Bearings Corp.*, 615 F. Supp. 562 (Ct. Int'l Trade 1984).

109. *Teraoka*, 669 F.2d 577.

110. 18 U.S.C. § 542 (1980) (text cited *supra* note 14).

111. *Teraoka*, 669 F.2d at 579.

112. The court explained:

The district court ruled that unless it could be said that the false statements in the invoice documents had some relationship to the actual importation of the goods into the country, it could not be said that entrance of the goods had been "by means of" the false statement. We agree with that construction of 542. . . .

The protection established against dumping of foreign goods is not to deny entrance of goods or to impose terms upon which entrance is granted, but to impose a special duty on goods. As a result, the entry of the Mitsui nails at issue would not have been affected even had correct invoice prices been submitted showing the sale price to be less than the trigger price.

Id.

lated to an important aspect of the importation process.¹¹³ Although conceding that the defendant may have violated some other statute by submitting false invoices, the court held that “[h]e has not, however, entered goods into the United States by means of a false statement.”¹¹⁴

The First Circuit and the CIT have both considered the “by means of” issue in the context of a section 592 action.¹¹⁵ Both courts have rejected the *Teraoka* rule. In *United States v. Ven-Fuel, Inc.*,¹¹⁶ the First Circuit considered an appeal brought by an oil importer who had been assessed a U.S.\$783,500 civil penalty under former section 592.¹¹⁷ Latching on to the argument advanced by the defendant in *Teraoka*, Ven-Fuel similarly argued that the “by means of” language in section 592 limited the reach of that statute to situations in which importation of the goods in question would not have been allowed but for the false statement.¹¹⁸ The court rejected Ven-Fuel’s argument, observing that “[s]uch a restrictive reading would largely eviscerate the statute, rendering it meaningless in the vast majority of cases.”¹¹⁹ The court went on to note that even in the context of section 542 prosecutions, criminal convictions have regularly been sustained when the merchandise was itself not excludable.¹²⁰ Finally, the First Circuit added, its construction of the “by means of” language in the context of *Ven-Fuel* was consistent with the *Teraoka* decision in that the false statements made by Ven-Fuel avoided a conditional ban on entry of the merchandise.¹²¹

113. *Id.*

114. *Id.*

115. *United States v. Ven-Fuel, Inc.*, 758 F.2d 741 (1st Cir. 1985); *United States v. F.A.G. Bearings Corp.*, 615 F. Supp. 562 (Ct. Int’l Trade 1984); *United States v. F.A.G. Bearings, Ltd.*, 598 F. Supp. 401 (Ct. Int’l Trade 1984).

116. *Ven-Fuel*, 758 F.2d 741 (1st Cir. 1985).

117. *Id.* at 743. As noted, the district courts had exclusive jurisdiction over section 592 actions prior to enactment of the Customs Courts Act of 1980. See 28 U.S.C. § 1355 (1976); 19 U.S.C. § 1592(e), amended by Customs Courts Act of 1980, Pub. L. No. 96-417, § 507, 94 Stat. 1743 (1980); see also *United States v. Accurate Mould Co.*, 546 F. Supp. 567, 568 (Ct. Int’l Trade 1982).

118. *Ven-Fuel*, 758 F.2d at 762.

119. *Id.*

120. *Id.* (citing *United States v. Murray*, 621 F.2d 1163 (1st Cir.), cert. denied, 449 U.S. 837 (1980); *United States v. Brown*, 456 F.2d 293 (2d Cir.), cert. denied, 407 U.S. 910 (1972)).

121. *Ven-Fuel*, 758 F.2d at 762-63 & n.16. But for Ven-Fuel’s false statements, the entry of oil would not have been duty-free. *Id.* at 763.

Similarly, in *United States v. F.A.G. Bearings, Ltd.*,¹²² the CIT found untenable the defendant's contention that section 592 only applied to merchandise that was otherwise prohibited or excludable. Noting that the courts have consistently applied section 592 and its predecessor provisions to importations of nonprohibited merchandise,¹²³ the CIT grounded its conclusion that section 592 applied to all kinds of merchandise largely on the Senate's Report on the Procedural Reform Act.¹²⁴ In that Report, the court noted, the Senate Finance Committee stated that the purpose of section 592 was "'to encourage accurate completion of the entry documents upon which Customs must rely to assess duties and administer other customs laws.'"¹²⁵ From this statement the CIT drew the obvious conclusion that "[i]t is unlikely that Congress would emphasize that section 592 was intended to allow Customs to properly 'assess duties' if the statute was meant to apply only to prohibited merchandise."¹²⁶

The major difficulty with the CIT's rationale is that the *F.A.G. Bearings Corp.* case was based on former section 592.¹²⁷ The CIT therefore used subsequent legislative history to explain a previous Congress' intent in enacting former section 592. As the Supreme Court has cautioned, subsequent legislative history provides "an extremely hazardous basis for inferring the meaning of a congressional enactment."¹²⁸ Nevertheless, although the CIT's analysis may have been defective in this respect, it still sheds light on the proper interpretation of the "by means of" language contained in the current version of the statute.¹²⁹

The *Teraoka*, *Ven-Fuel*, and *F.A.G. Bearings Corp.* decisions

122. *United States v. F.A.G. Bearings, Ltd.*, 598 F. Supp. 401 (Ct. Int'l Trade 1984).

123. *Id.* at 404 (citing *United States v. Twenty-Five Packages of Panama Hats*, 231 U.S. 358 (1913)).

124. *F.A.G. Bearings, Ltd.*, 598 F. Supp. at 403-04.

125. *Id.* at 403 (quoting S. REP. NO. 778, *supra* note 4, at 17).

126. *Id.* at 404.

127. *Id.* at 402.

128. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980). *But see* *Seatrains Shipbuilding v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); *Ven-Fuel*, 758 F.2d at 758.

129. *See also* *United States v. F.A.G. Bearings Corp.*, 615 F. Supp. 562, 569 (Ct. Int'l Trade 1984), where the court again rejected the *Teraoka* construction of "by means of":

are distinguishable in that in *Teraoka* the court was construing a criminal statute. Although most of the rules of statutory interpretation apply equally to criminal as well as civil statutes, one rule applies specifically to criminal statutes: they are to be strictly construed in favor of the defendant.¹³⁰ The rationale for this rule is based on procedural due process concerns -- that the criminally accused be given advance warning of prohibited conduct.¹³¹ By contrast, although revenue laws such as section 592 have a penal character,¹³² they are "a special breed, sui generis, demanding a more liberal interpretation in light of the remedial policies which they promote."¹³³ In construing one of section 592's predecessors, the Supreme Court held :

Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong, and promote the public good. They should be so construed as to carry out the intention of the legislature in passing them and most effectually accomplish these objects.¹³⁴

Thus, the First Circuit in *Ven-Fuel* concluded that "notwithstanding their penal aspects, the revenue laws are to be expansively read in order to give effect to the will of the Congress."¹³⁵

It is unfortunate that the courts have arrived at divergent interpretations of the "by means of" language, especially con-

Such a restrictive reading of section 1592 would emasculate that provision, depriving the United States Government of one of its more effective and widely-used customs civil enforcement statutes. Moreover, false statements in civil penalty and forfeiture cases concerning value, origin, quantity, and price made in connection with the entry process have historically met the injunction of the "by means of" false statement requirement of civil statutes.

130. See generally Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748 (1935).

131. See, e.g., *McBoyle v. United States*, 283 U.S. 25 (1931).

132. See, e.g., *United States v. Murray*, 561 F. Supp. 448, 452-54 (Ct. Int'l Trade 1983) (section 592 is essentially remedial in nature and, therefore, no double jeopardy implications); *United States v. Alcatex*, 328 F. Supp. 129, 131-32 (S.D.N.Y. 1971) (same).

133. *Ven-Fuel*, 758 F.2d at 753.

134. *Cliquot's Champagne*, 70 U.S. (3 Wall.) 114, 145 (1865).

135. *Ven-Fuel*, 758 F.2d at 753.

sidering that sections 542 and 592 are statutory analogues.¹³⁶ However, it seems clear that the more expansive interpretation of that term will be controlling in section 592 litigation before the CIT.

3. The Materiality Requirement

Section 592 adds a specific requirement that before the act or omission can constitute a violation that act or omission must be material.¹³⁷ This requirement is new.¹³⁸ The Customs Service has promulgated its own definition of materiality in Appendix B (A) to 19 C.F.R. Part 171:

A document, statement, act, or omission is material if it has the potential to alter the classification, appraisal, or admissibility of merchandise, or the liability for duty, or if it tends to conceal an unfair trade practice under the antidumping, countervailing duty or a similar statute, or an unfair act involving patent or copyright infringement.¹³⁹

The term "material" has been defined in other contexts in somewhat similar, although slightly more exacting, ways.¹⁴⁰ For example, under United States securities laws, a fact is deemed "material" if there is a substantial likelihood that, under all the circumstances, a reasonable investor would consider it important in reaching an investment decision.¹⁴¹ In the context of a motion for summary judgment,¹⁴² a fact is "mate-

136. In addition, if the decision in *Teraoka* is read as imposing a materiality requirement via the "by means of" term (as the First Circuit did in its *Ven-Fuel* decision, 758 F.2d at 761), then placing a similar construction on that term as used in section 592(a) would render later references in section 592(a)(1)(A)(i) and (ii) to material acts and material omissions surplusage. It is a fundamental tenet of statutory construction that all words of a statute are to be given effect. See *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973).

137. 19 U.S.C. § 1592(a)(1)(A)(i)-(ii) (1982).

138. See *Ven-Fuel*, 758 F.2d 762, where the court stated in connection with former section 592 that "[n]o case has been cited to us which imposes a similarly stringent materiality requirement [as that found in *Teraoka*] — or any materiality requirement at all, for that matter — under § 1592; and our research has revealed none such."

139. Appendix B, *supra* note 51, at (A).

140. See generally 26A WORDS & PHRASES (1986 Supp.) (definitions of "material").

141. *Greenapple v. Detroit Edison Co.*, 468 F. Supp. 702, 708 (S.D.N.Y. 1979), *aff'd*, 618 F.2d 198 (2d Cir. 1980). See *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

142. Rule 56(c) of the Federal Rules of Civil Procedure provides in part that

rial" if its existence or nonexistence might affect the outcome of the action.¹⁴³ Under the Federal False Claims Act,¹⁴⁴ a statement is considered "material" if it is capable of influencing or affecting a governmental function.¹⁴⁵ Likewise, a statement is "material" for purposes of the statutory prohibition against filing false income tax returns if it is capable of influencing the actions of the Internal Revenue Service.¹⁴⁶

The most striking similarity between the foregoing definitions of "materiality," particularly those dealing with governmental agencies, and the one promulgated by the Customs Service is the causal nexus that must exist between the statement and some Government action. Unless the statement, act, or omission is capable of affecting agency action, it is not material. Congress specifically provided that the statement, act, or omission need not result in a loss of duties in order to be material.¹⁴⁷ Thus, for example, an importer could incorrectly describe merchandise in order to avoid a quota on that merchandise, and in the process pay greater duties than he might otherwise have had to but for the inaccurate description. The importer would nevertheless be violating section 592. Or an importer could improperly describe the quantity of duty-free merchandise, and that inaccurate description would still qualify as a material, false statement because it would thwart the accurate statistical enumeration of imports.¹⁴⁸

The CIT has addressed the question of materiality in the context of section 592 in *United States v. Rockwell International Corp.*,¹⁴⁹ and *F.A.G. Bearings Corp.*¹⁵⁰ In *F.A.G. Bearings Corp.*,

"judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact . . ."

143. 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2725, at 94 (1983).

144. 18 U.S.C. § 1001 (1982 & Supp. III 1985).

145. *United States v. Olin Corp.*, 465 F. Supp. 1120, 1132 (W.D.N.Y. 1979).

146. *United States v. Goldman*, 439 F. Supp. 337, 344 (S.D.N.Y. 1977).

147. 19 U.S.C. § 1592(a) (1982).

148. Such statistics are required by statute under 19 U.S.C. § 1484(e), which provides in part: "All import entries . . . shall include or have attached thereto an accurate statement specifying . . . the kinds and quantities of all merchandise imported . . . and the value of the total quantity of each kind of article." *Id.*

149. *United States v. Rockwell Int'l Corp.*, 628 F. Supp. 206 (Ct. Int'l Trade 1986).

150. *United States v. F.A.G. Bearings Corp.*, 615 F. Supp. 562 (Ct. Int'l Trade 1984).

the defendant contended that even accepting the Government's allegations as true, the false statements could not be material because they did not affect the dutiable value of the merchandise,¹⁵¹ and, therefore, could not affect the assessment of duties.¹⁵² Accordingly, F.A.G. argued that no penalty could be sought under either section 592(c)(2)(B)¹⁵³ or under section 592(c)(3)(B).¹⁵⁴ The CIT concluded that because the entry documents inaccurately described the merchandise as well as the declared values, this constituted "at least the possibility of materiality since the basis of the appraisement of the merchandise may have been affected."¹⁵⁵ The court buttressed its conclusion with the further observation that even if the revenue of the United States was not threatened by the defendant's inaccurate description, section 592's prohibition applied "[w]ithout regard to whether the United States is or may be deprived of all or a portion of any lawful duty."¹⁵⁶

The CIT in *F.A.G. Bearings Corp.* appears to have missed the point of F.A.G.'s motion on the materiality issue, unless the CIT's unstated rationale was that a genuine issue existed as to whether F.A.G.'s inaccurate descriptions affected the assessment of duties. Otherwise, if all of the merchandise in issue had been properly liquidated¹⁵⁷ and duties paid, the violation would not, in the language of section 592(c)(2)(B) and (3)(B), "affect the assessment of duties." In that event it seems that the appropriate penalty for grossly negligent and negligent violations should be the four and two times multiples of lawful duties respectively,¹⁵⁸ which in most instances will represent a substantially smaller penalty than the one provided in section 592(c)(2)(B) and (3)(B).

In a more recent opinion, *United States v. Rockwell Interna-*

151. *Id.* at 568.

152. *Id.* at 563, 568.

153. 19 U.S.C. § 1592(c)(2)(B) provides for a penalty in the amount of 40 percent of the dutiable value of the merchandise in the case of a grossly negligent violation.

154. 19 U.S.C. § 1592(c)(3)(B) provides for a penalty in the amount of 20 percent of the dutiable value in the case of a negligent violation.

155. *F.A.G. Bearings Corp.*, 615 F. Supp. at 568.

156. 19 U.S.C. § 1592(a) (1982).

157. "Liquidation" is the final stage of the entry process, where the actual duties are computed and assessed on the imported merchandise.

158. *See* 19 U.S.C. § 1592(c)(2)(A)(ii) and (3)(A)(ii) (1982).

tional Corp.,¹⁵⁹ the CIT not only proffered a definition of materiality, but also implicitly approved the Customs Service definition. The court stated “[i]n determining whether a false statement is material, the test is whether it has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made.”¹⁶⁰

In this case, the court held that the materiality of the false statement is measured by its potential impact upon Customs determination of the correct duty for the imported merchandise. Under this standard, a statement is material which identifies components to be of United States origin and nondutiable, when in fact the components are foreign and had an aggregate dutiable value of over U.S.\$119,000.¹⁶¹

In sum, the test employed by the CIT to analyze whether a false statement or omission is material is that adopted by the Customs Service in Appendix B. In light of the broad statutory requirement that the Secretary of Treasury compile various import statistics relating to classification and valuation,¹⁶² and considering further that the false statement need only raise the possibility of triggering agency action, few false statements will escape the net of materiality.

B. *Procedures Under Section 592(b)*

Section 592(b), an entirely new provision, sets forth the administrative procedures Customs is to follow in processing a purported section 592 violation. Section 592(b)(1) governs the pre-penalty notice stage of the administrative process and provides:

(A) **In general**

If the appropriate customs officer has reasonable cause to believe that there has been a violation of subsection (a) of this section and determines that further proceedings are warranted, he shall issue to the person concerned a written notice of his intention to issue a claim for a monetary penalty. Such notice shall —

159. *Rockwell Int'l Corp.*, 628 F. Supp. 206 (Ct. Int'l Trade 1986). The CIT also stated that the question of materiality is an issue of law to be decided by the court. *Id.* at 209. See *United States v. Ackerman*, 704 F.2d 1344, 1347 (5th Cir. 1983).

160. *Rockwell Int'l Corp.*, 628 F. Supp. at 210.

161. *Id.* (quoting *United States v. Krause*, 507 F.2d 113, 118 (5th Cir. 1975)).

162. 19 U.S.C. § 1484(a), (e) (1982).

- (i) describe the merchandise;
- (ii) set forth the details of the entry or introduction, the attempted entry or introduction, or the aiding or procuring of the entry or introduction;
- (iii) specify all laws and regulations allegedly violated;
- (iv) disclose all the material facts which establish the alleged violation;
- (v) state whether the alleged violation occurred as a result of fraud, gross negligence, or negligence;
- (vi) state the estimated loss of lawful duties, if any, and, taking into account all circumstances, the amount of the proposed monetary penalty; and
- (vii) inform such person that he shall have a reasonable opportunity to make representations, both oral and written, as to why a claim for a monetary penalty should not be issued in the amount stated.¹⁶³

Excepted from the pre-penalty notice procedure are noncommercial importations and penalty claims for U.S.\$1,000 or less.¹⁶⁴

As noted, section 592(b) to some extent codifies preexisting administrative practice, but in large measure endeavors to improve it.¹⁶⁵ Prior to enactment of the new law and under the former regulations,¹⁶⁶ Customs included in its pre-penalty notices the provisions of law alleged to be violated, the acts or omissions constituting the violation, a description of the merchandise, identification of the entries involved, and any loss of revenue.¹⁶⁷ Additionally, section 592 now requires Customs to "disclose *all the material facts* which establish the alleged violations,"¹⁶⁸ as well as "set forth *the details* of the entry or intro-

163. 19 U.S.C. § 1592(b)(1)(A) (1982).

164. *Id.* § 1592(b)(1)(B) (1982). That subparagraph provides:

The preceding subparagraph shall not apply if —

- (i) the importation with respect to which the violation of subsection (a) of this section occurs is noncommercial in nature, or
- (ii) the amount of the penalty in the penalty claim issued under paragraph (2) is [U.S.]\$1,000 or less.

165. *See supra* notes 44-46 and accompanying text.

166. 19 C.F.R. §§ 162.31(b), 171.1(b) (1978). *See supra* notes 15-30 and accompanying text.

167. 19 C.F.R. §§ 162.31(b), 171(b) (1978).

168. 19 U.S.C. § 1592(b)(1)(A)(iv) (1982) (emphasis added).

duction;”¹⁶⁹ to state the degree of culpability;¹⁷⁰ and to inform the alleged violator of the opportunity to make a response.¹⁷¹ Regrettably, based on the author’s experience, Customs normally does not honor the provisions of section 592(b)(1)(A)(ii) and (iv). The contents of the pre-penalty notices are frequently fact-lean in the extreme, and contrary to the clear congressional expression that the details of the entry or introduction and *all material facts* are to be set forth in the notice. In their terseness and brevity Customs’ pre-penalty notices most closely approximate the Official Forms for complaints appended to the Federal Rules of Civil Procedure, in which notice to the adverse party is the guiding principle. Although notice may be the overriding consideration in the pleading rules of the Federal Rules of Civil Procedure,¹⁷² leaving the determination of the relevant facts to the discovery process,¹⁷³ section 592(b) takes an opposite tack: all material facts are to be disclosed in the pre-penalty notice itself. Although Customs has adopted an expansive interpretation of the term “material” in connection with false statements and omissions under section 592(a),¹⁷⁴ an interpretation that is highly favorable to the Government, in practice Customs has declined to be even-handed with the term “material” as used in section 592(b). Indeed, its practice evidences a narrow interpretation of the “all the material facts” language of section 592(b)(1)(A)(iv). By throwing bureaucratic sand into the face of congressional reform, Customs has effectively sabotaged much needed change in administrative practice. Absent disclosure of all the material facts establishing the alleged violation, it is extremely difficult for a person charged with a section 592 violation to make any meaningful presentation to Customs because discovery is not available at the administrative level.

Further, Customs has undermined a person’s statutory right under section 592(b)(1)(A)(vii) to make both an oral and written presentation to Customs following receipt of the pre-penalty notice. Customs uses pre-penalty notice presenta-

169. 19 U.S.C. § 1592(b)(1)(A)(ii) (1982) (emphasis added).

170. 19 U.S.C. § 1592(b)(1)(A)(v) (1982).

171. 19 U.S.C. § 1592(b)(1)(A)(vii) (1982).

172. 5 C. WRIGHT & A. MILLER, *supra* note 102, § 1202.

173. *See id.* § 1202, at 60.

174. *See supra* notes 137-56 and accompanying text.

tions, not for resolving the matter on a mutually satisfactory basis, but instead for building a case against the person named in the pre-penalty notice and, at times, against others as well. Customs has too often exhibited a closed mind to alleged violators' pre-penalty notice presentations, discounting or finding incredible many presentations made to Customs at this stage of the administrative process. Although it is true that some presentations bear witness to the boundless imagination of the human mind, Congress nevertheless expected Customs to keep an open mind at this early stage of the administrative proceedings.¹⁷⁵ Congress would not have afforded importers the opportunity to make a presentation to Customs if it thought that any such presentation would be a meaningless exercise for the importer. Congress kept open the possibility that alleged section 592 violations would be disposed of at this stage, as reflected in section 592(b)(2). That paragraph, which covers penalty claims, provides:

After considering representations, if any, made by the person concerned pursuant to the notice issued under paragraph (1), the appropriate customs officer shall determine whether any violation of subsection (a) of this section, as alleged in the notice, has occurred. *If such officer determines that there was no violation, he shall promptly issue a written statement of the determination to the person to whom the notice was sent.* If such officer determines that there was a violation, he shall issue a written penalty claim to such persons. The written penalty claim shall specify all changes in the information provided under clauses (i) through (vi) of paragraph (1)(A). Such person shall have a reasonable opportunity under section 1618 of this title [19 U.S.C. § 1618] to make representations, both oral and written, seeking remission or mitigation of the monetary penalty. At the conclusion of any proceeding under section 1618, the appropriate customs officer shall provide to the person concerned a written statement which sets forth the final determination and the findings of

175. See, e.g., S. REP. NO. 778, *supra* note 4, at 19, where the Senate Finance Committee noted that Customs would "consider representations by the importer" at the pre-penalty notice stage, suggesting to Customs that it keep an open mind. See also *United States v. Ross*, 574 F. Supp. 1067, 1069 n.3 (Ct. Int'l Trade 1983) ("After due consideration of any representations the alleged violator may have made in response to the notice, the officer is directed to arrive at a determination as to the penalty or fine.") (emphasis added).

fact and conclusions of law on which such determination is based.¹⁷⁶

However, as noted, Customs' position often hardens early and fast at the pre-penalty notice stage. From the perspective of the alleged violator, this unfortunate state of affairs is only exacerbated because it is frequently repeated at the penalty claim stage. Customs' position appears to be that because the alleged violator is entitled to a trial de novo under section 592(e), he suffers no prejudice if Customs fails to comply with the provisions of section 592(b).¹⁷⁷ In other words, any failure of Customs at the administrative level can be cured at trial. Customs also seems to believe that the procedural provisions of section 592(b) are for the Government's benefit, not the alleged violator's.¹⁷⁸

Customs' seeming insouciance has, unfortunately, received a judicial imprimatur in two opinions, one from the CAFC¹⁷⁹ and the other from the CIT.¹⁸⁰ In the CIT opinion, *United States v. Ross*,¹⁸¹ Customs issued a pre-penalty notice to the defendants on February 24, 1983.¹⁸² Two weeks after defendants responded, Customs issued a penalty claim, informing the defendants that they had seven days within which to file a petition for remission or mitigation.¹⁸³ The defendants did not file a petition, objecting that seven days was insufficient to prepare such a petition.¹⁸⁴ An action was then brought in the CIT which defendants moved to dismiss for lack of subject matter jurisdiction, among other grounds.¹⁸⁵

In sustaining Customs' action, the CIT rejected the de-

176. 19 U.S.C. § 1592(b)(2) (1982) (emphasis added).

177. See U.S. Customs Service, Office of Regional Counsel, Northeast Region, *Analysis of 19 U.S.C. 1592 As Amended by the Customs Procedural Reform and Simplification Act of 1978* 22 (undated monograph) [hereinafter Regional Counsel Monograph].

178. *Id.*

179. *United States v. Priority Prods., Inc.*, 793 F.2d 296 (Fed. Cir. 1986).

180. *United States v. Ross*, 574 F. Supp. 1067 (Ct. Int'l Trade 1983).

181. *Id.*

182. *Id.* at 1068.

183. *Id.* at 1069 n.4. This seven-day filing period was imposed pursuant to a regulation at 19 C.F.R. § 162.32(a)(1983). The regulation gives the district director authority to specify a time period of seven days for filing a mitigation petition should the statute of limitations run before completion of the administrative process. *Id.*

184. *Ross*, 574 F. Supp. at 1068.

185. *Id.* Defendants also sought dismissal for lack of due process and on the basis of estoppel. *Id.*

defendants' contention that the regulation authorizing a seven day filing period violated the statutory prescription in section 592(b)(2) that an alleged violator be afforded "a reasonable opportunity" to file a section 618 mitigation petition.¹⁸⁶ First, the court noted that Congress authorized the Secretary of the Treasury to make "regulations as may be necessary to carry out the provisions of this chapter."¹⁸⁷ Second, the court added, the agency's regulation is entitled to "great deference."¹⁸⁸ Third, and finally, the CIT faulted the defendants for failing to show that seven days was in fact an unreasonably short time period to prepare a mitigation petition, noting that the regulations governing the preparation of a mitigation petition are very general.¹⁸⁹

The CIT's analysis defers regulation of section 592 to the Customs Service to the point of abdication. However, the Supreme Court has recognized that "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia."¹⁹⁰ Furthermore, the Court has elsewhere endorsed the independent judgment principle in the context of interpreting statutes "[w]hen an agency's decision is premised on its understanding of a specific congressional intent, . . . it engages in the quintessential judicial function of deciding what a statute means. In that case, the agency's interpretation . . . may be influential, but it cannot bind a court."¹⁹¹ The CIT ignored both these principles in its *Ross* decision.

Not only is the *Ross* decision a disappointment, it is shocking in its cavalier treatment of the mitigation petition process. First, the court brushed aside the defendants' statutory right to receive findings of fact and conclusions of law from Customs in the latter's mitigation decision,¹⁹² denying the defendants a reasonable opportunity to present a mitigation petition. Second, although the regulations regarding the preparation and

186. *See id.* at 1070.

187. 19 U.S.C. § 1624 (1982); *Ross*, 574 F. Supp. at 1070.

188. *Ross*, 574 F. Supp. at 1070.

189. *Id.*

190. *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261, 272 (1968), *modified*, 392 U.S. 901 (1968) (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965)). *See generally* Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587 (1984).

191. *BATF v. FLRA*, 464 U.S. 89, 98 n.8. (1983).

192. *See* 19 U.S.C. § 1592(b)(2) (1982).

contents of such a petition may be general,¹⁹³ that fact is not necessarily a reflection of the time and effort that must go into preparing a mitigation petition. The pleadings rules of the Federal Rules of Civil Procedure, for example, call for "a short and plain statement of the claim,"¹⁹⁴ but that does not mean that all complaints can be drafted in a matter of a few days. The CIT's opinion reflects a lack of sensitivity to the time involved in preparing a mitigation petition.

Importers who held out hope that the CAFC would restore some semblance of procedural due process to section 592 administrative proceedings must have been disheartened after that court's decision in *United States v. Priority Products, Inc.*¹⁹⁵ The issue presented in that case was whether corporate officers could be sued in their individual capacities under section 592 if they had not been named in the pre-penalty and penalty notices.¹⁹⁶ The CAFC answered in the affirmative.¹⁹⁷ The individuals involved presented two arguments on appeal: (1) that the CIT lacked subject matter jurisdiction over them because they had not been served individually with pre-penalty and penalty notices,¹⁹⁸ and (2) that the failure so to serve them deprived them of due process.¹⁹⁹ The Federal Circuit found neither contention persuasive.

Regarding the CIT's purported lack of subject matter jurisdiction, the appellants advanced the argument that because the CIT has jurisdiction of any civil action to recover a civil penalty under section 592,²⁰⁰ and because no "civil penalty" exists under section 592 unless the Customs Service has complied with the administrative procedures set forth in section 592(b), no civil penalty existed as to appellants over which the CIT could exercise jurisdiction.²⁰¹ The CAFC rejected appel-

193. See 19 C.F.R. § 171.11(c)(3) (1986).

194. FED. R. CIV. P. 8(a)(2).

195. *United States v. Priority Prods. Inc.*, 793 F.2d 296 (Fed. Cir. 1986).

196. *Id.* at 297.

197. *Id.*

198. *Id.* at 299.

199. See *id.* at 300.

200. 28 U.S.C. § 1582 (1982 & Supp. III 1985). That section provides in part: "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 —

(1) to recover a civil penalty under section 592, . . ."

201. 793 F.2d at 299.

lant's minor premise, concluding that compliance with the administrative procedures set out in section 592(b) are not jurisdictional prerequisites to the institution of a civil penalty action in the CIT.²⁰² The court found no indication in the statutes or legislative history that Congress intended to limit section 592 actions to persons named in the administrative proceedings.²⁰³ Indeed, from the language of section 592(e) regarding judicial review, the court concluded that "so long as some 'civil penalty exists' the Court of International Trade can assume jurisdiction over any complaint to recover that penalty"²⁰⁴ The CAFC also felt that to require otherwise would place a heavy administrative burden on Customs.²⁰⁵ "To preserve its right to sue all possible parties," the court noted, "the Customs Service would have to delve into the records of each corporation subject to possible penalty to uncover the names of all corporate directors, officers, and shareholders, serve them with notice and grant them an opportunity to contest their personal liability."²⁰⁶ The CAFC stated further that the failure to comply with administrative notice and hearing requirements or to exhaust administrative remedies is not a jurisdictional defect.²⁰⁷

Turning to the appellants' due process contention, the court held that because appellants had actual notice, and because of the degree of participation by the appellants at the administrative level, there had been no due process violation.²⁰⁸ The CAFC reached this conclusion, however, "without deciding whether the opportunity for a trial de novo afforded the [defendants] with all the process to which they were entitled."²⁰⁹ The court thus stopped short of adopting Customs' view that a trial de novo cures all defects at the administrative level.

The *Priority Products* decision deals a severe blow to the administrative procedures outlined in section 592(b). The court

202. *Id.* at 299-300.

203. *Id.* at 299.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 300.

208. *Id.*

209. *Id.*

seems overly solicitous of the Customs Service when it cites the “unduly heavy administrative burden”²¹⁰ that would be placed on Customs if it were put to the task of investigating corporate records to learn the identity of all potential *dramatis personae*. The fact is that the identities of the actors usually will be discovered early and without any untoward burden. For example, in the *Priority Products* case itself, the corporate defendant was a close corporation with only three individuals filling the various director, officer, and shareholder positions.²¹¹ Although the CAFC stopped short of totally emasculating section 592(b), it did suggest that defects in section 592(b) administrative proceedings were “mere procedural irregularities which are subject to harmless error analysis”²¹² When viewed in light of its facts, the apparent damage that the *Priority Products* decision does to section 592(b) may not be as bad as it seems, considering the individual appellant’s actual notice and high degree of participation at the administrative level. So viewed, the decision represents a common sense resolution of a case built on a hypertechnical and overly literal construction of section 592. The danger is that the Customs Service might take *Priority Products* as a signal that the administrative procedures that Congress so painstakingly drafted and enacted in section 592(b) are now merely precatory, not mandatory, in nature. Importers may thus witness the rebirth of one of the greatest ills to plague former section 592 — the absence of meaningful administrative proceedings.

C. Section 592(c) — Maximum Penalties

Congress significantly changed former section 592 in the Procedural Reform Act by providing for three degrees of culpability — fraud, gross negligence, and negligence — and for maximum penalties in amounts reflecting a violator’s degree of culpability.²¹³ Congress intended the differences between the penalties to reflect the relative culpability of the violator.²¹⁴

210. *Id.* at 299.

211. *Id.* at 297.

212. *Id.* at 300.

213. See S. REP. NO. 778, *supra* note 4, at 2 (“Section 592 is strongly criticized by all segments of the importing public because it requires a fixed penalty regardless of the nature of the violation.”).

214. Whether a single prohibited act can give rise to multiple liabilities has not

The three degrees of culpability and the maximum penalties that may be imposed on connection with each will be discussed in turn.

1. Fraud

The Customs Service provides definitions of fraud, gross negligence, and negligence in Appendix B.²¹⁵ Appendix B was attached to the regulations in order to assist Customs field personnel and to advise the public.²¹⁶ The wisdom of including in those guidelines definitions of the terms "fraud," "gross negligence," and "negligence" is questionable. It arguably would have been more sound to let those terms be fleshed out by the courts in litigation. Customs may have unwittingly boxed itself in, although the courts could still arrive at their own definitions of those terms, Customs' definitions notwithstanding.²¹⁷ Considering the legal terminology used by Customs in these definitions, the definitions are not much assistance to either Customs personnel or the lay public.

According to Customs, "[a] violation is determined to be fraudulent if it results from an act or acts (or commission or omission) deliberately done with intent to defraud the revenue or to otherwise violate the laws of the United States, as established by clear and convincing evidence."²¹⁸

been specifically addressed by the courts, although in the *Priority Products* case the jury returned a U.S.\$30,000 verdict against the three defendants, who were jointly and severally liable. 793 F.2d at 298.

215. Customs does not consider the guidelines, which include the definitions in Appendix B of fraud, gross negligence, and negligence, to be formal regulations. See 49 Fed. Reg. 1,673 (1984). Nevertheless, in jury instructions given by the CIT in *United States v. Priority Prods., Inc.*, No. 84-09-01311 (Ct. Int'l Trade Sept. 1984) (complaint filed), the court adopted in large measure Customs' definitions of fraud and gross negligence.

216. 49 Fed. Reg. 1,672, 1,673 (1984).

217. See *infra* notes 218, 226, 237 and accompanying text.

218. Appendix B, *supra* note 51, at (B)(3). By comparison, the elements of the tort action of deceit have been stated as (1) a false representation, (2) knowledge or belief that the representation is false (*scienter*), (3) an intention to induce the other party to act or refrain from acting in reliance upon the misrepresentation, (4) justifiable reliance, and (5) damage to the other party. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER & KEETON ON TORTS* § 105 (5th ed. 1984) [hereinafter *PROSSER & KEETON*]; see also *United States v. Quintin*, No. 81-9-01320, slip op. 84-33 (Ct. Int'l Trade April 3, 1984), where the CIT found the defendant liable for a fraudulent violation of section 592 following a bench trial. The Customs Service is in the process of revising its definition of fraud.

This definition of fraud is somewhat tautological. By stating that fraud is a deliberate act done with intent to defraud, it adds little to any definition of fraud. The Justice Department has a different formulation of fraud, as reflected in the section 592 complaints it has filed with the CIT. For example, in the *F.A.G. Bearings Corp.* case, the fraud allegation was that the defendant "knew or should have known" of the false and material statements.²¹⁹ In *United States v. Priscilla Modes, Inc.*,²²⁰ the Government alleged that the defendants "knowingly and willfully" made false statements to the injury of the United States. There appears, however, to be no difference between "knowingly" and "with intent to defraud."²²¹

Section 592(c)(1) sets forth the maximum penalty for fraud: "A fraudulent violation of subsection (a) is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise."²²² After noting that the maximum penalties are ceilings, the Senate Finance Committee Report added that "[c]ustoms should not automatically issue a penalty claim for the maximum amount on each case."²²³ In its mitigation guidelines, Customs has provided the following with regard to the disposition of fraud cases:

Absent extraordinary factors justifying further relief, a penalty for a fraudulent violation shall be mitigated as follows:

(a) For revenue-loss violations, to an amount ranging from a minimum of five times the loss of revenue to a maximum of the lesser of the domestic value of the merchandise or eight times the loss of revenue. However, a penalty

219. 615 F. Supp. at 564 n.2, 566.

220. No. 84-4-00493, slip op. 85-122 (Ct. Int'l Trade Nov. 27, 1985).

221. See *Zell v. Commissioner*, 763 F.2d 1139, 1143 (10th Cir. 1985) (discussing civil tax fraud); *United States v. Davis*, 597 F.2d 1237, 1238-39 (9th Cir. 1979) (prosecution under 18 U.S.C. § 545); *Moore v. United States*, 360 F.2d 353 (4th Cir. 1965) (discussing civil tax fraud), *cert. denied*, 385 U.S. 1001 (1967). In a mail and wire fraud criminal prosecution, "fraud" was defined as follows:

To establish fraud, the government must prove that the defendant possessed the requisite intent to defraud. The elements of fraud consist of: (1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) and with intent to deceive, (5) with action taken in reliance upon the representation.

United States v. Clevenger, 733 F.2d 1356, 1358 (9th Cir. 1984).

222. 19 U.S.C. § 1592(c)(1) (1982).

223. S. REP. NO. 778, *supra* note 4, at 21.

equal to the greater of the domestic value of the merchandise or eight times the loss of revenue may be warranted due to the existence of aggravating factors.

(b) For non-revenue-loss violations, to an amount ranging from 50 to 80 percent of the dutiable value of the merchandise. However, a penalty equal to the domestic value of the merchandise may be warranted due to the existence of aggravating factors.²²⁴

Whether separate penalties may be collected from multiple violators, or whether the Government is limited to one penalty per prohibited act regardless of the number of violators, remains an open question.²²⁵ In complaints filed with the CIT, the Justice Department seeks recovery of a separate penalty from each violator in a multi-defendant action, even though only one prohibited act may have been committed. It is questionable, however, whether multiple penalties should be recoverable, considering that the total amount of penalties could exceed the maximum penalty recoverable under former section 592, i.e., forfeiture value of the merchandise. Such a result would seem at odds with Congress' intent to ameliorate the harshness of the old section 592 penalty.

2. Gross Negligence

The term "gross negligence" is defined in Appendix B as follows:

A violation is determined to be grossly negligent if it results from an act or acts (of commission or omission) done with

224. Appendix B, *supra* note 51, at (d)(3)(a)-(b). For a definition of "domestic value," see 19 C.F.R. § 162.43(a) (1986), which provides in part: The term "domestic value" . . . shall mean the price at which such or similar property is freely offered for sale at the time and place of appraisal, in the same quantity or quantities as seized, and in the ordinary course of trade.

In the case of merchandise which is not seized, the same method is used to determine domestic value, except that the value is fixed as of the date of the violation. 19 C.F.R. § 162.43(b); *see also* H.R. REP. NO. 621, 95th Cong., 1st Sess. 15-16 (1977), which sets out additions to domestic value, such as profit and general expenses, costs of transportation and insurance, and customs duties and applicable federal taxes.

"Dutiable value," which is lower than domestic value, is determined under complex valuation principles contained at 19 U.S.C. §§ 1401a, 1402. *See* 19 C.F.R. § 148.24(a) (1986).

225. *See Priority Products*, 793 F.2d at 298, where three defendants who were all shareholders of the same defendant corporation were found jointly and severally liable for a single penalty of U.S.\$30,000.

actual knowledge of or wanton disregard for the relevant facts and with indifference or disregard for the offender's obligations under the statute, but without intent to defraud the revenue or violate the laws of the United States.²²⁶

The Supreme Court in *Conway v. O'Brien*,²²⁷ a case involving Vermont law, noted that the difficulty with the term "gross negligence" is not in defining it, but rather in applying it.²²⁸ In that case the Court provided the following definition of gross negligence:

Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence. Gross negligence is equivalent to the failure to exercise even a slight degree of care. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected . . . Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man. But it falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure.²²⁹

This definition comports with the one settled on by Customs. Nevertheless, as noted in connection with Customs' definition of fraud, its definition of gross negligence is still nebulous. In the end, each case will undoubtedly turn on its facts.

Section 592(c)(2) sets forth two kinds of maximum penalties for a grossly negligent violation of section 592, depending

226. Appendix B, *supra* note 51, at (B)(2).

227. 312 U.S. 492 (1941).

228. *Id.* at 495.

229. *Id.* at 495 (quoting *Shaw v. Moore*, 104 Vt. 529, 531-32, 162 A. 373 (1932)); *see also* *Stewart & Stevenson Servs., Inc. v. Pickard*, 749 F.2d 635, 651 (11th Cir. 1984) (gross negligence is entire lack of care which shows that the acts or omissions complained of are the result of conscious indifference to the rights of the persons affected).

on whether the violation affected the assessment of duties. A violation that affected the assessment of duties "is punishable by a civil penalty in the amount not to exceed —

(A) the lesser of —

(i) the domestic value of the merchandise,

or

(ii) four times the lawful duties of which the United States is or may be deprived. . . ."²³⁰

If the violation did not affect the assessment of duties, the maximum penalty is forty percent of the dutiable value of the merchandise.²³¹ In the case of a revenue-loss violation, Customs will mitigate the amount of the penalty to a minimum of two and one-half times the loss of revenue.²³² For non-revenue-loss violations, the mitigated amount will range from twenty-five to forty percent of dutiable value.²³³

A violation of section 592 can take place even though there has been no revenue loss.²³⁴ If a violation is discovered prior to liquidation²³⁵ and duties are correctly assessed and paid, the violation has not affected the assessment of duties. In such a case, a question arises whether the penalty should be the one provided in section 592(c)(2)(A)(ii), four times the lawful duties of which the United States is or may be deprived, or that provided in section 592(c)(2)(B), forty percent of the dutiable value of the merchandise. One interpretation is that if the violation, regardless of when it was discovered, had no effect on the assessment of duties, for example, a violation involving duty-free merchandise, or if the violation could have had an effect on duty assessment but was discovered prior to the final duty assessment phase of entry, i.e., prior to liquidation, then the correct penalty would be forty percent of dutiable value. This interpretation is consistent with the language of section 592(c)(2)(B), since the violation *did not* affect the assessment of duties. If Congress had intended to include within section 592

230. 19 U.S.C. § 1592(c)(2)(A) (1982).

231. *See id.* § 1592(c)(2)(B) (1982).

232. Appendix B, *supra* note 51, at (D)(3)(a).

233. *Id.* at (D)(3)(b).

234. 19 U.S.C. § 1592(a)(1) (1982) ("without regard to whether the United States is or may be deprived of all or a portion of any lawful duty . . .").

235. 19 C.F.R. § 159.1 (1986). Liquidation is the final duty computation phase which completes the entry process.

(c)(2)(A)(ii) those violations that could have affected the assessment of duties but which were detected prior to liquidation, Congress would have provided in section 592(c)(2)(B) that “the violation *would not have affected* the assessment of duties.” Moreover, if it intended this result, Congress would have further provided in section 592(c)(2)(A)(ii) for a penalty not to exceed “four times the lawful duties of which the United States is or *may have been* deprived,” rather than “may be deprived.”²³⁶

3. Negligence

Customs has defined negligence as follows:

A violation is determined to be negligent if it results from an act or acts (of commission or omission) done through either the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute, or in communicating information so that it may be understood by the recipient. As a general rule, a violation is determined to be negligent if it results from the offender's failure to exercise reasonable care and competence to ensure that a statement made is correct.²³⁷

When Customs promulgated this definition, there were several objections.²³⁸ Among the complaints was that the phrase “reasonable care and competence expected from a person in the same circumstances” would place a higher degree of care on experienced importers,²³⁹ and that the phrase “communicating information so that it may be understood by the recipient” would make the importer responsible for the competency of the Customs officer receiving the information.²⁴⁰ Customs, unmoved, explained its definition as follows:

Customs has chosen the language comprising the defi-

236. The language “may be deprived” refers to a potential loss of revenue, i.e., a violation involving entries which have not yet been liquidated. The language “is deprived” refers to an actual loss of revenue, i.e., the entries have been liquidated and the time for reliquidation has run.

237. Appendix B, *supra* note 51, at (B)(1).

238. See 49 Fed. Reg. 1,672, 1,681 (1984).

239. *Id.* at 1,681.

240. *Id.*

nition of negligence from the Restatement (Second) of Torts, section 552, comment b, which applies to the obligations of suppliers of information. According to the Restatement, a supplier of information, in order to fulfill the expected standard of care, must exercise the competence reasonably expected of one in the same circumstances. Therefore, experienced importers may be reasonably expected to exercise a higher degree of competence in ascertaining the facts stated in entry documents than the business novice or inexperienced importer. Similarly, in order to fulfill the standard of care, the information supplied must not be communicated in such a manner that it is misleading. This definition imposes only a reasonable standard of care and does not, as the commentators suggest, make the importer a guarantor of the interpretation or understanding of the information presented.²⁴¹

Customs' defense of its negligence definition begs a question. Although Customs states that information must not be misleading, it does not explain whom the information is not to mislead. Accurate information communicated to an incompetent Customs officer may still be misleading to that person. However, imposing a higher degree of care for experienced importers is consistent with the accepted principle that "if a person in fact has knowledge, skill, or even intelligence superior to that of the ordinary person, the law will demand of that person conduct consistent with it."²⁴²

In the only CIT decision to consider the definition of negligence under section 592, *United States v. Rockwell International Corp.*,²⁴³ the defendant moved for summary judgment on the issue of negligence.²⁴⁴ Rockwell contended that it had adopted reasonable procedures in order to comply with applicable Customs requirements regarding foreign assembly operations.²⁴⁵ The court denied Rockwell's motion, finding the

241. *Id.*

242. PROSSER & KEETON, *supra* note 218, at 185.

243. *United States v. Rockwell Int'l Corp.*, 628 F. Supp. 206, 208 (Ct. Int'l Trade 1986).

244. Under 19 U.S.C. § 1592(e)(4), once the Government has proved the act or omission constituting the violation in a negligence case, the burden shifts to the alleged violator to prove that the act or omission did not occur as a result of negligence.

245. *Rockwell Int'l Corp.*, 628 F. Supp. at 210. Those procedures required receipt of country of origin certificates from suppliers. Absent such receipt, Rockwell would

existence of a genuine issue of material fact.²⁴⁶ The CIT did note, however, that negligence is defined in the tax negligence context as “lack of due care or failure to do what a reasonable and ordinarily prudent person would do under the circumstances.”²⁴⁷

The maximum penalties for a negligent violation of section 592 are:

an amount not to exceed —

(A) the lesser of —

(i) the domestic value of the merchandise,

or

(ii) two times the lawful duties of which the United States is or may be deprived, or

(B) if the violation did not affect the assessment of duties, 20 percent of the dutiable value of the merchandise.²⁴⁸

Customs will mitigate these amounts to as low as one-half the loss of revenue for a revenue-loss violation.²⁴⁹ For non-revenue-loss violations, the mitigated amount will range from five to 20 percent of dutiable value.²⁵⁰

D. Section 592(c)(4) — Prior Disclosure

The prior disclosure provision, section 592(c)(4),²⁵¹ is new, although Customs had provided for special treatment of cases involving “voluntary disclosure” by regulation²⁵² prior to enactment of the Procedural Reform Act. As will be discussed shortly, the regulations promulgated by Customs for implementing section 592(c)(4) put a substantial gloss on that provision, imposing additional burdens on the disclosing party that undermine the spirit, if not the letter, of that section.²⁵³ To

assume that a part was of U.S. origin since its suppliers were located in the United States. *Id.*

246. *Id.* at 211.

247. *Id.* at 210 n.5 (quoting *Marcello v. Commissioner*, 380 F.2d 499, 506 (5th Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968)).

248. 19 U.S.C. § 1592(c)(3). For a discussion of the applicability of these provisions depending on whether or not liquidation has taken place, see *supra* notes 234-236 and accompanying text.

249. Appendix B, *supra* note 51, at (D)(4)(a).

250. *Id.* at (D)(4)(b).

251. 19 U.S.C. § 1592(c)(4) (1982).

252. 19 C.F.R. § 171.1 (1978).

253. The legislative history of this provision reveals little about Congress' intent

date, the courts have not had an opportunity to consider this provision or the implementing regulations.

In voluntary disclosure cases involving fraud, the penalty is capped at 100 percent of the duty underpayment, or if there is no underpayment, to 10 percent of the dutiable value of the merchandise.²⁵⁴ In voluntary disclosure cases involving gross negligence or negligence, the penalty is limited to the interest due on any duty underpayment.²⁵⁵ Section 592(c)(4) provides in part as follows:

If the person concerned discloses the circumstances of a violation of subsection (a) of this section before, or without knowledge of, the commencement of a formal investigation of such violation, with respect to such violation, merchandise shall not be seized and any monetary penalty to be assessed under subsection (c) of this section shall not exceed —

- (A) if the violation resulted from fraud —
 - (i) an amount equal to 100 percent of the lawful duties of which the United States is or may be deprived, so long as such person tenders the unpaid amount of the lawful duties at the time of disclosure or within thirty days . . . , or
 - (ii) if such violation did not affect the assessment of duties, 10 percent of the dutiable value; or
- (B) if such violation resulted from negligence or gross negligence, the interest . . . on the amount of lawful duties of which the United States is or may be deprived so long as such person tenders the unpaid amount of the lawful duties at the time of disclosure or within thirty days The person asserting lack of knowledge of the commencement of a formal investigation has the burden of proof in establishing such lack of knowledge.²⁵⁶

with regard to the implementation of section 592(c)(4). See S. REP. NO. 778, *supra* note 4, at 20; H.R. CONF. REP. NO. 1517, *supra* note 36, at 10.

254. 19 U.S.C. § 1592(c)(4)(A) (1982).

255. 19 U.S.C. § 1592(c)(4)(B) (1982).

256. 19 U.S.C. § 1592(c)(4) (1982). This provision also gives Customs the discretion to extend the period of penalty payment. Interest is computed from the date of liquidation and is the prevailing rate used by the Internal Revenue Service under 26 U.S.C. § 6621.

By regulation a "person concerned" does not qualify for the lenient treatment accorded by section 592(c)(4) unless the prior disclosure is in writing and (1) identifies the kind of merchandise involved, (2) identifies the importations involved by entry number or by port and approximate date of entry, (3) specifies the material false statements or material omissions, and (4) sets forth the accurate information to the best of the violator's knowledge.²⁵⁷ Customs holds invalid any disclosure that fails to comply with these requirements, such as an oral prior disclosure.²⁵⁸ The district directors have been authorized, however, to treat written disclosures that substantially comply with 19 C.F.R. § 162.71(e) as qualifying for prior disclosure treatment.²⁵⁹

Although it is true that 19 U.S.C. § 1624 authorizes the Secretary of the Treasury to promulgate rules and regulations "as may be necessary to carry out the provisions of this [Act]," it must be seriously questioned whether the formalities of 19 C.F.R. § 162.71(e), are truly necessary -- especially the requirement that the disclosure be in writing. One slip could jeopardize whatever rights an importer had under section 592(c)(4). Congress, knowing that most Customs violations go undetected, certainly wanted to encourage importers to come forward and voluntarily disclose their violations. The regulations that Customs has issued to implement section 592(c)(4) are at cross-purposes with this goal.

Even more startling is the position Customs apparently takes with regard to those entitled to make a voluntary disclosure. Although neither the statute nor the regulations define "person concerned," Customs seems to require that anyone making a disclosure on behalf of another person must prove that they are acting as an authorized agent or representative.²⁶⁰ Thus, for example, if an officer of a corporation came forward to make a disclosure on behalf of the corporation, and that officer was not duly authorized to make such representations on behalf of the corporation, Customs could arguably use that disclosure to justify levying the maximum penalties under section

257. 19 C.F.R. § 162.71(e) (1986).

258. 19 C.F.R. § 162.74(a)(2) (1986).

259. *Id.*

260. See Regional Counsel Monograph, *supra* note 177, at 33-34.

592(c)(2). Such a result, which is quite probable under Customs' interpretation of "person concerned," seems unduly harsh and overly legalistic. It could have no effect other than to chill voluntary disclosures under section 592(c)(4).

Customs has also seen fit to interpret the phrase "commencement of [a] formal investigation" in a manner highly favorable to the agency.²⁶¹ "Commencement" is defined as the date recorded in writing by the Customs Office of Investigations on which facts and circumstances were discovered or information received that caused a Customs agent to believe that the disclosing party may have violated a provision of section 592.²⁶² This definition dispenses with any requirement that the matter be formally documented in a standard Customs form, such as a Memorandum of Information Received. Therefore, although Customs has made disclosure extremely formal, it has virtually written "formal" out of the statute in connection with commencement of an investigation. In fact, other than the requirement that some notation be put in writing, it is difficult to see how Customs' definition of a "formal" investigation would differ from its definition of an "informal" investigation, were it asked to draft one.

In short, Customs may have crippled section 592(c)(4). Although the implementing regulations have not been the subject of litigation to date, it is hoped that the courts will recognize the damage wrought by Customs and take appropriate corrective measures.

E. *Section 592(c)(5) — Seizure and Forfeiture*

The seizure provision of new section 592 has provided much grist for the CIT judicial mill. Debate over its meaning has been rancorous. Section 592(c)(5) provides:

If the Secretary has reasonable cause to believe that a person has violated the provisions of subsection (a) of this section and that such person is insolvent or beyond the jurisdiction of the United States or that seizure is otherwise essential to protect the revenue of the United States or to prevent the introduction of prohibited or restricted merchandise into the customs territory of the United States,

261. *See* 19 C.F.R. § 162.74(d) (1986).

262. *Id.*

then such merchandise may be seized and, upon assessment of a monetary penalty, forfeited unless the monetary penalty is paid within the time specified by law. Within a reasonable time after any such seizure is made, the Secretary shall issue to the person concerned a written statement containing the reasons for the seizure. After seizure of merchandise under this subsection, the Secretary may, in the case of restricted merchandise, and shall, in the case of any other merchandise (other than prohibited merchandise), return such merchandise upon the deposit of security not to exceed the maximum monetary penalty which may be assessed under subsection (c) of this section.²⁶³

Neither the statute nor the regulations define terms or interpret phrases such as “reasonable cause to believe,”²⁶⁴ “insolvent,”²⁶⁵ “beyond the jurisdiction of the United States,”²⁶⁶ “essential to protect the revenue of the United States,”²⁶⁷ or “prohibited or restricted merchandise,”²⁶⁸ perhaps explaining in part why section 592(c)(5) has been the source for much of the section 592 litigation.

263. 19 U.S.C. § 1592(c)(5) (1982).

264. For a discussion of the “reasonable grounds to believe or suspect” standard contained in 19 U.S.C. § 1677b(b) of the U.S. antidumping law, see *Al Tech Specialty Steel Corp. v. United States*, 575 F. Supp. 1277 (Ct. Int’l Trade 1983), *aff’d*, 745 F.2d 632 (Fed. Cir. 1984). For an analysis of what “reason to believe” constitutes in the criminal context, see *Terry v. Ohio*, 392 U.S. 1, 27 (1967).

265. Regardless of whether “insolvent” is defined as an inability to pay debts as they become due or is determined on a balance sheet basis, the fact remains that no seizing Customs officer will be in a position to make such a determination absent an audit of the suspect’s books.

266. It is not clear whether “jurisdiction” refers to the territory of the United States or the power of the United States.

267. This phrase is so broad that it would seem to subsume the term “insolvent,” although it could still cover the situation of an alleged violator who is not insolvent but who may not be able to pay a substantial penalty, if one is contemplated. Again, however, how a Customs officer is to acquire such knowledge in the absence of an intensive investigation is far from clear.

268. Neither the statute nor the regulations distinguish between “prohibited” and “restricted” merchandise. Examples of prohibited merchandise might include articles excluded from entry because they are in excess of quota, or articles from countries with which the United States does not have trade relations. *But see United States v. Gold Mountain Coffee, Ltd.*, 601 F. Supp. 212, 215 (Ct. Int’l Trade 1984) (coffee beans entered in excess of quota not “prohibited” merchandise). An example of restricted merchandise would be an automobile which does not conform with Department of Transportation standards and for which no bond has been obtained to insure compliance under 19 C.F.R. § 12.80(c). Such an automobile may be entered once compliance with those regulations is secured.

Whether the underlying purpose of section 592(c)(5) is to provide an alternative means of satisfying a section 592(a) judgment,²⁶⁹ or whether that paragraph provides an alternative remedy, namely forfeiture of the seized merchandise, has been the subject of recent CIT litigation.²⁷⁰ The first case to examine this question was *United States v. Gold Mountain Coffee, Ltd.*,²⁷¹ which concerned the importation of coffee beans that the Government maintained were restricted or prohibited merchandise because they exceeded quota.²⁷² The Government sought a civil penalty under section 592 and forfeiture of the merchandise under section 592(c)(5) and 18 U.S.C. § 545.²⁷³

269. See *United States v. Tabor*, 608 F. Supp. 658, 666 (Ct. Int'l Trade 1985).

270. See *United States v. One Red Lamborghini*, 625 F. Supp. 986 (Ct. Int'l Trade 1986); *United States v. Tabor*, 608 F. Supp. 658 (Ct. Int'l Trade 1985); *United States v. Gold Mountain Coffee, Ltd.*, 597 F. Supp. 510 (Ct. Int'l Trade 1984)

Following seizure of their merchandise, importers, in an attempt to secure early release of their merchandise, have filed actions in the CIT against the United States seeking a declaratory judgment that they have not violated section 592 and requesting return of their merchandise. See, e.g., *Seaside Realty Corp. v. United States*, 607 F. Supp. 1481 (Ct. Int'l Trade 1985); *Siaca v. United States*, 754 F.2d 988 (Fed. Cir. 1985). Such actions have been dismissed, generally for failure to exhaust administrative remedies. See, e.g., *Seaside Realty*, 607 F. Supp. at 1483; *Siaca*, 754 F.2d at 992. At the same time, however, the CIT has recognized that unreasonable delay by the United States in prosecuting a section 592 action following a seizure of merchandise may result in a denial of due process and, accordingly, dismissal of the action. See *United States v. Tabor*, 608 F. Supp. 658, 666; see also *United States v. Helpert Co.*, 611 F. Supp. 985, 988-89 (Ct. Int'l Trade 1985). The CIT has also allowed a claim for recoupment to be filed by defendants against the United States in a section 592 action where the defendants' merchandise was detained and seized by Customs. *United States v. Gold Mountain Coffee, Ltd.*, 601 F. Supp. 215 (Ct. Int'l Trade 1984). For a case dealing with the availability of the self-incrimination privilege in the prosecution of section 592 actions, see *United States v. Gordon*, 634 F. Supp. 409 (Ct. Int'l Trade 1986). For a case addressing the pleading requirements for the statute of limitations, see *United States v. Gordon*, 7 CIT 350 (1984).

271. 597 F. Supp. 510 (Ct. Int'l Trade 1984). The author was counsel of record for the United States.

272. *Id.* at 512, 515.

273. 18 U.S.C. § 545 provides for criminal sanctions for fraudulent entry of merchandise into the United States, as well as forfeiture of the offending merchandise. The forfeiture provision states:

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

It was the Government's position that a section 545 forfeiture would be conducted pursuant to 19 U.S.C. § 1615, which shifts the burden of proof to the claimant of the property to be forfeited once the United States has shown probable cause for the seizure.

In declining jurisdiction over the 18 U.S.C. § 545 forfeiture,²⁷⁴ the CIT ruled that an in rem forfeiture action was not available under section 592(c)(5), at least when restricted merchandise was concerned.²⁷⁵ The court found persuasive the following legislative history: "The penalty for violation of section 592 would be changed from an in rem penalty, forfeiture of [sic] merchandise, to an in personam penalty, a monetary liability of the importer The seized merchandise would, in general, be forfeited to the United States only if the monetary penalty is not paid."²⁷⁶ The Senate's qualification, "in general," gave the CIT pause, for the court was forced to concede in dictum that forfeiture might be available in connection with prohibited merchandise, considerations of judgment satisfaction aside.²⁷⁷ Although the CIT's *Gold Mountain Coffee* opinions are not models of clarity, Congress furnished the court with virtually no guidance as to the proper interpretation of a very cryptic statutory provision.

Shortly after the *Gold Mountain Coffee* decisions, the CIT again had the opportunity to consider the forfeiture provisions of section 592(c)(5) in *United States v. Tabor*.²⁷⁸ In that case the Government sought forfeiture under section 592(c)(5) and 18 U.S.C § 545 of an automobile that had entered the United

274. *Gold Mountain Coffee*, 597 F. Supp. at 513-15. This pendent jurisdictional argument was renewed by the Government and again rejected by the CIT in *United States v. Tabor*, 608 F. Supp. 658, 662-64 (Ct. Int'l Trade 1985).

275. *Gold Mountain Coffee*, 597 F. Supp. at 515. The court did hold out the possibility, however, that "[f]orfeiture . . . might be necessary to prevent dangerous or totally prohibited merchandise (not involved here) from entering into the commerce of the United States." *Id.* at 515. The CIT denied a motion for rehearing on this question. See *United States v. Gold Mountain Coffee, Ltd.*, 601 F. Supp. 212 (Ct. Int'l Trade 1984). The court refused to find the coffee beans to be prohibited merchandise because they "are the type of goods that in some situations may be imported and are not the type of goods which must necessarily be forfeited to protect the public" 601 F. Supp. at 215.

276. *Gold Mountain Coffee*, 597 F. Supp. at 515 (quoting S. REP. NO. 778, *supra* note 4, at 19).

277. See *Gold Mountain Coffee*, 597 F. Supp. at 515. *But see* *United States v. Gold Mountain Coffee, Ltd.*, 601 F. Supp. at 215 (Section 592(c)(5) "applies largely to interim remedies. It is not the source of another basis for forfeiture.").

In *Tabor*, 608 F. Supp. 658 (Ct. Int'l Trade 1985), the Government apparently conceded that forfeiture based solely on the prohibited nature of goods is not warranted under section 592. 608 F. Supp. at 664 n.10. It is not clear why the Government has abandoned its position that forfeiture is available under section 592(c)(5) for reasons other than collection of penalties.

278. *Tabor*, 608 F. Supp. 658.

States without compliance with the Clean Air Act.²⁷⁹ The CIT again declined to exercise ancillary jurisdiction over the section 545 forfeiture,²⁸⁰ stating that "discretion would seem to indicate that one of the courts specifically empowered to hear § 545 claims [*i.e.*, the district court] be given an opportunity to determine the essential features of such claims."²⁸¹ As for the Government's section 592(c)(5) forfeiture, two bases were proffered for such a forfeiture. The first basis was accepted by the CIT in *Gold Mountain Coffee* — forfeiture to satisfy any unpaid judgment.²⁸² The second was novel, forfeiture because the defendant did not pay the penalty determined at the administrative level within the time set by the Secretary of the Treasury.²⁸³ The central issue was the interpretation of the phrase "within the time specified by law," contained in section 592(c)(5).²⁸⁴

The CIT rejected the Government's argument because it would not only have a chilling effect on an importer's resort to the mitigation process but would also have the tendency to erode a defendant's right to a trial *de novo* provided for in section 592(e).²⁸⁵ The court added that "Congress appears to have provided a particular, but nonexclusive, manner for satisfaction of a judgment . . . [and] did not intend forfeiture as a remedy which is distinct from monetary penalties, and which may be stated as a separate claim in a case such as this."²⁸⁶

The forfeiture issues raised in the *Tabor* case were reprised in *United States v. One Red Lamborghini*.²⁸⁷ Undaunted by its lack of success in the *Gold Mountain Coffee* and *Tabor* cases at squeezing some type of forfeiture action out of section 592(c)(5), at least one other than for satisfying an unpaid judgment, the

279. *See id.*; 19 C.F.R. § 12.73(b)(5)(ii), (f) (1986).

280. *Tabor*, 608 F. Supp. at 662-64.

281. *Id.* at 664.

282. *Id.*

283. *Id.* at 664-65. *See* 19 U.S.C. § 1592(c)(5) (1982) ("Such merchandise may be seized and, upon assessment of a monetary penalty, forfeited unless the monetary penalty is paid within the time specified by law.").

284. *Tabor*, 608 F. Supp. at 665. The Government cited as the relevant "law" 19 C.F.R. § 171.32, which provides for payment of a mitigated penalty within a time period specified in the mitigation decision.

285. 608 F. Supp. at 665.

286. *Id.* at 666.

287. *United States v. One Red Lamborghini*, 625 F. Supp. 986 (Ct. Int'l Trade 1986), *appeal docketed*, No. 86-1015 (Fed. Cir. Mar. 17, 1986).

Government brought an in rem forfeiture action pursuant to section 592(c)(5).²⁸⁸ The Government sought forfeiture of two automobiles seized by Customs which purportedly entered the United States by means of false and material statements.²⁸⁹ In dismissing the Government's action, the court held that section 592(c)(5) did not provide for an in rem forfeiture action, repeating the much overworked observation that Congress changed section 592 from an in rem forfeiture penalty to an in personam monetary penalty.²⁹⁰ The Government pointed out, quite correctly, that the statement in the legislative history that "seized merchandise would, *in general*, be forfeited to the United States only if the monetary penalty is not paid,"²⁹¹ allowed for the possibility that merchandise might still be forfeited in circumstances other than to satisfy an unpaid judgment.²⁹² The court did not find this observation dispositive,²⁹³ but its rationale for so finding borders on the sophistical:

But the question posed by plaintiff's action is whether section 592 provides for *in rem* actions, not whether forfeiture is only permitted where the monetary penalty is unsatisfied. The Court does not find the language cited by plaintiff "a clearly expressed legislative intention to the contrary" of the language of the statute providing only for an *in personam* action.²⁹⁴

The CIT's treatment of the Government's argument is far too facile. The court places heavy reliance on the plain meaning rule of statutory construction,²⁹⁵ but does not apply the rule in an evenhanded manner. True, section 592(c)(5) does not provide for an in rem action *in haec verba*; but similarly, section 592 considered as a whole does not provide for an in personam action *in haec verba* either. Thus, by a parity of rea-

288. *One Red Lamborghini*, 625 F. Supp. at 987.

289. *One Red Lamborghini*, 625 F. Supp. at 987. The person who entered the automobiles, a German national, returned to Germany shortly after the entry. *Id.* at 987-88.

290. 625 F. Supp. at 987, 989.

291. S. REP. NO. 778, *supra* note 4, at 19 (emphasis added); H.R. CONF. REP. NO. 1517, *supra* note 36, at 10 (emphasis added).

292. *One Red Lamborghini*, 625 F. Supp. at 989-90.

293. *Id.* at 990.

294. *Id.* at 990 (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (footnote omitted)).

295. *Id.* at 988, 990.

soning, section 592 should no sooner be construed as providing for an in personam action than it should for an in rem action. More importantly, however, section 592(c)(5) does provide for forfeiture which, in the customs context, is an in rem proceeding. In short, to acknowledge that forfeiture is allowed under section 592(c)(5), as the CIT does, but to conclude that all in rem proceedings are forbidden under that section, is logically inconsistent.

Section 592(c)(5) is in drastic need of redrafting. Congress has sent mixed signals, on the one hand stating that new section 592 is an in personam penalty provision, and on the other still providing for forfeiture actions under the new law. It would be of immeasurable assistance to importers and customs practitioners if Congress would resolve this issue.

F. *Restoration of Duties Under Section 592(d)*

Under the old law there was no provision permitting collection of duties that were lost due to a section 592 violation. Once the entry was liquidated, the computation of duties was final and conclusive for all parties, including the United States,²⁹⁶ unless protested by the importer²⁹⁷ (an unlikely event in the context of a section 592 violation) voluntarily reliquidated by Customs,²⁹⁸ or reliquidated within two years if the entry had been fraudulent.²⁹⁹ Duties would therefore go uncollected if section 592 violations were discovered after these time periods had run.

Section 592(d) was enacted to remedy this problem, providing: "Notwithstanding section 1514 of this title, if the United States has been deprived of lawful duties as a result of a violation of subsection (a) of this section, the appropriate customs officer shall require that such lawful duties be restored, whether or not a monetary penalty is assessed."³⁰⁰

The legislative history of the Procedural Reform Act indicates that Congress enacted section 592(d) to codify the existing agency practice of requiring payment of the actual loss

296. 19 U.S.C. § 1514 (1982 & Supp. III 1985).

297. *Id.*

298. 19 U.S.C. § 1501 (1982). Voluntary reliquidation must be done within 90 days of liquidation. *Id.*

299. 19 U.S.C. § 1521 (1982).

300. 19 U.S.C. § 1592(d) (1982).

of revenue as a condition of mitigation.³⁰¹ The CIT explained Congress' enactment of section 592(d) in *United States v. Ross*:³⁰²

This subsection was added by the Customs Procedural Reform and Simplification Act of 1978 . . . in order to remedy the problems relating to the finality of liquidations. The United States, pursuant to § 1592(d), may seek the restoration of duties even though a particular entry and liquidation have become final within the meaning of 19 U.S.C. § 1514(a) (1982).³⁰³

The *Ross* decision is the only case decided by the CIT to date construing section 592(d). In *Ross*, the court held that because duties may be collected under that section even though no penalty is assessed, provided there has been a section 592(a) violation, a section 592(d) duty collection action is not subject to the section 592(b) pre-penalty and penalty notice provisions.³⁰⁴

Two of the more interesting questions arising under section 592(d) remain unanswered, namely, who is liable for the duties, and what is the applicable statute of limitations, if any. An issue related to the first question is whether an innocent customhouse broker or its surety can be held liable for the duties. Customhouse brokers are licensed by Customs to act as agents for importers and in that capacity undertake the actual entry of merchandise. If the broker makes the entry in its own name, *i.e.*, if it is the importer of record, it would be liable for any increased duties assessed on merchandise at the time of liquidation.³⁰⁵ That being so, the argument runs, because the broker was under no obligation to be the importer of record, and because the broker has presumably been compensated in

301. See H.R. REP. No. 621, 95th Cong., 1st Sess. 16 (1977) [hereinafter H.R. REP. No. 621]. The purpose of section 592(d), as stated in the House Ways and Means Committee Report, was to "codify the existing administrative practice of mitigating claims for forfeiture value on condition that any loss of revenue is deposited with the United States . . . [even] where Customs may not wish to assess a penalty (e.g., with petty or technical violations), but nevertheless, wishes to recover lost revenue." *Id.*

302. 574 F. Supp. 1067 (Ct. Int'l Trade 1983).

303. *Ross*, 574 F. Supp. at 1068 n.1.

304. 574 F. Supp. at 1068-69. Customs has provided procedures for notice of a section 592(d) duty assessment. 19 C.F.R. § 162.79b.

305. 19 U.S.C. § 1485(d) (1982).

order to assume the liability of an importer of record, he ought to be held liable for section 592(d) duties as well.³⁰⁶

This argument leads to a very harsh result, holding an innocent party liable for duties that escaped collection because of another party's defalcation. In interpreting section 592(d), one cannot divorce it from the rest of section 592.³⁰⁷ At least one of the purposes of section 592 is to deter violations of the customs laws. To that end, section 592(d) was added to ensure that section 592(a) violations do not result in the United States being deprived of lawful duties. Indeed, Congress created an express nexus between section 592(a) violations and section 592(d) duty losses. But it is difficult to see how deterrence is enhanced by holding innocent parties liable for duties that escaped collection because of someone else's section 592(a) violation.³⁰⁸

The Government's position that the statute of limitations contained in 19 U.S.C. § 1621 does not govern section 592(d) further aggravates this oppressive result.³⁰⁹ This argument was rejected by the district court in *United States v. RCA, Consumer Electronics Division*.³¹⁰ The court in *RCA* ruled that the five-year limitations period contained in 19 U.S.C. § 1621 governs all section 592 actions, whether for the assessment of penalties or the restoration of lawful duties.³¹¹ The court's holding was based largely on the observation that the time periods

306. The Government has taken the position that an innocent broker and its surety are liable for section 592(d) duties in a section 592(d) action pending in the CIT. See *United States v. Blum*, No. 85-05-00640 (Ct. Int'l Trade June 28, 1985) (plaintiff's memorandum in opposition to defendant's motion to dismiss). The author was counsel for the United States on the Government's memorandum in opposition filed in the *Blum* case.

307. See *United States v. Gordon*, 634 F. Supp. 409, 416 n.11 (Ct. Int'l Trade 1986) ("In order to determine Congressional intent, the statute [section 592] must be viewed as a whole, inasmuch as Congress enacted the provisions together as part of one scheme for assessing civil penalties.").

308. See O'Kelly, *Changes Under the Customs Procedural Reform and Simplification Act*, 58 ST. JOHN'S L. REV. 815, 819-26 (1984).

309. See *United States v. RCA, Consumer Elecs. Div.*, No. IP 80-933-C (S.D. Ind. Dec. 16, 1983) (order denying motion for summary judgment); *United States v. Appendagez, Inc.*, 560 F. Supp. 50, 55 (Ct. Int'l Trade 1983); *United States v. Blum*, No. 85-05-00640 (Ct. Int'l Trade June 28, 1985) (plaintiff's memorandum in opposition to defendant's motion to dismiss).

310. No. IP 80-933-c (S.D. Ind. Dec. 16, 1983) (order denying motion for summary judgment).

311. *Id.*

in which Customs must challenge the amounts paid upon liquidation under 19 U.S.C. §§ 1514 and 1520 are more restrictive than the five-year statute of limitations found in 19 U.S.C. § 1621.³¹² Therefore, it is incongruous to allow Customs to bring a section 592(d) collection action at any time.³¹³ From a planning perspective, any other result would make it virtually impossible to conduct a brokerage business with such massive contingent liabilities lurking in perpetuity.³¹⁴

G. *The New Judicial Proceedings Under Section 592(e)*

For alleged section 592 violators, the most important change to section 592, after the maximum penalty amendments, is found in section 592(e). The provisions making judicial review *de novo*, allowing the court to impose any penalty it deems appropriate, and placing the burden of proof on the Government, have radically altered the nature of section 592 collection actions.³¹⁵ Section 592(e) provides:

Notwithstanding any other provision of law, in any proceeding commenced by the United States in the Court of International Trade for the recovery of any monetary penalty claimed under this section—

- (1) all issues, including the amount of the penalty, shall be tried *de novo*;
- (2) if the monetary penalty is based on fraud, the United States shall have the burden of proof to estab-

312. *Id.*

313. See *Customs Procedural Reform Act of 1977: Hearings on H.R. 8149 Before the Subcomm. on Trade of the House Comm. on Ways and Means, 95 Cong., 1st Sess. 57 (1977)* (testimony of Robert E. Chasen, Commissioner of Customs):

It is not clear what subsection (d)(4) [the House version of section 592(d)] is intended to accomplish. We interpret this subsection as allowing the Government to collect all duties (not previously collected) arising out of the discovery of a section 592 violation (whether or not a monetary penalty is assessed), limited only by the 5-year statute of limitations.

Id.; see also *United States v. Appendagez, Inc.*, 560 F. Supp. 50, 55 (Ct. Int'l Trade 1983), where the CIT ruled that the applicable limitations period was the two-year period of 19 U.S.C. § 1521 in the case of fraud, and the 90-day period of 19 U.S.C. § 1514(c)(2)(A) in all other cases. However, those time periods govern reliquidation, not duty collection. The court thus would appear to be in error in its ruling.

314. Because a surety's liability is contractually being based on the bond it executes with the Customs Service, the applicable statute of limitations arguably should be the six-year period provided for in 28 U.S.C. § 2415(a).

315. See generally O'Kelly, *supra* note 308, at 815-19.

lish the alleged violation by clear and convincing evidence;

(3) if the monetary penalty is based on gross negligence, the United States shall have the burden of proof to establish all the elements of the alleged violation; and

(4) if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence.³¹⁶

In discussing the various burden of proof provisions, the House Report stated the following with regard to fraud:

Section 592(g)(2) [the House version of section 592(e)] requires that in a fraud case, the United States has the burden to establish the existence of fraud by clear and convincing evidence, as the Government is required to do in tax fraud cases under 26 U.S.C. § 7454. "Clear and convincing" is the usual evidentiary standard required for proof of fraud.³¹⁷

In discussing the burden of proof in gross negligence and negligence cases, the House Conference Report stated:

In gross negligence and negligence cases, the Government would have to prove the elements of the violation or the act or omission constituting the violation, respectively. This means the Government would have to prove, by a preponderance of the evidence, that the importer acted in reckless disregard of his legal duties in a gross negligence case. In a negligence case, the Government would have to prove, by a preponderance of the evidence, that the importer did an act which violates section 592. Thereafter, the importer would have to prove, by a preponderance of the evidence, that he exercised that care which was reasonable under the circumstances.³¹⁸

316. 19 U.S.C. § 1592(e) (1982).

317. H.R. REP. NO. 621, *supra* note 301, at 17. For cases dealing with the burden of proof in tax fraud cases, see, e.g., *Valetti v. Commissioner*, 260 F.2d 185 (3d Cir. 1958); *Goldberg v. Commissioner*, 239 F.2d 316 (5th Cir. 1956); *Kashat v. Commissioner*, 229 F.2d 282 (6th Cir. 1956).

318. H.R. CONF. REP. NO. 1517, *supra* note 36, at 11. The House Report ex-

There is not a great deal of case law on most of section 592(e). However, given the comparative clarity with which it has been drafted, there should not be many questions about the construction and interpretation of the subsection.

CONCLUSION

Recognizing the substantive and procedural harshness of section 592, Congress took action in 1978 to remedy the situation. Although the changes that Congress enacted were heartily embraced by the importing public, the Customs Service seems to have taken a begrudging attitude toward enforcing amended section 592. Regrettably, the Customs Service displays the same attitude that finally made importers grow weary of old section 592, an attitude of arrogance and flippancy toward persons attempting to enter merchandise into the United States. The trial de novo provisions of section 592(e) could serve as some check on agency overreaching. Unfortunately, decisions such as the Federal Circuit's in *Priority Products* and the CIT's in *Ross* send the wrong signal to Customs, a signal that it is permissible to cut corners, a signal that the administrative pre-penalty, penalty, and mitigation procedures are mere formalities that need not be closely followed.

Although the bulk of new section 592 has been drafted with a sufficient degree of clarity, the section 592(c)(5) seizure provision is a shambles. All that is clear is that Customs may seize merchandise and may have merchandise forfeited. Although section 592(c)(5) on its face states under what circumstances seizure and forfeiture may take place, putting that subsection into operation has presented nettlesome problems that Congress should address.

Another provision of new section 592 that has raised concerns within the importing public is section 592(d). Considering section 592 as a whole, a civil penalty statute designed to deter violations of the customs laws, it is incongruous to allow

plained why the burden of proof in negligence cases was allocated in the manner it was:

This would ensure that facts susceptible of proof by the Government (those relating to the acts under challenge) would be proven by the Government, but the facts within the possession of the defendant (those relating to the exercise of due care) would be proven by the defendant.

H.R. REP. No. 621, *supra* note 301, at 17.

an independent duty collection to be instituted against innocent customhouse brokers and their sureties pursuant to section 592(d). Congress should act to clarify this issue as well.

With the exception of the various section 592(c)(5) issues that have been litigated in the CIT, Customs has fared very well in its section 592 litigation. From the perspective of the importer, however, it would be desirable if the courts acted more frequently as a brake on an agency that too often abuses the tremendous economic leverage it has over an importer. The courts should not be so deferential; it is, after all, "emphatically the province and duty of the judicial department to say what the law is."³¹⁹ To this end, the CIT and the Federal Circuit should closely scrutinize what Customs does at the administrative level under section 592. It is both far too facile and a dismissal of the congressional intent behind section 592 to say that a trial *de novo* will cure whatever defects take place at the administrative level.

319. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).