A Question of Evidence, Ethics, and Interpretation: Possible Perils and Pitfalls of USCIT Rules 8 and 11 *

By: Frances P. Hadfield, Esq.[*]

The standards for federal pleadings were tightened by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*[1] and *Ashcroft v. Iqbal.*[2] In these cases, the Supreme Court reconsidered and obviated the liberal pleading standard of *Conley v. Gibson*[3] and held instead that parties are required to allege specific and objectively verifiable facts in their complaints that are "plausible." These Supreme Court cases have already provided grounds for the dismissal of causes of action and/or cases pending before the U.S. Court of International Trade ("CIT"), in *Sioux Honey Ass'n v. United States,*[4] *Totes-Isotoner Corp. v. United States,*[5] and *United States v. Pressman-Gutman Co.*[6] Moreover, the *Twombly*[7] and *Iqbal*[8] Supreme Court cases have arguably

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[*] Ms. Hadfield is an attorney with Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP. Prior to joining GDLSK she was a law clerk for the Honorable Evan J. Wallach of the United States Court of International Trade. She is also a licensed Customs Broker. The author wishes to express her thanks to Robert B. Silverman, Ned H. Marshak and Michael Khorsandi for their insight and comments. All opinions and any errors or mistakes are solely attributable to the author.

[1] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

[2] *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009).

[3] *Conley v. Gibson,* 355 U.S. 41 (1957).

[4] *Sioux Honey Ass'n v. United States*, 2010 Ct. Intl. Trade LEXIS 100, 12-14 (CIT Aug. 27, 2010).

[5] *Totes-Isotoner Corp. v. United States*, 569 F. Supp. 2d 1315 (CIT 2008), 594 F.3d 1346, 1354-1355 (Fed. Cir. 2010) (underlying Complaint alleged that provisions of the tariff unconstitutionally discriminated based on the sex of users of gloves. The Complaint was dismissed by the CIT because pursuant to *Twombly* and *Iqbal*, Plaintiff had failed to properly and plausibly state a claim for unequal treatment).

[6] *United States v. Pressman-Gutman Co*., 2010 Ct. Intl. Trade LEXIS 109 (CIT 2010).

[7] While *Twombly* was an antitrust case that many district and appellate courts originally believed was limited to actions of the sort brought in *Twombly*, in *Iqbal*, the Supreme Court expressly affirmed that the reasoning in *Twombly* was applicable to *all* civil actions in the federal courts because *Twombly* had construed Rule 8 of the Federal Rules of Civil Procedure.[7]

[8] Iqbal was a former government detainee who was held in connection with a government investigation following the September 11, 2001 terrorist attack. He alleged in his Complaint that he was deprived of various constitutional rights while in federal custody. After his release, Iqbal filed a Bivens action against various federal officials. Iqbal alleged that petitioners "knew of, condoned, and willfully and maliciously agreed to subject" him to illegal treatment as a matter of policy, solely on account of his religion and/or race and for no legitimate reason. The District Court

created a tension between Federal Rules of Civil Procedure 8 and 11 – and USCIT rules 8 and 11. Although the Federal Rules of Civil Procedure do not apply in cases before the Court of International Trade,[9] the CIT's Rule 11 is identical in scope to the federal rule.[10]

The New Pleading Standard

The new pleading standard requires that the CIT give no weight to any allegations that the CIT deems conclusory or claims that simply repeat the elements of a particular cause of action.[11] CIT Rule 8 requires that a pleading contain:

> (1) a short and plain statement of the grounds for the court's jurisdiction;
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> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
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> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

However, these Supreme Court decisions held that plaintiffs now must provide factual allegations that "plausibly" support their claims.[12] Rule 8 has now been interpreted to require sufficient factual matter be pled that if accepted as true, "to 'state a claim to relief that is plausible on its face.'"[13] Furthermore, the Court's opinion in these cases indicated that a claim only has facial plausibility when "the pleaded factual content allows the court to draw the

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denied the defendants motion to dismiss on the basis of qualified immunity, and the Second Circuit affirmed. Although the Second Circuit found *Twombly* applicable, it determined that "*Twombly* called for a 'flexible "plausibility standard," which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.'" The Court of Appeals then concluded that Iqbal's case did not involve one of "those contexts" requiring amplification. The Supreme Court reversed, finding Iqbal's allegations insufficient under *Twombly*. The Court concluded that Iqbal's mere recitations of the elements of claims for constitutional discrimination were not entitled to the assumption of truth on a motion to dismiss. Moreover, because the allegations of misconduct were insufficient to establish the discriminatory purpose required for a Bivens action based on invidious discrimination, the Court reversed the Second Circuit's decision to allow the complaint to survive as pled. *Iqbal*, 129 S. Ct. at 1949-50.

[9] *In re N.C. Trading*, 586 F.2d 221, 231 (CCPA 1978).

[10] *Retamal v. U.S. Customs & Border Prot.*, 439 F.3d 1372, 1376 (Fed. Cir. 2006).

[11] *See Iqbal*, 129 S. Ct. 1937 (2009) (citing *Twombly*, 550 U.S. 544 (2007)).

[12] *Iqbal*, 129 S. Ct. at 1949.

[13] *Id*. (citing *Twombly*, 550 U.S. at 570).

reasonable inference that the defendant is liable for the misconduct alleged."[14] Thus, the Supreme Court's decisions in *Twombly* and *Iqbal* set forth what amount to a two-step analysis for the CIT to use when adjudicating a motion to dismiss.[15]

First, the CIT must identify and reject any legal conclusions that are unsupported by factual allegations. These allegations could appear in almost any of the cases that are brought before the CIT – from antidumping cases to penalty cases. The reason for this broad applicability of the Supreme Court cases to all federal cases (even international trade and customs cases) is because the Supreme Court indicated that conclusions set out as allegations in a complaint "are not entitled to the assumption of truth."[16] Moreover, the Supreme Court determined that:

> (1) "threadbare recitals of a cause of action's elements, supported by mere conclusory statements"[17];
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> (2) "labels and conclusions"[18]; and
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> (3) "'naked assertion[s]' devoid of 'further factual enhancement'"[19]

will not be countenanced by the court.

These statements were brought out in part because the Supreme Court believed that a party with "'a largely groundless claim'" should not be allowed to needlessly take up the time of a number of other people.[20] Therefore, the Supreme Court determined that when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, "'this basic

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[14] *Id*. (citing *Twombly*, 550 U.S. at 556).
[15] *Iqbal*, 129 S. Ct. at 1940.
[16] *Id*.
[17] *Id*. (citing *Twombly*, 550 U.S. at 555).
[18] *Id*. (citing *Twombly*, 550 U.S. at 556).
[19] *Id*. (citing *Twombly*, 550 U.S. at 557).
[20] *Twombly,* 550 at 557 (citing *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005)) (internal citations omitted).

deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'"[21]

In this vein, facts that are "merely consistent with"[22] a defendant's liability fail to provide sufficient information indicating that there exists plausibility to the plaintiff's claim of 'entitlement to relief.'"[23] In short, when a complaint alleges that a defendant caused plaintiff's injury, but fails to factually explain how the injury occurred, the pleading does not meet the requirements of USCIT Rule 8; and therefore cannot survive a Rule 12(b) motion to dismiss for failure to state a claim upon which relief can be granted.

The government has already found itself vulnerable to this new standard in penalty cases. For example, in *United States v. Tip Top Pants, Inc.*,[24] the court dismissed one of the named defendants and explained that in order to avoid dismissal for failure to state a claim upon which relief can be granted, the factual allegations set out in the complaint must be enough to raise a right to relief above the speculative level – notice pleading no longer being sufficient.[25] Specifically, the court determined that the facts as pled by the government failed to demonstrate a basis on which one of the personally named defendants in the action would have incurred any liability for a negligent violation of Section 592 that the company, Tip Top, may have

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[21] *Id.*; *5 Wright & Miller § 1216, at 233-234 (*quoting *Daves v. Hawaiian Dredging Co., 114 F. Supp. 643, 645 (Haw. 1953)); see also Dura, supra,* at *346, 125 S. Ct. 1627, 161 L. Ed. 2d 577; Asahi Glass Co. v. Pentech Pharmaceuticals, Inc.,* 289 F. Supp. 2d 986, 995 (ND Ill. 2003) (Posner, J., sitting by designation) ("[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase").

[22] *Twombly*, 550 U.S. at 557.

[23] *Id*.

[24] *United States v. Tip Top Pants, Inc.*, 32 Int'l Trade Rep.1106 (CIT Jan. 13, 2010) (indicating that even were there sufficient factual allegations in the complaint, plaintiff still would not have pleaded or demonstrated a basis on which the named defendant would have incurred any liability for a negligent violation of Section 592).

[25] *Id.*

committed. Therefore, the court concluded that it would not allow the case to go to trial against the named defendant on the complaint before it.[26]

The second part of the test as set forth by the Supreme Court indicated that federal courts should assume the veracity of "well-pleaded factual allegations" and should conduct a "context-specific" analysis that "draw[s] on [the court's] judicial experience and common sense" to determine whether the allegations "plausibly give rise to an entitlement to relief."[27] This standard is much more amorphous and subjective. The Supreme Court indicated that well-pleaded facts that "do not permit the court to infer more than the mere possibility of misconduct" are insufficient to show that plaintiff is entitled to relief.[28] Thus, in order to survive a USCIT 12(b) motion to dismiss, the complaint must present a story "plausible" enough to convince the court that the plaintiff actually stands a reasonable chance of proving the claims asserted.[29]

USCIT Rule 11

This standard for the sufficiency of Complaints is somewhat at odds with the current USCIT R. 11. Moreover, this new pleading standard by the Supreme Court harkens back to the 1980's version of Rule 11 that required that lawyers conduct a pre-filing investigation to establish that allegations in the complaint were "well grounded in fact."[30]

The two logical consequences of the old rule 11 were that: (1) plaintiffs had to plead with more factual detail than Rule 8(a) required; and (2) Rule 11 motions for sanctions at the district court level were principally directed at complaints - more so than for any other papers filed with

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[26] *Id.*

[27] *Iqbal,* 129 S. Ct. at 1949.

[28] *Id*. at 1950.

[29] *Id*. (citing *Twombly*, 550 U.S. at 556).

[30] Benjamin P. Cooper, *"Iqbal's Retro Revolution"* (Sept. 2010) *available at* http://works.bepress.com/benjamin_cooper/4 (explaining that under *Iqbal*, the Supreme Court said that judges are to use their "judicial experience" and "common sense" in determining whether the claim is plausible – a highly subjective determination).

a court.[31] Now, with the newly resurrected requirement that facts be pled in a Complaint with "plausibility," it necessarily follows that the failure to so plead could result in Rule 11 violations as was the case under the old Rule 11.

> The current USCIT R. 11 provides in pertinent part that:
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> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after any inquiry reasonable under the circumstances,--
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> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
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> (b) By presenting to the court a pleading, written motion, or other paper – whether by signing, filing, submitting, or later advocating it – an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after any inquiry reasonable under the circumstances:
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> (3) **the factual contentions have evidentiary support or, if specifically so identified**, **will likely have evidentiary support after a reasonable opportunity for further investigation or discovery**; (emphasis added) and
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> ***
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> (c) Sanctions.
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> If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorney . . . that has violated subdivision (b).
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> (1) How Initiated
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> (B) On Court's Initiative.
> On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney . . . to show cause why it has not violated subdivision (b) with respect thereto.

[31] Jeffrey W. Stempel, *Sanctions, Symmetry and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing it with Pre-Verdict Dismissal Devices*, 60 Fordham L. Rev. 257, 267 (1991).

(Emphasis added). The portion of FRCP Rule 11 (and USCIT R. 11) that allows plaintiffs to plead facts for which they will "likely have evidentiary support after a reasonable opportunity" was put in place in 1993 in order to lessen the harshness of Rule 11.[32] Thus, rule 11 in its current iteration permits a pleader to obtain supportive fact through discovery. However, the Supreme Court's plausibility pleading holding in *Twombly* and *Iqbal* does not appear to permit discovery to support an allegation to occur. Instead, plaintiffs are required to offer facts that may support a pleading when it is filed. Moreover, USCIT R. 11 in its current iteration requires that the factual contentions have evidentiary support. What might also be an unfortunate consequence of the new pleading standards is an even greater level of subjectivity in evaluating the sufficiency of a pleading.[33] Thus, what has yet to be determined is whether as a consequence of *Twombly* and *Iqbal*, the CIT will revert to practices more reflective of decades past than current practices.[34] While the dismissal of an action under *Twombly* does not necessarily imply a violation of Rule 11 for lack of evidentiary support, a plaintiff prior to discovery may have incomplete knowledge of the specific facts, but have sufficient information to survive *Twombly*.[35] Alternatively, a plaintiff may believe that his facts have evidentiary support, but the court could subjectively determine that this was not the case when pleading was filed (or that counsel's inquiry was not reasonable).

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[32] *See Sanctions, Symmetry and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing it with Pre-Verdict Dismissal Devices*, 60 Fordham L. Rev. 257, 267 (1991).

[33] George Cochran, *Rule 11: The Road to Amendment*, 61 Miss. L.J. 5, 9 (1991) (explaining that under the 1983 version of Rule 11, sanctionable complaints were in the eye of the beholder. "[O]n the same set of facts, almost half of judges surveyed would have sanctioned a complaint as frivolous which the other half determined not to violate the rule…. Lawyers sanctioned by the district court for bringing 'frivolous' cases, have secured reversals not only of sanctions but also on the merits.").

[34] *See supra, "Iqbal's Retro Revolution"*; s*ee supra, Rule 11: The Road to Amendment*, 61 Miss. L.J. at 9.

[35] *See supra,"Iqbal's Retro Revolution."*

This scenario is not as far-fetched as it may originally appear. The opportunity for pled facts to differ from those determined through discovery recently occurred in *Horizon Lines, LLC v. United States*, ("Horizon I"). In this case, plaintiff challenged CBP's partial denial of a protest made against alleged duties owed on repairs to a vessel. The facts of the case as it was initiated were relatively straight forward. A U.S.-flag vessel operated by Horizon was required to undergo American Bureau of Shipping ("ABS") inspections by September 21, 2001, or cease operating commercially after that date. Under the ABS guidelines the deadline would be suspended if the vessel were placed in lay-up.[36] In September 2001, the vessel went into lay-up in Indonesia.[37] The vessel remained in lay-up in Indonesia until November 2001, when it was towed to Singapore.[38] While in Singapore, the vessel was placed in dry-dock and underwent inspections and certain repairs, satisfying the ABS requirements.[39] In January 2002, the vessel departed Singapore and arrived on January 25, 2002, in the United States. At that time, Horizon was required to notify CBP of all foreign repairs conducted on the vessel - because these repairs were dutiable at a rate of 50% *ad valorem*.[40] In August 2002, Customs concluded that Horizon owed $810,295.99 in duties, which included the cost of the lay-up in Indonesia and liquidated the repair entry.[41] Horizon protested this determination in November 2002, insisting that the vessel's lay-up was not a cost of repair. In December 2004, CBP granted the protest in part and denied it in part. Once the case was initiated, CBP moved for summary judgment, and its motion was granted in part and denied in part by the CIT. The court held that the lay-up in Indonesia was a cost of repair because Horizon failed to present evidence that the Indonesia lay-up was not

[36] *Horizon I*, 31 CIT at 1854
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.;* 19 U.S.C. § 1466(a).
[41] *Horizon I*, 31 CIT at 1854.

caused, at least in part, by the dry-dock in nearby Singapore.[42] Thereafter, the CIT entered partial judgment for Horizon.[43]

Plaintiff appealed and the U.S. Court of Appeals for the Federal Circuit ("CAFC") reversed the CIT's grant of summary judgment that held the repairs caused the lay-up and remanded the case.[44] The CAFC reasoned that Horizon's evidence suggested that the vessel was laid-up in Indonesia for a variety of reasons, including seasonal considerations and the company's contractual obligation to transport empty containers to Hong Kong.[45]

During the trial on remand, Horizon introduced new evidence that supported a wholly new explanation for the lay-up of the vessel – that is, business and commercial reasons for the repairs. In the time between the plaintiff's successful appeal before the CAFC, and trial before the CIT, Horizon uncovered evidence indicating that its prior position was incorrect. The new evidence suggested that the Crusader was laid-up because Horizon decided to alter its express service in the Pacific, which resulted in the elimination of the vessel's new route.[46] Plaintiff was ultimately successful in obtaining refunds under this new theory.[47] However, when Horizon commenced the action in 2005, challenging CBP's partial denial of its protest and seeking a refund, it alleged that its decision to lay-up the vessel in Indonesia was based on a seasonal decline in trade and, in any case, was entirely separate from the later repairs conducted in Singapore.[48]

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[42] *Id.* at 1853, 1857, 1875, 76.
[43] *Horizon Lines, LLC v. United States*, Slip Op. 08-109, 2008 Ct. Intl. Trade LEXIS 108 (CIT Oct. 15, 2008).
[44] *Horizon Lines, LLC v. United States*, 341 F. App'x 629 (Fed. Cir. 2009) ("Horizon II").
[45] *Horizon II*, 341 F. App'x at 633.
[46] *Horizon Line, LLC v. United States*, 2010 Ct. Intl. Trade LEXIS 102, 2-7 (CIT Aug. 31, 2010).
[47] *Id.*
[48] *See Horizon II*, 341 F. App'x at 631.

Naturally, the Government objected to this new evidence on the ground that such evidence was "a wholesale change and there's no ability for the [G]overnment to go in and restart this whole discovery process . . . ."[49] Nonetheless, the court allowed plaintiff's witnesses to testify regarding this new position, but invited the Government to renew its objection at a later date.

As originally argued, the facts in the pleading in this case were necessarily incorrect. Nonetheless, the true facts were not discovered until after an appeal before the CAFC and prior to a trial after the CAFC's remand. What is completely subjective is whether the initial facts were "plausible" given the internal knowledge available within the company and whether counsel's inquiry into the facts as pled was reasonable. While there certainly was no indication of bad faith on the part of Plaintiff's counsel during trial, what remains an open question is whether incorrect knowledge of the facts in this case could legitimately lead to allegations of Rule 11 violations under the new pleading requirements.[50]

Possible Implication of the New Pleading Standards in 19 U.S.C. § 1592 Penalty Actions

Many CBP ports pursing administrative penalty actions pursuant to 19 U.S.C. § 1592(e) seek the maximum penalties that they are able to allege in order to have negotiating room during mitigation. Thus, administrative penalty proceedings often allege a level of culpability that is not fully borne out by the investigation. Although the claim that was alleged was a stretch - that might still pass the "red face test," the agency now must consider whether their penalty claims

[49] *Horizon Lines, LLC v. United States*, 2010 Ct. Intl. Trade LEXIS 102, 2 (CIT Aug. 31, 2010).
[50] *See BenQ Am. Corp. v. United Stat*es, 683 F. Supp. 2d 1335, 1347 (CIT 2010); *Diamond Sawblades Mfgrs.' Coalition v. United States*, 34 CIT ___, ___, 2010 Ct. Intl. Trade LEXIS 15 (2010); *Precision Specialty Metals v. United State*s, 315 F.3d 1346, 1356 (Fed. Cir. 2003).

meets the "plausibility" standard before commencing an action in the CIT. By alleging a higher level of culpability, CBP may hope to use it as a marker to achieve higher penalties by negotiating down from a higher starting point in the same fashion that commercial retailers increase a price and the then have a "sale" where merchandise is sold at the normal market value.

Although FRCP Rule 8 does not require "detailed factual allegations," the Supreme Court in *Twombly* held that a pleading that offers either "labels and conclusions" or "a formulaic recitation of elements of a cause of action" is no longer sufficient. Many times in administrative penalty proceedings this is the extent of the allegations against an importer. Moreover, pleadings that fail to state sufficient facts that, if accepted as true, "state a claim to relief that is plausible on its face will not meet the new requirements of FRCP 8 (or USCIT R. 8), and may leave government counsel vulnerable to allegations of rule 11 violations."[51]

Iqbal is especially significant for causes of action based on a defendant's intent, such as a 28 U.S.C. § 1582 fraud case. 19 U.S.C. § 1592(e) provides that:

> 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—
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> (1) all issues, including the amount of the penalty, shall be tried de novo;
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> (2) if the monetary penalty is based on fraud, the United States shall have the burden of proof to establish the alleged violation by clear and convincing evidence;
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> (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
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> (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.

[51] *Id.* at 570.

Pursuant to the Supreme Court's new pleading framework, when analyzing a § 1582 pleading the CIT may give no weight to mere assertions of an importer's intent because such conclusory allegations are not entitled to the presumption of truth. In the context of a penalty case, CBP defines a fraudulent violation of section 1592 as one resulting from an act or acts (of commission or omission) deliberately done with intent to defraud the revenue or violate the laws of the United States. 19 C.F.R. Pt. 171; *United States v. Thorson Chem. Corp*., 16 CIT 441, 447 (1992).[52] FRCP 9(b) only requires that intent and state of mind be pleaded "generally." The Supreme Court's decision does not appear to permit CBP to simply recite that a defendant had the requisite intent at the time of the challenged conduct. Arguably, the Court interpreted Rule 9(b) to require that intent be pleaded in accordance with Rule 8(a)'s plausibility standard.

Additionally, at the second step, any fraudulent conduct alleged may not create a plausible inference of intent if a there is another plausible explanation for the importer's conduct. Moreover, if counsel pleads facts that are ultimately borne out to be incorrect and were not investigated properly, they may be opening themselves up to claims of a Rule 11 violation.

Following the CIT's decision in *United States v. Optrex Am., Inc.,*[53] CBP rightly had the added concern that it may subsequently discover a higher level of culpability during litigation and because it failed to allege gross negligence or fraud at the administrative level (or in the Complaint), it denied itself an avenue of recovery against an importer. In *Optrex*, CBP initiated penalty proceedings, which alleged negligence.[54] Specifically, the pre-penalty notice charged Optrex with providing insufficient information in its entry documents to enable Customs to

[52] A fraudulent violation is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise. 19 U.S.C. § 1592(c)(1). *United States v. Maxi Switch, Inc.*, 22 CIT 778 (1998).

[53] *United States v. Optrex Am., Inc*, 29 CIT 1494, 1498-1502 (2005).

[54] *United States v. Optrex Am., Inc.*, 560 F. Supp. 2d 1326, 1334-35 (CIT 2008).

determine the correct classification of its imported products.[55] In October 2002, the government initiated an action in the CIT claiming that between 1997 and 1999, Optrex imported products by means of negligent material false statements in violation of section 1592.[56] Plaintiff's original complaint alleged negligent misclassification of Optrex's imported products.[57] However, after discovery did the government believed that it had evidence which established either fraud or gross negligence claims.[58] Based on these newly discovered facts, the government sought leave to amend its complaint to add penalties for fraud and gross negligence as well as to capture entries made by Optrex beginning in January 1997.[59] The government sought to amend its complaint because CBP alleged that it originally did not have a basis to pursue higher levels of culpability.[60] Therefore, the issue before the court was whether the government could bring a penalty action pursuant to 19 U.S.C. § 1592(e) (2004) to recover a penalty claim for gross negligence or fraud that had not been pursued at the administrative level.[61]

Section 1592 delineates the administrative requirements for penalty proceedings pursued against an importer by CBP.[62] Pursuant to the statute, when CBP has "reasonable cause to believe that there has been a violation," it must issue a pre-penalty notice "of its intention to issue a claim for a monetary penalty."[63] The notice must:

(i) describe the merchandise;

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[55] *Id.* at 1335-39.

[56] *Id.*

[57] *Optrex*, 29 CIT at 1503.

[58] The government believed this as a consequence of material produced pursuant to the court's order compelling Optrex to reveal certain attorney-client communications. *United States v. Optrex Am., Inc.,* 28 CIT 987, Slip Op. 2004-79 (CIT July 1, 2004).

[59] *Optrex*, 29 CIT at 1495.

[60] *Id.*

[61] *Id.*

[62] 19 U.S.C. § 1592(b).

[63] *Id.*

(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, taxes, and fees if any, and, taking into account all circumstances, the amount of the proposed monetary penalty; and

(vii) informsuch 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.§ 1592(b)(1)(A).[64]

Thus, the penalty statute requires that CBP engage in specific administrative proceedings prior to the commencement of an action before the CIT. Additionally, in a section 1592 action brought before the court pursuant to 28 U.S.C. § 1582,[65] the CIT must, "where appropriate, require the exhaustion of administrative remedies."[66] The court in *Optrex* did not permit waiver of administrative procedures because "no precedent supports waiving all statutory requirements for a particular claim."[67] Moreover, the opinion determined that the language of section 1592 clearly indicates that the level of culpability forms the core around which the government must construct each penalty claim it wishes to bring, and that each level of culpability generates a new

[64] During the underlying administrative proceedings, if representations are made by the importer to the agency, CBP must review them and determine whether a violation occurred. If it believes a violation exists, CBP must then issue a penalty claim that specifies the all of the changes in the information under clauses (i) through (vi). 19 U.S.C. § 1592(b). Thereafter, CBP is required to issue a written penalty claim to the importer after which the importer is afforded an opportunity to make representations to the agency in order to seek remission or mitigation of any monetary penalties assessed under 19 U.S.C. § 1618. Finally, CBP provides the importer with a written statement that sets forth the final determination and the findings of fact and conclusions of law on which such determination is based. 19 U.S.C. § 1592. If the importer fails to pay any penalty assessed, CBP may refer the case to the Department of Justice. 19 C.F.R. § 162.32.

[65] The CIT has exclusive jurisdiction over civil actions that arise out of import transactions that are commenced by the United States to recover a civil penalty under 19 U.S.C. § 1592. 28 U.S.C. § 1582.

[66] 28 U.S.C. § 2637.

[67] *Optrex,* 29 CIT at 1498-1502 (2005) (explaining that the court believed that such a waiver would require the court to consider a claim that did not go through the proper administrative proceedings, and thus would vitiate the entire statutory framework).

and separate claim.[68] Thus, the CIT determined that the level of culpability was an essential element of the violation for which a penalty is claimed.[69]

Conclusion

Certainly, it has always been the case that FRCP 11 imposed penalties on parties who failed to engage in sufficient pre-filing investigations and filed frivolous claims.[70] The prior version of Rule 11 also required that attorneys certify that any allegations in the complaint were "well grounded in fact."[71] The "well grounded in fact" language was aimed at a lawyer's pre-filing investigation - not the sufficiency of the complaint. Nonetheless, district courts in the 1980's and early 1990's used Rule 11 to dismiss complaints and abrogated much of the liberal pleading standard of FRCP 8.[72]

With the Supreme Court's change to the pleading rules, parties must now plead more facts in allegations made to the court and consequently the district courts may decide to revert to past practices. While the CIT has never been a court that was aggressive in dismissing complaints or penalizing counsel there have nonetheless been a few instances of both.[73]

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[68] *Optrex* 29 CIT at 1495.

[69] *Id.* at 1498-1502 (2005); 19 U.S.C. § 1592(b)(1)(A)(v).

[70] See 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1331 at 470-74 (3d ed. 2004); see also Fed. R. Civ. P. 11 (1983). For example, from 1983-1993, after Federal Rule of Civil Procedure 11 was amended (and prior to the current version) FRCP R. 11 contained no provision through which an attorney could withdraw an allegedly frivolous pleading without being penalized. Fed. R. Civ. P. 11 (1983); Georgene M. Vairo, Rule 11 Sanctions: Case Law, Perspectives and Preventive Measures (3d ed. 2004); *see also supra,* "Iqbal's Retro Revolution".

[71] *See id.*

[72] *Id.*

[73] *See Sioux Honey*, 2010 Ct. Intl. Trade LEXIS 100, 12-14; *Totes-Isotoner Corp.*, 569 F. Supp. 2d 1315; *United States v. Pressman-Gutman Co*., 2010 Ct. Intl. Trade LEXIS 109. Additionally, in *Precision Specialty Metals, Inc. v. United States*, the CIT reprimanded an attorney in the U.S. Department of Justice for making misrepresentations in a motion. The court determined that the attorney left out portions of quotations from judicial opinions, which the court determined altered their meanings. Therefore, the CIT formally reprimanded the attorney. On appeal, the U.S. Court of Appeals for the Federal Circuit had to determine whether the CIT's unpublished opinion was a final decision. *Precision Specialty Metals*, 315 F.3d at 1349. The Federal Circuit determined that reprimand was appealable because "[t]he reprimand was explicit and formal, imposed as a sanction for what the court determined was violation

Moreover, given the fact that more reprimands have occurred in the past decade than in prior two, the USCIT appears to have already moved toward more stringent practice standards. Accordingly, counsel would be wise to conduct much more thorough pre-filing investigations.

Finally, it is worth mentioning that while Antidumping Duty and Countervailing Duty litigation normally is based on the contents of the administrative record before the Department of Commerce and/or United States International Trade Commission, without discovery, the impact of the new pleading standards should be less severe on trade litigation than their potential impact on customs litigation. Nevertheless, trade practitioners need to follow the new guidelines and add more "meat" to their complaints, rather than continuing to rely on notice pleadings that had become the norm in many trade cases. Complaints should now include some of the basic facts which had been included in briefs filed before the agencies. While this standard may result in what practitioners view as unnecessary work, the maxim "better safe than sorry" should not be ignored.

Ultimately, parties may wish to consider a bit longer whether they have sufficient facts to make a case. While a party may initially have what they believe to be sufficient facts at the administrative level, if it is later determined to be "implausible" after discovery they may leave

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of the court's Rule 11 in signing motion papers which contained omissions/misquotations." *Id.* at 1352. Specifically, the Federal Circuit indicated that a trial court's reprimand of a lawyer is immediately appealable, even though the court has not also imposed monetary or other sanctions upon the lawyer. The court's rationale was that there is a seriously adverse effect upon a lawyer's reputation and status in the community and upon his career when he receives a judicial reprimand. Conversely, judicial statements that criticize the lawyer, no matter how inelegant or harsh, not accompanied by a sanction or findings, are not directly appealable.

The CIT has also warned that "counsel…must be cautioned that a more scrupulous attention to detail may be warranted when quoting language from Court decisions. Omission of language within quotations that results in a substantive change may be seen as a deliberate attempt to mislead the court." *Diamond Sawblades Mfrs. Coalition v. United States*, 650 F. Supp. 2d 1331, 1353 (CIT 2009). Finally, it has cautioned that The CIT has also cautioned that turning a blind eye to the critical words in classification criterion. The court has indicated that ignoring criteria and making statements that conflict with the language of the Harmonized Tariff Schedule of the United States ("HTSUS") is 'inconsistent with the obligations of counsel under USCIT Rule 11(b), which provides that an attorney's signature on court papers certifies, among other things, that each of 'the claims, defenses, and other legal contentions' therein 'are warranted by existing law.'" *BenQ Am. Corp*, 683 F. Supp. 2d at 1347 (citing USCIT R. 11).

themselves open to claims of a rule 11 violation. Thus, a valid question exists as to whether parties should be concerned at the initiation of a case whether their complaints will be more vulnerable to rule 11 allegations by either the court or the opposing counsel.

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