CASE STUDY

pillsbury

Countering a New Threat from the False Claims Act

Client:	**Victaulic Co., a major global producer of mechanical pipe joining solutions**
Industry:	Manufacturing
Area of Law:	Contracts
Result:	Lawsuit under False Claims Act dismissed with prejudice

"CFI has failed... to support a plausible claim that Victaulic has failed to mark its imported pipe fittings, that Victaulic falsified customs entry documents, that Victaulic owed marking duties, or that Victaulic knowingly concealed or avoided any obligation to pay marking duties."

*—Judge Mary McLaughlin, U.S. District Court, Eastern District of Pennsylvania, in an **opinion** dismissing the complaint against Victaulic*

For companies in certain business sectors, such as defense contracting and health care, insider-whistleblower lawsuits under the U.S. False Claims Act are a familiar threat. But Pillsbury client Victaulic, the world's leading producer of mechanical pipe joining solutions, could never have expected to face FCA litigation brought by a "whistleblower" with no connection to the company.

A courtroom victory in September 2014 spared client Victaulic from substantial potential damages—but it also highlighted the novel ways plaintiffs are using the False Claims Act to target companies in industries where FCA lawsuits have previously been rare.

The FCA allots a share of funds recovered to whistleblowers who alert the government to fraud against it. The law has been amended several times over the years, most recently in legislation responding to fraud in the financial and health care sectors. The Fraud Enforcement and Recovery Act of 2009 and the Affordable Care Act of 2010 each expanded the scope of the FCA, with the seemingly unintended consequence of enabling plaintiffs to bring whistleblower lawsuits against defendants from a broad range of other economic sectors—including manufacturers like Victaulic.

Victaulic provides pipe joining solutions to a global customer base through its facilities across the world. In this case, the plaintiff (known in the terminology of the FCA as the "relator") alleged that Victaulic imported pipe fittings from its facilities in Poland and China into the U.S. and failed to designate or "mark" the country of origin on those imports over a nine-year period. Failure to do so could potentially subject a company to a "marking duty" of 10 percent of the product's value.

In the past, relators were almost always insider whistleblowers of some kind, with some connection to the alleged fraud (current or former employees, competitors or customers). Not so here. The relator in this case was a self-styled customs expert with no connection to Victaulic or its business.

The relator conducted her own investigation using publicly available information: shipping manifest data published and compiled by industry news publications, along with postings for Victaulic pipe fittings on eBay.

Pillsbury's attorneys laid out a number of grounds for dismissal, including: 1) the relator's failure to state a claim, 2) the fact that she was not an original source of non-public information as required by the FCA; and 3) the fact that regulatory non-compliance does not and should not give rise to a claim under the FCA. The parties argued the case before Judge Mary McLaughlin of the U.S. District Court for the Eastern District of Pennsylvania. She issued a 45-page opinion dismissing the case with prejudice for failure to state a claim.

The judge did not decide the original source issue, concluding reluctantly that the public disclosure bar, one of the strongest defenses available, did not apply. Judge McLaughlin noted that while information from eBay was "certainly readily accessible to the general public," it did not fall neatly within any of the enumerated categories of public disclosure listed in § 3730(e)(4)(A). The judge also declined to determine whether a failure to mark imported goods or to pay marking duties under the Tariff Act gives rise to a claim under the pre-2009 or post-2009 version of the FCA.

The judge's decision on the public disclosure bar is troubling because it suggests a roadmap for savvy relators to avoid dismissal under the public disclosure bar. The decision also failed to address whether regulatory noncompliance could form the basis of a False Claims Act lawsuit—leaving unresolved a question likely to recur as other relators seek to bring novel cases against manufacturers and importers.

