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Keywords

Legislation, Regulation, States, Trade Regulation, Civil Rights, Damages, Discrimination, Sex, Sex Discrimination

THE DUTY OF “REASONABLE CARE” UNDER THE CUSTOMS MODERNIZATION ACT OF 1993

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In 1993, major developments occurred in the field of United States international trade law. That year saw the conclusion of the North American Free Trade Agreement (NAFTA), and the passage by Congress of the NAFTA implementing legislation.¹ This legislation accomplished more than just a free trade zone among Canada, Mexico, and the United States. The NAFTA implementation legislation radically altered the distribution of responsibilities between the United States Customs Service (Customs) and the importing community.

Included in the NAFTA implementation legislation is Chapter VI, the Customs Modernization Act (Modernization Act).² This Act impacts all transactions involving the importation of merchandise into the United States, not just importations from Canada and Mexico.

The Modernization Act stemmed from the perception that Customs procedures were inefficient, and unable to manage the expected increase in the flow of international trade. Specifically, Customs' reliance on paper documentation was viewed as cumbersome. The Modernization Act was intended to create a statutory framework to allow electronic filing of documents.

While the Modernization Act was intended to create a more convenient system for both Customs and importers, the act effectively placed greater responsibility on importers. Specifically, the Modernization Act imposed the duty of “reasonable care” on importers in declaring the proper classification and value of goods imported.³ Further, the Modernization Act granted Customs a greater ability to ensure compliance with this duty.

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1. North American Free Trade Agreement Implementation Act, 19 U.S.C. § 3301, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

2. *Id.* § 631.

3. *Id.* § 637.

The concept of reasonable care, as applied to an importer when making a declaration upon entry of merchandise, is in its infant stages as the United States Court of International Trade has yet to address the issue. Nonetheless, guidance on how to interpret reasonable care can be found from other areas of the law that impose a duty of reasonableness. Indeed, the legislative history of the Modernization Act, as well as subsequent Customs publications, indicate that reasonable care should be interpreted consistently with the duty of reasonableness as applied, generally, in other legal fields.

This article analyzes the duty of reasonable care as created by the Customs Modernization Act. Part I explains the legislative history of the Act by examining the importation process prior to the Modernization Act, and the perceived need for change. Part II discusses the provisions of the Modernization Act. Part III examines how Congress and Customs have interpreted the duty of reasonable care. Part IV analyzes the duty of reasonableness in other areas of the law, and concludes that reasonable care under the Modernization Act appears to be following a consistent path.

The Modernization Act changed the way that importers and Customs operate. It has imposed greater responsibilities on the importing community. Like all changes, it has been met with some resistance. By following Customs' published guidelines and becoming familiar with the general duty of reasonableness, importers can discern what is required under this new system, and take steps to ensure compliance with the duty of reasonable care.

I. LEGISLATIVE HISTORY

Prior to the Modernization Act, the process of importing merchandise could be very cumbersome and paper intensive.⁴ An importer had to submit a form to Customs summarizing information relevant to the determination of the classification, value, and origin of the goods.⁵ In addition, the importer would have to submit various supporting documents.⁶ Customs had the responsibility of determining the proper classification, value, and origin.⁷ Customs would not release the goods without proper documentation.⁸ Further, the entry forms and documentation had to be filed at the port where the goods entered the United

4. See 137 CONG. REC. E2118 (extension of remarks June 7, 1991) (statement of Rep. Crane).

5. See UNITED STATES CUSTOMS SERVICE, IMPORTING INTO THE UNITED STATES 6-7 (1994) [hereinafter IMPORTING].

6. See Arthur W. Bodek & Steven S. Weiser, *Many Responsibilities, Too Little Time for Importers Doing Customs' Work*, J. COMMERCE, Feb. 1, 1999, at 7A.

7. See *id.*

8. See IMPORTING, *supra* note 6, at 6.

States.⁹

This process strained the resources of Customs. To relieve the problem, Customs implemented various automation programs during the 1980s and 1990s that provided for electronic transmission of the required information.¹⁰ However, Customs had no statutory authority to establish these programs. Rather, the statutes continued to require the submission of paper documents.¹¹

A concern arose due to the expectation that international trade would increase dramatically. During the late 1980s and early 1990s, the United States was involved in the negotiation of two major international trade agreements: the Uruguay Round of the General Agreement on Tariffs and Trade, and NAFTA. Senator Orin Hatch observed that trade was growing “at an unprecedented rate, one that will accelerate still faster with the adoption of the North American Free-Trade Agreement.”¹² Government officials strove to ensure Customs had “the adequate capacity to process the expected increase in import and export activity,”¹³ and to “greatly enhance the efficient operation of our import and export system.”¹⁴

On June 7, 1991, Representative Philip Crane introduced a bill to the House of Representatives in the 102nd Congress titled the “Customs Modernization Act of 1991.”¹⁵ This bill aimed, in part, to eliminate much of the paperwork involved in importing goods by providing for electronic processing of customs transactions.¹⁶ The Customs Modernization Act of 1991, along with a bill titled the “Customs Informed Compliance and Automation Act of 1991,”¹⁷ was submitted to the House Ways and Means Committee. No further official action was taken on either bill.

The push to modernize the Customs Service was renewed in November 1991, when Representative Sam Gibbons¹⁸ introduced a bill ti-

9. *See id.*

10. *See* 137 CONG. REC. E2118 (extension of remarks June 7, 1991) (statement of Rep. Crane); Paul L. Green, *New Entry Processing System Remains Controversial Issue Customs Brokers Express Concern*, J. COMMERCE, Mar. 15, 1991, at 4A.

11. *See* 137 CONG. REC. E2118 (extension of remarks June 7, 1991) (statement of Rep. Crane).

12. 138 CONG. REC. S14123 (daily ed. Sept. 18, 1992) (statement of Sen. Hatch).

13. 137 CONG. REC. E2118 (extension of remarks June 7, 1991) (statement of Rep. Crane).

14. 138 CONG. REC. S14123 (daily ed. Sept. 18, 1992) (statement of Sen. Hatch).

15. H.R. 2589, 102d Cong. (1991).

16. *See* 137 CONG. REC. E2118 (extension of remarks June 7, 1991) (statement of Rep. Crane).

17. H.R. 2512, 102d Cong. (1991).

18. *See* Tim Shorrocks, *Compromise Bill to Reform Customs Introduced*, J. COMMERCE, Dec. 2, 1991, at 5A.

tled the "Customs Modernization and Informed Compliance Act."¹⁹ After being submitted to the Ways and Means Committee, the bill was incorporated into another bill, titled the "Trade Expansion Act of 1992,"²⁰ introduced by Representative Dan Rostenkowski.²¹ Like the Customs Modernization Act of 1991, this bill was meant to provide for full electronic processing of all customs transactions.²² Representative Rostenkowski stated that the bill "improves and clarifies Customs enforcement authority with respect to submission of documentation, recordkeeping and examination procedures and penalty and seizure provisions."²³ The House of Representatives voted to approve the Trade Expansion Act of 1992 on July 8, 1992.²⁴ The bill was then introduced to the Senate.²⁵ However, no further official action was taken on the bill.

The Customs Modernization and Informed Compliance Act did not completely die at that point in the 102nd Congress. Rather, it was incorporated into another bill, entitled the "Revenue Act of 1992."²⁶ The Revenue Act of 1992 mainly sought to provide tax incentives for the establishment of enterprise zones.²⁷ This bill passed in both houses of Congress²⁸ but President George Bush vetoed the legislation.²⁹

In 1993, both houses renewed their push to pass legislation to reform Customs. Representative Gibbons³⁰ and Senator Hatch³¹ introduced identical legislation in their respective houses. However, the legislation met with opposition from portions of the customs brokers community. The National Customs Brokers and Forwarders Association of America, which had supported Customs modernization legislation in 1992, announced its opposition to the Customs Modernization Act of 1993.³² Specifically, the organization opposed the enactment of remote filing, fearing that this change would be harmful to the small customs brokerage firms.³³ This organization believed that the cost of

19. H.R. 3935, 102d Cong. (1991).

20. H.R. 5100, 102d Cong. (1992).

21. See 138 CONG. REC. H3071 (daily ed. May 7, 1992) (statements of Rep. Rostenkowski).

22. See *id.*

23. *Id.*

24. See 138 CONG. REC. 6038 (daily ed. July 8, 1992) (statements of Sen. Hatch).

25. See S. 3249, 102d Cong. (1992).

26. H.R. 11, 102d Cong. (1992).

27. See H.R. REP. NO. 102-1034 (1992).

28. See Richard Lawrence, *Setting the 1993 Trade Agenda*, J. COMMERCE, Jan. 7, 1993, at 6A.

29. See *id.*

30. See generally H.R. 700, 103d Cong. (1993).

31. See generally S. 106, 103d Cong. (1993).

32. See Tim Shorrock & Peter Tirschwell, *Brokers Group Now Opposes Customs Reform*, J. COMMERCE, Jan. 20, 1993, at 1A.

33. See *id.*

modernizing would be prohibitive to small brokerage firms, giving the advantage to larger firms.³⁴ These fears were echoed by the San Francisco Customs Brokers and Freight Forwarders Association, who also opposed the legislation.³⁵ Thus, the support for Customs modernization began to erode in 1993.

In 1993, however, the Clinton Administration finished negotiating NAFTA with Canada and Mexico. The President still possessed Fast-Track authority for trade agreements,³⁶ therefore, the President could submit legislation to implement NAFTA to Congress, and Congress could only vote to accept or reject the legislation as submitted.³⁷ Congress could not amend the implementing legislation.³⁸

With this authority, the President included the Customs Modernization Act of 1993 in NAFTA implementation legislation. Congress approved the NAFTA legislation, thereby passing Customs reform.

II. PROVISIONS OF THE CUSTOMS MODERNIZATION ACT

The Customs Modernization Act of 1993 significantly altered the process of merchandise entering the United States.³⁹ In essence, the Modernization Act reduced the amount of documents an importer had to file. In return, however, the importing community assumed greater responsibilities in the process. This exchange of duties between Customs and the importer has been called a "shared responsibility."⁴⁰

The Modernization Act established a program of automation by allowing electronic processing of customs related transactions.⁴¹ This feature of the Modernization Act is known as the National Customs Automation Program,⁴² and allows importers to file their entry of merchandise electronically.⁴³ In addition, importers may make their payments of duties, fees and taxes electronically.⁴⁴

The Modernization Act further eliminated the requirement that all

34. See Peter M. Tirschwell, *Brokers and Forwarders Meet Amid Upheaval*, J. COMMERCE, Mar. 8, 1993, at 5A.

35. See Brian Johns, *SF Brokers Oppose Couriers' Remote Entry Plans*, J. COMMERCE, Apr. 20, 1993, at 2B.

36. See Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2903(b) (1998).

37. See Trade Act of 1974, 19 U.S.C. § 2191(d) (1998).

38. *Id.*

39. Customs Modernization Act of 1993, 19 U.S.C. § 1411(a) (1998).

40. H.R. REP. NO. 103-361, pt. 1 (1993); U.S. See also CONGRESS, HOUSE WAYS AND MEANS COMMITTEE, OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 52 (1997) [hereinafter U.S. TRADE STATUTES].

41. See 19 U.S.C. § 1411(a); U.S. TRADE STATUTES, *supra* note 39, at 54.

42. See 19 U.S.C. § 1411.

43. See *id.* § 1411 (a)(1)(A).

44. See *id.* § 1411 (a)(1)(E).

entry documentation be filed in the port of entry. Rather, an importer may utilize "remote location filing."⁴⁵ Under this program, a participating importer "may file electronically an entry of merchandise with the Customs Service from a location other than the [port] designated in the entry of examination."⁴⁶ This program provides importers with greater convenience.

While the Modernization Act made it easier for an importer to file entry documentation, Customs required some assurance of the reliability of the information provided. To this end, the Modernization Act imposed the duty of "reasonable care" on importers in providing certain information to Customs.⁴⁷ Upon entry, an importer must use reasonable care in supplying an accurate classification, declared valuation and rate of duty of the merchandise.⁴⁸

By imposing this duty, Congress intended to allow Customs to rely more on the accuracy of information provided by the importers.⁴⁹ To this end, the importer must furnish "information sufficient to permit Customs to fix the final classification and appraisal of the merchandise."⁵⁰ If an importer fails to engage in reasonable care in providing this information, Customs is authorized to impose penalties.⁵¹

The Modernization Act also established procedures allowing Customs to verify the precision of the information the importers provide. The person making a declaration of entry "shall make, keep and render for examination and inspection records" concerning the import transaction.⁵² The importer is required to maintain these records for five years.⁵³

In addition, the Modernization Act strengthened the ability of Customs to verify the importer's compliance. Prior to the passage of the Modernization Act, the Secretary of the Treasury could engage in investigation and inquiry in order to ascertain the correctness of the entry, and determine the importer's liability for duties, fees, and taxes.⁵⁴ The Modernization Act amended the law to allow the Secretary to "examine or cause to be examined, upon reasonable notice, any record . . . which may be relevant to such investigation or inquiry."⁵⁵ Any importer who

45. *See id.* § 1414 (a)(1).

46. *Id.* Since the passage of the Customs Modernization Act, districts and regions have been eliminated from Customs' organization. Restructuring resulted in a greater emphasis on ports. 29 Cust. B. & Dec. 25 (1995).

47. 19 U.S.C. § 1484(a)(1).

48. *See id.* § 1484(a)(1)(B).

49. *See* U.S. TRADE STATUTES, *supra* note 41, at 52.

50. H.R. REP. 103-361, pt. I, at 136 (1993).

51. 19 U.S.C. § 1592.

52. *Id.* § 1508 (a)(3).

53. *Id.* § 1508 (c); 19 C.F.R. § 143.37 (1998).

54. *See id.* § 1509 (a).

55. *Id.* § 1509 (a)(1).

fails to comply with this request is subject to penalties.⁵⁶ In addition, Customs has the power to conduct an audit of the importer.⁵⁷

The Customs Modernization Act of 1993 established a new relationship between Customs and the importer. The Modernization Act made it more convenient for the importer to file entry documents. However, in return, the importing community assumed greater responsibility. Further, the Modernization Act provided Customs with more tools to ensure that the importers observe their responsibilities.

III. REASONABLE CARE IN CUSTOMS TRANSACTIONS

Customs admits "that a 'black and white' definition of reasonable care is impossible, inasmuch as the concept of acting with reasonable care depends on individual circumstances."⁵⁸ To assist importers, Customs published a "Reasonable Care Checklist" in 1997.⁵⁹ The checklist is actually a series of questions organized into such subjects as Classification, Valuation, Origin, Intellectual Property, and Textiles and Apparel.⁶⁰ These questions reveal several themes that run throughout Customs laws, including: providing for adequate internal procedures to ensure accurate information is provided to Customs, the use of experts, and obtaining advance rulings.⁶¹ Additionally, the legislative history of the Customs Modernization Act, Customs' publications, and Customs' rulings serve as a guide in defining the standard of reasonable care.

A. *Informed Compliance*

As an initial matter, reasonable care involves adequate knowledge and familiarity with Customs laws and regulations. Customs refers to this concept as "informed compliance."⁶² Customs emphasized what this concept involves by stating:

At the heart of informed compliance is a strategy called reasonable care, in which the trade community demonstrates its exercise of due diligence by following the suggestions and protocols promulgated by the Customs Service in its publications, which include not only the various informed compliance publications available in Customs Web site (www.customs.ustreas.gov), but also include Customs rulings, Cus-

56. *Id.* § 1509 (a)(1)(B).

57. *Id.* § 1509 (b) (1998).

58. Reasonable Care Checklist, 31 Cust. B. & Dec., available at 1997 CUSBUL LEXIS 93, at *2 (1997) [hereinafter Reasonable Care Checklist].

59. *Id.*

60. *Id.*

61. *Id.*

62. See U.S. Customs Service, *What Every Member of the Trade Community Should Know About U.S. Customs Service's Informed Compliance Publications*, (visited Feb. 22, 1999) <<http://www.customs.ustreas.gov/imp-exp1/comply/icpframe.htm>>.

toms Regulations, Court decisions and the law.⁶³

Customs indicates that an importer should "establish reliable procedures to ensure [the importer] provide[s] a correct tariff classification."⁶⁴

When "using in-house employees such as counsel, a Customs administrator, or a corporate controller," the House Report states such personnel should "have experience and knowledge of customs laws, regulations and procedures."⁶⁵ The Reasonable Care Checklist further asks whether an importer has "access to Customs Regulations (Title 19 of the Code of Federal Regulations), the Harmonized Tariff Schedule of the United States,⁶⁶ and the GPO publication, Customs Bulletin and Decisions."⁶⁷

The first requirement of "reasonable care," then, is sufficient knowledge of the law. Importers should ensure that the proper legal materials are available, and are regularly reviewed in order to apply the law properly to the imported goods.

B. Information About the Goods

As an essential part of reasonable care, an importer should provide Customs with enough information concerning the goods to be imported. An importer should furnish "information sufficient to permit Customs to fix the final classification and appraisal of merchandise," and provide "sufficient pricing and financial information to permit proper valuation of merchandise."⁶⁸ Customs has stated that the importer should provide "a complete and accurate description of [the] merchandise,"⁶⁹ and its "proper declared value."⁷⁰

C. Proper Application of the Law

Knowledge of Customs laws and regulations may not be sufficient to satisfy the duty of reasonable care. Rather, reasonable care may require the proper application of the law. Under the Modernization Act, the importer is responsible for the assessment of the proper classification and value of the merchandise. An importer should be prepared to

63. Priv. Ltr. Rul. HQ 962007 (Nov. 23, 1998), available at 1998 U.S. CUSTOM HQ LEXIS 604 at *4.

64. *Id.* at *12.

65. H.R. REP. NO. 103-361, pt. I, at 120 (1993).

66. The Harmonized Tariff Schedule of the United States was adopted by Congress through the Omnibus Trade and Competitiveness Act of 1998. 19 U.S.C. § 3001 (1998).

67. Reasonable Care Checklist, *supra* note 59, at *6.

68. H.R. REP. NO. 103-361, pt. I, at 136 (1993).

69. Reasonable Care Checklist, *supra* note 59, at *6.

70. *Id.* at *7.

apply complicated rules regarding classification and valuation.

1. Classification

The first step toward determining the tariff on merchandise imported into the United States is to identify the proper classification of the merchandise. Classification is the process of applying the proper heading and subheading of the Harmonized Tariff Schedule of the United States ("HTSUS").⁷¹ Once the proper heading or subheading is found, the duty on the merchandise is based on the rate of duty listed under that heading or subheading.⁷²

One Customs ruling demonstrates the requirement that the importer provide proper classification of each individual item imported. British Airways requested an advance ruling concerning a proposed practice of storing spare parts and other supplies in a bonded warehouse.⁷³ The airline wanted permission to store the parts in the warehouse without declaring a Customs classification, or by classifying all items stored in the warehouse under 8803.90.9050 of the HTSUS.⁷⁴ Upon withdrawal of the parts for consumption, the part would be assigned the proper tariff classification.⁷⁵

Customs denied permission. Specifically, Customs noted the duty of the importer to "show the value, classification, and rate of duty as approved by the port director at the time the entry summary is filed. . . ."⁷⁶ Customs asserted that it had no authority to approve of a request to use subheading 8803.90.9050, unless the goods actually fit under that subheading.⁷⁷ Customs further stated its belief that such a procedure would run afoul of the duty of reasonable care.⁷⁸

The British Airways ruling demonstrates that an importer cannot be indifferent to the correct classification of goods. Thus, goods cannot be imported under a tariff classification merely for the convenience of the importer if the subheading does not describe those goods. The ruling reflects the proposition that reasonable care requires an importer to

71. See U.S. TRADE STATUTES, *supra* note 41, at 5 (discussing the application of the Harmonized Tariff Schedule).

72. See *id.*

73. Priv. Ltr. Rul. HQ 226319 (July 23, 1996), available in 1996 U.S. CUSTOM HQ LEXIS 1170, at *2. Goods may be stored in a bonded warehouse duty free for up to five years. See 19 U.S.C. § 1557 (a) (1998). While goods are stored in a bonded warehouse, they may also be free from state taxes as well. See *Xerox Corp. v. Harris County*, 459 U.S. 145, 153-54 (1982).

74. Priv. Ltr. Rul. HQ 226319 (July 23, 1996), available in 1996 U.S. CUSTOM HQ LEXIS 1170, at *4.

75. *Id.*

76. *Id.* at *19 (quoting 19 C.F.R. 144.12 (1998)).

77. *Id.* at *19-20.

78. *Id.*

make an effort to provide the proper classification of all goods individually, not in the aggregate, even when they are to be stored in a bonded warehouse.

2. Valuation

Once merchandise has been classified, the tariff must be determined. There are three types of tariffs: specific, ad valorem, or compound.⁷⁹ A specific tariff is based on a stated value for merchandise while an ad valorem tariff is based on a percentage value of the merchandise.⁸⁰ Compound tariffs combine specific and ad valorem rates. Thus, in order to determine an ad valorem tariff, it is essential to determine the proper value of the merchandise. Additionally, all goods imported into the United States must be valued for the purpose of keeping trade statistics.⁸¹

Generally, the Customs value is based on the transaction value, where feasible.⁸² This is the price actually paid or payable for the merchandise, plus statutory additions.⁸³ The complexity involved in valuation stems, first, from determining whether the transaction value can be applied, and second, for determining whether an additional amount should be added to the price actually paid or payable to determine the transaction value.

a. Related Parties Transactions and Valuation

Where the parties to a transaction are related, the parties may not apply the transaction value, unless certain conditions are present.⁸⁴ First, the parties must be able to show "that the relationship between such buyer and seller did not influence the price actually paid or payable."⁸⁵ However, even where the relationship between the parties did influence the price, the transaction value may still be acceptable under

79. The House Ways and Means Committee defined these terms:

An ad valorem rate of duty is expressed in terms of a percentage to be assessed upon the customs value of the goods in question. A specific rate is expressed in terms of a stated amount payable on some quantity of the imported goods, such as 17 cents per kilogram. Compound duty rates combine both ad valorem and specific components (such as 5 percent ad valorem plus 17 cents per kilogram).

U.S. TRADE STATUTES, *supra* note 41, at 5.

80. *Id.*

81. 19 U.S.C. § 1484 (a)(1)(B)(ii) (1998).

82. *See id.* § 1401a (a). Where the transaction value is either inappropriate or cannot be calculated, the statute provides for other methods that should be used, and the order of preference of those methods.

83. *See id.* § 1401a (b)(1).

84. *See id.* § 1401a (b)(2)(A)(iv).

85. *Id.* § 1401a (b)(2)(B).

two circumstances. The transaction value will be acceptable when it "closely approximates . . . the transaction value of identical merchandise or similar merchandise, in sales to unrelated buyers in the United States."⁸⁶ Secondly, the transaction value will be acceptable when it "closely approximates . . . the deductive value or computed value for identical merchandise or similar merchandise."⁸⁷

Consequently, related parties must be cautious in a transaction with each other involving the importation of goods. The related parties should carefully consider the price paid or payable for the merchandise. By pricing the merchandise in the same range as identical or similar goods imported into the United States, related parties can help to ensure that the transaction value will be acceptable as the Customs value. However, the parties should take measures to provide documentation supporting their price.

b. Assists and Valuation

Even when parties to an import transaction are not related, however, complexity may exist in determining the proper transaction value. The price actually paid or payable may require some adjustments under the statute. One such adjustment is called an assist.⁸⁸ To arrive at the transaction value, an importer must add the assist amount to the price actually paid or payable.⁸⁹

Assists are defined as certain items which the buyer supplies to the seller, free of cost or at a reduced charge, used in connection with the item imported.⁹⁰ These items include components and parts to the merchandise,⁹¹ items used in the production of the merchandise such as tools,⁹² items consumed in the production of the merchandise,⁹³ and certain services performed outside of the United States such as engineering, development and artwork.⁹⁴ The value of an assist should be added to the price actually paid or payable, regardless of whether it was provided to the buyer directly or indirectly.⁹⁵

The importer should be aware of the fact that the transaction value includes certain additions to the price actually paid or payable. By un-

86. *Id.* § 1401a (b)(1)(B)(i).

87. *Id.* § 1401a (b)(1)(B)(ii).

88. *See id.* § 1401a (b)(1)(C).

89. *See id.*

90. *See id.* § 1401a (h)(1)(A).

91. *See id.* § 1401a (h)(1)(A)(i).

92. *See id.* § 1401a (h)(1)(A)(ii).

93. *See id.* § 1401a (h)(1)(A)(iii).

94. *See id.* § 1401a (h)(1)(A)(iv).

95. *See id.* § 1401a (h). *See also* Generra Sportswear v. United States, 905 F.2d 377 (Fed. Cir. 1990) (holding that an assist exists where buyer agrees to pay for export license through a buying agent).

derstanding the application of the law, the importer can ensure to provide Customs with the proper valuation. An importer who fails to include the value of such items as an assist will have understated the value of the merchandise. Therefore, reasonable care in the entry of merchandise would seem to require an understanding of the concept of an assist.

D. Use of Experts

Customs recognizes that the law concerning classification and valuation can be complex. Accordingly, Customs encourages the use of experts when providing the required information upon entry.⁹⁶ This is consistent with the legislative history of the Customs Modernization Act. The House Ways and Means Committee, for example, expressed its expectation "that an importer [would] consult with an attorney or an in-house employee having technical expertise about the particular merchandise in question."⁹⁷ Similarly, in its Reasonable Care Checklist, Customs asks whether the importer has "retained an expert to assist [it] in complying with Customs requirements."⁹⁸ It is clear that both Congress and Customs have expressed their view that reasonable care involves the use of an expert under the appropriate circumstances.

The employment of an expert alone, however, will not satisfy the importer's duty of reasonable care. Rather, it is evident from the House Report that when an importer utilizes the services of an expert, that importer must provide the expert with adequate information to allow the expert to analyze the transaction.⁹⁹ Customs echoes this concern, encouraging importers to ensure that they have "discussed . . . importations in advance" with their experts, and provided "full complete and accurate information about the import transactions."¹⁰⁰ Thus, an importer cannot rely on an expert's advice if that importer has not disclosed all of the relevant information concerning the good to be imported to the expert. The failure to provide this information to the expert, therefore, would constitute a breach of the duty of reasonable care.

In addition, an importer must take care in choosing its expert. Customs noted the concern "that unlicensed and unregulated individuals are regularly advising importers in the Customs matters—i.e., hold-

96. See generally Reasonable Care Checklist, *supra* note 59, at *3 (discussing the use of experts in complying with Customs requirements).

97. H.R. REP. NO. 103-361, pt 1, at 120 (1993).

98. Reasonable Care Checklist, *supra* note 59, at *10.

99. "In using a qualified expert, the importer is also responsible for providing such expert with full and complete information sufficient for the expert to make entry or to provide advice as to how to make an entry." H.R. REP. NO. 103-361, pt. 1, at 120.

100. Reasonable Care Checklist, *supra* note 59, at *11.

ing themselves out as 'Customs experts' or Customs consultants, in violation of section 641 of the Tariff Act of 1930."¹⁰¹ To these concerns, Customs replies:

A party's selection of an expert, and the expert's qualifications are part and parcel of the review of all of the facts and circumstances in the agency's determination whether the party has exercised reasonable care. In Customs' view, the importer who retains the service of an "expert" bears some responsibility in ensuring that the party is qualified to render advice on the Customs matter at issue. In Customs' view, it is not unreasonable to expect that a party selecting an expert will inquire about the Customs experience and credentials of an expert.¹⁰²

Consequently, the importer's reliance on the advice of an expert, and that the expert was mistaken on an issue of Customs law will not serve as a defense to the importer. Rather, it is clear from Customs' publications that Customs expects an importer to use reasonable care in considering the qualifications of the expert before hiring the expert's services.

E. Advance Rulings

In addition to the use of experts, both Congress¹⁰³ and Customs¹⁰⁴ encourage importers to avail themselves of the advance ruling procedures in order to ensure proper classification and valuation upon entry. To this end, an interested party¹⁰⁵ may request a ruling from Customs concerning prospective transactions.¹⁰⁶ "Each request for a ruling must contain a complete statement of all relevant facts relating to the transaction."¹⁰⁷ "The Customs transaction to which the ruling request relates must be described in sufficient detail to permit the proper application of relevant Customs and related laws."¹⁰⁸ Such information includes a description of the merchandise,¹⁰⁹ its "chief use,"¹¹⁰ "commercial, common, or technical description,"¹¹¹ and its purchase price.¹¹² In order to deter-

101. *Id.* at *3.

102. *Id.*

103. See H.R. REP. NO. 103-361, pt. 1, at 120.

104. See Reasonable Care Checklist, *supra* note 59, at *12 & *14.

105. "[A] ruling may be requested under this part by any person who, as an importer or exporter of merchandise, or otherwise has a direct and demonstrable interest in the question or questions presented in the ruling request, or by the authorized agent of such person." General Ruling Procedure 19 C.F.R. § 177.1 (c) (1998).

106. 19 C.F.R. § 177.1 (a)(1).

107. *Id.* § 177.2 (b)(1).

108. *Id.* § 177.2 (b)(2)(i).

109. See *id.* § 177.2 (b)(2)(ii)(A).

110. *Id.*

111. *Id.*

112. *Id.*

mine the proper value of the merchandise, the information should include "the nature of the transaction . . . the relationship (if any) of the parties, whether the transaction was at arm's length," and if "the same or similar merchandise" has been sold in the exporting country.¹¹³ Additionally, the party requesting the ruling should provide samples¹¹⁴ and related documentation.¹¹⁵

By requesting an advance ruling, the importer can ensure that it provides proper classification and valuation prior to entry of the goods. The regulations provide that the rulings are binding between Customs and the importer:

A ruling letter issued by the Customs Service under the provisions of this part represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel in accordance with the provisions of this section until modified or revoked.¹¹⁶

In addition to the ruling being binding on the specific transaction for which the ruling was requested, the ruling "may be cited as authority in the disposition of transactions involving the same circumstances."¹¹⁷ Indeed, the ruling "may be applied to all entries which are unliquidated, or other transactions with respect to which the Customs Service has not taken final action on that date."¹¹⁸

Federal regulations provide a procedure through which Customs may evaluate an import transaction, and supply its interpretation of the proper classification and valuation of the merchandise. Because Customs is bound by this interpretation, reasonable care would appear to involve the utilization of the advance ruling procedure when the importer possesses any doubt concerning the proper classification and valuation of the merchandise to be imported.

IV. REASONABLENESS IN OTHER LEGAL FIELDS

Reasonableness is a concept utilized in many different areas of the law. It is a concept used to create an objective standard by which to assess a person's conduct. Prior to the enactment of the Modernization Act, Customs utilized the common law concept of reasonableness in de-

113. *Id.* § 177.2 (b)(2)(iii).

114. *See id.* § 177.2 (b)(3).

115. *See id.* § 177.2 (b)(4).

116. *Id.* § 177.9 (a). The rulings, however, are only binding between the person requesting the ruling, and Customs. "Accordingly, no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter." *Id.* § 177.9 (c).

117. *Id.* § 177.9 (a).

118. *Id.*

fining when to assess penalties for submitting false documents upon entry.¹¹⁹

Guidance for what is reasonable can be found in such legal areas as torts, corporations, trusts and estates, and income tax. An examination of these topics reveals that reasonableness entails an adequate level of knowledge, proper application of legal principles, remaining up to date on information, and the use of experts when necessary.

A. Adequate Knowledge

Generally speaking, reasonableness requires a minimum level of knowledge. In the field of torts, reasonableness is used to create an objective standard to determine whether negligence has occurred. For example, in the case of *Vaughan v. Menlove*,¹²⁰ a bail of hay that was piled too close to the boundary of the defendant's property, caught fire and burned a barn located on the plaintiff's land. The defendant claimed that he was unsophisticated and should be held liable solely if he failed to exercise his best judgment.¹²¹ The defendant's subjective lack of requisite knowledge was not accepted as a defense.¹²² Chief Judge Tindal stated that such a standard "would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various."¹²³ Only the objective standard of reasonableness has been accepted by the courts as the proper measure of reasonableness.

1. Minimum Level of Professional Knowledge

Reasonableness requires professionals dealing with complex matters to possess a minimum level of knowledge.¹²⁴ "[A] professional must use reasonable care to obtain the information needed to exercise his or her professional judgment."¹²⁵ Attorneys, for example, who face allega-

119. In 1984, Customs defined negligence stating, "A violation is determined to be negligent if it results from an act or acts (of commission or omission) done through . . . failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances." Penalties and Penalties Procedure 49 Fed. Reg. 1672, 1681 (1984) (to be codified at 19 C.F.R. pt. 171). Customs stated that this definition was meant to impose "a reasonable standard of care," and "not . . . make the importer a guarantor of the interpretation or understanding of the information presented." *Id.* at 1673. This definition was based on RESTATEMENT (SECOND) OF TORTS § 552 cmt. b (1977), which defines negligence in supplying false information to others in business transactions. *Id.*

120. 3 Bingham's New Cases 468, 469-70, 132 Eng. Rep. 490, 491 (C.P. 1837).

121. *Id.* at 472, 132 Eng. Rep. at 492.

122. *Id.* at 474, 132 Eng. Rep. at 493.

123. *Id.* at 475, 132 Eng. Rep. at 493.

124. See, e.g., *Ouellette v. Subak*, 391 N.W.2d 810, 816 (Minn. 1986) (holding that the physician must have adequate knowledge in a medical malpractice case).

125. *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 113 (Minn. 1992) (applying the standard to attorney malpractice case).

tions of malpractice¹²⁶ or disciplinary proceedings¹²⁷ must show that they possess adequate knowledge of the law. In order to provide quality services, a professional must know about the subject with which he or she is dealing. When a professional does not have the minimum level of knowledge needed to perform those services, then it is unreasonable behavior to perform those services.

In corporate law, a member of the Board of Directors has a duty to be reasonably informed about certain matters involving the corporation.¹²⁸ In the case of *Francis v. United Jersey Bank*,¹²⁹ a director who was also the largest single shareholder of the corporation inherited her shares from her husband.¹³⁰ She was not active in the affairs of the corporation¹³¹ and left most of the corporation's management to her two sons, who were also directors.¹³² However, her sons engaged in "fraudulent conveyances."¹³³ The issue in the case was whether a director could be held personally liable for failing to prevent the misappropriation of funds by other directors.¹³⁴ The court held that a director of a corporation had a duty to become reasonably informed:

126. *See, e.g.*, *Hickox v. Holleman*, 502 So.2d 626, 635-36 (Miss. 1987) (holding attorney may have committed malpractice where attorney failed to check appropriate statute of limitations before filing case for clients).

127. *See, e.g.*, *Lewis v. State Bar of California*, 621 P.2d 258, 258 (Cal. 1981) (disciplining inexperienced probate attorney for failing to apply complex procedure properly); *Attorney Grievance Comm'n v. Brown*, 517 A.2d 1111, 1118-19 (Md. 1986) (disciplining attorney in estate planning matter for failing to know the law adequately); *State ex rel. Nebraska State Bar v. Holscher*, 230 N.W.2d 75, 75 (Neb. 1975) (holding attorney is required to ascertain the law to represent client adequately).

128. *See, e.g.*, *Joy v. North*, 692 F.2d 880, 896 (2d Cir. 1982) (holding lack of knowledge is not a defense when directors allow a fellow director to make major decision concerning the corporation without oversight); *Hoye v. Meek*, 795 F.2d 893, 897 (10th Cir. 1986) (holding bank chairman breached duty by failing to be informed about bank's investments); *Smith v. Van Gorkam*, 488 A.2d 858, 874 (Del. 1985) (holding board of directors liable for failing to reach an informed decision when voting to approve merger); *Brane v. Roth*, 590 N.E.2d 587, 591-92 (Ind. Ct. App. 1992) (holding directors breached their duty by failing to become informed on the essentials of hedging, and the corporation's financial condition).

129. *Francis v. United Jersey Bank*, 432 A.2d 814 (N.J. 1981).

130. *Id.* at 818.

131. The court described her participation, stating:

Mrs. Pritchard was not active in the business of Pritchard & Baird and knew nothing of its corporate affairs. She briefly visited the corporate offices in Morristown on only one occasion, and she never read or obtained the annual financial statements. She was unfamiliar with the rudiments of reinsurance and made no effort to assure that the policies and practices of the corporation, particularly pertaining to the withdrawal of funds, complied with custom or relevant law.

Id. at 819.

132. *Id.* at 818.

133. *Id.* at 816.

134. *Id.*

As a general rule, a director should acquire at least a rudimentary understanding of the business of the corporation. Accordingly, a director should become familiar with the fundamentals of the business in which the corporation is engaged. Because directors are bound to exercise ordinary care, they cannot set up as a defense lack of knowledge needed to exercise the requisite degree of care. If one feels that he has not had sufficient business experience to qualify him to perform the duties of a director, he should either acquire the knowledge by inquiry, or refuse to act.¹³⁵

Consequently, the court found that the director had breached her duty of care.¹³⁶ In order for a corporate director to make a decision, the director requires facts. The exercise of reasonable care would necessitate enough factual information upon which to make a decision. Without such a factual foundation, corporate directors may be held personally liable for their decisions.

The very foundation of reasonableness is the acquisition of knowledge. A person must become familiar with the subject matter in that person's care. A person who fails to become informed will not be judged by his or her subjective level of knowledge, but by the minimum level of knowledge that the person should have obtained.

Therefore, a person involved in international trade, should be familiar with the importing and exporting business. That person must understand the factors that affect international trade. Such factors include Customs laws and regulations as they pertain to imports. A person engaged in an international transaction should also know the basic facts pertaining to that transaction. Whether an importer complied with the duty of reasonable care should be assessed objectively by determining the minimum level of knowledge of an international trade professional.

2. Knowledge of the Law

Under some circumstances, the duty of reasonable care will require a person to be familiar with the law applicable to that particular behavior. For example, such a requirement can be ascertained from publications of the Internal Revenue Service (IRS). Under the Internal Revenue Code, the IRS is authorized to impose penalties of up to twenty percent when a taxpayer understates his or her income due to negligence or disregard for rules or regulations.¹³⁷ The IRS defines negligence as "any failure to make a reasonable attempt to comply with the provisions of the internal revenue laws or to exercise ordinary and rea-

135. *Id.* at 821-22 (internal quotations and citations omitted).

136. *Id.* at 826.

137. I.R.C. § 6662 (b)(1) (1998).

sonable care in the preparation of a tax return."¹³⁸ An example of the failure to exercise reasonable care is when "[a] taxpayer fails to make a reasonable attempt to ascertain the correctness of a deduction, credit or exclusion on a return which would seem to a reasonable and prudent person to be 'too good to be true' under the circumstances."¹³⁹ Other examples given by the IRS include instances where the taxpayer fails to comply with specific sections of the Internal Revenue Code.¹⁴⁰

In order to ascertain the correctness of a deduction, credit or exclusion, a taxpayer must know the relevant portions of Internal Revenue Code. Thus, the IRS defines reasonable care to include an adequate level of knowledge of income tax laws. Failure to file a return based on such knowledge may result in the assessment of penalties.

For Customs law, the foundation of reasonableness is knowledge of Customs law and regulations. An importer cannot begin to complete Customs documents, such as entry forms, without understanding the rules regarding classification and valuation. Therefore, an importer should be held to an objective standard of a person who has knowledge of the relevant Customs laws and regulations.

3. Proper Application of the Law

However, knowledge of the law alone will not satisfy the duty of reasonable care where a person misapplies the law. For example, in *Hardy v. Commissioner of Internal Revenue*,¹⁴¹ the Tax Court affirmed the imposition of penalties pursuant to Section 6651(a) of the Internal Revenue Code where a taxpayer failed to exercise reasonable care in ascertaining that no tax return was necessary. The taxpayer filed no tax returns between 1977 and 1982, and claimed he was exempt as a religious organization, but failed to produce any documentation to support that claim.¹⁴² Indeed, it was shown that during these years, the taxpayer earned income from selling real estate and working with a consulting firm.¹⁴³ In arguing against penalties, the taxpayer claimed that he briefly spoke to an accountant who told him that churches were tax

138. 26 C.F.R. § 1.6662-3 (b)(1) (1998).

139. *Id.* § 1.6662-3 (b)(1)(ii).

140. These are: (1) a failure to comply with I.R.C. § 6222 (a), (b) (1998), "which requires that a partner treat a partnership items on its return in a manner that is consistent with the treatment of such item on the partnership return (or notify the Secretary of the inconsistency)," 26 C.F.R. § 16662-3 (b)(1)(iii) (1998), and (2) failure to comply with 26 C.F.R. § 1662-3 (b)(iv) (1998), "which requires that an S corporation shareholder treat subchapter S items on its return in a manner consistent with the treatment of such items on the corporation's return (or notify the Secretary of the inconsistency)."

141. *Hardy v. Commissioner*, 60 T.C.M. (CCH) 1110 (1990), citing *Shomaker v. Commissioner*, 38 T.C. 192, 202 (1962).

142. *Hardy*, 60 T.C.M. at 1112-13.

143. *Id.* at 1111-12.

exempt.¹⁴⁴ The taxpayer made further references to IRS publications claiming they had led him to believe that he qualified for tax exempt status as an individual.¹⁴⁵

The Tax Court found that while the taxpayer received advice showing that religious organizations were tax exempt, he received no advice that he, individually, could claim tax exempt status.¹⁴⁶ Specifically, the Tax Court found that the IRS publications could not be reasonably interpreted as allowing an individual, whose primary activities were selling real estate and working for a consulting firm, to claim tax exempt status.¹⁴⁷

Hardy shows that while a taxpayer may be aware of the law, the taxpayer may fail to exercise reasonable care in applying the law. The taxpayer's belief was based on a misreading of the IRS publications discussing the tax law, and a misunderstanding of a conversation with an accountant. Therefore, simple knowledge of the law was not sufficient to qualify as reasonable care.¹⁴⁸

With respect to Customs law, it would appear to be insufficient for an importer to read various publications, such as the Customs Bulletin or the Federal Register, if the importer is ignorant on how those publications actually impact his or her business. An abstract knowledge of rules and regulations would not be enough where the importer does not understand the practical application of those rules to his or her business.

4. Adequacy of Information

Knowledge of the law, and knowledge of the proper application of the law constitute only part of the exercise of reasonable care. In order to apply the law properly, there must be a proper factual basis. Thus, reasonable care would require enough factual information to ascertain if the law has been applied properly.

An examination of the publications of the Internal Revenue Service shows that the IRS interprets reasonable care to include having enough factual information.¹⁴⁹ With respect to filing income tax returns, the IRS considers it negligent to "fail to keep proper books and records or to substantiate items properly."¹⁵⁰ Thus, in order to avoid penalties, taxpayers must have enough information to support claims made in their

144. *Id.* at 1115.

145. *Id.*

146. *Id.*

147. *Id.*

148. *See generally id.*

149. Accuracy-Related Penalty, 56 Fed. Reg. 8,943, 8,944 (1991) (to be codified at 26 C.F.R. pt.1).

150. *Id.*

income tax returns. Taxpayers must maintain records that contain enough information to show that they are entitled to the deduction, credit or exclusion claimed.

An adequate system of record-keeping appears to be a requirement for the exercise of reasonable care as defined by the IRS in implementing other aspects of the Internal Revenue Code as well. For example, when a person (the payor) pays interest or dividends to another person (the payee), under certain circumstances, the payor will be required to withhold thirty-one percent of the payment as tax.¹⁵¹ One such circumstance is where the Secretary of the Treasury informs the payor that the payee has furnished the wrong taxpayer identification number.¹⁵² In that circumstance, the IRS requires the payor to use reasonable care in identifying all accounts that the payee has with the payor, in order to ensure compliance with the withholding requirement.¹⁵³ In order to satisfy the duty of reasonable care, the payor must have a computer or other record-keeping system that it can search in order to identify the payee's accounts using the information provided by the IRS.¹⁵⁴

The IRS, consistently defines reasonable care as requiring a system of record keeping. Those who are under the duty of reasonable care must have enough information to comply with IRS regulations. An adequate level of factual information is assured when sufficient records are kept.

The view of the IRS is consistent with the new requirements of the Modernization Act. Under the Modernization Act, importers are required to maintain records pertaining to imports for five years.¹⁵⁵ These records are open for inspection by Customs officials.¹⁵⁶ The records would assist importers in proving claims made on entry documents, such as the value of the merchandise imported. Therefore, much like reasonable care would entail maintaining records to substantiate claims on income tax returns, Customs law would require reasonable care in the keeping of records in accordance with the requirements of the Modernization Act.

5. Changes in Information

One problem that arises in determining whether a person has exercised reasonable care is the situation where the information upon which the person relied has changed. Such was the case in *Sicari v. Commis-*

151. I.R.C. § 3406(a)(1) (1998).

152. *Id.* § 3406(a)(1)(B).

153. 26 C.F.R. § 31.3406(d)-5 (c)(3)(i) (1998).

154. *See id.* § 31.3406(d)-5 (c)(3)(ii)(B).

155. 19 U.S.C. § 1508 (c) (1998); 19 C.F.R. § 143.37 (a) (1998).

156. *See id.* § 1508 (a)(3) (1998).

sioner of Internal Revenue.¹⁵⁷ When the Commissioner of Internal Revenue has determined that a deficiency in income tax exists, a taxpayer must file a petition for redetermination within ninety days of the mailing of the notice of deficiency.¹⁵⁸ When the IRS has failed to exercise reasonable care in determining the last known address of the taxpayer, however, the ninety day period does not begin to run.¹⁵⁹

In 1991, the taxpayers in *Sicari* had been assigned a new address designation by the United States Post Office.¹⁶⁰ The taxpayers used this address in their correspondence with the IRS when filing for extensions in 1991 and 1992, and in connection with a bankruptcy proceeding in 1992.¹⁶¹ Indeed, the Special Procedures Unit of the IRS had notice of the new address, and used it when corresponding with the taxpayers in June 1992.¹⁶² However, an agent from the Quality Measurement Staff of the IRS was responsible for sending the notice of deficiency to the taxpayers, and sent the notice to the old address designation in October 1992.¹⁶³

The court held that it was unreasonable for the Commissioner to rely on the old address.¹⁶⁴ Specifically, the court stated, “[n]ormally, reasonable diligence will require the Service to consult its own files, at least those maintained in computer databases in the same district initiating the disputed notices.”¹⁶⁵

The *Sicari* case raises some concern for those importers who maintain separate units, or different offices, within its business organization. Reasonable care would seem to require that these units create some mechanism to share and update information. Where one unit of a business organization fails to provide new information to other units within the same organization, Customs may find a violation of the duty of reasonable care, and choose to impose penalties if the outdated information is used upon entry of goods.

157. See *Sicari v. Commissioner*, 136 P.3d 925 (2d Cir. 1998).

158. 26 U.S.C. § 6213 (a) (1994).

159. *Tadros v. Commissioner*, 763 F.2d 89, 91-92 (2d Cir. 1985).

160. *Sicari*, 136 F.3d at 926. The old address was “Route 208.” The new address became “Route 208, Box 1370.” The designation was changed to assist in implementing a new 911 emergency system. *Id.*

161. *Id.* at 927.

162. *Id.*

163. *Id.*

164. *Id.* at 929.

165. *Id.* (citing *United States v. Bell*, 183 B.R. 650, 653 (S.D. Fla. 1995)); Russel J. Kuttell, Note, *The Current Trend in Interpreting the Internal Revenue Service’s Standard of Reasonable Diligence in Mailing Notices of Deficiency to a Taxpayer’s “Last Known Address” and the Due Process Implications: Ward v. Commissioner*, 44 TAX LAW. 625, 630 (1991).

B. Use of Experts

Complicated matters, at times, require the employment of those who possess specialized knowledge or expertise. Thus, reasonableness in those situations may entail the use of an expert.

In California, an attorney who admittedly "had no knowledge of tax matters"¹⁶⁶ drafted a trust instrument for his clients without consulting a tax law specialist. The IRS assessed a penalty on the clients for a tax deficiency.¹⁶⁷ The clients sued the attorney for malpractice. Because the attorney recognized his own deficiency, the court held that he could be held liable for failing to consult with a tax specialist in this matter.¹⁶⁸

Other states have imposed discipline on attorneys for failing to consult with another attorney with more expertise when involved in a complicated matter.¹⁶⁹ Thus, reasonableness requires one to recognize his or her own inability to address complex matters. Under those circumstances, the engagement of a professional with greater expertise would seem necessary.

Merely committing a complicated matter to the care of an expert, however, will not always satisfy the duty of reasonableness. In the case of *In re Goldstick*,¹⁷⁰ trust property was managed by two trustees. One trustee had no knowledge of real estate investment, while the second possessed expertise in this area. The first trustee delegated power to the more knowledgeable trustee over real estate matters. The second trustee, however, engaged in self-dealing.¹⁷¹ That the first trustee did not engage in self-dealing did not necessarily relieve that trustee of liability:

A trustee may delegate the exercise of trust power to a fellow trustee, especially where the latter has an expertise in some particular aspect of the trust management . . . but that does not give a trustee the right to abdicate his function to be personally "active in the administration of the trust" with regard to those functions which call for consistency with usual prudent business practice.¹⁷²

Thus, the first trustee had to show that his inactivity did not

166. *Horne v. Peckham*, 158 Cal. Rptr. 714, 716 (Cal. Ct. App. 1979). This case also involved an issue of the statute of limitations in attorney malpractice cases. The rule *Horne* established concerning the statute of limitations was overruled by the California Supreme Court in *ITT Small Business Finance Corp. v. Niles*, 885 P.2d 965, 971 (Cal. 1994).

167. *Horne*, 158 Cal. Rptr. at 717.

168. *Id.* at 720.

169. See, e.g., *Lewis*, 621 P.2d at 258; *Brown*, 517 A.2d at 1118-19.

170. *In re Goldstick*, 177 A.2d 225, 581 N.Y.S.2d 165 (NY Sup. Ct.), modified on other grounds, 183 A.2d 684 (NY App. Div. 1992).

171. *Id.* at 238, 581 N.Y.S.2d at 173.

172. *Id.*

amount to negligence, "even where he had no direct knowledge of wrongdoing."¹⁷³

Similarly, while the board of directors of a corporation may utilize information and opinions of those with greater expertise when the board makes its decisions, reliance on such experts must be reasonable. In *Smith v. Van Gorkam*,¹⁷⁴ the board of directors approved a merger relying, in part, on a report generated by an officer of the corporation. Under Delaware law, the board of directors was "fully protected in relying in good faith on reports made by officers."¹⁷⁵ However, the officer in this case was uninformed on the matter that he was presenting to the board.¹⁷⁶ The Delaware Supreme Court held that the directors "were duty bound to make reasonable inquiry" of the officer presenting the information.¹⁷⁷ The board was held liable for failing to observe this duty.¹⁷⁸

Reliance on an expert must itself be reasonable. Reasonableness would appear to include the supervision over the work of the expert, as well as taking care to select the expert properly. The expert should possess some degree of knowledge on the matter for which the expert has been employed. Therefore, failing to ensure that the expert possesses this knowledge would seem to be a breach of the duty of reasonableness.

These cases can provide guidance for determining when an importer has exercised reasonable care in selecting and relying upon the advice of an expert. First, as discussed previously, the importer must be able to recognize that he or she is in need of an expert. Such a situation arises when the transaction involves a complex subject. Second, the importer would appear to be required to take care to examine the qualifications of the experts carefully. Third, the importer should take care to see that the expert performs his or her function in a proper manner.

CONCLUSION

From its initial publications, it appears as though Customs interprets the duty of reasonable care in a manner consistent with reasonableness as applied in other legal fields. The very foundation of reasonableness is the possession of an adequate level of knowledge. Just as doctors and lawyers must possess a basic knowledge of the fundamentals of their trade, importers must be aware of and familiar with the laws and regulations concerning international trade. In addition, importers should take care to see that these laws and regulations are

173. *Id.* at 238-39, 581 N.Y.S.2d at 173 (citations omitted).

174. *Smith v. Van Gorkam*, 488 A.2d 858, 869 (Del. 1985).

175. *Id.* at 874-75 (citations omitted).

176. *Id.* at 875.

177. *Id.*

178. *Id.* at 881.

properly applied.

Like many professions, importers encounter complex laws and transactions. When an importer is confronted with a situation beyond his or her competence, reasonableness would seem to require that the importer recognize his or her limits. In such a situation, the importer should consult with one who possesses greater expertise and experience.

Reliance on an expert, however, will not automatically relieve an importer of the duty of reasonable care. Rather, it would appear as though the choice of expert must itself be reasonable.

The importer has an option available prior to the importation of goods to assist in complying with the duty of reasonable care. These are the procedures through which an importer can obtain an advance ruling from Customs. By providing Customs with all relevant information concerning the transaction prior to importation, the importer can receive a binding ruling on the proper classification and valuation of goods. An importer who possesses any doubts about the proposed transaction should utilize this procedure and ensure that the merchandise will be properly classified and valued upon entry.