The Metropolitan Corporate Counsel®

www.metrocorpcounsel.com

Volume 13, No. 10 October 2005

International Law & Trade – Law Firms

Maximizing Economic Opportunities And Minimizing Risks In Today's Global Marketplace

The Editor interviews Marian E. Ladner, Partner, Epstein Becker Green Wickliff & Hall, P.C.

Editor: Please tell us about your firm's Houston office.

Ladner: Established in 2002, Epstein Becker Green Wickliff & Hall, P.C. (the firm's name in Texas) draws upon the resources of the entire firm to offer services in such areas as labor and employment law, commercial litigation, healthcare and life sciences, corporate and securities law, and international trade.

We are very proud of our diverse workforce throughout the firm and particularly in Texas. Both Marty Wickliff and Alton Hall are African Americans, and there are women and minorities serving many critical roles. For example, the partner who runs our Dallas office, Gayla Crain, is female.

Heightening our sensitivity, diversity allows us to provide creative, nuanced and sophisticated services to our clients. The caliber of our workforce and geographic location puts us among the forefront of our firm's growing international practice.

As a founding member of the International Lawyers Network (ILN) more than 20 years ago, the firm enjoys well-established working relationships within a worldwide confederation of high-quality law firms located in sixty cities on six continents. In an increasingly globalized economy, I am very enthusiastic about the firm's wonderful vision for growth.

Editor: What is the firm's vision for its international trade practice?

Ladner: Our firm's International Trade Group assists businesses in a broad range of industries to maximize economic opportunities while minimizing risks. Our clients include importers, exporters, service providers (including customs brokers and freight forwarders) in such diverse industries as textile and apparel, cosmetics, high tech, consumer goods, and oil and petrochemical production and exploration.

Marian E. Ladner

In an arena highly regulated by import and export laws, regulations, treaties, customs and tariffs, the well-established relationships our lawyers have cultivated inside government, business and professional communities around the globe are critical to helping each client develop the most cost-effective and efficient strategies for achieving their business objectives while meeting its trade compliance obligations. We help facilitate commerce seamlessly across borders.

Editor: How has your practice evolved?

Ladner: An international trade lawyer concentrating on imports and exports, I began my career working for the U.S. Customs Service as a senior attorney in the office of regulations and rulings. I then went into private practice in Florida. When I moved to Houston, I worked in-house for a very large logistics provider, then went to one of the big four accounting firms and was in charge of its southeast trade practice. Later, I returned to the law firm environment and went to work for a smaller, predominantly regional firm before joining Epstein Becker Green Wickliff & Hall.

My practice has evolved from straight customs work into the areas regulated by the 44 other federal agencies governing imports into and exports from the U.S. Following the events of 9/ll, export enforcement has increased dramatically and the penalties imposed have increased in amount. In the past, noncompliance was a cost of doing business in the range of $10,000. Now, it is a cost of going out of business with multimillion dollar penalties that can shut down a business. I advise companies transacting or contemplating business in a global arena that confront significant new compliance challenges and risks. I also help them prepare for and survive government compliance audits and investigations.

Editor: How will Hurricane Katrina's devastation impact international trade into and from the region?

Ladner: It is too early to say. While the Port of St. James, which is an entry point for crude oil, is in good shape, many questions about the infrastructure need to be addressed. For example, can trucks get to and from the loading docks? Is there rail service? Is an adequate workforce available? When will the pipelines in the region be

Please email the interviewee at mladner@ebglaw.com with questions about this interview.

fully operational?

Corporations are assessing the points of shipment for their goods and their relationships with the ports. If the Port of New Orleans or any other port in that region was an integral part of its supply chain, the company has to rethink how to efficiently and economically get its goods to market.

Editor: What are some of the post-9/ll legislation and security concerns?

Ladner: The climate has changed dramatically following the terrorist attacks. From an import standpoint, most corporations had been using the just-in-time inventory model focused on having only as much inventory as needed. After 9/11, the model is very different because the government is focused on information.

Now, importers have to pressure their supply chain, including their carriers, brokers, freight forwarders, manufacturers, and exporters to transmit information for the early manifestating of cargo. The Maritime Transportation Security Act and Trade Act of 2002 require the information to be available 24 hours before the merchandise is loaded onto a vessel.

The government is considering new requirements that the information be provided not only more quickly, but also with more detail. Just two years ago, importers were required to provide 14 new data elements prior to shipment. The government is now considering the addition of six to nine more.

Today, vessel cargo is required to be in the ports 24 hours before loading to give the government adequate time to target certain shipments for additional screening. In the past, the government would raise concerns about certain shipments depending on the source after arrival. Now, the government is inspecting more containers. While not necessarily a bad thing, it does take time, and often additional demurrage charges have to be paid. In the past, importers had until post importation to file documents. Now, delays slow the supply chain and tie up money.

Things have changed on the outbound side as well. Since its founding, our country has had export controls for policy reasons. The First Continental Congress in 1774 passed rules about doing business with England. Now, export controls come with penalties that are enormous. Many companies are not geared up for export compliance. They spend their efforts on Sarbanes-Oxley compliance because of the CEO's potential exposure to liability, but a CEO can go to prison faster for an export or import violation. The highest levels of management need to appreciate how much they risk on a day-to-day basis.

Penalties are particularly stiff for fraud. For example, if the government turns down a request for a license to export certain equipment, but the company sends the equipment anyway through a transshipment point, the CEO can see some jail time.

The government is imposing record high penalties even for companies that cooperate. Some penalties result from successor liability where the purchased company was lax on their responsibilities in the export-import context.

To avoid successor liability, the acquiring company should create questions about import and export compliance. For example, has the company to be acquired done a voluntary disclosure? Has it done business with a denied party? Does it have a screening process? Has it had a mandated program from the government? On the inbound side, the acquiring company will want to know if the company to be acquired has internal controls over the importation of goods. Are there written policies and procedures? Have they paid administrative penalties? How do they establish their classifications and transfer prices?

Editor: What are the critical elements of an import and export compliance program?

Ladner: The program should be overseen by someone who understands the rules and has authority to monitor whether the company is meeting its obligations. Importing and exporting goods are privileges, not rights. The government can take them away, or they can move in and monitor your compliance on-site.

Auditing compliance requires staff who understand the company's operations and business model. For example, the prices need to match up on the billing invoices and the shipping records. One common pitfall is the treatment of research and development costs. The U.S. imposes no duty on research and development done in this country, but research and development done abroad will incur a duty.

Another common pitfall relates to trade with NAFTA participants. Discounted duties do not automatically apply to products imported from Mexico or Canada. A certificate saying that the product originated in Mexico and not in another country is required. Without that certification, companies that claim NAFTA privileges violate the law.

Companies also need to be aware that there are four types of assists that are subject to duties if not already included in the product's price. For example, supplying a cutting machine used in sewing apparel is an assist, as are the costs of the transportation to get it to the work site.

Also coming down the road are the Department of Homeland Security's new push to have mandatory seals for all containerized cargo. The trade is debating their effectiveness because seals can be broken easily. Do they provide a false sense of security?

On the outbound side, a big issue is successor liability. Another is having automated processes to screen your business partners at various points in the transaction.

Issues also arise related to dual use items. For example, because the export of certain chemicals have not only commercial applications (e.g., they might produce plastics) but also military applications (e.g., they might be a precursor chemical in the product of mustard gas), they would require a license pre-export.

Companies need to be concerned with "deemed exports." What happens when there is a foreign national who is an employee of a subsidiary? If that person is an Iranian national, and they come over to examine a product in the U.S., you have just exported that item to Iran (i.e., a transmission of that technology). In that case, you may need to apply for a license from the government prior to that person coming.

This can also apply to re-exports. If you export a product to France and your French buyer re-exports it to Libya, you may need a license for the re-exportation. The deemed export rules can tie to re-exportation in that you can have a deemed re-export.

Companies need to take ownership of the compliance requirements just as they did with Sarbanes-Oxley. The penalties can be just as severe and the monetary impact have devastating consequences.

Companies should understand that the trade legislation passed in the last three years is massive. Its implementing regulations have yet to be promulgated. When they come into effect, their implications will be far reaching and most likely expensive. The time is now for proactive review and enhancement to your existing compliance programs.