

# **LIQUIDATED DAMAGES**

## I. In General

- A. Claims for liquidated damages are contractual in nature arising from breaches of the terms of bonds.
- B. By statute, the Secretary of the Treasury authorizes Customs officers to require bonds to ensure protection of the revenue or assure compliance with any provision of law that Customs may be authorized to enforce. See, 19 U.S.C. 1623(a).
- C. 19 U.S.C. 1623 is an enabling statute. It is incorrect to cite section 1623 on the CF-5955A as the statute violated.
- D. Parties to bond contract:
  - 1. Principal – party who takes out bond as required by regulation (e.g., importer of record, bonded warehouse proprietor, bonded carrier, container freight station, centralized examination station, gauger, foreign trade zone operator, etc.)
  - 2. Surety - underwriter of debt (corporate or individual surety)
  - 3. Beneficiary (Customs)
- E. Cancellation authority - Under the provisions of 19 U.S.C. 1623, the Secretary of Treasury may cancel (i.e., mitigate) claims for liquidated damages upon terms and conditions he deems appropriate. Authority to cancel all liquidated damages claims has been delegated to Customs.
- F. Coverage
  - 1. Single entry – covers a single entry of merchandise or a single arrival of a conveyance.
  - 2. Continuous (term) – covers all transactions occurring during a set term (usually one year). Continuous bonds are automatically renewed on their anniversary date.
- G. Customs Bond Conditions – see 19 C.F.R. Part 113, Subpart G
  - 1. Basic importation and entry bond – see 19 C.F.R. 113.62
  - 2. Basic custodial bond – see 19 C.F.R. 113.63
  - 3. International carrier bond – see 19 C.F.R. 113.64

4. Repayment of erroneous drawback payments – see 19 C.F.R. 113.65
  5. Control of containers and instruments of international traffic – see 19 C.F.R. 113.66
  6. Commercial gauger and commercial laboratories – see 19 C.F.R. 113.67
  7. Wool and fur products labeling acts and fiber products identification act – see 19 C.F.R. 113.68
  8. Production of bills of lading – see 19 C.F.R. 113.69
  9. Bond to indemnify U.S. for detention of copyrighted material – see 19 C.F.R. 113.70
  10. Bond condition to observe neutrality – see 19 C.F.R. 113.71
  11. Bond condition to pay court costs (claim and cost bond) – see 19 C.F.R. 113.72
  12. Foreign trade zone operator bond – 19 C.F.R. 113.73
- H. Termination of bonds – See, 19 C.F.R. 113.27
1. Termination by principal. A request by a principal to terminate a bond shall be made in writing to the port director and shall take effect on the date requested if the date is at least 10 business days after the date of receipt of the request. Otherwise the termination shall be effective on the close of business 10 business days after the request is received at the port.
  2. Termination by surety. A surety may, with or without the consent of the bond principal, terminate a Customs bond on which it is obligated. The surety shall provide reasonable written notice of termination to the port director and the principal and shall be sent to both Customs and the principal by certified mail, with a return receipt requested. Thirty (30) days shall constitute reasonable notice unless the surety can show to the satisfaction of the port director that a lesser time is reasonable under the facts and circumstances.
  3. Customs does not terminate bonds. The port director can require additional bonding from a principal and surety if he believes that acceptance of a transaction secured by a continuous bond would place the revenue in jeopardy or otherwise hamper the enforcement of Customs laws or regulations. See, 19 C.F.R. 113.13.

4. Termination of a bond does not extinguish any obligations under the bond that were undertaken while the bond was in force. Also, termination does not serve to cancel any claim for liquidated damages that has been assessed against a bond.

## II. Statute of Limitations for Bond Violations-See, 28 U.S.C. 2415

- A. The statute of limitations for the vast majority of liquidated damages cases is six years from the date the right of action accrues, i.e., the date of breach of the bond condition.
- B. In some limited instances, the statute of limitations will run one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law (if that one year period expires beyond six years from the date of the breach of the bond condition).
- C. Statute does not run:
  1. if the violator (principal on the bond) is outside of the United States
  2. if the violator is exempt from the legal process (e.g., insane)
  3. if facts material to the right of action-are not known by the Customs so that the claim can not be issued

## III. FP&F Officer's Mitigation Authority

- A. All cases involving claims of \$200,000 or less (with certain exceptions). See, 19 C.F.R. 172.11(a) and T.D. 00-58.
- B. Exceptions; No dollar limit to the district director's cancellation authority in the following cases:
  1. Late or non-filing of entry summary cases
  2. Late or non-filing of reconciliation entry cases
- C. If it is definitely determined that the act or omission forming the basis for the claim for liquidated damages did not occur, the claim may be canceled by the FP&F Officer without regard to assessed amount. See, 19 C.F.R. 172.11(b).
- D. No action will be taken on any petition from a principal or surety if received after the issuance to surety of a notice to show cause pursuant to 19 C.F.R. 113.38(c)(3). See, 19 C.F.R. 172.13(b).

- E. No action will be taken on any petition if the civil liability has been referred to the Department of Justice for institution of legal proceedings. The petition will be forwarded to the Department of Justice. See, 19 C.F.R. 172.13(a).

#### IV. **Assessment of Claims**

- A. Maximum assessments - Claims for liquidated damages cannot be assessed against either the principal or the surety for an amount in excess of that for which the bond is written. See, Bill Curphy Company v. Elliott, 207 F.2d 103.
- B. Minimum assessments - No claim should be assessed for less than \$100, except where the law or regulation expressly provides that a lesser amount may be taken, e.g., a claim for late filing of SED or export documents necessary to complete outward manifest that is one day late. Assessment of \$50 is mandated by regulation and is appropriate in that instance. Also, carnet violations may be issued for less than the minimum.
- C. Assessing against correct bond.
  - 1. The bond in effect at the time a transaction is commenced is responsible for obligations that arise and payment of any liquidated damages because breaches of those obligations. That bond will remain liable for breaches of any obligations that vest while the bond is in force. For example, the international carrier bond presented for the arrival and clearance of a conveyance will cover all obligations governing the reporting of arrival (including manifesting of cargo, unloading of merchandise, etc.) and clearance of that conveyance. If a violation is discovered in a subsequent audit, the bond presented for that arrival will be charged even if another bond has been obtained by the carrier in the interim.
  - 2. Superseding Bonds - The importer of record on a CF-3461 who uses his bond to effect release of goods is responsible for the payment of estimated duties. A superseding bond filed in the name of another party (usually the actual owner or consignee) at the time of filing the entry summary will shift liability for any subsequent obligations (e.g., increased duties, redelivery notices issued after presentation of the superseding bond) but will not make the party named in the superseding bond liable for previously vested obligations such as payment of estimated duties.
- D. Assessment amounts – Unless another amount is authorized by law or regulation, liquidated damages are generally assessed in an amount equal

to the entered value of the merchandise which is the subject of the bond breach or three times the entered value of that merchandise if the merchandise is restricted, prohibited or alcoholic beverages.

## V. Offers in Compromise

- A. FP&F Officers have been delegated the authority to accept offers in compromise in liquidated damages cases consistent with their authority to mitigate claims, i.e., when the amount assessed (not the amount offered) is \$200,000 or less (or in any late or non-filing of an entry summary or late or non-filing of a reconciliation entry case).
- B. Any decision by the FP&F Officer to accept an offer submitted with regard to a claim for liquidated damages must be approved by the Assistant Chief Counsel, Account Services Division, Indianapolis.

## VI. Petitions for Relief

Petitions for relief from liquidated damages claims shall be considered timely if they are filed within 60 days of the date of issuance of the CF-5955A. See, 19 C.F.R. 172.3(b). Extensions may be granted by the FP&F Officer when the circumstances so warrant.

- A. Pursuant to 19 C.F.R. 172.1(a), sureties are notified at the same time as principals of liability for liquidated damages. The concurrent notice shall be construed as a courtesy copy for sureties.
- B. If the principal does not respond to the initial notice in 60 days, a demand on the surety is issued as soon thereafter as possible. The surety will then have 60 days to petition from the date of the demand. See, 19 C.F.R. 172.4.
- C. Supplemental petitions must be filed within 60 days of the decision on the original petition for relief or within 60 days following an administrative or judicial decision with respect to issues serving as the basis for the claim for liquidated damages (whichever is later) unless another time to file such a supplemental petition is prescribed in the original decision. See, 19 C.F.R. 172.41.
- D. Carnet Cases. The petitioning process for carnet cases differs from all other cases. See, Section III B., below, for information.

## VII. Protests

Claims for liquidated damages are not protestable by the bond principal. See, United States v. Toshoku America, Inc., 879 F.2d 815 (Fed. Cir. 1989). If a

principal does file a protest, the FP&F Officer may either return the protest and inform the principal that protests may not be filed, or treat the protest as a petition for relief. A surety may protest a claim for liquidated damages.

If a protest is filed against a Customs action that forms the basis for the claim for liquidated damages (the most common example being the filing of a protest against a notice of redelivery), the claim for liquidated damages may be assessed, but any action on the claim should be held in abeyance pending the resolution of the protest (including any applications for further review).

## **VIII. Providing Copies of Bonds and Entries**

- A. Customs is not required to attach a copy of the bond to its demand for payment when Customs supplies sufficient information for the surety to locate the bond and ascertain its liability for payment. See, Peerless Insurance v. United States, 703 F. Supp. 104 (1988).
- B. A formal demand containing the name and address of delinquent debtor, the bill number, billing date, port name, document date, entry number, the amount due and the importer number was found to be a sufficient demand. See, Peerless v. United States, supra.

## **IX. Defenses**

The surety stands in the shoes of the principal and may raise any defense or issue that the principal could raise. The surety will receive the same mitigation that would have been due the principal.

## **X. Effect Of Liquidation**

Liquidation of an entry does not affect the issuance or mitigation of claim for liquidated damages if the violation occurred while entry bond was still in effect.

Exception: If a Notice of Redelivery (CF-4647) is issued after liquidation has become final, a claim for liquidated damages for failure to redeliver cannot be assessed. See, 19 C.F.R. 141.113(g).

## **XI. Bankruptcy of Principal**

Bankruptcy of a principal does not affect the liability of the surety. Any claims for liquidated damages should be pursued against the surety.