

Litigators of the Week: Taking the Fight to the Feds to Make Their Clients Whole

By **Katheryn Hayes Tucker**

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They faced a formidable opponent—the U.S. government—and carried the burden of proof. Beyond that, their clients were immigrants at a time when deep nativist sentiment has shown itself in American politics. But a trial team from Covington & Burling in Washington, D.C. overcame those challenges to persuade a New York jury that the federal government should return 47 luxury cars and \$3.4 million in cash seized from a Chinese couple running an import-export business.

“It was harrowing,” said partner Benjamin Razi on a phone call from a train as he returned to D.C. Razi, a commercial litigator, led a team that included partner Bruce Baird, a white-collar criminal defense attorney, and associates Jon Dougherty and Andrew Leff.

The seven-day trial before U.S. District Court Judge Katherine Polk Failla in the Southern District of New York involved a rarely tested statute that allows the government to seize assets based on probable cause that they were used in a crime. Razi said his clients had never been charged with any crime, but still the government had been holding their property for the past three-and-a-half years.



Benjamin Razi and Bruce Baird of Covington

“The burden shifts to people like our clients to prove by a preponderance of evidence that they did not commit a crime,” Razi said. Similarly, they shoulder the burden of proving they deserve to have their assets returned. Their attorneys moved to shift that burden to the government, but lost that point.

“It’s contrary to everything we understand about how the justice system is supposed to work,” Razi said. “But that’s apparently the way the laws are at the moment.”

As Razi told the tale, the couple’s personal story became the theme of the trial. Erxin Zhou was born

in China and became a trade representative for the government. She also owned a tea house in Beijing, where she met and fell in love with her husband, Yifan Kong. The son of a sunflower seed trader in rural China, Kong grew up to start a garment design business.

They made the painful decision to leave family and friends behind and move to the U.S. in 2006 when a relative to whom she had loaned most of her life savings delivered the sad news that he could not repay her. Instead, he gave her the keys to a warehouse filled with \$1 million worth of tires in Memphis, Tennessee.

When Kong described that decision on the witness stand—through an interpreter because he speaks little English—he was holding his glasses in his hand. As his eyes misted over, he put them on to cover his tears.

“I did it for love,” his interpreter said.

Together they built a life and two businesses in Memphis. She grew a successful tire import business. He began buying and exporting cars to China with Efans Trading Corp. They raised their children in Memphis and made it their home.

In 2013, a team of agents from the Department of Homeland Security swarmed their businesses, seized their bank accounts, inventory, papers, computers and phones and held their employees for hours of questioning. They were caught in the net of a broader investigation of a dozen other luxury car exporters. Their

business was engulfed simply because they shared the same address, Razi said.

Though the couple was never charged with a crime, the government alleged that dealers selling cars to Efans Trading did not intend for the vehicles to be exported. The Covington team used strategic cross examinations of car dealers and salesmen to secure admissions that they sell to the first person who walks in the door with a cashier’s check or good credit, Razi said. He quoted a salesman from Mississippi saying on cross, “The more cars we sell, the more money we make.”

Screening the jury for understanding of car buying turned out to be possibly more important than weeding out bias against immigrants. “It’s good that we were in New York. It’s a diverse place with people who bring a wide range of life experiences,” Razi said.

But New York is one of the few places in the country where it’s possible to run across an adult who has never purchased—or driven—a car, he added. So the team looked for jurors who had experience with car dealers.

Still, the emotion of the couple’s story is what Razi believes swayed the jury.

“What did it for us was we had real people who had suffered as a result of this case,” Razi said. “They had their property taken for more than three years, and they fought tooth and nail to get it back.”

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