

Global Trade Alert

NEVILLE PETERSON LLP

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Federal Circuit Deals Setback to Tariff “Equal Protection” Litigation

Totes-Isotoner Decision Points Litigants to Supreme Court

On February 5, 2009, the Court of Appeals for the Federal Circuit issued a decision in *Totes-Isotoner Corporation v. United States*, Appeal No. 2009-1113, the “test case” regarding the constitutionality of various tariff provisions which discriminate on the basis of gender or age. The Federal Circuit affirmed the United States Court of International Trade (CIT) ’s dismissal of Totes’ complaint, in the process announcing - for the first time - a higher standard of pleading for plaintiffs alleging equal protection violations relating to tariff legislation.

Not all of the judges agreed with the new standard. Judge Sharon Prost, concurring in the result, rejected what she called “the majority’s treatment of trade law as an exception to this country’s equal protection jurisprudence and implication that a heightened legal standard applies only in the case of tariff schedules.”

Totes is likely to ask the United States Supreme Court to review the question of whether a higher standard of pleading an equal protection violation is appropriate in cases where the law challenged is a tariff law..

Totes-Isotoner the “Test Case” for More than 150 Others

The *Totes-Isotoner* case challenges the constitutionality of various tariff provisions which discriminate between products on the basis of the gender or age of the intended user. The issue is whether Totes’ complaint meets the requirements for pleading an equal protection cause of action. Traditional equal protection jurisprudence holds that if a statute or other enactment is discriminatory on its face, a plaintiff has satisfied its pleading burden, and the burden shifts to the government to prove an “exceedingly persuasive justification” for the discrimination (in cases of gender discrimination) or a “rational basis” for the discrimination (in cases of age discrimination). If the challenged statute or enactment does not “facially” discriminate, then the litigant must also plead (and ultimately prove) that the enactment has a “disproportionate impact” on a class of persons, and that the discrimination is invidious.

The government moved to dismiss Totes’ complaint on various grounds in the CIT. It asserted that the CIT lacked subject matter jurisdiction over Totes’ case, because that company had failed to protest individual duty assessments. It suggested that Totes lacked standing to bring the case, and that the setting of a tariff rate was a “political question” that could not be considered by the courts. The government also suggested that Totes had not pleaded an adequate basis for its complaint, asserting that the

challenged tariff classifications were not “facially discriminatory”.

A three-judge CIT panel rejected the government’s claims regarding subject matter jurisdiction, standing and the “political question” issue. However, the CIT panel held that Totes had not pleaded an adequate cause of action, because the challenged provisions were not facially discriminatory, and therefore Totes was required to plead and prove that persons of a particular gender were “disproportionately impacted” by the discriminatory tariff provisions.

Totes appealed to the Federal Circuit, arguing that the challenged tariff provisions [establishing one duty rate for leather gloves “for men” and a different rate covering leather gloves “for other persons”] were facially discriminatory, that disproportionate impact was shown, and that an adequate pleading had been filed, shifting to the government the burden of justifying the enactment.

Federal Circuit Rejects CIT’s Reasoning, Substitutes Its Own

The Federal Circuit upheld the CIT’s dismissal of Totes’ complaint, but on a different ground than used by the CIT. Although conceding that Totes had in fact shown a “disproportionate impact”, a two judge majority (Judges Alan Lourie and Timothy Dyk) ruled, as a matter of first impression, that tariff cases require a higher standard of pleading than other equal protection cases.

Initially, the Federal Circuit made short shrift of the government’s arguments that the CIT lacked subject matter jurisdiction over the action, that Totes lacked standing to bring it, and that the setting of a tariff rate was a non-justiciable “political question”.

The Federal Circuit rejected the CIT’s analysis that Totes was required to plead, and

prove at trial, that the discriminatory tariffs had a “disproportionate impact” on a given class of persons who purchase gloves for persons of a given gender. The test was whether the tariff rates discriminated against glove users based on gender, and the Totes complaint did this.

But even though the Federal Circuit held that Totes had satisfied the traditional requirements of pleading an equal protection case, it suggested that, because the case involved a tariff law, more was required.

Circuit Court Requires Evidence of “Invidious Intent”

However, the Federal Circuit then went on to establish – for the first time - a higher standard of pleading in equal protection challenges involving tariff laws. It held that more than an allegation of disproportionate treatment is necessary to establish some equal protection violations. While acknowledging that, in most contexts, an allegation of disproportionate treatment is sufficient, the court said “**however, we think a different approach is required in the tariff context**”.

“This is so for two reasons”, the Circuit court held. “First, apart from a desire to raise revenue, Congress, in classifying goods for the imposition of tariffs, as a general matter is not concerned with the characteristics of the ultimate retail users of goods, but rather such classifications are designed to promote particular trade policy objectives negotiated with other countries.”

Second, the Circuit Court noted, duty rates are driven by various concerns, including multilateral agreements and negotiations, or the desire to protect particular domestic industries.

Given these considerations, the Federal Circuit said – without really explaining why – that it could not simply assume the differential

treatment of goods based on gender to be invidious, noting that legislatures have difficulty crafting non-discriminatory taxation laws

Judge Prost Concurs, But Rejects the Majority's Reasoning

Judge Sharon Prost concurred in the result, while criticizing the majority's treatment of tariffs as an exception to "this country's equal protection jurisprudence". She would have affirmed the CIT on the much simpler ground that men's and women's gloves are not of the same "class" of merchandise, and therefore there is no discriminatory treatment. One class of merchandise is being assessed with tax at one rate, and a different class of merchandise assessed with tax at a different rate, she suggested. While she did not indicate how a "class" of merchandise is to be determined, she became rather tongue-tied when trying to explain why the products in question were anything but a single class of merchandise, distinguished for tax purposes on the basis of gender, suggesting that "the happenstance that the English language does not have separate names for these particular products, thus requiring reference to the gender of the intended wearer, does not transform the distinction into facial discrimination".

An Interesting, But Questionable Decision

Obviously, the Federal Circuit has issued a Constitutional decision of first impression, establishing a higher standard of pleading for equal protection violations involving tariff laws. There is neither precedent nor support for such a heightened standard of pleading [nor any way a litigant could have drafted a pleading to conform to a standard not yet announced]. .

The Federal Circuit's decision may be wrong, as a matter of law. The court is conflating *proof* of unconstitutional treatment with *pleading* such treatment. Ordinarily, when disparate impact is shown from facial discrimination, the "tipping point" is reached, and the burden shifts to the government to try and justify the discrimination. While it may be true that tariff acts result from international agreements and negotiations, this merely refers to some of the sources from which the government might draw to try and justify the discrimination.

For instance, the court suggests that tariffs might be intended to protect domestic industries, but there has been no domestic leather glove industry for decades. It also suggests that disparate tariffs might have been created to balance tariff concession offers. That may be so (and is likely the reason for the disparate tariff rates for leather gloves), but the key question is – was this a sufficient reason for gender discrimination? Instead of setting the duty rate for mens' gloves at 14% and womens' gloves at 12.6%, why not balance the tariff concession by setting the rate for both at, say, 13.3%?

The fact that a discriminatory Congressional enactment is ensconced in a tariff law, rather than any other kind of law, should not affect the standard of pleading a challenger must satisfy. Nothing in the Constitution gives special status or deference to tariff laws, as opposed to other laws.

Another point to be made is that, while the Federal Circuit claims that the tariff discrimination is not "facial", it does appear to concede that Totes' pleading alone does establish "disproportionate impact". If a pleading alone could carry this burden, it strongly suggests that the tariff provisions are facially discriminatory.

Next Stop, Supreme Court?

Because the Federal Circuit's decision does not appear to provide an intelligible basis on which a different pleading can be constructed, it does not appear to us to make sense to return to the CIT and try to advance another complaint. The complaint would no doubt encounter similar objections regarding adequacy of pleading.

Because the Federal Circuit enunciated a new constitutional standard, it appears appropriate to continue the appeal process upward, to the United States Supreme Court, seeking a writ of certiorari so that the Supreme Court could speak to the question of whether a higher standard of pleading should apply in constitutional challenges to tariff laws. In our judgment, if fundamental issues concerning the basis for challenging a discriminatory tariff are not resolved early, any future attempts to litigate the equal protection cases would be delayed and plagued with these types of definitional issues, and consequent uncertainty.

Importers continue to file "equal protection" cases while the appeals continue. Please don't hesitate to call us if we can furnish any additional information or assistance regarding this unique constitutional issue, which may create a predicate for over \$1 billion in tariff refunds.

NEVILLE PETERSON LLP
Counsellors at Law

17 State St.
New York, NY 10004
212 635-2730

1400 16th St., N.W.
Washington DC 20036
202 861-2959

www.npwtradelaw.com
