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If the Glove or Shoe Fits: Court of International Trade Invokes Totes-Isotoner and Rejects Another Equal Protection Exception for Customs Cases in *Rack Room Shoes v. United States*

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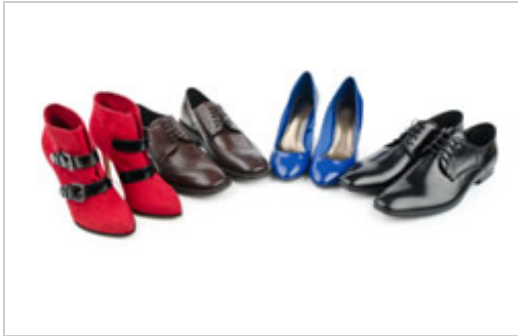

Introduction

At first blush, if one heard that the government treated identical women's products differently from men's products, one might think it was unfair. One might even wonder if this difference in treatment gives rise to a problem under the Equal Protection clause of the U.S. Constitution.[1] Importers wondered just that in *Totes-Isotoner Corp. v. United States*[2] and challenged the different tariff rates for men's and women's gloves imposed by the Harmonized Tariff Schedule of the United States ("HTSUS").[3] The tariff rate for men's gloves was 14% *ad valorem* while women's gloves were subject to a 12.6% *ad valorem rate*. Plaintiffs in *Totes* saw these two different rates as a clear cut equal protection problem. After all, the rates differed depending on whether the user of the product was a man or a woman.

First, the Court of International Trade ("CIT"), and then the Court of Appeals for the Federal Circuit ("CAFC"), rejected that challenge, finding that separate HTSUS classifications based on gender did not constitute facial discrimination.[4] Both courts rejected the facial discrimination claim because the tariff fell not on the user of the gloves but on the gloves themselves. Further, the CAFC imposed a heightened pleading standard and found that the plaintiffs could not sustain a claim based upon disparate impact without more evidence that Congress intended to discriminate.[5]

Totes-Isotoner meant that to win an equal protection case challenging gender distinctions within the HTSUS one needed to allege specific facts in support of a Congressional intent to discriminate based on gender. The plaintiff importers in *Rack Room Shoes v. United States* unsuccessfully attempted to do just that.

The Court's Decision

In *Rack Room Shoes v. United States,* plaintiffs unsuccessfully attempted to answer the

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CAFC's demand for factual support of Congressional discriminatory intent in HTSUS gender distinctions.[6] Once again the claims were rejected for insufficient pleading under *Bell Atlantic Corp. v. Twombly*.[7] In *Twombly*, the Supreme Court held that in order to survive a motion to dismiss, plaintiff had to do more than merely allege conduct that would sustain a claim. Plaintiff had to allege sufficient facts in order to show that there was "a plausible entitlement to relief." [8]

The court recounted the CAFC's holding in *Totes III* that "the HTSUS provisions at issue were not facially discriminatory"[9] because the classification does not require that men and women be treated differently, just that the products are distinguished based upon how they will be used.[10] Thus, without making any distinction between the HTSUS subheadings at issue in *Totes III* and those implicated in *Rack Room Shoes,* the CIT found that the HTSUS classifications were not facially discriminatory.[11] Nor was a mere allegation of disparate impact, without more, sufficient to show that Congress intended to discriminate.[12] The CIT reasoned (relying on *Totes III*) that "all schemes of taxation necessarily contain some inherent discriminatory impact."[13]

In response to the *Totes III* challenge to show an intent to discriminate, the plaintiffs in *Rack Room Shoes* pointed to two sets of additional facts. First, they claimed that Congress' choice of a gender distinction in and of itself, when there were other means by which it could construct a classification scheme, demonstrated that it meant to discriminate.[14] The CIT rejected this argument almost out of hand.[15] The CIT found this was a mere reassertion of the plaintiffs' claim in *Totes III*.[16] The CIT concluded that plaintiffs failed to show any facts that Congress intended discriminate.[17] Plaintiffs only showed that the language of the HTSUS made a distinction based on gender.[18] Secondly, the plaintiffs pointed to a 1960 U.S. Tariff Commission Tariff Classification Study, which questioned the economic usefulness of the distinctions based on age or gender.[19] The CIT rejected this as insufficient, finding that it merely critiqued a precursor to the present HTSUS tariff nomenclature (the Tariff Schedule of the United States or TSUS). Moreover, the CIT noted that simply because the "original economic justification may have blurred with time does not render their purposes discriminatory."[20] Indeed, the CIT concluded that it supports the view that there was an alternative purpose for the distinction, i.e., a historic purpose.[21] The CIT did not address whether that historic purpose might have (at the time) been to discriminate.

Ultimately, the CIT relied on what it saw as the real motivation for the gender distinctions. It found that the tariff distinctions were commercial distinctions made for reasons having to do with trade negotiations. Thus, the court seemed content to assume that commercial motivations for these distinctions were in play, absent convincing evidence that Congress intended to discriminate**.**[22] For the CIT, the fact that the distinction was a gender distinction, in and of itself, or that the economic justification for the distinction might be questioned, was a long way from finding that Congress intended to discriminate. Unfortunately, neither the CIT nor the CAFC in *Totes III* gave examples of what types of evidence might be suitable for this purpose.[23]

Conclusion

Totes III warned potential equal protection plaintiffs that they needed specific evidence of congressional intent to discriminate in order to get past a motion to dismiss under *Twombly*. The CIT in *Rack Room Shoes* found one offered piece of evidence conclusory and the other insufficient. More important than the CITs characterization of the evidence offered

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though is the attitude which the court took with these claims. The CIT, following *Totes III*, based its holding on an assumption that Congress chooses distinctions in the HTSUS based upon concerns such as reciprocal trade negotiations, which are influenced by numerous factors like the negotiating country, product, and domestic industry. Both courts were unwilling to displace these presumed motivating factors with the intent to discriminate without more compelling evidence.

The plaintiffs filed a request for reconsideration and, if necessary, are likely to appeal.

About the Author

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Endnotes:

[1] Cornell University Law School Legal Info. Inst., *Equal Protection: An Overview*, http://www.law.cornell.edu/wex/Equal_protection.

[2] Totes-Isotoner Corp. v. United States, 594 F.3d 1346 (Fed. Cir. 2010) [hereinafter *Totes III*]. *See also* Claire Kelly, *Court of Appeals for the Federal Circuit Announces Equal Protection Exception for Customs Cases:* Totes-Isotoner v. United States, ASIL Insights (May 17, 2010), http://www.asil.org/insights100517.cfm.

[3] The HTSUS is the U.S. schedule of customs tariffs on all products, classified in conformity with the Harmonized Commodity Description and Coding System (HS) tariff nomenclature developed and maintained by the World Customs Organization.

[4] Totes-Isotoner Corp. v. United States, 580 F. Supp. 2d 1371, 1379 (Ct. Int'l Trade 2008) [hereinafter *Totes II*]; *see also Totes III* at 1358.

[5] *Totes III* at 1357.

[6] Rack Room Shoes v. United States, No. 07-00404 (Ct. Int'l Trade Feb. 15, 2012), *available at* http://www.cit.uscourts.gov/slip_op/Slip_op12/12-18.pdf [hereinafter Slip Op.].

[7] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), *available at* http://www.supremecourt.gov/opinions/06pdf/05-1126.pdf.

[8] *Id*. at 559.

[9] Slip Op. at 4 (citing *Totes III* at 1358).

[10] *Id*.

[11] *Id*. at 7-8.

[12] *Id*. at 8.

[13] *Id*. at 6.

[14] *Id*. at 9-10.

[15] *Id*. at 10.

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] *Id*. at 11

[20] *Id*.

[21] *Id.* at 11-12.

[22] *Id*. at 13.

[23] In *Totes III*, the CAFC hints at a situation which might show an intent to discriminate when it distinguishes between men's gloves and a hypothetical situation posed *in Bray v. Alexandria Women's Health Clinic* where the Supreme Court states, "[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews." *Totes III* at 1358 (quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993)).