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# Faster Resolutions in Tariff Classification Litigation: Using Patent Law as a Model

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# FASTER RESOLUTIONS IN TARIFF CLASSIFICATION LITIGATION: USING PATENT LAW AS A MODEL

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## INTRODUCTION

The United States Court of International Trade has exclusive nationwide jurisdiction to review United States Customs and Border Protection ("Customs") decisions concerning the tariff classification of imported merchandise.[1] Tariff classi-

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fication is important to both the United States and to importers because it controls, among other things, the rate of duty applicable to goods entering the United States. Importers may challenge the classification that Customs assigns to merchandise in an effort to seek the refund of duties,[2] to avoid the imposition of monetary penalties for noncompliance,[3] to avoid the application of quantitative quotas, or for other reasons.

Most tariff classification cases do not involve disputed facts concerning the structure, operation, or other physical aspects of the merchandise. Consequently, these cases often turn entirely on questions of law involving the interpretation of the Harmonized Tariff Schedule of the United States.[4] Consistent with the legal nature of these disputes, most classification cases are resolved via motions for summary judgment because there are no material facts in dispute.[5]

Nevertheless, the parties to classification disputes generally engage in sometimes lengthy and expensive discovery involving document production and deposition testimony from both lay and expert witnesses. The focus of this discovery is often to confirm, on the record, the nature of the merchandise in a way that fits each party's understanding of the tariff language. Discovery may also involve expert opinion as to the common and commercial meaning of the tariff language.[6] Each party then argues for the Court of International Trade to adopt its interpretation of the tariff language and then to apply the usually uncontroverted facts to the interpreted text.

The result is that customs practitioners—both private and governmental—may expend considerable time and effort developing facts to fit a legal interpretation of the law that the court

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1. 28 U.S.C. § 1581(a) (2012).
2. 19 U.S.C. § 1514 (2012).
3. *See* 19 U.S.C. § 1592 (2012).
4. *See* Levi Strauss Co. v. United States, 21 C.I.T. 677, 679 (1997) ("[T]he purely legal question found in most classification cases has already been answered.") *rev'd on other grounds*, 222 F.3d 1344 (Fed. Cir. 2000).
5. A review of decisions of the Court of International Trade showed that from January 1, 2011 through April 8, 2014, there were forty-five published opinions on tariff classification. Of those, only six referred to a trial. The remainder were motions for summary judgment or motions to dismiss. That means that only about 13% of classification cases involve a dispute regarding facts.
6. *See, e.g.,* Samsung International, Inc. v. United States, 887 F. Supp. 2d 1330, 1342 (2012).

will not ultimately accept. For one party or the other, that will be wasted effort.

This Article proposes that practitioners adopt an alternative approach modeled on the U.S. Supreme Court decision in the patent case *Markman v. Westview Instruments, Inc.*[7] Following a *Markman* model, practitioners would ask the Court of International Trade to hold a hearing or entertain motions, preferably early in the dispute, to determine the scope of the tariff headings at issue. With that information, the parties would be able to devise a discovery plan that, given the court's guidance as to the controlling law, focuses on any relevant questions of fact that may be necessary to resolve. It is suggested that practitioners adopting this approach may find a quicker and more efficient resolution of customs classification disputes. Given the expense of customs litigation, this approach may also encourage more cases to be brought to the Court of International Trade, which would result in greater business and legal certainty in the application of the tariff laws. As an alternative, absent adoption by practitioners, the court might choose to adopt rules modeled on local patent rules in district courts in order to force the early resolution of questions of law.

## I. *MARKMAN* HEARINGS

*Markman* was a patent infringement dispute relating to a system for tracking clothing and other articles brought into dry cleaning shops.[8] The specific question brought to the Supreme Court was whether the correct interpretation of patent claims was a question of law to be decided by the court or a question of fact to be decided by a jury.

As background, a patent must describe the scope of the claimed invention.[9] In American patent law, the scope of the patent is defined by two elements. The first is the specification, which is a clear and concise description of the invention.[10] The specification must provide enough detail to permit someone skilled in the relevant art (i.e., the relevant area of technology or industry) to implement the invention.[11] The second part is

7. Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996).
8. *Id.*
9. *Id.* at 373.
10. *Id.*
11. *Id.*

made up of the patent claims, which "distinctly claim" the subject matter the patent applicant regards as the invention.[12] According to the Supreme Court in *Markman*, the claim defines the scope of the patent. Assuming the application matures into a granted patent, infringement results when the patent claim covers the infringer's product or process.[13]

Thus, like tariff language, the patent claim sets the metes and bounds of the subject merchandise. The claims define the scope of the patented invention in much the same way that a tariff heading defines the scope of the merchandise it covers. And, also like tariff language, the interpretation of the patent claim is purely a question of law.

The fundamental question before the Supreme Court in *Markman* was whether claims interpretation is a question for the judge or for the jury. In tariff litigation, the question of what issues go to a jury is not relevant because actions challenging tariff classification determinations may not be tried before a jury.[14] Nevertheless, in language strikingly similar to language used in myriad tariff classification cases from the Court of International Trade and the Court of Appeals for the Federal Circuit,[15] the Supreme Court characterized a patent case as consisting of two elements. "The first is a question of law, to be determined by the court, construing the letters-patent, and the description of the invention and specification of claim annexed to them. The second is a question of fact, to be submitted to a jury."[16] In the end, the Supreme Court determined that the interpretation and construction of patent claims is the province of judges. According to Justice Souter:

> The construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis. Patent construction in

12. 35 U.S.C. § 112 (2012).

13. *See Markman*, 517 U.S. at 373.

14. Rule 38 of the Rules of the Court of International Trade ("C.I.T.") preserves the right to a jury trial in cases where that right is conferred by the Seventh Amendment to the U.S. Constitution. In other cases, including classification cases, an "advisory jury" is possible. 28 U.S.C.A. C.I.T. Rule 39(c) (2010).

15. *See, e.g.,* Faus Group Inc., v. United States, 581 F.3d 1369, 1371-72 (Fed. Cir. 2009); Hewlett-Packard Co. v. United States, 189 F.3d 1346, 1348 (Fed. Cir. 1999).

16. *Markman*, 517 U.S. at 384.

> particular "is a special occupation, requiring, like all others, special training and practice. The judge, from his training and discipline, is more likely to give a proper interpretation to such instruments than a jury; and he is, therefore, more likely to be right, in performing such a duty, than a jury can be expected to be."[17]

As a result of this finding, a practice has developed in which district court judges hold so-called *Markman* hearings. By way of example, consider the Local Patent Rules of the Northern District of Illinois.[18] These rules require patent litigants to exchange lists of phrases the court should construe, the proposed construction of those terms, and, among other things, the elements of the subject merchandise or process that relate to the terms.[19] Within seven days of this exchange, the parties must agree on up to ten claims to be submitted to the court.[20]

After the list of claims for construction has been submitted, the party opposing infringement is given thirty-five days to submit briefs supporting their respective constructions of the claims.[21] The brief may contain extrinsic and intrinsic evidence in support of the proposed constructions. Furthermore, the parties may rely on testimony in a sworn statement. The rules then provide for response and reply briefs concerning claim construction and a joint appendix of supporting evidence. Finally, within twenty-eight days of the submission of the last brief, the judge may hold an oral argument or hearing on the proper construction of the tariff terms.[22]

Using this process, the district court ensures that the questions of law arising out of claims construction are addressed by the court. The process, however, also has the potential to allow the court, through early intervention on questions of law, to narrow the issues to be addressed in discovery and subsequent proceedings. As a result, early claims construction may lead to settlement or the entry of summary judgment, which is explicitly recognized by the Northern District of Illinois in its comments to Local Patent Rule 4.1. According to that Comment:

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17. *Id.* at 388-89 (citation omitted).
18. N.D. Ill. Local Patent Rules [hereinafter LPR].
19. *Id.* at 4.1(a).
20. *Id.* at 4.1(b).
21. *Id.* at 4.2(a).
22. *Id.* at 4.3.

> In some cases, the parties may dispute the construction of more than ten terms. But because construction of outcome-determinative or otherwise significant claim terms *may lead to settlement or entry of summary judgmen*t, in the majority of cases the need to construe other claim terms of lesser importance may be obviated. The limitation to ten claim terms to be presented for construction is *intended to require the parties to focus upon outcome-determinative or otherwise significant disputes*.[23]

## II. TARIFF CLASSIFICATION

When merchandise is imported to the United States, the importer is required to identify the nature of the merchandise by providing an eight-digit tariff classification number under the Harmonized Tariff Schedule of the United States.[24] Customs uses this information, in part, to assess duties on the importation. Because of the tariff classification's importance to the administration of the customs laws, importers are required to exercise "reasonable care" when reporting classifications, as well as other information, to Customs.[25] When Customs finally determines the classification of the goods and otherwise completes its processing of the importation, it "liquidates the entry."[26] Liquidation is the final determination of the duties owed with respect to that entry of merchandise.[27]

The Harmonized System ("HS") for tariff classification was developed by the Customs Cooperation Council —now known as the World Customs Organization. The United States implemented the Harmonized Tariff Schedule of the United States

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23. N.D. Ill. LPR 4.1. cmt. (emphasis added).

24. 19 U.S.C. § 1484(a)(1)(B) (2012). Two additional digits are appended to the tariff item for use by the Bureau of Census and do not affect the rate of duty applicable to the imported merchandise. *See, e.g.,* Figure 1, infra, illustrating the eight-digit heading/subheading combination and the two-digit statistical suffix.

25. 19 U.S.C. § 1484(a)(1) (2012). "Reasonable care," in this context, has been defined as the absence of negligence. United States v. Optrex America, Inc., 30 C.I.T. 650, 661 (2006). More specifically, customs negligence occurs when an importer fails "to exercise the degree of reasonable care and competence expected from a person in the same circumstances . . . " *See* 19 C.F.R. Pt. 171 app. B(C)(1) (2012).

26. 19 U.S.C. § 1500 (2012).

27. Heartland By-Products, Inc. v. United States, 568 F.3d 1360, 1363 (Fed. Cir. 2013).

("HTSUS") in 1989 pursuant to the Convention on the Harmonized System.[28]

Internationally, the HS is broken down into twenty-one sections and ninety-seven chapters describing, in varying degrees of detail, all physical merchandise that might be imported into the United States. There are additional U.S.-specific provisions providing for special rates of duties, quotas, and other special treatment.

As is illustrated in Figure 1, each chapter of the HTSUS is broken down into four-digit headings, which are the main operational units of the classification system. In this example, Heading 9205 covers "Wind musical instruments (for example keyboard pipe organs, accordions, clarinets, trumpets, bagpipes) other than fairground organs and mechanical street organs." Headings are further broken down into six-digit subheadings and eight-digit tariff items (e.g., brass-wind instruments of 9205.10.00 and bagpipes of 9205.90.20). The applicable rate of duty is identified in column 1 under the heading "General." For example, brass instruments are subject to a 2.9% rate of duty while bagpipes are duty free. The "Special" rate of duty identifies applicable duty preference programs such as NAFTA ("CA" or "MX"), Chile ("CL"), and the Generalized System of Preferences ("A").

Importers, government officials, and courts seeking to interpret the HTSUS apply the included General Rules of Interpretation, shown in Figure 2. These rules, and the binding section and chapter notes, are designed to differentiate between multiple headings that might otherwise appear to describe the same merchandise. The *Explanatory Notes to the Harmonized System*, which are published by the World Customs Organization, provide commentary on the scope of the various components of the Harmonized System, but are not binding on Customs or the courts.[29] Prior decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit are also useful tools for interpreting the tariff schedule. Lastly, Customs and Border Protection publishes private letter rulings to import-

28. *See* 19 U.S.C. § 3011(a)(1)(A) (2012).

29. Although not binding, the *Explanatory Notes* are considered persuasive and generally indicative of the meaning of a tariff term. LeMans Corp. v. United States, 675 F. Supp. 2d 1374, 1380 (Ct. Int'l Trade 2010), *aff'd*, 660 F.3d 1311 (Fed. Cir. 2011).

ers.[30] The rulings illustrate the agency's understanding of the relevant tariff language.

30. The rulings are published by U.S. Customs and Border Protection online. *See CROSS Customs Rulings Online Search System*, U.S. CUSTOMS AND BORDER PROTECTION, http://rulings.cbp.gov (last visited April 5, 2014).

**Harmonized Tariff Schedule of the United States (2012) - Supplement 1 (Rev. 1)**
Annotated for Statistical Reporting Purposes

XVIII
92-3

| Heading/ Subheading | Stat. Suf-fix | Article Description | Unit of Quantity | Rates of Duty 1 General | Rates of Duty 1 Special | Rates of Duty 2 |
|---|---|---|---|---|---|---|
| 9205 | | Wind musical instruments (for example, keyboard pipe organs, accordions, clarinets, trumpets, bagpipes), other than fairground organs and mechanical street organs: | | | | |
| 9205.10.00 | | Brass-wind instruments | | 2.9% | Free (A,AU,BH,CA, CL,CO,E,IL,J,JO, KR,MA,MX,OM, P,PA,PE,SG) | 40% |
| | 40 | Valued not over $10 each | No. | | | |
| | 80 | Valued over $10 each | No. | | | |
| 9205.90 | | Other: | | | | |
| | | Keyboard pipe organs; harmoniums and similar keyboard instruments with free metal reeds: | | | | |
| 9205.90.12 | 00 | Keyboard pipe organs | No. | Free | | 35% |
| 9205.90.14 | 00 | Other | No. | 2.7% | Free (A,AU,BH,CA, CL,CO,E,IL,J,JO, KR,MA,MX,OM,P, PA,PE,SG) | 40% |
| | | Accordions and similar instruments; mouth organs: | | | | |
| | | Accordions and similar instruments: | | | | |
| 9205.90.15 | 00 | Piano accordions | No. | Free | | 40% |
| 9205.90.18 | 00 | Other | No. | 2.6% | Free (A,AU,BH,CA, CL,CO,E,IL,J,JO, KR,MA,MX,OM, P,PA,PE,SG) | 40% |
| 9205.90.19 | 00 | Mouth organs | doz. | Free | | 40% |
| | | Woodwind instruments: | | | | |
| 9205.90.20 | 00 | Bagpipes | No. | Free | | 40% |
| 9205.90.40 | | Other | | 4.9% | Free (A,AU,BH,CA, CL,CO,E,IL,J,JO, KR,MA,MX,OM, P,PA,PE,SG) | 40% |
| | 20 | Clarinets | No. | | | |
| | 40 | Saxophones | No. | | | |
| | 60 | Flutes and piccolos (except bamboo) | No. | | | |
| | 80 | Other | No. | | | |
| 9205.90.60 | 00 | Other | No. | Free | | 40% |

**Figure 1**

**GENERAL RULES OF INTERPRETATION**

Classification of goods in the tariff schedule shall be governed by the following principles:

1. The table of contents, alphabetical index, and titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions:

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

   (b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

3. When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

   (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

   (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

   (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

5. In addition to the foregoing provisions, the following rules shall apply in respect of the goods referred to therein:

   (a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and entered with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character;

   (b) Subject to the provisions of rule 5(a) above, packing materials and packing containers entered with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

**Figure 2**

## III. TARIFF LITIGATION IN THE UNITED STATES

The U.S. Court of International Trade is an Article III court[31] and has exclusive jurisdiction to hear challenges to tariff classification determinations by Customs.[32] In most cases, the importer challenges the determination via an administrative protest.[33] Customs decides the protest internally and, if denied, the protesting party may file a summons in the Court of International Trade.[34]

In contrast to most forms of administrative review in U.S. courts, tariff classification cases are reviewed de novo.[35] The judge is statutorily directed to decide the case upon the record developed in the judicial proceeding. The parties engage in discovery including the exchange of interrogatories and depositions to prepare for a trial on the merits.[36] As stated above, there are few disputes as to the nature of the imported merchandise and questions of fact are often absent or limited. As a result, these cases are most often decided on the basis of cross motions for summary judgment without the need for a trial.

Like a district court in a patent case, the Court of International Trade applies a two part analysis to decide a classification case. In the first part, the court determines the proper meaning of the relevant tariff terms.[37] This is purely a question of law. In the second part, the court determines whether the merchandise at issue falls within a particular tariff provision.[38] The court is then charged with applying the law to the available facts to arrive at a correct tariff classification, even if the correct result is not one proposed by one of the parties.[39] Appeals from the Court of International Trade go to the Court of

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31. 28 U.S.C. § 251(a) (2012).

32. 28 U.S.C. § 1581(a) (2012).

33. *See* 19 U.S.C. § 1514(a) (2012); *see also* 19 C.F.R. § 174.11(b)(2).

34. *See* 19 C.F.R. §§ 174.21, 174.29 (2012). In classification cases, the summons is the initial pleading in the action. DaimlerChrysler Corp. v. United States, 442 F.3d 1313, 1318 (Fed. Cir. 2006).

35. *See* 28 U.S.C. § 2640(a)(1) (2012). Tyco Fire Prods. L.P. v. United States, 918 F. Supp. 2d 1334, 1339 (Ct. Int'l Trade 2013).

36. *See* 28 U.S.C.A. C.I.T. Rule 26 (2012).

37. *Faus Group*, 581 F.3d at 1371-72; Orlando Food Corp v. United States, 140 F.3d 1437, 1439 (Fed. Cir. 1998).

38. *Id*.

39. Jarvis Clark Co. v. United States, 733 F.2d 873, 878 (Fed. Cir.), *reh'g denied*, 739 F.2d 628 (Fed. Cir. 1984).

Appeals for the Federal Circuit[40] and then ultimately—but rarely—to the Supreme Court. It is important to this discussion that the Federal Circuit is also the sole Court of Appeals for patent cases appealed from the regional district courts.[41]

When construing the tariff language as a matter of law, the court is to determine the "common and commercial meaning" of the tariff terms.[42] Absent evidence to the contrary, the common and the commercial meaning are presumed to be the same.[43] In making this determination, the judge may rely upon his or her own understanding of the words, so-called lexicographical sources, and expert testimony.[44]

With respect to the development of a factual record, the parties may engage in detailed discovery concerning the physical nature of the merchandise. Often, this involves responding to numerous interrogatories and producing corporate records concerning the design, production, marketing, and use of the product as well as depositions of both fact and expert witnesses.

There are no reliable statistics available concerning discovery practices at the Court of International Trade. Nevertheless, the nature of these cases is that the plaintiff, which is usually the importer, holds all of the knowledge and expertise concerning the nature of the imported product. The defendant, which is the United States Government, must use the mandatory disclosure information and discovery tools to learn about the product. At the same time, the plaintiff may engage in discovery to determine, to the extent that it is documented, the government's decision making process and analysis. As would be expected in a case that might turn on the resolution of disputed facts, both parties use discovery tools to look for inconsistencies in testimony, probe credibility, create evidentiary foundations, and to find facts that, based on their understanding of the relevant tariff terms, support their desired outcome. In other words, the parties engage in potentially expensive and time-consuming discovery as would careful lawyers in most federal litigation. But, unlike most other kinds of litigation, much of that time

40. 28 U.S.C. § 1295(a)(5) (2012).

41. 28 U.S.C. § 1295(a)(1) (2012).

42. Cummins Inc. v. United States, 454 F.3d 1361, 1364 (Fed. Cir. 2006) (citation omitted).

43. *Id.*

44. Baxter Healthcare v. United States, 22 C.I.T. 82, 88-89 (Ct. Int'l Trade 1998) (citation omitted) *aff'd,* 182 F.3d 1333 (Fed. Cir. 1999).

and effort is often wasted because the court's interpretation of the controlling statute—the HTSUS—decides or substantially focuses the dispute as a matter of law.

## IV. CLASSIFICATION CASE STUDIES

The following cases are presented to illustrate the principles discussed in this paper and as examples for practitioners to consider whether the *Markman* model would present a means of achieving a faster resolution of the case.

### *A. Firstrax v. United States*

This case[45] involved the tariff classification of collapsible pet crates made of a steel frame and textile covering.[46] Upon liquidation of the entries, Customs determined that the correct tariff classification for the crates was in Heading 4202,[47] which provides for:

> Trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper. . .

Classification in this heading, specifically in tariff item 4202.92.90, resulted in an applicable rate of duty of 17.6%.[48] For its part, the plaintiff believed the correct classification to be as an "other made up article" of textiles, classifiable in tariff item 6307.90.98, which carries a rate of duty of 7%.[49]

In other cases, the Court of International Trade and Federal Circuit had held that products properly classifiable in Heading 4202 are designed to protect, organize, store, and transport

45. Firstrax v. United States, No. 07-00097, 2011 WL 5024271 (Ct. Int'l Trade Oct. 21, 2011).
46. *Id.* at *1.
47. *Id.*
48. *Id.*
49. *Id.*

personal property of some kind.[50] As a result, the discovery process focused on the factual questions of whether the pet crates were designed, marketed, and used to organize, store, protect and transport pets, primarily dogs.

### *B. Del Monte Corp. v. United States*

Del Monte Corp. imported prepackaged tuna meat prepared with the addition of a flavored sauce in an airtight pouch.[51] The sauce contained a small amount of oil, which was intended to function as a flavor dispersant or emulsifier. The amount of the oil was between 0.62% and 2.48% by weight of the contents.[52] According to counsel for the importer, the predominant additive to the tuna was water.[53] The question before the court was whether the tuna was classifiable as tuna in airtight containers "[n]ot in oil."[54]

Practitioners familiar with customs litigation can imagine the scope and nature of discovery involved in this case. It is likely that Del Monte personnel provided detailed factual information concerning the formulation and function of the sauce mixture. There may also have been significant time spent with both lay and expert witnesses explaining the function performed by the small amount of oil in the mixture. Nevertheless, the case turned on the question of whether there is a de minimis amount of oil permissible in tuna "[n]ot in oil."

### *C. Salem Minerals v. United States*

The last case for illustration involves the importation of decorative glass vials containing small amounts of gold leaf in a liquid suspension.[55] These items were sold to tourists in gold producing regions and were not considered to be items of jewelry or fine goods.[56] The importer wanted to have the goods clas-

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50. Avenues in Leather, Inc. v. United States, 317 F.3d 1399, 1401 (Fed. Cir. 2003).

51. Del Monte Corp. v. United States, 885 F. Supp. 2d 1315, 1316 (Ct. Int'l Trade 2012).

52. *Id.* at 1317.

53. *Id.* at 1318.

54. *Id.* at 1319.

55. Salem Minerals, Inc. v. United States, No. 07-00227, 2012 WL 2700424, at *1 (Ct. Int'l Trade June 26, 2012).

56. *Id.* at *2.

sified as other articles of precious metals.[57] Customs classified the goods as articles of goldsmith's wares.[58] Thus, the sole question presented to the court to resolve the case was the meaning of the term "goldsmith's wares." There appears to have been no material dispute as to the nature of the product or its production. Nevertheless, there seems to have been significant inquiry into the facts surrounding the production process involved in making the gold leaf as well as the vial and decorative cap.

## V. APPLYING THE *MARKMAN* MODEL TO CLASSIFICATION CASES

Practitioners who adopt an approach similar to that undertaken in patent cases in the wake of *Markman* may reduce the scope of discovery undertaken in customs classification cases and improve the efficiency of deciding these issues. If, for example, either party in a classification case identifies a controlling question of tariff interpretation, that question can be presented to the court early as a motion for partial summary judgment under CIT Rule 56.[59] A prompt decision by the court on the scope of the tariff heading might sufficiently clarify the controlling law to permit a stipulated judgment, settlement, or voluntary dismissal of the action. Even if the legal determination is not dispositive as to the entire case, at least counsel, who knows the scope of the tariff headings involved, can then tailor discovery accordingly.

For example, in the *Firstrax* case, the main question to be decided was the scope of HTSUS Heading 4202. Specifically, whether the collapsible pet crates were similar to the exemplars of, among other things, traveling bags, knapsacks and backpacks, tool bags, and sports bags. Plaintiff's argument was based partly on the premise that none of the containers used as exemplars in Heading 4202 are used to contain a living animal.[60] As a result, the pet crates were not "similar to" the items included in Heading 4202 and were therefore excluded from 4202 classification.[61] This is a question that could have been put to the Court of International Trade prior to either party

57. *Id.* at *1.
58. *Id.*
59. 28 U.S.C.A. C.I.T. Rule 56(a) (2013).
60. *Firstrax*, 2011 WL 5024271, at *1.
61. *Id.* at *7.

conducting any discovery. Further, had the court agreed, it is entirely possible that the case would have settled because of the lack of an alternative classification. Had the court disagreed, the parties could then have proceeded to discovery on whether the pet crates were able to protect, organize, store, and transport pets.

*Del Monte* turned on the meaning of the tariff term "[n]ot in oil." Thus, given a product that unquestionably contains a small amount of oil in the closed pouch, the possibly dispositive question was whether there existed a de minimis amount of oil. The court eventually held that 0.62% by weight of oil was a sufficient amount for the tuna to be considered packed "in oil."[62] Had the parties asked the court whether that level of oil in the sauce mixture would be sufficient to make the tuna classifiable as "in oil," that determination may have resolved the case. Or, the parties may have wanted a decision on additional legal questions such as whether the oil needed to act as a flavoring or preservative agent.

Finally, in *Salem Minerals*, had the parties asked the court to define "goldsmith's wares" prior to the commencement of discovery, the parties may have avoided significant time and expense. In particular, the parties might have resolved the matter had they known at the start of the case that the court would find goldsmith's wares to be limited to useful articles formed of gold for household, office, or religious use—including jewelry.[63] This definition excluded the gold leaf from the meaning of goldsmith's wares, as leaf is a semi-manufactured form of gold, not an article of gold.[64] Furthermore, the court's definition excluded objects plated in gold, including the stoppers in the vials.[65] Without regard to any factual disputes to be resolved in discovery, the definition of the term "goldsmith's wares" may have resolved this case or substantially facilitated an early resolution.

## VI. POSSIBLE CONCERNS

For practitioners, the application of *Markman*-style procedures to tariff classification litigation may appear to present

62. *Del Monte Corp.,* 885 F. Supp. 2d at 1320.
63. *Salem Minerals, Inc.,* 2012 WL 2700424, at *7.
64. *Id.*
65. *Id.*

practical problems and raise questions for both the private litigant and the U.S. Department of Justice. The most obvious question is whether this approach might result in the conclusion of litigation in the absence of a full record made before the court. The short answer to that concern is that it is *intended* to result in cases being decided before a full record is developed with respect to the facts involved. This approach is based on practical experience in customs litigation as well as the observation that the Court of International Trade holds very few trials in the course of any given year. Rather, the court resolves almost all classification disputes on motions for summary judgment. This is an acknowledgement that these cases turn on legal interpretations rather than factual disputes and that discovery that is often considered necessary by a prudent lawyer may not be necessary or particularly useful in classification cases.

More important, a party seeking an early determination as to the meaning of relevant tariff terms has few limitations on what can be submitted to the court. The court has repeatedly noted that to determine the common and commercial meaning of an undefined tariff term, it may consult dictionaries, scientific authorities, and other reliable information sources including "lexicographic and other materials."[66] The court may also rely on its own understanding of the term used.[67] Lastly, the court may consider expert opinions regarding the common meaning or understanding of a term in a particular industry or context. These expert opinions are advisory in nature, and the court will give them weight only to the extent they are consistent with lexicographic and other reliable sources.[68]

What this means is that the parties to a classification case who opt to seek an early resolution of a classification matter may present to the court fully formed arguments concerning the legal issues. These arguments can be based on standard and technical dictionaries, expert opinions, and lexicographical sources. While it is true that much discovery in tariff litigation is directed at cataloging particular examples of use by the parties and the relevant industry, individual examples of usage by

66. *See, e.g.,* Simod America Corp. v. United States, 872 F.2d 1572, 1576 (Fed. Cir. 1989).

67. *See, e.g.,* Airflow Tech., Inc. v. United States, 524 F.3d 1287, 1291 (Fed. Cir. 2008) (citation omitted).

68. *Samsung*, 887 F. Supp. 2d at 1342.

the importer or Customs personnel are of limited value in identifying the common, English meaning of a term. Furthermore, those examples of usage could easily be included in early, mandatory disclosures to the opposing party. Consequently, it does not appear that adopting a *Markman* style approach to resolving questions of law in tariff litigation will produce decisions on the question of law that were based on an undeveloped record.

A second area of concern might be the appealability of the isolated legal determination as to the meaning of the tariff term. Given that the majority of tariff classification decisions appealed from the Court of International Trade are currently taken from decisions on motions for summary judgment, this does not appear to present a problem. The party that disagrees with the decision rendered on the legal question would, presumably, not agree to an early settlement or stipulation. As a result, the case would continue until such time as either party believed it had sufficient grounds to move for complete summary judgment. Assuming a decision on the merits, the case would not be different than any other summary judgment decision. Should the Court of Appeals reverse the Court of International Trade's legal interpretation, the case would be remanded for further proceedings. Given the change in legal interpretation necessitated by a reversal, additional discovery may be required in order to determine how the court should interpret the tariff language. The Court of International Trade would need to permit that discovery to occur. Given the similarity of this process to patent litigation, it is likely that the Court of Appeals for the Federal Circuit will be comfortable with this type of bifurcated process.

## VII. RECOMMENDATIONS

Counsel in customs classification cases should realistically review their cases and make an early determination as to the real, controlling questions. It is possible that there may be significant disputes as to material facts that will prevent a case from being decided on the basis of a motion for summary judgment. Those cases are, however, in the minority.

In the more usual circumstance, the case turns on a question of law based on the interpretation of the Harmonized Tariff Schedule. In these cases, practitioners should seek to engage the court early to receive a definitive ruling as to the meaning of the disputed tariff language. That step will either promote

the resolution of the case through voluntary dismissal or stipulated judgment, or it will focus the parties on discovery relevant to the tariff term's legal meaning.

The most obvious means of implementing this approach is a motion on the initiative of one or both parties through the Rule 56(a) partial summary judgment process.[69] Another possibility is for the assigned judge or a party to request that the classification be referred to Court-Annexed Mediation pursuant to CIT Rule 16.1.[70] In mediation, a judge of the Court of International Trade could provide an expert and impartial view as to the meaning and scope of the tariff language. This might encourage the parties to more realistically evaluate the strengths and weaknesses of their cases and, as discussed above, might limit and focus discovery to the relevant physical characteristics of the merchandise.

If, however, litigants do not approach the tariff litigation using these tools and the court sees value in this approach, the court is not without recourse. Under Rule 16.1, a judge can refer the action to mediation.[71] Or, if the Court of International Trade chooses, it can follow the lead of district courts that have promulgated local rules to implement the *Markman* process.

Specifically, if necessary or desirable, the Court of International Trade could consider adopting rules similar to local patent rules under which the parties would be required to consult and present to the court a list of tariff terms to be construed. Each party would then be permitted to submit briefs supporting their respective constructions of the disputed tariff terms. Those briefs would contain any available evidence of common and commercial meaning or commercial designation, including lexicographical materials and expert opinion. The parties would then be permitted to submit reply briefs, and, if deemed necessary, the court could hold an oral argument during which the experts could speak.

## CONCLUSION

Customs litigation, as it is typically undertaken, looks very much like commercial litigation in any federal court. Practitioners, who understandably do not know what information the

69. 28 U.S.C.A. C.I.T. Rule 56(a) (2013).
70. 28 U.S.C.A. C.I.T. Rule 16.1 (2009).
71. *Id.*

other side may have, often engage in multiple rounds of depositions, interrogatories, and requests for production. Much of that effort is directed at finding out the detailed specifications of the imported product, which is not realistically in dispute. Furthermore, both sides use discovery to explore and catalog the language individuals and companies use in relation to the product. This is also of minimal probative impact when trying to determine the common meaning of a term in the English language, as opposed to that term's common meaning within a particular company or in the parlance of a handful of individuals.

More often than not, there is no smoking gun in corporate file drawers. There is rarely a "Gotcha!" moment when the president of the importer testifying in a deposition changes her statement as to the meaning of a term. Moreover, on an occasion when that happens, the impact of the evidence is of limited value when weighed against dictionaries, technical references, and expert opinion. Consequently, there is significant lawyering invested in fact-based discovery, the related questions of evidence law, and linguistic hunts for needles in the haystacks of business records.

The Court of Appeals for the Federal Circuit is familiar with *Markman* and has experience reviewing the decisions of the district courts where there have been bifurcated proceedings to resolve questions of law and fact. As a result, adopting a similar approach to customs litigation should not present any analytical problems for the Federal Circuit. Furthermore, the Court of International Trade bases most of its tariff classification decisions exclusively on questions of law, without regard to disputed material facts. Thus, the process for appealing a bifurcated classification case will present no procedural or administrative difficulties for the parties or either court.

Reversing the current process of tariff litigation by resolving questions of law early in the process will likely result in significantly more efficient resolutions of these matters. An early judicial decision as to the scope of tariff language will, at a minimum, focus discovery on the relevant questions. In many cases, a decision as to what the disputed language means may result in the complete resolution of the case without the need for any discovery. Thus, this suggested process, which can be undertaken by practitioners without a change in the court's rules, will benefit the parties, the court, and the public.