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Made In USA: Increasing Challenges to False or Misleading U.S.-Origin Claims

U.S. consumers notice and are more likely to buy products that are marketed as *Made in USA*. President Donald J. Trump proclaimed in his inaugural address that we should "follow two simple rules: Buy American and Hire American." [1] See also *Buy American and Hire American* Executive Order (making it policy of the executive branch to "maximize, consistent with the law, . . . the use of goods, products, and materials produced in the United States"). [2]

With this renewed emphasis on America First, companies are striving to capitalize on the resurgence of consumer interest in American-made goods by marketing their products as wholly or partially made, designed, or assembled in the United States.

But companies labeling or marketing products as *Made in USA* face significant legal risk, as federal, state, self-regulatory, and private actors are increasingly challenging those designations as false or misleading. Although companies are free to promote their use of U.S. processes and U.S. workers, they must not overstate the extent to which their products are made in the United States or risk not only civil liability but also negative publicity and decades of government oversight.

Federal Trade Commission

According to the Federal Trade Commission (FTC), companies promoting their products without qualification as *Made in USA* must meet the "all or virtually all" standard, meaning that "all significant parts and processing that go into the product must be of U.S. origin. That is, the product should contain no—or negligible—foreign content." [3]

To determine whether a product qualifies, the FTC considers several factors, including the proportion of the product's manufacturing costs attributable to U.S. parts and processing, the separation between any foreign content and the finished product, and the importance of the foreign content or processing to the overall function of the product. [4]

Consider, for example, a company producing a propane barbeque grill in the United States with its major components (e.g., gas valve, burner, and aluminum housing) each made in the United States but with minor components (e.g., knobs and tubing) imported from Mexico. According to the FTC, an unqualified *Made in USA* claim here is unlikely to be deceptive "because the knobs and tubing make up a negligible portion of the product's total manufacturing costs and are insignificant parts of the final product." [5]

In contrast, what if a table lamp is assembled in the United States from U.S.-made brass and a U.S.-made lampshade but also uses an imported base? Even if the imported base accounts for only a "small percent of the total cost of making the lamp," an unqualified *Made in USA* claim is likely deceptive for two reasons: "The base is not far enough removed in the manufacturing process from the finished product to be of little consequence and it is a significant part of the final product." [6]

Implied claims, meaning those where the marketer does not explicitly say that a product is *Made in USA* but where consumers may make such an inference, can likewise create legal risks. For example, a company may convey that a product originates in the United States where it promotes the product in an advertisement featuring a manager describing the "true American quality" of the work produced at the company's U.S. factory. [7] The FTC focuses on the "overall impression of the advertising, label, or promotional material" to determine whether the marketing conveys a message of U.S. origin. [8]

To avoid some of these risks, companies may make a qualified claim. By describing "the extent, amount or type of a product's domestic content or processing[,] it indicates that the product isn't entirely of domestic origin." [9] Thus, claims such as *60% U.S. content*, *Made in USA of U.S. and imported parts*, or *Couch Assembled in USA from Italian Leather and Mexican Frame* are less likely to face scrutiny. [10]

But even qualified claims may imply that a product contains more domestic content than it holds, so manufacturers or marketers must avoid even qualified claims "unless the product has a significant amount of U.S. content or U.S. processing." [11] At bottom, "[a] qualified *Made in USA* claim, like an unqualified claim, must be truthful and substantiated." [12]

Recent Enforcement Actions and Other Litigation

Bollman Hat Company. The FTC in April finalized a settlement with Bollman Hat Company and its subsidiary SaveAnAmericanJob, LLC, after alleging that the companies deceived consumers by marketing hats with claims such as *Choose American* and *Made in USA since 1868*, even though more than 70 percent of their hat styles were imported as finished products. [13] In addition, of the remaining hat styles, many contained significant imported content. [14]

The FTC also alleged that Bollman and SaveAnAmericanJob made deceptive claims through a seal called *American Made Matters*. The seal implied that their hats had been endorsed or certified by an independent third party, even though the seal was a fictitious name they owned. [15] They not only used the seal to market their products but also licensed it for a fee to any company claiming to have, among other things, a U.S.-based manufacturing factory or one product with a U.S.-origin label. [16]

As a result of the settlement, Bollman is prohibited from, among other things, representing that its hats are made in the United States unless the final assembly, all significant processing, and all or virtually all ingredients are within or from the United States or unless the company makes a conspicuous qualification adjacent to its representation. [17] And users of their *American Made Matters* seal must receive either independent evaluation to confirm that they meet the seal's certification standard or disclose that the products may meet the standard via self-certification. [18]

Atomic Beam Flashlights. The National Advertising Division (NAD) in July recommended that the manufacturer of the Atomic Beam flashlight discontinue or refine its advertisement stating that the "critical components" of the flashlight are "made right here in the USA." [19] A part of the Council of the Better Business Bureau, NAD independently evaluates the truth and accuracy of national advertising and encourages businesses and consumers to share information on potentially inaccurate claims made by advertisers.

NAD explained that the Atomic Beam advertisement must be truthful and adequately qualified, confirming that the manufacturer could make a claim that specific parts in the flashlight, rather than merely the "critical components," are made in the United States. [20]

North Star Creations, LLC. The U.S. District Court for the District of New Jersey last month denied a motion to dismiss a lawsuit that included a Lanham Act claim for false advertising related to the designation of textile products as *Made in USA*. [21]

North Star LLC, a manufacturer of kitchen aprons, dish towels, decorative pillows, and similar products, entered a license agreement with Fish Kiss LLC, a "small lifestyle brand company that specializes in the creation of unique designs and artwork." [22] Fish Kiss alleged that North Star falsely advertised its finished products as *Made in USA* in violation of the Lanham Act because, although the products were "made" in the United States, the "materials supplier receives its products from a foreign country." [23]

The district court denied North Star's motion to dismiss because regulations under the Textile Fiber Products Identification Act further limit what manufacturers of textile-fiber products can label their merchandise.[24] *Made in USA* is a label reserved for such products that are "completely made in the United States of materials that were made in the United States." [25] But a textile-fiber product "made in the United States, either in whole or in part of *imported materials*, shall contain a label disclosing these acts; for example: 'Made in USA of imported fabric.'" [26]

Because Fish Kiss alleged that North Star used imported fabric, the complaint sufficiently alleged a violation of the Lanham Act via the textile-fiber regulations.

Conclusion: Other Claims to Avoid

These are just a few of the recent actions seeking to rigorously curtail false or misleading use of *Made in USA* claims.

Companies also should be careful to avoid claims that a whole product line is of U.S. origin when only some products in the product line support that claim.[27] They likewise should ensure that comparative claims are truthful and substantiated, making clear whether the comparison is to another leading brand or to a prior version of the same product.[28] Certain products, like automobiles, are subject to additional laws about *Made in USA* labeling.[29] The Buy America Act regulations affect federal expenditures for certain public works using iron, steel, and manufactured goods produced in the United States.[30] Separate and distinct from the Buy America Act regulations is the Buy American Act, which generally prohibits the government from acquiring a supply that is not a domestic end product.[31]

And companies must be aware of various state regulations affecting the same subject matter. For example, California state law permits a *Made in USA* claim provided that no more than 5% —or in certain instances 10%—of the product's component inputs originate from outside of the United States.[32]

If your company is planning to designate products as *Made in USA* or use similar messaging, has received litigation notices about your advertisements, or suspects that a competitor is improperly marketing its products, we suggest contacting experienced counsel for guidance.

ENDNOTES

[1] President Donald J. Trump, Inaugural Address (Jan. 20, 2017), <https://www.whitehouse.gov/briefings-statements/the-inaugural-address/>.

[2] Exec. Order No. 13788, 82 Fed. Reg. 18,837 (Apr. 18, 2017), Buy American and Hire American, <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-buy-american-hire-american/>.

[3] Fed. Trade Comm'n, Complying with the Made in USA Standard 4 (Dec. 1998), <https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf>; *see also* Fed. Trade Comm'n, Enforcement Policy Statement on U.S. Origin Claims (Dec. 1, 1997), <https://www.ftc.gov/public-statements/1997/12/enforcement-policy-statement-us-origin-claims>.

[4] Complying with the Made in USA Standard, *supra* note 3, at 4.

[5] *Id.* at 5.

[6] *Id.* at 6.

[7] *Id.* at 3.

[8] *Id.*

[9] *Id.* at 9.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Complaint, *In re Bollman Hat Co.*, No. C-4643 (Fed. Trade Comm'n Apr. 12, 2018), https://www.ftc.gov/system/files/documents/cases/172_3197_bollman_hat_complaint.pdf.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Decision and Order, *In re Bollman Hat Co.*, No. C-4643 (Fed. Trade Comm'n Apr. 12, 2018), https://www.ftc.gov/system/files/documents/cases/172_3197_bollman_hat_decision_and_order.pdf.

[18] *Id.*

[19] Press Release, Nat'l Advert. Div., NAD Recommends Telebrands Discontinue Certain Claims for 'Atomic Beam' Flashlights; Advertiser to Appeal NAD's BOGO Finding (July 19, 2018), <http://www.asrcreviews.org/nad-recommends-telebrands-discontinue-certain-claims-for-atomic-beam-flashlights-advertiser-to-appeal-nads-bogo-finding/>.

[20] *Id.*

[21] Opinion, *Fish Kiss LLC v. North Star Creations, LLC*, No. 17-8193 (D.N.J. Aug. 13, 2018), ECF No. 54.

[22] *Id.* at 3.

[23] *Id.* at 25.

[24] *Id.* at 25–26.

[25] Rules and Regulations Under the Textile Fiber Products Identification Act, 16 C.F.R. § 303.33 (2012).

[26] *Id.* (emphasis added).

[27] Complying with the Made in USA Standard, *supra* note 3, at 4.

[28] *Id.* at 12.

[29] American Automobile Labeling Act, 66 FR 13625 (Mar. 6, 2001).

[30] Buy America Act, 49 U.S.C. § 5323(j).

[31] Buy American Act, 41 U.S.C. §§ 10a–10c.

[32] Cal. Bus. & Prof. Code § 17533.7 (2016).

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