

## CLIENT ALERT

### "Made in America": Qualified Claims and New Class Actions in California

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The past month was particularly busy for California "Made in America" claims. In late October, a federal judge in California ruled that qualified "Made in America" claims can comply with the state's strict labeling standards. And one day later, a new class action lawsuit was filed against retailer Lands' End over "Made in USA" labeling on a tie.

#### Must "Made in America" be all or nothing?

Manufacturers and retailers have struggled with the conflict between the FTC's "virtually all" content standard for "Made in America" claims, and California's all or nothing standard. Under the Federal Trade Commission's (FTC) "Made in the U.S.A." guidelines, in order to be marked and sold as "Made in the U.S.A.," a product must contain "all or virtually all" U.S. content. But, the California Business and Professions Code § 17533.7, which is part of California's False Advertising Law that generally prohibits false and misleading advertising statements, has even stricter rules for making "Made in America" claims in California:

It is unlawful for any person, firm, corporation or association to sell or offer for sale in this state any merchandise on which merchandise or on its container there appears the words "Made in the USA," "Made in America," "USA," or similar words when the merchandise or any article, unit or part thereof, has been entirely or substantially made, manufactured or produced outside of the United States.

Neither guidance from the Attorney General nor case law enforcing California's 52-year-old provision previously explained whether qualified claims, such as "Made in America from Imported Parts" or "75 percent Made in America," could comply. The few recorded decisions upheld that merchandise containing even insignificant foreign parts could not say "Made in America," but none of the underlying facts solicited a ruling on qualified claims. Labeling a product as "Made in America from foreign and domestic parts" in California remained an untested approach. This decision provides critical guidance to fill that vacuum.

In *Paz v. AG Adriano Goldschmied*, No. 3:14-cv-01372 (S.D. Cal.), a California resident brought a class action lawsuit alleging that jeans she purchased in 2014 at a San Diego Nordstrom were falsely and deceptively labeled as "Made in U.S.A." even though the thread, rivets and other parts were actually foreign made. The defendant filed a motion to dismiss, arguing that compliance with both FTC and California requirements was impossible, thus giving rise to conflict preemption. In denying the

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motion, Judge Dana Sabraw found that there was no conflict preemption because a product could be labeled with a qualified "Made in America" claim that would comply with both Federal and California law:

If a product is made in the U.S.A. with imported fabric and components, and the label accurately reflects that, then there is no falsity or misrepresentation. The product is what it is described to be, "Made in U.S.A. of imported fabric and components." The words "Made in U.S.A." or "U.S.A." do not make the label inherently misleading, and they must be read in context.

Relying on "common sense," Judge Sabraw went on to explain that:

If the purpose of the false advertising law is to protect consumers from fraud and deceit, it is difficult to see how that purpose is not served, or is affirmatively violated, by a label that accurately describes where a product and all its component parts are sourced and manufactured. Defendants' argument to the contrary, that section 17533.7 prohibits such labels, even when they are accurate and not misleading, strains the purpose of the statute, the FAL in general and common sense.

Armed with this clarification, manufacturers and retailers should consider whether they can make qualified "Made in America" claims for goods in the California market.

#### Lands' End Is the Latest Retailer Hit with 'Made in USA' Suit

One day after Judge Sabraw's ruling, another class action lawsuit regarding California's "Made in America" statute was filed. A California resident filed a putative class action seeking to represent nationwide and statewide classes of Lands' End customers over deceptive labeling of apparel as being produced in the U.S. *Oxina v. Lands' End, Inc.*, No. 3:14-cv-02577 (S.D. Cal.)

The plaintiff alleged that she purchased a tie from a Lands' End outlet website. The online product description said "Made in U.S.A.," but the fabric tag attached to the tie said that it was "wholly made" in China. She claimed that Lands' End engaged in the false advertising in order to charge higher prices.

This class action is the latest in a number of actions against retailers accusing them of deceptive advertising in violation of federal (Lanham Act) and state laws. Similar accusations have been filed against Macy's, Nordstrom, and grocery chain Trader Joe's Co. The Lanham Act causes of actions are certain to be dismissed, as it is well-established that consumers do not have standing to sue under that law. However, the state law claims may be more difficult to fight.

These allegations highlight the importance of tracking not only the sourcing of products but also ensuring that advertising aligns with product labeling. We are seeing a dramatic rise the "Made in America" litigation, so this is emerging as a high-risk set of claims.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

#### Christopher A. Cole

Partner – Washington, D.C.

Phone: +1 202.624.2701

Email: [ccole@crowell.com](mailto:ccole@crowell.com)

**John B. Brew**

Partner – Washington, D.C.

Phone: +1 202.624.2720

Email: [jbrew@crowell.com](mailto:jbrew@crowell.com)