CLIENT ALERTS & INSIGHTS

The FTC Has Not Taken Its Foot Off the Pedal on “Made in the USA” Claims

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The fact that the Federal Trade Commission (“FTC”) has been active over the last two-plus years is far from breaking news. While it has gained tremendous attention for its relatively new interest in certain big issues-e.g., “dark patterns,” consumer privacy, and non-competition agreements-it also has not forgotten about longer-standing priorities. Specifically, the FTC remains steadfast in is pursuit of manufactures and marketers for allegedly misleading customers into believing their products are "Made in USA" when they are largely assembled abroad or contain foreign-made components.

Recent enforcement actions should serve as a reminder to retailers and manufacturers alike to ensure their practices satisfy the FTC’s strict standard.

Background of the “Made in the USA” Rule

For more than 30 years, the FTC has advised against using “Made in USA” labeling claims unless “all or virtually all” of the product’s components are made and sourced domestically. Throughout that time, the FTC has brought numerous enforcement actions against companies for allegedly misrepresenting that products or their components are made domestically. Historically, these enforcement actions were brought under Section 5 of the FTC Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce.”

On July 14, 2021-just months after the Supreme Court in *AMG Capital Management v. Federal Trade Commission* effectively held the FTC lacks authority “to seek, [or] a court to award, equitable monetary relief such as restitution or disgorgement” for violations of Section 5-the FTC codified its guidance by enacting the Made in the USA Labeling Rule (the “Rule”), which provides for civil penalties of up to $43,280 *per violation*.

Under the Rule, an unqualified “Made in the USA” claim may only be used where the following three requirements are satisfied:

1. The product’s final assembly or processing occurred within the United State
2. All significant processing of the item occurred within the United States; and
3. “All or virtually all” 3. of the product’s components are made and sourced within the United States.

The Rule applies to any unqualified claim, express or implied, that a product, service, or any component thereof, hails from, either wholly or in part, the USA.

Recent Enforcement

Since the Rule took effect on August 13, 2021, the FTC has brought a number of actions against retailers and manufacturers concerning their alleged violations of the Rule. These actions have spanned industries-including pharmaceutical, technology, automotive, beauty and cosmetics, and even greeting cards-but have generally targeted the practice of suggesting items are Made in the USA when components of the product were, in fact, foreign-sourced or -manufactured. These actions have generally resulted in six-figure settlements. Two recent actions make clear that the FTC remains interested in Made in the USA claims.

On April 5, 2023, the FTC filed a complaint against North Carolina-based motocross and ATV parts manufacturer Cycra, Inc. ("Cycra"), and its Chief Operating Officer Steven Chadwick James ("James"), alleging that they violated the Rule, and the FTC Act generally, by falsely representing on Cycra's website, social media, and product packaging, that Cycra products are made within the USA. Cycra's advertising championed its products as "[p]roudly designed, developed, and manufactured in Lexington, North Carolina." The FTC determined that these statements were false, however, because Cycra imported at least thirty (30) shipments of parts or accessories from outside the United States, including two shipments of products that were entirely made in Taiwan, but were packaged, or ready to be packaged, with "Made in USA" labels.

Under a stipulated judgment entered on April 18, 2023, Cycra and James agreed to pay $872,557, and to refrain from making further unqualified "Made in USA" claims with regard to their products, unless they can demonstrate that the final assembly or processing-or all significant processing-occurred in the United States using all, or virtually all, United States-sourced components.

It is of particular note that the stipulated judgment requires Cycra to send an email to customers who purchased improperly labeled products, stating:

We're writing to tell you that the Federal Trade Commission, the nation's consumer protection agency, has sued us for making false claims. To settle the FTC's lawsuit, we're contacting you to tell you that the product you bought was not all or virtually all Made in the USA. In fact, the product was imported from Taiwan.

This requirement for proactive "mea cupla" outreach to consumers is a significant departure from past advertising-related consent judgments, and may be a preview of new terms the FTC will require in future settlements.

The Cycra lawsuit came just months after another dispute filed against Instant Brands, LLC ("Instant Brands"), the manufacturer of consumer cookware, such as the Instant Pot, Pyrex, and CorningWare. The FTC claimed that Instant Brands falsely marketed Pyrex glass measuring cups as "Made in USA" and "American as Apple Pie" when they were actually imported from China. Instant Brands agreed to pay a $129,416 judgment. Instant Brands was not required to provide notice along the lines of the Cycra case, which was the first of its kind in this space.

Conclusion

“Made in the USA” continues to be a hot issue that not only catches the attention of enforcers, but also of private litigants looking to file class actions for misrepresentation based on violations of a number of state and federal laws, given the somewhat technical requirements. Just because a product may be assembled in the United States, does not make it “Made in USA” under the law. Nor is it permissible to make that claim unless there is strict compliance with the requirements, which oftentimes require picayune evaluation of a product’s makeup. Companies should consult knowledgeable counsel before making such claims. Benesch has extensive experience in this area and is here to help.

For more information, please contact a member of Benesch's Litigation Practice Group or Retail & E-Commerce industry team.