Tucker Ellis LLP

CLIENT ALERT

CALIFORNIA TO LOOSEN "MADE IN USA" LABELING STANDARD

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California takes action to repair its reputation as a litigation "hell hole" by bringing its "Made in USA" product labeling law in line with the rest of the country.

Effective January 1, 2016, California Business and Professions Code § 17533.7 will feature new provisions that should protect advertisers long targeted by predatory class action lawyers. Historically, § 17533.7 has prohibited "Made in USA" labeling claims where a product "unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside of the United States." That expansive statutory language has been used by certain plaintiffs' lawyers who file false advertising class action lawsuits if anything short of 100% of a product has U.S. origins. Manufacturers typically have been unable to get these cases dismissed at the outset, giving plaintiffs' lawyers tremendous leverage to extract settlements from manufacturers seeking to avoid the cost of litigation and risk of having to pay plaintiffs' attorneys' fees under California's Private Attorney General doctrine.

By contrast, Federal Trade Commission (FTC) guidelines and most other states have allowed "Made in USA" labeling claims even where a small portion of the product is of foreign origin. Specifically, the FTC allows Made in USA claims where "all ***or*** virtually all" of the significant parts and processing of the product are of U.S. origin. In other words, the FTC allows "Made in USA" claims for products containing only a *de minimis*, or negligible, amount of foreign content. There is no bright line rule as to the amount of acceptable foreign content, but final product assembly must take place in the United States. Beyond this threshold, the FTC considers factors such as the portion of the product's total manufacturing costs attributable to U.S. parts and processing and how far removed the foreign content is from the finished product.

This month, California Governor Edmund G. Brown signed Senate Bill 633, amending Business and Professions Code § 17533.7 to include provisions that should better protect manufactures/advertisers. First, the new law exempts U.S. made products containing foreign components if all foreign made parts constitute 5 %or less of the final wholesale value of the product. Second, products are exempt if the manufacturer can show that the foreign components are unavailable in the U.S. and those components constitute 10% or less of the final wholesale value of the product. Finally, the law does not apply to merchandise sold for resale to consumers outside of California so long as the claims comply with the laws of the state where the product is intended to be sold.

California's new law moves the FTC's standard to the forefront as the baseline against which "Made in USA" claims will be measured because "all or virtually all" provides a stricter standard than California's new numerical test. This provides advertisers more options when developing marketing campaigns and manufacturers greater supply chain flexibility. Both can take comfort knowing they can produce products for sale in California that comply with the FTC's guidelines without the fear that the plaintiffs' class action bar will pounce - an especially frustrating experience for non-California based U.S. manufacturers.

Tucker Ellis has historically represented manufactures unfairly targeted under the prior statutory language. We are hopeful the new provisions of § 17533.7 will stem the tide of predatory labeling lawsuits or at least make it easier to get rid of frivolous lawsuits soon after they are filed. In the meantime, manufacturers may want to adopt qualified "Made in USA" claims since the FTC *de minimis* standard does not provide a bright line as to the amount of permissible foreign content. Claims such as "Made in USA of U.S. and imported materials" may be the safest and most flexible approach.

ADDITIONAL INFORMATION

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