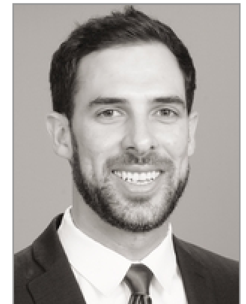
Law360

Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

FTC Must Step Up Policies On False 'Made In USA' Claims

By **Anson Smuts** (March 14, 2019, 3:28 PM EDT)



Anson Smuts

If you saw two identical products sitting on a shelf — one labeled "Made in USA," the other not — which one would you buy? A 2015 survey by Consumer Reports found that 8 in 10 Americans would buy the American-made product.[1] And therein lies the incentive to label a product made in USA, whether it's actually made in the United States or not.

Recent settlements between the Federal Trade Commission and companies using false made in USA labels have drawn scrutiny due to the lack of meaningful consequences. These settlements had "no-fault, no-money" outcomes, where the companies incurred no monetary penalties, findings of liability or admissions of guilt.

While the FTC is mandated to protect consumers and defend the integrity of made in USA labels, such settlements in recent years have established a trend of failing to punish even the most egregious of fraudulent claims and doing little to disincentivize other fraudulent Made in USA labels. A letter sent to the FTC in February 2019 from three U.S. senators questioned the lack of punitive action against false made in USA labels and asked the commission "to do more to protect American manufacturers and consumers."

False made in USA claims have been an issue for decades. To address these false claims, the FTC adopted the "all or virtually all" standard in 1997 to better define the expectations of a product fit to bear the made in USA label. Since 1997, based upon records available on the FTC website, legal action relating to false made in USA claims has been taken against 26 companies. The most common outcome of these cases is a settlement to cease the use of the false claim, but without any admission of guilt.

FTC Chairman Joseph Simons stated before a Senate subcommittee in November 2018 that the FTC receives hundreds of complaints every year regarding improper use of the made in USA label, however, the FTC only pursues legal action against the few companies that do not cease their use of the label after being informed of the false claim.[2] A far more common path pursed by the FTC is a closing letter, wherein the FTC states that a company made a false made in USA claim, the company was informed and subsequently amended the relevant claims. End of story.

The actions of the FTC have begun to force the question as to why monetary remedies are so incredibly rare for false made in USA claims and whether the FTC is doing enough to deter false claims. The letter sent from three U.S. senators to the FTC in February 2019 took aim at FTC's practices, asking how a "no-fault, no-money" settlement serves as a deterrent.[3] In addition, the senators asked whether the use of closing letters, 134 of which could be found on the FTC website, only served to perpetuate weak enforcement.

Such a letter was sent to Detroit-based watch-maker Shinola in 2016 relating to its use of the slogan "Where American is Made" and use of imported parts, which in some cases were judged by the FTC to comprise 100 percent of certain watches.[4] Shinola transitioned its marketing slogan to "Built in Detroit using Swiss and Imported Parts" and no further action was taken.

Shinola is an example where the FTC might be forgiven for their approach of providing guidance rather than pursuing harsher penalties. Although the company strayed into noncompliance, one would question the harm to consumers when the brand is so strongly associated with Detroit. However, matters such as Shinola are not the target of FTC critics who believe enforcement is too weak. The U.S. senators were focused upon egregious examples of false claims in three recent settlements, which related to a hockey puck company, a mattress company and tactical gear company.

The hockey puck company used labels such as "100% American Made!" while having imported more than 400,000 pucks since 2016. The mattress-maker labelled its products "Designed and Assembled in the USA"

when the products were actually imported fully assembled from China. The tactical gear company, among other things, advertised its website as "Featuring American Made products" while 95 percent of its products were imported as finished goods.[5]

The "no-fault, no-money" settlements of the matters in September 2018 reveal some differences of opinion from within the FTC. Some FTC commissioners feel these settlements are adequate due to the potential penalties of future infringement ($40,000 per violation) and the fact that only one of the more than 20 respondents in past settlements has been found in contempt. While this may appease some FTC critics, the glaring issue is that FTC enforcement should deter false claims altogether, not only repeat infringement.

Many critics of these settlements have called for more monetary remedies. In this regard, the FTC appears to have tied its own hands. Under FTC policies, monetary remedies must factor in a "reasonable basis for calculating the amount of a remedial payment."[6] For false made in USA claims, a "reasonable basis" appears to require the existence of a price premium.

An FTC commissioner acknowledged this before a Senate subcommittee in November 2018, stating: "In order for us to assess monetary penalties, in order for us to get a monetary remedy right now, we would have to show a monetary harm and show a price premium and make that demonstration, that can be very difficult to do."[7] In other words, under FTC policies, the only way to calculate monetary remedies is to prove that an infringing product was sold at a higher price than other imported products that were not falsely labeled as American-made.

Indeed, this could be very challenging due to the numerous variables which affect price and the challenges of attributing a price premium solely to a made in USA label. However, the focus upon price premiums is somewhat surprising given that it omits consideration of market share. A preference for American-made products may drive consumers to purchase a slightly more expensive product, but it is very likely to drive consumers to purchase the American-made option when presented with two equally priced products. Therefore, sole reliance upon the existence of a price premium to calculate ill-gotten gains is illogical when the lack of price premium is a likely strategy for an infringer, especially in industries with thin margins.

Fortunately, other tools are available to the FTC beyond monetary remedies. FTC Commissioner Rohit Chopra, in response to the three "no-fault, no-money" settlements in September 2018, stated that moving forward "the Commission should consider remedies tailored to the individual circumstances of the fraud, including redress and notice for consumers, disgorgement of ill-gotten gains, opt-in return programs, or admissions of wrongdoing."[8] While disgorgement or returns are worthwhile considerations, the prospect of admitting guilt and opening the door to civil claims from competitors under a false designation of origin claim under the Lanham Act would surely force potential infringers to think twice about slapping "Made in USA" on a product that does not meet the "all or virtually" standard.

If the FTC is determined to protect the welfare of consumers, changes must be made. Meaningful change will also serve to protect the investment of U.S. companies in their local communities. The commission should amend policy keeping in mind that companies are (generally) rational, acting based upon incentives and consequences. The current trends of FTC settlements do little to push the consequences of false made in USA claims beyond the incentives.

Anson Smuts is a senior associate at O'Keefe.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] https://www.consumerreports.org/cro/magazine/2015/05/made-in-america/index.htm

[2] https://www.jdsupra.com/legalnews/ftc-testimony-signals-possible-increase-81787/

[3] https://www.brown.senate.gov/newsroom/press/release/brown-baldwin-murphy-demand-answers-from-the-ftc-on-weak-enforcement-of-made-in-usa-labeling-standards

[4] https://www.ftc.gov/system/files/documents/closing_letters/nid/160616musabedrockletter.pdf

[5] https://www.ftc.gov/news-events/press-releases/2018/09/hockey-puck-seller-companies-selling-recreational-outdoor

[6]
https://www.ftc.gov/system/files/documents/public_statements/410451/030804policystatementequitable.pdf

[7] https://www.jdsupra.com/legalnews/ftc-testimony-signals-possible-increase-81787/

[8] https://www.ftc.gov/system/files/documents/public_statements/1407380/rchopra_musa_statement-sept_12.pdf

---

All Content © 2003-2019, Portfolio Media, Inc.