

MEMORANDUM

From: Martin J. Hahn
Veronica Colas

Date: July 18, 2018

Re: **Ninth Circuit Issues Ruling on “Made in the USA” Claims in California**

The U.S. Appeals Court for the 9th Circuit issued a favorable decision earlier this year interpreting the California “made in the USA” statute. ^{1/} In a March 2018 unpublished opinion, the court affirmed the dismissal of lawsuits filed over the labeling of dog food and treats as “made in the USA” when they contained tapioca starch, an ingredient derived from a plant not commercially grown in the U.S. The appeals court decision confirms that a plaintiff cannot bring a lawsuit to challenge a “made in the USA” claim under the old, stricter version of the California “made in the USA” statute. Instead, such claims would be governed by the more permissive version of the statute that permits a made in the USA claim when a product contains certain small amounts of foreign-sourced ingredients consistent with one of two exemptions. The case did not address how the claim should be viewed under the Federal Trade Commission (FTC) standard for U.S. origin claims. A copy of the appeals court decision is attached to this memorandum.

By way of brief background, the previous version of the California statute on “made in the USA” claims had prohibited use of the term “made in the USA” on products where the “merchandise or any article, unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside of the United States.” ^{2/} In 2015, the California legislature revised the statute to create two exemptions to this rule, where:

- (1) All articles, units, or parts of the product obtained from outside of the U.S. “constitute no more than five percent of the “final wholesale value of the manufactured product”; or
- (2) The manufacturer can demonstrate that “it can neither produce the article, unit, or part within the United States nor obtain the article, unit, or part of the merchandise from a domestic source” irrespective of cost, and that “all of the articles, units, or parts of the merchandise obtained from outside of the United States constitute not more than 10 percent of the final wholesale value of the manufactured product.” ^{3/}

^{1/} *Fitzpatrick v. Tyson Foods, Inc.*, Case No. 16-17038; *Fitzpatrick v. Big Heart Pet Brands*, No. 17-15047 (9th Cir. March 13, 2018).

^{2/} Cal. Bus. & Prof. Code § 17533.7 (2015).

^{3/} Cal. Bus. & Prof. Code § 17533.7 (2016).

The revisions to the statute became effective January 1, 2016. Plaintiff allegedly purchased the dog food before the amendment of the statute but filed suit January 11, 2016, after the effective date of the revisions.

The appeals court held that the district court properly determined that the current version of California law governs the claims. The holding was based on the California “safe harbor doctrine”, which precludes plaintiffs from bringing claims based on actions the legislature permits. The court explained that because the legislature had adopted a substantial reversal of policy, the new statutory scheme could be applied to pending actions. The decision clarifies that class action challenges to “made in the USA” claims brought under California law will be subject to the current, more permissive version of the California statute.

We note that the FTC maintains its long-held policy that an unqualified U.S. origin claim may only be made where the product is “all or virtually all” made in the U.S. ^{4/} The FTC has explained the term “all or virtually all” means that “all significant parts and processing that go into the product must be of U.S. origin.” In other words, a product labeled with an unqualified “made in the USA” claim, it should contain only a *de minimis*, or negligible, amount of foreign content. The *Fitzpatrick* case involved an interpretation of state law and did not address how U.S. origin claims should be viewed under the FTC standard.

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We will continue to monitor developments related to “made in the USA” and other origin claims. Please contact us if you have any questions regarding this or any other matter.

^{4/} FTC Enforcement Policy Statement on U.S. Origin Claims, Dec. 1, 1997, available at <https://www.ftc.gov/public-statements/1997/12/enforcement-policy-statement-us-origin-claims>.