

# Place-Of-Origin Class Actions, FTC Scrutiny May Rise In 2023

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It has been almost 40 years since Bruce Springsteen first famously celebrated being American-made with his hit "Born in the USA."

From an advertising industry perspective, this song's lasting popularity is no surprise; as advertisers know, "Made in the USA" is often a selling point for American industries.

The [Federal Trade Commission](#) knows this too. In late 2021, the FTC finalized a new rule cracking down on deceptive or misleading unqualified U.S. origin claims.

The rule, which went into effect on Aug. 13, 2021, does not create new substantive requirements for advertisers, but gives the FTC the ability to impose new, substantial monetary penalties for violating the rule.

Following the enactment of this rule, we have seen a rising number of class actions targeting "Made in the USA" and other place of origin claims — a trend we expect to continue in 2023.

This article discusses some such class actions, as well as the FTC's enforcement of its U.S. origin claims rule. The FTC will likely continue, if not increase, its scrutiny of "Made in the USA" claims this year and beyond.

This is therefore a good time for companies who have not yet done so to conduct an internal review and analysis of their unqualified "Made in the USA" claims based on the guidance summarized below.

## **FTC's Rule on Unqualified "Made in the USA" Claims**

The FTC's rule prohibits marketers from making unqualified U.S.-origin claims unless:

- Final assembly or processing of the product occurs in the U.S.;
- All significant processing that goes into the product occurs in the U.S.; and
- All or virtually all ingredients or components of the product are made and sourced in the U.S.

This rule differs from the FTC's prior guidance because:

- The rule enables the commission for the first time to seek civil penalties of up to \$43,280 per violation.
- The rule includes a full or partial exemption if marketers have evidence showing their unqualified "Made in USA" claims are not deceptive. This exemption was not part of the previous policy.
- Unlike the prior guidance, the rule does not make an exception for foreign ingredients unavailable in the U.S. Under the rule, an unqualified U.S.-origin claim can be made only where no more than a de minimis amount of the product is of foreign origin — with no special accommodations if an ingredient in the product cannot be found in the U.S.

Under the prior guidance, advertisers were given more flexibility for products containing raw materials that are "inherently unavailable in the United States."

In the prior enforcement policy, the FTC advised that unless the nonindigenous imported material constitutes "the whole or essence of the finished product" consumers are likely to understand a "Made in the USA" claim means that "all or virtually all of the product, except for those materials not available here, originated in the U.S." In the Made in the USA rule, the FTC stated it sees no support for this exception.

According to the rule and the FTC's press release announcing it, it applies only to labeling.

But the rule also says it encompasses "materials, used in the direct sale or direct offering for sale of any product or service, that are disseminated in print or by electronic means, and that solicit the purchase of such product or service by mail, telephone, electronic mail or some other method without examining the actual product purchased" that include "a seal, mark, tag or stamp labeling a product Made in the United States."

It is unclear how broadly the FTC will interpret this definition. That said, Commissioner Christine S. Wilson, who dissented to the rule, expressed concern that this language could be interpreted to cover stylized marks in online advertising or paper catalogs and potentially other advertising marks, such as hashtags, that contain "Made in USA" claims.

Note that qualified U.S.-origin claims are not covered by this rule, and are still subject to the FTC's prior guidance.

## **FTC Enforcement Efforts Following Enactment of New Rule**

Under the rule, the FTC has brought claims against:

### ***Electrowarmth Products***

Electrowarmth Products LLC is a company that advertised its heated fabric mattress pads as being "Made in USA" and distributed promotional materials with statements like "Made in the USA since 1939" and "made-in-America products."

In its complaint, filed Aug. 30, 2022, the FTC alleged that the advertised products were wholly imported from China. The FTC's complaint also named Electrowarmth's owner, Daniel Grindle, as a defendant.

The parties reached a \$815,809 settlement on Oct. 28, 2022. The settlement prohibits Grindle and Electrowarmth from making country-of-origin claims unless such claims are not misleading, and they have a reasonable basis that substantiates them.

The order also requires the defendants to make certain disclosures about the country of origin of its products that are subject to the Textile Fiber Products Identification Act, and to submit compliance reports.

### ***Axis and ALG-Health***

Axis LED Group LLC and ALG-Health LLC, a personal protective equipment company, represented their merchandise was "Made in USA."

In an inquiry launched by the FTC in conjunction with the [U.S. Department of Justice](#), the FTC alleged that these products were wholly imported or incorporated significant imported materials or subcomponents.

The complaint, filed in the U.S. District Court for the Western District of Ohio in August, named Adam J. Harmon — the president and chief executive officer of both companies — as a defendant. The parties settled for a \$2.8 million redress judgment and \$157,683.37 civil penalty.

In addition, the settlement prohibited Harmon, Axis and ALG from claiming that products are made in the U.S. unless they can show that the product's final assembly or processing — and all significant processing — takes place in the U.S., and that all or virtually all product components are made and sourced in the U.S, and clearly and prominently qualify origin claims.

### ***Lithionics Battery***

Lithionics Battery LLC is a battery company that labeled its batteries as being "Made in U.S.A." along with an image of the American flag, often accompanied by the statement "Proudly Designed and Built in USA."

The FTC's complaint, filed April 12, 2022, alleged the products included imported lithium ion cells and incorporate significant other imported components. The parties settled for a penalty of about \$105,000, which was equal to three times Lithionics' profits attributable to the advertising.

The settlement also required Lithionics to refrain from making unqualified "Made in the USA" claims unless it can show that the product's final assembly or processing — and all significant processing — occurs in the U.S., and that all or virtually all ingredients are made and sourced in the U.S.

Under the settlement, the FTC also required Lithionics to notify affected customers, and to submit compliance reports to the FTC for the next 10 years.

### ***Lions Not Sheep Products***

Lions Not Sheep Products LLC is a clothing company that advertised its clothing and accessories as "Made in USA," along with similar claims including "Made in America," "100% American Made" and "Best Damn American Made Gear on the Planet."

The FTC alleged that, in most instances, the products advertised using these statements consisted of wholly imported shirts and hats with limited finishing work performed in the U.S.

The FTC's complaint also named Lions Not Sheep's owner, Sean Whalen as a defendant. The FTC alleged that between May 10, 2021, through Oct. 21, 2021, Whalen and Lions Not Sheep removed tags disclosing accurate foreign country of origin information and printed "Made in USA" at the neck of the shirts.

In July, the FTC issued a decision requiring Whalen and Lions Not Sheep to pay a \$211,335 penalty, and to cease making deceptive U.S.-origin claims.

### **Consumer Class Actions**

The consumer class action space has seen challenges to similar "Made in USA" claims, including the following suits filed in 2021 and 2022:

- Cristostomo v. [New Balance Athletics Inc.](#) in the [U.S. District Court for the District of Massachusetts](#);
- Jackson v. Genfoot America Inc. in the U.S. District Court for the District of New Hampshire; and
- Shirley v. [Reynolds Consumer Products](#) in the [U.S. District Court for the Northern District of Illinois](#).

The class action Newton v. [R.C. Bigelow Inc.](#) was also filed in September 2022 in the [U.S. District Court for the Eastern District of New York](#), citing Bigelow's claims that its tea bag products are "manufactured in the USA 100%."

Craig v. American Tuna Inc., another class action, targeted American Tuna in April 2022 for claims that its products are "caught and canned" in the U.S.

Land Air Sea Systems Inc. is facing a similar lawsuit, Pinter v. Land Air Sea Systems, in the Eastern District of New York for marketing its GPS devices as "USA manufactured."

### **Other Active "Place of Origin" Lawsuits**

Place of origin claims, of course, are not limited to "Made in the USA." Recent cases have challenged advertising claims that products are made in other places. These include suits against:

#### ***La Fermiere***

Manier v. La Fermiere Inc., a class action filed in the [U.S. District Court for the Central District of California](#) on Oct. 27, 2022, alleges La Fermiere — a yogurt and desserts company that labeled its yogurt as "Naturally French" — actually has its yogurt made in New York, despite its marketing.

#### ***Garner Foods***

White v. T.W. Garner Food Co., also filed in the Central District of California, alleged on Sept. 12, 2022, that the sauce manufacturer's "Texas Pete" hot sauce is actually manufactured in North Carolina.

### ***Barilla***

The [U.S. District Court for the Northern District of California](#) denied [Barilla America Inc.](#)'s motion to dismiss on Oct. 17, 2022, in *Sinatro v. Barilla*, which alleged that the pasta company — that holds itself out as "Italy's #1 brand of pasta" on its product packaging — has its products made in the U.S.

The court found that the product packaging "supports a reasonable inference that the products were made in Italy from Italian ingredients." Factors weighing in the plaintiffs' favor included the colors of the Italian flag on product packaging and a website that "markets the Barilla brand and company as undeniably Italian."

### ***Icelandic Provisions***

The plaintiff in *Steinberg v. Icelandic Provisions Inc.* alleged in the Northern District of California in January 2022 that Icelandic Provisions' packaging, which states "Traditional Icelandic Skyr" and "Icelandic Provisions," misrepresents that the product — a traditional Icelandic cultured dairy product called skyr — is made in Iceland.

The district court granted Icelandic Provisions' motion to dismiss, finding that the product's label would not mislead a reasonable consumer.

The court reasoned that the label "only contains the brand name, a nonspecific painted image (which does not refer to Iceland), and the words 'traditional Icelandic' on the package."

Furthermore, the plaintiff's claim of deception was weakened by the fact that the product's cultures "are in fact from Iceland." The plaintiff has appealed this decision to the Ninth Circuit.

### ***Olé Mexican Foods***

In the class action *Hardy v. Olé Mexican Foods Inc.*, the complaint alleged in the [U.S. District Court for the Western District of New York](#) in December 2021 that Olé, a company that makes and sells tortillas under the brand name La Banderita, misled consumers to believe that the company's tortillas are made in Mexico when, in reality, they are produced in New York.

Specifically, the plaintiff cited references to the Mexican flag on pack, the phrases "A Taste of Mexico" and "Authentic," and the brand name itself. Olé was successful on its motion to dismiss.

Despite finding that the messaging on the front of the package was potentially ambiguous, the court ultimately dismissed the plaintiff's claims because the back side clearly reads "MADE IN U.S.A." The court concluded that "the packaging as a whole is clear about the country of manufacture — the United States."

### ***King's Hawaiian***

In deciding whether a complaint states a plausible claim that reasonable consumers are likely to be deceived, courts tend to distinguish between claims explicitly touting that a product has been "made in" a certain location versus claims that merely tend to evoke a certain locale.

For example, in a recent case involving King's Hawaiian rolls, *Hodges v. King's Hawaiian Bakery West Inc.*, the Northern District of California found in November 2021 that a mere reference to Hawaii, even when combined with imagery that evoked references to Hawaii, did not deceive reasonable consumers into thinking that King's Hawaiian made its rolls in Hawaii.

When evaluating product claims for litigation risk, advertisers should keep in mind this distinction between claims that refer to or evoke imagery of a location, and claims that state the product was sourced in a location. We will continue to watch this space for further developments.

### **Other Developments in U.S.-Origin Labeling**

This Made in the USA rule is not the only significant development surrounding U.S.-origin claims.

Immediately following the FTC's decision to strengthen regulations surrounding these claims, U.S. Secretary of Agriculture Tom Vilsack released a statement indicating the U.S. [Department of Agriculture](#) intends to complement the FTC's efforts by "initiating a top-to-bottom review of the 'Product of USA' label" to "determine what that label means to consumers."

The review appears to be ongoing. This past February, the USDA announced:

A web-based survey/experiment to help gauge consumer awareness and understanding of current 'Product of USA' labeling claims on meat (beef and pork) products and consumer willingness to pay (WTP) for meat product labeled as 'Product of USA' using the current and potentially revised definitions of the claim.

And more recently, the [U.S. House of Representatives](#) and Senate have considered proposed legislation that would limit "Product of USA" labels to beef products that are born, raised and slaughtered in the U.S.

In 2021, President Joe Biden issued an executive order directing the federal government to "maximize the use of goods, products and materials produced in, and services offered in, the United States," advising that "[t]he United States Government should, whenever possible, procure goods, products, materials and services from sources that will help American businesses compete in strategic industries and help America's workers thrive."

As a result, "Made in the USA" claims may now be more important to marketers than ever. But given the FTC's Made in the USA rule, its potential effects on consumer class actions and recent developments in legislation and USDA regulation, the consequences of making an unsupported and unqualified "Made in the USA" claim may also be greater than ever.

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