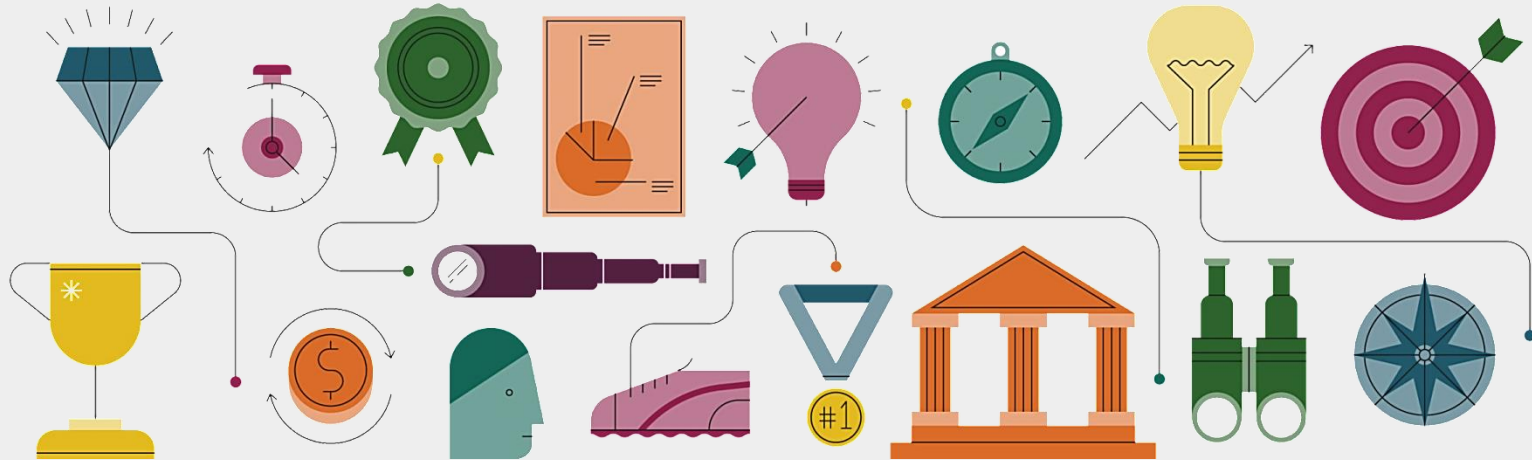


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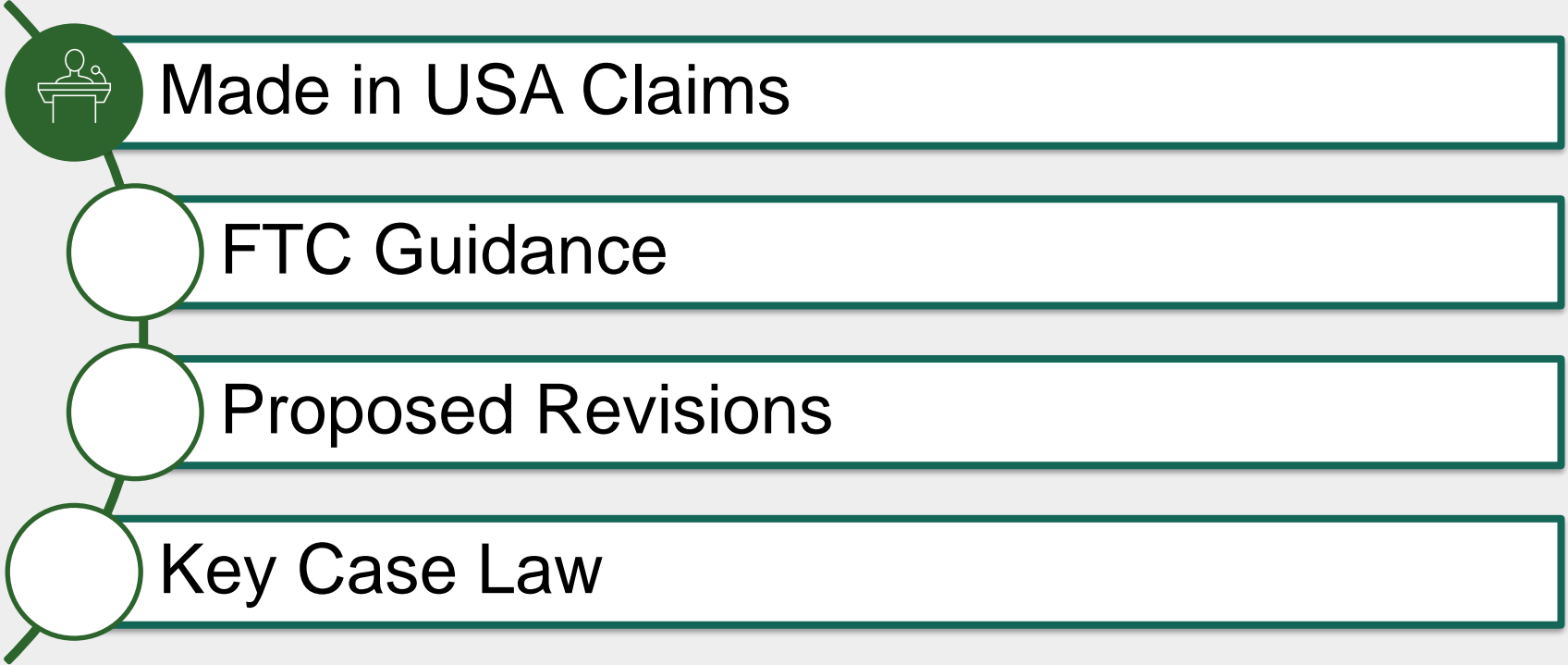
Guidance and Recent Case Law Regarding “Made in the USA” Claims

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August 11, 2020



Agenda



Made in USA Claims

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 Goldtouch[®]
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MADE IN THE U.S.A. WITH IMPORTED FABRICS AND MATERIALS	

25

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 -Happy Puppies-

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 Puppy Bites**

A Natural Source of DHA | Perfect for Training

GRAIN FREE Lamb & Salmon Recipe

Contains No: Corn, Soy, or Artificial Colors or Flavors

MADE IN USA WITH FINEST QUALITY SOURCED INGREDIENTS

NATURAL PUPPY TREATS NET WT 3 OZ (85 g)



J-B WELD

HIGHER STRENGTH FORMULA
 5020 PSI

J-B Weld[™]

Original Cold-Weld[™] Formula
 Steel Reinforced
 Epoxy

Strength 5020 PSI
 Set Time 4-6 Hours
 Cure Time 15-24 Hours
 Cure Color Dark Gray

Easy to Use

Works on Multiple Surfaces

Our Strongest Epoxy

Made in USA

Great For:

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- Automotive
- Plumbing
- Marine
- Crafts & More

Espanol al reverso

Metal • Wood • Plastic • Tile • PVC • Ceramic
 • Fiberglass • Concrete & More



Made in USA and Other US Origin Claims

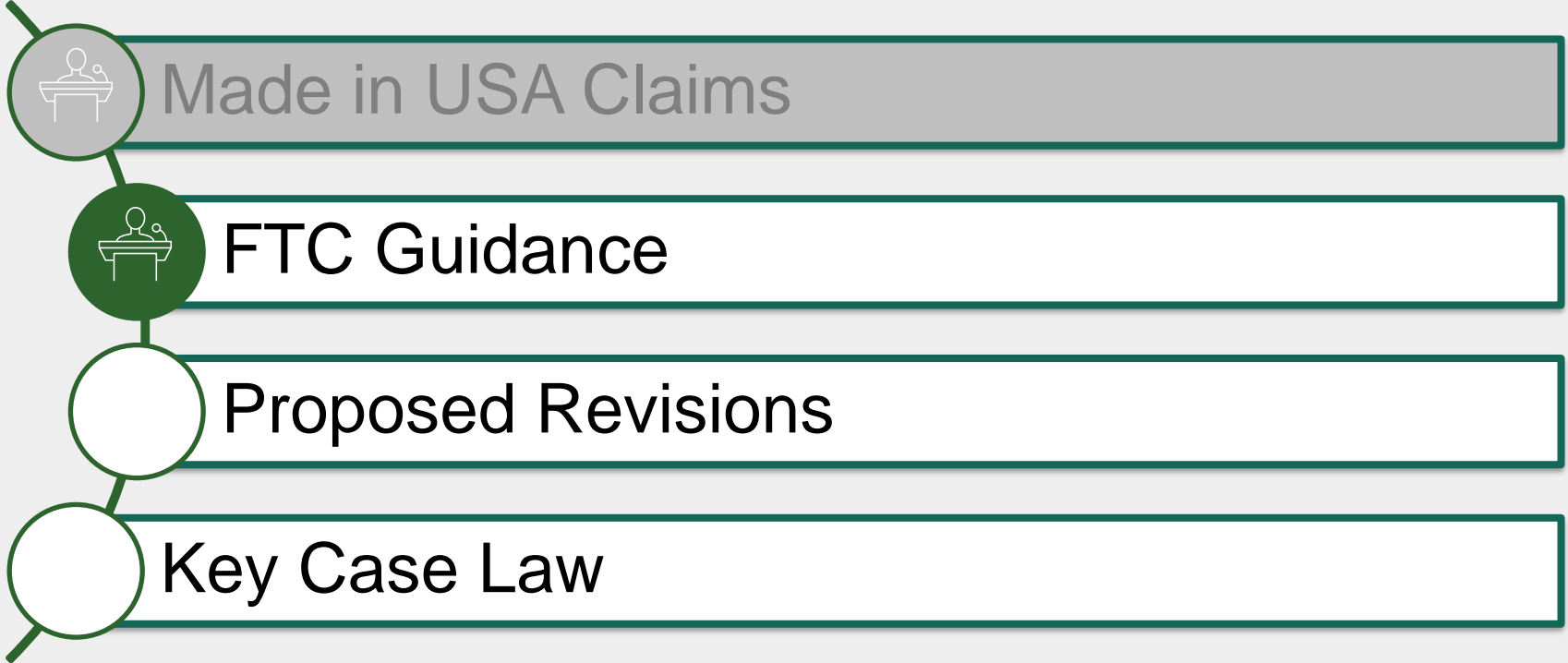
- “Made in USA” claims and similar claims (e.g. Made in America, USA Made, American Made) may be **express** or **implied** using language or symbols of geographic references (e.g., reference to cities, maps, factories, etc.).
- Misleading Made in USA and similar claims carry substantial risk and have been at the center of numerous district court lawsuits and National Advertising Division (“NAD”) and Federal Trade Commission (“FTC”) proceedings.

**National Advertising
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Unqualified Made in USA Claims

- **Made in USA/American Made** and similar broad claims (without any disclaimers) require that “**all or virtually all**” of the parts and manufacturing of a product are of U.S. origin. The brand must have a “reasonable basis” to make an unqualified claim, **substantiated** by “competent and reliable” evidence **before** making the claim.
- **Requirements for “all or virtually all” standard**
 - **1) Final assembly and/or processing must take place in the U.S.**
 - Must be last “*substantially transformed*” in the U.S.: this means the ingredients were combined to make the final product and it was packaged in the U.S.
 - **2) All significant PARTS** (i.e. ingredients, raw materials, components, packaging) and **MANUFACTURING** (i.e. processing, assembly, labor, finishing) are from **the U.S.**

“All or Virtually All” Standard

How do you determine if *all significant* parts and manufacturing/processing are from the U.S.?

- **Step #1**: Calculate the product’s **total manufacturing costs** (also called “**content**”)
 - **Total manufacturing costs** are the cost of goods sold or inventory costs of finished goods. This usually includes:
 - the total cost of all manufacturing materials;
 - direct manufacturing labor; and
 - manufacturing overhead

“All or Virtually All” Standard

- **Step #2:** Determine the % of **content** (i.e., **total manufacturing costs**) attributable to **U.S. v. foreign costs**
 - No bright line rule as to % threshold, but below are general rules of thumb:
 - **If** % of foreign content is **5% or more** → do not make unqualified Made in USA or similar claim
 - **If** % of foreign content is **less than 5%** → move to **Step #3**
 - Consider U.S. suppliers, as well as suppliers further back in the supply chain
 - Obtain substantiation from **all direct** U.S. suppliers providing the breakdown of manufacturing costs for U.S. and foreign origin content
 - FTC gives general guidelines to look back far enough in the supply chain that a **reasonable marketer** would expect that it had accounted for **any significant foreign** content

“All or Virtually All” Standard

- **Step #3**: Determine whether the 5% or less foreign content is still a **significant** part of the product.
 - If content is called out on packaging → should qualify Made in USA claim
 - e.g., Vitamin C touted on FOP or in ads; Vitamin C is less than 5% total content → may use “Made in USA with U.S. and foreign ingredients”
 - If content is “integral” to use of product → should qualify Made in USA claim
 - e.g., shampoo bottle cap less than 5% total content, but part is essential for use; may say “Made in USA with foreign bottle cap”
 - If content is otherwise a noticeable or essential component of the product even if less than 5% of total content → should qualify Made in USA claim
 - e.g., the vinegar in the product is less than 5% total content, but is essential for the taste or texture of the product

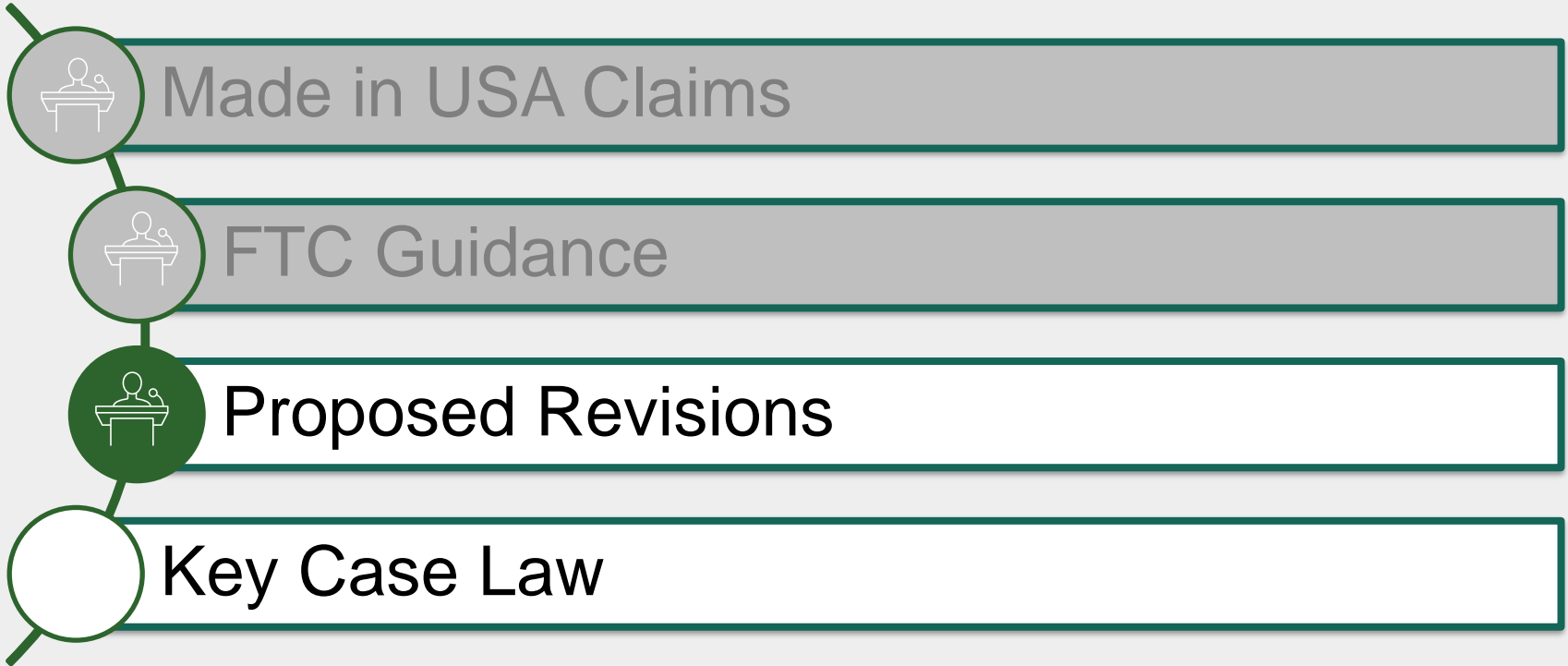
Qualified Made in USA Claims

- When parts and processing are not “all or virtually all” from the U.S., a brand **must qualify its claim.**
- **Requirements:**
 - Must use a **true** and **substantiated** qualifier or disclaimer
 - Qualifier/disclaimer must be **sufficiently clear, prominent, and understandable** to prevent deception; should be in **close proximity** to claim
 - For “made in”/“manufactured in” claim, **final assembly or processing must take place in the U.S.**
 - Should state there are **foreign sourced ingredients** (e.g. “Made in USA from foreign ingredients”)
 - If foreign content is de minimis or negligible, refer to guidance on unqualified claims
 - **Use clear qualifying terms:** “*packaged in the U.S.*”; “[*part*] *made in U.S.*”; “*Designed in USA — Made in Finland*”; “[*Brand*] *founded in the U.S.*”
 - **Avoid vague, broad terms:** “*created in the U.S.*”, “*critical components made in U.S.*”— could convey unsupported claim entire product is made in USA

Qualified Made in USA Claims

- **Example:** Foreign parts (components/ingredients); final processing in the U.S.
 - Ok to use: **“Made in USA from imported components”**
- **Example:** Foreign and U.S. parts (components/ingredients; final processing in the U.S.)
 - Potentially ok to use: **“Made in USA of U.S. and imported parts”**
 - If value of U.S.-made ingredients/components is negligible/incidental compared to value of all the components, a claim “Made in USA of U.S. and imported ingredients” is deceptive. But a claim “Made in U.S. from imported ingredients” would not be deceptive.

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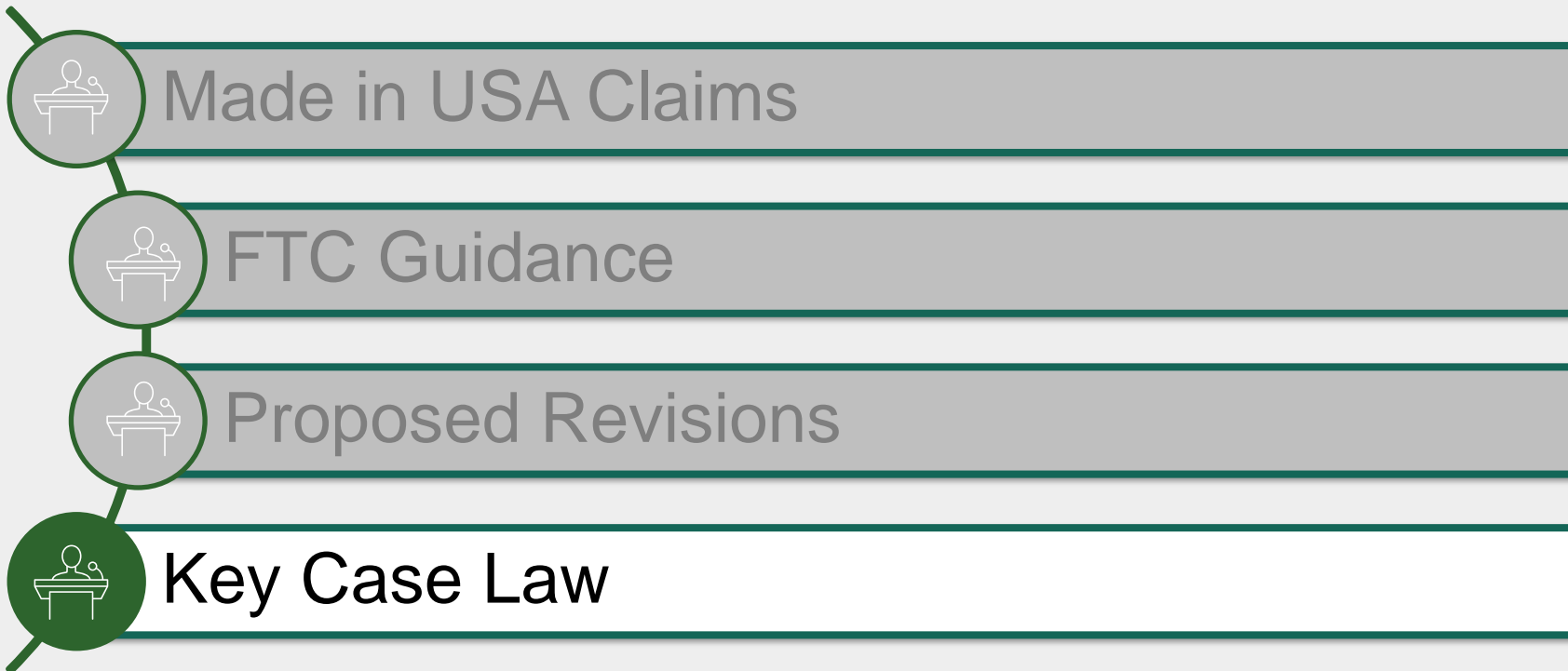


FTC's Proposed Made in USA Labeling Rule

- In July 2020, the FTC proposed a new rule to prevent unfair or deceptive acts or practices relating to Made in USA labeling which prohibits the following conduct:
 - “In connection with promoting or offering for sale any good or service, in or affecting commerce . . . it is an unfair or deceptive act or practice . . . to label any product as Made in the United States unless the final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States.”

16 C.F.R. § 323.2

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Recent FTC Cases

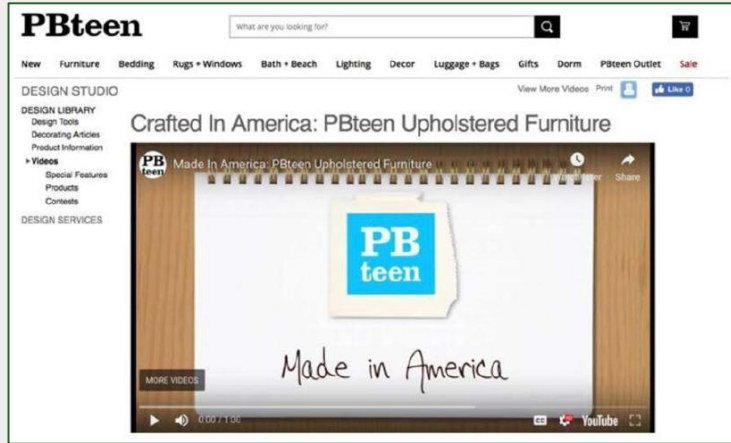


In re Williams-Sonoma, Inc., FTC File No. 202-3025 (2020)

- Claims at issue:
 - Williams-Sonoma advertised that numerous products were “Made in USA” through unqualified claims (e.g. “Crafted in America”, “Made in the USA”).
- It further alleged the products were wholly imported or contained significant imported materials or components—making Williams-Sonoma’s unqualified “Made in USA” claims false and deceptive.
- The complaint did not specify what percentage of components or manufacture allegedly occurred outside the U.S.



In re Williams-Sonoma, Inc., FTC File No. 202-3025 (2020)



- The terms of the proposed consent order prohibit Williams-Sonoma from making unqualified “Made in USA” or USA-origin claims for any product.
- Further, any qualified claims must clearly and conspicuously include a disclosure about the extent to which the product was produced or processed in a foreign country.
- Finally, as part of the proposed settlement, Williams-Sonoma was ordered to pay the FTC \$1 million.

In re Sandpiper of California, FTC File No. 182-3095 (2019)

- Claims at issue:
 - “U.S. Made By S.O.C.” (Sandpiper of California)
 - “Featuring American Made products developed and manufactured by our sister company, PiperGear USA.”
- The FTC alleged that more than 95% of Sandpiper’s products are imported as finished goods, and approximately 80% of PiperGear’s products either are imported as finished goods or contain significant imported components.
- Additionally, the FTC alleged that in some wallets imported as finished goods, the companies hid truthful country-of-origin information on the back of tags, and inserted cards that prominently displayed false U.S.-origin claims.



In re Sandpiper of California, FTC File No. 182-3095 (2019)

- The parties were prohibited from making unqualified U.S.-origin claims, unless the products' final assembly or processing -- and all significant processing -- take place in the US, and all or virtually all ingredients or components of the product are made and sourced in the US.
- Any qualified Made in USA claim **must include a clear and conspicuous disclosure** about the extent to which the product contains foreign parts, ingredients, and/or processing.
 - To claim that a product is assembled in the US, the product must be last substantially transformed in the US, its principal assembly takes place in the US, and US assembly operations are substantial.
- The order also prohibits the parties from making untrue, misleading, or unsubstantiated origin claims in marketing materials about any product.

Recent Federal District Court Cases



Kimberly Banks et al v. R.C. Bigelow, Inc., et al, Case No. 2:20-cv-06208 (C.D. Cal. July 13, 2020)



- Claims at issue:
 - "Manufactured in the USA," "100% American Family Owned," and "America's Classic."
- In this putative class action, consumers allege that the tea company falsely and deceptively advertised its tea products as made in the United States, when the tea is sourced and processed overseas.
 - The tea they purchased included black, green, and oolong tea leaves, derived from a plant grown by tea plantations and processed by tea processing plants in Sri Lanka and India.
- This case is ongoing.

Dashnaw v. New Balance Ath., Inc., 2019 U.S. Dist. LEXIS 126183 (S.D. Cal. July 29, 2019)



New Balance And Manufacturing In The US

We're proud to be the only major company to make or assemble more than 4 million pairs of athletic footwear per year in the USA, which represents a limited portion of our US sales. Where the domestic value is at least 70%, we label our shoes Made in the USA.

- Claim at issue: “Made in the USA”
- Consumers alleged that New Balance mischaracterized its line of “Made in USA” sneakers because as little as 70% of the product was made with domestic components or labor.
- The claim appeared in advertising, on the shoes, and on the shoe boxes. New Balance disclosed in some places that its “Made in USA” sneakers contain a domestic value of 70% or greater but alleged that a “Made in USA” claim appeared in places like the shoe and the shoe box.

***Dashnaw v. New Balance Ath., Inc.*, 2019 U.S. Dist. LEXIS 126183 (S.D. Cal. July 29, 2019)**

- The parties initiated settlement discussions and proposed a settlement of \$750,000, with \$215,000 going to settlement administration costs and compensation and \$535,000 to consumers, with each consumer receiving up to \$10.
- The court initially denied the proposed settlement stating that the proposed amount was not enough for the estimated 1 million class action members.
- Ultimately, the court determined the proposed settlement amount was reasonable and approved.

Benshot, LLC v. Lucky Shot USA LLC, 2019 U.S. Dist. LEXIS 21343 (E.D. Wis. Feb. 8, 2019)

- Claim at issue:
 - Defendant made unqualified claims that its line of shot, whiskey, pint, and wine glasses that the products were “Made in the USA”
- Plaintiff alleged that the glass portion of the glasses was made in China and that the whiskey glass packaging stated that the glass and packaging were made in China, but that defendant advertised its products online as being “Made in the USA.”



***Benshot, LLC v. Lucky Shot USA LLC*, 2019 U.S. Dist. LEXIS 21343 (E.D. Wis. Feb. 8, 2019)**

- The court found plaintiff stated a plausible claim that defendant's unqualified statements were literally false and constituted false advertising.
- Further, plaintiff's allegation that the packaging states that the glass and packaging were made in China does not mean that defendants' other commercial representations were sufficiently qualified.
- The court denied defendant's motion to dismiss:
 - It concluded that "[i]f [plaintiff's] allegations are true, then the second and third factors under the FTC standard—proportion of U.S. manufacturing costs and remoteness of foreign content—seem to weigh against a finding that Lucky Shot USA's embedded glasses are "all or virtually all" made in the United States."

Sabo v. Wellpet, LLC, 250 F. Supp. 3d 332 (N.D. Ill. 2017)



- Claim at issue:
 - Wellpet claimed its pet food was “Made in USA.”
- Plaintiff alleged that vitamin C in the form of ascorbic acid has not been produced in the US since 2009.
- Further, he and other class members place a premium on American-made products and have been damaged by defendant’s deceptive labeling.

Sabo v. Wellpet, LLC, 250 F. Supp. 3d 332 (N.D. Ill. 2017)

- Defendant argued that because vitamin C is unavailable from any United States source, its pet food products may properly be labeled "Made in USA" under the FTC's policy.
 - The FTC explains that "consumers are likely to understand that a 'Made in USA' claim...means that all or virtually all of the product, except for those materials not available here, originated in the United States."
- The court granted defendant's motion to dismiss.
 - Plaintiff failed to state viable claims under the state consumer fraud act and for unjust enrichment.
 - He did not claim that defendant charged more for its pet food products because they were (supposedly) "Made in the USA," nor did he claim that comparable pet food products that lacked domestic-source designations were less expensive.

Hofmann v. Dutch, Ltd. Liab. Co., 2017 U.S. Dist. LEXIS 30566 (S.D. Cal. Mar. 2, 2017)

- Plaintiff alleged that she bought a pair of Current/Elliott jeans bearing a Made in the U.S.A. label when, in fact, the jeans contained foreign-made buttons, rivets, zipper assembly, thread, and/or fabric.
- The court described the dispute as whether the jeans bought by class members were comprised of foreign-made parts and whether those parts were legally significant.



***Hofmann v. Dutch, Ltd. Liab. Co.*, 2017 U.S. Dist. LEXIS 30566 (S.D. Cal. Mar. 2, 2017)**

- The parties chose to settle before the court could rule on any dispositive motions or factual disputes, so plaintiff moved for preliminary approval of class action settlement.
 - Defendant voluntarily agreed to revise its label.
- Initially, the court noted that it considered plaintiff's case to be strong:
 - "Provided that Plaintiff can set forth evidence proving that the zippers, buttons, and other parts of the jeans were foreign-made, Plaintiff's chances of prevailing under California's false advertising laws would be high."
- Balancing the remaining factors, the court determined settlement was favored, but found the proposed settlement awards to be deficient and denied the motion.

A.P. Deauville, LLC v. Arion Perfume & Beauty, Inc., 2014 U.S. Dist. LEXIS 173073 (N.D. Cal. Dec. 12, 2014)

- Claims at issue:
 - Qualified claim: Plaintiff claimed its Power Stick brand deodorant was “Made in the U.S.A. of U.S. and/or imported ingredients”, which defendant claimed was false or misleading
 - Unqualified claim: “manufactured in the USA”
- Defendant alleged plaintiff’s use of both qualified and unqualified statements created “an inference that plaintiff's products contain more than a de minimis amount of foreign content, which would require sufficient qualification in order to avoid consumer confusion.”



***A.P. Deauville, LLC v. Arion Perfume & Beauty, Inc.*, 2014 U.S. Dist. LEXIS 173073 (N.D. Cal. Dec. 12, 2014)**

- The court determined that “[e]ven if Plaintiff was forced to provide all available information regarding its Power Stick ingredients, neither the parties nor the Court would be in a position to determine whether there was sufficient foreign content to satisfy the FTC’s standard.”
- “Whether Plaintiff is in compliance with FTC policy, and whether consumers are deceived as a result, is therefore not provably false.”
- “Defendants suggest that Plaintiff’s U.S. origin statements are misleading when examined in the context of the FTC’s policy on U.S. origin statements, but whether Plaintiff’s statements comply with FTC policy cannot be proven in this Court.”

Recent NAD Decisions

**National Advertising
Division (NAD)[®]**

Of **BBB National Programs, Inc.**

Illinois Tool Works Inc. vs J-B Weld Company, LLC, NAD Case #6230 (Dec. 10, 2018)



- Claims at issue:
 - J-B Weld’s claimed its products are “Made in USA” and that “they have always been made in the USA”
- Challenger asserted that various product components (e.g., tubes, caps, syringes, etc.) were of foreign origin.
- J-B Weld argued its products fully complied with the FTC’s “Made in USA” standard and noted that although some components of its epoxy and adhesive products were of foreign origin, they were merely a part of the product packaging and should not be considered the actual epoxy or adhesive product.

Illinois Tool Works Inc. vs J-B Weld Company, LLC, NAD Case #6230 (Dec. 10, 2018)

- The NAD recommended that J-B Weld discontinue claims that its epoxy and adhesive products were “Made in USA” and that “they have always been made in the USA.”
- It found that J-B Weld’s product components, which were of foreign origin, were integral to the customer’s ability to use the products properly.
- With respect to J-B Weld’s claim that its products “have always been made in the USA,” the NAD found that there was no information or context that limited that claim to the ingredients and processing of the epoxies and adhesives, and not the product components as well.

Capillus, Inc., NAD Case No. 6107 (Aug. 18, 2017)

- Claim at issue:
 - Unqualified claim that cap containing lasers for hair growth was “Made in the USA”
- Capillus claimed that U.S. Customs and Border Protection did not require the imported lasers to have a foreign country-of-origin mark but produced no proof of this.
- FTC guidance makes clear that it considers factors in addition to those that Customs considers when determining if a product can be advertised or labeled as “Made in USA.”



Capillus, Inc., NAD Case No. 6107 (Aug. 18, 2017)

- The NAD determined that the unqualified “Made in the USA” claim was not supported because the lasers—“one of the most significant components of the product”—were manufactured outside of the U.S.; therefore, the Capillus 82 was not all or virtually all made in the U.S.
- The NAD recommended that Capillus discontinue its unqualified express “Made in the USA” claims.

Gerber Prods. Co. v. Nurture, Inc., NAD Case No. 5710 (May 7, 2014)

- Claim at issue:
 - Baby food products advertised as “made in the USA”
- Challenger alleged that many products marked as made in the USA “contain significant ingredients that were produced abroad.”
- Nurture Inc.’s FAQs stated that its bananas and mangos come from South America, quinoa from Turkey, and amaranth and salba from South America, but products made with each of these ingredients are marked as made in the United States.



Gerber Prods. Co. v. Nurture, Inc., NAD Case No. 5710 (May 7, 2014)

- Before the NAD weighed in, Nurture Inc. stated that, where appropriate, it would qualify its claims to indicate that the products are made in the USA from domestic and/or imported ingredients.
- The NAD determined the claims that the baby food products were “made in the USA from domestic and/or imported ingredients” were “consistent with the “Made In USA” standard articulated by the Federal Trade Commission (FTC).”

Stihl Inc., NAD Case No. 5634 (Sept. 24, 2013)

- Claims at issue:
 - “All these, built in America.*” with “*A majority of STIHL Products are built in the United States from domestic and foreign components.”
- Stihl produced data that 55% of component parts were manufactured in U.S., 45% were sourced from foreign suppliers, and that many parts were “actually constructed from raw materials in its Virginia Beach facility.”
- The components it purchased “are assembled with its self-produced components in Virginia Beach, and are “built” into finished units for sale in the United States.”



Stihl Inc., NAD Case No. 5634 (Sept. 24, 2013)

- The NAD determined the advertiser's evidence demonstrated the products contained significant domestic content and processing, such that the advertiser could make a properly qualified "Made in the U.S.A." claim.
- NAD found that the language, "All These, Built In America* *A majority of STIHL Products are built in the United States from domestic and foreign components" sufficiently conveyed that the advertised products were manufactured in the United States from components that were not completely domestic.
- However, NAD recommended that the advertiser modify its claim to make the disclaiming language clear and conspicuous by making it substantially larger and placing it in close proximity to the triggering claim, "Built in America."

Your Presenters



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Anna's practice focuses on trademark and false advertising litigation. She serves key roles in managing extensive trademark enforcement portfolios for well-known brands, including consumer goods. Anna was selected as a Managing Intellectual Property (MIP) Rising Star and a Legal Media Group Americas Rising Stars award winner for copyright and trademark work in 2019.

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Margaret focuses on contemporary issues in U.S. and global copyright, advertising, and trademark law. She leads litigation teams defining the scope of copyright protection, trademark infringement, and advertising substantiation on traditional and emerging platforms. She provides legal counsel across all media, in all facets of branding, advertising, and marketing.

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Questions?

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