LOS ANGELES
Daily Journal
www.dailyjournal.com
MONDAY, NOVEMBER 3, 2014

PERSPECTIVE

'Made in the USA' may land a lawsuit

By Collin P. Wedel, Amy Lally and Jennifer Ratner

Do you know where your jeans have been? The answer to that question — which lies at the heart of a pair of class actions pending in the U.S. District Court for the Southern District of California, *Paz v. AG Adriano Goldschmied Inc.*, 14-1372 (S.D. Cal., filed June 4, 2014) and *Clark v. Citizens of Humanity*, 14-1404 (S.D. Cal., filed June 9, 2014) — is more complicated than you might think.

David Paz, the named plaintiff, filed a class action against jeans manufacturer AG Adriano Goldschmied Inc. and retail giant Nordstrom Inc., bringing claims under California's trifecta of consumer protection statutes — the Consumers Legal Remedies Act, Unfair Competition Law, and False Advertising Law. He alleges that the defendants mislead consumers by labelling their jeans as "Made in the U.S.A" even though the fabric, threads, buttons and rivets sometimes come from foreign countries. These claims rest on Business and Professions Code Section 17533.7, which makes it unlawful for manufacturers to represent their products as "Made in the U.S.A." (or a similar phrase to the effect) if "any article, unit, or part thereof has been ... substantially made ... outside of the United States."

Paz also alleges that some of the defendants' qualified labels (those noting that the product is also made with imported fabrics) mislead consumers by not fully disclosing the extent and source of the foreign-made components.

Although defendants in more-traditional manufacturing contexts have been hit with similar complaints in the past several years, the allegations in Paz as to labelling practices represent a new front in this context. And, as is apparent from the parties' arguments, laws that turn on the provenance of component "articles" and "units" are an awkward fit (pun intended) for things like fabric dyes and decorative pocket rivets.

But these allegations are in tension with preexisting federal laws governing apparel and textile manufacturing, as the defendants argued in their motion to dismiss in September. This further complicates plaintiffs' attempts to apply Section 17533.7 to the fashion industry.

According to the defendants, the Federal Trade Commission (FTC) Act, 15 U.S.C. Section 45a and the Textile Fiber Products Identification Act, 15 U.S.C. Section 70, permit the use of "Made in the U.S.A." labeling on products that include some foreign-sourced component parts, so long as "virtually all" of the finished product is *made* in the U.S. Sometimes, defendants contend, those acts mandate "Made in the U.S.A." language on garments like the jeans, which are alleged to be *manufactured* in the U.S. *from* foreign components.

Given this apparent overlap, the defendants argue that California's statute is preempted by federal law under the "conflict preemption" doctrine, which applies where simultaneous compliance with state and federal law is impossible or would stand as an obstacle to Congress' purposes. Two other forms of preemption, express preemption (where a statute expressly forbids state action) or field preemption (where Congress has placed an entire subject in the hands of federal courts or agencies) are not at issue.

But the plaintiffs contend that California's consumer protection laws fully harmonize with the federal statutes. They point to the FTC Act, which contains a savings clause meant to avoid any preclusive effect it might have against states enacting their own labeling laws. Accordingly, the plaintiffs argue, preemption should come into play only if simultaneous compliance with both California and federal laws is impossible. Here, they say, the manufacturers could easily have complied with both sets of standards by labeling jeans with a fully curative qualifying statement identifying which components were not made in America, such as "Made in the U.S.A. with foreign made fabric, buttons, zippers, and thread."

On Oct.27, the district court sided with the plaintiffs and held that, because "it would not be impossible for Defendants to comply with both" federal and state law, the claims are not barred by the doctrine of conflict preemption. This is so, the court explained, even though it would likely prove "burdensome" to defendants since their labels would be lawful in every state except California. The case is now proceeding to the class certification stage.

The court's holding does not settle this issue. A near-identical complaint was filed by the same attorneys against Citizens of Humanity and Macy's on behalf of Louise Clark — the motion to dismiss in that case is still pending — and it's likely that the apparel industry will be the subject of repeated challenges. Future defendants will continue to have strong arguments to make at the pleading stage to either wholly bar or at least trim plaintiffs' claims, especially given the heightened pleading standard applicable to fraud-based claims.

These proceedings should serve as a warning to manufacturers that compliance with federal laws governing textiles may not preclude all California consumer complaints going forward.

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