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Chapter 238: Made in the U.S.A.? Relaxing California's Standard for Claims of Origin

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Code Section Affected
Business and Professions Code § 17533.7 (amended).
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I. INTRODUCTION

American-made products continue to gain popularity as consumers make a lifestyle choice to buy domestically.[1] In fact, "four out of five consumers" notice "Made in America" claims on product packaging when they are shopping.[2] The trend has become so popular that America's largest retailer, Walmart, made a commitment in 2014 to purchase "$250 billion in American-made products by 2023."[3] This commitment will likely resonate with consumers considering that eight in ten Americans prefer to buy American-made products as opposed to imports, according to a May 2015 *Consumer Reports* survey.[4] More than half of those surveyed stated that they would pay more money to buy American-made goods.[5] Despite the increasing demand for domestic products, California previously maintained a higher standard than the federal government for claims of origin for products sold in California.[6] In fact, California was the only jurisdiction that required products bearing a "Made in the U.S.A."[7] label to be composed of 100 percent American-made components.[8] This bright-line rule demonstrated California's goal to ensure that consumers receive exactly what they think they are paying for.[9] It also reflected a patriotic pledge to support American-made products over foreign competitors.[10]

Chapter 238 updates California's claim or origin protection laws, unchanged since 1961.[11] Today, many manufacturers source negligible amounts of products from foreign countries, but otherwise primarily make and assemble those

1. Ian P. Murphy, *"Made in the USA" Sells Again*, RETAILDIVE (June 17, 2015), *available at* http://www.retaildive.com/news/made-in-the-usa-sells-again/400685/ (on file with *The University of the Pacific Law Review*).

2. MADE IN THE USA BRAND, LLC, https://www.madeintheusabrand.com/about/ (last visited Sept. 27, 2015) (on file with *The University of the Pacific Law Review*).

3. *Top 100 Retailers Chart 2014*, NAT'L RETAIL FED'N, https://nrf.com/2014/top100-table (last visited Sept. 2, 2015) (on file with *The University of the Pacific Law Review*).

4. Murphy, *supra* note 1.

5. *Id.*

6. Jennifer Roe, *Measure to Support "Made in America" Labeling in California Passes State Assembly* (July 16, 2015), https://ad71.assemblygop.com/press-release/8503 (on file with *The University of the Pacific Law Review*).

7. Claims of origin on products can take many different forms. The Federal Trade Commission states that "Made in U.S.A." claims can be express or implied. "Made in U.S.A.," "Made in America," or "American-made" are used interchangeably in this Article as examples of the types of claims that Chapter 238 regulates. *Complying with the Made in USA Standard*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/business-center/guidance/complying-made-usa-standard#basic (last visited Apr. 5, 2016) (on file with *The University of the Pacific Law Review*).

8. Sally Schilling, *Legislation Seeks to Tweak Standards for Made in USA*, MADE IN AMERICA MOVEMENT (May 10, 2013), http://www.themadeinamericamovement.com/american-made/legislation-seeks-to-tweak-standards-for-made-in-usa/ (on file with *The University of the Pacific Law Review*).

9. *Id.*

10. *Id.*

11. *Id.*

products in the United States.[12] Senator Jerry Hill, the author of Chapter 238, argues that it "brings California's labeling statute into the 21st century, helping to promote California manufacturing and jobs."[13] Chapter 238 changes California law to reflect the realities of the global economy.[14]

II. LEGAL BACKGROUND

Under prior law, California's standard for "Made in America" labeling was stricter than the federal standard, due in part to California's staunch commitment to consumer protection.[15] The Federal Trade Commission (FTC) regulates claims of origin like "Made in America" in order to prevent misleading labels on items from being sold to consumers.[16] The FTC requires products labeled with "Made in the U.S.A." to be "all or virtually all" made in the United States, and that the "final assembly or processing" of that product takes place in the United States.[17] California implemented its own stricter standard through the Unfair Competition Law (UCL) and False Advertising Law (FAL) codified in California Business and Professions Code Sections 17200—17210 and 17500—17509, respectively.[18] The advent of California's consumer protection laws provided ample recovery opportunities against unfair, deceitful manufacturing practices.[19]

However, the law slowly chipped away at consumer protections as it evolved.[20] Most importantly, Proposition 64 (Prop. 64) amended the standing requirements to initiate a lawsuit under the Business & Professions Code, making it more difficult for consumers to sue manufacturers.[21] The 100 percent requirement under prior law withstood not only constitutional challenges, but also attempts to amend the Business & Professions Code to mirror the FTC standard until Chapter 238 passed.[22] The prior standard's longevity is a testament

12. *Id.*

13. Allen Young, *Governor Loosens Definition of 'Made in U.S.A.' for California Products*, SACRAMENTO BUS. J. (Sept. 2, 2015), http://www.bizjournals.com/sacramento/news/2015/09/02/governor-loosens-definition-of-made-in-u-s-a-for.html (on file with *The University of the Pacific Law Review*).

14. *Id.*

15. *See, e.g.*, *FTC to Retain 'All or Virtually All' Standard for 'Made in USA' Advertising and Labeling Claims*, FED. TRADE COMM'N (Dec. 1, 1997), https://www.ftc.gov/news-events/press-releases/1997/12/ftc-retain-all-or-virtually-all-standard-made-usa-advertising (on file with *The University of the Pacific Law Review*) (describing that the FTC will retain the "all or virtually all" standard in lieu of a bright-line rule like California's previous standard).

16. "*Made in USA" and Other U.S. Origin Claims*, 62 Fed. Reg. 63756 (Dec. 2, 1997), *available at* https://www.ftc.gov/public-statements/1997/12/enforcement-policy-statement-us-origin-claims#e14 (on file with *The University of the Pacific Law Review*).

17. *Id.*

18. *Infra* Part II.A.

19. *Infra* Part II.A–B.

20. *Infra* Part II.A.

21. *Infra* Part II.A.

22. *Infra* Part II.

to California's commitment to consumers and the predictability of a bright-line rule.[23]

A. California's Consumer Protection Laws

In 1961, California enacted the FAL, Business and Professions Code Sections 17500—17509.[24] California implemented this legal tool, in part, to stop foreign companies from "taking advantage of 'buy America' promotions."[25] This section prohibits any product or container from bearing a claim of United States origin if *any* part of that product was "entirely or substantially made, manufactured, or produced outside of the United States."[26]

Although well-intended, the FAL created uncertainty for manufacturers because the Legislature did not provide guidance on what constitutes a product "substantially" made outside of the United States.[27] It also failed to define "article, unit, or part."[28] Courts strictly interpret California's statute as allowing manufacturers to advertise products as "Made in the U.S.A." only if they made *every* part of that product in the United States.[29] Courts construed the FAL broadly to prohibit not only false advertising, but also advertising that is misleading or confusing to consumers.[30]

The FAL works in conjunction with California's UCL.[31] The UCL incorporates the FAL into the activities that it prohibits.[32] The FAL and UCL internally cross-reference each other, so they work together to protect consumers from unfair business practices and false advertising.[33] The FAL allows private

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23. *See* Lawrence B. Steinberg, *Remedies Available for False Advertising under California Business & Professions Code §17500 and Section 43(A) of the Lanham Act*, BUCHALTER NEMER (July 1, 2005), http://www.buchalter.com/wp-content/uploads/2003/08/Lanham-Act.Steinberg.pdf (on file with *The University of the Pacific Law Review*) (describing that the FAL prohibits false advertising and that a defendant's knowledge of falsity is not required to prevail).

24. CAL. BUS. & PROF. CODE § 17533.7 (West 2014); James R. Robie et al., *MCLE Article: American Made*, 31 L.A. LAW MAG, No. 9, at 28 (2008), *available at* http://www.lacba.org/Files/LAL/Vol31No9/2540.pdf (on file with *The University of the Pacific Law Review*).

25. Schilling, *supra* note 8.

26. § 17533.7 (amended by Chapter 238).

27. Robie et al., *supra* note 24.

28. *Id.*

29. *See* Colgan v. Leatherman Tool Group, Inc., 135 Cal. App. 4th 663, 684 (2006) (holding that a product may not be labeled as "Made in U.S.A." if any part of that product was manufactured outside of the United States, including component parts of tools).

30. *Id.* at 679.

31. CAL. BUS. & PROF. CODE § 17200 (West 2014); *California's Proposition 64 Imposed Important Reforms to Rein in Section 17200 and Section 17500 Claims*, REEDSMITH, http://www.reedsmith.com/Californias-Business-Professions-Code-17200-Unfair-Competition-and-17500-False-Advertising-Practices/ [hereinafter REEDSMITH] (last visited Sept. 27, 2015) (on file with *The University of the Pacific Law Review*).

32. § 17200.

33. *Id.*

individuals and public prosecutors to sue for violations.[34] Remedies available under the FAL include injunctive relief, restitution, and civil penalties.[35] Notably, plaintiffs cannot recover damages for a false advertisement claim under the UCL.[36] Damages are also unavailable under the UCL.[37] One important difference between the two is that the UCL was amended in 1992 to include past acts.[38] The FAL was not amended in the same way, so a plaintiff must show that harm will likely reoccur to prevail under a FAL claim.[39]

The UCL defines unfair competition as any "unlawful, unfair or fraudulent business act or practice" or any untrue or misleading advertising.[40] Prior to 2004, any plaintiff had standing to sue based on violations of the UCL on behalf of the general public without suffering any personal injury.[41] The UCL's lack of formal class-action requirements resulted in judgments binding only the named plaintiff rather than the general public.[42] This made it possible for manufacturers to face repeat liability for the same issue from plaintiffs who had suffered no actual injury.[43]

In 2004, voters passed Prop. 64 in hopes of curtailing a plethora of frivolous "shakedown" lawsuits against manufacturers that resulted in windfalls to attorneys.[44] Voters passed Prop. 64 with a fifty-nine percent "yes" vote.[45] Prop. 64 requires a plaintiff to show that he or she suffered actual financial injury as a result of the alleged unfair competition violation.[46] Plaintiffs no longer have standing to sue based on general grievances.[47] Plaintiffs must also meet class-action requirements for claims under the UCL and FAL.[48] This development

34. Steinberg, *supra* note 23.

35. *Id.* at 5–8.

36. *Id.* at 8.

37. Kent J. Schmidt, *What is California's Unfair Competition Law?—The Michael Scott Explanation*, DORSEY & WHITNEY LLP (Oct. 4, 2012), http://www.lexology.com/library/detail.aspx?g=26df0acf -ef9d-4ffa-8bc6-d459c0686837 (on file with *The University of the Pacific Law Review*).

38. Steinberg, *supra* note 23, at 6.

39. *Id.*

40. CAL. BUS. & PROF. CODE § 17200 (West 2014).

41. *Id.*

42. *See* Kimberly A. Kralowec, *Another New Opinion Interpreting* Tobacco II: Cohen v. DIRECTV, Inc., UCL PRACTITIONER (Oct. 29, 2009) http://www.uclpractitioner.com/2009/10/another-new-opinion-interpreting-tobacco-ii-cohen-v-directv-inc.html (on file with *The University of the Pacific Law Review*) (describing that relief under the UCL is available to plaintiffs without a showing of individualized injury or reliance).

43. BUS. & PROF. § 17200.

44. *Id.*; Nathan Koppel, *California High Court to Corporate America: "Labels Matter,"* WALL ST. J. (Jan. 28, 2011), http://blogs.wsj.com/law/2011/01/28/calif-high-court-to-corporate-america-labels-matter/ (on file with *The University of the Pacific Law Review*).

45. *Californians to Stop Shakedown Lawsuits—Yes on Proposition 64*, REDWOOD PAC. PUB. AFFAIRS, *available at* http://www.redwoodpacific.com/case-study/californians-to-stop-shakedown-lawsuits-yes-on-proposition-64#.VfIunXs1dRk (last visited Sept. 27, 2015) (on file with *The University of the Pacific Law Review*).

46. REEDSMITH, *supra* note 31.

47. *Id.*

48. *Id.*

sought to decrease lawsuits against manufacturers based on general complaints in recognition of the growing problem of frivolous lawsuits against manufacturers.[49]

Prop. 64 remains important because it recognizes that manufacturers can be inadvertently exposed to huge liability as a result of strong consumer protection laws.[50] It is also important because it requires plaintiffs to meet additional hurdles in order to sue a manufacturer.[51]

B. Constitutional Challenges to California's FAL

Manufacturers defending FAL-based lawsuits generally invoke defenses based on constitutional grounds.[52] In *Colgan v. Leatherman Tool Group, Inc.*, consumers filed a class-action lawsuit against tool manufacturer Leatherman because the company labeled some products as "made in America" when those products contained foreign component parts.[53] The class-action plaintiffs alleged violations of the FAL and UCL.[54]

The court made two important holdings.[55] First, it held that Leatherman violated the FAL because "reasonable consumers" who purchased Leatherman products with "Made in the U.S.A." labels would not expect that the company manufactured parts of those products outside of the United States.[56] In interpreting the FAL, the court looked strictly at its language to ascertain the substance of the statute.[57] By construing the plain language, the court determined that the Legislature intended to prohibit manufacturers from using American-made labeling on a product if the product or any part of it was made abroad.[58] Applying the statute strictly "did not lead to an absurd result" because the statute states that no part of a product with a "Made in the U.S.A." label may be produced outside of the United States.[59]

Second, the court held that the statute's failure to define "substantially" did not render the statute unconstitutionally vague because the statute's meaning could be "refined through application."[60] The defendant manufacturers challenged the FAL on grounds that it was unconstitutionally vague because the

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49. *See* CAL. BUS. & PROF. CODE §§ 17200–17500 (West 2014) ("It is the intent of California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have not client who has been injured in fact under the standing requirements of the United States Constitution.").

50. REEDSMITH, *supra* note 31.

51. *Id.*

52. Colgan v. Leatherman Tool Group, Inc., 135 Cal. App. 4th 663, 663 (2006).

53. *Id.*

54. *Id.* at 672.

55. *Id.* at 682–83.

56. *Id.* at 682.

57. *Id.* at 684.

58. *Id.*

59. *Id.* at 684.

60. *Id.* at 692.

statute does not provide a formula for determining what constitutes a product "substantially" made outside of the United States.[61] A statute is not impermissibly vague in violation of the Constitution if its meaning can be "objectively ascertained by reference to common experiences of mankind."[62] *Colgan* solidifies that manufacturers would likely fail if they claimed that the FAL is void on constitutional grounds.[63]

Similarly, in *Benson v. Kwikset*, consumers tested the strict boundaries of California's "Made in the U.S.A." labeling laws.[64] The plaintiff sued the defendants for violations of the FAL.[65] The defendants challenged the constitutionality of the FAL, arguing that "Made in America" type labels constitute commercial speech and should be afforded First Amendment protection.[66] The First Amendment protects commercial speech, but it receives less protection than other kinds of speech for two reasons: the government needs to protect the public from commercial harms, and commercial speakers are less likely to experience a "chilling effect."[67]

The court held that the labels met the standard for commercial speech and applied a two-part test to determine whether the speech should be protected under the First Amendment: (1) whether the speech was a non-misleading lawful activity, and (2) whether California had a substantial interest in enacting Business and Professions Section 17533.7.[68] California had a "fervent interest" in protecting the public from deceptive advertising practices.[69] Although California's FAL is strict, it advances California's interest in protecting consumers and is "reasonably tailored" to serve the state's interest.[70] The court plainly stated that the FAL does not "chill" the free speech rights of defendants.[71]

The defendants also argued the FAL was void for vagueness because Business and Professions Code Section 17533.7 does not provide "sufficiently definite guidelines so as to prevent arbitrary enforcement."[72] A statute is constitutionally certain when it is: "(1) sufficiently definite to provide adequate notice of the conduct proscribed; and (2) the statute must provide sufficiently definite guidelines . . . to prevent arbitrary and discriminatory enforcement."[73] The court rejected the defendants' void for vagueness challenge, reasoning that

61. *Id.* at 691.
62. *Id.* at 692.
63. *Id.*
64. 152 Cal. App. 4th 1254, 1254 (2007).
65. *Id.*
66. *Id.* at 1262.
67. Kasky v. Nike, Inc., 27 Cal. 4th 939, 956 (2002).
68. *Benson*, 152 Cal. App. 4th at 1268.
69. *Id*.
70. *Id.*
71. *Id.*
72. *Id.* at 1269.
73. *Id.*

the labels at issue misled consumers and that California had a sufficient interest in the FAL.[74]

Courts look to the statutory language, legislative history, and California case law to determine if a statute is sufficiently definite.[75] Courts also require the public to apprise itself of the statutory language, legislative history, and legislative intent that the plain meaning of a statute demonstrates.[76] The *Benson* court requested that the parties provide the court with the legislative history of the FAL, which indicated that the Legislature enacted it in 1961 and never amended it, despite two attempts to do so.[77]

The statute was held not void for vagueness because Defendants' component manufacturing in Mexico should have put them on notice to the possibility that they were violating California law.[78] There are numerous judicial interpretations of what is "substantial," and many instances in which people must govern their conduct based on their own estimations of what is "reasonable" or "prudent."[79] *Colgan* and *Leatherman* demonstrate the issues manufacturers grappled with prior to Chapter 238.[80] Manufacturers had to comply with the FAL in the strictest sense, and any constitutional challenges of it failed.[81] Furthermore, courts were not sympathetic to the manufacturers' void-for-vagueness challenges to the prior standard and expected them to apprise themselves of the law.[82] Manufacturers also tried to argue that federal law preempted California's "Made in the U.S.A." standards.[83]

C. Federal Preemption Issues

Manufacturers attempted to defend lawsuits from consumers before Chapter 238 by arguing that federal law preempts California law.[84] In *Paz v. AG Adriano Goldschmied, Inc*., the court considered whether the Federal Textile Fiber Products Identification Act (TFPIA) preempted Plaintiffs' state law causes of action based on violations of the UCL and the FAL.[85] The TFPIA requires that

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74. *Id.* at 1269.

75. *Id.*

76. *Id.*

77. *Id.* at 1273.

78. *Id.* at 1269.

79. *Id.* at 1270.

80. Colgan v. Leatherman Tool Group, Inc., 135 Cal. App. 4th 663, 663 (2006); *Benson*, 152 Cal. App. 4th at 1254.

81. *Supra* Part II.

82. Anita R. Kalra, *"Made in the USA" Update: California Law Upheld and FTC Closes Investigations*, LEXOLOGY (Apr. 23, 2015), http://www.lexology.com/library/detail.aspx?g=88fc8779-335e-48ec-bldb-07f976ae1312 (on file with *The University of the Pacific Law Review*).

83. *Infra* Part II.C.

84. Kalra, *supra* note 82.

85. Order Denying Motion to Dismiss Complaint at 2, Paz v. AG Adriano Goldschmied, Inc., No. 14-CV-1372 DMS (DHB) (S.D. Cal. 2014) [hereinafter Paz v. AG Adriano Goldschmied, Inc. *Order*], *available at*

any garment "processed or manufactured" in the United States must have a "Made in the U.S.A." label affixed to it even if component parts are manufactured in foreign countries.[86] The TFPIA allows the use of qualified language on labels, such as "Made in the U.S.A. of imported fabric."[87] The court rejected arguments that the TFPIA conflicted with the FAL.[88] The FAL allows for qualified language as a matter of common sense, because as long as a label accurately reflects that a product is "Made in the U.S.A." with foreign components, then no misrepresentation has taken place.[89]

In another case, defendants moved to dismiss a suit brought by consumers who purchased jeans with a "Made in the U.S.A." label that contained foreign components.[90] Defendants argued the FTC's standard for claims of origin preempts the FAL via the Supremacy Clause,[91] which provides that federal law "shall be the supreme Law of the Land."[92]

The Supremacy Clause nullifies any state law that interferes with "an Act of Congress."[93] The court rejected the idea that California's law presented an obstacle to the FTC's ability to accomplish its objectives of "preventing consumer deception [and] encouraging businesses to manufacture in the United States by allowing them to use the powerful 'Made in the U.S.A.' label."[94] The FTC standard does not preempt California law because manufacturers can comply with both laws at the same time.[95] The FTC standard allows manufacturers to use "Made in the U.S.A." labeling on goods that are "all or virtually all" made in the United States, but it does not require such labeling.[96] The court held that California law does not conflict with the FTC standard because a manufacturer can use two different labels—one based on the FTC "all or virtually all standard" and one for clothing sold in California.[97] Although this may burden or frustrate manufacturers, it is not impossible.[98] Furthermore, the court held that the FAL does not prevent the FTC from accomplishing its

https://www.crowell.com/files/Paz-v-AG-Adriano-Goldschmied-Inc.pdf (on file with *The University of the Pacific Law Review*).

86. *Id.* at 8.

87. *Id.*

88. *Id.* at 9.

89. *Id.*

90. Order Denying Defendants' Motion to Dismiss First Amended Complaint at 2, Clark v. Citizens of Humanity et al., Case No. 14-CV-1404 JLS (WVG) (S.D. Cal. Apr. 8, 2015).

91. U.S. CONST. art. VI, cl. 2.

92. *Id.*

93. Paz v. AG Adriano Goldschmied, Inc. Order, *supra* note 86, at 4.

94. *Id.* at 7.

95. *Id.* at 9.

96. *Id.*

97. *Id.*

98. *Id.*

objectives: both California's law and the FTC regulation are meant to protect consumers against fraud.[99]

These decisions demonstrate California courts' hostility towards preemption arguments, as well as the growing sentiment that manufacturers who choose to sell products in California should not expect sympathy from courts over the inconveniences they face when complying with California's labeling standard.[100]

D. The Hard Sell: Prior Attempts to Loosen the California Standard

Assembly Member Brian Jones introduced AB 858 in 2012, which would have changed California's "Made in the U.S.A." labeling standards to match the federal standard.[101] California entrepreneurs like Rio Sabadicci—creator of the Vinturi wine aerator—supported the bill out of frustration at California's strict labeling standards and the perceived competitive edge to out-of-state manufacturers.[102] The bill eventually failed in the Senate Judiciary Committee due to opposition from consumer groups and personal injury attorneys who voiced concerns that the bill was an "unprecedented" departure from California's law.[103] Opponents claimed that the California standard provides a clear, bright-line test, whereas the federal standard confuses consumers.[104] The Senate Committee stated that the federal standard was not meant to preempt state law, and that loosening the standard would invite manufacturers using foreign parts to take business away from companies who commit to meeting California's high standard for claims of origin.[105]

AB 890, introduced by Assembly Member Jones in 2013, would have amended California's labeling law to allow manufacturers to label a product "American-made" if at least ninety percent of the product was made in the United States and final assembly occurred domestically.[106] The Consumer

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99. *Id.* at 9.

100. Kalra, *supra* note 82.

101. Michael Gardner, *Change in "Made in USA" Label Debated*, SAN DIEGO UNION-TRIB. (Feb. 8, 2012, 3:18 PM), http://www.utsandiego.com/news/2012/feb/08/change-in-made-in-usa-label-debated/?#article-copy (on file with *The University of the Pacific Law Review*).

102. *Id.*

103. *AB 858 (Jones) False Advertising*, TOTAL CAPITOL, http://totalcapitol.com/?bill_id=201120120AB 858 (last visited Apr. 10, 2016) (on file with *The University of the Pacific Law Review*); Karlee Weinmann, *Calif. Senate Drops Bill to Relax "Made in USA" Label Rules*, LAW360 (July 6, 2012), http://www.law360.com/articles/357567/calif-senate-drops-bill-to-relax-made-in-usa-label-rules (on file with *The University of the Pacific Law Review*).

104. Weinmann, *supra* note 103; Letter from Cal. Mfrs. & Tech. Ass'n, to Hannah-Beth Jackson, Senator, Cal. State Senate (Apr. 21, 2015), *available at* http://www.cmta.net/page/legwatch.php?g=corp (on file with *The University of the Pacific Law Review*).

105. Letter from Cal. Mfrs. & Tech. Ass'n., *supra* note 104.

106. *AB 890: Senate Judiciary Committee Rejects "Made in USA" Labels on Products with Bangladesh Content (2-Year Bill)*, CONSUMER FED'N OF CAL. (June 19, 2013), http://consumercal.org/update-senate-

Federation of California opposed this bill, arguing that it would allow for the kind of deceptive labeling in California that occurs in other states under the FTC's standard.[107] For example, the FTC's standard allows shoe manufacturer New Balance to label shoes as "Made in America" that contain thirty percent foreign content.[108] This bill failed in the Senate Judiciary Committee.[109]

Most recently, Senator Jerry Hill proposed SB 661 in 2014, which sought to loosen California's labeling standards to allow companies to label products as "Made in America" if ninety percent of the manufacturing costs occurred in the United States and the manufacturer showed that the other ten percent of costs could not occur domestically.[110] SB 661 allowed products to be labeled as "Made in the U.S.A" if only a "negligible" part of the final product was made outside of the United States.[111] This attempt to amend California's FAL failed in the Senate Committee, in part, because of concerns that Californians looking for products wholly made in America would be deceived as a result of the loosening standards that SB 661 proposed.[112]

Prior to her "no" vote, Senate Judiciary Committee Chair Senator Noreen Evans provided her own personal example of why claims of origin labels are so important.[113] She recalled a situation where her dog faced life-threatening ailments as a result of eating "chicken" treats manufactured in China that contained small amounts of melamine that poisoned her dog.[114] She now buys dog treats strictly made in America.[115] Senator Evans questioned how she would be able to assure that her dog's treats would be completely "Made in the U.S.A." if they adopted SB 661's "negligible" standard.[116] She further stated that changing labeling standards presents a consumer protection issue because "as a consumer, labeling is critically important."[117]

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judiciary-committee-rejects-made-in-usa-labels-on-products-with-bangladesh-content/ (on file with *The University of the Pacific Law Review*).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Made in USA Bills:' One Moves, One Stops*, CAL. MFRS. TECH. ASS'N (May 9, 2013), http://www.cmta.net/page/legupdate-article.php?legupdate_id=21512 (on file with *The University of the Pacific Law Review*).

111. SB 661, 2014 Leg., 2013–2014 Sess. (Cal. 2014).

112. *Hearing on SB 661 before the S. Judiciary Comm.*, 2014 Leg., 2013–2014 Sess. (Cal. 2014), *available at* https://www.youtube.com/watch? v=1WvhE8xNbzg (on file with *The University of the Pacific Law Review*).

113. *Id.*

114. *Id.* at 15:30.

115. *Id.*

116. *Id.*

117. *Id.*

III. CHAPTER 238

Chapter 238 amends the Business & Professions Code by redefining what percentage of a product may be produced outside of the United States and still be labeled as "Made in America."[118] It allows products with foreign-sourced material to be labeled as American-made, so long as that foreign material comprises less than five percent of the wholesale value of the product.[119] Products with up to ten percent of foreign-made materials may only be labeled as "Made in America" if the manufacturer cannot produce or purchase the foreign components domestically.[120] The cost of a component may not be the determinative factor of why the material cannot be produced domestically.[121] Chapter 238 does not apply to goods sold for resale to consumers located outside of California.[122] Furthermore, goods sold outside of California will not be considered mislabeled if their labels satisfy the laws of the state or country where the goods are sold.[123]

IV. ANALYSIS

Chapter 238 updates the FAL to more accurately reflect the realities of a globalized economy.[124] Although this will likely benefit consumers, it may result in potential consumer protection issues.[125] Chapter 238 will have positive effects since it will likely reduce litigation against manufacturers over claims of origin.[126] Chapter 238 also addresses manufacturers' potential claims that the law is void for vagueness and may prove positive for California's economy.[127]

A. Chapter 238 Updates California Law in the Era of Global Production

Chapter 238 modernizes California law in the era of globalization.[128] Although Chapter 238 presents a departure from the bright-line standard, it still requires that ninety to ninety-five percent of a product be manufactured in

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118. CAL. BUS. & PROF. CODE § 17533.7 (amended by Chapter 238).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Amy Burroughs, *In Globalization Age, What Does "Made in America" Mean?*, KOGOD NOW (2013), http://kogodnow.com/2013/03/in-globalization-age-what-does-made-in-america-mean/ (on file with *The University of the Pacific Law Review*).

125. *See infra* Part IV.B (describing consumer protection issues that may arise because of Chapter 238).

126. *See infra* Part IV.B (explaining that Chapter 238 will likely reduce litigation against manufacturers over claims of origin).

127. *See infra* Part IV.D (describing how Chapter 238 addresses any potential manufacturers' claims that the law is void for vagueness).

128. Burroughs, *supra* note 124.

America in order to claim "Made in the U.S.A."[129] Thus, it maintains a high level of American-made content that comports with "a reasonable consumer understanding of the label."[130] Chapter 238 addresses both manufacturer and consumer concerns: it loosens the FAL so manufacturers can more easily present products with negligible foreign components as "Made in America"[131] and, at the same time, it maintains consumer protection with a high standard for claims of origin.[132]

Chapter 238 differs from prior attempts to loosen California's FAL because it maintains a higher standard for claims of origin than previous attempts.[133] Chapter 238 only allows for exceptions to the 100 percent American-made standard for negligible component parts or parts that cannot be found domestically.[134] Before Chapter 238, manufacturers were forced to choose between cutting costs by purchasing foreign component parts, or spending more in order to gain a competitive edge with a "Made in U.S.A." label.[135] Simply put, Chapter 238 provides a sensible solution to the concern that prior law did not reflect global realities by loosening the law only enough to reduce the penalty for using negligible amounts of foreign components.[136] Chapter 238 reflects California's commitment to consumer protection because it protects the integrity of the claim of origin by only marginally loosening the law's reach.[137]

B. Consumer Protection Issues

Chapter 238 presents a legitimate concern for consumers because it eliminates the strict, 100 percent standard.[138] Consumers may be misled under the new standard because they assume that "Made in the U.S.A." connotes the 100 percent standard.[139] Consumers may need to acclimate to the new standard, but Chapter 238 still provides more clarity and protection than the imprecise FTC standard of "all or virtually all" made in the United States.[140] Chapter 238, like

129. CAL. BUS. & PROF. CODE § 17533.7 (amended by Chapter 238).

130. Letter from Cal. Mfrs. & Tech. Ass'n, *supra* note 104.

131. *Id.*

132. BUS. & PROF. § 17533.7 (amended by Chapter 238).

133. *Supra* Part II.D.

134. BUS. & PROF. § 17533.7 (amended by Chapter 238).

135. Gardner, *supra* note 101.

136. *Supra* Part II.D.

137. BUS. & PROF. § 17533.7 (amended by Chapter 238).

138. *See infra* Part IV.B (explaining the concerns Chapter 238 present for consumers).

139. *Id.* (analyzing how consumers may be misled under the new standards because they assume that "Made in the U.S.A." connotes the 100 percent standard).

140. *Id.* (explaining that although the new standard may mislead consumers, Chapter 238 will provide more protection than the FTC standard).

the previous standard, does not address qualified claims of origin, so it remains unclear if such claims are allowed.[141]

1. Whether Chapter 238 will Mislead Consumers

Loosening the FAL creates potential for manufacturers to deceive consumers acclimated to California's former bright-line test.[142] Changing the bright-line test to one based on the percentage of foreign components reduces clarity for consumers.[143] Calculating an individual component's percentage of overall wholesale value presents a more difficult task than evaluating whether or not a product's components are 100 percent American-made.[144] Concerns regarding possible consumer confusion have merit, because recent polls show that sixty percent of Americans will pay more for a product that claims to be "Made in the U.S.A." than they will for one not made in America.[145] Because claim of origin labels affect consumer spending habits, removing California's bright-line rule may mislead consumers who spend more for products with such claims.[146]

The Consumer Federation opposed Chapter 238 because allowing a manufacturer to advertise a product that has foreign parts as American-made disadvantages companies that "go the extra mile to keep jobs and manufacturing in the USA."[147] That concern is likely overblown under Chapter 238 because manufacturers are still subject to a high bar under Chapter 238 due to the ninety to ninety-five percent standard.[148]

Although Chapter 238 will require consumers to acclimate to the new standard, it will protect consumers more than the "all or virtually all" standard under the FTC's guidelines.[149] Chapter 238 establishes a clear percentage guideline for products to qualify for a United States claim of origin.[150] The FTC "all or virtually all" standard provides manufacturers with a lot of leeway, which can mislead consumers because products only need to be "substantially" assembled in the United States and have "significant parts" that are of U.S. origin to qualify for a United States claim of origin.[151]

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141. BUS. & PROF. § 17533.7 (amended by Chapter 238).

142. Chris Nichols, *"Made in USA" Debate Revived at Capitol*, SAN DIEGO UNION-TRIB. (Feb. 16, 2015, 8:35 PM), http://www.utsandiego.com/news/2015/feb/16/made-in-usa-america-label-brian-jones/ (on file with *The University of the Pacific Law Review*).

143. Gardner, *supra* note 101.

144. BUS. & PROF. § 17533.7 (amended by Chapter 238).

145. Murphy, *supra* note 1.

146. Nichols, *supra* note 142.

147. Schilling, *supra* note 8.

148. BUS. & PROF. § 17533.7 (amended by Chapter 238).

149. *Id.*

150. *Id.*

151. *"Made in USA" and Other U.S. Origin Claims, supra* note 16.

Unlike Chapter 238, the FTC standard does not establish a percentage to guide the "all or virtually all" requirement.[152] The FTC standard, for example, allows New Balance to use "Made in the U.S.A." claims on shoes that contain thirty percent of foreign-sourced materials based on the "all or virtually all" standard.[153] Chapter 238's clear-cut United States percentage requirements provide needed guidance for consumers and manufacturers, and, therefore, it provides more protection to consumers than the FTC standard.[154]

2. Qualified Claims of Origin

One issue that Chapter 238 does not address is whether California law allows for qualified claims of origin.[155] The FTC standard permits the use of qualified claims of origin if manufacturers can substantiate those claims with proof and qualifications that do not deceive consumers.[156] Qualified claims of origin are important for manufacturers because it gives them more leeway in labeling their products.[157] It is unclear whether Chapter 238 adopted the FTC's same standard for qualified claims of origin because Chapter 238 is silent on that issue.[158]

Although California courts recently held that the previous version of the FAL allowed for qualified claims of origin, that holding has never been tested.[159] Furthermore, the holding that pre-Chapter 238 law allowed for qualified claims of origin is misplaced; if prior law prohibited a "Made in the U.S.A." label on a product with any amount of foreign components, it is inapposite that the law would allow a product with foreign parts to claim "Made in the U.S.A. with foreign components."[160]

Chapter 238 does not state whether it allows qualified claims of origin.[161] Based on the canon of statutory construction of *expressio unius est exclusio alterius*—the expression of one thing implies the exclusion of another—a court interpreting Chapter 238 may conclude that qualified claims of origin are not

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152. *Id.*

153. NEW BALANCE, http://www.newbalance.com/made-in-the-usa/ (last visited Apr. 5, 2016); John W. Schoen, *New Balance Sidesteps FTC Ad Rules*, NBC NEWS (Apr. 16, 2010), http://www.nbcnews.com/id/36476797/ns/business-us_business/t/new-balance-sidesteps-ftc-ad-rules/#.VdP45UVnFOc (on file with *The University of the Pacific Law Review*).

154. CAL. BUS. & PROF. CODE § 17533.7 (West 2014).

155. *Id.*

156. *"Made in USA" and Other U.S. Origin Claim*, *supra* note 16 (stating that a qualified claim of origin is a claim on a product that qualifies the "presence or amount of foreign content") An example is "Made in the USA of U.S. and imported parts." *Id.*

157. *See* Nichols, *supra* note 142 (describing that many manufacturers backed SB 633 because it would allow California manufacturers to compete with those in other states because of the proposed looser standards).

158. Order Denying Defendants' Motion to Dismiss First Amended Complaint at 11, Clark v. Citizens of Humanity et al., Case No. 14-CV-1404 JLS (WVG) (S.D. Cal. Apr. 8, 2015).

159. *Id.*

160. *Id.*

161. CAL. BUS. & PROF. CODE § 17533.7 (amended by Chapter 238).

permissible because Chapter 238 is silent on the issue.[162] It is important for manufacturers who are hoping to use a qualified label to satisfy both the FTC and Chapter 238 to understand whether or not qualified claims are allowed under Chapter 238.[163] Clarification will help manufacturers comply with the law and avoid potential litigation.[164]

C. Chapter 238's Effect on Reducing Litigation over Claims of Origin

Chapter 238 will decrease the number of lawsuits consumers bring against manufacturers because it provides manufacturers with more leeway and definitive guidelines.[165] Chapter 238 increases predictability for manufacturers so they can more easily comply with the law.[166] It also will likely reduce the interstate chaos that resulted under prior law since California law departed so much from the rest of the country.[167] Further, consumers may be less inclined to initiate lawsuits against manufacturers because deciphering whether a product contains a deceptive label under Chapter 238 likely proves more difficult than under prior law.[168]

Chapter 238 may reduce litigation against manufacturers who sell products in California with labels that meet the FTC standard.[169] Manufacturers can make one claim of origin label for products sold in every state rather than tailoring a label specific to meet California's FAL.[170] Prior to Chapter 238, manufacturers faced a growing risk of litigation over products sold on the Internet in California bearing labels that met the national standard, but that did not contain 100 percent American-made components.[171]

Despite Prop. 64's reforms, manufacturers continued to face litigious consumers in class action lawsuits, resulting in hefty monetary penalties and legal fees.[172] The threat of litigation encourages manufacturers to forego labels altogether, putting them at a competitive disadvantage because consumers choose

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162. *See* CIV. PROC. § 1858 (West 2015) (codifying the concept of *expressio unius* for judges in statutory interpretation); *see also* People v. Oates, 32 Cal. 4th 1048, 1057 (2004) ("If exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary.").

163. *See, e.g.*, "*Made in USA" and Other U.S. Origin Claims*, *supra* note 16 (describing that the FTC explicitly allows for qualified claims of origin).

164. *Id.*

165. BUS. & PROF. § 17533.7 (amended by Chapter 238).

166. *See* Nichols, *supra* note 142 (describing that many SB 633 aligns California law more closely with the rest of the country).

167. *See id.* (stating that California previously had the strictest labeling law in the country).

168. *See* § 17533.7 (many consumers may not be able to tell by inspecting a product what percentage is foreign made).

169. *Id.*

170. Gardner, *supra* note 101.

171. Lara A. Austrins, *A Trap for the Unwary: Use of the "Made in U.S.A." Mark*, CLARK HILL (Nov. 4, 2014), http://www.clarkhill.com/alerts/a-trap-for-the-unwary-use-of-the-made-in-u-s-a-mark (on file with *The University of the Pacific Law Review*).

172. *Id.*

products with "Made in the U.S.A." claims over products without the labels.[173] Chapter 238 will reduce such litigation because many manufacturers being sued under prior law will now meet Chapter 238's standards.[174]

Chapter 238 will also eliminate the "interstate chaos" resulting from California's strict deviation from the FTC standard.[175] The discrepancy between California law and the national standard increased risks to manufacturers selling products in California and increased costs of applying separate labels to California products.[176] Chapter 238 provides quantifiable and predictable guidelines for California manufacturers that will help cure the "interstate chaos" created by the interstate flow of goods between states with vastly different labeling standards.[177] For example, California's prior strict standard prohibited Maglite flashlights from bearing the "Made in the U.S.A." label in California, although they could use that label in other states.[178]

Chapter 238 will reduce litigation against manufacturers because consumers will find it difficult to identify products in violation of Chapter 238 due to the new percentage standards.[179] Under prior law, consumers could determine whether a product violated the FAL relatively simply because they only needed to determine whether any portion of a product contained foreign material.[180] Under Chapter 238, consumers will have to ascertain whether a product sold in California contains a foreign-made component, and what percentage of the total wholesale value that component constitutes.[181] Chapter 238 will reduce the amount of litigation manufacturers face because many instances of previously actionable mislabeling now satisfy the law under Chapter 238.[182] For instance, the Vinturi wine aerator could not use a claim of origin under prior law because of a small decorative ribbon from China.[183] Such a negligible item is exactly the type of component part that would have prevented a manufacturer from using a claim of origin before Chapter 238.[184] A reduction in lawsuits also means that

173. *"Made in USA Bills:" One Moves, One Stops*, *supra* note 110.

174. CAL. BUS. & PROF. CODE § 17533.7 (amended by Chapter 238).

175. Katy Grimes, *Products "Made in America" at Odds with CA*, CAL WATCHDOG (July 3, 2012), http://calwatchdog.com/2012/07/02/products-made-in-america-at-odds-with-ca/ (on file with *The University of the Pacific Law Review*).

176. *Assemblyman Brian Jones Introduces Measure to Support 'Made in America' Labeling in California*, CAL. STATE ASSEMB. (Feb. 13, 2015), https://ad71.assemblygop.com/featured-news/assemblyman-brian-jones-introduces-measure-support-made-america-labeling-california [hereinafter *Assemblyman Brian Jones*] (on file with *The University of the Pacific Law Review*).

177. Grimes, *supra* note 175.

178. Gardner, *supra* note 101.

179. § 17533.7 (amended by Chapter 238).

180. *Supra* Part II.

181. § 17533.7 (amended by Chapter 238).

182. *Id.*

183. Gardner, *supra* note 101.

184. *Id.*

manufacturers will not have to resort to constitutionally challenging California's claim of origin law.[185]

D. Chapter 238 Will Reduce Manufacturer Constitutional Challenges

Because Chapter 238 will reduce litigation against manufacturers, it will also reduce the number of constitutional challenges.[186] Chapter 238 specifies standards for claims of origin based on percentages of wholesale value.[187] Under prior law, the FAL passed constitutional muster because courts required members of the public to apprise themselves of the statutory language, legislative history, and legislative intent of a statute.[188] Chapter 238 will not face the same constitutional scrutiny from manufacturers because it defined the exact proportions more than prior law since it apprises manufacturers of the exact proportions of foreign products that a product can contain.[189]

Furthermore, it is unlikely that a court will find merit in a claim that the FAL is void for vagueness because Chapter 238 is more specific and definite than prior law.[190] Thus, Chapter 238 cured any perceived constitutional defect of the FAL based on vagueness from the standpoint of manufacturers.[191]

E. Effect on California's Economy

Chapter 238 will better the state's economy.[192] It will allow manufacturers that could not bear the costs of separate labels for products sold in California to more efficiently produce one label for all markets.[193] During the Great Recession of the early 2000s, consumers believed that outsourcing manufacturing decreased jobs available to Americans, so domestic manufacturing became a "badge of honor for companies and a selling point for consumers."[194] The "Made in the U.S.A." label denotes not only "better quality," but also that the manufacturer is helping the national economy by producing products domestically.[195]

Presumably, Chapter 238's looser standard will allow more products currently sold in California to bear a "Made in U.S.A." label than under prior

185. *See infra* Part IV.D (explaining how Chapter 238 will likely reduce constitutional challenges by manufacturers).

186. *Id.* (explaining why the number of constitutional challenges will be reduced).

187. CAL. BUS. & PROF. CODE § 17533.7 (amended by Chapter 238).

188. Benson v. Kwikset Corp., 152 Cal. App. 4th 1254, 1269 (2007).

189. *Supra* Part II.

190. *Id.*

191. BUS. & PROF. § 17533.7 (amended by Chapter 238).

192. Nichols, *supra* note 142.

193. Gardner, *supra* note 101.

194. Murphy, *supra* note 1.

195. Gardner, *supra* note 101.

law.[196] Since consumers are willing to pay more for such products, more "Made in the U.S.A." labeling means more consumer spending in California.[197] Chapter 238 will "level the playing field" for manufacturers and allow California companies to enjoy the advantage that other manufacturers across the country have under the lax FTC standard.[198] A company like Maglite, which employs hundreds of U.S. workers, can now signify to the public its commitment to American-made products since its flashlights contain a "small percentage" of foreign parts.[199] Additionally, California's bright-line standard was bad for business and consumers because some parts simply cannot be made in the United States.[200]

The economic impact remains unclear because, under prior law, manufacturers faced no disadvantage when competing with other manufacturers in California because they all faced the same strict standards.[201] California will probably experience a boost in the number of "Made in the U.S.A." products available in the state; manufacturers who were either too apathetic or fiscally incapable of complying with prior law can now easily utilize a claim of origin label.[202] Whether an increase in "Made in the U.S.A." inventory will translate into increased revenues for the state remains to be seen.[203]

V. CONCLUSION

Chapter 238 modernizes the FAL by recognizing that many "American-made" products contain negligible foreign parts as a result of the ease with which goods move in the global economy.[204] Chapter 238 erases California's bright-line rule that limited the use of "Made in the U.S.A." labels to products that were 100 percent made in America.[205] While eliminating this bright-line rule may initially present challenges for consumers who must acclimate to the new law, Chapter 238 still maintains the goals of the FAL due to its high standards for claims of origin.[206] Ultimately, Chapter 238 should prove advantageous to manufacturers, who finally get the leeway they have been asking for with claims of origin labels.[207]

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196. *See supra* Part II (describing the legal background of the previous bright-line rule).

197. Roe, *supra* note 6.

198. Gardner, *supra* note 101.

199. *Id.*

200. *Assemblyman Brian Jones*, *supra* note 176.

201. *Id.*

202. Gardner, *supra* note 101.

203. *See, e.g.*, *Assemblyman Brian Jones*, *supra* note 176 (claiming that the prior law was bad for business in California).

204. Roe, *supra* note 6.

205. *Assemblyman Brian Jones*, *supra* note 176.

206. *Supra* Part IV.

207. *Supra* Part IV.