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"Made in the USA"* (*Unless Sold in California): The *Kwikset* Decision and Its Implications on U.S.-marked Goods

On January 27, the California Supreme Court issued an opinion in the case *Kwikset v. Benson*. The question answered by the Court here was facially narrow: whether an individual possessed standing to sue a company under a state unfair competition law. However, the implications of this case may have a nationwide impact on companies that use "Made in the USA" markings for their goods.

As a brief background, Kwikset Corporation is a manufacturer of locksets. It had marked these products as "Made in the USA," even though some of its locksets contained screws or pins made in Taiwan and some subassemblies were manufactured in Mexico. James Benson, a California resident, purchased these locksets with the misleading origin markings before learning of the foreign parts and manufacturing.

Benson sued Kwikset under California's Unfair Competition Law (UCL), specifically CA Bus. & Prof. Code § 17533.7, which makes it unlawful to sell or offer for sale in California "any merchandise on which . . . there appears the words 'Made in the U.S.A.,' 'Made in America,' 'U.S.A.,' or similar words when the merchandise or any article, unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside of the United States."

While the case was pending, California passed Proposition 64, which required that private plaintiffs in UCL and false advertising suits must show "lost money or property" from the unfair business practices in order to have standing to sue. Before, such plaintiffs had standing simply by acting "for the interests of itself, its members or the general public." The state appeals court determined that, because Kwikset's locks worked properly, Benson suffered no financial loss, and therefore could not sue under the UCL. The Supreme Court reversed, determining that Benson paid more for the locksets than he may have been willing to pay if the locksets had been labeled accurately. To the Court, the economic harm suffered—the "lost money or property" required under Proposition 64—is the same whether or not the products are "functionally equivalent."

What is the significance of this case in the international trade context?

First, it is important to understand that "Made in the USA" claims or markings are regulated by the federal government. The Federal Trade Commission has developed an enforcement policy describing when "Made in the USA" markings are appropriate and

If you have questions about this decision or the California state law relating to "Made in the USA" claims, or if you have concerns about products that your company is manufacturing or selling, please contact one of the Katten Muchin Rosenman LLP **Customs and International Trade** attorneys or professionals listed below.

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when they are not. This policy describes a standard known as the "all or virtually all" standard, meaning that a "Made in the USA" claim for a product (with no other qualifications) is appropriate only when ***all or virtually all*** of the materials and labor that went in to the manufacture of the product are of U.S. origin.

Most states have their own unfair competition laws, and many states include references to misleading U.S.-origin claims in those laws. Except for California, these states generally defer to the FTC's "all or virtually all" standard when determining whether such a claim is appropriate. California, however, has its own rule under Bus. & Prof. Code § 17533.7, and it does not necessarily align with the FTC's "all or virtually all" standard. The key difference between the two standards is that the FTC looks at the foreign content of the product as a whole, while the California law applies to ***articles, units, or parts thereof***, resulting in potentially stricter requirements. The details of California's "Made in the USA" requirements are discussed in both the lower court opinions in *Kwikset* and another recent California case, *Colgan v. Leatherman*.

The *Kwikset* decision has basically put the "teeth" back in the California UCL by establishing that private individuals can sue a company making U.S.-origin claims that turn out to be false, even when the falsely advertised product is not materially defective. Because California's standard of determining the legitimacy of a "Made in the USA" claim is different from the FTC's standard, manufacturers and retailers of products that bear such marks and that are sold in California should: (a) familiarize themselves with ***both*** standards; and (b) hope that other states do not follow in California's footsteps and enact their own standards as well.