10th Circuit Decision at Odds with FTC over "American Made" Claims

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I Dig Texas and Creager Services both sell construction equipment called skid steer attachments. I Dig Texas urged customers to buy its products instead of Creager Services' products by appealing to their sense of patriotism. I Dig Texas claimed that its products are "American Made" while its competitor's products are "110% Made in China." Creager Services didn't dig those claims and filed a lawsuit alleging, among other things, that the "American Made" claims were literally false. (It missed an opportunity to argue that a product can't be "110%" made in any location.)

According to undisputed evidence in the record, some of I Dig Texas' products had been assembled in the United States, while others had been assembled in China. Even for the products that I Dig Texas had assembled in the United States, some components – such as a nitrogen power cell – had come from other countries. If you've followed our coverage of Made in USA claims and the FTC's strict standard for supporting those claims, you might think you know how this case turned out. In this instance, though, you'd probably be 110% wrong (give-or-take about 10%).

The 10th Circuit noted that under the Lanham Act, "a statement can be literally false only if it is unambiguous" and that "a statement without objective meaning can't be literally false." The court then asked itself "what does it *mean* to make a product in the United States or in America" and didn't come up with a clear answer to its question. The term "make" could refer "either to the origin of the components or to the assembly of the product itself." The challenged ads "are thus ambiguous when they say that the products are made in the United States or in America" and cannot be literally false.

How does the 10th Circuit square its reading with the FTC's Made in USA Rule? It doesn't. In a short footnote, the court writes that "even if the FTC policy were otherwise instructive, it would not bind us when addressing false advertising under the Lanham Act." The court then went on to say that given the absence of a "bright line" rule in the FTC's policy, "it doesn't remove the ambiguity of the phrase *made in the United States or American-made*." The decision doesn't go into more detail or discuss the FTC's specific guidance on this issue.

If you want to know more about the FTC's specific guidance on this issue and the consequences of ignoring that guidance, take a look at this post in which we covered a recent settlement over "Made in USA" claims that involved a $2 million penalty. The requirements in that settlement provide a good outline of what you should consider when making these types of claims. Even if you dig the 10th Circuit's analysis, you should know that the decision is a probably an outlier. The FTC, NAD, and other courts are likely to have a much different view of what it means for a product to be "made" somewhere.