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No Duty to Disclose Labor Issues on Product Labels: The Effect of the Ninth Circuit's Hodsdon Decision on California's Transparency in Supply Chains Act as a Safe Harbor Defense

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On June 4, 2018, the Ninth Circuit affirmed the Northern District of California's dismissal of consumer protection claims in a putative class action, primarily on the ground that such laws do not require a chocolate manufacturer to label its goods as possibly being the product of supply chains tainted by child or slave labor. *See Hodsdon v. Mars, Inc.*, -- F.3d --, No. 16-15444, 2018 WL 2473486 (9th Cir. June 4, 2018). In doing so, concerns and questions surrounding whether California's Transparency in Supply Chains Act (Supply Chains Act)[1] provides a "safe harbor" defense from such consumer protection claims may have become moot, particularly where plaintiffs argue that a company should have made disclosures about the labor practices used in its supply chain at the point of sale.

California law recognizes a "safe harbor" defense to claims brought under its consumer protection laws, such as the Unfair Competition Law (UCL)[2] and the Consumer Legal Remedies Act (CLRA).[3] Such laws are some of the most comprehensive and potent consumer protection laws in the country. The UCL generally forbids "unfair, unlawful, and fraudulent" conduct in connection with virtually any type of business activity. "Unfair" conduct, "unlawful" conduct and "fraudulent" conduct each constitute a separate cause of action under the UCL. The CLRA is more defined in structure—it enumerates a list of unlawful acts or practices and applies to "consumer" transactions involving the "sale or lease of goods or services." The "safe harbor" defense serves to rein in these expansive laws to some extent in instances where the California legislature has either clearly permitted certain conduct or "considered a situation and concluded no action should lie." *See Loeffler v. Target Corp.*, 324 P.3d 50, 76 (Cal. 2014). Defendants, particularly in the United States District Court for the Central District of California, have pointed to their compliance with the Supply Chains Act to successfully employ the "safe harbor" defense when facing allegations that their failure to disclose labor issues in their supply chains violated California's consumer protection laws. *Wirth v. Mars, Inc.*, No. 1:15-cv-1470, 2016 U.S. Dist. LEXIS 14552, at *3 (C.D. Cal. Feb. 5, 2016); *Barber v. Nestle USA, Inc.*, 154 F. Supp. 3d 954, 961 (C.D. Cal. 2015).

California's Supply Chains Act went into effect in January 2012 and applies to retailers and manufacturers conducting a threshold amount of business in California. More specifically, it applies to any company that does business in California, has worldwide annual revenues in excess of $100 million, and is either a "manufacturer" or "retail seller" as reported on the entity's California tax return.[4] It is a disclosure statute that requires subject retailers and manufacturers to make five specific disclosures on their websites regarding their efforts to eradicate slavery and human trafficking from their direct supply chains.[5] It does not mandate any action to detect or eliminate slavery or human trafficking from such supply chains, and a subject company would most likely be compliant if it simply stated that it took no efforts in the required disclosure categories. Drinker Biddle discusses the full contours of the Supply Chains Act here. The Central District cases that find that the Supply Chains Act provides a safe harbor reason that the California legislature, in passing the Supply Chains Act, specifically considered how much should be disclosed to consumers about the supply chains of retailers and manufacturers. *See, e.g., Wirth v. Mars, Inc.*, Case No. 1:15-cv-1470, 2016 U.S. Dist. LEXIS 14552, at *3 (C.D. Cal. Feb. 5, 2016).

On the other hand, the Northern District has expressed doubt about the Supply Chains Act's applicability as a safe harbor in the face of UCL and CLRA claims when it originally dismissed the *Hodsdon* case. 162 F. Supp. 3d 1016, 1029 (N.D. Cal. 2016), *aff'd*, No. 16-15444, 2018 WL 2473486 (9th Cir. June 4, 2018). The Northern District, however, dismissed for failure to show that the consumer protection laws require the omitted disclosure without reaching the merits of the safe harbor defense. It dismissed the consumer protection

1 CAL. CIV. CODE § 1714.43.

2 CAL. BUS. & PROF. CODE § 17200 *et seq.*

3 CAL. CIV. CODE § 1750 *et seq.*

4 CAL. CIV. CODE §§ 1714.43(a)(1)–(a)(2).

5 Retailers and manufacturers must disclose the extent that they (1) engage in verification of product supply chains to evaluate and address risks of human trafficking and slavery; (2) conduct audits of suppliers; (3) require direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the countries in which they are doing business; (4) maintain accountability standards and procedures for employees or contractors that fail to meet company standards regarding slavery and human trafficking; and (5) provide employees and management training on slavery and human trafficking. *Id.* § 1743.43 (c).

claims brought under the CLRA and under the "unlawful"[6] and "fraudulent" prongs of the UCL because it found the company had no duty to disclose the information at the point of sale under applicable precedent. *Id.* at 1024–26. It also dismissed plaintiff's claim under the "unfair" prong of the UCL because the omitted disclosure failed to satisfy the two possible tests used to determine an "unfair" business practice. *Id.* at 1026–27. Nevertheless, the Northern District of California went out of its way to note the ambiguity that exists "regarding how to determine whether the legislature 'considered a situation and concluded no action should lie'" and, with respect to the Supply Chains Act, noted that the "legislative history is silent about whether the legislature contemplated disclosures on labels." *Id.* at 1029. Logically, it also pointed out an inequity that arises in creating a safe harbor under the Supply Chains Act: "businesses earning less than $100,000,000 in gross receipts worldwide may be subject to liability under the UCL and CLRA, while large corporations are not." *Id.*

On appeal, the Ninth Circuit affirmed the Northern District's dismissal of plaintiff's claims that the omitted disclosure violated the CLRA and the three prongs of the UCL on the grounds noted above, but it did not address the safe harbor defense since the District Court only mentioned the defense in dicta. The Ninth Circuit stated that "[i]n the absence of any affirmative misrepresentations by the manufacturer, we hold that the manufacturers do not have a duty to disclose the labor practices in question even though they are reprehensible, because they are not physical defects that affected the central function of the chocolate products." *See Hodsdon v. Mars, Inc.*, -- F.3d --, No. 16-15444, 2018 WL 2473486, *1 (9th Cir. June 4, 2018). Ironically, it noted that failure to disclose is not "substantially injurious"—which is one of the tests for unfairness under the UCL—because information about slave and child labor is public knowledge "accessible on Mars' website [] pursuant to the Supply Chains Act." *Id.* at *8.

Therefore, the Ninth Circuit's holding has provided defendants with more than just an argument that their compliance with the Supply Chains Act creates a safe harbor from consumer protection claims premised on their failure to disclose potential supply chain issues on their product labels. Now, the Ninth Circuit has explicitly said that the consumer protection statutes do not require such disclosures at the point of sale and that the failure to make such disclosures is not "unfair" under either current test. Nevertheless, manufacturers and retailers subject to the Supply Chains Act should consider whether their website disclosures comply with the Supply Chains Act, should be mindful of the safe harbor doctrine, and should be aware of the *Hodsdon* case.

6 Plaintiff's allegations under the "unlawful" prong of the UCL were linked to the CLRA, so dismissal of the claims under the CLRA mandated dismissal.

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