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## Nestlé Takes Shelter in Its Supply Chain Safe Harbor

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Nearly a hundred years ago, Justice Brandeis observed "that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (in dissent). The California legislature often leads the way as such a "laboratory," exploring new and different ways to approach problems – often at the expense of business interests. And California plaintiffs' attorneys are consistently creative in developing innovative class actions based upon these legislative experiments. Their newest innovation is the development of class action lawsuits based on alleged public misrepresentations and/or omissions by corporations regarding the presence of forced or slave labor in the supply chains for their products.

Not surprisingly, the California legislature previously undertook its own experiment seeking to address the issues of forced labor in supply chains, the Transparency in Supply Chains Act. *See* Cal. Civ. Code §1714.43 (2010). The act, a first-in-the-nation initiative, requires large retailers and manufacturers with over $100,000,000 in gross receipts worldwide to disclose their efforts to combat slavery and human trafficking in their supply chain via a "conspicuous and easily understood link" on the company's website. The legislature's act does not, however, require companies to actually eradicate forced labor in their supply chain; it only requires disclosure of each company's efforts to address slave labor employed by its suppliers in order that concerned purchasers may take those efforts into account. The question recently considered by the Central District of California is whether the disclosure required by the legislature's experiment trumps the plaintiffs' lawyers' innovative efforts.

Following growing public concern about the use of forced/slave labor highlighted by the legislature's passage of the Transparency in Supply Chains Act, California plaintiffs' lawyers filed a handful of class actions against various businesses alleging false advertising and consumer fraud related to statements made regarding the use of slave or forced labor in their supply chains. A primary focus of many of these suits is the use of forced or slave labor in the harvesting of Taiwanese shrimp and other seafood sold in the United States for human consumption and also used in products like dog and cat food. As detailed in a report by the group Verité, the organization of the Taiwanese fishing industry makes it very difficult to verify that the boats that actually catch the seafood do not employee slave or forced labor.

In one notable suit, *Barber v. Nestlé USA, Inc.*, No. 8:15-cv-1364 (C.D. Cal. Aug. 27, 2015), the class plaintiffs alleged that Nestlé made misstatements and/or omissions in its public statements setting out its aspirational goals and concrete efforts to ensure its supply chains are free of forced or slave labor. The *Barber* plaintiffs claimed that Nestlé violated the California Unfair Competition Law, the California Consumers Legal Remedy Act, and the California False Advertising Law by stating in company policies and public statements that it disavowed and/or prohibited the use of slave and/or forced labor in its supply chain, while selling (through its Purina subsidiary) cat food products containing Thai shrimp in California that were "likely" sourced via slave or forced labor.

On October 19, 2015, Nestlé filed a motion to dismiss plaintiffs' complaint, arguing that the Transparency in Supply Chains Act precluded plaintiff's claims under the Safe Harbor doctrine. *See Barber*, No. 8:15-cv-1364, ECF No. 28 (C.D. Cal.). That doctrine, which had been previously applied in false advertising cases, *see, e.g., Pom Wonderful LLC v. Coca-Cola Co.,* No. CV 08-6237, 2013 WL 543361, at *5 (C.D. Cal. Feb. 13, 2013), and unfair competition/consumer

protection cases, *see, e.g., Alvarez v. Chevron Corp.*, 656 F.3d 925, 933 (9th Cir. 2009), provides a bar against suits brought by private individuals for consumer protection violations when "the Legislature has permitted certain conduct or considered a situation and concluded no action should lie." *Pom-Wonderful*, 2013 WL 543361, at *5, *quoting Cel–Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.,* 973 P.2d 527 (1999). Nestlé argued in its motion to dismiss that the Supply Chains Act only requires a company to outline its "efforts" at eradicating human trafficking and forced labor from its supply chain, and did not require a company to disclose the results of its efforts or to actually eradicate slave labor from its supply chain. *Barber*, No. 8:15-cv-1364, ECF No. 28-1, at 8 (C.D. Cal.). Thus, Nestlé contended, all of plaintiffs' claims should have been dismissed.

This past November, the Court ruled on Nestlé's motion and dismissed plaintiffs' claims with prejudice, finding that "businesses' responsibilities to inform consumers about the presence of forced labor in supply chains begin and end with the required disclosures in" the Supply Chains Act. *Barber*, No. 8:15-cv-1364, ECF No. 39 (Dec. 9, 2015). The *Barber* Court's decision was based in large part on its examination of the legislative history of the Supply Chains Act, and its finding that the legislature expressly considered requiring businesses to disclose labor abuses in their supply chain, and chose not to do so. *Id.* at 8-10. The logic of the *Barber* decision should extend to any alleged omissions regarding supply chain practices beyond those disclosures required by the Supply Chains Act. Assuming the Ninth Circuit upholds *Barber* on its now pending appeal ( No. 16-55041), plaintiffs' imaginative class action theory of liability should be dead in its tracks (at least in California).

The *Barber* decision is an example of increased regulation of industry providing a shield for defendants against runaway litigation costs. Companies in consumer fraud and false advertising litigation in California, and elsewhere, should be aware of his decision when formulating defense strategies. And, companies should be considering whether they can use other regulations and statutes in support of a Safe Harbor defense in consumer fraud and false advertising cases. Though industry is often regulation-averse, *Barber* demonstrates that increased regulation may have untapped advantages for defendants and, to the extent that the legislature or regulators speak on a particular subject, those pronouncements can be useful in limiting the options of creative plaintiff's counsel.

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