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First Amendment Defenses Apply to Class Actions Demanding 'Confessions' About Human Trafficking Supply Chain Risks



BY T. MARKUS FUNK, DAVID BIDERMAN AND CHARLES SIPOS

For decades, consumer goods have been subject to government-regulated disclosures of one form or another. These disclosures are often noncontroversial and give consumers basic factual information—like the amount of Vitamin C in a glass of orange juice or the presence of nuts in a candy bar as a potential allergen. But recent regulatory efforts now require businesses to make disclosures on a subject of political controversy: the extent and efficacy of a company's efforts to purge its supply chain of goods and services obtained through forced labor (that is, human trafficking/slavery/indentured servitude/child labor).

September 2015 Signaled the Arrival Of Class Actions Premised On "Misleading" Disclosures

In recent months the enactment of these regulations has inspired a series of class action lawsuits filed against prominent consumer goods companies.[1] Of course, the defender of forced labor is indeed a rare species (and for good reason). But these lawsuits go one step further than the underlying regulatory regime, demanding that defendants (1) at the front end (2) label their products to (3) fully disclose the potential taint of forced labor in their supply chain. Even those of us who have spent years immersed in the fight against forced labor abuses, this may simply go too far.

The emergence of these class actions highlights two interrelated issues: (1) the need for awareness of the regulatory-required disclosures; and (2) the attempt to use class actions as a means to compel companies to engage in controversial commercial speech.

While these cases remain at the very early stages, they come at a time when federal courts, including the U.S. Supreme Court, have grown increasingly willing to apply heightened constitutional scrutiny to restrictions on commercial speech. In addition to a passel of other specific arguments,[2] a First Amendment defense may well apply to these new consumer class actions. Indeed,

[1] *Melanie Barber et al v. Nestlé USA Inc. et al*, No. 8:15-cv-01364 (C.D. Cal. filed Aug. 27, 2015); *Monica Sud v. Costco Wholesale Corp. et al*, No. 4:15-cv-03783 (N.D. Cal. filed Aug. 19, 2015); *McCoy v. Nestlé USA Inc. et al*, No. 3:15-cv-04451 (N.D. Cal. Sept. 28, 2015); *Laura Dana v. The Hershey Co. et al*, No. 3:15-cv-04453 (N.D. Cal. filed Sept. 28, 2015); *Christina Wirth et al v. Mars Inc. et al*., No. 8:15-cv-01470 (C.D. Cal. filed Sept. 10, 2015); and *Robert Hodsdon v. Mars Inc. et al*, No. 3:15-cv-04450 (N.D. Cal. filed Sept. 28, 2015).

[2] These arguments include reliance on company claims, reasonableness of claims that consumers were misled, federal law safe harbor, failure to plead specific damages, and failure to plead violation of underlying law.

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it is precisely such a defense that will prevent a company's efforts at transparency and good corporate citizenship from being perversely transformed into a simple cudgel by the plaintiffs' bar.

Recent Regulations Call for Disclosure Of a Company's Efforts to Address Forced Labor in Its Supply Chain

As we have noted from the outset,[3] since 2012 several laws have created a new compliance regime that require companies to tell the public what specifically they are doing to *minimize*—though not necessarily *eliminate*—the risks of forced labor. The California Transparency in Supply Chains Act (California Act), the Federal Acquisition Regulation Provisions (FAR Provisions) coming from President Obama's Executive Order No. 13627, and the 2015 UK Modern Slavery Act (UK Act) (basically a slightly more flexible carbon copy of the California Act) are the three principal regulatory requirements mandating disclosure of efforts to combat human trafficking and slavery in a company's supply chain.

Both the California Act and the UK Act require, for covered entities, publicly posted statements that outline the particular measures a company has taken to combat human trafficking and slavery in its supply chain. Each provision likewise requires affected companies to come up with enforceable standards, subject to auditing, that its suppliers must comply with and that prohibit such practices.

"Basics" Concerning Applicable Regulations

The key requirements of the California Act and FAR Provisions are summarized in the box below.

The common thread running between the California Act and FAR Provisions (and UK Act) is that companies must advise the public, in ''objective'' terms, about what they are doing to address human trafficking in their supply chain. Neither the California Act nor the FAR Provisions, however, (1) dictate certain performance levels in eliminating these practices, or (2) demand that a company make a product-by-product disclosure of the potential for forced labor somewhere in that product's supply chain.

Indeed, each regulation, through its focus on suppliers (and sub-suppliers), fundamentally assumes that human trafficking is an ongoing issue that cannot be fully controlled by the company itself. So, for example, the California Act contains a finding that ''the criminal nature of slavery and human trafficking [means that] these crimes are often hidden from view and are difficult to uncover and track.'' Thus, the California Act is intended simply to ''provide consumers with information regarding [companies'] efforts to eradicate slavery and human trafficking from their supply chains.''

But doing the right thing is, in some circles, not enough. The plaintiffs' class action bar is attempting to take these disclosures a step further by seeking the courts' assistance in imposing civil liability for *any* products that a company has not *affirmatively advertised* as potentially tainted by supply chain issues. Those who understand the complexity of global supply chains and the real-world challenges involved in fighting forced labor overseas will appreciate why these ''demands'' are, perhaps not coincidentally, impossible to meet.

New Class Action Lawsuits Reframe Supply Chain Challenges as Violations Of Consumer Protection Laws

Going back to basics, we must first recognize that neither the California Act nor the FAR Provisions give citizens a private right of action to enforce these statutes. Nonetheless, beginning in August of 2015, a series of consumer class actions have been filed in federal courts in California, all alleging that the defendant in the crosshairs failed to disclose the *potential* that certain of its products *might* have been affected by forced labor practices occurring abroad.

Moving from the general to the specific, these cases seek to use the California consumer class action statutes, the Unfair Competition Act (UCL) and the Consumer Legal Remedies Act (CLRA), as well as the False Advertising Act (FAA), to bootstrap a cause of action going beyond the regulatory disclosure requirements. Consider that these cases allege that (1) defendants are ''*generally aware*'' that forced labor *may* be used in the production of materials/ingredients in their products, and (2) consumers would not have purchased those products *had they known* there was some risk of traf-

T. Markus Funk is a partner at Perkins Coie LLP. Mr. Funk is the Co-Chair of Perkins Coie's Supply Chain Compliance Practice (the first such practice among the AmLaw 100 law firms). In addition, Mr. Funk serves on the ABA's Presidential Anti-Trafficking Task Force, is founding co-chairman of the ABA's Corporate Social Responsibility and Forced Labor Task Force, and in 2004-2006 helped lead the Balkan fight against human trafficking while serving as the Department of Justice Section Chief in post-conflict Kosovo.

David Biderman is a partner at Perkins Coie and is Chair of the firm's Mass Tort Defense group. On consumer class actions, Mr. Biderman represents packaged food companies, coffee companies, dairy companies, footwear companies and others whose nutritional or health claims have been challenged.

Charles Sipos is a partner in Perkins Coie's Litigation group and focuses his practice on class action defense, intellectual property litigation, and appellate advocacy. Mr. Sipos has defended numerous class actions against food manufacturers whose health or nutritional claims have been challenged.

[3] *See, e.g.,* T. Markus Funk, ''Preparing for the Next Compliance Battleground: Eliminating Trafficking, Forced Labor, Child Labor, and Slavery from Global Supply Chains,'' *Bloomberg Law Reports* (February 21, 2012); Hon. Virginia Kendall & T. Markus Funk, *Child Exploitation and Trafficking: Examining the Global Challenges and U.S. Responses* (Rowman Littlefield, 2010).

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ficking in the supply chain. Based on the foregoing, the argument goes, (3) companies should in the future be *forced to disclose* the *presence* of that risk—and, of course, offer refunds to consumers for goods already purchased.

Each of the complaints alleges violations of the same three California statutes:

■ **The Unfair Competition Act, Cal. Bus. & Prof. Code §§ 17200, et seq.**: This statute is extremely broad, prohibiting any ''unlawful,'' ''unfair,'' or ''fraudulent'' business act or practice, as well as deceptive, untrue, or misleading advertising. Any private party who has ''lost money or property'' may sue, as may the government. Remedies include injunctions and restitution of money or property obtained by means of the illegal conduct.

■ **The False Advertising Act, Cal. Bus. & Prof. Code §§ 17500, et seq.**: This statute broadly forbids the use of untrue or misleading statements made with intent to dispose of property or perform services or to induce the public to enter into obligations related thereto. Standing requirements and remedies are similar to those under the UCL.

■ **The Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, et seq.**: This statute forbids certain methods of competition and unfair or deceptive acts or practices designed to result in the sale or lease of goods or services to a consumer. Remedies under the CLRA include compensatory and punitive damages, as well as equitable relief.

At their core, these cases simply seek to impose legal obligations well beyond the regulatory disclosures described above; they demand that companies affirmatively (not to mention speculatively) state that certain products might be affected by forced labor somewhere in the supply chain. The lawsuits contend that these companies' public disclosures (and statements) concerning their efforts to combat trafficking are lacking—the companies' disclosures about forced labor are simply insufficient or constitute outright falsehoods. Indeed, complaints in several of these cases point to public statements concerning forced labor not as evidence of a desire to comply with the relevant regulations but rather as proof that the companies' efforts fall short of the mark.

Possible Achilles Heel—Compelled Speech

As touched on above, these cases are subject to the traditional defenses used to defeat consumer class actions, including that the companies' statements are not misleading to a ''reasonable consumer'' and that there is a lack of causation between the alleged violation and any injury. There is, however, an equally important defense that is not available to traditional consumer class actions. It is our view that a First Amendment constitutional defense should apply to the claims in these cases and bar imposition of the specific disclosures these cases demand.

In recent years, federal courts have has grown increasingly willing to apply heightened First Amendment scrutiny to ''commercial speech,'' a form of speech that traditionally received less constitutional protection than other forms of speech. Just last term, the Supreme Court held in *Reed v. Town of Gilbert* that restrictions on public signage are subject to ''strict scrutiny'' because those regulations discriminated against the content of the speech by making distinctions between the kinds of speech on the sign. And four years ago, in *Sorrell v. IMS Health Inc.*, the Supreme Court applied strict scrutiny and struck down a Vermont law that restricted commercial use of prescriber information for drugs if that information was intended for use in marketing (versus some noncommercial speech applications).

More recently, on Aug. 18, 2015, the U.S. Court of Appeals for the District of Columbia Circuit held in *National Association of Manufacturers v. SEC* that a Securities and Exchange Commission rule demanding that companies disclose whether minerals are ''conflict free'' was subject to intermediate constitutional scrutiny under the First Amendment. The court explained that the SEC rule was subject to that heightened scrutiny because the disclosure essentially demanded that a company ''publicly condemn'' itself on a matter of political controversy. The *National Association* court further explained that there was no showing that this forced speech would do anything to actually address the underlying atrocities committed elsewhere, explaining: ''The idea must be that the forced disclosure regime will decrease the revenue of armed groups [in the Congo] and their loss of revenue will end or at least diminish the humanitarian crisis there. But there is a major problem with this idea—it is entirely unproven and rests on pure speculation.''

The disclosures demanded by the plaintiffs in these newly filed class actions are virtually identical to those struck down in *National Association*. Just as in *National Association*, the disclosures demanded by plaintiffs are on matters of public controversy. Plaintiffs in these cases are asking for the same type of ''public condemnation'' that the court in *National Association* recognized as impermissible compelled speech. Moreover, there is nothing alleged in the complaints in these cases to show that the product-by-product disclosures demanded will actually address the underlying problem of human trafficking. And finally, the disclosures demanded as relief go well beyond those required by the California Act or the FAR Provisions. Plaintiffs are not asking the defendants to simply explain what efforts they are taking to combat human trafficking. These plaintiffs are, instead, demanding a ''confession'' that there is some risk in the supply chain—a confession that may or may not even be true, given the extreme difficulty in tracking these practices.

Parting Thoughts

As these class actions play out in the coming months, it will remain essential to seek practical advice on how to ensure full compliance with the regulatory-based disclosures called for by the California Act and the FAR Provisions. Similarly, these cases highlight the virtue of not ''over-promising'' in, say, a company's California Act disclosure, for risk of unnecessarily incurring liability. As to the more far-reaching disclosures called for in these lawsuits, however, the First Amendment should prove to be a valuable defense against private plaintiffs who are attempting to use consumer protection statutes to impose a more demanding, and constitutionally impermissible, disclosure regime.

The Three Statutes

The California Transparency In Supply Chains Act (2012)

Effective Jan. 1, 2012, the California Act amended California's Civil Code to require that qualifying companies detail and publicly disclose the nature and scope of their efforts to eradicate human trafficking, slavery, child labor, and forced labor from their worldwide supply chains. The California Act applies to all (1) retail sellers and manufacturers with (2) more than $100 million in annual global gross receipts who (3) do business in California (that is, that, *inter alia*, have more than $50,000 in assets in California or spend more than the same amount in wages in the state). The California Act provides for injunctive relief brought by the California Attorney General.

Stated Objective: Help consumers ''distinguish companies on the merits of their efforts to supply products free from threat of slavery and trafficking.''

Type of Entity to Which the Act Applies:

- Retail seller/manufacturer (based on tax status);
- With annual gross worldwide receipts exceeding $100 million; and
- That is ''doing business'' in California (property or salaries in California exceeding $50K)
  - ✓California Franchise Tax Board (FTB) confidentially released business names to Attorney General.
  - ✓Estimated 6,000+ businesses are on list.

Disclosure of Supply Chain Verification/Audit Results:

- Disclosures must be on Internet homepage.
- Homepage disclosure must be through a ''conspicuous'' and ''easily understood'' link to full-text document (cannot hide it).

Disclosure of What Companies Have Done to Accomplish the Following:

- ***Verify*** supply chain to evaluate/address risks.
- ***Audit*** suppliers for compliance with standards.
- ***Obtain*** certification from direct suppliers re: materials.
- ***Maintain*** ''accountability standards''/remediation plan.
- ***Provide*** training to key employees/management.

Net Impact: Reporting clean bill of health requires significant supply chain due diligence.

FAR Provisions Arising Out of President Obama's 2012 Executive Order 13627 (2015)

The FAR Provisions mandate that all federal contractors revamp their compliance programs to address human trafficking and slavery in their supply chains.

Impact :

- Over 300,000 federal contractors and direct subcontractors must report anti-trafficking efforts.
- Compliance is, *de facto*, also required for sub-suppliers in the contracting party's supply chain.

Mandatory/Key Provisions:

- Contractors and subcontractors must represent that they have no trafficking activities in the supply chain.
- Contractors and subcontractors must agree to self-report and take remedial action if they identify any activities ''inconsistent with'' the Executive Order.
- Mandatory Contract Clause: By contract clause, contractors and subcontractors must agree to cooperate fully in providing reasonable access to allow audits, investigations, or other actions to ascertain compliance with the Executive Order and other anti-trafficking laws.
- No *de minimis* exception, safe harbor, compliance defense, etc. are available.
- There are special rules for contracts performed outside of the U.S. involving $500,000 or more.

UK Modern Slavery Act of 2015

Disclosure Statement: The company's disclosure statement can, but (in a departure from the California Act's mandatory language) does not have to, include the following items from an organization:

- *Structure*. The organization's structure, business and supply chains.
- *Policies*. Its policies in relation to slavery and human trafficking.
- *Due Diligence*. Its due diligence processes in relation to slavery and human trafficking in its business and supply chains.
- *Risk Assessment and Management*. The parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk.
- *Effectiveness*. Its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate.
- *Training*. The training about slavery and human trafficking available to its staff.

Like the California Act, the UK Act also requires that any company with a website publish the entire disclosure statement on its website and have a link to the disclosure statement in a prominent place on the website homepage. In the (unlikely) chance that a qualifying company has no website, it must provide its disclosure statement within 30 days of receiving a written request.

Signatory Requirements: To ensure accountability, the UK Act requires that the disclosure statement be approved and signed in a specific manner. Specifically:

- *Corporations* must have the disclosure statement approved by the board of directors and signed by a director.
- *Limited liability partnerships* must get member approval and signature by a designated member.
- *Limited partnerships* must get a general partner's signature.
- *Any other partnership* must get a partner's signature.

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