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Courts Are Right To Limit Disclosure Requirements For Cos.

By **Jonah Knobler and Brandon Trice** (September 1, 2020, 5:08 PM EDT)

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Consumer protection laws prohibit not just misrepresentations, but also certain omissions. We all know what makes a misrepresentation actionable: materiality. In other words, a reasonable consumer would rely on it when choosing whether to purchase.

But does the same materiality standard apply to omissions liability? In other words, does a manufacturer violate consumer protection laws merely by failing to disclose something that might affect a reasonable consumer's purchase decision?

In a series of recent cases, plaintiffs lawyers have advanced that sweeping liability theory. Fortunately, however, courts have not been biting. Specifically, the U.S. Court of Appeal for the First Circuit and the U.S. Court of Appeal for the Ninth Circuit have rejected this theory of material omissions in two similar cases involving chocolate.

By way of background, in West Africa, where most of the world's cocoa is produced, some farmers use child labor. Sometimes, this consists of children working on their own family farms to help make ends meet, but in some cases, it may involve actual human trafficking and forced labor akin to slavery.

Western chocolate companies have long acknowledged and condemned these labor abuses in their supply chains, and they have spent millions of dollars trying to prevent them. But due in large part to crippling poverty and political instability in West Africa, the problem persists.

Of course, none of this is a secret. American newspapers and magazines have covered the plight of these child laborers for many years. Congress has debated legislation on the subject. And the chocolate companies themselves have made public statements on their websites and in corporate literature. Yet some consumers remain unaware.

Take Tomasella v. Nestle USA Inc. et al.[1] In that case, the plaintiff bought chocolate products made by Nestle SA, Mars Inc. and The Hershey Co. Upon learning that the defendants may have had child labor in their cocoa supply chains, she brought a putative class action under Massachusetts' consumer protection law.

Importantly, she did not contend that the defendants had made any false affirmative claims (e.g., that their products were fair trade). Rather, she alleged that the defendants had violated the law by failing to include disclosures about potential child labor on their product labels, where she would have seen them. Had she been privy to such information, she alleged, she would not have chosen to purchase those chocolate products.

While recognizing that child labor is a "humanitarian tragedy," the First Circuit rightly focused on the narrow legal question before it. That question was whether Massachusetts' consumer protection law extends to pure omissions — i.e., situations where "the seller has simply said nothing, in circumstances that do not give any particular meaning to his silence."

Since there was little precedent on this point, the First Circuit turned to the decisions of the Federal Trade Commission — in particular, a 1984 decision called In re: International Harvester Co.,[2] where that agency set forth its policy on what it called "pure omissions."

As the FTC recognized in International Harvester, there are a limited number of scenarios where a seller may mislead through omissions. For example, a product's physical appearance may create a misleading impression that a seller has an obligation to correct (e.g., if the product is designed to look like expensive wood, but is actually made from cheap plastic).

Sometimes, the circumstances of a specific transaction may give rise to a false implicit representation by the seller — for example, if the buyer tells the seller that she is purchasing the product for a specific purpose, proceeding with the transaction may constitute an implicit representation by the seller that the product is fit for that purpose.

Finally, the FTC acknowledged, "the very act of offering goods for sale" constitutes an implied representation that the goods "are free of gross safety hazards" and satisfy "the irreducible minimum performance standards [for that] particular class of good."

Beyond these narrow situations, however, the mere act of placing goods on the market does not constitute an implied representation about their properties — let alone the processes used to manufacture them. Consumers, the FTC said, may bring to the table a variety of "erroneous preconceptions" on these subjects. But because the seller does not create those preexisting assumptions, it does not act misleadingly by failing to reach out and correct them.

Furthermore, as the FTC pointed out, "[i]ndividual consumers may have erroneous preconceptions about issues as diverse as the entire range of human error, and it would be both impractical and very costly to require corrective information on all such points."

Applying the FTC's International Harvester framework, the First Circuit found the plaintiff's claim lacking. Nothing about the physical appearance of the defendants' chocolate products conveyed any implicit message about their manner of production, and there was no allegation that the products were physically unsafe or failed to meet the irreducible minimum performance standards expected of a candy bar.

Merely placing the products on the market did not constitute an implied representation that they were manufactured only from ethically sourced cocoa. The plaintiff's assumption that the defendants' supply chains were free of child labor was an erroneous preconception that she brought to the transaction, and not one that the chocolate manufacturers had affirmatively created. The manufacturers' labels, therefore, were not misleading as a matter of law.

As noted above, the Ninth Circuit has also considered a similar challenge brought under California's consumer protection laws.[3] Unlike the First Circuit in Tomasella, the Ninth Circuit in Hodsdon v. Mars Inc. did not consult FTC precedent, since courts had already addressed when California's consumer protection laws impose a duty to disclose information.

However, the test that the Ninth Circuit distilled from California precedent looks a lot like the FTC's International Harvester standard. For starters, the Ninth Circuit held, manufacturers must disclose "unreasonable safety hazard[s]." Manufacturers may also have a duty to disclose "physical defects" that "affect[] the central functionality" of the product. But the duty of disclosure goes no further.

In particular, California law does not require manufacturers to affirmatively disclose facts at odds with consumers' subjective preferences. The child labor at issue in Hodsdon did not render the defendants' chocolate products unsafe to eat, and it did not constitute a physical defect that prevented the products from functioning as snack foods. The plaintiff's allegation that the challenged labor practices rendered the products unusable to her was a matter of subjective preference, which created no duty to disclose.

Notably, the Ninth Circuit has extended Hodsdon's holding from cases about consumer goods to cases about consumer services. For example, in Hall v. SeaWorld Entertainment Inc.,[4] the plaintiffs alleged that the SeaWorld theme park had violated California's consumer protection laws by failing to disclose to guests its alleged mistreatment of captive orcas. Had such a disclosure been made, the plaintiffs asserted, they would not have purchased tickets to the park.

The Ninth Circuit reasoned that there was "no meaningful distinction between the sale of goods and services for purposes of the seller's duty to disclose," and found that SeaWorld had no such duty because "the alleged omissions concerning the treatment of orcas reflect[ed] Plaintiffs' 'subjective preferences,'" rather than "the central functionality of SeaWorld's services."

It goes without saying that we condemn child labor and animal cruelty. Nonetheless, we think the First and Ninth Circuits reached the right outcome. For starters, any other result would be completely unworkable.

As the FTC recognized in International Harvester, "[t]he number of facts that may be material to consumers ... is literally infinite." Moreover, the nature of those material facts is constantly in flux as new issues enter the public consciousness.

For example, consumers have long based their purchase decisions on companies' records and stances on topics like abortion, gun control, LGBTQ rights and the environment. With the rise of the #MeToo and Black Lives Matter movements, consumers are now increasingly directing their purchases toward businesses whose practices align with their views on racial and gender justice. And as the 2020 campaign season goes into full swing, consumers are actively boycotting businesses seen as favoring — or disfavoring — President Donald Trump's reelection.

All of this information, in other words, is material to wide swaths of the consuming public — just as much as the labor and animal rights issues in Tomasella, Hodsdon and Hall. If the plaintiffs in those cases were right, and materiality alone were enough to require disclosure, manufacturers would have to include all of this information, and far more besides, on their product labels — or elsewhere at the point of sale.

Even if it were possible for manufacturers to "anticipat[e] exactly what information ... customers might find material" during the shelf life of their products — a doubtful assumption — disclosing all such facts in the "limited surface area of a chocolate wrapper," or other product packaging, would be a physical impossibility.[5] Even the most conscientious manufacturer would inevitably incur massive liability under such a regime.

Consumers, too, would suffer.[6] For starters, businesses would have little choice but to pass this vast new liability on to consumers in the form of increased prices — forcing the bulk of customers who may not care, or care strongly, about moral, ethical or political issues to subsidize the verdicts and settlements paid to those who do.

Furthermore, the flood of new disclosures designed to prevent moral, ethical and political offense would drown out truly important warnings, such as health and safety advisories that may literally be a matter of life and death.[7]

The only regime that is workable and fair — both to manufacturers and consumers — is the type of carefully cabined disclosure rule endorsed by the First and Ninth Circuits. Under such a regime, information that bears on serious safety risks or fundamental physical product defects must generally be disclosed.

Beyond that, consumers must bear the risk that goods and services they purchase on the open market will not satisfy their subjective moral, ethical or political preferences — unless, of course, the seller affirmatively represents that they will.

Importantly, the free market gives sellers "substantial economic incentives" to "discover what product or process attributes consumers will find appealing" and voluntarily "provide consumers with [such] information."[8] For example, if there is a real consumer desire for products that conform to certain ethical standards — e.g., sweatshop-free clothing or conflict-free diamonds — businesses have every incentive to tailor their offerings and product claims to that market.

Consumers who care about these issues can then choose to purchase products that expressly claim to meet their moral and ethical standards and avoid products that do not make such claims. If those express claims turn out to be false, purchasers will have a remedy under existing consumer protection law.[9] Thus, to avoid consumer deception, there is no need to incur the considerable downsides of imposing liability for pure omissions.

We think that it is a sign of a healthy democracy that consumers are increasingly speaking with their wallets. They have every right to do so — and manufacturers must be prepared to face the consequences of their moral, ethical and political choices in the court of the free market.

At the same time, consumers should not be permitted to coopt state consumer protection laws and transform them into roving vehicles for the enforcement of their own personal moral, ethical or political preferences. Such a vast expansion of consumer-protection law would benefit neither businesses nor consumers. Thus far, at least, the courts have agreed — and we find that outcome sweet indeed.

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Disclosure: Patterson Belknap was counsel for The Hershey Co. in the Tomasella case discussed in this article.

[1] Tomasella v. Nestle USA Inc. et al., 962 F.3d 60 (1st Cir. June 16, 2020).

[2] In re: International Harvester Co., 104 F.T.C. 949.

[3] Hodsdon v. Mars Inc., 891 F.3d 857 (9th Cir. 2018).

[4] Hall v. SeaWorld Entertainment Inc., 747 Fed. App'x 449 (9th Cir. 2018).

[5] See Dana v. Hershey Co., 180 F. Supp. 3d 652, 664-65 (N.D. Cal. 2016).

[6] See Int'l Harvester, 104 F.T.C. at 1059 (recognizing that imposing liability for pure omissions "would very possibly represent a net harm for consumers").

[7] Cf. Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 994 (2019) (noting that overly stringent warning requirements "would impose a difficult and costly burden on manufacturers while simultaneously overwarning users").

[8] Jonathan H. Adler, Compelled Commercial Speech and the Consumer "Right to Know," 58 Ariz. L. Rev. 421, 453-54 (2016).

[9] See, e.g., Walker v. Nestlé USA Inc., 2020 WL 3317194, *3 (S.D. Cal. June 17, 2020) (denying motion to dismiss consumer protection claims involving chocolate affirmatively marketed as "[s]ustainably sourced").