

## A New Class Of Calif. Supply Chain Disclosure Suits

*Law360, New York (October 27, 2015, 10:54 AM ET) --*



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In the past two months, six class actions have been filed in California federal courts against food product companies for failing to disclose alleged slave labor in their supply chains. These are the first lawsuits of their kind and we predict that more will follow.

California's Transparency in Supply Chains Act of 2010 became effective in January 2012. It requires companies with over \$100 million in gross sales to disclose on their website efforts taken (if any) to "eradicate slavery and human trafficking" from the supply chain. The act requires disclosure of five facts regarding such efforts: whether the company verifies its supply chain, conducts audits of suppliers, requires supplier certification, maintains internal compliance procedures and provides employee training. Companies are not required to take *any* efforts to do any of these things, only to disclose what they do.

The California attorney general has authority to sue violators of the act. Earlier this year, it reportedly sent warning letters to multiple retailers and manufacturers asking them to demonstrate compliance. It also issued a consumer alert, which provided an online form to report suspected violations. To date, the attorney general has not yet brought any enforcement proceedings.

The recent class actions contend that breach of the act constitutes violation of California's consumer protection and unfair competition laws, Cal. Bus. and Prof. Code §§17200 and 17500 and Civ. Code §1750. Lawyers representing plaintiffs in the actions allege that defendants falsely represented — in disclosures under the act and other corporate statements on social responsibility — that they forbid the use of slavery, forced labor or human trafficking by their suppliers, but continued to sell products tainted with supply chain issues. Plaintiffs also contend that affirmative representations condemning slave labor create a separate duty to disclose noncomplying practices to the consuming public. Each

complaint seeks injunctive relief — prohibiting nondisclosure and continued sales — as well as monetary damages.

The first lawsuit was filed against Costco Wholesale Corp. in August 2015<sup>[1]</sup> and alleges that, contrary to the disclosures on its website, the wholesaler is selling farmed prawns that were fed fishmeal sourced by “pirate boats manned with slaves” off the coast of Thailand and Indonesia. Costco’s importer and its Thai exporter are named as co-defendants. The complaint cites a documentary, “Supermarket Slave Trail,” in which the importer reportedly admits that its supply chain “was plagued with human rights violations, which include human trafficking and slave labor.” Next, Nestle USA Inc. and Iams Co. were hit with similar class actions regarding ingredients in their pet food allegedly supplied by Thai seafood companies.<sup>[2]</sup>

Most recently, in September 2015, three class actions were filed against major chocolate companies — the Hershey Co., Mars Inc. and Nestle (again) — alleging the companies purchase cocoa from the Ivory Coast, where it is harvested by minors and/or forced labor.<sup>[3]</sup> The complaints detail the chocolate industry’s promises since 2001 to self-regulate and eliminate child labor in the Ivory Coast from their supply chain and allege that, despite such promises, child labor in the region has only increased.

On Monday, Oct. 19, 2015, Nestle moved to dismiss the first complaint against it, arguing that it would be impossible to determine which ingredients may be the product of forced labor, and that companies cannot be required to disclose the mere possibility that forced labor may be present in their supply chains. Nestle further argued that the act actually bars the plaintiff’s claims, in that it only requires specified disclosures regarding a company’s efforts, but does not require disclosure of any known instances of forced labor. The motion is currently scheduled to be heard in front of the Honorable Cormac J. Carney of the Central District of California on Dec. 7, 2015.

The complaints, and Nestle’s motion, raise a number of questions regarding the scope, application and enforcement of the act. By itself, the act has no civil consumer enforcement provision. Will courts allow consumers to pursue private civil claims under the act using California’s separate unfair competition laws? Does compliance with the act shield companies from other potential liabilities related to partial disclosure or representations around the quality of a business’ supply chain? Could such disclosures, although factually accurate, be considered misleading, e.g., where they are aspirational in nature? Can consumers show any actual damages or loss of property sufficient to give rise to actual damages claims? Will a court certify any class of consumers on this issue?

Over the next year or years, answers to such questions at the district court level is likely to be varied and businesses (and consumers) will need to await final review by the Ninth Circuit or California’s Supreme Court for guidance on the act’s application. Based on recent activity, it also is likely the attorney general may begin to take enforcement action to secure compliance with the act.

In the meantime, more class lawsuits are likely to be filed and threatened against companies doing business in the state. This also is part of a growing trend in other jurisdictions scrutinizing labor practices in global supply chains. In July, a bill with nearly identical requirements for public companies, to require annual disclosure with the U.S. Securities Exchange Commission, was introduced in the U.S. House of Representatives. A Senate version of the bill is expected to be introduced soon. The U.K. recently enacted the Modern Slavery Act, effective in 2016, which requires similar disclosure for all suppliers of good and services in the U.K. that gross over \$45 million annually worldwide.

Companies with more than \$100 million in sales doing business in California should consider conducting

a thorough review for compliance with the act and developing procedures to address questions regarding their supply chain. Examples of good practices in this area would include supply chain audits to identify unknown or hidden abuses, developing supplier vetting criteria and guidelines for compliance with basic human rights and labor norms and periodic review of disclosure statements to ensure compliance under the act. The U.S. State Department's Trafficking in Persons Report[4] and the nongovernmental organization Verite's report[5] on corporate supply chains, can also serve as helpful guides to areas of potential risk.

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[1] Sud v. Costco Wholesale Corp., Case No. 3:15-cv-03783 (N.D. Cal.).

[2] Barber v. Nestle USA Inc., Case No. 8:15-cv-1364 (C.D. Cal.); Wagner v. Mars Inc., Case No. 8:15-cv-1470 (C.D. Cal.).

[3] Dana v. Hershey Co., Case No. 3:15-cv-04453 (N.D. Cal); McCoy v. Nestle USA Inc., Case No. 3:15-cv-04451 (N. D. Cal.); Hodson v. Mars Inc., Case No. 3:15-cv-04450 (N.D. Cal.).

[4] U.S. Department of State, Trafficking in Persons Report 2015.

[5] Verite, Strengthening Protections Against Trafficking in Persons and Federal and Corporate Supply Chains.