

## Candy Giants Prevail In Child Labor Warning Suits At 1st Circ.

By **Hailey Konnath**

*Law360 (June 16, 2020, 9:56 PM EDT)* -- The First Circuit refused Tuesday to revive several proposed class actions accusing Hershey, Mars and Nestle of failing to disclose on candy wrappers that they source cocoa beans from farms that may use child labor, ruling that the suits failed to state claims under Massachusetts consumer protection law.

Danell Tomasella claimed in her suits that she wouldn't have purchased the candy giants' products if she'd known about the child labor issue. She alleged violations of Massachusetts consumer protection statute Chapter 93A.

But in January 2019, a Massachusetts federal judge threw out the suits, holding that while it is "beyond dispute" that the use of child and slave labor in cocoa production is reprehensible and tragic, the lack of disclosure from the three companies is not an omission likely to deceive or influence customers.

The three-judge appellate panel agreed Tuesday, though it noted in its lengthy decision that the exploitation of children in the supply chain used by U.S. corporations "is a humanitarian tragedy."

"This case thus serves as a haunting reminder that eradicating the evil of slavery in all its forms is a job far from finished," the panel said.

That said, Tomasella hasn't plausibly stated claims that the candy companies engaged in unfair or deceptive acts or practices under the Massachusetts law, the panel held. The nondisclosures she's alleged don't clearly fall into categories recognized as being deceptive by the Supreme Judicial Court of Massachusetts or the Federal Trade Commission, it said.

"By not disclosing on the packaging of their chocolate products that there are known labor abuses in their cocoa supply chains, defendants stay silent on the subject in a way that does not constitute a half-truth or create any misleading impressions about the upstream labor conditions in the cocoa supply chain," the panel said.

And the omissions also don't fall within the scope of any recognized concept of unfairness, the judges ruled. Tomasella's pleadings do not provide any basis for finding that companies have tricked consumers or taken advantage of their assumptions for capital gain, they said.

"And as to substantial injury, the hard truth with which society must reckon is that consumers actually

benefit from the prevalence of forced child labor in cocoa bean supply chains because it makes chocolate cheaper," the panel said.

"Again, we must separate the undisputed immorality of the alleged underlying conduct, which we don't take lightly, from the challenged nondisclosures," it added.

In the February 2018 suits, Tomasella claimed that candy makers deceive customers by not disclosing that they buy cocoa from farms in the Ivory Coast and Ghana that use child and slave labor. But U.S. District Judge Allison D. Burroughs dismissed the suits, ruling that the omission wasn't likely to deceive customers. The cases landed in the First Circuit the following month.

Hershey argued in September that if companies were required to disclose all "boycott-worthy" issues on packaging, then "vital health-and-safety warnings" would be "drowned out" and the courts would be overrun with litigation by consumers who suffered no tangible losses.

The First Circuit panel suggested that it agreed during oral arguments in December, cautioning against a "slippery slope" of disclosures that could become necessary if Tomasella's claims prevailed.

"There's not a duty to talk about everything under the sun on package labeling," U.S. Circuit Judge Sandra L. Lynch said at the time. "There is not enough room on package labeling to do that."

A Nestle spokesperson said in a statement provided to Law360 on Tuesday that the company is pleased with the First Circuit's ruling.

"Child labor is unacceptable and has no place in our supply chain," the spokesperson said. "We have explicit policies against it and are working with other stakeholders to combat this global social problem. In bringing such lawsuits, class action lawyers are targeting some of the very organizations trying to fight child labor."

Counsel for the other parties didn't immediately return requests for comment late Tuesday.

U.S. Circuit Judges Juan R. Torruella, Sandra L. Lynch and William J. Kayatta sat on the panel for the First Circuit.

Tomasella is represented by Steve W. Berman and Elaine T. Byszewski of Hagens Berman Sobol Shapiro LLP.

Hershey is represented by Steven A. Zalesin and Jonah M. Knobler of Patterson Belknap Webb & Tyler LLP.

Mars is represented by Stephen D. Raber, David M. Horniak and Alison M. Newman of Williams & Connolly LLP.

Nestle is represented by Bryan A. Merryman, Michael Kendall, Lauren M. Papenhausen and Karen Eisenstadt of White & Case LLP.

The cases are Danell Tomasella v. The Hershey Co. et al., case number 19-1132; Danell Tomasella v. Mars Inc. et al., case number 19-1131; and Danell Tomasella v. Nestle USA Inc., case number 19-1130, in the U.S. Court of Appeals for the First Circuit.

--Additional reporting by Chris Villani. Editing by Breda Lund.  
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