RECENT CASES

ADVERTISING LAW — DECEPTIVE OMISSIONS — FIRST CIRCUIT HOLDS THAT PRODUCT PACKAGES NEED NOT DISCLOSE LABOR ABUSES. — *Tomasella v. Nestlé USA, Inc.*, 962 F.3d 60 (1st Cir. 2020).

Like human speakers, corporate advertisers are prone to mixed messaging. What advertisers assert in one claim, in another they contradict, revise, or ignore. It then falls to courts to discern what message consumers absorb from the noise. Recently, in *Tomasella v. Nestlé USA, Inc.*,[1] the First Circuit was charged with determining the takeaway from claims by chocolate manufacturers who alternately had acknowledged, repudiated, and said nothing about their use of child and slave labor. Despite these inconsistent representations, the court confined its examination to the manufacturers' omissions on their candy wrappers as if they stood alone and concluded that the wrappers were not deceptive. Had the court taken account of the manufacturers' broader marketing scheme, however, it should have recognized that the manufacturers may have deceived consumers.

In February 2018, Massachusetts resident Danell Tomasella brought consumer class actions against chocolate manufacturers Nestlé, Hershey, and Mars for failing to disclose on candy wrappers that their production processes relied on child and slave labor.[2] The manufacturers predominately imported cocoa beans from Côte d'Ivoire, where over 1.2 million children work in the hazardous cocoa industry, wielding machetes and spraying pesticides.[3] Some of these children are forced into the work through kidnapping or debt bondage,[4] and many are unpaid.[5] Over half have sustained work-related injuries.[6]

While the manufacturers were silent about their labor practices on candy wrappers, they spoke about them in other forums. On their websites, the manufacturers posted Corporate Business Principles and Supplier Codes of Conduct prohibiting child and slave labor as a matter of policy.[7] Despite these commitments, the manufacturers publicly

---

[1] 962 F.3d 60 (1st Cir. 2020).

[2] *Id.* at 67. The putative class consisted of all consumers who had purchased the defendants' allegedly mislabeled chocolate in Massachusetts since early 2014. *Id.* Implicated candy included such favorites as M&M's, Reese's, and Snickers. *See id.* at 66 n.3.

[3] *Id.* at 65–66.

[4] *Id.* at 65.

[5] Tomasella v. Nestlé USA, Inc., 364 F. Supp. 3d 26, 30 (D. Mass. 2019).

[6] *Tomasella*, 962 F.3d at 65.

[7] *Id.* at 66; *see also, e.g.*, NESTLÉ, CORPORATE BUSINESS PRINCIPLES 4 (2020), https://www.nestle.com/sites/default/files/asset-library/documents/library/documents/corporate_governance/corporate-business-principles-en.pdf [https://perma.cc/UC3Y-LAR3].

acknowledged their continued labor abuses and launched corporate remedial initiatives to stamp them out.[8]

Tomasella alleged that the manufacturers' failure to disclose their labor abuses on chocolate wrappers violated the Massachusetts Consumer Protection Act, Chapter 93A.[9] She had two theories for the violation. First, she claimed that the omissions were deceptive because they lured reasonable consumers into buying chocolate that they otherwise would not have purchased "had they known the truth."[10] Second, she claimed that the omissions were unfair because they made consumers "unwitting support[ers] of child and slave labor."[11]

In January 2019, Judge Burroughs of the Massachusetts federal district court granted the defendants' motion to dismiss.[12] Although the labor abuses were "widespread, reprehensible, and tragic," she held that the manufacturers' omissions on candy wrappers were neither deceptive nor unfair under the Massachusetts statute.[13]

As to deception, the court found that the omissions failed to mislead reasonable consumers into buying the manufacturers' chocolate.[14] Labor abuses had "nothing to do with the central characteristics of the chocolate products sold."[15] In selling the chocolate, the manufacturers made no representation about their labor practices, implying only that the chocolate was "fit for human consumption."[16]

Federal policy favored limiting deception liability for omissions. The Massachusetts statute directed courts to seek guidance from interpretations of the analogous federal consumer protection statute,[17] the Federal Trade Commission Act[18] (FTC Act). Under the FTC's interpretation of its statute, advertisers were not liable for "pure omissions,"[19] defined as silence "in circumstances that do not give any particular meaning to

---

[8] *Tomasella*, 962 F.3d at 66.

[9] MASS. GEN. LAWS ch. 93A (2020); *see also Tomasella*, 962 F.3d at 67. In addition to the statutory claim, Tomasella brought a second cause of action alleging that the omissions had unjustly enriched the manufacturers. *Tomasella*, 962 F.3d at 67–68. Both the district court and the First Circuit dispensed with the claim. *Id.* at 84; *Tomasella*, 364 F. Supp. 3d at 37. Massachusetts law precluded claims for unjust enrichment where a plaintiff had an adequate remedy at law, even if that remedy was not viable. *Tomasella*, 962 F.3d at 83; *Tomasella*, 364 F. Supp. 3d at 37.

[10] *Tomasella*, 962 F.3d at 67.

[11] *Id.* (alteration in original).

[12] *Tomasella*, 364 F. Supp. 3d at 29–30. Only the *Nestlé* decision was published, but the court's rulings for Mars and Hershey resembled the *Nestlé* decision. *Tomasella*, 962 F.3d at 68 n.7. This comment follows the First Circuit in using the *Nestlé* decision to illustrate the district court's reasoning in the three lawsuits. *See id.*

[13] *Tomasella*, 364 F. Supp. 3d at 29–30.

[14] *Id.* at 35.

[15] *Id.* at 33.

[16] *Id.* at 35.

[17] *Id.* at 33–34 (citing MASS. GEN. LAWS ch. 93A, § 2(b) (2020)).

[18] 15 U.S.C. §§ 41–58.

[19] *Tomasella*, 364 F. Supp. 3d at 34.

[the] silence."[20] Because Tomasella did not allege that the manufacturers made any false or misleading affirmative representations on product packaging, the manufacturers' omissions were pure and exempt from liability.[21]

Nor were the manufacturers' omissions unfair. Judge Burroughs distinguished between the unfairness of the manufacturers' labor abuses and the unfairness of their failure to disclose those abuses.[22] Although Tomasella had identified legal authorities suggesting that child labor was unfair, these sources did not speak to the manufacturers' disclosure obligations.[23]

Tomasella appealed the dismissal to the First Circuit, which affirmed the district court's ruling and echoed much of its reasoning.[24] Judge Torruella wrote for the unanimous panel.[25] Like the district court, he lamented the "humanitarian tragedy" of child labor, but he separated this ethical condemnation from the "very narrow" legal judgment about the manufacturers' liability under the Massachusetts statute.[26]

Regarding deception, the First Circuit held that the manufacturers' packaging omissions did not mislead consumers.[27] Like Judge Burroughs, Judge Torruella drew on the FTC's framework for assessing omissions.[28] In its 1984 decision *In re International Harvester Co.*,[29] the FTC set forth two limited cases in which omissions could give rise to deception.[30] The first is "half-truth,"[31] where an advertiser omits information "necessary to prevent one of [their] affirmative statements from creating a misleading impression."[32] The second is when an advertiser "remain[s] silent . . . under circumstances that constitute an implied but false representation."[33] They create a misleading impression about core

---

[20] *Id.* at 33 (quoting Int'l Harvester Co., 104 F.T.C. 949, 1059 (1984)).
[21] *See id.* at 33, 35.
[22] *See id.* at 36.
[23] *Id.*
[24] *See Tomasella*, 962 F.3d 60.
[25] Judges Lynch and Kayatta joined Judge Torruella's opinion.
[26] *Tomasella*, 962 F.3d at 65; *see also Tomasella*, 364 F. Supp. 3d at 33.
[27] *Tomasella*, 962 F.3d at 79.
[28] *See id.* at 72–73. On appeal, Tomasella argued that the district court had erred in relying on FTC guidance. *Id.* at 75. She maintained that Chapter 93A contemplated a broader notion of omissions liability that reached any knowing omission of material information, citing language from Supreme Judicial Court rulings and from a Massachusetts regulation. *Id.* The First Circuit rejected the argument. *Id.* at 76. Chapter 93A clearly directed courts to consult FTC guidance, the SJC rulings were distinguishable, and Tomasella had misread the regulation. *See id.* at 76–79.
[29] 104 F.T.C. 949 (1984).
[30] *Tomasella*, 962 F.3d at 72.
[31] *Id.*
[32] *Id.* (quoting *Int'l Harvester*, 104 F.T.C. at 1057).
[33] *Id.* (quoting *Int'l Harvester*, 104 F.T.C. at 1058).

features of the product without speech — such as by presenting a used product as if it were new.[34]

According to the First Circuit, the manufacturers' omissions did not fit into either category.[35] Since Tomasella did not allege any affirmative statements by the manufacturers about their labor practices on product packaging, their omissions did not constitute a half-truth.[36] Nor did their silence create any misleading impressions about the chocolate's core features.[37] Instead, the First Circuit agreed with the district court that the manufacturers' failure to disclose their labor abuses constituted a "pure omission[],"[38] a category that was "by and large" not actionable.[39] Consumer misconceptions about the manufacturers' labor abuses resulted not from the manufacturers' omissions but from their own assumptions, which were too numerous to anticipate and correct.[40]

Federal precedent suggested the same result.[41] The court referenced a series of Ninth Circuit cases dismissing similar claims against the defendant manufacturers and other advertisers under California's consumer protection laws.[42] In those cases too, the Ninth Circuit said that the plaintiff had not alleged any affirmative misrepresentations and had "relie[d] solely on an omission theory of consumer fraud."[43] Since slave labor had no relation to "chocolate's function as chocolate," the Ninth Circuit held that the manufacturers had no duty to disclose their labor abuses on candy packaging.[44] Similarly, in *Tomasella*, the First Circuit maintained that manufacturers' labor practices were a "tangential" aspect of the product that did not bear on the consumption experience and thus did not require disclosure.[45]

---

[34] *Id. International Harvester* did not explicitly cabin its theory of misleading impressions to core features. *See Int'l Harvester*, 104 F.T.C. at 1057–58. Rather, the court derived that restriction from a Ninth Circuit case, *Hall v. SeaWorld Ent., Inc.*, 747 F. App'x 449, 453 (9th Cir. 2018). *See Tomasella*, 962 F.3d at 72–73.

[35] *Tomasella*, 962 F.3d at 74.

[36] *Id.*

[37] *Id.* On appeal, Tomasella maintained that the omissions did in fact bear on the "central pleasure-providing characteristic of the product, which is undermined by undisclosed child and slave labor." *Id.* at 74 n.13. But the court refused to consider the argument because she had not raised it below. *Id.*

[38] *Id.* at 74.

[39] *Id.* at 73.

[40] *See id.*

[41] *Id.*; *see also* MASS. GEN. LAWS ch. 93A, § 2(b) (2020) (directing courts to construe the statute in accordance with FTC and federal courts' interpretations of the FTC Act).

[42] *Tomasella*, 962 F.3d at 75 n.14 (citing cases).

[43] Hodsdon v. Mars, Inc., 891 F.3d 857, 861 (9th Cir. 2018); *see also* Dana v. Hershey Co., 180 F. Supp. 3d 652, 663 (N.D. Cal. 2016); McCoy v. Nestlé USA, Inc., 173 F. Supp. 3d 954, 965 (N.D. Cal. 2016); Wirth v. Mars, Inc., No. 15-cv-01470, 2016 WL 471234, at *3 (C.D. Cal. Feb. 5, 2016).

[44] *Hodsdon*, 891 F.3d at 864–65; *see also* Dana v. Hershey Co., 730 F. App'x 460, 461 (9th Cir. 2018); McCoy v. Nestlé USA, Inc., 730 F. App'x 462, 463 (9th Cir. 2018); Wirth v. Mars, Inc., 730 F. App'x 468, 468–69 (9th Cir. 2018).

[45] *Tomasella*, 962 F.3d at 68, 72, 74.

In rejecting the unfairness claim, the First Circuit followed the district court and focused on the omissions of labor abuses on product packaging, rather than the labor abuses themselves.[46] Although Tomasella argued that the labor abuses and the omissions went "hand in hand," the court maintained that "functionally," the labor abuses served "only as predicates for her consumer protection argument."[47] Since Tomasella had not identified any authority that recognized the lack of point-of-sale disclosures as unfair, the claim failed.[48]

An unfairness claim required substantial injury, but the court maintained that, on the contrary, the labor of children and slaves produced a gain for consumers: "[T]he 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."[49] On some level, the court suggested, savvy consumers understood this bargain.[50] The low prices of the chocolate and the absence of fair-trade labels on their packaging suggested that manufacturing conditions were grim.[51] The defendants' websites and other media described the labor abuses outright.[52] Regardless of whether Tomasella or the putative class members were aware of the abuses, publication was sufficient to defeat the unfairness claim.[53] Given space constraints, it would be impractical to require advertisers to make all disclosures on product packaging.[54]

As the court recognized in its unfairness analysis, product packaging is not the only location where manufacturers communicate to consumers. On the contrary, the manufacturers publicized their labor practices in other marketing materials, alternately prohibiting and acknowledging their use of child and slave labor. Rather than sorting out the inconsistencies across the manufacturers' advertising, the court dismissed the deception claim based on the candy wrappers alone, overlooking a broader marketing scheme that had the potential to mislead consumers.

Outside the four corners of the candy wrappers, the manufacturers made affirmative representations about their labor practices. The court recognized corporate policy statements on the manufacturers' websites that prohibited the use of child and slave labor.[55] Tomasella had quoted

---

[46] *Compare id.* at 80, *with* Tomasella v. Nestlé USA, Inc., 364 F. Supp. 3d 26, 36 (D. Mass. 2019).

[47] *Tomasella*, 962 F.3d at 80.

[48] *Id.* at 80–81. The court also doubted that Massachusetts state law would recognize as authoritative the sources that Tomasella had proffered, particularly federal statutes and generalizations about international law. *Id.* at 81.

[49] *Id.* at 82.

[50] *See id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 66.

these claims in her complaints and in her briefs to the First Circuit. Nestlé's Supplier Code of Conduct barred the use of child and slave labor. The Code stated that "[t]he use of child labour by the Supplier is strictly prohibited"[56] and that "[t]he Supplier must under no circumstances use, or in any other way benefit, from forced labour."[57] Nestlé characterized the standards in its Supplier Code as "non-negotiable."[58] Hershey's Supplier Code stated that "[s]uppliers must not utilize or benefit in any way from forced or compulsory labor."[59] In its Supplier Code, Mars asserted that suppliers "do[] not use any prison, slave, bonded, forced or indentured labor" and further "do[] not use or source raw materials or products associated with forced labor or human trafficking."[60] In sum, these "strict," "non-negotiable" codes set forth obligations that suppliers "must" fulfill and could "under no circumstances" avoid. These obligations extended beyond direct use to "any other way" of benefiting from child and slave labor. The formal, seemingly binding nature of these codes and their emphatic, absolute commitments sounded in the register of law. These claims were rules that the manufacturers intended readers — suppliers and consumers — to take seriously, not as puffery.[61]

At the same time that the manufacturers asserted that they would not and did not allow child and slave labor, they made statements acknowledging their labor abuses. Compared to their proclamations prohibiting child and slave labor, these acknowledgments were more circumspect, and they were couched in reports of the manufacturers'

---

[56] Appellant's Opening Brief at 19, *Tomasella*, 962 F.3d 60 (No. 19-1130), 2019 WL 2745418, at *19; Class Action Complaint ¶ 64, Tomasella v. Nestlé USA, Inc., 364 F. Supp. 3d 26 (D. Mass. 2019) (No. 18-cv-10269), 2018 WL 823151, ¶ 64 [hereinafter Nestlé Complaint].

[57] Appellant's Opening Brief, *supra* note 56, at 19; Nestlé Complaint, *supra* note 56, ¶ 65.

[58] Appellant's Opening Brief, *supra* note 56, at 19; Nestlé Complaint, *supra* note 56, ¶ 63.

[59] Appellant's Opening Brief at 16, *Tomasella*, 962 F.3d 60 (No. 19-1132), 2019 WL 2745420, at 16; Class Action Complaint ¶ 54, Tomasella v. Hershey Co., No. 18-cv-10360 (D. Mass. Feb. 26, 2018), 2018 WL 1051865, ¶ 54 [hereinafter Hershey Complaint].

[60] Appellant's Opening Brief at 15, *Tomasella*, 962 F.3d 60 (No. 19-1131), 2019 WL 2745419, at *15; Class Action Complaint ¶ 53, Tomasella v. Mars, Inc., No. 18-cv-10359 (D. Mass. Feb. 26, 2018), 2018 WL 1051861, ¶ 53 [hereinafter Mars Complaint].

[61] *See, e.g.*, FTC v. Direct Mktg. Concepts, Inc., 624 F.3d 1, 11–12 (1st Cir. 2010) ("Due to their specificity and concreteness, such claims go far beyond puffery as a matter of law." *Id.* at 12.). In *Barber v. Nestlé USA, Inc.*, 154 F. Supp. 3d 954 (C.D. Cal. 2015), however, the federal district court in the Central District of California examined Nestlé's online documents and concluded otherwise. The court acknowledged that Nestlé's documents "set forth firm requirements for suppliers," but held that the statements were puffery because "no reasonable consumer who read[] the . . . documents . . . in context could conclude that Nestlé's suppliers comply with Nestlé's requirements in all circumstances." *Id.* at 964. Given that Nestlé's Supplier Code explicitly required suppliers to comply in all circumstances, *see id.* at 963, it is unclear why consumers should have expected violations. As some commentators have argued, courts seem to lack a coherent theory for distinguishing factual statements and puffery in corporate social responsibility disclosures. *See* Caitlin M. Ajax & Diane Strauss, *Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere "Puffery"?*, 45 ECOLOGY L.Q. 703, 706 (2018).

efforts to improve their labor practices. In describing its remedial endeavors, Nestlé recognized on its website that "there are children working on farms in Cote d'Ivoire in areas where we source cocoa," stopping somewhat short of admitting that children worked on Nestlé's farms.[62] Hershey spoke in probabilities and, like Nestlé, avoided identifying a responsible actor, conceding in a corporate social responsibility report that "there is a potential for human and labor rights abuses occurring within our supply chain."[63] On its website, Mars deflected personal responsibility by turning attention toward the cocoa sector as a whole, granting that "child labor and trafficking are serious challenges facing many supply chains that originate in developing countries, particularly for the entire cocoa industry."[64] These admissions were tepid, but they were not meaningless.[65] Even the manufacturers' efforts to curb labor abuses could themselves imply that the manufacturers had labor abuses to cure.[66]

Although the court recognized the varied, divergent claims that the manufacturers made about their labor practices across their websites, it did not consider those claims in its deception analysis, focusing only on product packaging. Viewed in isolation, the candy wrappers said nothing about the manufacturers' labor practices: "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 . . . ."[67] To the court, silence on product packaging amounted to silence everywhere.

Tomasella herself prevented the court from examining the manufacturers' affirmative statements. Since Tomasella did not allege that she read or relied on the affirmative statements that her briefings documented, she had no standing to bring a claim based on the supplier codes.[68] Instead, she sought to establish that, under the Massachusetts statute, "pure omissions are actionable," which she characterized as "the very question at issue here."[69] She repeatedly asserted that "[r]easonable consumers assume that the products they buy at the market are free of

---

[62] Nestlé Complaint, *supra* note 56, ¶ 21; *see also* Appellant's Opening Brief, *supra* note 56, at 5–6.

[63] Hershey Complaint, *supra* note 59, ¶ 23.

[64] Mars Complaint, *supra* note 60, ¶ 21.

[65] *But cf.* Suchanek v. Sturm Foods, Inc., 764 F.3d 750, 761–62 (7th Cir. 2014) (finding implicit falsity where an advertiser's deceptive overall messaging overshadowed a truthful but inconspicuous claim).

[66] *See* REBECCA TUSHNET & ERIC GOLDMAN, ADVERTISING & MARKETING LAW 101–03 (4th ed. 2018) (describing implicature).

[67] *Tomasella*, 962 F.3d at 74.

[68] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

[69] Appellant's Opening Brief, *supra* note 56, at 33.

child and slave labor," suggesting that consumer presumptions, not manufacturer representations, gave rise to misconceptions about the manufacturers' labor practices.[70] When the court labeled consumers' belief about the manufacturers' labor practices as a "pre-existing conception,"[71] it was largely adopting a position that Tomasella herself had staked out.

Still, it is troubling that the court ignored the manufacturers' affirmative statements in its deception analysis given the court's partial recognition of those statements in its unfairness analysis. The court rejected Tomasella's unfairness claim in part because the manufacturers had acknowledged their labor abuses in other contexts, which "mitigate[d] the concern raised that their omission at the point of sale is unethical . . . regardless of whether Tomasella or the putative class members were (or should have been) cognizant of Defendants' website disclosures."[72] When it came to unfairness, the court sought out good intentions and gave weight to truthful disclosures wherever they were. When it came to deception, however, the court was quick to blame consumers for misunderstandings. This heads-I-win, tails-you-lose approach favoring the manufacturers was not only internally inconsistent but was also incompatible with the consumer-protective aims of the statute.

By restricting its deception inquiry to product packaging, the court overlooked the role that the manufacturers' claims in other locations could have played in generating consumers' misconceptions. Under the FTC's framework, which the Massachusetts statute adopted, two types of omissions give rise to liability.[73] Contending that the manufacturers were entirely silent about their labor practices, the court assessed only the second: omissions that mislead consumers about core product features.[74] Since the production process did not influence the consumption experience, no liability attached.[75] But the court neglected to consider the first type of actionable omission: half-truths that are deceptive because of the advertisers' affirmative statements.[76] Given the strong claims that the manufacturers made in their supplier codes prohibiting the use of child and forced labor, reasonable consumers could have believed that the manufacturers abided by their own professed standards.

---

[70] *Id.* at 24; *see also id.* at 28, 47.

[71] *Tomasella*, 962 F.3d at 74 (quoting Int'l Harvester Co., 104 F.T.C. 949, 1059 (1984)).

[72] *Id.* at 82.

[73] *See id.* at 72.

[74] *See id.* at 74.

[75] *See id. But see* Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 623–24 (2004) (undermining the distinction in false advertising law between consumer preferences for products and processes).

[76] *See Tomasella*, 962 F.3d at 72.

By failing to disclose code violations, the manufacturers may have exposure to liability for "tell[ing] only half the truth."[77]

Had the court assessed the manufacturers' omissions in light of their affirmative claims, the court might have found them misleading. To establish deception, it would have been necessary to prove only that the manufacturers' half-truths "ha[d] the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted."[78] Given the pile of representations prohibiting the use of child and slave labor, and given the materiality of labor abuses to some consumers, it is at least plausible that these representations could have misled reasonable consumers and caused them to purchase candy they otherwise would not have bought.[79]

The manufacturers' muted recognition of their labor abuses does not change the analysis. As the First Circuit has acknowledged elsewhere: "[D]isclaimers or qualifications . . . are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings."[80] Compared to the manufacturers' full-throated prohibitions of child and slave labor, their half-hearted concessions of their labor abuses are unlikely to have corrected the misconceptions that their prohibitions could have conveyed.

That the manufacturers made the affirmative claims on their websites, rather than on product packaging, should not have removed those claims from consideration. When assessing deception, courts examine the range of an advertiser's marketing campaigns to ascertain the overall message that consumers receive.[81] It is this "net impression" that

---

[77] Int'l Harvester Co., 104 F.T.C. 949, 1057 (1984).

[78] *Tomasella*, 962 F.3d at 71 (quoting Aspinall v. Philip Morris Cos., 813 N.E.2d 476, 488 (Mass. 2004)).

[79] The difficulty of establishing reliance would likely pose an obstacle to a consumer class action, but other entities such as attorneys general can and should bring these claims.

[80] FTC v. Direct Mktg. Concepts, Inc., 624 F.3d 1, 12 (1st Cir. 2010) (quoting Removatron Int'l Corp. v. FTC, 884 F.2d 1489, 1497 (1st Cir. 1989)).

[81] *See, e.g.*, MillerCoors, LLC v. Anheuser-Busch Cos., No. 19-cv-218, 2019 WL 4187489, at *1–2, *4 (W.D. Wis. Sept. 4, 2019) (holding that a jury could find deception "in [the] context of the full advertising campaign," *id.* at *4, which included website claims and product packaging); FTC v. Wash. Data Res., 856 F. Supp. 2d 1247, 1273–74 (M.D. Fla. 2012) (finding deception where an advertiser's postcard and verbal sales techniques "combine[d] to create a deceptive 'net impression,'" *id.* at 1274); *see also* Abbott Lab'ys v. Mead Johnson & Co., 971 F.2d 6, 15 (7th Cir. 1992) ("The presence of this implied message is even more pronounced when viewed in the context of Mead's entire promotional campaign."). *But cf.* Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 502 n.11 (5th Cir. 2000) (declining to recognize cross-channel deception between misleading ads and an advertiser's slogan because there was no evidence that the misleading ads "somehow had become encoded in the minds of consumers such that the mention of the slogan reflectively brought to mind the misleading statements").

determines whether a claim is deceptive.[82] This holistic approach accords with advertiser strategy and consumer experience. Advertisers communicate with consumers through an expanding array of channels and expect that consumers will aggregate messages across sources.[83] Indeed, consumers tend to forget the source of the messages that they hear even when they remember the content.[84]

Because advertisers transmit and consumers receive claims across a variety of channels, a cross-channel approach is necessary to prevent advertiser gameplaying. If advertisers are not held liable for claims that they make on their own websites, then they are free to misrepresent their practices in those spaces that consumers can see but courts choose to ignore. The *Tomasella* decision outlines a strategy for those advertisers who seek to capitalize on consumer scruples without doing the work to eliminate the offense: announce a prohibition online, muddle it with fuzzy qualifiers, and stay silent at the point of sale. Under a cross-channel approach, advertisers that use child and slave labor still have the option to say nothing about their labor practices in locations where consumers can see them, but that silence needs to be total. Alternatively, if they do choose to speak, they must be consistent and consistently truthful in their representations.

In ignoring deception in advertiser claims about social responsibility, courts seem to believe that they are encouraging corporations to make strides, by giving them a break when they fail to live up to their commitments. In fact, courts inhibit progress. With their misrepresentations, advertisers garner false goodwill and distort the market to the detriment of those who truly do have better labor practices.[85] If courts do not distinguish between corporations that have honored their commitments and those that have merely announced them, then neither can consumers.

---

[82] *Wash. Data Res.*, 856 F. Supp. 2d at 1273 (quoting FTC v. Tashman, 318 F.3d 1273, 1283 (11th Cir. 2003) (Vinson, J., dissenting)).

[83] *See* Rajeev Batra & Kevin Lane Keller, *Integrating Marketing Communications: New Findings, New Lessons, and New Ideas*, 80 J. MKTG. 122, 122–23 (2016).

[84] *See* Raoul Bell, Laura Mieth & Axel Buchner, *Source Memory for Advertisements: The Role of Advertising Message Credibility*, 49 MEMORY & COGNITION 32, 43 (2021) ("While advertisers may want to exploit the limits of source memory, policy makers may want to find ways to prevent this.").

[85] *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 495 (1970).