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Ninth Circuit Made-in-the-U.S.A. Complaint Does Not Make the Cut: Hass v. Citizens of Humanity

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In a case decided in December that flew beneath our radar, a judge in the Southern District of *California* dismissed without prejudice a proposed class action alleging that Citizens for Humanity falsely labeled its jeans as being made in the USA. *Hass v. Citizens of Humanity, LLC*, 2016 WL 7097870 (S.D. Cal. Dec. 6, 2016). This month, plaintiff notified the court that another amended complaint would not be filed, and the court has now dismissed the case with prejudice. On the face of it, this case may not seem especially noteworthy, but the rationale for the court's decision is emblematic of what may be becoming a long-overdue trend.

Under California Business and Professions Code § 17533.7, it is unlawful to sell an article marked Made in the USA if the article has been "entirely or substantially made, manufactured, or produced outside of the United States." Effective January 1, 2016, the statute contained a safe harbor for products in which foreign parts do not constitute more than five percent of the "final wholesale value of the manufactured product," as well as for products in which foreign materials that cannot be found domestically do not constitute more than ten percent of the same.

The plaintiff alleged, "on information and belief" in a second amended complaint ("SAC"), that the jeans incorporated foreign materials that constituted more than five or ten percent of their wholesale value, but the court held that the complaint lacked sufficient factual detail and particularity to state a claim sounding in fraud under Federal Rule of Civil Procedure 9(b). In short, the court concluded that although the complaint alleged in conclusory fashion that the jeans were not compliant with the California statute, it did not articulate any factual allegations that plausibly explained how plaintiff knew this to be so.

As with other federal appellate courts, the Ninth Circuit has made clear that under F.R.C.P. 8(a), purely conclusory allegations in a complaint are not entitled to be accepted as true on a motion to dismiss, a point federal district courts sometimes miss in giving unwarranted deference to a pleading's naked conclusions. This is less of an issue when the plaintiff is a percipient witness to each of the facts on which a complaint turns. But many of the most common class action complaints in California—involving, for example, challenges to Made in the USA labeling, supposedly fraudulent discount price advertising, and claims that a product is falsely labeled as "natural"—are dependent on

facts that the plaintiff is unlikely to be able to see, feel, touch, taste or otherwise experience.

Of course that fact does not, by itself, doom such complaints to defeat, but it does mean that the complaint must state, in sufficient factual detail to comply with Rule 8(a) and the particularity requirements of Rule 9(b), a plausible, non-conclusory basis for plaintiff's knowledge of these central facts. Where the plaintiff either resorts to naked conclusions, or its factual allegations are too incomplete to be plausible, the complaint must be dismissed, as the court in the Citizens for Humanity case wisely recognized.

Also noteworthy was the court's additional holding that the revisions to § 17533.7 effective January 1, 2016, which made the statute more lenient to defendants, applied retroactively because, as per California's well-settled rule regarding retroactive application, such a claim "derives entirely from statute" and there is no savings clause in the amended statute.

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