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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Move Over Caveat Emptor, Meet Caveat Venditor

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James Muehlberger

Decades ago, consumer advocates worried about the perils of caveat emptor and under incentivized consumers unable to bring claims. The modern consumer protection landscape, however, now resembles caveat venditor: "Let the seller beware." Nowhere is this more true than in the fertile field of purported class actions filed against food manufacturers. Companies are paying millions of dollars in legal fees to defend against an onslaught of lawsuits for even the most minimal and theoretical infractions.[1]

Food lawsuits tend to garner significant notoriety. For example, Subway faces seven class actions alleging that its "foot long" subs sometimes come out of the oven at eleven-and-one-half inches (or so). Other lawsuits have pondered whether Greek yogurt is "Greek" or even "yogurt." Even the confetti-colored children's cereal, Froot Loops, has received criticism for the iconic "froot" not actually being fruit. Now, a putative class action complaint, filed against the nation's premier health food seller — Whole Foods Market Inc. — further begs the question: When litigation transforms from consumer protection to business restriction, who really pays the price?

California consumer protection laws are at the epicenter of a putative class action filed in California state court in Los Angeles County. In Michelle Richard v. Whole Foods Market California Inc., No. BC563304 (Cal. Super. Ct., Los Angeles Cnty., filed Nov. 7, 2014), the plaintiff alleges that Whole Foods benefited from misleading labeling claims on almond milk. More specifically, she accuses Whole Foods of incorrectly selling Blue Diamond's Almond Milk with a Non-GMO Project verified label, which she claims she relied on in purchasing the milk. The plaintiff further asserts that she would not have purchased the almond milk, would have purchased less of it or would have paid less for it had the almond milk not carried a Non-GMO Verified label.

The Non-GMO Project is a non-profit 501(c)(3) organization that offers third-party verification and labeling for foods that meet the organization's definition of GMO-free. Although scores of non-GMO and genetically engineered labeling requirements have been proposed in the U.S., all have been unsuccessful. The scientific community and industry groups have successfully demonstrated there is nothing unsafe about GMO foods and as such, compulsory labeling would violate a manufacturer's free

speech rights. Subsequently, there is no federally mandated GMO labeling requirement beyond those products labeled as USDA Organic. Products carrying a USDA Organic label must also be verified as GMO-free, allowing consumers to confirm they are buying non-GMO food products without an additional label.

Still, companies and groups, such as the Non-GMO Project, are able to use their own verification processes and standards to develop labeling to increase marketing potential to consumers interested in avoiding GMO foods. The Richard complaint states, without citation to any type of report or official finding, that the almond milk at issue is not verified by the Non-GMO Project. But, a quick reference to the Non-GMO Project website's list of verified products indeed indicates that both Blue Diamond Almond Breeze Original and Blue Diamond Almond Breeze Vanilla are verified by the organization.[2]

The Richard complaint alleges violations of the Unfair Business Practices Act, California False Advertising Act and Consumers Legal Remedies Act, negligent misrepresentation and breach of quasi-contract. The claim for UBPA violations complains that Whole Foods' alleged misbranding of the almond milk was an unfair practice. Richard's second and fifth counts, under the CFAA and negligent misrepresentation common law, allege that Whole Foods intentionally or negligently advertised its almond milk as Non-GMO Project verified, incorrectly. The plaintiff also seeks damages for alleged violations of the CLRA when Whole Foods allegedly misrepresented its almond milk as Non-GMO Project verified. Finally, the plaintiff's fifth count argues that Whole Foods has been unjustly enriched by breaching quasi-contracts with potential class members.

In a long line of consumer protection putative class actions aimed at food companies, Richard is somewhat unique in targeting a retailer. In most situations, plaintiffs have targeted the manufacturers of food and beverage products they deem to be improperly labeled. The plaintiff's complaint seeks to impute liability on Whole Foods, a retailer. Unlike Subway, which actually bakes and advertises "foot long" sandwiches, or Kellogg USA, which manufactures Froot Loops, Whole Foods simply sells the almond milk in question. Almond Breeze is manufactured and labeled by Blue Diamond Growers, a California cooperative that is owned by California almond growers. As a retailer, Whole Foods likely had no hand in the labeling or certification of Blue Diamond's almond milk products.

The plaintiff in Richard couches retailer liability in the broad language of California's consumer protection laws. For example, the UBPA loosely defines unfair competition as "any unlawful, unfair or fraudulent business act or practice" and provides for injunctive relief against any person who participates in unfair competition. The UBPA does not, by the text of the statute, limit liability to those unfair practices or allegedly bad actors that control the marketing or labeling of products. Similarly, the CFAA makes it unlawful for any person to intend to dispose of property in an untrue or misleading manner.

If the plaintiff in Richard is successful in extending liability to Whole Foods, a retailer, the floodgates of litigation will likely swing open in jurisdictions already inundated with food and beverage consumer protection lawsuits. The consumer protection statutes at issue in Richard and a litany of others like them were created to allow consumers a remedy for unfair business practices. Unfortunately, the all-consuming breadth of some consumer protection statutes, like those at issue in Richard, encourages suits against entities and individuals who likely have little or no control over the allegedly misleading acts or words of a product's manufacturer. When businesses face costly class actions and a devil's nightmare of compliance hassles, consumers ultimately bear the cost of litigation through increased prices.

Transitioning American businesses from the traditional concept of caveat emptor to the more expensive world of caveat venditor will make it difficult for mom-and-pop groceries to stay in business and ultimately cost consumers more at the cash register.

—By James Muehlberger and Jara Settles, Shook Hardy & Bacon LLP

James Muehlberger is a partner and Jara Settles is an associate in Shook Hardy & Bacon's Kansas City, Missouri, office, where they are members of the firm's agribusiness and food safety practice. Muehlberger is co-chairperson of the firm's class action and complex litigation practice group.

[1] See Joanna Shepherd, The Expanding Missouri Merchandising Practices Act, American Tort Reform Foundation (Nov. 5, 2014), http://www.consumerlawsunhinged.org/white-paper/white-paper-on-missouri-merchandising-practices-act/ (last visited Dec. 19, 2014).

[2] NON-GMO PROJECT, http://www.nongmoproject.org/find-non-gmo/search-participating-products/search
?brandId=742lists (last visited Dec. 11, 2014).
