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One Size Doesn't Fit All Product Labeling Class Actions

By **Jon Tomlin** (June 15, 2018, 1:44 PM EDT)

Jon Tomlin

Plaintiffs in recent consumer class actions have challenged product labels as misleading in terms of efficacy (such as providing "energy"), ingredients (such as "all natural" or "no added sugar"), origination (such as olive oil associated with Italy) and production method (such as "handcrafted"). In other class actions, plaintiffs have alleged that product packaging is deceptive because it contains nonfunctional empty space ("slack-fill").

From an economic perspective, these are highly disparate claims involving very different products. The challenged labels and packaging typically have different impacts on consumer demand and the products involved differ along fundamental economic dimensions, including costs and competitive conditions. Put simply, these cases are not the same.

Regrettably, in many recent product labeling class actions, experts have offered simple damages methods which mimic those they have used in other cases and which ignore fundamental economic differences in claims and products. As explained below, these methods are often unreliable. Courts have rejected these overly simplified damages models in many (but not all) recent cases.

Some Fundamental Economic Differences

Economists distinguish between three types of products (or "goods") when considering the informational content of a label or an advertisement. Consumers can determine the quality of "search" goods by simply examining the product at issue. For "experience" goods, consumers can determine quality only after making a purchase. Consumers have difficulty determining the quality of "credence" goods even after making a purchase. Because products in recent product labeling cases fall into different categories, the impact on demand and damages for labeling and packaging claims differ across these cases as well.

Some of the products in recent class actions likely fall into the category of "search" goods. For example, in some cases involving alleged underfilling of a product, consumers may be able to ascertain the quantity contained in the package by examining the information on the package (such as the weight), shaking the package or opening the package. In cases involving allegedly false "original price" designations on clothing, consumers may be able to determine the style of the clothing and the actual price to be paid prior to purchase. The fact that a product is a "search" good can have important implications for consumer impact and damages, because allegedly false packaging or labeling may not impact many consumers given the other information readily available to them.

Products in some other recent class actions likely fall into the category of "experience" goods. For example, the plaintiff in Alexander Forouzesh v. Starbucks Corp. claimed that Starbucks' iced beverages were underfilled through the inclusion of ice.[1] In Strumlauf et al. v. Starbucks, the plaintiff alleged that Starbucks' lattes were underfilled through inclusion of foam.[2]

But many customers of Starbucks are repeat customers who "experienced" the inclusion of ice or foam in their beverages in their prior purchases, and were therefore aware of the amount of

beverage they would be receiving when they made subsequent purchases. To put it simply, these repeat customers knew what they were getting when they purchased the product, and the price they paid almost certainly reflected this expectation. This has an important implication for damages, because demand and willingness to pay a price premium was not likely influenced by the presence of foam or ice for many consumers.

Finally, some products in recent cases likely fall into the "credence" good category, in which consumers may not be able to ascertain product qualities even after consuming them. For example, it may be difficult for a consumer to determine whether an olive oil originated from Italy, or a beer originated from Hawaii, even after purchasing and consuming the product. The inability to discern product quality has implications for demand and damages as well, both in terms of how consumers interpret the claim and their likelihood of repeat purchases.

In addition to the differences in the informational content of a label or package, consumer products in labeling class actions typically differ in their costs, how they are advertised, the competition they face and the importance of retail pricing strategies. For example, products in recent consumer class actions differ based on whether the defendant directly sells its product to consumers its own retail stores (e.g., Starbucks) or through retailers which set the final price paid by consumers.

This can have important implications for the existence and amount of any "price premium," which is often the measure of restitutionary damages in product labeling cases.[3] Empirical economic research has shown that retail pricing strategies, and not manufacturer pricing, often determine price changes faced by consumers.[4] Thus, the price paid by a consumer alleging misleading product labeling by a manufacturer may largely be determined by the retailer and not the defendant manufacturer.

Recent "One-Size-Fits-All" Damages Methods

Because of the important economic differences among recent product labeling and packaging class actions, reliable shortcuts or cookie-cutter approaches will rarely, if ever, be available for calculating damages. Nevertheless, in many recent cases, damages experts have proposed overly simplified methods that overlook important economic differences and are retreads of those they proposed in previous cases. Fortunately, courts have rejected many (although certainly not all) of these attempts in recent cases.

One commonly proposed approach is the "just trust me" method, in which a damages expert asserts an ability to determine classwide damages through regression analysis, a survey or both, but doesn't perform the analysis at the class certification stage. This promise of a damages model down the road should provide little assurance that the expert will ultimately deliver a method that takes into account the impact on demand and pricing of the claims at issue.

In Bruton v. Gerber Products Co., the court denied class certification earlier this year based in part on its conclusion that the plaintiff's damages expert had not proposed a viable damages model, but instead only asserted an ability to calculate damages through regression analysis.[5] In two earlier cases, this same expert had asserted an ability to calculate classwide damages based on regression analysis (also without performing the analysis), and the court certified a class based on this assertion.[6] In both of the prior cases, the court later decertified the class after concluding that the regression analysis ultimately performed by this expert did not comport with the regression he had described at the class certification stage.

In several other product labeling class actions, experts have calculated a price premium based on the difference in price between the product with allegedly false labeling and a similar product without the label at issue. Such a simple method will almost certainly be deficient in failing to account for economic differences across products.

In Singleton v. Fifth Generation Inc., the plaintiff alleged that he and putative class members paid a price premium for Tito's Vodka based on an allegedly false label that the product was "handmade."[7] The plaintiff's damages expert purported to calculate a price premium based on a simple comparison between the average price of Tito's Vodka and two other vodkas that were "corn based" like Tito's Vodka but did not contain the "handmade" claim. He did not, however, adjust for factors apart from the "handmade" claim that could impact price. The court denied class certification

after concluding that this simple comparison did not isolate a price premium associated with the "handmade" claim, and therefore did not measure the damages attributable solely to the plaintiff's theory of liability as required by the U.S. Supreme Court's decision in Comcast v. Behrend.[8]

Experts have proposed mechanically applying a percentage to existing sales without accounting for any underlying economic factors in several product labeling class actions. In Elisabeth Martin et al. v. Monsanto Co., the plaintiff alleged that she and other putative class members sustained damages because Monsanto's bottles of herbicide concentrate allegedly made about half of the amount claimed on the label after adding water per the instructions on the bottle.[9] The plaintiff's damages expert proposed calculating "benefit of the bargain" damages by mechanically applying alleged "underfill" percentages to sales of the product. The court certified the class after concluding that this expert's proposed formula, "albeit simplistic," was capable of measuring classwide damages.

This same expert proposed applying a slightly modified version of this model once again in In Re: 5-Hour Energy Marketing and Sales Practices Litigation.[10] In this case, the plaintiffs claimed that they sustained damages because 5-hour Energy bottles provided less than five hours of energy. The plaintiff's damages expert proposed calculating classwide damages by mechanically applying the percentage that each bottle of 5-hour energy was assumed to be underfilled with "energy" to sales of the product.[11] The court concluded that this damages model failed to appropriately account for "other factors that drive consumer preferences" and denied class certification.

Implications

Recent product labeling class actions differ substantially in their claims and the products involved. The fundamental economic differences between these cases means that cookie-cutter methods consisting of promises to develop a reliable regression at some later point, applying a simple benchmark or using a mechanical formula are not likely to yield reliable measures of classwide damages. Hopefully, courts will reject such models when they have no basis in economics.

Jonathan T. Tomlin, Ph.D., is a managing director at Navigant Consulting Inc.

[1] Alexander Forouzesh v. Starbucks Corp. et al., case number 2:16-cv-03830, in the U.S. District Court for the Central District of California.

[2] Strumlauf et al. v. Starbucks Corp., suit number 4:16-cv-01306, in the U.S. District Court for the Northern District of California.

[3] A "price premium" which is the "difference between the market price actually paid by consumers and the true market price that reflects the impact of the unlawful, unfair, or fraudulent business practice." Brazil v. Dole Packaged Foods LLC, 660 F. App'x 531, 534 (9th Cir. 2016) (Brazil III), aff'g 2014 WL 5794873 (N.D. Cal. 2014) (Brazil II).

[4] See, e.g., "Pass-Through in Retail and Wholesale," Emi Nakamura, American Economic Review, 2008, 98 (2): 430-37.

[5] Bruton v. Gerber Products Co. et al., case number 5:12-cv-02412, in the U.S. District Court for the Northern District of California.

[6] Brazil v. Dole Package Foods, supra note 3; Werdebaugh v. Blue Diamond Growers, Case No. 12-CV-02724-LHK (N.D. Cal. Dec. 15, 2014).

[7] Singleton v. Fifth Generation Inc., case number 5:15-cv-00474, in the U.S. District Court for the Northern District of New York.

[8] Comcast v. Behrend, 133 S.Ct. 1426, 1433 (2013).

[9] Elisabeth Martin et al. v. Monsanto Company, case number 5:16-cv-02168, in the U.S. District Court for the Central District of California

[10] In Re: 5-Hour Energy Marketing and Sales Practices Litigation, case number 2:13-ml-02438, in the U.S. District Court for the Central District of California.

[11] In addition, he stated that he attempted to adjust for the costs of the other ingredients in the product.
