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What's in a label? Economic issues in labeling disputes

Economic issues in food labeling cases

A company markets a breakfast cereal as "all-natural" to consumers. What is the value of that "all-natural" label to consumers and the company? Did the presence of the label affect the purchase decisions of consumers? If so, how should we measure the impact? These types of questions are frequently encountered in food labeling litigation in which class action plaintiffs allege that inappropriate labeling affected consumer decision-making.[1] Examples include lawsuits over claims of a GMO-free menu,[2] over "natural" tea,[3] and over "0 g trans-fat" claims.[4] Plaintiffs have also alleged the lack of an appropriate label disclosing that a product contains "artificial" ingredients. In this issue of *CRA Insights,* we discuss some of the economic issues associated with these questions and allegations.

What's in a label?

Companies spend considerable time and resources crafting marketing campaigns and managing the package messaging and look and feel of their brands. Trade dress and brand value may be regarded as important assets. Does it follow that label claims are important drivers of market success?In evaluating a particular label claim, one challenge is in separating the effect of the claim at issue from the product's overall brand equity and any other non-label factors that may influence the consumer purchase decision. Often, plaintiff allegations revolve around a few

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1 In addition, companies are also in engaged in Lanham Act litigation to ensure that competitors do not use inappropriate labeling (for example over "Poland Springs" labeling, as in Maine Springs LLC v. Nestlé Waters North America, Inc., case number 2:14-cv-00321, in the U.S. District Court for the District of Maine).

2 See e.g., Gallagher v. Chipotle Mexican Grill Inc., U.S. District Court, Northern District of California, No. 15-03952.

3 See e.g., In Re: Hain Celestial Seasonings Products Consumer Litigation, case number 8:13-cv-01757, in the U.S. District Court for the Central District of California.

4 See e.g., Troy Backus et al. v. Nestle USA Inc., case number 3:15-cv-01963, in the U.S. District Court for the Northern District of California.

disputed statements. As a result, the appropriate level of analysis should isolate the alleged impact on consumers and separate such impact from other factors influencing consumer purchases.

Comparing product pricing and consumer purchases during the period around the introduction and removal of such labels can allow for "natural experiments" to determine if the label in question had any effect on consumers.[5] If price and/or quantity does not change during the period under consideration, this might suggest that consumer behavior was not affected in aggregate and that the company did not benefit from the label change. Alternatively, contemporaneous increases in prices and/or quantities sold could allow for the inference that the labels in question had an effect on consumer behavior. Such an inference requires an understanding of the industry in question, including how pricing is determined and other factors that might drive demand and pricing behavior.

Sales and pricing data for the labeled product can also be compared with data on contemporaneously sold identical products without the label,[6] or other comparable products (with the caveat that finding "comparable" products can be difficult due to differences in brand equity).[7] Again, it is critical to understand the industry to understand the drivers of pricing and demand. For example, consider a company that markets a number of cereals to consumers. Labeling claims at issue might affect only a subset of the company's products (for example, cereals targeted to health-conscious consumers with associated "all-natural" labeling). Any evaluation of the impact of the "all-natural" label on consumers must account for industry dynamics. The cereal company might set a single price for all of its cereal products irrespective of the presence of the "all-natural" labeling. Such "line-pricing" would limit what price premium may exist for the "all-natural" cereals and any ability for the company to price products differently based on their label.[8]

Testing a label

Consumer surveys and market research can provide additional insight into the impact that the label at issue has on purchasing by consumers. An appropriately designed study can measure the differential impact on consumers by varying the presence of the label claim while holding other parts of the product label the same. This can provide direct experimental evidence of the value (or lack thereof) consumers place on such labels.[9] Such testing can also provide information regarding the segments of consumers that may be affected by the labels at issue and

[5] Such analyses can be more difficult for plaintiff claims concerning the lack of an active disclosure. In those cases, it may be that the product never had an active disclosure and as result there is no "natural experiment" that can be analyzed.

[6] Special and limited edition products that often have special labeling may provide useful natural experiments to compare pricing across products.

[7] An appropriate comparable would be as similar as possible to the product in question. This often means looking at other products sold by the same company, rather than competitor products.

[8] Additionally, companies that sell their products to distributors and retailers may face limitations on their ability to affect the final pricing of their products.

[9] Online survey resources have made it possible to field large samples to achieve statistical precision quickly and at reasonable cost.

whether the claims asserted by the plaintiffs are common and typical to the alleged class. For example, "all-natural," "0 g trans fat," and other similar labels might reasonably be expected to have greater impact on purchases by health-conscious consumers than other groups of consumers, with implications for the appropriate class and the ability to identify class members.

Further complications arise due to varying product sizes and retailer types. Food and beverage products are often sold in a range of sizes, from single servings to bulk quantities, across a range of different retailers (e.g., convenience stores, grocery stores, big-box retailers, discount clubs, etc.). Consumer sensitivity to price and to the label in question might reasonably be expected to differ across individuals, some of whom may be buying a beverage for immediate consumption at the convenience store as compared to shoppers buying bulk quantities for family consumption at the grocery store. Regional variation in consumer tastes or distribution agreements might further affect efforts to assess price sensitivity and the drivers of consumer choice.

Even if consumers are shown to place value in the label at issue, the alleged harm would depend on whether the consumer's choice would have been different in the absence of the label and/or whether the consumer would have paid a lower price in the absence of the label. As discussed above, answering these questions requires an understanding of the industry dynamics.

Conclusion

In this *CRA Insights*, we have highlighted some key issues arising in food labeling litigation. Plaintiffs may argue that products with the alleged labeling are significantly less in value than what was paid, or even worthless. From an economic perspective, the presence or absence of a label is unlikely to be determinative of a product's value. An appropriate analysis would isolate the impact of the alleged label on price and quantity, controlling for other factors that affect price and quantity.

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