

# Using Civil Litigation to Fight Seafood Substitution: Consumers, Competitors & Whistleblowers

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## Who is potentially impacted by seafood substitution?

### Consumers

- don't get what they bargain for
- overpay
- potentially exposed to health risks

### Competitors

- honest players lose sales and market share to dishonest players

### Taxpayers

- government buys directly, or funds the purchase of, food including seafood products

# Introduction

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## **Consumers**

→ can bring claims for fraud and/or violations of consumer protection laws

## **Competitors**

→ can bring claims for anticompetitive conduct, including false advertising

## **Taxpayers**

→ whistleblowers with inside information about fraud on government programs can bring “qui tam” actions

# **Introduction**

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**Consumer who buys product labeled Fish A, that is really cheaper Fish B, could bring class action claims for:**

- Common law fraud
- Negligent misrepresentation
- Violation of consumer protection statutes

# **Consumers**

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- All participants in supply chain (retailers, manufacturers, importers) selling mislabeled seafood have potential liability.
- Lack of reasonable safeguards and monitoring could give rise to liability.
- In some jurisdictions (including District of Columbia) “testors” may have standing to bring a lawsuit.

# Consumers

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- Substitution and mislabeling, as a way to gain market share or increase profits, is illegal and unethical. “Honest players” have legal remedies against “dishonest players.”
- Primary tool is the federal Lanham Act, designed to combat false advertising.

# Competitors

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§ 43(a) of the Lanham Act authorizes civil lawsuits against a competitor that makes “any false or misleading description of fact or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s good, services, or commercial activities.”

# Competitors

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## **Under Lanham Act, two primary remedies:**

### **Injunction**

A court order prohibiting the dishonest competitor from continuing to engage in false advertising or promotion; often the primary goal of Lanham Act lawsuit.

### **Damages**

Can be recovered if honest competitor can show lost sales, or other types of business injuries

# **Competitors**

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## **The federal government pays for a lot of food.**

- Purchases directly for its own use (cafeterias in federal buildings, food for armed services, prisons, etc.)
- Purchases or pays for food through various assistance programs, including:
  - School Lunch Program (\$10.2 billion)
  - Special Supplemental Nutrition Program for Women, Infants & Children (WIC) (\$6.6 billion)
  - Child and Adult Care Program (\$2.8 billion)
  - The Emergency Food Assistance Program (TEFAP) (\$308 million)
  - Food Distribution Program on Indian Reservations (\$102 million)

# **Whistleblowers**

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**If taxpayer dollars used to buy fish that isn't what it claims to be, seller may be liable for defrauding the government.**

- Under the federal False Claims Act, unlawful to present, or cause to be presented, a “false claim” to the government or to a government program.
- “Cause to be presented” – even downstream sellers (ones that sell to contractors or other middlemen) can be liable.

# **Whistleblowers**

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**Under the federal False Claims Act, the government can recover significant sums of money, even beyond what it paid for the product.**

- Treble damages, plus
- Penalties of up to \$11,000 per false claim

# **Whistleblowers**

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- A whistleblower with non-public information about fraud on a government program can bring a “qui tam” lawsuit, which means a lawsuit brought in the name of the government.
- If case is successful, the whistleblower receives an award of between 15-30% of the amount recovered for the government.

# Whistleblowers

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**Through qui tam cases, whistleblowers not only  
“do the right thing,” but also received large awards.**

For example, whistleblower has information about 10  
fraudulent shipments, \$100,000 each:

**Government**

$(\$1 \text{ million} \times 3) +$   
 $\$110,000 = \$3,110,000$

**Whistleblower**

**Between**  
**\$466,500 and \$930,000**

**Government / Whistleblowers**

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**To be a successful under False Claims Act, a seafood substitution whistleblower would need to at least have non-public information that:**

- A company was engaged in substitution;
- The company was acting knowingly; and
- The government was purchasing the substituted product

**Government / Whistleblowers**

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