

## Does the Chipotle GMO Lawsuit Go Too Far?

By Gene Williams

In recent years, the American public has become markedly more health-conscious with respect to the ingredients contained in the food it consumes, and has demanded increased transparency from the companies who manufacture, prepare and sell food. The companies have acted predictably, looking to capitalize on the public's desire for information by disclosing more and more information regarding what is or isn't in the food they sell. The government has done its part by implementing heightened standards for food labeling. And consumer protection attorneys have played their role of watchdog, making sure that the companies who are profiting from this new heightened consumer focus on the ingredients in their food are honest with respect to the representations they make. The system has worked, for the most part, by providing the public with additional information regarding the contents of the food they consume, while allowing companies to profit by charging more for foods that contain premium ingredients, or that remove ingredients perceived as unhealthy or potentially dangerous.

One such example has been products containing genetically modified organisms ("GMOs.") A large segment of the public has come to feel that GMOs are unhealthy or unsafe, and are willing to pay a premium for products that do not contain GMOs. Companies have obliged by offering and promoting "non-GMO" products, usually at a premium, and consumer protection attorneys have filed lawsuits against companies who falsely claim to be offering "non-GMO" products. Setting aside for a moment the question of whether GMOs are actually unhealthy or unsafe (many of us living in California have benefitted greatly from the drought-resistant and pesticide-resistant grains and fruits that are "genetically modified"), the checks and balances of the system have worked - consumers are given the information necessary to decide whether or not they want to pay more for GMO-free foods, while the companies profit from selling those foods at a higher rate.

However, a recent putative class action lawsuit filed against Chipotle restaurants, *Gallagher v. Chipotle Mexican Grill, Co.*, 15-03952 (N.D. Cal., filed August 28, 2015) is an example of the type of overreaching by plaintiffs' attorneys that threatens to upset that balance. In *Gallagher*, the plaintiff takes Chipotle to task for its "We're GMO Over It" ad campaign that claims that Chipotle restaurants no longer offer food items containing GMOs. But the suit does not allege that the actual food items offered by Chipotle do contain GMOs - the complaint concedes that the beef and chicken that Chipotle uses do not contain GMOs (Chipotle has temporarily ceased offering carnitas in some of its stores because at least one supplier was not able to guarantee that its pigs were GMO-free). The complaint also does not claim that the tortillas, beans, rice, vegetables, salsas, cheese, or chips contain GMOs. The complaint does not claim that any of the actual food items offered by Chipotle are genetically modified!

Instead, the complaint alleges that Chipotle's advertising campaign is false and misleading because ... the cows and chickens from which Chipotle gets its beef, chicken and cheese, may have been fed genetically modified grains (a fact that Chipotle already conspicuously discloses on its website). Thus, without offering any studies or scientific basis that would suggest that the genetically modified nature of a grain is somehow then passed on to the animal that consumes the grain, and then makes into the meat of that animal

when it is sold as food, the complaint is inferring that Chipotle's food items are not actually GMO-free. If this same logic is followed, companies offering non-GMO food would also need to ensure that the meat and cheese that they sell comes from animals that were never fed grains from a field that may at some earlier point grown genetically modified grain (since presumably the genetically modified nature of those grains could likewise be passed on, through the soil, to non-GMO grains later grown at the same location).

Even more amazingly, the complaint attempts to take Chipotle to task because the fountain drinks offered at Chipotle restaurants contain GMOs! It is hard to imagine that any reasonable consumer would believe that Chipotle's "no GMOs" claim somehow applies to the Coca Cola and Sprite offered in its fountain drink dispenser, yet according to the Gallagher complaint, that is precisely the case.

*Gallagher*, and cases like it, threaten to upset the current checks and balances that provide consumers with sufficient transparency to allow them to make an educated decision regarding the food they eat while allowing companies to make a profit from offering "higher quality" products at a premium. Chipotle and other companies can respond to this type of overreach in one of several ways: (1) they can provide even more information, disclosing for each and every food item offered on their menus whether the item is genetically modified, and whether any component at any point in the process of producing that item has been fed something that was genetically modified, or was prepared in the same location as items that were genetically modified; (2) they can cease advertising or promoting the fact that their food items are GMO-free; or (3) they can quit providing any information about the products.

None of these options is particularly viable, and none will ultimately benefit the consumer. The first will lead to information overload or the burying of the important information regarding the food item -- every food item would have to contain a description essentially tracing its path from the field, barn, or factory to the restaurant; menus will have to be printed in tiny fonts to squeeze in all of the information and consumers will be frustrated and overwhelmed attempting to glean the critical information regarding the food item. The second and third options will prevent consumers from locating and frequenting establishments that do offer GMO-free products, or from determining whether a particular food item does or does not contain GMOs. Restaurants and other food production companies who would otherwise seek to profit from the public's desire for non-GMO products may determine that the risk of litigation outweighs the profits to be made from offering such products, and may revert back to the safer path of not offering non-GMO fare.

There is no doubt that consumer protection attorneys play an important role in preserving the checks and balances between the public and the companies that sell food to the public. But when those attorneys stretch too far, they actually do a disservice to the consumers they are seeking to protect. The same way that the companies selling "healthy" products to the public have a duty to not intentionally deceive the public in an effort to make a buck (and those that do attempt to deceive the public are almost always held accountable in the court of law and/or the court of public opinion when the deception is discovered), the attorneys tasked with serving as watch dogs have a duty to not overreach and punish companies that are doing things the right way.

The line needs to be drawn when consumer protection attorneys are no longer actually protecting the consumer.

Gene Williams is a partner at The Maloney Firm, APC

[www.maloneyfirm.com](http://www.maloneyfirm.com)