Lessons Learned from *Fuchs v Menard, Inc.*

**What happened?**

Plaintiff Fuchs bought several 1x6 cedar planks and 4x4 Douglas fir planks. The tags labeling the material read “1 x 6 – 71 – 72” Cedar” and “4 x 4 – 10’ Premium Douglas Fir”. When Fuchs measured the material at home, he found the 1 x 6 measured .66” x 5.25” x 6’ and the 4 x 4 measured 3.5’ x 3.5’ x 10’.

Plaintiff Krasilnikov bought 4 x 4 pieces labeled as “4 x 4 – 8’ White Wood” which measured 3.5” x 3.5” x 8’.

Images of the actual labels were made a part of the pleadings:
What did the customer claim?

Plaintiffs brought a class action lawsuit alleging that Menard affirmatively represented and advertised particular sizes for its lumber that did not reflect the actual dimensions sold.

The plaintiff’s case is based on allegations of fraud – that Menard knows that it is mislabeling lumber dimensions.

Specifically, plaintiffs alleged Menard violated the Illinois Consumer Fraud and Deceptive Business Practices Act, breached both express and implied warranties, and unjustly enriched itself.

Plaintiffs said that they would not have bought the lumber had they not been misled by the labels, or that they would have paid less for the lumber because it was less material than advertised.
What did Menard say?

Menard moved to have all claims dismissed. Menard said that it made no false or misleading representation about the actual size of the lumber on the labels.

How did the court rule?

The court dismissed all claims.

Did Menard violate the Illinois Consumer Fraud and Deceptive Business Practices Act?

No. For the following three reasons –

1) The labels are literally true. Key is that the labels did not have the inch-mark symbols after the customary trade names 1 x 6 and 4 x 4. Also, only the length had any kind of dimensional symbol. The court said this in fact “set off from the name of the product, indicating a switch from a nominal descriptor to one of size, e.g., a 4 x 4 – 10’.

2) The National Institute of Standards and Technology (NIST) recognizes the "hardware industry's" practice of labeling lumber products with a nominal size that is not the lumber’s actual size.

NIST is a federal agency charged with assisting industries to develop manufacturing standards.

“So the practice of not literally stating the actual size of lumber is endorsed by a government agency and industry practice.”

“What these standards recognize is that a government-promoted industry practice had developed under which the nominal size of a lumber product is it named size and not its actual size.”

AN IMPORTANT NOTE FROM THE COURT:

NIST’s lumber guidelines state that if a seller is going to use the nominal dimension to label the size of lumber, then that nominal size should be represented with the term “nominal” or “nom” and the actual or minimum dressed sizes should be “prominently displayed to the customer by means of a table or label” (See NIST Handbook section 2.10.3 at 113.)

Lessons Learned from Fuchs v Menard Inc. (NLBMDA October 2017)
Menard did not uniformly use the terms “nominal” or “nom” and did not always prominently display the actual or minimum dressed sizes. But the court said this was not determinative as to whether the labels were deceptive.

3) **No reasonable consumer would be deceived by the way Menard labeled its lumber.**

Important here is that the plaintiffs had access to all the information they needed – “the lumber's width and height are right there for the measuring. (... Plaintiffs see labels that do not have dimensional-size markings, based on a published distinction recognized by [NIST], and the Plaintiffs have direct and complete access to the information needed to determine the height and width of the limber.”

**AN IMPORTANT NOTE FROM THE COURT:**

The court noted that packaging would prevent this important “access to the height and width” or if any other disputed characteristics of the product was not readily accessible.

**Did Menard breach an express warranty?**

Plaintiffs alleged that Menard various signage, labeling, and advertising using nominal size language created an express warranty that Menard breached when its lumber's dimensions did not match its labels.

No. The court said that the lumber’s labels are the only place where an express warranty could arise from, but the labels (and advertisements) did not make any misleading statements about the size of lumber. And there were no other statements amounting to Menard making an assertion that could act as an express warranty.

**Did Menard breach an implied warranty?**

No. Plaintiffs would have to show that Menard sold goods that were not merchantable at the time of sale and that the plaintiffs suffered damage as a result of the defective goods.

The court found that Menard made no actionable affirmation of fact or promise on the labels and that the lumber itself was merchantable because it would pass without objection in the trade.

Lessons Learned from *Fuchs v Menard Inc.* (NLBMDA October 2017)
Did Menard unjustly enrich itself?

No. Plaintiffs would have to show that Menard retained a benefit at their expense. Here plaintiffs’ allegations of unjust enrichment rely on the allegedly fraudulent labeling and there was nothing fraudulent about the labeling of the dimensional lumber.

LESSONS LEARNED

It is important to be consistent with the use of nominal values when naming dimensional lumber.

Labeling such as 2 x 4 – 6’ demonstrates an intended distinction between the nominal name of a 2 x 4 and the actual length of the labeled piece.

In particular, do not use inch mark symbols in naming the lumber.

The applicable NIST standard says that nominal values should be represented using “nominal” or “nom”, and if you use the nominal value to name the lumber, you should also provide the actual or minimum dressed sizes.