

# Empirical Analysis and Countermeasure of Know-Fake-Buy-Fake Cases in the Field of Food Safety

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## ABSTRACT

The cases of “know-fake-buy-fake” are important manifestation of food safety liability disputes at this stage in China. In the cases of “know-fake-buy-fake”, tortious act mainly involved the controversial focus of the consumer identity confirmation, the unsafe food identification standard and the application of ten-fold the price penalty. The case is governed by the <Food Safety Law of the People’s Republic of China> and the <Food Safety Law Implementation Regulations of the People’s Republic of China>. Articles 3, 6 and 15 of the <Provisions of the Supreme People’s Court for the Administration of Several Issues Concerning the Application of Laws in the Trial of Food and Drug Disputes >have important guiding value for correct refereeing and clarifying the legal liability of the subject of legal relations. The analysis of empirical analysis and law and economics analysis shows that the judicial institution's absolute support or non-support for the application of the ten-fold the price penalty is not conducive to the regulation and governance of the phenomenon of “know-fake-buy-fake”. Local courts in China should exercise their discretion within the framework of the law, and make fair and reasonable judgments in light of the specific case of “know-fake-buy-fake” cases.

**KEYWORDS:** food safety; know-fake-buy-fake; punitive damages; legal liability

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## I. AN EXAMPLE

A product liability case between Han Fukun and Duomeihao supermarket at Li Cang District

This case is a typical case that caused more controversy in 2019. Because the first-instance judgment and the second-instance judgment were the opposite, the case party Han Fukun had previously filed several similar civil suits. This has aroused public concern.

### 1. Brief introduction

In July 2018, Han Fukun purchased imported red wine worth RMB 20160 in the Haoduomei supermarket, paid by credit card, and issued a VAT invoice. Han Fukun recorded the whole purchase process. The shooting content showed that the imported red wine was not pasted with Chinese labels. Subsequently, Han Fukun sued the supermarket to the People’s Court of Litun District, Qingdao City, requesting that the supermarket refund the purchase price and pay compensation. The court of first instance ruled that the supermarket returned the purchase price, and Han Fukun returned 12 bottles of red wine and rejected the request for compensation for ten times of the purchase price. Han Fukun refused to accept the first instance judgment and appealed to the Qingdao Intermediate People’s Court. The court of second instance approved Han Fukun’s appeal. After the mediation failed, the Haoduomei supermarket was sentenced to return the purchase money and pay compensation.

In addition, we can find it by searching Han Fukun in the Chinese refereeing paper network. Since 2016, Han Fukun has purchased imported goods (mostly imported wines) without Chinese labels in many places across China (mainly in Guangdong Province), and then sued the corresponding companies to the court, asking them to return the purchase price and pay the penalty. In this way, Han Fukun had received huge compensation. According to these facts, Han Fukun should be a professional “fake buyer”.

### 2. Dispute focus

#### A. Is the person who knows and buys fakes a “consumer”?

The court of first instance held that Han Fukun had repeatedly filed similar lawsuits with other courts in the past, and the red wine purchased in the case was not drunk. Therefore, Han Fukun purchased the red wine involved in order to make profits rather than “need for consumer spending.” It does not comply with the provisions of Article 2 of the <Law of the People’s Republic of China on Consumer Rights Protection>. He is not a consumer and does not apply the Consumer Protection Law. The court of second instance proceeded from the legislative purpose of the Consumer Protection Law and held that consumers did not have a specific definition. It is not possible to judge whether the buyer is a consumer by the subjective will of the purchaser. Objectively, this kind of behavior guarantees the implementation of the law, making the public pay attention

to food safety and promoting the implementation of relevant laws, which is of positive significance. In addition, the court of second instance also cites Article 3 of the <Provisions of the Supreme People's Court for the Administration of Several Issues Concerning the Application of Laws in the Trial of Food and Drug Disputes>, stipulating that the purchaser claims rights to producers and sellers due to disputes over the quality of food and drugs. If the seller and the seller know that the purchaser knows the quality of the food or the drug and still buys it, the people's court will not support it; therefore, the judgment believes that the plaintiff should be the consumer and support his claim.

**B. Disputes over unsafe food and food that do not meet safety standards**

According to the provisions of Article 148 of the <Food Safety Law of the People's Republic of China>, both the court of first instance and second instance considered that the red wine involved in the case was not pasted with Chinese labels and did not meet food safety standards. However, the court of first instance held that the <Customs Declaration Form> and the <Certificate of Inspection and Quarantine of Entry Goods> submitted by the defendant could prove the safety of the red wine involved. The foods considered by the court of second instance to be inconsistent with food safety standards are unsafe foods, and the safety of foods that do not meet food safety standards should not be subdivided.

**C. Disputes over the "10 times the price" compensation**

According to Article 148 of the Food Safety Law, the court of first instance considers that the wine without Chinese label does not affect the food safety, and may exempt the operator from the responsibility of paying compensation. Foods that are not considered to meet food safety standards by the court of second instance are unsafe food. Therefore, the red wine involved does not comply with the proviso of Article 148. And Article 15 of the <Provisions of the Supreme People's Court on Several Issues Concerning the Application of Laws in the Trial of Food and Drug Disputes> stipulates: "The sale of foods that are known to not meet food safety standards, consumers claim ten times compensation to the seller, the court shall support." Therefore, the court changed the penalty for the supermarket to compensate Han Fukun for ten times the price.

**II. EMPIRICAL AND LEGAL ANALYSIS**

In order to clarify the focus of disputes, the determination of legal liability and the application of law in such cases. The empirical analysis will be used to sort out similar cases and analyze the connection and difference between them and the case.

**1. Empirical analysis based on 48 similar case judgments**

**A. Case retrieval process**

Discovered by searching on the Chinese refereeing documents website. Before the occurrence of this case, that is, between 2016 and 2018, the "know-fake-buy-fake" lawsuits mainly occurred in Guangdong Province, especially Zhuhai City and Shenzhen City. After a preliminary search, most of the cases in Zhuhai City were similar to this case. Therefore, 48 cases in Zhuhai City were selected as samples. Searching for the "Food Safety Law Article 97" & "Zhuhai Intermediate People's Court" on the website of the Chinese refereeing documents, 48 relevant cases and judgment results can be obtained.

**B. Statistical results of the case judgment**

After combing and analyzing the judgments of 48 cases, the results are shown in Table 1. The following three characteristics can be found:

First, the case of 48 related cases is basically the same as this case. Most of the goods involved are imported wine. Among the 48 cases, several parties involved in the case appeared as plaintiffs several times.

Second, the case of 48 cases is similar, but the judgment results are different, and basically there are four situations. The main difference is whether the court supports the penalties that the involved company compensates the plaintiff for ten times the purchase amount. The trial results include: both first-instance and second-instance support compensation (condition 1). The first and second trials do not support compensation (condition 2). The first trial supports compensation, and the second trial does not support compensation (condition 3). The first instance does not support compensation, and the second instance supports compensation (condition 4).

Third, the results of the 48 cases are regularly ruled. Among them, there were fewer cases in 2016, two in total, and two cases in the first instance and the second instance supported the defendant to pay the plaintiff a penalty. The judgment results from January to July 2017 were relatively diverse, including condition 1, condition 2 and condition 4. However, in the 14 cases during this period, 10 cases were supported by the second instance, and 3 cases were supported by the two trials. That is to say, before August 2017, the Zhuhai Intermediate People's Court supported the payment of the penalty. Of the 32 cases from August 2017 to the end of 2018, 25 were not supported by the two trials, 6 were supported by the first trial, and the second trial was not supported. It can be seen that since August 2017, the Zhuhai Intermediate People's Court has changed its attitude toward payment of compensation.

**Table1: Statistics on similar cases in Zhuhai City**

Time of the second instance judgment	2016	January to July 2017	August 2017 to 2018
Number of cases	2	14	32
Judgment results of two trials	condition 1	condition 1 and condition 4	condition 2 and condition 3
Proportion of all cases during that time period	100%	92.9%	96.9%

**C. Court disputed focus**

The focus of the disputes determined by the court in each case ultimately comes down to whether the defendant should pay the plaintiff a penalty.

There are three kinds of arguments about this: (1) Whether the plaintiff is a consumer, whether the Consumer Protection Law is applicable; (2) The goods involved do not meet the commodity safety standards. Whether the provisions of Article 148 of the Food Safety Law can be applied. The first

two are the same as the focus of the case. (3) The plaintiff has not entered into a sales contract based on the principle of good faith, which exceeds the scope of consumers as stipulated in Article 2 of the Consumer Protection Law and does not have the right to claim compensation.

## 2. Analysis of legal responsibility of case focus

### A. Knowing fakes should be conditionally recognized as consumers

The identification of the identity of counterfeiters is always a controversial point in legal research in related fields. Professor Liang Huixing explained in a positive way that buying a fake and claiming it was not for living expenses. Not a consumer. Professor Wang Liming explained in reverse that after buying a counterfeit, there was no resale, not for trading. Should be identified as a consumer. This is the two main points of view whether the counterfeit buyer is a consumer. However, the Consumer Protection Act adopts the "dichotomy" approach of consumers and operators. It has been unable to adapt to the shoppers who are seeking claims in reality. In recent years, the academic community has produced a view that the consumer identity of the counterfeit buyers is analogous to the gambler's identification. For example, Liu Baoyu and Wei Zhenhua believe that it is uncertain whether the goods purchased by the fake buyers are "fake goods", and whether the court will support the claim for compensation is also uncertain, which is similar to the speculation and luck of gambling. According to the provisions of the Chinese Criminal Law, the determination of gambling crimes is for the purpose of making profits, and there are situations in which gambling or gambling is used for business. Infrequent gambling does not constitute a crime. If this is the standard, it is not a consumer to know that the fake buyer is a claim for the purpose of forming an organization or taking it as the main business. It is only for the purpose of claim, if it is not formed or is based on it, it belongs to consumers.

In addition to the above-mentioned identification methods for the fake buyer, the Consumer Protection Law provides a certain interpretation space for the consumer status of the fake buyer. Food safety conditions across the country are also different. For areas where unsafe food is rampant, the purpose of the fake buyers is not necessarily to protect the rights and interests of consumers, but the litigation against the merchants has brought about this objective effect. In order to maintain a food safety environment and enhance public food safety awareness, it is understandable that a fake buyer can get a certain amount of compensation. They can be identified as consumers. However, the behavior of fake buyer in some areas occupies judicial resources, and even some fake buyers are asking for huge settlement fees from the relevant businesses, otherwise they threaten to bring the business to the court. This kind of behavior seriously jeopardizes the normal operation of the enterprise and the social atmosphere. It is not appropriate to identify them as consumers and support their unreasonable appeals. Therefore, in a certain period of time and in a specific environment, in order to play the beneficial role of fake buyer, its existence can be tolerated.

### B. Food that does not meet food safety standards is not necessarily unsafe food

The court of second instance considered that the origin of the wine involved was unknown and lacked basic food safety

information, which was "unsafe food". Indeed, the imported red wine involved in the case is not labeled with Chinese, and does not comply with the relevant provisions of Article 97 of the Food Safety Law on imported prepackaged food. Therefore, it does not meet food safety standards. However, whether foods that do not meet safety standards are unsafe foods remains to be discussed. Article 26 of the Food Safety Law stipulates eight food safety standards. The second-instance judgment of this case also states that "the label related to food safety requirements such as hygiene and nutrition is one of the important contents of food safety standards". However, the more important standard of food safety is the harmful substances of food, nutrition and other indicators related to human health itself, which is also the same as the general perception of society.

Many similar cases in Zhuhai have mentioned Article 6 of the <Provisions of the Supreme People's Court for the Administration of Several Issues Concerning the Application of Laws in the Trial of Food and Drug Disputes>: "The seller bears the burden of proof for whether the food meets the quality standards". For the identification of unsafe foods, simple presumptions should not be made because imported foods do not have Chinese labels. The key is whether the sales enterprise can provide evidence that the goods involved have passed the inspection of the entry-exit inspection and quarantine institutions. In this case, Duomeihao supermarkets provided the "Customs Import Goods Declaration Form" and "Incoming Goods Inspection and Quarantine Certificate" for the red wine involved. The court of second instance considered them to be unsafe food. Article 148 of the Food Safety Law is not applicable. This is obviously flawed.

### C. Violation of the principle of good faith and the identification of consumers

Whether the violation of the principle of good faith affects the consumer identity of the counterfeit buyers is not an outstanding performance in the judgment of this case, but it is also an important focus in the trial of such cases. The principle of good faith is not only the basic principle of China's "General Principles of Civil Law", but also appears in the general provisions of China's "Contract Law." In Zhuhai's similar case judgment, the court held that both parties involved in the case of fraudulent buying and selling and false sales were in violation of the principle of good faith. There is a legal flaw in the validity of the contract. Therefore, a counterfeit buyer cannot be a consumer of a contract. The Consumer Protection Law cannot be applied. For example, the Civil Judgment of the Intermediate People's Court of Zhuhai City, Guangdong Province [(2017) Yue 04 Min Zhong 1207]. However, the breach of the principle of good faith by both parties to the contract does not constitute a statutory situation concerning the invalid contract under Article 52 of the Contract Law. It is obviously not rigorous to identify the fake and fake consumers.

## 3. Analysis of the legal application of know-fake-buy-fake

On the basis of comprehensive analysis, the legal application of the focus of know-fake-buy-fake cases should be considered from two aspects.

### A. The identity of the fake buyer shall be governed by Article 3 of the Provisions of the Supreme People's Court for the Administration of Several Issues

### Concerning the Application of Law in the Trial of Food and Drug Disputes

At present, the courts, government departments, academia and the public have not yet fully reached a consensus on whether the fake buyers are consumers, and there is a legislative gap in the identification of the counterfeiters. Article 3 of the "Provisions of the Supreme People's Court for the Administration of Several Issues Concerning the Application of Laws in the Trial of Food and Drug Disputes" indicates that "the seller shall not support the seller if the purchaser knows that there is a quality problem with the food or the drug and still purchases." This provision avoids the relevant disputes and indirectly supports the claim of the fake buyer. Before the law does not stipulate the nature of the fake buyer, the relevant provisions of this judicial interpretation should be applied.

#### B. The tenth price compensation issue shall be subject to Article 15 of the Provisions of the Supreme People's Court for the Administration of Several Issues Concerning the Application of Laws in the Trial of Food and Drug Disputes

Article 148 of the Food Safety Law and Article 15 of the <Provisions of the Supreme People's Court for the Administration of Several Issues Concerning the Application of Laws in the Trial of Food and Drug Disputes> Cases stipulate the issue of compensation for ten times the price. The difference between the two is that Article 148 of the Food Safety Law has a proviso that the label and the instructions do not affect food safety and can be exempted from compensation. Due to the proviso of Article 148 of the Food Safety Law, the standards for the identification of unsafe foods and the evidence of the identification of different courts have different perceptions. In order to comply with the principle of fairness, strict standards should be adopted in accordance with Article 15 of the Supreme People's Court Regulations on Several Issues Concerning the Application of Laws in the Trial of Food and Drug Disputes.

### III. LAW AND ECONOMICS ANALYSIS

The case of know-fake-buy-fake has experienced a development process from generation to rapid increase to sudden sharp decline in some places. The analysis of this phenomenon from the perspective of law and economics will help courts in various regions to better handle similar cases and form a benign development.

#### 1. Cost-benefit analysis of know-fake-buy-fake

##### A. Cost-benefit analysis of ordinary consumers' rights protection

In the similar case of this case, imported foods purchased by ordinary consumers without the Chinese label will not cause damage to their bodies. At this time, if ordinary consumers want to defend their rights, the cost they mainly include:

Legal costs, including the cost of studying the law, the cost of hiring a lawyer, and the cost of obtaining evidence. Judicial litigation is very unfamiliar to ordinary consumers, and it is highly probable that unnecessary fees will be added for reasons such as information asymmetry. In addition, due to the lack of basic legal knowledge of ordinary consumers, it is more difficult to obtain evidence after the infringement. In the case of this case, if an ordinary consumer wants to defend his rights through litigation, it is difficult to provide evidence that the merchant has not pasted the Chinese label when purchasing the red wine.

Risk costs. As stated in the above article, ordinary consumers may be at risk of losing their claims because of insufficient evidence.

Time cost. Taking this case as an example, it took nearly eight months from the plaintiff to purchase the red wine involved in the case to the second instance. For ordinary consumers, the long-term litigation procedure will have a huge impact on their work and life.

In terms of efficiency, for ordinary consumers, if their litigation requirements are supported, they can get refunded shopping money and ten times of purchase money, which is a direct benefit. In terms of indirect benefits, whether or not they win the case, ordinary consumers can acquire relevant legal knowledge and provide knowledge reserves and skills for better rights protection in the future.

#### B. Cost-benefit analysis of fake buyers

The cost type of fake buyers is similar to that of ordinary consumers, but the cost of fake buyers is lower than that of ordinary consumers.

Legal costs. Fake buyers also also have a certain legal cost. However, fake buyers have some legal knowledge, they are familiar with product quality standards and they also have mastered the methods of collecting evidence and the means of appeal, which have greatly reduced legal costs.

Risk costs. The risk of fake buyer depends on the various places' judges' perception of the behavior of know-fake-buy-fake, which has certain regularity. At certain times and in certain areas, judges will recognize their status as consumers, and their chances of winning litigation will increase significantly, which will reduce their risk costs.

Time cost. For professionalized fake buyers, the "main business" is to buy fakes and file a claim lawsuit. The long-term litigation process has little effect on them.

For faker buyers, if their claims are supported, they can get refunded purchases and 10 times the purchase price. In addition, they have filed numerous lawsuits to gain social attention and gain clues about more problematic products to support follow-up activities.

#### C. Cost-benefit analysis of sellers

The main cost of the seller is from ten times the compensation and administrative penalties without winning the lawsuit. However, the cost of the product being sold is necessarily lower than that of the qualified product, so the excess return obtained is correspondingly higher. Therefore, as long as the excess profit of the unqualified product is far greater than the amount of the lost compensation and the amount of the administrative penalty, the seller will choose to sell the unqualified product. More importantly, once the sellers are noticed by the fake buyers, they are likely to be sued for claims. But in China, the ordinary consumer has a lower probability of filing a lawsuit. Moreover, even if the seller is accused, there is no uniform standard for the court to determine the know-fake-buy-fake behavior, and the seller is not necessarily liable for the penalty of ten times the price.

#### 2. Game Analysis of the Surge and Sharp Reduction of the Case of know-fake-buy-fake

Through cost-benefit analysis, it can be found that the common consumer rights protection costs are higher, resulting in a reduction in direct benefits, so it is difficult for ordinary consumers to defend their rights against a single

infringement. The seller seized this mentality and chose problem products with lower sales costs to make huge profits. Compared with ordinary consumers, the cost of professionalized fake buyers is lower. And they can increase their income by choosing areas that are more likely to win litigation. As Han Fukun, the party to this case, began to choose Qingdao as a target after the trial orientation of the court in Zhuhai was fully turned.

On the whole, if the ordinary consumer chooses to defend their rights, in order to make their own benefits outweigh the costs. Consumers are likely to use the legal skills acquired by the first rights defense to conduct multiple litigations, and eventually the consumer may turn into a real fake buyer. The changes in the views and opinions of the society and the court on the two-level differentiation of know-fake-buy-fake have made the living space of professional fake buyers and fake sellers long-term exist, and the two cannot be eliminated in the short term.

In the development process of 48 similar cases in Zhuhai City, the two cases in 2016 supported the 10 times price compensation, which did not attract the attention of the sellers. The profit of the problem food they sold was still greater than the penalty cost. In 2017, there were 17 related second-instance cases, and most of the fake buyers were supported in the second trial in 2017. At this point, the benefits of fake buyer far exceed the cost. In 2017, the Supreme People's Court pointed out that the fraudulent buying behavior deviated from the original intention of purifying the market and seriously violated the integrity. The principle is to waste judicial resources and explicitly oppose such behavior in the "Response to the 5th National People's Congress Fifth Meeting No. 5990 Recommendation" (Law of the Law [2017] No. 181). Since August 2017, the Zhuhai Intermediate People's Court has completely rejected the request for a ten-fold compensation for the fake buyers in the relevant lawsuits. At this time, the gains of fake buyers are drastically reduced, and they may no longer be able to bear the cost. As of the end of May 2019, China Judgment Document website has not found the second-instance judgment of similar cases in Zhuhai. This fully shows that the attitude of the people's court has greatly affected the choice of fake buyers' behavior.

#### IV. ENLIGHTENMENT AND COUNTERMEASURES

##### 1. The "one size fits all" ruling method does not help solve the problem of know-fake-buy-fake

Through the law and economics analysis of this case and related cases in Zhuhai, it can be seen that the different results of the judicial judgment of the know-fake-buy-fake cases affect the development of subsequent similar behaviors. In 2018, the Zhuhai City Court began to completely dismiss the request for ten times the price compensation of the fake buyer. To a certain extent, this has curbed the situation of the proliferation of counterfeit and fake lawsuits. However, it is still unknown whether the situation of know-fake-buy-fake is improved. In addition, this is likely to result in more frequent purchases of fakes and blackmail.

##### 2. Strengthening judicial flexibility and strengthening mutual cooperation between the judiciary and the administration

In the process of combing the case, the judgment of the civil judgment of Qingdao Intermediate People's Court of Shandong Province [(2018) Lu 02 Minquan 6454] is worth

learning. In the second-instance judgment of the contract dispute between Han Xuexin and Aofaxin Liquor Store, the court held that the liquor store sold liquor that did not meet the safety standards should be punished according to the relevant provisions of the Food Safety Law, but it also made a penalty of three times the price compensation in light of the specific circumstances. In the initial example of the article, the court considered the difficulties of the operation of the beautiful supermarket, hoped to mediate and reduce the amount of compensation to four times the price, which indicates that the compensation for ten times the price is unreasonable in such cases. On this issue, the judiciary should have greater discretion. The administrative organ should also cooperate with the judicial authorities to improve the reporting procedures for problem products and the administrative punishment mechanism for problem enterprises, and raise the bonuses for reporting products to the same level as the judicial decisions. In this way, it is possible to reduce the waste of judicial resources by fake buyers. At the same time, the administrative organs should increase the administrative penalties for problem enterprises, so that they can abandon the practice of obtaining huge profits through sales of problem products. Only through multi-pronged and coordinated governance can this problem be completely eradicated.

#### CONCLUSION

To sum up, in the practice of judicial trials, it is aimed at the know-fake-buy-fake lawsuits in the field of food safety. Absolutely supporting or not supporting the ten-fold price penalty compensation claim filed by the fake buyer' claim, can not achieve the good social effect and economic effect of standardizing the phenomenon of know-fake-buy-fake and tackling food safety violations. When the court hears the case of know-fake-buy-fake in the field of food safety, it should conduct law and economics analysis according to the specific circumstances within the framework of legal provisions, give full play to the positive role of judicial discretion, balance and guarantee the legitimate rights and interests of all parties, and establish food safe collaborative governance mechanism and establish a joint prevention and control system for food safety.

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