SLACK-FILL LITIGATION:
RECENT DEVELOPMENTS AND TIPS TO MINIMIZE RISK

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Though courts have shown some willingness to assess the validity of plaintiffs' slack-fill claims at the outset of cases which has resulted in some early dismissals, a few recent decisions demonstrate that slack-fill litigation still presents a risk to consumer product manufacturers. This article describes the regulations and recent cases, and concludes with proactive tips to minimize the risk of litigation and help facilitate an early and economical resolution.

What is slack-fill?

Slack-fill refers to the empty space in a product's container. Federal regulations provide that a container misleads the consumer if he or she cannot fully view the contents and it contains "nonfunctional" empty space.[1] There are safe harbors that allow a container to have empty space where it provides a specific function. Three frequent examples are: (1) to protect the contents of the package, (2) because the empty space is required by the machines used for closing the package, and (3) the empty space results from settling of the product during shipping and handling.

What specifically does the regulation provide?

The federal regulation, 21 C.F.R. § 100.100(a), provides that:

> A food shall be deemed to be misbranded if its container is so made, formed, or filled as to be misleading.
>
> (a) A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill. Slack-fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack-fill is the empty space in a package that is filled to less than its capacity for reasons other than:
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> (1) Protection of the contents of the package;
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> (2) The requirements of the machines used for enclosing the contents in such package;
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> (3) Unavoidable product settling during shipping and handling;
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> (4) The need for the package to perform a specific function (e.g., where packaging plays a role in the preparation or consumption of

> a food), where such function is inherent to the nature of the food and is clearly communicated to consumers;
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> (5) The fact that the product consists of a food packaged in a reusable container where the container is part of the presentation of the food and has value which is both significant in proportion to the value of the product and independent of its function to hold the food, e.g., a gift product consisting of a food or foods combined with a container that is intended for further use after the food is consumed; or durable commemorative or promotional packages; or
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> (6) Inability to increase level of fill or to further reduce the size of the package (e.g., where some minimum package size is necessary to accommodate required food labeling (excluding any vignettes or other nonmandatory designs or label information), discourage pilfering, facilitate handling, or accommodate tamper-resistant devices).

Some states have enacted similar provisions regarding slack-fill, have incorporated the federal definition of misbranding, or generally prohibited misleading packaging.[2]

California Recently Added Additional Safe Harbors

California recently amended it state regulations to allow empty space under certain circumstances. For example, a company may make the dimensions of the product visible through the exterior packaging, depict the "actual size" of the product on any side of the exterior packaging (excluding the bottom), or provide a clear and conspicuous line or graphic representing the product fill line on the packaging.[3]

Private Consumer Enforcement in Multiple States Covering Various Products

Individual consumers have brought class actions in a variety of jurisdictions alleging that they were misled and damaged as a result of the misleading packaging. They have alleged, for example, that they expected to receive a full container of a product in a non-transparent container and were "surprised and disappointed" to open the container and see it had 30% empty space.[4] They have sued over packaging of peanut butter cups, pretzels, movie candy boxes, pasta sides, tuna, cereal, ice cream and chips, just to name a few.[5] One plaintiff in California brought at least four lawsuits, claiming he had been deceived by packages varying in 50-70% empty space for a baking mix, cookie dough bites, risotto and dried fruit.[6]

Putative class action complaints have alleged claims relating to slack-fill or misleading packaging under the state consumer protection statutes such as California's Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.* and Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq*., Illinois's Consumer Fraud and Deceptive Practices Act, 815 Ill. Comp. Stat. 505/1, *et seq.*,[7] New York's General Business Law §§ 349 and 350,[8] and Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann. §501.201, *et seq.*

Possible Early Dismissals

Some courts have been willing to review closely the allegations of the complaint at the motion to dismiss stage, resulting in dismissals of the actions.

Courts can and do dismiss consumer fraud claims where a plaintiff fails to plausibly plead that "members of the public are likely to be deceived" by the allegedly misleading statement.[9] This requires "more than a mere possibility" that a statement "might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner."[10] Rather, it "requires a probability 'that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.'" *Id.*

Defendants have had some limited success arguing that a consumer is not misled where the product's label contains accurate statements about its contents. For example, a district court dismissed a case and held that the size of cookie packaging was not deceptive because the label disclosed the number of cookies inside.[11] Another district court dismissed a case and held that the size of an over-the-counter drug was not deceptive because the label stated the number of pills inside.[12]

Other courts have found that a product's packaging may mislead a consumer even if the package accurately discloses the contents. For example, one court addressing candy boxes that had nonfunctional slack-fill reasoned:

> "In the Court's view, a reasonable consumer is not necessarily aware of a product's weight or volume and how that weight of volume correlates to the product's size. In other words, the fact that the Products' packaging accurately indicated that a consumer would receive 141 grams or 5 ounces of candy does not, on its own, indicate to a reasonable consumer that the Products' box may not be full of candy and that, instead, 35.7% of the box is empty. Rather, a reasonable consumer may believe that 141 grams or 5 ounces of candy is equivalent to an amount approximately the size of the Products' box."[13]

The FDA also noted as much, stating that the "presence of an accurate net weight statement does not eliminate the misbranding that occurs when a container is made, formed, or filled so as to be misleading."[14]

Some defendants have had success arguing a plaintiff should not be allowed to proceed based simply on a conclusory allegation that the empty space serves no function. In one case, the plaintiff tried to make out a slack-fill claim by reciting the circumstances in which slack-fill is functional and then asserted that "none of these circumstances apply here."[15] The court held that such threadbare allegations were "insufficient to support a claim of unlawful packaging." Other examples exist as well.[16]

In one recent case last month, a district court dismissed a slack-fill class action on two grounds.[17] It held that the plaintiff failed to allege facts that the box's empty space was nonfunctional. It also held that the plaintiff failed to plead facts that the *size* of the box was materially misleading given the net weight and amount of servings were also disclosed.

Other defendants have argued, with mixed results, that the plaintiff did not adequately plead damages. In one case, the court held that the plaintiff's expectation to receive more

product than she did was not actual damage.[18] There, the court noted that the plaintiff did not allege that the product was defective, or that she would have paid less in the marketplace for a comparable product.

Recent Private Enforcement Successes Beyond the Motion to Dismiss Stage

As one district court noted, despite the volume of slack-fill cases, "very few have reached the stage of class certification."[19] In addition to pleading challenges, some cases appear to have been dismissed either because the plaintiff lost interest or possibly through an individual settlement with the defendant.

One recent decision on a motion for class certification is worth noting. There, the district court certified classes in California, Florida and Missouri in multi-district litigation relating to the sale of black pepper in tins and grinders allegedly containing non-functional slack-fill not visible to purchasers. Of note and potentially unique was the fact that the defendants intentionally reduced the fill of their containers. The alleged objective was "'to mitigate commodity cost increases expected on black pepper through a net weight reduction across branded and private label metal cans,' and thus avoid any further price increases for its own products."[20] The effort allegedly resulted in reducing the net weights by 25% with no change in container size or price.[21]

Though some have speculated that slack-fill litigation is on a downward trend, there are a few class certification decisions,[22] as well as a few recent settlements that could incentivize plaintiffs to bring such suits. For example, one case involving boxed candy recently settled on a class-wide basis for $2.5 million, with an award of attorneys' fees of $625,000.[23] Another case recently settled on a class-wide basis for $1.7 million, of which $566,100 was allocated for plaintiff's attorneys' fees.[24] While both of those settlements provided monetary compensation for class members, in another class action, a class-wide settlement was reached for injunctive relief only in the form of packaging changes, but which provided $450,000 in attorneys' fees to class counsel.[25]

Tips for Protecting Against Slack-Fill Litigation Or Reaching an Efficient Resolution

Consider Conducting a Slack-Fill Audit. An audit can be helpful to assess risk and determine whether changes to packaging may be appropriate before litigation is threatened or filed. As part of the audit, the company can identify products that might be viewed by a consumer as having non-functional slack-fill, and then investigate whether that empty space provides a function covered by one of the safe harbors. As part of this process, information and documents can be gathered so that the company is prepared if a challenge is made to the amount of slack-fill in a product. For example, the company might take photographs of product as it is first packaged to demonstrate that the empty space is the result of settling during handling and shipping. It might gather test data showing that various fill levels were tested and the current fill level was decided upon because of the machinery's limitations. It might have records demonstrating that the fill level was set in response to complaints or concerns about damaged product. Gathering and retaining this information will be helpful to fend off a demand letter or complaint if one is received. Alternatively, the audit may result in a recommendation to change the packaging procedure.

Pay Attention to Demand Letters and Customer Complaints. Sometimes consumers reach out to customer service before retaining a lawyer to complain about slack fill. One of California's consumer protection statutes requires a demand letter be sent before a lawsuit for damages is filed. These pe-litigation contacts present opportunities to see if the dispute may be resolved informally and to conduct an investigation of the claims alleged. If a demand letter is received, a document hold should be put in place and information relating to the rationale for the empty space gathered and preserved. If no resolution is reached, the company will be better prepared to then defend the lawsuit and explain the function of the empty space.

Engage During Product Development. When the company is preparing to launch a new product, be involved in the process to understand and advise as to the importance of avoiding non-functional empty space. Offer options to avoid an argument that the consumer was misled such as showing the fill line or product size on the package, using transparent packaging and/or conspicuously showing servings. And, collect and retain the records reflecting the decision-making process in case it becomes necessary to explain the empty space later.

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[1] 21 C.F.R. § 100.100(a).
[2] *See In re: McCormick & Company, Inc., Pepper Products Marketing and Sales Practices Litigation*, Misc. No. 15-1825 (ESH) (D.C. D.C. 2019) Memorandum Opinion, July 10, 2019, pp. 5-6, n. 3-5.
[3] Cal. Health & Safety Code § 110375.
[4] Complaint, *Buso v. Just Born, Inc.*, No. 17 CV 1630 (S.D. Cal. Aug. 11, 2017).
[5] *Clark v. Justin's Nut Butter, LLC*, No. 3:18-cv-06193 (N.D. Cal. 2018) (peanut butter cups), *Escobar v. Just Born, Inc.*, No. 2:17-cv-01826 (C.D. Cal. 2017) (candy); *Francisco v. Just Born, Inc.*, No. 2:19-cv-05543 (C.D. Cal. 2019) (candy); *Tsuchiyama v. Taste of Nature Inc.*, No. BC 651252 (L.A. Superior Ct. 2017) (candy); *Fasih v. Unilever U.S., Inc.*, No. 3:18-cv-01032 (S.D. Cal. 2018) (pasta sides); *In re Safeway Tuna Cases* 3:15-cv-05078 (N.D. Cal. 2015) (tuna); *Shihad v. Wild Planet Foods*, No. 1:16-cv-01478 (N.D. Cal. 2016) (tuna); *Jackson v. General Mills*, No. 3:18-cv-02634 (S.D. Cal. 2018) (cereal); *Kamal v. Eden Creamery, LLC*, No. 3:18-cv-01298 (ice cream); *Lankenau-Ray v. Mars*, No. 16-cv-2660 (N.D. Cal. 2016) (rice); *Perry v. Calbee America, Inc.*, No. 37-2018-00054125-CU-FR-CTL (San Diego Superior Ct. 2018) (snacks).
[6] *Buso v. ACH Food Cos., Inc.*, No. 3:17-cv-01872 (S.D. Cal. 2017); *Buso v. Taste of Nature, Inc.*, No. 37-2018-000300055-CU-MT-CTL (San Diego Superior Ct. 2018); *Buso v. Vigo Importing Co.*, 3:18-cv-01328 (S.D. Cal. 2018); *Buso v. Penguin Trading, Inc.*, No. 2:17-cv-07025 (C.D. Cal. 2017).
[7] *See e.g., Benson v. Fannie May Confections Brands, Inc.*, No. 17 C 2519 (N.D. Ill. 2017) (alleging that Mint Meltaways and Pixies had 33% and 40% empty space); *Stemm v. Tootsie Roll Indus., Inc.*, No. 18 C 2289 (N.D. Ill. 2018) (alleging Junior Mints candy boxes hid large amount of empty space).
[8] *See e.g., Berni v. Barilla G. e R. Fratelli, S.p.A.* No. 16-CV-4196 (E.D.N.Y. 2016) (G.B.L. § 349) (specialty pasta); *Morrison v. Barcel United States, LLC.*, No. 18 CV 531 (S.D.N.Y. 2018) (G.B.L. §§ 349 and 359) (Takis Rolled Tortilla Chips).
[9] *Freeman v. Time, Inc.*, 68 F.3d 285, 289-90 (9th Cir. 1995) (California law).
[10] *Ebner v. Fresh, Inc*., 838 F.3d 958, 965 (9th Cir. 2016) (citing *Lavie v. Procter & Gamble Co*., 105 Cal.App.4th 496 (2003)) (California law).
[11] *Bush v. Mondelez Int'l, Inc.*, No. 16-cv-02460, 2016 U.S. Dist. LEXIS 174391 (N.D. Cal. Dec. 16, 2016).
[12] *Fermin v. Pfizer Inc.*, 215 F.Supp.3d 209 (E.D.N.Y. 2016) (applying California, Florida, and New York law)
[13] *Escobar v. Just Born, Inc.*, Case No. CV 17-01826 (C.D. Cal.) Order re Defendant's Motion to Dismiss, June 12, 2017, p. 15.
[14] *Misleading Containers; Nonfunctional Slack-Fill*, 58 Fed. Reg. 64123-01, 64128 (Dec. 6, 1993).
[15] *Bush v. Mondelez Int'l, Inc.*, 2016 U.S. Dist. LEXIS 140013, *11 (N.D. Cal. Oct. 7, 2016).
[16] *Martinez-Laeander v. Wellnx Life Sciences, Inc*., 2017 WL 2616918, *7 (C.D. Cal. Mar. 6, 2017); *Benson v. Fannie May Confections Brands, Inc.*, No. 17 C 2519 (N.D. Ill. Dec. 10, 2018); *Cordes v. Boulder Brands USA, Inc.*, No. 2:18-cv-06543 (C.D. Cal. Jan. 30, 2019).

[17] *Green v. SweetWorks Confections, LLC*, No. 18 CV 902 (S.D.N.Y. Aug. 21, 2019).
[18] *Stemm v. Tootsie Roll Indus., Inc.*, (N.D. Ill. Mar. 19, 2019) (dismissing claim brought under the Illinois Consumer Fraud and Deceptive Practices Act).
[19] *In re: McCormick & Co., Inc., Pepper Products Marketing and Sales Practices Litigation*, Misc. No. 15-1825 (July 10, 2019 D.C.D.C.) at pp. 8-9.
[20] *In re: McCormick & Co., Inc., Pepper Products Marketing and Sales Practices Litigation*, Misc. No. 15-1825 (July 10, 2019 D.C.D.C.) at p. 11.
[21] *Id.* at p. 13.
[22] *Id; Escobar v. Just Born, Inc.*, No. CV 17-01826 (C.D. Cal. March 25, 2019).
[23] *Iglesias v. Ferrara Candy Co.*, No. 3:17-cv-849 (N.D. Cal. 2017) (objector appealed attorneys' fees award, but appeal dismissed for lack of prosecution on July 22, 2019).
[24] *Shihad v. Wild Planet Foods*, No. 1:16-cv-01478 (N.D. Cal 2016).
[25] *Bernie v. Barilla G. e R. Fratelli, S.p.A.*, No. 16-CV-4196 (E.D.N.Y. June 3, 2019) (notice of appeal filed).