



LITIGATING OVER EMPTY SPACE: PUBLIC AND PRIVATE PLAINTIFFS TARGET CONSUMER CLASS ACTIONS AT “SLACK FILL”

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Lawsuits alleging fraudulent or misleading “slack fill,” a subset of the consumer-protection class actions that are now so common, are on the rise. Slack fill is the empty space between products and their packaging. Consumers can sue companies for using “nonfunctional slack fill” in product packaging under both the Federal Food Drug and Cosmetic Act (FD&C Act) and state unfair business practice statutes (most states have consumer fraud statutes and California has a specific statute that addresses slack fill: Business and Professions Code § 12606.2). County District Attorneys and plaintiffs’ lawyers argue that slack fill suits protect consumers from deceptive packaging and overpayment.

But more often than not, the county governments and plaintiffs’ lawyers that file these lawsuits benefit far more than the individual consumers on whose behalf they are brought. While food producers must take such litigation seriously, they must also understand that settlement of meritless slack fill suits, even for mere “nuisance value,” will only feed public and private litigation war chests and paint a target on themselves for more such claims.

Deception and Misbranding: Understanding the Regulatory Backdrop

A general background of the federal and state regulatory framework for packaging slack fill is instructive in understanding the county District Attorney and private litigation. Under FD&C Act § 403(d), when a container of a food is “so made, formed or filled as to be misleading,” the food is misbranded. A misbranding offense exposes violators to a range of penalties, including incarceration. Although the provision is broad, courts have interpreted it narrowly, particularly in slack fill cases.

For instance, in *United States v. 174 Cases (Delson Thin Mints)*, 287 F.2d 246 (3d Cir. 1961), the government charged that a food was misbranded in violation of § 403(d) because, by making it appear that it contained more mints than it did, the 75%-full package deceived the ordinary purchaser. The court ruled against the government, holding that outward appearances, *per se*, are not dispositive. Rather, if the defendant can provide a practical reason for using an apparently misleading package, the product is not misbranded. *See also United States v. 738 Cases (Jiffy-Lou Vanilla Flavor Pudding)*, 71 F. Supp. 279 (D. Ariz. 1946) (Similarly finding that 55% slack fill did not violate the FD&C Act).

As part of the Nutrition Labeling and Education Act of 1990 (NLEA), Congress ordered the Food and Drug Administration (FDA) to examine whether or not it had adequately implemented the food misbranding provisions of FD&C Act § 403. The standards-of-fill provision was one of the six to be studied by the National Academy of Sciences and the Institute of Medicine’s Food and Nutrition Board. That study found FDA was not properly

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implementing the FD&C Act's slack fill standards. Under the NLEA, FDA could either revise its regulations or cede all slack fill enforcement authority to the states. In response to the study, FDA issued a new rule establishing the circumstances where a container's excess volume was non-functional and, therefore, "misleading." 58 Fed. Reg. 64136 (Dec. 6, 1993). The rule took effect on January 5, 1994.

The rule defines "slack fill" as the difference between the actual capacity of a container and the volume of product in the container. "Nonfunctional slack fill" is defined as the empty space in a package that is filled to less than its capacity and that does not fit into one of the six permitted exceptions. Those exceptions are: (1) the slack fill performs an appropriate function, such as protecting the contents of the container; (2) the slack fill is necessary because the machines used for enclosing the contents in the package require it; (3) the slack fill is the result of "normal product settling;" (4) the package performs a specific function that is inherent to the nature of the food and is clearly labeled; (5) the product is a food packaged in a reusable container where the container is part of the presentation of the food, *e.g.*, a gift product; or (6) the manufacturer cannot increase the level of fill or reduce the size of the package (*e.g.*, where a minimum package size is necessary to accommodate required food labeling, discourage pilfering, facilitate handling, or accommodate tamper-resistant devices). See 21 C.F.R. § 100.100.

California Business & Professions Code § 12606.2 is similar to the federal rule regarding slack fill and the justifications that producers can provide as a defense to a misbranding action. In 2013, the California legislature passed, and California Governor Brown signed, SB 465, which added the words "substantially less" to the definition of nonfunctional slack fill under § 12606.2. The definition now reads "Nonfunctional slack fill is the empty space in a package that is filled to *substantially less* than its capacity."¹ The California law lists 15 instances where slack fill is considered lawfully functional.

Varying Types of Liability Exposure

Food producers face three types of liability exposure in relation to slack fill claims. The first type, discussed above, is FDA regulation of deceptive or nonfunctional slack fill packaging. The risk of such liability is generally low; FDA does not aggressively enforce misleading container provisions. FDA's use of its enforcement discretion, however, has created enforcement opportunities at the state level. The second type of liability exposure, then, comes from county District Attorneys, as such enforcement is a revenue generator for local governments. District Attorneys deploy the expertise of county Weights and Measures Offices, which investigate the amount of empty space within a container. The third type of liability exposure, which has been increasing and engenders the greatest risk for producers, arises from private class-action lawsuits. Notably, despite complying with federal and state regulations, businesses can be exposed to private litigation.

Beware the "County Bounty"

In District Attorney-initiated enforcement actions, a food or other consumer-product producer will receive a letter from a county's Weights and Measures Office and its District Attorney noting a slack fill violation and offering to negotiate a resolution prior to filing a lawsuit. The goal of this letter is not to convict, but to extract penalties from the target, a process that has been colloquially dubbed the "County Bounty." California District Attorneys have become aggressive in their deployment of the County Bounty, filing actions under the broad California Unfair Competition Laws and Business and Professions Code §§ 17200 and 17500. Such claims require a showing that the challenged action or statement is unlawful, unfair, or fraudulent.

The District Attorneys use the Business and Professions Code to prosecute slack fill cases for a variety of reasons. Sections 17200 and 17500 do not require jury trials. As a result, District Attorneys can gain a home-field advantage by bringing cases before familiar judges. The county financially backs the costs and attorneys' fees in

¹ The California District Attorneys Association opposed SB 465.

§§ 17200 and 17500 cases. Finally, District Attorneys are seeking compensation for the county, not consumers, so they need not comply with procedural rules that govern class certification.

District Attorney actions carry significant repercussions: (1) a recovery period that applies four years retroactively from the date filed; (2) payment of up to \$2,500 per violation/sale; (3) injunctive relief; and (4) negative publicity for the producer's brand, since any resolution of a lawsuit will be disclosed in a public consent order. Food producers can, of course, mitigate the effects of a County Bounty action by negotiating the calculated penalties in good faith. District Attorneys would rather settle than lose the bounty in a court trial.

The Rise of Slack Fill Class Actions

Consumer-product fraud litigation generally is on the rise nationally. Since 2012, consumers have filed over 500 class actions aimed at food producers claiming misrepresentations of food content or labeling. Slack-fill-packaging cases account for approximately 12% of the claims. The U.S. District Court for the Northern District of California (dubbed the "Food Court") is home to more than 33% of the cases filed, while slack fill cases make up 22% of the cases filed in New York, 12% filed in Florida, and 7% filed in Illinois. In 2015, 30 slack fill cases were filed in the U.S., which rose to 37 cases in 2016, and 14 in the first half of 2017.

Private plaintiffs file suit most frequently under state consumer-protection laws. In California, plaintiffs rely upon some of the same laws used by District Attorneys as part of their County Bounty prosecutions. Under the California Business and Professions Code, unfair competition includes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." CAL. BUS. & PROF. CODE § 17200. Under that statute's § 17500, it is unlawful to disseminate information used in advertising or used to induce the public to enter into any obligation that is known or should be known to be untrue or misleading. CAL. BUS. & PROF. CODE § 17500.

Plaintiffs also prosecute slack fill actions under the Consumer Legal Remedies Act (CLRA). CAL. CIV. CODE § 1750 *et seq.* Section 1782 requires a plaintiff to provide defendants with 30-days advance notice of the misleading conduct before filing suit for damages. It is during this "safe harbor" time frame that most cases are settled or abandoned depending on the strength of the claims.

While slack fill cases may be on the rise, success for plaintiffs should not be presumed. State-law class actions are easy to file, but plaintiffs must overcome considerable procedural and substantive obstacles to maintain and successfully prosecute such claims. Plaintiffs must plead and prove consumer deception, obtain class certification, and survive a motion to decertify the class. Their pleadings must make specific and plausible allegations of deception, ones that would deceive a "reasonable consumer."² Often, plaintiffs are unable to satisfy these requirements and many deception cases are halted at the pleadings stage. Class-action plaintiffs must also prove that the alleged deception actually harmed them, they must prove the quantity of damages class-wide, and they must quantify that harm in a concrete dollar amount.

Food producers should be prepared to offer proactive defenses beyond urging the court to closely scrutinize the plaintiff's slack fill complaint. One potential defense is to argue that the class is not ascertainable, *i.e.* the plaintiffs cannot offer a feasible, objective method to identify who is and is not a member of the class. Ascertainability can be a difficult prerequisite for plaintiffs to meet, especially when a case involves a consumer product with millions of consumers who may have purchased the product once, on occasion, or frequently.

² Under this standard, plaintiffs must demonstrate "more than a mere possibility that ... the label 'might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner.' Rather, the reasonable consumer standard requires a probability 'that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.'" *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (quoting *Lavie v. Proctor & Gamble Co.*, 129 Cal. Rptr. 2d 486, 495 (Ct. App. 2003)) (citations omitted).

Defendants can also still prevail after a class has been certified. A prudent defense strategy should include a motion to decertify, which may be granted if the court determines that the plaintiffs are not similarly situated. A successful motion to decertify causes the case value for the named plaintiff (and, even more importantly, her lawyer) to drop to zero, demonstrating that the most powerful defense may come even after class certification.

Do Not Feed the War Chest

When threatened with a lawsuit, some food producers settle meritless cases to avoid litigation's financial and public-relations costs. Private settlements financially enrich the plaintiffs' lawyer and the named class representative, but the supposedly injured consumers routinely receive nothing of value. Consumers usually receive a nominal cash payment or a voucher for the product about which they had been allegedly deceived.

Settlement may, in the abstract, be the right business decision for an individual company. But food producers also should be conscious that such settlements may cure a short-term issue, while fueling a long-term problem. A settlement will rid a food or consumer-product producer of a specific lawsuit, but may at the same time finance a plaintiff lawyer's arsenal of future lawsuits.

In the past six years, numerous lower court (and a few appellate court) rulings have established a fairly consistent body of law that can inform a slack fill class-action defendant's decision on whether to fight or attempt an early settlement. For example, in *Fermin v. Pfizer, Inc.*, 215 F. Supp. 3d 209 (E.D.N.Y. 2016), the court denied plaintiff's claim that consumers were tricked into buying larger bottles with excessive amount of space because the product stated the pill count on the front label. The court found the claims did not pass the "laugh test;" consumers can and should read the label, and thus no deception was found. *Id.* at 212.

However, there is no bright-line rule or specific percentage of content when it comes to slack fill cases. In *Izquierdo et al. v. Mondelez International Inc.*, the Southern District of New York held that label disclosure of product quantity does not give the food producer a free pass to include excess packaging. The court, however, ultimately dismissed the claims for insufficient pleading. 2016 WL 6459832 (S.D.N.Y. Oct. 24, 2016).

Conclusion

FDA possesses the authority to regulate consumer-product producers' use of slack fill, and bring enforcement actions against those whose products are misbranded because they utilize nonfunctional slack fill. Federal regulators, however, have generally refrained from devoting the federal government's resources to pursuing such actions. State officials and private plaintiffs' lawyers have stepped in to purportedly protect consumers. Because many state laws impose standards that are the same as those in federal regulations, courts have generally rejected defendants' preemption defenses.³ Thus, county District Attorneys and private lawyers have pursued state-law suits against a broad array of companies, mostly those offering packaged goods.

Before considering early settlement, slack fill defendants should carefully evaluate the challenges plaintiffs face in pursuing their claims, as well as the defenses that have been quite effective both before and after class certification. That assessment should also consider the long-term costs of feeding slack-fill-litigation war chests and the possibility that a strong assertion against these at the initial stages can result in abandonment of the claim.

³ See, e.g., *Ebner*, 838 F.3d at 964-65.