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This Week's Feature

"Slack-Fill" Litigation: Defenses and Developments

by Carla Rose Karp

Lawsuits against food and other consumer product manufacturers dubbed "slack-fill" cases are on the rise. Slack fill is the difference between the capacity of a package and the amount of the product contained in it. *See* 21 C.F.R. § 100.100(a). These cases, often putative class actions, allege that the size or design of a product's packaging, or both, deceives customers into expecting more product than they receive. Slack-fill claims target various products, including candy, over-the-counter medication, and cosmetics, but manufacturers frequently achieve dismissals at early stages of the litigation.

Potential Defenses

There are several potential defenses against slack-fill lawsuits that are available to manufacturers, including

- "Functional" empty space,
- Federal preemption,
- Inadequate pleading, and
- Clear packaging.

"Functional" Empty Space. The U.S. Food and Drug Administration (FDA) considers only "non-functional" slack fill to be misleading, and a product might fall under several defined exceptions. 21 C.F.R. § 100.100(a). For example, empty space resulting from "unavoidable product settling during shipping and handling," such as in a cereal box, is not deceptive slack fill. *Id.* § 100.100(a)(3). Nor is empty space to protect the package's contents. *Id.* § 100.100(a)(1).

Federal Preemption. The Nutrition Labeling and Education Act (NLEA) bars state law claims that impose food-labeling requirements that are not identical to the federal requirements. 21 U.S.C. § 343-1(a).

Inadequate Pleading. In the federal courts, plaintiffs must plead sufficient factual support for their claims. This includes Federal Rule of Civil Procedure 9(b)'s heightened pleading standard for fraud claims, which could apply to some slack-fill allegations. Certain state court pleading requirements also might bar plaintiffs' claims.

Clear Packaging. A product's container may not be misleading if consumers can view the fill level fully through the container. *See* 21 C.F.R. § 100.100(a) ("A container that does not allow a consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill.").

Recent Decisions in Slack-Fill Litigation

Manufacturer defendants have enjoyed recent successes in slack-fill cases at the motion to dismiss stage, often using some of the defenses listed above. Three examples follow.

In *Fermin v. Pfizer, Inc.*, plaintiffs alleged that certain large-sized Advil bottles tricked them into believing that the bottles were filled to capacity with tablets. However, the U.S. District Court for the Eastern District of New York dismissed the plaintiffs' purported slack-fill claims because a clear total-pill count was displayed on the Advil label so that a reasonable consumer would not have been misled. No. 15CV2133, 2016 WL 6208291 (E.D.N.Y. Oct. 18, 2016).

In *Izquierdo v. Mondelez International Inc.*, the U.S. District Court for the Southern District of New York dismissed plaintiffs' slack-fill suit regarding packaging of Watermelon Sour Patch Kids. The court rejected the plaintiffs' plea for injunctive relief due to the plaintiffs' failure to plead real or immediate threat of injury adequately. The court also dismissed claims for compensatory damages due to various additional pleading deficiencies. However, the court declined to find federal preemption because the state deceptive trade practices statute expressly incorporated the federal standard and provided that compliance with federal regulations per se complied with state law. No. 16-CV-04697 (CM), 2016 WL 6459832 (S.D.N.Y. Oct. 26, 2016).

In *Ebner v. Fresh, Inc.*, a plaintiff alleged that Fresh, Inc.'s lip balm was packaged deceptively because some balm could not be accessed without digging it out with a finger or instrument. The U.S. District Court for the Central District of California held, and the Ninth Circuit affirmed last year, that the packaging was not misleading simply because the entire declared weight of the lip balm was not accessible without a tool. The Ninth Circuit explained that a reasonable consumer understands the "commonplace" design of a lip balm tube and that some balm might not be easily accessible. Furthermore, California's slack-fill statutes did not apply because non-functional slack fill involves *empty* space—not

space filled with inaccessible product. No. SACV13-00477JVS, 2013 WL 9760035 (C.D. Cal. Sept. 11, 2013), *aff'd,* 838 F.3d 958 (9th Cir. 2016).

But a plaintiff recently survived a motion to dismiss before the U.S. District Court for the District of Columbia in *In re: McCormick & Company, Inc., Pepper Products Marketing and Sales Practices Litigation.* There, pepper-manufacturer Watkins Inc. alleged that competitor McCormick reduced the amount of pepper in its opaque containers without changing the size of the containers and therefore misled customers. The court declined to dismiss at the pleading stage, despite McCormick's accurate weight statement on the container, noting that "the [federal] slack-fill regulations do not include an exception for containers which accurately state the product amount." MDL No. 2665, 2016 WL 6078250 (D.D.C. Oct. 17, 2016).

New Lawsuits

Defendants' recent success in slack-fill cases has not deterred plaintiffs from filing new suits. For example, in January 2017, plaintiffs sued Elmer's Products Inc. in California state court, claiming that Krazy Glue's opaque outer packaging misleadingly hides the much smaller tube of glue inside that plaintiffs actually receive. Also in January, plaintiffs sued Harry and David LLC in the U.S. District Court for the Southern District of New York, alleging deceptive packaging of Moose Munch Popcorn because nearly 43 percent of its container is "non-functional" slack fill (i.e., empty space with no valid purpose). And in October 2016, plaintiffs sued Arizona Canning Company in California state court (later removed) for using water to fill space in Sun Vista bean cans.

Conclusion

Faced with this new type of litigation, which involves potentially large, class action lawsuits, food and other consumer product companies should consult with experienced counsel to consider packaging options that will comply with FDA and Federal Trade Commission regulations regarding consumer deception, and if they are sued, they should consult counsel about the potential defenses versus settlement options. Defendants have thus far successfully defeated many of these slack-fill complaints, but since plaintiffs keep filing them, companies and their attorneys should continue to stay abreast of slack-fill litigation developments.

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