

Expert Analysis

Calif.'s Updated Slack-Fill Law: What Cos. Should Know

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California has its own prohibition against “slack fill” in food, drugs and cosmetics that parallels, but is in some ways broader than, the federal regulation that by its terms applies only to food packaging. California Gov. Jerry Brown recently signed into law Assembly Bill 2632, which amended California’s slack-fill law to create several new exemptions. The amendment may provide some relief from the slack-fill lawsuits that have proliferated in California. This article covers background on slack-fill litigation, amendments to the California’s slack-fill law and steps to protect against slack-fill claims.

Background on Slack Fill Litigation

Slack fill is allegedly nonfunctional empty space in product packaging. The theory behind prohibiting it is that the presence of empty space renders the packaging misleading to consumers, causing them to think that they are getting more of the product than they actually are. Empty space itself is not actionable; liability hinges on whether the empty space is functional or nonfunctional.

Under the Food, Drug & Cosmetic Act regulations, slack fill is considered nonfunctional unless it falls into one of six categories: (1) it protects the package’s content; (2) machines cannot close the package without that empty space being present; (3) the empty space results from the product settling during shipment; (4) the package performs a specific function that is communicated to the consumers; (5) the container is reusable, part of the food’s presentation and has its own value, such as a gift container designed to be used after consumption; or (6) the manufacturer cannot provide more product or make the package smaller for other legitimate reasons, like accommodating necessary food labels or discouraging theft.[1]

There is no private right of action under the Food, Drug & Cosmetic Act, and government enforcement has been rare. Private plaintiffs, however, have used the FDCA regulations to contend that product packaging is misleading as a matter of state consumer fraud laws. Putative class actions have been brought under a variety of legal theories, including common law fraud, state deceptive and unfair or false advertising consumer protection statutes, and in California, California’s unique version of the FDCA regulations, codified into law as California Business



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& Professions Code Section 12606.2.

Plaintiffs have brought slack-fill challenges against a variety of products, including pepper shakers, fried chicken, premade sandwiches, potato chips, lip balm, dried pasta, candy, ibuprofen and supplement powders. California, Missouri and New York have seen the bulk of these cases. Many cases are voluntarily dismissed, suggesting they are settled on an individual basis.

Litigated cases have been a mixed bag. At the motion to dismiss stage, plaintiffs frequently face difficulty overcoming packaging disclosures of weight and volume or pleading in sufficient terms that slack fill is nonfunctional. The materiality of slack fill to purchasing decisions would pose an even greater hurdle at the class certification stage, if cases survive that long.

Slack-fill lawsuits have drawn not only judicial scrutiny, but also legislative scrutiny. In Missouri, for example, uproar from businesses and the Missouri Chamber of Commerce has helped prompt discussions of tort reform. In California, reform actually happened, with the state slack-fill statute being amended in several ways that should help ensure slack-fill lawsuits target only clear violations.

Summary of Changes to California's Law

Online Sales Exempted

Perhaps the most significant change of the new law is that it exempts packaging sold in a mode of commerce that does not allow the consumer to view or handle the physical container or product. This would appear to exempt online sales, which is consistent with the rationale that a consumer could not be misled by packaging that he or she could not have inspected or handled prior to purchase.

Actionable Only If Substantial

The law was amended to add the clarification that “nonfunctional slack fill is the empty space in a package that is filled to substantially less than its capacity for reasons other than any one or more of the following. ...” “Substantially” is not defined, but its addition seems likely to block lawsuits unless the alleged nonfunctional slack fill consumes a large portion of a package’s volume.

Consistent with this, the new law also states that “slack fill shall not be used as grounds to allege a violation of this section based solely on its presence unless it is nonfunctional slack fill.”

Actual Size

The prior CA law required that the actual size of the product be depicted on the exterior packaging. The new law specifies that this depiction can be on any side of the packaging, excluding the bottom. “Actual size” must be noted in a clear and conspicuous disclosure.

Fill Line

The new law also allows for a line or graphic representing the “fill line” on either the actual product or the product container. The “fill line” must be clearly and conspicuously depicted. If the product is subject to settling, the fill line must represent the minimum amount of expected settling.

The above changes also apply to California’s Sherman Food and Drug Act.

Steps to Protect Against Slack-Fill Claims

Although courts generally have been receptive to defense arguments in slack-fill cases, no company wants to incur the costs and potential reputational damage that can arise from defending a slack-fill lawsuit. To help avoid slack-fill challenges, manufacturers, marketers and their legal counsel may consider a variety of steps.

Assess Empty Space in Current Packaging

Packaging designers may be consulted about the space in current packaging to identify what function, if any, is performed by the space, and how settling may affect the amount of empty space during shipment and handling.

Outside consultants may also be hired to assist in this assessment. Legal counsel should consider privilege and confidentiality issues, including how involved they should be in the process.

Consider Labeling and Package Design

In addition to listing the weight and volume of the items within a package, consider other specific information. For example, consider whether a fill line showing the product level within the packaging, a numerical count of items within a package or serving size, or similar disclosures may improve consumer perception even more. Modifications to packaging design, such as adding a translucent strip to see inside the package, may also be an option for some products.

Keep the Competition and Consumer Expectations in Mind

If your packaging is similar in size and design to competitors, but yours contains less product, plaintiffs may try to argue that the additional empty space in yours indicates nonfunctional slack fill. Plaintiffs may also raise arguments that consumers expect certain products to be sold in specific weights or quantities, and that lower weights or smaller quantities in similar packaging indicates nonfunctional slack fill. Although not dispositive, how your product may be viewed relative to others can affect the risk of a slack fill challenge.

After a sharp spike in lawsuits between 2014 and 2015, slack-fill lawsuits against food and beverage companies declined between 2016 and 2017, as courts resisted indulging arguments such as an inability to understand basic item counts clearly labeled on a container’s front label. With legislative changes and focus from businesses, the number of

lawsuits may be even lower in the future.

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[1] 21 CFR §100.100(a).