

## The Glass Half-Empty Class Action: Slack-Fill Litigation

*Law360, New York (August 3, 2015, 11:45 AM ET) --*

Whether we realize it or not, we are all familiar with slack-fill. We have all popped open a bag of potato chips that appears half-empty, flipped off the cap from a vitamin bottle with a little room left at the top or cracked open a video game case that was twice the size of the disk within. We may even understand the reasons why manufacturers use slack-fill: what looks like nonfunctional or empty space is used by the manufacturer to keep the product unbroken in transit, flowing smoothly through the company's production line and safe from theft on the shelf.

### Current Litigation Landscape

All of the legitimate explanations in the world have not deterred some in the plaintiffs' bar, who have seized upon slack-fill litigation as the newest product packaging and labeling class action du jour. Plaintiffs' counsel have filed suits alleging:

- the size of deodorant containers is larger than the actual deodorant stick;<sup>[1]</sup>
- the packaging for eye drops leads consumers to believe they are receiving a larger volume than is contained in the package;<sup>[2]</sup>
- pill bottles deceive customers through packaging meant to increase the amount of shelf space the bottle occupies;<sup>[3]</sup> and
- the slack-fill in potato chip containers and other food packaging lacks a permissible purpose.<sup>[4]</sup>



James P. Muehlberger

In filing these lawsuits, plaintiffs' counsel have traditionally asserted claims of fraud, negligent misrepresentation, breach of express warranties, unjust enrichment and violation of state consumer protection laws, seeking to represent alternative classes of all nationwide consumers of the products or state consumer classes, for purposes of asserting their state consumer protection claims.

## **Regulatory Structure**

The Fair Packaging and Labeling Act provides broad authority to the Federal Trade Commission to regulate the packaging and labeling of certain consumer products. Congress has delegated authority to regulate nonfunctional slack-fill to the FTC.[5] Although the FTC has not promulgated any rules directly addressing the issue, the use of nonfunctional slack-fill must still comply with the general FTC prohibition against consumer “deception.”[6]

For products regulated by the U.S. Food and Drug Administration, the FDA has promulgated rules to regulate the use of slack-fill. Under 21 C.F.R. § 100.100, the FDA prohibits the use of “nonfunctional slack-fill.” The statute defines this term as empty space in the packaging that is not: (1) intended to protect the contents of the package, (2) required for the operation of the manufacturing process, (3) resultant from unavoidable product settling, (4) necessary for the proper preparation or consumption of the product, (5) dictated by labeling requirements or (6) required for the intended reuse of the packaging, such as in gift products.

California has its own prohibition on the use of slack-fill if not for a “functional purpose,” codified at Cal. General: Bus. Prof. Code § 12606 and Cal. Health & Safety Code § 110375. Although a California law that allows a state district attorney’s office to retain penalties recouped for investigating violations has led to a flurry of litigation, the state has since amended its law to clarify that slack-fill is actionable only if the product does not meet a number of statutorily recognized safe harbor provisions (15 for general containers; six for food containers), and has led to a marked decrease in slack-fill litigation. Despite this, some county district attorneys in California continue to bring actions for slack-fill violations.

## **Ways to Minimize Litigation Risk**

Manufacturers can minimize litigation risk through careful product design:

- Avoid slack-fill if possible: Consider filling product containers as much as practically possible. If there is no empty space in your container, you are unlikely to face slack-fill litigation.
- Look for safe harbors: To the extent a product must contain some slack-fill, consider whether the packaging satisfies the FDA and/or California safe harbors.
- Avoid any possibility of confusion: Consider making the contents of products visible when possible, and evaluate whether to add further information about content to the product, such as fill lines, a statement regarding the possibility of product settling, or further clarification of net weight.

- Maintain design and complaint records: Consider maintaining documentation showing a lack of improper purpose in package design. Track consumer complaints to spot problems before class actions are filed.

### **After Litigation Is Filed**

When faced with litigation, a number of strategies can narrow or dispose of these claims:

- Narrow claims: Carefully analyze allegations of fraud to determine whether they are pled with sufficient particularity as required by Rule 9(b). Particularly if the slack-fill complaint revolves around purported independent testing of product weight or volume, plaintiffs may not have alleged sufficient details about their “testing” to satisfy 9(b). Evaluate whether the complaint pleads claims that are not legally viable (e.g., claims for breach of warranty in states requiring privity, or claims that are preempted by federal law).
- Consider a refund offer: A refund policy can offer putative class members full relief without incurring the costs of a class action. If plaintiffs propose incurring these unnecessary costs, they may not adequately represent class interests under Rule 23(a), and a class action may not be the “superior” method for resolving the dispute under Rule 23(b)(3). See *Imber-Gluck v. Google Inc.*, No. 5:14-cv-01070-RMW (N.D. Cal. Apr. 3, 2015).
- Challenge standing: Consider challenging the named plaintiff’s Article III standing to sue on behalf of the purported class for products the named plaintiff did not purchase. These arguments have gained traction in instances in which the class action complaint seeks damages for numerous, allegedly related products, none of which the named plaintiff has actually purchased. See, e.g., *Toback v. GNC Holdings Inc.*, No. 13-80526-CIV (S.D. Fla. Sept. 13, 2013) (holding that the named plaintiff lacked Article III standing with respect to any products other than those he purchased); *Lieberson v. Johnson & Johnson Consumer Cos.*, 865 F. Supp. 2d 529, 537 (D.N.J. 2011) (same).
- Consider filing an early motion to strike class allegations: When significant impediments to class certification are obvious from the pleadings, consider an early motion to strike the class allegations. Courts have granted early motions to strike class allegations in instances in which numerous states’ laws are implicated such that predominance cannot be met. See, e.g., *Pilgrim v. Universal Health Care LLC*, 660 F.3d 943, 946-48 (6th Cir. 2011) (holding that the predominance requirement was not satisfied because different states’ laws would apply and “any potential common issues of fact cannot overcome this problem”). Motions have also been successful when the class was overly broad or when individualized discovery would be necessary to determine class membership.

In sum, plaintiffs' slack-fill complaints often contain more air than substance once cracked open, and by following these strategies manufacturers should be able to effectively limit their exposure to this emerging litigation arena.

—By James P. Muehlberger and Iain L. Kennedy, Shook Hardy & Bacon LLP

*James Muehlberger is a partner in Shook Hardy & Bacon's Kansas City, Mo., office, where he is co-chairman of the firm's class action and complex litigation practice.*

*Iain Kennedy is an associate in Shook Hardy & Bacon's Miami office.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] Tjokronolo v. Procter & Gamble Co., No. 1:14-cv-5577 (E.D.N.Y. Sept. 23, 2014); Bimont v. Unilever United States Inc., No. 1:14-cv-7749 (S.D.N.Y. Sept. 24, 2014); Stoltz v. Henkel Corp. No. 1:14-cv-5547 (E.D.N.Y. Sept. 22, 2014); Alberto v. Colgate-Palmolive Co., No. CV 14-5649 (E.D.N.Y. Sept. 25, 2014).

[2] Office of the District Attorney, County of Shasta, Novartis & Alcon Agree to Settlement with District Attorney's Office for \$225,000 for Packaging Violations (Feb. 3, 2014), available at [http://www.co.shasta.ca.us/docs/DA/pr-2014/02032014\\_pr\\_Zaditor.pdf?sfvrsn=0](http://www.co.shasta.ca.us/docs/DA/pr-2014/02032014_pr_Zaditor.pdf?sfvrsn=0).

[3] Fermin v. Pfizer, No. 1:15-cv-2133 (E.D.N.Y. Apr. 14, 2015); Fermin v. McNeil-PPC Inc., No. 1:15-cv-01215 (E.D.N.Y. Apr. 24, 2015).

[4] Samet v. Procter & Gamble Co., No. 5:12-CV-01891 (N.D. Cal. Apr. 16, 2012) (potato chip container deceived consumers); see also Lam v. ConAgra Foods Inc., No. 1:15-cv-02334 (E.D.N.Y. Apr. 23, 2015) (alleging that Slim Jim packaging is 4 inches long, despite the product being only 2.5 inches in length).

[5] 16 C.F.R. 502.1.

[6] See 15 U.S.C. 1454(c).