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Slack-Fill Suits See Boom Despite Few Class Wins

By **Joyce Hanson**

Law360, New York (April 17, 2017, 3:07 PM EDT) -- The number of "slack-fill" lawsuits claiming food companies trick consumers into thinking they are getting more product than they actually paid for has jumped more than six times since 2013, and that growth shows no signs of diminishing despite mixed results from judges' decisions in these cases.

Lawyers who sue food companies say that their slack-fill class suits serve a greater good because they protect consumers and keep companies honest. But lawyers defending the companies say these are often frivolous nuisance suits that end up passing on legal costs to consumers in the supermarket check-out line. And at least one judge has agreed, saying a slack-fill complaint against Advil bottles labeled with a pill count couldn't even "pass the proverbial laugh test."

Successes so far for the plaintiffs side have been few, and the federal courts have denied most bids for class certification. The one big exception is an action in the Northern District of California that successfully argued Starkist Co. had cheated tuna buyers with underfilled cans and resulted in a $12 million judgment against the company in September 2016. Starkist must now make $8 million in cash and $4 million in vouchers available to millions of consumers.

Despite the limited number of wins, plaintiffs lawyers have come up with a "precise template" for multiple slack-fill suits that blanket the courts with similar language and photos, according to food-labeling expert Cary Silverman, a public policy partner at Shook Hardy & Bacon LLP. By using this template, lawyers hope to cash in on out-of-court settlements — and it's this template, more than anything else, that's responsible for the six-times growth in slack-fill actions, Silverman said.

Specifically, slack-fill lawsuits alleging that food makers intentionally underfill their packages have skyrocketed from 10 filed cases in 2013 and 2014 to 65 in 2015 and 2016, Silverman and a Shook Hardy colleague, James Muehlberger, wrote in a report published in February by the U.S. Chamber Institute for Legal Reform.

'Shake the Box' Suits

"I call them 'shake the box' lawsuits," Silverman said. "If you can hear the product shake, you've got a lawsuit. You just plug it into your template, take a photo, and you're ready to go."

Businesses sometimes choose to settle even before a lawsuit gets filed, according to Silverman, because

they know that the $50,000 to $100,000 cost of seeking a claim's dismissal is far more expensive than the $10,000 to $25,000 a lawyer would accept to make the lawsuit disappear.

In successful certified class actions, plaintiffs lawyers receive millions of dollars in fees, but consumers who often don't feel wronged in the first place usually get no more than a nominal cash payment, product vouchers or products in the mail while the prices of products ultimately rise due to litigation costs, Silverman said.

However, some food-labeling experts say there is some value in slack-fill suits. Nicole Negowetti, policy director for the Good Food Institute and a former assistant law professor at Valparaiso University Law School, said there are valid claims to be made as plaintiffs fill the regulatory void.

More than a third of slack-fill cases have been filed in the U.S. District Court for the Northern District of California, now referred to as the "food court," Negowetti noted, saying the surge in lawsuit filings has led some observers to suggest that food is replacing tobacco as the new regulatory and class action target.

Silverman's report — titled "The Food Court" — also says the Northern District of California is the most popular jurisdiction for food class actions, at 36 percent of cases filed, but it adds that New York district courts are experiencing a surge, with 22 percent of slack-fill cases filed in the state, followed by Florida at 12 percent and Illinois at 7 percent. Another 10 percent of cases are spread among federal courts in Missouri, New Jersey and Pennsylvania, he said.

"A consumer can always read the number of ounces printed on the packaging to know the exact amount of product contained inside," the report said. "However, none of these legitimate explanations have deterred some in the plaintiffs bar from this new product packaging and labeling class action du jour."

But Negowetti said nationwide food labeling class actions can serve a purpose because the U.S. Food and Drug Administration and the Federal Trade Commission have limited resources for monitoring false and deceptive practices by food manufacturers.

"Fortunately, in our justice system, if the agencies are not fulfilling their responsibilities, then lawyers can file lawsuits to protect consumers," Negowetti said.

FDA and State Slack-Fill Regs

Slack-fill is defined by the FDA in Title 21 of the Code of Federal Regulations in a section on misleading containers based on the FDA's Federal Food, Drug and Cosmetic Act. Specifically, the section says "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." The law defines slack-fill as the difference between a container's actual capacity and the volume of product inside.

"Nonfunctional slack-fill" — the focus of all the attention in putative class actions — is viewed by the FDA as the empty space in a package that doesn't protect its contents, doesn't interfere with the requirements of a machine used to package food and doesn't result from unavoidable product settling during shipping and handling.

There is no private right to take legal action under the FDA regulations for misleading nonfunctional slack-fill claims, however, so private plaintiffs typically sue under state consumer protection laws, claiming that because a product's container violates the FDA slack-fill regulations, it is misleading to consumers under

state law. In other words, the federal slack-fill standard applies throughout the United States, so the FDA regulations end up preempting any state standard and thus leave open the possibility of suits with a nationwide class of consumers.

California in particular has seen a large number of slack-fill cases because the state has its own slack-fill laws that have allowed district attorneys to file suit. For example**,** Procter & Gamble Co. in June 2015 agreed to change the way it packages its Olay line of skincare products to resolve a consumer protection case brought by California prosecutors accusing the consumer products giant of using oversized packaging in violation of the state's slack-fill law.

Prosecutors for Yolo, Fresno, Shasta and Riverside counties joined forces to bring allegations that P&G's packages contained excessive slack-fill that made its products look like they contained more than they actually did without serving a functional purpose. P&G agreed to pay $850,000 to settle the unfair competition and false advertising suit filed in Yolo County Superior Court, and the settlement funds were divided evenly among the four counties' consumer fraud units to use for restitution, company training and future prosecution and investigative costs.

Sabrina D. Ashjian, a Fresno deputy district attorney, said the county's weights and measures unit polices stores throughout Fresno, examining products and seeking egregious instances where underfilled packages are ripe for prosecution by the DA's office. Ashjian and other lawyers in the office then meet with company representatives and their counsel to tell them about the county's findings and agree on a stipulation and judgment to be presented in court for approval.

"We have no profit motive that we're trying to seek or a private client that we're acting on behalf of," Ashjian said. "We are ensuring there's a level playing field so companies can sell their products competitively and so consumers are protected. We don't take cases that seem frivolous or minor. These are important regulations that help consumers make informed decisions."

The Greater Good

Private slack-fill cases also serve a greater good by protecting consumers from profit-focused companies, said Zachary Crosner, the California-based head of Crosner Legal PC's litigation and class action practice. The state's laws protect consumers with two separate provisions regulating nonfunctional slack-fill, he said, adding that while some courts have held that these provisions are preempted by the federal law, slack-fill case law is not yet robust, and unknowns remain.

For now, Crosner said, Section 12606.2 of California's Business and Professions Code, which governs food packaging, imposes the same slack-fill requirements as the federal regulations, although it adds the word "substantially" to the phrase "nonfunctional slack fill is the empty space in a package that is filled to substantially less than its capacity," suggesting that a small amount of nonfunctional slack-fill doesn't create liability under the California statute.

However, he added, the $12 million judgment over underfilled tuna cans against Starkist was a success in citing violations of California's Consumer Legal Remedies Act, Unfair Competition Law and False Advertising Law.

"Food labeling and food litigation are a big part of consumer protection these days," Crosner said. "We represent actual individual consumers who bring these class claims not just for themselves but for similarly situated individuals."

Deceptive marketing practices drive the proliferation of slack-fill suits, and some judges have found that the size and shape of packaging is a form of advertising, Crosner said. Other judges have said companies adequately defended themselves by saying product count is clearly marked on packages, he added.

“But I stick to my position that people are visual, and ultimately, they do rely on the size and shape of packaging, which is a form of advertising,” he said. “Companies should be able to package products in a way that conforms to the actual size and shape so people can comprehend what is in these packages. People are visual and don’t look nearly as much at the fine print.”

Crosner said his firm doesn’t have any slack-fill cases currently filed in court, “but we are actively evaluating these cases.” He declined to say whether any of those evaluations have included settlements with food companies.

A relatively small number of law firms file most slack-fill class actions, according to Silverman, who named the Clarkson Law Firm and Kazerouni Law Group APC in California, Lee Litigation Group PLLC in New York and Steelman Gaunt & Horsefield in Missouri. These “frequent filers” search supermarket shelves for product packaging that can give rise to a lawsuit and gain reputations for repeatedly bringing a particular type of claim, Silverman’s report said.

“For example, in a motion to dismiss a class action alleging that boxes of Sour Patch Kids Watermelon candy are underfilled, Mondelez International indicated that this lawsuit was ... the latest of 14 cut-and-paste slack-fill class actions filed by Lee Litigation Group,” the report said.

Lee Litigation Group, which did not respond to requests for comment, in February sued gourmet food gift maker Harry & David LLC in New York federal court, claiming that the company's popcorn tins were deceptively underfilled in violation of the FDCA.

The putative class led by consumer Bria Brown, a Queens resident, claimed that Medford, Oregon-based Harry & David broke New York’s General Business Law, in addition to violating the federal act, by inducing her to pay $7.99 at a Macy’s store for a tin of Moose Munch in a large container with excessive nonfunctional slack-fill. The complaint seeks at least $5 million that would include refunds for potential class members. On March 22, U.S. District Judge Deborah A. Batts gave Harry & David a deadline of May 4 to respond to Brown’s complaint.

Dale Giali, a Mayer Brown LLP litigator who has represented a number of the world's largest multinational corporations in food, beverage and consumer product false advertising and consumer product class actions, said he has defended food companies in slack-fill cases and squared off against Lee, Clarkson and Steelman. By Giali’s lights, slack-fill suits are on the rise because of the efforts of this handful of plaintiffs law firms — and they’re a nuisance.

“All of these suits are nonsense, sheer and complete rubbish,” Giali said. “I do not agree with their theory of liability. These are all, every single one of them without exception, lawyer-driven shakedown lawsuits. Period. And the courts agree.”

The Moose Munch claim, for example, contends that Harry & David’s package is a form of false advertising, but consumers are not at all deceived by the package, Giali said. Rather, they view the package as a plus, he said.

“Moose Munch comes in a decorative tin. So you not only get popcorn, but you get a free tin that you can use for the rest of your life,” Giali said. “People don’t buy food products based on the package. Products are sold and consumers buy products based on weight, not the size or shape of the package. Consumers already know that packages have empty space in them.”

Courts Have Decided

The future for slack-fill claims depends in part on legislative action and regulatory changes, but perhaps even more so on where the courts come down on these suits, the experts say.

The $12 million judgment against Starkist may suggest that the future looks bright for plaintiffs counsel in slack-fill suits, but Silverman and Giali both pointed to a March 2016 Ninth Circuit decision in Ebner v. Fresh that nixed a putative class action accusing Fresh Inc. of deceiving consumers about the quantity of product accessible in their lip balm tubes.

In a published opinion, a three-judge Ninth Circuit panel affirmed a lower court’s dismissal of the suit filed by lead plaintiff Angela Ebner, saying that her claims that the portion of the balm that can’t be accessed by the consumer due to a plastic stop device in the product’s screw mechanism constituted nonfunctional slack-fill that did not meet its definition under California’s Fair Packaging and Labeling Act.

“It went up to the Ninth, where a lot of such cases are litigated, and the Ninth says the consumers are aware of the little bit left, so there’s no deception,” Silverman said. “That was a specific product, and it may not translate to food, but it stands for the principle that when an ordinary consumer understands how a product is packaged, there’s no deception and nothing misleading.”

Giali also pointed to defendants counsel wins in Bush v. Mondelez, where the Northern District of California slapped down objections to Go-Pak products such as Mini Oreos because the label accurately discloses net weight; Bautista v. CytoSport Inc., where the Southern District of New York said the plaintiff’s case against the maker of Muscle Milk protein powder wasn’t supported by facts; and Matthew Fermin v. Pfizer Inc., where the Eastern District of New York dismissed the putative class action claiming the drugmaker tricked consumers into buying larger bottles of Advil by incorporating excessive empty space.

The Advil consumers’ failure to read the label’s unambiguous pill count “does not pass the proverbial laugh test,” Senior U.S. District Judge Sterling Johnson Jr. said when handing down his ruling.

“All of those cases stand for the proposition that what’s in the package is what counts, not supposed consumer deception over the size of a package,” Giali said. “There’s still uncertainty out there, but I like the way these slack-fill decisions are going.”

--Editing by Christine Chun.
