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Food

More Slack-Fill Suits Filling Court Dockets

Most every U.S. consumer has been there: You buy a package of tuna, pepper or any of a number of other household products but, when you get home and open it up, the product seems mostly packaging.

Consumers have noticed it too, plaintiffs' attorneys say, which explains the ever-growing number of class actions challenging the packaging's slack fill or empty space. The attorneys count as successes high-profile suits against McCormick & Company, Inc. and StarKist Co.

These suits, they say, don't challenge functional fill, the kind of empty space that's included to protect a product, like air that keeps potato chips from breaking.

The complaints instead take issue with non-functional fill, the kind of emptiness that plaintiffs say seems to serve little purpose but to deceive, causing shoppers to pay too much for too little.

"American jurisprudence has a longstanding history of protecting the people against fraud and deception and promoting truth in advertising," Zachary Crosner, plaintiffs' attorney and head of Crosner Legal PC's litigation and class action practice in Los Angeles, told Bloomberg BNA.

But defense attorneys, like Cary Silverman in Washington and James Muehlberger in Kansas City, Mo., question the merit of many slack-fill suits, most of which they say are thrown out of court.

These attorneys also assign different reasons to the growing number of slack fill complaints: cheap filing costs, cut-and-paste complaints, and some companies' willingness to try and rid themselves quickly of potentially expensive and reputation-harming litigation.

"It just seems like the level of ridiculousness can keep rising and nothing is really coming in to stop them," Silverman told Bloomberg BNA. Silverman and Muehlberger are both partners with the public policy group at Shook, Hardy & Bacon.

In 2013 and 2014, only 10 slack-fill suits were filed in total. But that number swelled over the last two years, with a total of 65 filed in 2015 and 2016, according to a report from the U.S. Chamber of Commerce's Institute for Legal Reform prepared by Silverman and Muehlberger.

Peppered With Lawsuits Though Silverman and Muehlberger said there is only about a one-in-three chance that a slack fill suit will lead to a class-wide settlement, they acknowledge that plaintiffs' attorneys have had some notable successes.

They include cases against food industry giants McCormick and StarKist.

Allegedly under-filled tuna cans resulted in a \$12 million class settlement—and one of the largest number of claims submitted in a class action ever, about 2.5 million—in *Hendricks v. StarKist Co.*, the defense attorneys said.

In *Dupler v. McCormick & Company Inc.*, McCormick was sued for allegedly misleading its customers by putting less pepper in its original-sized, iconic tins.

Although that litigation is still ongoing, the publicity it has already garnered has prompted more slack fill suits, the defense attorneys said.

Rebecca Tushnet, a professor of law at Georgetown University Law Center in Washington, told Bloomberg BNA in October that, "The *McCormick* case is better than many for the plaintiffs because of the allegedly deceptive change which could have confused people about whether the product would continue to be the way it was."

Gaining in Numbers Silverman said no end is in sight to new slack-fill suits and he and other defense attorneys attribute their increase in part to cheap filing costs.

"Even if you have a reasonably low chance of success, if the barriers to entry are low, the incentives are still in place to do it," Charles C. Sipos, defense attorney and partner at Perkins Coie LLP in Seattle, told Bloomberg BNA.

Silverman agreed.

"The only thing a plaintiff's lawyer has to lose is the few minutes it takes to insert the name of the product into the complaint and the small amount of the filing fee and a tiny amount of investment of time to serve as the class representative," Silverman said.

Silverman also said companies need to push back more against frivolous filings.

"Until companies decide they are going to be more aggressive about defending these cases, they are just going to keep coming," he said. "It's hard to see how much further up they can go but they are going to continue."

A number of companies have succeeded in having slack-fill complaints dismissed. Starbucks Corp., for example, recently beat claims that it misleads customers by using too much ice in its iced coffees.

But Silverman and Muehlberger said a number of other meritless suits are settled soon after they are filed because some companies want to avoid costly litigation and maintain a positive brand image.

Plaintiffs' lawyers, meanwhile, agree slack-fill complaints are increasing. But they said that's a positive de-

velopment, providing vital information to consumers and leading more companies to change misleading practices.

“It has been my experience that industries begin to slowly come into compliance with these types of consumer laws following a significant amount of litigation and court decisions finding in favor of consumers,” Crosner said.

Class-action complaints are the most potent motivators for compliance with consumer protection laws, according to Crosner.

“As more of these lawsuits are filed, particularly highly publicized class actions, consumers become more educated on various forms of deceptive advertising, including slack fill,” Crosner said.

“The fact that these consumers are contacting lawyers or law firms to pursue slack-fill actions is a testament to the strong public interest in protecting against this particular type of deceptive advertising,” he said.

Location, Location, Location The hot spots for slack-fill litigation are California, Missouri, and New York, according to Sipos, the defense attorney.

In Missouri state courts alone, a dozen slack-fill complaints were filed at the end of 2016 and in early 2017, according to Sipos.

California is one of the most attractive places for filing slack fill litigation in the food area because of its plaintiff-friendly consumer protection laws, he said.

Another contributing factor accounting for more litigation in those three states are the presence of a few well-known plaintiffs’ lawyers who have made a specialty of filing slack fill suits, sometimes filing multiple complaints at a time, Silverman said.

Some of the most well-known plaintiffs’ firms are Kazerouni Law Group APC in Costa Mesa, Calif.; Lee Litigation Group PLLC in New York; and Steelman, Gaunt & Horsefield in Rolla, Mo.

None of those firms responded to requests for comment.

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The Food Court: Trends in Food and Beverage Class Action Litigation