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New Calif. Packaging Law Cuts Companies Some Slack

By **William Tarantino and Megan Ault** (April 2, 2019, 3:03 PM EDT)

William Tarantino

Megan Ault

California's food and consumer product companies recently got some welcome relief from the onerous provisions of California's slack-fill law, Cal. Bus. & Prof. Code § 12606. This law, which has been the basis of an increasing number of consumer class action and civil enforcement actions, has posed numerous compliance challenges for companies striving to understand exactly how "full" their packages need to be to avoid litigation.

By expanding the state's slack-fill exemptions, these changes resolve some of that uncertainty and create new ways for companies to ensure compliance.

What Happened

Fundamentally, this statute restricts the use of slack fill, or the empty space included within a product's packaging, presumably to prevent consumer deception as to how much product is within the package. The law lists specific reasons for which slack fill may be used lawfully (i.e.,"functional"), and considers all other uses to be "nonfunctional" and therefore unlawful.

In September 2018, Gov. Jerry Brown signed into law Assembly Bill 2632, which expands the list of lawful approaches to packaging involving slack fill. The new provisions add language to the existing list of "safe harbor" packaging rules provided in the California Health and Safety Code and the California Business and Professions Code. AB 2632's changes went into force on Jan. 1, 2019.

Before AB 2632, California already recognized a number of acceptable uses for slack fill in non-food consumer products, including:

- Protection of package contents;
- If required by the machines used to enclose the product;
- If due to unavoidable product settling during shipping and handling;
- When necessary labeling information can only be displayed legibly on a larger package;

- Where the container bears a reasonable relationship to the product inside and the dimensions or amount of the product inside is visible to the consumer;

- When required to facilitate mixing, adding, shaking or dispensing by the consumer;

- In exterior packaging containing a product-delivery or dosing device;

- In containers for kits containing multiple components, if the kit's purpose is clearly displayed on the exterior packaging; and

- If tester units or demonstrations to consumers routinely display the packaging of the product so consumers can see the container or actual size of the product being sold.[1]

Under the new law, companies can now also comply with California's requirements using one or more of the following methods:

- Making the dimensions of the product or immediate product container visible through exterior packaging;

- Depicting the "actual size" of the product or immediate product container on any side of the exterior packaging, excluding the bottom; or

- Providing a line or graphic representing the product or fill line, presented "clearly and conspicuously" on the packaging visible at the point of sale.

Even though a separate California statute, with fewer exemptions — Cal. Health & Safety Code § 110375 — applies to food packaging, AB 2632 amends the slack-fill statute for both food and nonfood products.[2] Therefore, food manufacturers and packagers can also take advantage of these changes to the law by using AB 2632's additional safe-harbor approaches.

One other significant change made by AB 2632 deals specifically with internet-based purchases. The new law introduces a safe harbor for slack fill where "[t]he mode of commerce does not allow the consumer to view or handle the physical container or product."[3] Under this provision, products that are sold over the internet are exempt from the specific labeling and packaging requirements of the slack-fill law.

Why It Matters

Companies using the new approaches to labeling should be better able to defend against allegations that associated empty space in their packaging is illegal under California law. This may, in turn, allow companies to increase the variety and functionality of their packaging, and may avoid the need to recreate multiple package sizes for different markets.

Whether AB 2632 will reduce the current efforts to leverage California's slack-fill laws for quick settlements is another matter. In the past, prosecutors and plaintiffs have disputed companies' safe-harbor arguments, maintaining their right to enforcement actions against any intentionally added slack fill, even if it is "functional" under Cal. Bus. & Prof. Code § 12606. Whether they are willing to continue to advance that position in the face of the State Legislature's most recent efforts remains to be seen.

The Big Picture

On the whole, slack-fill suits seemed to be on the rise before California's most recent safe-harbor law was passed. A 2017 report by the U.S. Chamber Institute for Legal Reform indicates that, in 2013 and 2014, plaintiffs attorneys filed just 10 slack-fill cases. In 2015 and 2016, that number climbed to over 65 new slack-fill cases targeting food and beverage companies.

Of all federal and identified state class actions active during that period, slack-fill cases made up a full 12 percent of cases involving food. Of all states, California leads the pack in the number of suits filed. With the state's new law now in effect, companies in the crosshairs might reasonably hope for (but not count on) this trend to slow.

Plaintiffs generally should need to allege more than just conclusory statements that a product's packaging misled consumers. Where plaintiffs fail to set out more than bald allegations that a product contains deceptive slack fill, federal courts on both coasts have been willing to dismiss cases at the pleadings stage.[4]

But suits that stop short of trial still can be costly and require experienced counsel to navigate. In the latter half of 2018, a slack-fill case in federal court in San Francisco settled for $2.5 million.[5] Though the attorneys' fees portion of that settlement has been appealed, the suit likely will still have a price tag in the millions. California's new slack-fill safe harbors may make such payouts — and the litigation they incentivize — less common.

William F. Tarantino is a partner and Megan Elaine Ault is an associate at Morrison & Foerster LLP.

[1] Section 12606 of the California Business and Professions Code.

[2] Depending on their characteristics, consumer food products are regulated under either the federal Food, Drug, and Cosmetics Act or California's Sherman Food, Drug, and Cosmetics laws.

[3] Cal. Bus. & Prof. Code § 12606(b)(16).

[4] See, for example, Miao Xin Hu v. Iovate Health Scis. USA Inc. (S.D.N.Y. Oct. 12, 2018) (granting motion to dismiss where plaintiff did not allege facts to show clearly labeled package deceived consumers); Macaspac v. Henkel Corp. (S.D. Cal. June 4, 2018) (rejecting plaintiff's claims of deception where product contents were visible through packaging).

[5] See Thomas Iglesias vs. Ferrara Candy Co. et al. (N.D. Cal. Oct. 31, 2018).