

# Federal, Calif. 'Slack-Fill' Laws Ensure Fill Of Litigation

By Eric Schwartz, Amy Lally and Michael Mallow, [Sidley Austin LLP](#)

Law360

November 18, 2015

Law360, New York (November 18, 2015, 11:11 AM ET) -- Imagine that a manufacturer creates an innovative nutritional supplement that is double the concentration of that created by its competitors, and thus delivers the same benefit using half the product volume. How should it package the new product? If it places its product in a smaller container than its competitors, the smaller container may provide consumers with the incorrect impression that they are receiving less benefit or value for their dollar, thus under-selling the product's benefits and leaving consumers with an incorrect perception of value. Accordingly, the manufacturer might in good faith decide to use comparably sized packaging, albeit half-filled, in order to convey to consumers that its product provides just as much nutritional benefit as its competitors' product. Unfortunately, despite its best intentions, if the manufacturer chose the second option it may also have exposed itself to costly litigation, recalls, forced package redesign, and even civil and criminal penalties, for alleged violation of rules prohibiting undisclosed "nonfunctional slack-fill."

Slack-fill is the void space in packaging resulting from a difference between the volume of packaging and the volume of product. Not all slack-fill is proscribed. "Functional" slack-fill is permissible, while undisclosed nonfunctional slack-fill is often prohibited. The devil is in distinguishing between the two, and the consequences for failing to properly do so are higher than ever.

Laws prohibiting nonfunctional slack-fill have existed for many years, mostly unnoticed. In recent years, however, district attorneys' offices and the plaintiffs' bar have increasingly initiated slack-fill litigation seeking recovery from a broad range of manufacturers creating, among other commodities, hobby kits, potato chips, pepper, beef jerky, lip balm, eye drops, nose spray, cold medication, deodorants and antiperspirants, and, most recently, nutritional supplements. Understanding the regulatory regime governing nonfunctional slack-fill is therefore essential to avoiding litigation for any creator of consumer products.

## **Federal Regulatory Regime For Nonfunctional Slack-Fill**

Congress vested authority to promulgate regulations to prevent nonfunctional slack-fill in the

Secretary of Health and Human Services, as to food, cosmetics, devices and drugs, and the [Federal Trade Commission](#), as to other consumer commodities. Pursuant to that authority, the secretary elected to regulate nonfunctional slack-fill as to food products, but not as to other commodities. The FTC has thus far declined to enact regulations.

The federal slack-fill regulations state that a food is impermissibly misbranded if its container is made, formed or filled to be misleading. A container is presumed to be misleading if (a) it does not allow consumers to fully view the contents and (b) it contains nonfunctional slack-fill. “Nonfunctional slack-fill is the empty space in a package that is filled to less than its capacity for reasons other than” the following safe-harbors:

- (1) Protecting the contents of the package;
- (2) The requirements of the machines used for packaging the product;
- (3) Unavoidable product settling during shipping and handling;
- (4) The extra packaging is needed to perform a specific function such as preparing the food;
- (5) The container has a value and use that is independent of the food it contains; or
- (6) Some minimum package size is necessary to accommodate required food labeling, discourage pilfering, facilitate handling, or accommodate tamper-resistant devices.

### **California Regulatory Regime For Nonfunctional Slack-Fill**

California law has two separate provisions regulating nonfunctional slack-fill. Section 12606.2 of the California Business & Professions Code governs nonfunctional slack-fill regarding food packaging, and Section 12606 governs other commodities. Some courts have held that these provisions are preempted by federal law as to certain products. Accordingly, preemption should be considered as a defense in any slack-fill litigation. However, until there is more robust case law on the issue, or the regulations are ruled to be entirely preempted, it is advisable to consider California law addressing slack-fill compliance.

Section 12606.2, governing food packaging, imposes largely the same requirements as the federal regulations in this area, although it adds the word “substantially” to the following phrase: “Nonfunctional slack fill is the empty space in a package that is filled to substantially less than its capacity ...” This suggests that, de minimis or insubstantial nonfunctional slack-fill in food packaging would not give rise to liability under the California statute.

Section 12606, governing all nonfood commodities, differs from federal and California slack-fill food regulations in several significant respects requiring careful analysis.

First, Section 12606(a) prohibits “false” sides to packaging, stating that “[n]o container wherein commodities are packed shall have a false bottom, false sidewalls, false lid or covering, or be otherwise so constructed or filled, wholly or partially, as to facilitate the perpetration of deception or fraud.” Arguably, the “deception or fraud” portion of that section applies to the whole sentence. However, since “deception” is often in the eyes of the beholder, in this situation regulators, plaintiffs’ counsel, and the courts, companies may choose to avoid false sides in California if possible, whether deceptive or not, until further guidance is provided by the courts.

Second, California regulations for nonfood commodities includes language suggesting that only “substantial” nonfunctional slack-fill will support litigation.

Third, Section 12606 expands the available safe harbors from six to 15. The first six safe-harbors codified at Section 12606(b)(1)-(6) of the California Business & Professions Code mirror the federal safe-harbors for food packaging. California law adds safe-harbors seven through 15 as follows:

(7) The product container bears a “reasonable relationship” to the actual amount of product contained.

(8) The dimensions of the product are visible, or the actual size of the product is clearly depicted on the exterior packaging, with a notation that the product is “actual size.”

(9) The presence of headspace is necessary to facilitate the mixing, adding, shaking, or dispensing of liquids or powders by consumers prior to use.

(10) The exterior packaging contains a product delivery or dosing device, the existence of which is readily apparent from the packaging.

(11) It is a kit designed to produce a particular result that is not dependent upon the quantity of the contents.

(12) The exterior packaging is routinely displayed using tester units or demonstrations to consumers in retail stores, so that customers can see the actual, immediate container of the product being sold, or a depiction of the actual size prior to purchase.

(13) Exterior packaging consists of holiday or gift packages and the purchaser can adequately determine the quantity and sizes of the immediate product container at the point of sale.

(14) The exterior packaging is larger due to the inclusion of a free sample or gift, the presence of which is conspicuously disclosed.

(15) The packaging encloses computer hardware or software designed to serve a particular function which is clearly and conspicuously disclosed on the exterior packaging.

### **Best Practices For Avoiding Slack-Fill Litigation**

Where reducing the container size to match the volume of the product it contains is unwanted or impractical, it is important to clearly communicate actual product dimensions, disclose the reasons for any slack-fill on product packaging, and review state and federal regulations to ensure compliance with any available safe-harbors. Best practices also include monitoring and reacting to consumer complaints regarding alleged nonfunctional slack-fill, and maintaining documentation tending to demonstrate the functional (i.e., nondeceptive) reasons for the existence of slack-fill in product packaging.

In this regard, it is useful to revisit the hypothetical above. If our hypothetical nutritional supplement manufacturer elected to utilize a half-filled, larger container for its nutritional supplement it would be wise to take steps to conform that container with safe harbors such as: (a) making the container transparent; (b) including a conspicuously disclosed delivery device — such as a scoop — in the slack-fill void; (c) creating a special commemorative

container with an independent value and use; (d) having a convincing explanation why the extra container space is needed to accommodate mandatory labeling requirements, prevent pilfering, facilitate handling, or accommodate tamper-resistant devices; or (e) having an extremely clear and prominent disclosure informing the consumer that the container is only half-filled, but provides the same quantity of benefit as a competitor's full container.

—By Eric Schwartz, Amy Lally and Michael Mallow, [Sidley Austin LLP](#)

[Eric Schwartz](#) is an associate in Sidley's Los Angeles office and is a member of the firm's complex commercial litigation practice.

[Amy Lally](#) is a partner in the firm's Los Angeles office and a trial lawyer who practices in all areas of litigation, including class actions, contract dispute litigation, and real estate litigation.

[Michael Mallow](#) is a partner in Sidley's Los Angeles office and a trial lawyer who has represented clients in complex litigation matters, including cases related to economic product defects, unfair competition, false and deceptive advertising, business torts, privacy, entertainment and intellectual property.

*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.*