Not Edible, But Still Empty: Manufacturers of Non-Food Products are also Targets for Slack Fill Litigation

By: Michael C. Zogby, Tonia Ann Patterson and Katherine McBeth

Michael C. Zogby is co-chair of the Products Liability & Mass Tort department at Drinker Biddle & Reath LLP, and co-chair of the firm's Pharma and Life Sciences Industry Group. His products liability trial practice includes the defense of major pharmaceutical and medical device companies in products liability, negligence, failure to warn, strict liability design and manufacturing defect, and wrongful death actions that involve prescription medications and orthopaedic implants before state and federal courts and in mass tort, class action, and multidistrict proceedings. He is a faculty member at the National Trial Advocacy College at the University of Virginia School of Law and a Trustee of the Trial Attorneys of New Jersey. Mr. Zogby is an elected member of the International Association of Defense Counsel and the Trial Attorneys of America. He is co-chair of the Pharmaceutical and Medical Device Subcommittee of the ABA's Mass Torts Litigation Committee, he is a Master in the William J. Brennan, Jr.-Arthur Vanderbilt Inn of Court, and he is an active member of the Sedona Conference.

Tonia Ann Patterson is a Senior Association in the Products Liability & Mass Tort department at Drinker Biddle & Reath LLP. Her experience includes representing major pharmaceutical companies in defense of mass torts. Ms. Patterson has tried several complex pharmaceutical products liability matters and obtained a favorable jury verdict for a firm client in a matter concerning claims of negligent failure to warn and off-label promotion. Ms. Patterson is a graduate of the Brennan-Vanderbilt American Inn of Court, an alumna of the Leadership Council on Legal Diversity, and a former editor of Rutgers Law Review.

Katherine McBeth is an Associate in the Products Liability & Mass Tort department at Drinker Biddle & Reath LLP. Her experience includes researching and drafting memoranda and legal motions on a variety of issues.

THE mere mention of the phrase "slack fill" engenders a level of discomfort to manufacturers of certain products, based on the increasing number of class actions and commercial litigation that are based on this term. "Slack fill" generally refers to the difference between the actual capacity of a container and the volume of product contained therein. According to the Food and Drug Administration (FDA), slack fill is often necessary in the packaging of products, as it may serve to protect the contents of the package, allow for the machine used to enclose the package contents to do its work, enable the package to perform as intended, among other uses.[1]

Manufacturers should be more concerned about "nonfunctional slack fill," the empty space in a package that is filled to less than its capacity for reasons not approved by the FDA. Over the last nine years, the number of food-related slack fill federal class action lawsuits increased from 20 in 2008 to more than 110 in 2015, and this growth does not include individual plaintiff slack fill lawsuits filed during this period.[2] While there is no private right of action under the Federal Food, Drug, and Cosmetic Act (FDCA) or FDA regulations for nonfunctional slack fill claims, many of these lawsuits are brought pursuant to state consumer protection laws that mirror the federal laws.

This article assesses the successes and failures of slack fill litigation in the context of consumer food products and describes the initial attempts to expand slack fill litigation to non-food products. The article also suggests actions that companies can take to avoid being the target of slack fill lawsuits.

I. Food-Related Slack Fill Litigation

[1] *See, e.g.*, 21 C.F.R. 100.100.

[2] U.S. Chamber Institute for Legal Reform, *The Food Court: Trends in Food and Beverage Class Action Litigation*, 5 (2017), available at http://www.instituteforlegalreform.com/research/the-food-court-trends-in-food-and-beverage-class-action-litigation.

Most of the cases involving nonfunctional slack fill have been filed in the food context, and concern a variety of foods including box candy,[3] gum,[4] cookies,[5] protein powder,[6] and even packaged sandwiches and wraps.[7] A significant number of the food-related slack fill lawsuits have been filed in Missouri, California, and New York courts. According to a recent report by the United States Chamber Institute for Legal Reform, the law firms apparently leading the slack fill litigation parade are based in those states, making it less of a mystery why these venues are so popular.[8]

Results of food-related slack fill suits have been mixed, as the courts hearing these lawsuits in these forefront jurisdictions have both granted and denied defendants' motions to dismiss and motions for summary judgment.[9]

In *White v. Just Born,* a class action, the district court denied the defendant's motion to dismiss in a slack fill case concerning Mike & Ike and Hot Tamales candies.[10] Plaintiffs alleged that the defendant violated the Missouri Merchandising Practices Act (MMPA) by selling candy that was packaged in a misleading manner, in that the candy was packaged in "opaque, cardboard containers" that displayed net weight and serving size.[11] Each package was approximately 35 percent empty, which the plaintiffs alleged had no

---

[3] *See, e.g.,* Izquierdo v. Mondelez Int'l, Inc., No. 16-cv-4697, 2016 U.S. Dist. LEXIS 149795 (S.D.N.Y. Oct. 26, 2016) (Sour Patch Watermelon® candies), Bratton v. Hershey Co., No. 2:16-cv-04322 2017 U.S. Dist. LEXIS 74508 (W.D. Mo. May 16, 2017) (Reese's® Pieces® and Whoppers®), White v. Just Born, Inc., No.: 2:17-cv- 04025, 2017 U.S. Dist. LEXIS 114305 (W.D. Mo. July 21, 2017) (Hot Tamales® and Mike and Ike®).

[4] Martin v. Wrigley, No. 4:17-cv-00541, 2017 U.S. Dist. LEXIS 175502 (W.D. Mo. Oct. 23, 2017) (Eclipse®).

[5] Bush v. Mondelez Int'l, No. 16-cv-02460, 2016 U.S. Dist. LEXIS 174391 (N.D. Cal. Dec. 16, 2016) (Go-Pak products).

[6] Bautista v. Cytosport, Inc., 223 F. Supp.3d 182 (S.D.N.Y. 2016) (Muscle Milk protein powder).

[7] Lau v. Pret a Manger, No. 1:17cv05775 (S.D.N.Y. 2017).

[8] *See The Food Court: Trends in Food and Beverage Class Action Litigation*, *supra* note 2, at 9 (noting that plaintiffs' lawyers often file in these states because of their larger populations, "from which they can draw larger classes and settlements," and because these districts are "often home to one or more of plaintiffs' law firms that are members of the 'food bar.'").

[9] *Compare* Hawkins v. Nestle U.S.A., No. 4:17CV205, 2018 U.S. Dist. LEXIS 19933 (E.D. Mo. Feb. 7, 2018) (denying the defendant's motion to dismiss because the plaintiffs sufficiently alleged that the product's "packaging unfairly suggests the boxes contain more product than they actually do."), *with* Benson v. Fannie May Confections Brands, Inc., No. 17 C 3519, 2018 U.S. Dist. LEXIS 32781 (N.D. Ill. Feb. 28, 2018) (granting the defendant's motion to dismiss because the "plaintiffs have not adequately alleged a violation of the federal regulations," and the plaintiffs "cannot state a non-preempted claim under Illinois law.").

[10] 2017 U.S. Dist. LEXIS 114305.

[11] *Id.* at *1-2.

other purpose but to mislead consumers into thinking they were "purchasing more [p]roduct than was actually received."[12] The court denied the motion to dismiss because under the MMPA, which is construed broadly, it is not apparent that a reasonable consumer would not be misled by this packaging.[13] The court explained that the plaintiffs "ha[ve] alleged, at minimum, that the packaging unfairly suggests the boxes contain more product than they actually do, or tends to or has the capacity to mislead consumers or to create a false impression."[14] Moreover, even though the box displayed net weight and serving size information, "[n]arrowly focusing on an aspect of the labeling does not serve the purpose of the MMPA."[15]

Likewise, in *Bratton v. Hershey Company*, another Missouri class action, the court was not convinced that the presence of net weight and serving size information on the face of the box was sufficient to overcome the plaintiffs' claims.[16] The court held that the plaintiffs' allegation that the candy boxes contained about 29 percent or about 41 percent of nonfunctional slack fill depending on the type of candy[17] was sufficient to state a claim, and the plaintiffs "plausibly alleged, at minimum, that the packaging unfairly suggests the boxes contain more product than they actually do, or tends to or has the capacity to mislead consumers or to create a false impression."[18] In *Bratton*, the court relied on the existence of the federal prohibition against slack fill to support its finding that a consumer would be reasonable to conclude "that the package of candy he purchases will not have 29% or 41% non-functional slack-fill."[19]

Not all motions to dismiss in Missouri are futile. In *Martin v. Wrigley*, the same Western District of Missouri court that decided *White* and *Bratton* granted the defendant's motion to dismiss in a nonfunctional slack fill case related to the packaging of gum.[20] Like their predecessors, the *Martin* plaintiffs alleged deceptive packaging in violation of the MMPA.[21] Since the packaging was opaque and included empty tabs, which gave the appearance of additional pieces of gum, the plaintiffs claimed the packaging was misleading.[22] However, the *Martin* court explained that the packaging is not misleading

[12] *Id.* at *2-3.
[13] *Id.* at *9-10 ("Larger packages are attractive to consumers, and consumers tend to make their purchasing decisions in 13 seconds.").
[14] *Id.* at *10.
[15] *Id.* at *13.
[16] 2017 U.S. Dist. LEXIS 74508.
[17] *Id.* at *2-3.
[18] *Id.* at *10.
[19] *Id.* at *11.
[20] 2017 U.S. Dist. LEXIS 175502.
[21] *Id.* at *2.
[22] *Id.* at *1-2.

because "the 'empty tabs' are visible from the outside of the package,"[23] and "the package displays, in relatively large lettering and in more than one place, that it contains 18 pieces of gum."[24] The court distinguished this case from both *White* and *Bratton*, finding that the gum packaging was not actually opaque, as alleged, nor was it non-pliable.[25] Additionally, the packaging at issue in *Martin* clearly stated that the package contained 18 pieces of gum[26] while the packaging in *White* and *Bratton* required the consumer to estimate how many pieces of candy were in the package based on the net weight, serving size, and number of servings per container.[27]

A recent New York food slack fill class action also focused on the state's consumer fraud law. In *Izquierdo v. Mondelez International*, a Southern District of New York court granted the defendant's motion to dismiss a slack fill lawsuit related to candy packaging.[28] There, the plaintiffs alleged that the defendants manufactured Sour Patch Watermelon candy with false and misleading labels in violation of Section 349 of the New York General Business Law, a law prohibiting "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in New York."[29] Plaintiffs alleged that the candy was sold in a "thin cardboard box that housed a sealed plastic bag" and contained a label with the net weight and nutritional facts.[30] Based on the net weight and nutritional facts, the box contained about 28 pieces of candy, yet had about 44 percent nonfunctional slack fill, "which serve[d] no other purpose but to mislead consumers."[31] The court granted the defendant's motion to dismiss, determining that the plaintiffs failed to allege an injury because they did not demonstrate that they paid a higher price for the candy (a premium, as required by Section 349) than they otherwise would have, absent deceptive acts.[32]

Although a recent California class action survived a motion to dismiss, the case ultimately met its fate when a federal judge granted the defendant's motion for summary judgment. In *Strumlauf v. Starbucks Corp.*, plaintiffs alleged

---

[23] *Id.* at *8.
[24] *Id.* at *9.
[25] *Id.* at *12 ("In fact, the Court searched in vain for a slack-fill case in the United States alleging that packaging that is either transparent or has a window is misleading.").
[26] *Id.* at *9.
[27] *Id.* at *9-10.
[28] 2016 U.S. Dist. LEXIS 149795.
[29] *Id.* at *11.
[30] *Id.* at *2-3.
[31] *Id.* at *2-4.
[32] *Id.* at *18-19 ("Simply because Plaintiffs here recite the word 'premium' multiple times in their Complaint does not make Plaintiffs' injury any more cognizable.").

that Starbucks underfills its lattes.[33] The court held that the "plaintiffs failed to raise a triable issue of fact as to whether defendant made a false statement or mis-representation."[34] First, even though plaintiffs argued that the cups can only hold the "Promised Beverage Volumes" when they are filled to the brink, this was contradicted by the plaintiffs' own expert who maintained that the cups contain around 14 to 20 percent empty space.[35] Second, despite the plaintiffs' claim that extra space was left in the cups for milk foam – which does not count towards the volume of the drink – the court concluded a reasonable consumer would not be misled by this since milk foam is a necessary ingredient of lattes.[36] Finally, although the plaintiffs argued that volume is determined only by the liquid ingredients, the court held that all of the ingredients impact the volume determination, and the effect heating and aeration have on the ingredients should also be taken into consideration.[37]

Starbucks also won in federal court in California. In *Forouzesh v. Starbucks Corp.*, plaintiffs alleged that Starbucks violated California law by underfilling its cold drinks and then deceptively making the drinks appear full by adding ice.[38] The court granted the defendant's motion to dismiss, because a reasonable consumer would not have been misled by the product: (a) the beverages' cups are clear; (b) Starbucks advertises the cup's size rather than the amount of the beverage within the cup; and (c) a reasonable consumer would understand that some of the drink will contain ice.[39]

As shown above, applicable state laws upon which the claims are based play a significant determining factor whether the case will survive a motion to dismiss and motion for summary

---

[33] No. 16-cv-01306, 2018 U.S. Dist. LEXIS 2409, at *4-5 (N.D. Cal. Jan. 5, 2018) ("According to plaintiffs, Starbucks made a conscious decision to underfill Lattes when faced with financial difficulties and high milk prices at the end of 2007.").

[34] *Id.* at *22-23.

[35] *Id.* at *11-12.

[36] *Id.* at *12-14.

[37] *See id.* at *21; Defs. Mot. to Dismiss at 1 ("A reasonable consumer does not wait for a latte to get cold and allow the steamed milk and milk foam to dissipate any more than a reasonable consumer would allow a scoop of hand dipped ice cream to melt before consuming it.").

[38] No. CV 16-3830, 2016 U.S. Dist. LEXIS 111701, at *1-2 (C.D. Cal. Aug. 19, 2016), *aff'd*, 2018 U.S. App. LEXIS 6085 (9th Cir. March 12, 2018).

[39] *Id.* at *8-9 ("If children have figured out that including ice in a cold beverage decreases the amount of liquid they will receive, the Court has no difficulty concluding that a reasonable consumer would not be deceived into thinking that when they order an iced tea, that the drink they receive will include both ice and tea and that for a given size cup, some portion of the drink will be ice rather than whatever liquid beverage the consumer ordered.").

judgment. This is the case both as it relates to substantive grounds, such as the pleading requirements discussed above in *Izquierdo*, as well as the procedural grounds, such as whether the applicable statute is pre-empted by federal law.

II. Non-Food Slack Fill Litigation

While food-related litigation has been at the leading edge of slack fill litigation, recently several slack fill cases have been filed in cases concerning non-food consumer products. These cases claim slack fill in a wide variety of products, including over-the-counter medications, nasal spray, hair styling products, household cleaning products, vitamin powder, dietary supplements, deodorant, lip balm and laundry detergent.

Nearly all of the non-food slack fill cases filed to date have been filed in New York and California courts. Again, this is likely due to the fact that the law firms filing these non-food slack fill suits are located in these states. The California suits have yielded some success for plaintiffs, while results in New York are more mixed.

In *Bimont v. Unilever U.S.*, the Southern District of New York granted a defendant's motion to dismiss in a slack fill class action pertaining to deodorants and antiperspirants.[40] There, the plaintiffs alleged that the defendant violated consumer protection laws in multiple states because the packaging and labels on the defendant's products misstated the actual weight of usable product, misstated the total net weight, and contained "non-functional slack-fill, which when displayed for sale to Plaintiffs and other reasonable consumers, caused the false impression that there was more product than actually packaged."[41] In its motion to dismiss, the defendant argued that the plaintiffs' state law claims were pre-empted by federal law.[42] The court agreed, determining that the laws either imposed a non-identical requirement on conduct that could be regulated by the FDA or whose subject matter has been regulated by the FDA.[43] The court reasoned that Congress had explicitly given the FDA the power to regulate slack fill in food, drug and cosmetic products,[44] and the FDA has regulated the subject matter of

[40] No. 14-CV-7749, 2015 U.S. Dist. LEXIS 119908 (S.D.N.Y. Sept. 9, 2015).
[41] *Id.* at *3.
[42] *Id.*
[43] *Id.* at *12-13.
[44] *Id.* at *12-13.

slack fill with regards to food products.[45]

Similarly, in *O'Connor v. Henkel Corp.*, a class action similar to *Bimont*, the plaintiffs alleged the defendants violated multiple state consumer protection laws because their deodorant and antiperspirant packaging misstated the actual and total weight of usable product, and contained nonfunctional slack fill.[46] The court again granted the defendants' motion to dismiss on the ground that the state law claims were pre-empted.[47] The court explained that Congress gave the FDA the authority to regulate slack fill in food, drug and cosmetic products; however, the FDA chose to only regulate slack fill in food products.[48] The court said that "[t]he FDA's silence on slack-fill in cosmetics and nonprescription drugs is tantamount to a conscious decision by the agency to permit it."[49] As a result, "the prohibition on nonfunctional slack-fill that plaintiffs seek would impose requirements different from or additional to those required by federal law [and] falls within the scope of the relevant federal requirements."[50]

Finally, in *Fermin v. Pfizer Inc.*, the court granted the defendant's motion to dismiss in a slack fill case pertaining to an over-the-counter medication.[51] The plaintiffs alleged that "they were tricked into purchasing the over-the-counter medicine Advil due to the size of Advil's packaging" in violation of New York, Florida and California state consumer laws.[52] However, even though one of the defendant's arguments in its motion to dismiss was that the plaintiffs' claims were pre-empted, the court did not address this argument – distinguishing this case from *Bimont* and *O'Connor*.[53] Instead, the court held that the plaintiffs' claims were implausible as a matter of law.[54] Under the consumer protection laws, the plaintiffs needed to establish that the packaging "was likely to mislead [or deceive] a reasonable consumer acting reasonably under the circumstances."[55] The court found "that it is not probable or even possible that Pfizer's packaging could have misled a reasonable consumer.[56] The packages displayed a total pill-count on each label, which the plaintiffs gave no

[45] *Id.* at *12.
[46] No. 14-5547, 2015 U.S. Dist. LEXIS 140934, at *4 (E.D.N.Y. Sept. 21, 2015).
[47] *Id.* at *15.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] 215 F. Supp.3d 209 (E.D.N.Y. 2016).
[52] *Id.* at 210.
[53] *Id.*
[54] *Id.* at 211-212 ("Plaintiffs seek to be protected under packaging laws but to dispense with reading the package.").
[55] *Id.* at 211.
[56] *Id.* at 212.

basis for disregarding.[57] Moreover, "[i]t defies logic to accept that a reasonable consumer would not rely upon the stated pill count."[58]

Some of these lawsuits end after the motion to dismiss is filed. In *Collazo v. Now Health Group*, a slack fill class action pertaining to a vitamin C supplement, brought in the Eastern District of New York, the plaintiffs alleged that the defendant violated both FDCA Section 502 (21 U.S.C. 352(i)) and various state consumer protection laws by selling a misbranded product.[59] The product, a dietary supplement, was sold in non-transparent plastic containers, which contain 49 percent nonfunctional slack fill or empty space that serves no purpose.[60] As a result, the plaintiffs claimed they were misled since "[t]he size of the container in comparison to the volume of the [p]roduct contained therein makes it appear as if the consumer is buying more than what is actually being sold."[61] The case was voluntarily dismissed with prejudice prior to the defendant filing its answer.

Additionally, in *Marte v. Johnson & Johnson and McNeil-PPC,* the class action plaintiffs alleged that defendants violated FDCA Section 502 and similar state laws by selling a misbranded over-the-counter product, since "[t]he size of the bottles in comparison to the volume of the [p]roducts contained therein make it appear as if the consumer is buying more than what is actually being sold."[62] The defendants responded by filing a motion to dismiss, arguing that the plaintiffs either failed to state a claim upon which relief could be granted or stated claims that were pre-empted by federal law.[63] With regard to pre-emption, the defendants argued that "Congress and the FDA have never outlawed empty space in OTC drug packages," and that therefore the only requirement is that the containers must not be "filled in a manner likely to mislead ordinary consumers acting reasonably under the circumstances," which is a general prohibition in the FDCA.[64] "In other words, the FDCA does not outlaw all slack-filled containers for OTC drugs but only those which are actually misleading to the purchasing public."[65] Defendants further argued that "the standard for whether a container is misleading is whether the container would be likely to mislead the ordinary purchaser of the relevant

---

[57] *Id.* ("The suggestion that such laws should cover their failure to read an unambiguous tablet-count does not pass the proverbial laugh test.").
[58] *Id.*
[59] *Collazo* Compl. ¶ 2.
[60] *Id.* at ¶¶ 5, 30.
[61] *Id.* at ¶¶ 5, 32.
[62] *Marte* Compl. ¶ 6.
[63] *Marte* Mot. to Dismiss at 2-3.
[64] *Id.* at 2-3.
[65] *Id.* at 6.

type of merchandise acting reasonably under the circumstances."[66] The defendants asserted that "many of Plaintiffs' state-law claims deviate from the FDCA's" standard and are therefore pre-empted.[67] The defendants also maintained that the plaintiffs had not "plausibly alleged that ordinary consumers acting reasonably under the circumstances are likely to be misled" by the size of the packaging since there is a prominent pill count on each label.[68] Prior to a decision being reached on the motion to dismiss, the parties resolved the suit, and plaintiffs voluntarily dismissed the lawsuit with prejudice.

Similarly, *Riedel v. Church & Dwight Co., Inc.*[69] and *Garcia v. The Procter & Gamble Company*,[70] – two New York slack fill cases concerning detergent – each ended with a voluntary dismissal by the plaintiff prior to an answer being filed.

While many of the non-food slack fill cases filed in New York have been dismissed on pre-emption grounds, some plaintiffs have found ways to plead their claims in ways that allow for the matters to proceed to a stage where the parties are willing to enter into settlement discussions.

Non-food slack fill cases filed in California courts have also resulted in numerous settlements, including:

- *People v. Reckitt Benckiser* (Mucinex), California – December 19, 2008, press release from the County of Shasta District Attorney's office announcing that it and several other California counties reached a settlement with Reckitt Benckiser, which required the company to pay $300,000 in civil penalties and costs related to alleged misleading and unlawful packaging of its product Mucinex.

- *People v. Novartis Pharmaceuticals Corp. and Alcon Laboratories, Inc.* (Zaditor), California – February 3, 2014, press release from the County of Shasta District Attorney's office announcing that it and several other California counties reached a settlement with Novartis Pharmaceuticals Corporation, which required Novartis to

[66] *Id.* at 10.
[67] *Id.* at 1.
[68] *Id.* at 3.
[69] No. 2:16cv02093 (E.D.N.Y. 2016).
[70] No. 1:15cv09174 (S.D.N.Y. 2016).

pay $225,000 in civil penalties and costs related to alleged misleading and unlawful packaging of its eye drop product Zaditor.

- *People v. Unilever U.S.* (Axe hair styling products), California – April 30, 2015, press release from the Orange County District Attorney's office announcing that Unilever would pay over $770,000 in penalties and costs for, among other things, misrepresenting the quantity of the hair product in each container, which contained substantial empty space.

- *People v. The Clorox Company* (household cleaning products), California – consumer protection regulatory action alleging that certain types of specialty bleach were sold in the same 3-liter bottles as Clorox Regular Bleach yet were filled only to 80 percent capacity in violation of California's Fair Packaging and Labeling Act. The Clorox Company entered into a settlement with Alameda, Marin, Monterrey, Napa and Sonoma Counties, which required Clorox to pay close to $200,000 in civil penalties, law enforcement costs and restitution.

Plaintiffs may continue to try to bring these claims in additional jurisdictions, and it remains to be seen how hospitable these yet-untested venues will be concerning non-food slack fill cases.

III. Protections against Slack Fill Lawsuits

Once a nonfunctional slack fill lawsuit has been filed against a manufacturer, there are several potential defenses the company can lodge. These include arguments of pre-emption (which have been most effective in the context of non-food claims), failure to state a claim (which includes the argument that plaintiffs have failed to specifically allege how the slack fill is not functional), and that the slack fill is indeed functional. On this latter point, companies should ensure that they have clear documentation

on which of the functional slack fill criteria the package satisfies:

- Protection of the contents of the package;
- The requirements of the machines used for enclosing the contents in such package;
- Unavoidable product settling during shipping and handling;
- The need for the package to perform a specific function (e.g., where packaging plays a role in the preparation or consumption of a food), where such function is inherent to the nature of the food and is clearly communicated to consumers;
- The fact that the product consists of a food packaged in a reusable container which the container is part of the presentation of the food and has value which is both significant in proportion to the value of the product and independent to its function to hold the food; or
- Inability to increase level of fill or to further reduce the size of the package (e.g., where some minimum package size is necessary to accommodate required food labeling (excluding vignettes or other nonmandatory designs or label information), discourage pilfering, facilitate handling, or accommodate tamper-resistant devices).[71]

A primary goal for any manufacturer should be protecting itself from becoming a target of slack fill lawsuits. To this end, companies should assess current packaging to determine whether the current form is one by which a reasonable consumer could be misled. For instance, is the package opaque and non-pliable? Is the consumer able to see inside the package to the contents within? Does the company offer different amounts of product in the same or nearly the same size package?

Additionally, manufacturers should assess whether the package label is sufficiently descriptive. Packages that state the weight of the contents are important, but that

[71] 21 C.F.R. 100.100(a)(1) – (6).

information in and of itself is insufficient because nonfunctional slack fill can still exist inside the package. Some courts have held that packages displaying net weight and serving size, but which would also require the consumers to conduct calculations to determine the number of pieces or items in the packages, are also insufficient. Companies need to question whether the label clearly states the number of individual items in the package. The more details offered on the package, the easier it will be for a company to refute the reasonableness of consumers' reliance on the size of the package, rather than what was written clearly on the label.

As manufacturers take preemptive steps and assert strategic defenses, the phrase "slack fill" will lose its sting and filing of these lawsuits should decline.