

CGA IOC Symposium
Coffee with Counsel Agenda item B. 5.

At the link at the bottom of the agenda, you will find copies of the Federal Regulation on misleading containers and the California Fair Packaging and Labeling Act section for food containers. We did not provide CA laws on non-food product containers because this presentation is focused on food containers only (the standards for non-food containers are slightly different).

Additionally, most of the court rulings that create precedent were decided at the motion to dismiss stage and not on the full merits of each case. Thus, they have significantly more detail on consumer deception and significantly less detail on the nonfunctional slack fill safe harbor provisions in §12606.2.

Statutes and Regulations

Federal

- Statute – Federal Food, Drug, and Cosmetic Act – *21 USCA § 343(d)* – Misleading Container
 - “A food shall be deemed to be misbranded... if its container is so made, formed, or filled as to be misleading.”
- Regulation – *21 CFR § 100.100* – Misleading Containers

State

- Statutes
 - Fair Packaging and Labeling Act – *CA Business and Professions Code §12606.2* – Food containers made, formed, or filled as to be misleading; nonfunctional slack fill; seizure of container; destruction or release
 - This directly references the above Section 403(d) of the Federal Food, Drug and Cosmetic Act (21 USCA § 343(d)). Slack fill does not violate this law unless it is designated as nonfunctional slack fill. Slack fill is the difference between the amount of product in the container and its actual holding capacity. Nonfunctional slack fill is defined as “the empty space in a package that is filled to *substantially* less than its capacity for reasons other than” the safe harbor provisions listed in the code. Interestingly, although this is similar to the language in the federal regulation above, this state statute adds the word “substantially” to its definition of nonfunctional slack fill.
 - This is the main act for food containers.
 - Fair Packaging and Labeling Act – *CA Business and Professions Code § 12606* – False bottoms, sidewalls, lids or coverings; nonfunctional slack; seizure of deceptive containers and contents; condemnation; destruction or release
 - **Note:** This does not apply to food containers that fall under § 12606.2.

- *CA Health and Safety Code § 110375* – False Bottoms, Sidewalls, lids or coverings; nonfunctional slack; seizure of deceptive containers and contents; condemnation; destruction or release
 - **Note:** This is also not specifically for food containers.

Court Rulings of relevance

- *Del Real, LLC v. Harris*, 966 F.Supp.2d 1047 (E.D. Cal. 2013)
 - Del Real prepares, packages, and sells cooked poultry and meat dishes; Defendants alleged the company violated nonfunctional slack fill requirements in Cal. Bus. & Prof. Code § 12606.2(c). *Id.* at 1049. Del Real argued this CA law is preempted or overruled by the Poultry Products Inspection Act (PPIA) and the Federal Meat Inspection Act (FMIA) as for poultry and meat products. *Id.* The court held that the FMIA and the PPIA overrule the CA law here. *Id.* at 1067.
- *Buso v. ACH Food Companies*, 445 F.Supp.3d 1033 (S.D. Cal. 2020)
 - District court dismissed Plaintiff’s *consumer deception claim*. *Id.* at 1039. Plaintiff alleged Defendant’s opaque cornbread mix packaging was deceptive by containing roughly 50% of non-functional slack fill. *Id.* at 1035. The court stated it is “unreasonable for a customer to be deceived as to the amount of product contained in the cornbread mix box” because the box “discloses the product’s net weight and the approximate number of servings per container” in addition to an indication “that the box contains enough cornmeal mix to make ‘one 8-in square ‘loaf’ of cornbread or 12 standard cornbread muffins.’” *Id.* at 1038.
- *Kennard v. Lamb Weston Holdings, Inc.*, 2019 WL 1586022 (N.D. Cal. 2019) – Only the Westlaw citation is available.
 - District court dismissed Plaintiff’s *consumer deception claims*. *Id.* at 7. Defendant packages sweet potato fries. *Id.* at 1. Plaintiff alleged the opaque containers “had more than 50% empty space, or slack-fill.” *Id.* The court stated the packaging for the fries “discloses the product’s net weight, the number of fries per serving, and the approximate number of servings per container,” and those labels did “not contradict other representations or inferences from” the packaging. *Id.* at 5. The court noted that “many district courts have found that where the package itself discloses the actual unit counts, a ‘reasonable consumer’ could not be misled.” *Id.*
- *Buso v. Vigo Importing Co.*, 2018 WL 6191390 (S.D. Cal. 2018) – Only the Westlaw citation is available.
 - District court dismissed Plaintiff’s *consumer deception claim*. *Id.* at 5. Plaintiff alleged the Defendant’s risotto products contain around 70% of unfilled space. *Id.* at 1. The court held there was no deception, as the net weight on the label was accurate and the package was also pliable or flexible so consumers could feel and see the package to assess quantity. *Id.* at 4-5.

- *Stewart v. Kodiak Cakes, LLC*, 2021 WL 1698695 (S.D. Cal. 2021) – Only the Westlaw citation is available.
 - Kodiak Cakes manufactures and sells snack and breakfast products. *Id.* at 1. Plaintiffs alleged Kodiak packaging was less than half full and misrepresented the product amount. *Id.* The court stated reasonable consumers will rely on things such as product yield information, the serving size, and the feel of the box or package. *Id.* at 22. The court held the Plaintiffs “could plausibly prove that a reasonable consumer would be deceived by the size of Defendant’s packaging where the packaging does not provide information about the final product output.” *Id.* at 24. However, they would not prove so if the packaging does provide that information. *Id.* at 24.
 - With regards to *nonfunctional slack fill*, it is important to note that “district courts in California are split as to whether the safe harbor provisions are affirmative defenses or ‘whether their inapplicability is an element that must be plead.’” *Id.* at 31.

- *Matic v. U.S. Nutrition*, 2019 WL 3084335 (C.D. Cal. 2019) – Only the Westlaw citation is available.
 - District court stated that “unlike inherently fragile goods like pretzels or chips,” it is plausible that the protein powder at issue may not need 40% of empty space for protecting the package’s contents as per the safe harbor provision in § 12606.2. *Id.* at 6. Plaintiffs survived the motion to dismiss. *Id.* at 7.

- *Escobar v. Just Born Inc.*, 2017 WL 5125740 (C.D. Cal. 2017) – Only the Westlaw citation is available.
 - District court denied the motion to dismiss Plaintiff’s *consumer deception claim*. *Id.* at 1. Plaintiff alleged Defendant’s candy products (Mike and Ike and Hot Tamales) were deceptive as the boxes were 46% empty. *Id.* Being able to hear the rustling of the candy in the box does not mean the package is not deceptive, and “customers may reasonably rely on the size of packaging and believe that it accurately reflect the amount she is purchasing.” *Id.* at 10. Furthermore, the court noted the Plaintiff could not inspect the candy’s packaging before purchasing it, as it was in a glass enclosure and was only given out once the consumer paid. *Id.*

- *Jackson v. General Mills, Inc.*, 2020 WL 5106652 (S.D. Cal. 2020) – Only the Westlaw citation is available.
 - Under Plaintiff’s *nonfunctional slack fill claim*, Plaintiff alleged the box of cereal was 30-50% empty. *Id.* at 1. The court previously held in this case that product settling (a safe harbor provision) between 30-50% is not implausible. *Id.* at 3. Additionally, the court stated cereals “can settle by up to 43.1% after shipping” as per 58 Fed. Reg. 2957-01 2959. *Id.*

- *Padilla v. WhiteWave Foods Co.*, 2019 WL 4640399 (C.D. Cal. 2019) – Only the Westlaw citation is available.
 - Plaintiffs alleged Vega Protein Greens powder was misleading because of the slack fill (approximately 50%). *Id.* at 2. The court noted that according to the safe

harbor provision on unavoidable settling, “a package can contain both functional and nonfunctional slack fill;” if even “one fraction of an inch of slack fill in the a container” is legitimate, while another six inches of the slack fill is nonfunctioning, the product as a whole is not shielded from nonfunctional slack fill allegations. *Id.* at 14.