



KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Prior Version Limited on Preemption Grounds by [Del Real, LLC v. Harris](#), E.D.Cal., Aug. 19, 2013

West's Annotated California Codes  
Business and Professions Code (Refs & Annos)  
Division 5. Weights and Measures (Refs & Annos)  
Chapter 6. Fair Packaging and Labeling Act (Refs & Annos)

West's Ann.Cal.Bus. & Prof.Code § 12606.2

§ 12606.2. Food containers made, formed, or filled as to be misleading;  
nonfunctional slack fill; seizure of container; destruction or release

Effective: January 1, 2019

[Currentness](#)

(a) This section applies to food containers subject to Section 403(d) of the Federal Food, Drug, and Cosmetic Act ([21 U.S.C. Sec. 343\(d\)](#)), and [Section 100.100 of Title 21 of the Code of Federal Regulations](#). [Section 12606](#) does not apply to food containers subject to this section.

(b) No food containers shall be made, formed, or filled as to be misleading.

(c) A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack fill. Slack fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack fill is the empty space in a package that is filled to substantially less than its capacity for reasons other than any one or more of the following:

(1) Protection of the contents of the package.

(2) The requirements of the machines used for enclosing the contents in the package.

(3) Unavoidable product settling during shipping and handling.

(4) The need for the package to perform a specific function, such as where packaging plays a role in the preparation or consumption of a food, if that function is inherent to the nature of the food and is clearly communicated to consumers.

(5) The fact that the product consists of a food packaged in a reusable container where the container is part of the presentation of the food and has value that is both significant in proportion to the value of the product and independent of its function to hold the food, such as a gift product consisting of a food or foods combined with a container that is intended for further use after the food is consumed or durable commemorative or promotional packages.

(6) Inability to increase the level of fill or to further reduce the size of the package, such as where some minimum package size is necessary to accommodate required food labeling exclusive of any vignettes or other nonmandatory designs or label information, discourage pilfering, facilitate handling, or accommodate tamper-resistant devices.

(7) One or more of the following:

(A) The dimensions of the product or immediate product container are visible through the exterior packaging.

(B) The actual size of the product or immediate product container is clearly and conspicuously depicted on any side of the exterior packaging, excluding the bottom, accompanied by a clear and conspicuous disclosure that the depiction is the “actual size” of the product or immediate product container. If there are multiple units of the same product in a package, only one “actual size” depiction is required per same size product or immediate product container.

(C) A line or a graphic that represents the product or product fill and a statement communicating that the line or graphic represents the product or product fill such as “Fill Line,” both of which are clearly and conspicuously depicted on exterior packaging or the immediate product container if visible at point of sale. If the product is subject to settling, the line shall represent the minimum amount of product after settling.

(8) The mode of commerce does not allow the consumer to view or handle the physical container or product.

(d) Slack fill in a package shall not be used as grounds to allege a violation of this section based solely on its presence unless it is nonfunctional slack fill.

(e) This section shall be interpreted consistent with the comments by the United States Food and Drug Administration on the regulations contained in [Section 100.100 of Title 21 of the Code of Federal Regulations](#), interpreting Section 403(d) of the Federal Food, Drug, and Cosmetic Act ([21 U.S.C. Sec. 343\(d\)](#)), as those comments are reported on pages 64123 to 64137, inclusive, of Volume 58 of the Federal Register.

(f) If the requirements of this section do not impose the same requirements as are imposed by Section 403(d) of the Federal Food, Drug, and Cosmetic Act ([21 U.S.C. Sec. 343\(d\)](#)), or any regulation promulgated pursuant thereto, then this section is not operative to the extent that it is not identical to the federal requirements, and for this purpose those federal requirements are incorporated into this section and shall apply as if they were set forth in this section.

(g) Any sealer may seize any container that is in violation of this section and the contents of the container. By order of the superior court of the county within which a violation of this section occurs, the containers seized shall be condemned and destroyed or released upon any conditions that the court may impose to ensure against their use in violation of this chapter. The contents of any condemned container shall be returned to the owner thereof if the owner furnishes proper facilities for the return. A proceeding under this section is a limited civil case if the value of the property in controversy is less than or equal to the maximum amount in controversy for a limited civil case under [Section 85 of the Code of Civil Procedure](#).

### Credits

(Added by Stats.1995, c. 849 (S.B.735), § 1. Amended by Stats.2006, c. 538 (S.B.1852), § 20; Stats.2007, c. 43 (S.B.649), § 3; Stats.2013, c. 429 (S.B.465), § 2; Stats.2018, c. 544 (A.B.2632), § 2, eff. Jan. 1, 2019.)

### Editors' Notes

#### LAW REVISION COMMISSION COMMENTS

#### 2007 Amendment

Subdivision (f) of Section 12606.2 is amended to reflect unification of the municipal and superior courts pursuant to former Section 5(e) of Article VI of the California Constitution. As amended, subdivision (f) makes clear that if the value of seized containers is less than or equal to the maximum amount in controversy for a limited civil case, a proceeding under this section is a limited civil case even though permanent injunctive relief generally is not allowed in a limited civil case ([Code Civ. Proc. §§ 85, 580](#)). This preserves the pre-unification status quo, under which a municipal court had authority to order condemnation of containers under this section in specified circumstances. [36 Cal.L.Rev.Comm. Reports 305 (2007)].

#### [Notes of Decisions \(3\)](#)

West's Ann. Cal. Bus. & Prof. Code § 12606.2, CA BUS & PROF § 12606.2  
Current with urgency legislation through Ch. 19 of 2021 Reg.Sess

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