

# IS LESS REALLY MORE? THE CONTINUING RISE OF SLACK FILL LITIGATION

*Posted on November 3, 2016 by Litigation*



Slack fill litigation against food, beverage and consumer goods producers is flourishing. The primary allegation in these cases is that the packaging of the subject product gives off the false and misleading impression that more product is contained within the package than there actually is.

## **Food and Drug Administration: 1 CFR §100.100**

The Food and Drug Administration (FDA), in regulations pursuant to the Federal Food, Drug and Cosmetic Act (FDCA), defines slack fill as the difference between the actual capacity of a container and the volume of product contained therein.

**Federal regulation (21 CFR §100.100) makes food packaging presumptively misleading if it does not allow a consumer to fully view its contents and it contains non-functional slack fill, except for one of the following reasons:**

1. to protect the contents of the package;
2. as a result of the requirements of the machines used to enclose the contents in the package;
3. unavoidable product settling during shipment;
4. the need for the package to perform a specific function, where such function is inherent to the

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nature of the food and is clearly communicated to consumers;

5. the food is packaged in a reusable container where the container is part of the presentation and serves a useful purpose independent of its function to hold the food;
6. where increasing the level of fill or decreasing the size of the package is not feasible.

Although federal slack fill regulations were promulgated many years ago, increased litigation surrounding them is consistent with an overall uptick in litigation targeted at food, beverage and consumer goods companies.

**One thing is clear:** consumers are demanding more transparency (literally) when it comes to the production, labeling and packaging of food, beverages and other consumer goods.

## State Statutes on Non-Functional Slack Fill

In addition to federal regulations, many states have statutes that regulate non-functional slack fill. Plaintiffs (*or, more likely, their lawyers*) are capitalizing on those laws, in addition to state consumer protection laws, and filing class action lawsuits not only in federal courts, but also in state courts.

In the last week, at least ten separate class action lawsuits were filed in Missouri state courts (four in Cole County Circuit Court and six in Phelps County Circuit Court) against major food producers alleging violations of FDA regulations, the FDCA, Missouri slack fill regulations and Missouri common law.

As in other similar cases where plaintiffs have alleged violations of both federal and state laws, whether the state laws are pre-empted will be a major preliminary topic of litigation.

## Best Practices for Avoiding Slack Fill Litigation

Given the increasing risk of litigation, food, beverage and consumer goods companies should approach product packaging carefully and with an eye towards mitigating liability.

- The best ways to avoid litigation are to eliminate non-functional slack fill or to use transparent packaging.
- If non-functional slack fill is necessary, companies should evaluate whether any of the six safe harbor provisions apply.
- They should thoroughly document the evaluation process and be able to provide documentation showing a dialogue regarding the need for non-functional slack fill and what other options were considered.

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