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MEMORANDUM

From: Steven B. Steinborn
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Re: **California Amends Slack-Fill Law to Include Additional Safe Harbors**

The California legislature has passed a law amending the state's slack-fill statute for food containers subject to the Federal Food, Drug and Cosmetic Act (FFDCA). ^{1/} Assembly Bill 2632 (AB 2632), which Governor Jerry Brown signed into effect on September 19, 2018, revises the slack-fill statute by creating four new so-called "safe harbor" provisions, under which empty space in a container is not considered nonfunctional slack-fill. These new safe harbor provisions provide additional clarity on the types of food packages that will not be considered to contain nonfunctional slack-fill and may provide some relief to the food industry from the recent surge in purported class law suits seeking damages for allegedly slack-filled packaging. This memorandum summarizes the changes to the state slack-fill statute. ^{2/}

Background

California's slack-fill statute, Cal. Bus. & Prof. Code § 12606.2, applies to all food containers subject to Section 403(d) of the Federal Food, Drug, and Cosmetic Act and 21 C.F.R. § 100.100. It states that a container that does not allow the consumer to fully view its contents is considered misleading if it contains nonfunctional slack-fill. It defines nonfunctional slack-fill as 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 six reasons:

1. To protect the contents of the package;
2. The requirements of the machinery used to close the package;
3. Unavoidable product settling during shipping and handling;

^{1/} Assembly Bill No. 2632, available at http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB2632.

^{2/} AB 2632 also amends the slack-fill statute for commodities containers (Cal. Bus. & Prof. Code § 12606) and the section of the Sherman Food, Drug and Cosmetic Laws (Sherman Law) that relates to slack-fill in containers of commodities subject to the Sherman Law (Cal. Health & Safety Code § 110375). These amendments are not summarized here but can be viewed at http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201720180AB2632.

4. The need for the package to perform a specific function (e.g., where the packaging plays a role in the preparation or consumption of the 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 (e.g., a gift basket, where the basket is intended for further use after the food is consumed, or durable commemorative or promotional packages); or
6. The inability to increase the 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 (absent vignettes or other nonmandatory labeling), discourage pilfering, facilitate handling, or accommodate tamper-resistant devices).

The statute also states that slack-fill in a package may not be used as grounds to allege a violation based solely on its presence, unless it is nonfunctional slack-fill. These provisions remain intact following the adoption of AB 2632.

In recent years there has been a substantial number of purported class action lawsuits filed in California against food companies under the California Consumer Legal Remedies Act (CLRA), Unfair Competition Law, and False Advertising Law seeking damages resulting from food packages allegedly containing nonfunctional slack-fill. Though these cases have had varying outcomes, they have become a considerable burden on food companies.

New Safe Harbors

With the adoption of AB 2632, California's slack-fill statute now includes four additional safe harbor provisions. Under the revised law, slack-fill in a food container will not be considered nonfunctional under the following additional circumstances:

1. The dimensions of the product or immediate product container are visible through the exterior packaging;
2. 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;
3. 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; or
4. The mode of commerce does not allow the consumer to view or handle the physical container or product. ^{3/}

^{3/} The first three safe harbor provisions listed above are a slightly revised version of an existing safe harbor provision in the slack-fill statute for general commodities. Cal. Bus. & Prof. Code § 12606(b)(8).

These new safe harbor provisions are in addition to the safe harbor provisions that previously were included in the California statute. The changes are effective January 1, 2019. California has not issued any guidance or indicated whether implementing regulations will be issued.

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We will continue to monitor the implementation of California's revised slack-fill laws and their effect on slack-fill litigation. Please contact us if you have any questions or would like to discuss how to formulate your packages in compliance with applicable slack-fill requirements.