



Size Matters Under the Lanham Act: Competitor Suit Based on Slack Filled Containers Survives Motion to Dismiss

Consumer class actions based on “slack-fill” containers have had a seat at the food wars table for a while. Now, however, it appears that *competitors* may be able to pull up a chair. A court in the District of Columbia recently denied McCormick & Company, Inc.’s motion to dismiss a Lanham Act claim based on slack fill brought by its direct competitor, Watkins Inc.. Watkins alleged that it had standing under the Lanham Act because it lost sales to McCormick as a direct result of McCormick’s use of larger, slack-filled pepper tins. Because the competing tins were positioned on store shelves next to each other, McCormick’s larger tins created a false impression that consumers were getting more pepper. The court agreed with Watkins that a slack-filled container can amount to an actionable misrepresentation under the Lanham Act because “the size of a package signals to the consumer vital information about a product and is as influential in affecting a customer’s choices as an explicit message.”

McCormick pointed to the net weight representation on its label in defense, but the court was not persuaded. After finding no exception in the slack fill regulations for containers that accurately state their amount, it let the claim proceed:

“An accurate statement of weight does not necessarily correct a consumer’s misimpression of product quantity based on the size of a container because consumers are accustomed to seeing how much space a product occupies but may not know how that relates to its weight.”

Contrast that with the latest on the consumer slack-fill front. The Eastern District of New York dismissed a consumer class action against Pfizer, Inc. brought under the consumer protection statutes of California, New York and Florida in which the consumers alleged that they were tricked in to purchasing Advil by the size of Advil’s packaging. The court found the claim “laughable” because the pill count was printed on the packaging: “Plaintiffs seek to be protected under packaging laws but [seek to] dispense with reading the package. The suggestion that such laws should cover their failure to read an unambiguous tablet count does not pass the proverbial laugh test.”

To read the opinions:

- *In re McCormick & Company, Inc. Pepper Products Marketing and Sales Practices Litigation*, MDL Docket No. 2665, Misc. No. 15-1825 (D.D.C. Oct. 17, 2016) [Click Here](#)
- *Fermin v. Pfizer, Inc.*, 15 CV 2133 (SJ)(ST) (E.D.N.Y. Oct. 14, 2016) [Click Here](#)

For further information regarding these court orders or other consumer law matters, please contact:

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