Class Certification Insights From McCormick Slack-Fill Suit

By **Shawn Gebhardt**

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Class action litigation involving "nonfunctional slack fill" (empty space in a product container in excess of what is required to protect the contents, to accommodate manufacturing or safety concerns, or to account for settling during shipping and handling)[1] has been filed against a host of food and other consumer packaged goods manufacturers in recent years, and it continues to be a headache for companies in those industries.

But recently, a federal judge in the U.S. District Court for the District of Columbia issued a significant opinion considering whether to certify a slack-fill suit as a class action under Rule 23 of the Federal Rules of Civil Procedure. Judge Ellen Segal Huvelle's lengthy and thoughtful opinion in In re: McCormick & Co. Inc., Pepper Products Marketing and Sales Practices Litigation[2] was largely a win for the defendant, spice and seasoning manufacturer McCormick & Company Inc. However, it also contained victories for the plaintiffs and some important lessons for those who wish to steer clear of peril.

The Origins of the Suit

McCormick was first sued by consumers in June 2015 as a result of its response to intense economic pressures in the market for black pepper.[3] The plaintiffs alleged that over the time period of 2005 to 2015, pepper prices skyrocketed, increasing more than six times.[4] Accordingly, McCormick was forced to repeatedly raise retail prices on its black pepper products, which finally led to it suffering declining market share.[5]

In mid-2014, confronted with this intractable dilemma and with wholesale costs continuing to rise, McCormick initiated a "Black Pepper Net Weight Reduction" project.[6] The company ultimately reduced the weight of ground pepper in its tins by 25% and reduced the weight of peppercorns in its pepper grinders by 19%, while making no corresponding changes in container size or price.[7] Containers with reduced amounts were sold by retailers between March 2015 and June 2016.[8]

As Judge Huvelle observed:

Consumers looking at any of these products on store shelves saw the same containers they had always seen. The label on the container stated the new weight in the same size print and location as the prior weight had appeared. Consumers could not see the fill levels in any of the products; the metal tins were opaque and the fill level of the grinders was obscured by an opaque label. Nor were fill levels necessarily observable even after the products were opened.[9]

Within six months of the first case being filed against McCormick, more than a dozen additional consumer suits followed. Accordingly, in December 2015, the Judicial Panel on Multidistrict Litigation transferred all McCormick black pepper slack-fill cases to the U.S. District Court for the District of Columbia.[10] There, after surviving a motion to dismiss and completing fact discovery, the plaintiffs moved to certify a variety of multistate or single-state consumer classes made up of consumers with statutory consumer protection claims,[11] as well as a variety of multistate or single-state consumer classes made up of consumers with unjust enrichment claims.[12]

McCormick's Significant Victories

In a 110-page opinion, the court declined to certify a multistate class of individuals asserting statutory consumer protection claims due to several material variations among the states' consumer protection statutes. The most significant variations to the court included "differences in the burden of proof, scienter requirements, definitions of deception, in particular whether there is a materiality component and, if so, how it is defined, and the requirements of proving causation and injury."[13] These significant variations precluded certification under Rule 23(b)'s requirement that common questions of law or fact must predominate over questions affecting only individual members.[14]

The court likewise declined to certify, on predominance grounds, any multistate class of individuals asserting unjust enrichment. The court explained that the definition of "unjust" varies materially across jurisdictions, and that evaluating unjustness is "a fact-intensive inquiry that focuses on the totality of the circumstances, not just defendant's conduct."[15] The court further explained that jurisdictions vary in terms of whether they require a plaintiff pursuing an unjust enrichment theory to establish that he or she has no adequate remedy at law, and if so, how that requirement is defined.[16]

With respect to the single-state classes, the court declined to certify any class of individuals asserting unjust enrichment, again on grounds of predominance. The court noted that "in none of the seven single states does an unjust enrichment claim depend 'solely' on defendant's conduct. To the contrary, each state's unjust enrichment law requires consideration of both plaintiff's and defendant's conduct, as well as the factual context."[17]

The court also declined to certify a single-state class of individuals asserting Illinois statutory consumer protection claims because Illinois' Consumer Fraud Act requires injured persons to prove, and courts to make individualized inquiries into, proximate causation and actual damages.[18] Yet, the plaintiffs failed to proffer any "common evidentiary proof as to the reasons behind class members' purchasing decisions."[19]

McCormick's Partial Defeat

Although it prevailed in these important battles, McCormick fell short of total victory. The court granted certification of single-state classes of individuals asserting statutory consumer protection claims in three states: California, Florida and Missouri. The court reasoned that unlike the Illinois statute, these states' consumer protection statutes permit causation to be established by common, rather than individualized, proof.[20]

The court also observed that purchasers "were uniformly exposed to the same alleged misrepresentation — pepper containers that did not have visible fill lines and that allegedly contained nonfunctional slack fill." Additionally, it noted that there was "ample common evidence that the challenged action was deceptive," including the product packaging itself (which was opaque and concealed fill levels) and McCormick's internal documents (which the court opined "reflect a conscious decision to try to hide a price increase from consumers by reducing the net weight of the product without changing the container size.")

Key Takeaways

Judge Huvelle's opinion is noteworthy in several respects. First, it reinforces the need for manufacturers to be cautious when modifying the amount of product in their containers.

Manufacturers should avoid decreasing net weight without also redesigning product containers, adding fill lines or "actual size" imagery, or otherwise clearly disclosing the change in net weight to consumers.

Second, the opinion is one of the precious few that resolve class certification issues in the context of alleged nonfunctional slack-fill violations. Setting aside two cases in which classes were certified for settlement purposes only,[21] just four previous opinions have tackled this issue head-on. Of those cases, one court certified the only class sought by plaintiffs,[22] and three courts declined to certify any class sought by plaintiffs.[23]

Judge Huvelle's opinion represents the first split decision (certifying some classes and declining to certify others), and in contrast with previous opinions, did not focus on statutory standing or the class certification element of ascertainability, although those issues were raised in briefing.[24] Defendants facing slack-fill litigation in the future should consider whether these standing and ascertainability arguments could have greater traction in their cases.

Third, any manufacturer facing a nationwide class action based on slack-fill allegations would do well to think deeply about the variations in state consumer protection statutes that Judge Huvelle identified as "material" and "the most significant": the burden of proof, definitions of key concepts like "deception" and "materiality," and whether the plaintiff is required to plead and prove causation and injury.[25] These are all potentially winning defense arguments for the next class certification battle.

Fourth, and finally, be sure to watch this space for new developments in this area — McCormick filed an appeal of Judge Huvelle's decision at the end of July.[26]

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[1] See 21 C.F.R. §100.100(a).

[2] In Re: McCormick & Company, Inc., Pepper Prods. Mktg. & Sales Practices Litig. , MDL No. 2665, Misc. No. 15-1825 (D.D.C.).

[3] Dupler v. McCormick & Co., No. 2:15-cv-6760 (S.D.N.Y.).

[4] In Re: McCormick & Company , Dkt. No. 212, Mem. at 10.

[5] Id.

[6] Id. at 11.

[7] Id. at 11, 13.

[8] Id. at 24.

[9] Id. at 13 (internal citations omitted).

[10] In Re: McCormick & Company, Inc., Pepper Prods. Mktg. & Sales Practices Litig., 148 F. Supp. 3d 1364, 1365 (J.P.M.L. 2015).

[11] Mem. at 24-25.

[12] Id. at 25-27.

[13] Id. at 37-38.

[14] Fed. R. Civ. P. 23(b).

[15] Mem. at 45.

[16] Id. at 48-50.

[17] Id. at 102.

[18] Id. at 88-90.

[19] Id. at 90.

[20] Id. at 80-88, 95-98, 98-102.

[21] Berni v. Barilla G. e R. Fratelli, S.p.A., No. 16-cv-4196, 2019 WL 2341991 (E.D.N.Y. June 3, 2019); Hendricks v. StarKist Co., No. 13-cv-00729, 2016 WL 5462423 (N.D. Cal. Sept. 29, 2016), aff'd sub nom. Hendricks v. Ference, No. 16-16992, 754 F. App'x 510 (9th Cir. Oct. 19, 2018).

[22] Escobar v. Just Born Inc., No. 17-cv-01826, 2017 WL 5125740, at *14 (C.D. Cal. June 12, 2017) (certifying single-state class of movie theater boxed candy purchasers in California).

[23] Spacone v. Sanford, L.P., No. 2:17-cv-02419, 2018 WL 4139057, at *1 (C.D. Cal. Aug. 9, 2018) (denying certification of single-state class of glue purchasers in California); White v. Just Born, Inc., No. 2:17-cv-04025, 2018 WL 3748405, at *1 (W.D. Mo. Aug. 7, 2018) (denying certification of single- and multistate classes of boxed candy purchasers); Turcios v. Carma Labs., Inc., 296 F.R.D. 638, 641 (C.D. Cal. 2014) (denying certification of single-state class of lip balm purchasers in California).

[24] See, e.g., Spacone, at *4 (holding that named plaintiff lacked statutory standing to assert slack-fill claims arising from his purchase of glue because in his deposition he could not articulate any economic injury, but rather seemed to be complaining about the "mere inconvenience" of having to return to the store to buy more after realizing one tube did not have enough product); White, at *3-4 (repeat purchasers in proposed class would lack standing because after their first purchase, they had notice of package contents but chose to repurchase anyway); Turcios, 296 F.R.D. at 645 (proposed class not sufficiently ascertainable because it would include consumers who sought and received refunds and therefore suffered no damages).

[25] Mem. at 37-38.

[26] In re: McCormick & Company, Inc., No. 19-8003 (D.C. Cir.).