

Lowe's Can't Escape Mulch Short-Packing Claims

By **Emily Field**

Law360, New York (January 20, 2016, 8:56 PM EST) -- A California federal judge on Wednesday nixed Lowe's bid to toss a proposed class action accusing the retailer and its suppliers of ripping off consumers by selling bags of mulch that are not as full as advertised, saying that the allegations plausibly suggest the retailer knew about the deceit.

U.S. District Judge Kimberly J. Mueller said that Glenn McMillan's claims that Lowe's Home Centers LLC created a standard bag for packaging the mulch and designed the text and graphics on the labels, including the claims about how much mulch was in them, sufficiently allege that the retailer participated in the short-packing scheme.

The judge noted that McMillan's complaint doesn't claim that Lowe's passively sold the allegedly misleadingly labeled products, but specifically alleges that the retailer directs and controls the manufacturing and packaging of the mulch through contractual agreements. She declined to dismiss McMillan's claims for fraudulent misrepresentation and violations of California's consumer protection laws,

"The court accepts these allegations as true at this stage and finds that they sufficiently allege Lowe's' participation in the alleged short-packing scheme," the judge said. "The allegations are specific enough to give Lowe's notice of the particular misconduct alleged so that it can defend against the charge."

Lowe's had argued in a September motion to dismiss that McMillan acknowledged that it was co-defendant Gro-Well Brands Inc. — not Lowe's — that made, packaged and sold the mulch to Lowe's and that there's no plausible basis that Lowe's knew about and participated in an illegal short-packing scheme.

Lowe's had also argued that McMillan's unjust enrichment claim should be dismissed because there is no cause of action in California for unjust enrichment.

The grounds that the relief for an unjust enrichment claim is duplicative of the relief available under McMillan's false advertising and consumer fraud claims isn't a basis for dismissal, the judge said, citing a recent Ninth Circuit ruling.

This is the second suit that McMillan has filed against Lowe's over the mulch; the first suit was filed in Illinois federal court last year, claiming that the store's "premium mulch" package contains only 1.5 cubic feet of mulch, less than the 2 cubic feet advertised on the label.

After learning that the mulch Lowe's sold in Illinois comes from different suppliers than the mulch he bought at a Lowe's in California, McMillan filed the second suit.

In May, McMillan voluntarily dismissed his claims in the Illinois suit, according to the opinion.

"By 'short packing' the bags of mulch, defendants are able to (a) increase their profit margin per bag by selling a lesser amount of mulch than advertised and (b) save money on the cost of freight, as they can put more bags of mulch on a truck if there is less mulch in the bag," the suit said.

The suit against Lowe's and mulch manufacturers Gro-Well Brands and Harvest Power Inc. seeks

more than \$5 million in damages for what it estimates are thousands of defrauded customers.

McMillan alleges that the companies violated California's Consumers Legal Remedies Act, Unfair Competition Law and False Advertising Law, as well as the consumer protection statutes of all 50 states.

Representatives for the parties didn't immediately respond to requests for comment on Wednesday.

The mulch buyers are represented by Todd M. Friedman of the Law Offices of Todd M. Friedman PC, and Thomas A. Zimmerman Jr., Adam M. Tamburelli and Matthew C. De Re of Zimmerman Law Offices PC.

Lowe's is represented by Phillip J. Eskenazi and Neil K. Gilman of Hunton & Williams LLP.

The case is McMillan v. Lowe's Home Centers LLC et al., case number 1:15-cv-00695, in the U.S. District Court for the Eastern District of California.

--Editing by Kelly Duncan.