

## Short-Packing Claims Against Mulch Maker Remain Alive

By **Steven Trader**

Law360, New York (May 4, 2016, 10:02 PM EDT) -- The consumer leading a proposed class action accusing mulch manufacturer Gro-Well Brands of underfilling its bags has sufficiently pled that he relied on the bags' labels, and Gro-Well isn't protected by state packaging laws, a California federal judge concluded Wednesday, mostly nixing the company's motion to dismiss.

U.S. District Judge Kimberly J. Mueller for the most part kept alive Glenn McMillan's allegations that the labels of Gro-Well Brands Inc.'s premium mulch bags, which it produces and sells under a contract with Lowe's Home Centers Inc., are false and misleading because they actually contain less than the 2 cubic feet promised, though she did temporarily reject his request for injunctive relief on the grounds that his complaint doesn't allege he's likely to be misled by any misrepresentation in the future, granting him leave to amend.

Gro-Well attempted to mow down the allegations by contending that McMillan did not specifically reference California's Fair Packaging and Labeling Act in his complaint — a state law that charges the California secretary of food and agriculture with regulating the net quantity of consumer packages, and one that would control the issue here. Nor did McMillan measure the mulch using standards and procedures consistent with the CFPLA, thus it should have "safe harbor" from the claims, Gro-Well argued.

But the act's safe harbor only provides protection when a defendant actually complies with legislative labeling requirements, whereas the complaint here alleges that Gro-Well didn't comply, an allegation that it must accept as true at this point, the judge wrote.

"If the bags of premium mulch are systematically short-packed by 25 percent, as alleged in the complaint, the bags violate the CFPLA," Judge Mueller wrote. "The CFPLA allows some deviation from the labeled content to account for reasonable variations that may occur as a result of the packaging and distribution process, not to allow companies to intentionally underfill all of their packages by a certain amount."

The judge was likewise unswayed by the mulch maker's argument that McMillan's complaint didn't contain sufficient facts showing he relied on the bags' alleged misrepresentations or the company's alleged intent to deceive when making his purchases.

McMillan claims that, as a reasonable consumer, he read the alleged misrepresentations on the labels and then bought the mulch, and further alleges that had he known the bags were underfilled, he wouldn't have bought them at the price he did, both of which are enough to plead reliance at this stage, Judge Mueller wrote.

The judge found unpersuasive Gro-Well's argument that intentionally deceiving the customers would be contrary to its self-interest. Falsely representing that four bags of mulch cover 50 square feet when they only actually cover 48 square feet would encourage customers at the time of sale to buy fewer bags than they might otherwise, the company had contended.

"Defendant ignores the possibility that a consumer who needed exactly 50 square feet of mulch would return to purchase an additional bag, or that the misrepresentation might lead more

consumers overall, who require varying amounts of mulch, to choose defendant's product," Judge Mueller wrote.

Wednesday's ruling comes just three months after the judge **nixed a bid for dismissal by Lowe's**, who's also a named defendant in the suit.

Contrary to Lowe's **claim** that Gro-Well was solely responsible for packaging and selling the mulch bags, McMillan had sufficiently alleged that the retailer actively created a standard mulch bag and designed the text and graphics on its label, the judge previously ruled.

The suit, filed in May, 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, and claims the company unjustly enriched itself.

Thomas Zimmerman, an attorney for McMillan, told Law360 on Wednesday that they were pleased with the decision and its consistency with the judge's previous ruling on Lowe's motion to dismiss.

Representatives for Gro-Well did not immediately return a request for comment late Wednesday.

Gro-Well is represented by Raj N. Shah, Todd M. Noonan and Roger L. Longtin of DLA Piper.

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.

The case is Glenn 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.

--Additional reporting by Emily Field. Editing by Aaron Pelc.