Slack Fill Plaintiffs May Win Battles But Lose the War

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Lawyers who file "slack-fill" cases against food manufacturers found a friendly venue in Missouri. Missouri has a broad consumer fraud law and multiple courts have denied motions to dismiss slack-fill claims pleaded under that statute. But the real fight in class actions—where the money is, in a bank robber's parlance—is over class certification, and on Tuesday, a Missouri judge denied certification in one of the closely-watched slack-fill cases against a candy maker.

In *White v. Just Born, Inc.*, a Missouri case against the maker of Mike and Ike® candies, it was no great shock that the Court denied *multi-state* class certification. Convincing a court to certify a multi-state class is a tough slog for plaintiffs in any state law-based case, especially so if the case has only one plaintiff, rather than a plaintiff from each of the states in question. Even a single-state class can pose the threat of massive statutory damages, however, so the real victory in *White* was the Court's refusal to certify even a Missouri-only class.

The plaintiff in *White* bought two boxes of the defendant's candy at a dollar store. He pleaded that he personally "attached importance" to the "size" of the candy boxes and thought he was buying "more Product than [he] actually received." Bully for him, the Court thought, but "the question of whether any [consumer fraud] violation injured each class member will require individualized inquiry" because "if an individual [already] knew how much slack-fill was in a candy box before he purchased it, he suffered no injury." It does not matter at the class certification stage that a "reasonable consumer" *may have been* deceived. What matters instead is whether the practice *actually caused injury* to all putative class members in a common and centrally determinable manner. In a slack-fill case over a dollar's worth of candy, it seems, it cannot.

The *White* court also went one step further, joining the Third Circuit's side of the running battle over "ascertainability." Because "class members will have purchased the candy from a third-party retailer,…there is no master list that exists to provide common proof for each class member's purchase." The need for "each class member…to provide individualized evidence that they purchased the candy for personalized or household purposes within the last five years" gave the Court one more reason to deny class certification.

Between the recent New York decision dismissing slack-fill claims because "the law simply does not provide the level of coddling plaintiffs seek," and this loss on the class certification front, perhaps the tide really is turning against this particular type of "consumer fraud" claim, which is much better

policed by regulators with packaging expertise than by consumer class actions