

## Some Sanity on “Slack Fill”

August 3, 2018

The “Show Me” state of Missouri has not been kind to candy makers in cases where consumers allege that packages contain non-functional “slack fill.” Cases against the makers of Mike and Ike® candies, Raisinets®, and Reese’s® Pieces® all survived motions to dismiss within the last year or so, with judges finding that what “reasonable consumers” would and would not notice could not be determined without discovery. California has been fertile ground for these cases, too, with one candy maker just agreeing to a \$2.5 million settlement of slack-fill claims. In New York, however, these claims have been much more likely to be greeted with the judicial equivalent of “give me a break,” and Judge Naomi Reice Buchwald in the Southern District of New York delivered a classic of the genre yesterday.

In the dock in yesterday’s case was the maker of Junior Mints®. Plaintiffs claimed that different-size boxes of the tasty treats contain between 35-43 percent empty air. In the plaintiffs’ opinion, “the size of the product boxes in



comparison to the volume of candy...makes it appear that consumers are buying more than what is actually being sold.” Citing numerous New York cases, including one in which a plaintiff “attributes to consumers a level of stupidity that the Court cannot countenance and that is not actionable under “New York consumer fraud law, Judge Buchwald disagreed.

Judge Buchwald began her analysis with a fairly typical slack-fill analysis. She held that the plaintiffs’ allegations about the empty space supposedly being “non-functional” were purely conclusory. “Plaintiffs have not demonstrated, with factual assertions, that the slack-fill...is unnecessary to protect the Junior Mints, ...is not the result of unavoidable product settling,” etc. The plaintiffs also struck out when they attempted to compare the slack fill percentage of Junior Mints® and Milk Duds®. Each product, Judge Buchwald held, must be judged according to its own physical characteristics, and mint and caramel just ain’t the same.

Plaintiffs conceivably could have bolstered their allegations to fix those shortcomings, but Judge Buchwald did not stop there. She went on to hold that no “reasonable consumer” could have been deceived, because the Junior Mint® boxes “provide more than adequate information for a consumer to determine the amount of product contained therein.” The weight of the candy is “prominently displayed on the front” of each box. Then, equally importantly, each box listed the number of servings in each box and sufficient information in the “nutrition facts” to allow them to see the number of candies per serving. Judge Buchwald thus likened the Junior Mints® case to one that another New York judge dismissed against the makers of a popular pain reliever. “Slack fill” could not have deceived a reasonable consumer in that case because the number of pills was printed

prominently on the bottle, too.

And then, the following injection of common sense:

"[C]onsumers are not operating on a *tabula rasa* with respect to their expectations of product fill. To the contrary,...'no reasonable consumer expects the weight or overall size of the packaging to reflect directly the quantity of product contained therein.'....The law simply does not provide the level of coddling plaintiffs seek, [and] the Court declines to enshrine into the law an embarrassing level of mathematical illiteracy. A reasonable consumer is capable of multiplying 3.5 by 12 (42), 4 by 12 (48), and 10 by 12 (120), the number of Junior Mints in the [three] boxes, respectively." Case dismissed, microphone dropped.