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BEWARE THE EMPTY SPACE: NO SLACK IN SLACK FILL CASES, WHICH CONTINUE TO FLOOD COURTS

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As we previously reported, slack fill litigation remains on the rise. Plaintiffs continue to file consumer lawsuits – typically putative class actions – alleging food packaging is deceptive because it contains empty space, or nonfunctional slack fill, and disguises the amount of product in the package.

This roundup of recent decisions demonstrates that more plaintiffs are getting past early pleading challenges but likely will face significant barriers to success at summary judgment and class certification.

On February 16, 2018, a Missouri federal district court denied Nestlé's motion to dismiss in Hawkins v. Nestlé USA, Inc., No. 4:17CV205 -HEA, 2018 WL 926130 (W.D. Mo. Feb. 16, 2018) challenging allegations that boxes of Raisinets candy contain 45 percent nonfunctional slack fill. In its motion to dismiss, Nestlé argued that a reasonable consumer would instantly realize the package was half-empty because of its "maraca-like rattle." The court rejected this argument because Nestlé relied on matters outside of the complaint and held that plaintiff had pleaded sufficient facts to state claims for violation of the Missouri Merchandising Practices Act and unjust enrichment.

Though relying on a different state's consumer deception statute, a California federal district court reached a similar result last summer in Escobar v. Just Born Inc., No. CV 17-01826 BRO (PJWx), 2017 WL 5125740 (C.D. Cal. Jun. 12, 2017). The court denied a motion to dismiss and rejected the defendant's argument that by shaking the package and reading the label, the plaintiff could have determined that the package was half empty:

"[T]he Court cannot find as a matter of law that a reasonable consumer of Mike & Ike® or Hot Tamales® understands that the weight displayed on the Products' packaging will measure a significantly smaller amount of Products held within a larger outer packaging. Furthermore, the fact that a consumer may be able to hear 'the familiar rustling sound created by the empty space and feel the candy pieces moving from side to side within the box' does not mean that the packaging did not deceive the consumer into purchasing the item. Common sense dictates not only that candy may make audible noise upon shaking the Products' box, but also that consumers

do not necessarily have a reasonable opportunity prior to purchase to shake or otherwise manipulate a box of candy on the shelf or behind glass to ascertain whether the box is filled to the brim with Product. Thus, consumers may reasonably rely on the size of the packaging and believe that it accurately reflects the amount she is purchasing."

A decision on class certification, the briefing for which is due this spring, should shed much light on how viable courts will view slack fill class claims.

In another case that advanced past the pleading stage, a Missouri federal court granted summary judgment against plaintiffs who alleged that empty space—or "slack-fill" —in 4-ounce boxes of Reese's Pieces® and 5-ounce boxes of Whoppers® was misleading. Bratton v. The Hershey Company, No. 2:16–cv–4322–C–NKL, 2018 WL 934899 (Feb. 16, 2018). After denying Hershey's motion to dismiss last year, the court determined the plaintiff "was not misled by the packaging." In reaching that conclusion, the court relied on the plaintiff's admission that he was aware of approximately how much candy and how much empty space was in each box of Whoppers and Reese's Pieces, and nonetheless continued to purchase the boxes. "Therefore," the court reasoned, "he cannot demonstrate that he was injured by any purportedly deceptive practice by Hershey."

Finally, a recent California decision went even further by allowing a plaintiff to challenge the slack fill in a product that she did not even purchase. In Gordon v. Tootsie Roll Industries, Inc., No. CV 17–2664 DSF (MRWx), 2017 WL 4786090 (C.D. Cal. Oct. 4, 2017), the plaintiff bought a 3.5–ounce box of Junior Mints at a movie theater, allegedly relying on the opaque packaging and the size of the box as an indication of the amount of candy inside. The plaintiff asserts that had she known the box was just over half filled with candy and contained 45 percent "nonfunctional slack-fill," she would not have purchased the Junior Mints. She seeks to represent a class of consumers who purchased Junior Mints, Sugar Babies 6–ounce boxes, and all other "substantially similar" products manufactured by Defendant "which are packaged and sold in opaque boxes."

The Central District of California's decision focused on whether the plaintiff had standing to sue for products she did not purchase. The court ultimately held that the "standing requirement is met when named plaintiffs demonstrate substantial similarity between the products actually purchased and the non-purchased products, and any material differences between or among the products is best addressed at class certification." Because the plaintiff alleged sufficient similarity between the Junior Mints that she had purchased and another candy product, Sugar Babies, such as the products' similar density, weight, volume, size, and shape, and the fact that they were made in the same facility and contained many of the same ingredients, the court found she had standing to assert these claims, but she could not pursue claims relating to other unspecified candy manufactured by the defendant.

In another related case alleging under-filled lattes, Starbucks recently prevailed on summary judgment. Strumlauf v. Starbucks Corporation, No. 16-01306, 2018 WL 306715 (N. D. Cal. Jan. 5, 2018). While falling outside the regulations governing slack fill cases, the theories are similar. The

gravamen of plaintiff's claim was that the coffee chain systematically under-filled its beverages, and milk foam added to lattes and mochas should not count toward advertised volume. The court found that the plaintiff could not establish a violation of New York, California or Florida's consumer protection statutes where reasonable customers expect foam to take up some volume, and the plaintiff conceded that foam is an essential ingredient in the drink. This type of challenge is not new to Starbucks; it fought off unsuccessful class actions in 2016 alleging ice should not count towards the advertised volume of iced coffee drinks. See, e.g., Galanis v. Starbucks Corporation., No. 16 C4705, WL 6037962 (N.D. Ill. Oct. 14, 2016).

Despite the mixed results, consumers continue to attack more products for alleged slack fill. One firm recently filed two putative class actions regarding slack fill against manufacturers of Werther's caramel candy and Takis Rolled Tortilla Chips in the Southern District of New York. It will be interesting to see whether New York courts allow these cases to advance past the pleading stage, and whether the pending California and Missouri cases will survive summary judgment and class certification.

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