

## NEW YORK COURT TAKES CRITICAL VIEW OF SLACK FILL CLAIMS

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As we have previously reported, slack fill litigation remains on the rise, with plaintiffs continuing to file consumer lawsuits – typically putative class actions – alleging food packaging is deceptive because it contains empty space, or nonfunctional slack fill, thereby disguising the amount of product in the package.

While some federal courts in Missouri and California have allowed these claims to advance past the pleading stage, one federal court in New York recently took a harsher stance and granted the defendant's motion to dismiss.

The lawsuit, *Daniel v. Tootsie Roll Industries, LLC*, claimed that the manufacturer of Junior Mints tricked consumers into overpaying for the candy by leaving more than one-third of its boxes full of empty space, known as "slack fill."

In a 44-page decision, U.S. District Judge Naomi Reice Buchwald of the Southern District of New York found plaintiffs did not allege a viable claim for consumer fraud under New York law, holding "reasonable" consumers could have determined the weight and the number of candies from the packaging, and would expect some empty space.

Noting that the package clearly disclosed the weight of the candy, Judge Buchwald determined that "the Product boxes provide more than adequate information for a consumer to determine the amount of Product contained therein."

"Assuming that a reasonable consumer might ignore the evidence plainly before him attributes to consumers a level of stupidity that the court cannot countenance... 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[.]" the decision explained.

This decision follows recent class settlements involving slack fill in connection with other candy products. In May, the manufacturer of Jujufruits, Now and Later, and Lemonhead candies agreed to pay \$2.5 million to resolve a proposed class action in California federal court alleging the confectioner filled its cardboard boxes with an unnecessary amount of empty space, thereby

causing consumer deception. The proposed settlement will reimburse consumers of the allegedly underfilled candy 50 cents per cardboard movie-theater box. Defendant Ferrara Candy Co. also agreed to fill each of the boxes with at least 75 percent of candy going forward. The court is expected to hold a final settlement approval hearing in October. To date, this is the only classwide settlement with a candy manufacturer regarding slack fill claims, though the maker of Werther's candies recently settled similar claims on a confidential, individual basis.

For questions or more information, contact the authors, [Sarah Burwick](#) or [Robert Boone](#), or any member of our [Retail](#), [Class Action](#), or [Agribusiness & Food](#) teams.

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