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Cutting a class defendant some slack: the S.D.N.Y. rejects a "least sophisticated consumer" test in dismissing "slack-fill" class action

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Takeaway: There has been a proliferation of "slack-fill" class action litigation. These cases are premised on the notion that a large product container deceives a reasonable consumer, under the theory a reasonable consumer will only pay attention to the size of the container in assessing the amount of product contained within it. A recent decision by the Southern District of New York dismissing "slack fill" claims shows that context matters and that a reasonable consumer should read the side of a package to figure out how much product is actually inside the container. *Daniel v. Tootsie Roll Industries, LLC*, 17 Civ. 7541 (NRB), 2018 WL 3650015 (S.D.N.Y. Aug. 1, 2018). According to *Daniel*, a district court cannot assume a reasonable consumer would be "stupid" or "the least sophisticated consumer."

The *Daniel* case focused on Junior Mints, a product of the Tootsie Roll company. The class representatives purchased boxes of Junior Mints of various sizes. The non-transparent boxes contained not only chocolate mints but an allegedly high percentage of pure air, alleged by the class plaintiffs to constitute "non-functional slack-fill." According to the plaintiffs, "the size of the Product boxes in comparison to the volume of candy contained therein makes it appear that consumers are buying more than what is actually being sold, thereby denying them the benefit of their bargain." 2018 WL 3650015, at *2.

Among other claims, the class plaintiffs brought claims under New York law for deceptive and unfair trade practices (N.Y. Gen. Bus. Law § 349 ("GBL § 349")) and false advertising ("GBL §§ 350, 350-a"). To allege an unfair trade practices claim under GBL § 349, a plaintiff must allege and prove three elements: (1) "the challenged act or practice was consumer-oriented"; (2) "it was misleading in a material way"; and (3) "the plaintiff suffered injury as a result of the deceptive act." *Id*. at *11. False advertising claims under GBL §§ 350 and 350-a must satisfy the same elements.

To explain "slack-fill" claims, the district court pointed to the pertinent federal regulatory scheme of the Food Drug & Cosmetic Act ("FDCA"). A 1990 amendment to the FDCA focuses on misleading product packages. According to this amendment, "[a] food shall be deemed to be misbranded" if "its container is so made, formed, or filled as to be misleading." *Id*. at *3 (quoting 21 U.S.C. § 343(d)). As the district court further explained: "One category of misleading products are those that contain "slack-fill," defined as "the difference between the actual capacity of a container and the volume of product contained therein." *Id*. (quoting 21 C.F.R. § 100.100(a)).

Consistent with federal law, New York statutes (including GBL § 349 and GBL §§ 350, 350-a), "have been

interpreted to provide a private right of action for excessive slack-fill." *Id*.

To avoid preemption by the FDCA, "plaintiffs must allege at the threshold that the slack-fill in the Products is nonfunctional." *Id*. at *9. But even if a Product contains "nonfunctional" slack-fill, the plaintiffs must plausibly allege that the elements of the deceptive trade practice statutes at issue are also satisfied. In *Daniel*, the district court side-stepped the question of whether the Junior Mints packages contained non-functional slack-fill, focusing instead of whether the packages were deceptive to a reasonable consumer under New York law.

Under the New York statutes, whether a representation is misleading is determined objectively – the alleged act must be "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Id*. (quoting *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 126 (2d Cir. 2007)). To make this determination, context – including the entire label – must be considered. Moreover, "[i]t is well settled that a court may determine as a matter of law that an allegedly deceptive advertisement would not have misled a reasonable consumer." *Id*. (quoting *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013) (per curiam)).

The district court ruled: "We can easily conclude, as a matter of law, that the slack-fill enclosed in the Products would not mislead a reasonable consumer, as the Product boxes provide more than adequate information for a consumer to determine the amount of Product contained therein." *Id*.

A number of reasons supported the court's conclusion. First, the weight of the candy is displayed prominently on the box. Second, consumers can easily calculate the number of candies inside by viewing the serving size information on the outside of the box. On this point, the court concluded: "There is no suggestion that the displayed weight, serving size, or number of servings per box do not accurately reflect the amount of Product the customer actually receives." *Id*. at *13. Third, consumers are not operating on a blank slate: "[b]ecause of the widespread nature of this practice, no reasonable consumer expects the weight or overall size of the packaging to reflect directly the quantity of product contained therein." *Id*. (quoting *Ebner v. Fresh, Inc.*, 838 F.3d 958, 967 (9th Cir. 2016)).

The class plaintiffs argued that only an "unusually diligent consumer" would figure out the correct number of candies in the box. The district court disagreed, addressing the characteristics of the so-called "reasonable consumer": "The law simply does not provide the level of coddling plaintiffs seek." *Id*. In other words, the court need not assume a "level of stupidity" on the part of a reasonable consumer: "Assuming that a reasonable consumer might ignore the evidence plainly before him 'attributes to consumers a level of stupidity that the Court cannot countenance and that is not actionable under G.B.L. § 349'." *Id*. (quoting *Kommer v. Bayer Consumer Health*, 252 F. Supp. 3d 304, 312 (S.D.N.Y. 2017)). "[T]he applicable legal standard is whether a reasonable consumer, not the least sophisticated consumer, would be misled by Defendants' actions." *Id*. (quoting *Weinstein v. eBay, Inc.*, 819 F. Supp. 2d 219, 228 (S.D.N.Y. 2011)). "Infantile anticipation is not the test." *Id*. (quoting *United States v. 116 Boxes, etc, Arden Associated Candy Drops*, 80 F. Supp. 911, 913 (D. Mass. 1948)).

In dismissing the claims, the district court concluded: "Accordingly, given the prominence with which the Products' weight appears on the front of the package, the ease with which consumers can calculate the number of candies contained therein, consumers' expectations of slack-fill, as well as plaintiffs' conceded reliance on factors other than the Products' packaging, we conclude as a matter of law that no reasonable consumer would be misled by the presence of slack-fill, even assuming it were non-functional, in the Products' packaging. Accordingly, plaintiffs' claims under GBL §§ 349, 350, and 350-a are dismissed." *Id*. at *14.

For similar reasons, the *Daniel* court easily dismissed the common-law fraud claim. *Id.* at *15-*15. "A person of 'ordinary intelligence" could easily ascertain the amount of candy contained in the Product boxes by (1) inspecting the net weight printed on the front, and (2) multiplying the serving size by the number of servings in the box, as provided on the back." *Id.* at *15. And reasonable consumers "may have come to expect significant slack-fill" in snack products. *Id.* (quoting *Alce v. Wise Foods, Inc.*, No. 17 Civ. 2402 (NRB), 2018 WL 1737750, at *11 (S.D.N.Y. Mar. 27, 2018)). Thus, the named plaintiffs could not establish the essential element of justifiable reliance on the alleged misrepresentations.

The *Daniel* decision provides a practical solution to a potentially thorny dispute over the appropriate amount of "slack-fill" in a product's packaging. And it rejects class claims predicated on the perceptions of a "stupid" or "least sophisticated" consumer. Class action defendants almost certainly will ask future courts to cut them similar "common sense" slack when presented with the next package of attorney-driven consumer fraud class actions.