

END OF THE ROAD FOR MIKE AND IKE SLACK FILL CASE

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In another victory for a candy manufacturer, a federal court in Missouri denied class certification earlier this month, effectively ending the plaintiff's attempt to seek damages on a class-wide basis for all consumers of Hot Tamales and Mike and Ike candies.

The lawsuit, *White v. Just Born*, alleged that boxes of the candy were underfilled, leaving unusable empty space, known as "slack fill," that deceived the consumer into thinking he was receiving more candy than was actually in the package. The plaintiff sought certification of a Missouri class, and two multi-state unjust enrichment classes, on the theory that the actual value of the candy was less than the consumers paid for it.

The court declined to certify all three classes, ruling that proving class-wide violation of Missouri's Merchandising Practices Act "will involve predominantly individual inquiries as to whether each class member purchased the candy." Because most consumers purchase this type of product from a third-party retailer rather than from the manufacturer – at a movie theater, for example – there is no master list to provide common proof of purchase. Each class member will need to demonstrate his own individualized purchase, which makes the class unascertainable.

Furthermore, the court found that the "litigation would be dominated by individual inquiries into whether each class member was deceived by any slack-fill in a box before purchasing it. In other words, it would be dominated by causation and knowledge." Because "an individual who knew what he was getting before he purchased one of the candy boxes but chose to purchase it anyway cannot establish that Just Born's retention of the purported benefit was unjust[,]" inquiries into each class member's knowledge prior to purchase would also predominate.

The court also denied certification on standing grounds, holding that "White cannot represent a class that includes persons who purchased the candy despite knowing how much slack-fill would be in each box" because such a class would include members who lack standing to bring such a claim.

The decision is a significant victory for Just Born and other food manufacturers defending similar claims which often advance past the pleading stage, but are unlikely to satisfy the rigorous standards of class certification.

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

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